

INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

ASTRIDA BENITA CARRIZOSA,
Claimant,

v.

THE REPUBLIC OF COLOMBIA,
Respondent.

ICSID Case No. ARB/18/05

Colombia's Rejoinder on Jurisdiction

21 February 2020

Arnold & Porter

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Glossary

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

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

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

Term	Full Name or Description
Fogafín Agreement	Agreement executed by Granahorrar and Fogafín on 6 July 1998, through which Fogafín agreed to guarantee Granahorrar’s interbank financing and overdraft obligations (Granahorrar and Fogafín amended the Fogafín Agreement 13 times, to increase the ceiling of support, modify the type of support to include direct financing, and extend the contractual term)
Fogafín Board	Board of Directors of Fogafín
Foreign Capital Control Provisions	A series of provisions of Colombian law (in force at the time Claimant appears to have imported foreign capital to Colombia) requiring either the (i) registration or (ii) approval and special registration of foreign capital
Foreign Capital Investment Framework	A series of provisions of Colombian law (in force at the time Claimant obtained her alleged interest in Granahorrar) requiring the approval and registration of foreign capital investments
Granahorrar	Corporación Grancolombiana de Ahorro y Vivienda “Granahorrar”
Holding Companies	Companies owned by the Carrizosa Family, through which Claimant held her shares in Granahorrar (namely, <i>Asesorías e Inversiones C.G. S.A.</i> (“Asesorías e Inversiones”); <i>Inversiones Lieja Ltda.</i> (“Inversiones Lieja”); and <i>I.C. Interoventorías y Construcciones Ltda.</i> (“Interoventorías y Construcciones”))
IACHR	Inter-American Commission on Human Rights
ILC Articles on State Responsibility	Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001)

Term	Full Name or Description
Judgment Exclusion Provision	Article 10.28, footnote 15, of the U.S.-Colombia Trade Promotion Agreement
NAFTA	North American Free Trade Agreement
Notice of Appeal	Claimant's notice of appeal dated 5 August 2005, challenging the 2005 Administrative Judicial Tribunal Judgment
Nullification and Reinstatement Action	Claimant's complaint dated 28 July 2000 before the Administrative Judicial Tribunal, challenging the 1998 Regulatory Measures
PCIJ	Permanent Court of International Justice
Petitioners	Individuals who filed petitions seeking to annul the 2011 Constitutional Court Judgment (namely, Claimant, along with Magistrate Mauricio Fajardo, a member of the Council of State)
Planning Department	<i>Departamento Administrativo de Planeación</i> of Colombia
Resolution No. 25	Resolution No. 25 of 1995, regulating the issuance of temporary liquidity infusions by the Central Bank
Superintendency	<i>Superintendencia Financiera, or Superintendencia Bancaria</i>
TLI	Temporary Liquidity Infusion, or funds disbursed by the Central Bank to financial entities experiencing temporary liquidity shortfalls
TPA	U.S.-Colombia Trade Promotion Agreement
TPA Limitations Period	The three-year limitations period contained in TPA Article 10.18.1

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

I. INTRODUCTION

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

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

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

¹ See generally Claimant’s Request for Arbitration, 24 January 2018 (“**Request for Arbitration**”).

² See Request for Arbitration, ¶ 8.

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

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

3. The burden of proving the facts necessary to establish jurisdiction in an ICSID arbitration rests with the claimant.⁵ Here, however, Claimant devoted much of her Memorial on Jurisdiction (“**Memorial**”) to lengthy account of the facts, of the merits of her claims, and of the basis for her damages request, yet she gave short shrift to the issues that really matter at this stage of the proceeding: the jurisdictional issues.⁶ For its part, Colombia in its Counter-Memorial on Jurisdiction (“**Counter-Memorial**”) addressed those facts that are relevant to the jurisdictional determinations that the Tribunal must make. In that context, Colombia demonstrated – with reference to the TPA, to legal authorities, and to evidentiary items – that Claimant’s claims fall outside of the Tribunal’s jurisdiction.⁷
4. Claimant has now responded to Colombia’s Counter-Memorial with a needlessly voluminous, 502-page monster of a Reply on Jurisdiction (“**Reply**”). Following on the Request for Arbitration and Memorial, the Reply provided Claimant with yet another opportunity to satisfy her burden of proving the jurisdictional elements that must be satisfied for this arbitration to proceed. However, she has failed to do so. While Claimant’s Reply is rife with fustian rhetoric concerning Colombia’s allegedly “baseless,”⁸ “improper,”⁹ and “abusive”¹⁰ arguments, Claimant has failed to rebut the legal and factual bases of Colombia’s jurisdictional objections. In this Rejoinder, Colombia will further

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

⁶ For example, Claimant devoted a scant 3 pages of her Memorial to the subject of the Tribunal’s jurisdiction *ratione temporis*. See Claimant’s Memorial (ICSID), ¶¶ 267–74.

⁷ See generally Colombia’s Counter-Memorial (ICSID).

⁸ Claimant’s Reply (ICSID), ¶ 563.

⁹ Claimant’s Reply (ICSID), p. 15.

¹⁰ Claimant’s Reply (ICSID), ¶ 579.

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

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

¹¹ See **RL-0084**, Vienna Convention on the Law of Treaties, United Nations, 23 May 1969 ("**VCLT**"), Art. 28 ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.").

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

¹³ See, e.g., Claimant's Memorial (ICSID), ¶ 45 ("The Constitutional Court's Opinion [of 2011] represents an emblematic denial of justice that even more importantly itself gave rise to a constitutional crisis because of the extent of its abuse of regulatory-judicial authority"); see also *id.* ¶¶ 42-77, 295-298, 307.

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

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

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

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

¹⁶ See Claimant's Reply (ICSID), p. 79, heading 1 ("Claimant's Claims Are Based Upon a Measure Taken by Colombia After the TPA Entered Into Force").

Constitutional Court Judgment—were wrongful.¹⁷ Claimant’s claims are thus fundamentally rooted in pre-treaty conduct, and for that reason fall outside of the jurisdiction *ratione temporis* of the Tribunal.

8. The second reason for which Claimant’s claims are barred *ratione temporis* is because the present *dispute* arose before the TPA’s entry into force. In her Reply, Claimant attempts to elude this jurisdictional constraint (i) by challenging the applicability of the general principle of non-retroactivity to pre-treaty *disputes* (as opposed to pre-treaty *acts*),¹⁸ and (ii) by applying her own, self-serving definition of “dispute” (rather than the established definition adopted by the International Court of Justice and observed by a plethora of international tribunals).¹⁹ Further, Claimant insists that in any event the present dispute did not arise until 2014, which was after the TPA’s entry into force in 2014.²⁰
9. In her Reply, Claimant concedes that the present dispute encompasses both pre- and post-treaty conduct. For example, she describes the dispute as encompassing certain regulatory measures, which predated the TPA:

The Tribunal shall find that it has jurisdiction to conduct a full and thorough merits hearing arising from The Republic of Colombia’s abuse of **regulatory**, legislative, and judicial sovereignty.²¹ (Emphasis added)

10. As explained in more detail in the body of this Rejoinder, the only regulatory conduct at issue in this proceeding took place in 1998.²² The dispute between Claimant and Colombia over such regulatory conduct crystallized in the years

¹⁷ See, e.g., Claimant’s Memorial (ICSID), ¶¶ 48–53.

¹⁸ Claimant’s Reply (ICSID), ¶ 129.

¹⁹ See Claimant’s Reply (ICSID), ¶¶ 131–32.

²⁰ Claimant’s Reply (ICSID), p. 100 (“This ‘Dispute’ Arose in 2014”).

²¹ Claimant’s Reply (ICSID), p. 17.

²² It is not at all clear from Claimant’s written submissions what State conduct is alleged to constitute an “abuse . . . of legislative . . . sovereignty.” Claimant’s Reply (ICSID), p. 17.

following 1998, long before the TPA's entry into force, and such dispute continues, now in the form of the present arbitration. As discussed further below, the jurisprudence supports the proposition that a dispute that arose prior to an investment treaty's entry into force lies outside the temporal scope of such treaty.

11. Third, Claimant's claims transcend the *ratione temporis* scope of the TPA because they are time-barred under the TPA's 3-year limitations provision (TPA Article 10.18.1). Pursuant to such provision, a claimant must file a claim within 3 years from the time that the claimant knew (or should have known) about the alleged breach and resulting loss caused by the relevant State conduct.²³ In response, Claimant now argues (i) that the TPA limitations period does not apply at all to her claims;²⁴ (ii) that, by means of the most-favored nation clause of Chapter 12 of the TPA ("**Chapter 12 MFN Clause**"), she can in any event import and apply the more generous 5-year limitations provision contained in the Colombia-Switzerland BIT;²⁵ and (iii) that she did not know until 2014 of the alleged breach that gave rise to her claims.²⁶ Colombia demonstrates in the body of this Rejoinder that none of the above-cited rebuttal arguments is supported or tenable, and that Claimant failed to satisfy the applicable 3-year limitations period under the TPA. As a result, her claims must be dismissed.
12. ***Ratione Voluntatis* Objections.** Claimant's claims also fall outside of the jurisdiction *ratione voluntatis* of the Tribunal, as a consequence of the TPA's explicit conditions on Colombia's consent to arbitration. In her Reply, Claimant once again engages in interpretive acrobatics in an attempt to elude and elide

²³ **RL-0001**, Free Trade Agreement between the United States and Colombia, Chapter Ten (Investment), 22 November 2006 ("**TPA**"), Art. 10.18.1.

²⁴ Claimant's Reply (ICSID), ¶ 4.

²⁵ Claimant's Reply (ICSID), ¶ 5.

²⁶ Claimant's Reply (ICSID), ¶¶ 4, 34.

the referenced consent conditions. Although Claimant does not deny that she has not satisfied various TPA requirements (e.g., those of notice of intent; consultation and negotiation; and waiver), she argues: (i) that such conditions do not apply to her claims;²⁷ (ii) that such conditions are not mandatory, because they are not actually “requirements,”²⁸ and (iii) that in any event, she can circumvent such conditions using the MFN Clause of TPA Chapter 12.²⁹ Colombia demonstrates below that, notwithstanding Claimant’s contortions, the TPA’s express conditions of consent do indeed fully apply to Claimant, that she cannot avoid such conditions by means of the Chapter 12 MFN Clause, and that such conditions bar her claims herein.

13. Jurisdiction *ratione voluntatis* is also lacking with respect to a portion of the Claimant’s substantive claims (specifically, her fair and equitable treatment claims and her national treatment claims). The *fair and equitable treatment* claims are barred because the TPA does not impose any obligation to provide fair and equitable treatment under Chapter 12 (i.e., Chapter 12 does not include any fair and equitable treatment obligation).³⁰ Nor does Chapter 12 incorporate by reference any such obligation. While in Article 12.1.2(a)³¹ Chapter 12 does incorporate by reference from Chapter 10 four specific protections, such four protections do not include fair and equitable treatment. Claimant is also not entitled to import into Chapter 12 a fair and equitable treatment protection from some other treaty by means of the MFN Clause of Chapter 12, as she attempts to do. In short, Claimant cannot claim for the breach of a non-existent

²⁷ See Claimant’s Reply (ICSID), ¶¶ 502, 566.

²⁸ See Claimant’s Reply (ICSID), ¶¶ 517, 608, 639.

²⁹ Claimant’s Reply (ICSID), ¶ 569.

³⁰ See generally **RL-0001**, TPA, Ch. 12.

³¹ **RL-0001**, TPA, Article 12.1.2(a) (“Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.11 (Investment and Environment), 10.12 (Denial of Benefits), 10.14 (Special Formalities and Information Requirements), and 11.11 (Denial of Benefits) are hereby incorporated into and made a part of this Chapter.”).

obligation. Claimant's fair and equitable treatment claim therefore must be summarily dismissed.

14. Furthermore, both Claimant's *fair and equitable treatment* and *national treatment* claims are barred because the TPA parties did not consent to the arbitration of those types of claims under Chapter 12. In Article 12.1.2(b), the TPA parties specified only four types of claims that can be submitted to arbitration under Chapter 12.³² Fair and equitable treatment and national treatment are not amongst the four cited categories. Accordingly, no claimant is eligible to file either fair and equitable treatment claims or national treatment claims pursuant to Chapter 12 of the TPA.
15. In a muddled, 200-page-long argument,³³ Claimant rejects the foregoing straightforward, plain-text interpretation of Article 12.1.2(b), and endorses instead a self-serving interpretation that is based largely upon Claimant's own (tendentious) interpretation of the analogous provision in the North American Free Trade Agreement ("NAFTA"), which is Article 1401(2) of that treaty.³⁴ However, and unfortunately for Claimant, the only tribunal that has interpreted that provision of NAFTA adopted precisely the interpretation that Colombia is advancing herein.³⁵ Moreover, such interpretation was forcefully endorsed by

³² **RL-0001**, TPA, Article 12.1.2(b) ("Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter **solely for claims that a Party has breached** Articles 10.7 (**Expropriation and Compensation**), 10.8 (**Transfers**), 10.12 (**Denial of Benefits**), or 10.14 (**Special Formalities and Information Requirements**), as incorporated into this Chapter.") (emphasis added).

³³ See Claimant's Reply (ICSID), pp. 108-302.

³⁴ See generally Claimant's Reply (ICSID), Section III; Expert Report of Olin L. Wethington ("**First Wethington Expert Report**"); Supplemental Expert Report of Olin L. Wethington, 10 December 2019 ("**Second Wethington Expert Report**").

³⁵ See **RL-0101**, *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01 (van den Berg, Lowenfeld, Olavarrieta), Decision on the Preliminary Question, 17 July 2003 ("**Fireman's Fund (Decision)**"), ¶ 66.

two of the three NAFTA States Parties (Canada and Mexico).³⁶ Accordingly, Claimant's argument based on the NAFTA text does not help Claimant's cause.

16. Claimant also attempts to save her fair and equitable treatment and national treatment claims by relying—once again—on the Chapter 12 MFN Clause. However, such argument also fails because MFN clauses cannot be used to manufacture consent to arbitration where none exists otherwise, as tribunals have repeatedly held.³⁷
17. For all of the foregoing reasons, Claimant's claims fall outside of the scope of Colombia's consent to arbitration, and thus such claims must be dismissed for lack of *ratione voluntatis* jurisdiction.
18. ***Ratione Materiae* Objections.** The Tribunal also lacks jurisdiction *ratione materiae* over Claimant's claims. It is a basic tenet of investment treaty arbitration—and an explicit requirement of the TPA³⁸—that to be able to assert arbitral claims, a would-be claimant must identify and prove the existence of a qualifying investment under the terms of the treaty.
19. So far in this proceeding, Claimant's alleged qualifying investment has been a moving target. Initially, in her Request for Arbitration, Claimant had identified as the relevant investment her indirect interest in shares in Granahorrar.³⁹ In

³⁶ See **RL-0102**, *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01, Mexico's Submission on Preliminary Issues of Jurisdiction, 21 October 2002 ("**Fireman's Fund (Mexico's Submission)**"), ¶ 24(e); **RL-0103**, *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01, First Submission of Canada Pursuant to Article 1128 of NAFTA, 27 February 2003 ("**Fireman's Fund (Canada's Submission)**"), ¶ 16.

³⁷ See Colombia's Counter-Memorial (ICSID), ¶¶ 334–39.

³⁸ See **RL-0001**, TPA, Art. 12.1.1 ("This Chapter applies to measures adopted or maintained by a Party relating to . . . (b) investors of another Party, and investments of such investors, in financial institutions in the Party's territory").

³⁹ Request for Arbitration (ICSID), ¶ 1 ("In the case before this Tribunal the investment of a U.S. citizen in one of the Republic of Colombia's leading financial institutions [Granahorrar]

her Memorial, Claimant shifted the narrative, contending that it was the Council of State's 2007 judgment ("**2007 Council of State Judgment**") (rather than the Granahorrar shares) that constituted her qualifying investment under the TPA.⁴⁰ In her Reply, Claimant remarkably changed her story yet again, this time bizarrely asserting that "the investment was transformed into different modes at different times."⁴¹ Under the latter rendition of the qualifying investment, Claimant's investment in the form of her indirect shareholding in Granahorrar was subsequently "transformed into a judgment" – namely, the 2007 Council of State Judgment.⁴² However, Claimant's "transformation" theory does nothing to overcome the *ratione materiae* jurisdictional hurdle.

20. Claimant's indirect interest in shares in Granahorrar does not constitute a qualifying investment under the TPA. Pursuant to the TPA⁴³ and customary international law,⁴⁴ the relevant qualifying investment must have existed both (i) at the time of entry into force of the TPA (i.e., 15 May 2012), and (ii) at the time of the challenged measure (here, the 2014 Confirmatory Order, which was dated 25 June 2014). However, Granahorrar was dissolved – and its assets

was reduced to the peppercorn value of COP1 0.01 based upon discriminatory, irregular, and unprecedented treatment on the part of the Central Bank of Colombia . . . FOGAFIN . . . and Superintendency of Banking.").

⁴⁰ Claimant's Memorial (ICSID), ¶ 287 ("[F]or purposes of pleading and/or proof of *ratione materiae*, the Council of State's November 1, 2007 Judgment represents and constitutes Claimant's investment as alleged and demonstrated in this proceeding").

⁴¹ Claimant's Reply (ICSID), p. 14.

⁴² Claimant's Reply (ICSID), ¶ 796.

⁴³ See **RL-0001**, TPA, Art. 12.1.1 ("This Chapter applies to measures adopted or maintained by a Party relating to . . . (b) investors of another Party, and investments of such investors, in financial institutions in the Party's territory").

⁴⁴ See **RL-0084**, VCLT, Art. 28; **RL-0010**, ILC Articles on State Responsibility for Internationally Wrongful Acts, ("**ILC Articles on State Responsibility**"), Art. 13 ("An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.").

absorbed by another financial institution—in 2006.⁴⁵ Claimant’s Granahorrar shares thus ceased to exist in 2006,⁴⁶ which is six years before the entry into force of the TPA in 2012, and eight years before the 2014 State measure that the Claimant is challenging in this arbitration. An investment that was non-existent by the time the TPA entered into force, and also non-existent at the time of the measure purportedly challenged under the TPA, by definition cannot constitute a qualifying investment under the TPA.

21. As Colombia observed in its Counter-Memorial,⁴⁷ the 2007 Council of State Judgment also cannot constitute a qualifying investment under the TPA, for the simple reason that such decision is a judicial ruling, and the TPA explicitly excludes court judgments from the definition of “investment”: “The term ‘investment’ does not include an order or judgment entered in a judicial or administrative action.”⁴⁸ Claimant does not deny that the 2007 Council of State Judgment in fact constitutes a judgment issued in a judicial action. In any event, the 2007 Council of State Judgment was overturned by a final judgment of the Constitutional Court on 26 May 2011. Accordingly, the 2007 ruling ceased to exist long before the TPA’s entry into force in 2012, and also long before the measure challenged in this arbitration, which is the 2014 Confirmatory Order. For these reasons, the 2007 Council of State Judgment (like the Granahorrar shares) is not a qualifying investment under the TPA.

⁴⁵ See **Ex. R-0259**, Certificate of Existence and Legal Representation of Granahorrar, Financial Superintendency, 18 February 2020, p. 2; **Ex. R-0129**, Decree No. 663, President of Colombia, 2 April 1993 (“*Financial Act*”), Art. 60(3).

⁴⁶ See **Ex. R-0259**, Certificate of Existence and Legal Representation of Granahorrar, Financial Superintendency, 18 February 2020, p. 2; **Ex. R-0129**, Financial Act, Art. 60(3).

⁴⁷ See Colombia’s Counter-Memorial (ICSID), ¶¶ 381–83.

⁴⁸ **RL-0001**, TPA, Art. 10.28, fn. 15.

22. In sum, neither of the “different modes” of the alleged investment⁴⁹ that Claimant has identified as the relevant investment for purposes of her TPA claim in fact qualify as an “investment” under the TPA. Claimant’s “transformation” theory thus does not bring her claims within the jurisdiction *ratione materiae* of the Tribunal: just like neither the 2007 Council of State Judgment nor the Granahorrar shares qualifies as an investment under the TPA, the purported combination of the two, and/or the transformation of one into the other, also do not qualify as an investment, and therefore do not serve to overcome the jurisdictional hurdle.
23. Finally, in order to qualify for the protection of the TPA, Claimant’s alleged investment must have been made in accordance with Colombian law. Claimant denies the existence of this fundamental *ratione materiae* requirement,⁵⁰ but it is firmly supported by the jurisprudence, as discussed later in this Rejoinder.
24. Claimant failed to comply with Colombian law in making her investment. As explained in Colombia’s Counter-Memorial, at the time that Claimant (through her Holding Companies) purchased shares in Granahorrar, Colombian law required that investments made with foreign capital be approved by, and be registered with, the Colombian Government. The available evidence suggests that Claimant made her investment in Granahorrar using foreign capital. If that is the case, Claimant failed to register or obtain the required approval for her foreign investment, and thereby violated Colombian law in making her investment.⁵¹
25. Surprisingly, in her Reply, Claimant does *not* deny: (i) that she made her investment in Granahorrar using foreign capital; (ii) that Colombian law

⁴⁹ Claimant’s Reply (ICSID), p. 14.

⁵⁰ See e.g., Claimant’s Reply (ICSID), ¶ 805.

⁵¹ Colombia’s Counter-Memorial (ICSID), ¶¶ 393–419.

required the approval and registration of foreign investments; or (iii) that she did not comply with such approval and registration requirements. Accordingly, Claimant's claims fall outside of the jurisdiction *ratione materiae* of this Tribunal.

* * *

26. In sum, the Tribunal lacks jurisdiction *ratione temporis*, *ratione voluntatis*, and *ratione materiae* over Claimant's claims. Colombia therefore respectfully requests that this Tribunal dismiss all of Claimant's claims, by enforcing the explicit limits and conditions on consent contained in the plain text of the relevant provisions of the TPA.
27. Colombia concludes this Introduction with two brief final observations. *First*, Colombia has limited the scope of this Rejoinder only to the legal and factual issues that appear relevant to its jurisdictional objections. In doing so, Colombia has deliberately avoided engaging with those aspects of Claimant's submissions that are improper for the present stage, or otherwise irrelevant to the immediate task at hand. For instance, Claimant and her experts devoted significant portions of their written submissions to arguments concerning the merits of Claimant's claims.⁵² It is neither necessary nor appropriate for Colombia to respond to such arguments in the present jurisdictional phase. Colombia's refusal to address the merits of Claimant's claims at this stage does *not* mean that Claimant's arguments (or those of her experts) are "unrebutted," as Claimant mistakenly asserts in her Reply.⁵³ Colombia previously reserved its rights to respond to Claimant's arguments on the merits in the event that this

⁵² See generally Claimant's Memorial (ICSID), § I, II, V, IV; Expert Report of Antonio L. Argiz, 28 May 2019 ("**First Argiz Expert Report**"); Expert Report of Jack J. Coe, Jr., 7 March 2019 ("**First Coe Report**"). See also Expert Report of Alfonso Vargas Rincón, 11 June 2019 ("**First Vargas Rincón Report**"), ¶¶ 30–31; Expert Report of Luis Fernando López Roca, 22 May 2019 ("**First López Roca Report**"), ¶¶ 33, 71–72, 96, 98, 114–138; Expert Report of Martha Teresa Briceño de Valencia, 24 May 2019 ("**First Briceño de Valencia Expert Report**"), ¶¶ 30–31, 75–116; Second Expert Report of Jack J. Coe, 17 December 2019 ("**Second Coe Report**"), ¶ 30.

⁵³ Claimant's Reply (ICSID), ¶ 790.

dispute were to proceed to a merits phase,⁵⁴ and Colombia reiterates such reservation of rights now.

28. *Second*, Colombia also does not attempt herein to respond to Claimant’s various baseless accusations. In her Reply, for example, Claimant repeatedly attacks Colombia for alleged bad faith and alleged mischaracterization of the applicable legal authorities.⁵⁵ In some cases, the accusations are impossible to understand (e.g., the allegation that “[Colombia] pursues a piecemeal ‘cut and paste’ approach to legal analysis”⁵⁶). In other cases, Claimant and her experts have adopted a tone that is disrespectful—even hostile—towards Colombia, its counsel, and its expert, which is unwarranted and improper.⁵⁷ For the avoidance of doubt, Colombia categorically rejects any and all of Claimant’s accusations and suggestions of impropriety and/or mischaracterization, but does not attempt herein to respond to each such accusation or suggestion. Instead, Colombia will limit itself to declaring that it has not willfully misrepresented or mischaracterized anything at all, and to the contrary ratifies its belief that it has presented jurisdictional objections that are well-founded in both law and fact.
29. In the sections of the Rejoinder that follow below, Colombia provides a more detailed analysis of each of its various jurisdictional objections.

⁵⁴ See Colombia’s Counter-Memorial (ICSID), ¶ 27.

⁵⁵ See, e.g., Claimant’s Reply (ICSID), ¶¶ 563, 579-580.

⁵⁶ Claimant’s Reply (ICSID), ¶ 151.

⁵⁷ See, e.g., Claimant’s Reply (ICSID), ¶ 597 (characterizing Colombia’s conduct as “the apogee of duplicity and pettifoggery”), ¶ 603 (“Respondent here is simply acting in bad faith. It is unfortunate that this Tribunal has been presented with “analysis” of this nature and quality.”)

II. JURISDICTIONAL OBJECTIONS

A. The Tribunal lacks jurisdiction *ratione temporis*

30. In its Counter-Memorial on Jurisdiction, Colombia demonstrated that all of Claimant's claims fall outside of the jurisdiction *ratione temporis* of this Tribunal. Specifically, Colombia established that:

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

31. In her Reply, Claimant insisted that the temporal restrictions identified by Colombia—whether imposed by the TPA or by principles of customary international law—do not apply to her claims. However, for the reasons set forth below, these restrictions do apply to all of Claimant's claims, with preclusive effect.

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

32. The Parties agree that claims based on State acts or omissions that took place before the TPA entered into force fall outside of the jurisdiction *ratione temporis* of the Tribunal.⁵⁸ The Parties disagree, however, on how to approach situations such as the one at issue in the present case, in which the alleged State conduct straddles the entry into force of the applicable treaty. Previous tribunals facing similar circumstances have assessed the facts (both before and after the treaty entered into force) in order to determine whether the claims are in fact rooted

⁵⁸ Claimant's Reply (ICSID), ¶ 99.

in pre-treaty conduct and thus fall outside of the tribunal's jurisdiction. In doing so, these tribunals have evaluated different factors, including whether the post-treaty act challenged by the claimant altered the pre-treaty "status quo," or whether such act is "independently actionable." An assessment of these factors to the instant case demonstrates that Claimant's claim based on the single post-TPA act that they are invoking – the 2014 Confirmatory Order – is rooted in pre-treaty conduct, such that Claimant's claims fall outside of the jurisdiction *ratione temporis* of the TPA.

33. As discussed in the following subsections: (i) the TPA does not apply retroactively to claims of breach based on State acts that predate the entry into force of the TPA; (ii) the TPA does not apply to claims of breach based on post-TPA State acts that are rooted in pre-TPA conduct; and (iii) Claimant's claims of breach based on the 2014 Confirmatory Order are rooted in pre-TPA conduct, because the 2014 Confirmatory Order did not alter the status quo of Claimant's alleged investment, and is not independently actionable.
 - a. The TPA does not apply retroactively to alleged treaty breaches that are based on State acts that predate the entry into force of the TPA

34. The Parties agree that a claimant cannot bring a claim under the TPA based on State acts or omissions that predate the treaty's entry into force.⁵⁹ This rule is codified in Article 10.1.3 of the TPA,⁶⁰ and is fully consistent with Article 28 of

⁵⁹ See Claimant's Reply (ICSID), ¶ 99 ("Respondent's argument is premised upon the unremarkable proposition that the TPA does not apply to acts that occurred prior to its entry into force. Claimant has no quarrel with this proposition[.]").

⁶⁰ See **RL-0001**, TPA, Art. 10.1.3. (Article 10.1.3 provides, "[f]or greater certainty," that Chapter 10 of the TPA "does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.").

the Vienna Convention on the Law of Treaties (“**VCLT**”)⁶¹ and Article 13 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (“**ILC Articles on State Responsibility**”).⁶²

35. In her written submissions, Claimant is deliberately vague and inconsistent about the specific State measures that she is challenging. It is evident, however, that Claimant is basing her claim on State conduct that predated the entry into force of the TPA. For instance, in her Request for Arbitration and Memorial, Claimant had asserted claims based on conduct by Colombia that occurred *before* the TPA entered into force on 15 May 2012:

- a. “[T]he Republic of Colombia is responsible, through the actions and omissions of its **executive**^[63] **and judicial authorities**, for the breach of a number of treaty obligations contained in the TPA and the Colombia-Switzerland BIT” (emphasis added);⁶⁴
- b. “The Tribunal shall find that it has jurisdiction to conduct a full and thorough merits hearing **arising from** The Republic of Colombia’s **abuse of regulatory, legislative, and judicial sovereignty**” (emphasis added);⁶⁵

⁶¹ **RL-0084**, VCLT, Art. 28 (“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”).

⁶² **RL-0010**, ILC Articles on State Responsibility, Art. 13 (“An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”).

⁶³ The reference to executive measures appears to be an allusion to the 1998 Regulatory Measures. *See* Claimant’s Reply (ICSID), ¶ 307. The 1998 Regulatory Measures were adopted before the entry into force of the TPA in May 2012.

⁶⁴ Claimant’s Memorial (ICSID), ¶ 293.

⁶⁵ Claimant’s Reply (ICSID), p. 17.

- c. “This case is about the inordinate abuse of **regulatory** sovereignty”⁶⁶ (emphasis added); and
 - d. “As demonstrated in Section II of this Memorial on Jurisdiction, both the **regulatory**[⁶⁷] and the judicial treatments imposed by the Republic of Colombia on Claimant was discriminatory and in breach of the provisions under Article 12.2 of the TPA”⁶⁸ (emphasis added).
36. The “executive” and “regulatory” measures invoked by Claimant took place in 1998 – fourteen years before the entry into force of the TPA in 2012. Moreover, most of the relevant “judicial” conduct also took place before 2012. Thus, the 2005 Administrative Judicial Tribunal Judgment, the 2007 Council of State Judgment, and the 2011 Constitutional Court Judgment all predated the TPA. In other words, many of Claimant’s claims were based on pre-treaty conduct.
37. After Colombia pointed out in its Counter-Memorial the temporal jurisdictional bar to claims based on pre-treaty conduct, Claimant changed her case theory. Now cognizant of the impediments posed by the fundamental principle of non-retroactivity, in her Reply Claimant insists that all of her claims arise from the 2014 Confirmatory Order, and not from any pre-TPA acts or omissions by Colombia.⁶⁹
38. Claimant thus concedes – as she must – that there can be no liability for any of the State measures that she had purported to challenge (and had discussed at length) in her Request for Arbitration and her Counter-Memorial. As a result, and consistent with the principle of non-retroactivity, the Parties agree that

⁶⁶ Request for Arbitration, p. 1.

⁶⁷ The only “regulatory treatment” at issue in this case relates to the Capitalization Order and the Value Reduction Order, both of which took place in 1998 – well before the entry into force of the TPA in 2012.

⁶⁸ Claimant’s Memorial (ICSID), ¶ 307.

⁶⁹ See Claimant’s Reply (ICSID), ¶ 3.

Claimant's claims based on pre-treaty State conduct (including the 1998 Measures and the 2011 Constitutional Court Judgment) cannot be the source of liability under the TPA, and fall outside of the Tribunal's jurisdiction *ratione temporis*.

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

39. Although the Parties agree that the customary international law principle of non-retroactivity of treaties applies to the TPA, the Parties disagree as to the operation of that principle in situations—like the present one—in which the alleged State conduct straddles the entry into force of the applicable treaty.
40. Colombia explained in its Counter-Memorial that tribunals faced with such situations have analyzed the facts in order to determine whether claims based on post-treaty acts nevertheless fall outside the scope of the tribunal's jurisdiction. Case law warns against allowing claimants to subvert a treaty's temporal restrictions by means of the invocation of some post-treaty event as a vehicle for challenging measures that are rooted in pre-treaty conduct.⁷⁰ Previous tribunals have therefore considered whether such claims are in fact rooted in pre-treaty conduct, for the purpose of assessing whether the claims are outside the *ratione temporis* scope of the relevant treaty.⁷¹ In doing so, such

⁷⁰ See, e.g., **RL-0024**, *Spence* (Interim Award), ¶ 217 (“pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right”); **RL-0012**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3 (Dupuy, Mantilla-Serrano, Thomas), Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (“**Corona (Award on Preliminary Objections)**”), ¶ 215 (“[W]here a ‘series of similar and related actions by a respondent State’ is at issue, an investor cannot evade the limitations period by basing its claim on ‘the most recent transgression in that series[.]’”).

⁷¹ See, e.g., **RL-0024**, *Spence* (Interim Award), ¶ 246 (“The Tribunal considers, additionally, that the [c]laimants have failed to show, again manifestly, in the face of this pre-entry in force, pre-limitation period conduct, that the breaches that they allege are independently actionable

tribunals have applied different factors. Recent tribunals, for instance, have asked whether the post-treaty act altered the pre-treaty “status quo,”⁷² or whether that post-treaty act is “independently actionable.”⁷³ These tribunals have articulated the test in different ways, but they have all sought to identify the instances in which a claimant is invoking a post-treaty act to assert claims that are actually rooted in pre-treaty conduct.⁷⁴

41. In her Reply, Claimant advances three arguments in response to Colombia’s discussion of the relevant legal authorities. Specifically, Claimant asserts that:
 - (i) Colombia advocates a “blanket exemption from responsibility” if there is

breaches, separable from the pre-entry into force conduct in which they are deeply rooted.”); **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 212 (analyzing whether the act after the relevant date “was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision”); **RL-0013**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14 (Mayer, Gaillard, Stern), Award, 18 August 2017 (“**EuroGas (Award)**”), ¶ 455 ([t]he [subsequent judicial decisions] did not change Belmont’s legal and factual situation”); **RL-0011**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (Stern, Klein, Thomas), Award on Jurisdiction, 18 July 2013 (“**ST-AD (Award on Jurisdiction)**”), ¶ 332.

⁷² See, e.g., **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 212 (analyzing whether the State act after the relevant date “was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision”); **RL-0013**, *Eurogas* (Award), ¶ 455 (where, referring to a chart establishing the timeline of events, the tribunal concluded that “the situation was exactly the same on 3 May 2005, before the BIT entered into force, and 1 August 2012, after the BIT entered into force: the mining rights that were lost by Rozmin were reassigned to another company. In other words, the mining rights were taken from Rozmin in 2005, allegedly in violation of Belmont’s rights under the Canada-Slovakia BIT and international law, and several decisions of the mining authorities (not the judicial authorities) refused to reconstitute the rights to Rozmin. The [subsequent judicial decisions] did not change Belmont’s legal and factual situation.”).

⁷³ See, e.g., **RL-0024**, *Spence* (Interim Award), ¶ 221 (“[T]he Tribunal considers that, to move beyond a jurisdictional assessment, any such alleged breach must relate to independently actionable conduct within the permissible period.”).

⁷⁴ **RL-0024**, *Spence* (Interim Award), ¶ 246 (“The Tribunal considers, additionally, that the [c]laimants have failed to show, again manifestly, in the face of this pre-entry in force, pre-limitation period conduct, that the breaches that they allege are independently actionable breaches, separable from the pre-entry into force conduct in which they are deeply rooted.”).

conduct that straddles the date of entry into force;⁷⁵ (ii) Colombia “invent[ed]” a test from the jurisprudence; and (iii) the identification by Claimant of a single post-treaty act as the basis for her claim suffices to establish jurisdiction.⁷⁶ Colombia will address each of these arguments in turn.

42. First, Claimant alleges that Colombia is asserting a “blanket exemption from responsibility” if there is conduct that straddles the date of entry into force.⁷⁷ However, this is a mischaracterization of Colombia’s argument. As clearly stated in Colombia’s Counter-Memorial, the existence of pre- and post-treaty conduct will require a tribunal to *consider* whether the post-treaty conduct is sufficiently distinct and separate from the pre-treaty conduct as to be able to form the basis for independent claims. The proposed standard is therefore clearly *not* a “blanket exemption.”
43. Second, Claimant accuses Colombia of relying on the *Spence v. Costa Rica* award to “invent[]” a two-part test.⁷⁸ She contends that the *Spence* award “says nothing about fundamental changes to the status quo of the investment, and its reference to the challenged measure being independently actionable is simply a reference to the intertemporal principle codified in Art. 10.1.3 of CAFTA-DR.”⁷⁹ However, Claimant’s criticism is unfounded. Colombia did not and does not assert that the *Spence* tribunal articulated a two-part test that must be followed here. Instead, Colombia in its Counter-Memorial discussed the different factors that have been relied upon by previous tribunals (i) when assessing situations in which the relevant State acts straddle the date of entry

⁷⁵ Claimant’s Reply (ICSID), ¶ 99.

⁷⁶ Claimant’s Reply (ICSID), ¶ 80 (“[W]hen State actions straddle a relevant cut-off date, what is required is ‘conduct of the State after that date which is itself a breach.’”).

⁷⁷ Claimant’s Reply (ICSID), ¶ 99.

⁷⁸ Claimant’s Reply (ICSID), ¶ 59.

⁷⁹ Claimant’s Reply (ICSID), ¶ 59.

into force of the treaty, and (ii) in deciding to dismiss claims for lack of jurisdiction *ratione temporis*.⁸⁰

44. As Colombia explains below, the test articulated by the tribunal in *Spence* aims to ascertain whether the challenged measures effected a change to the status quo of the investment, and whether the challenged measure is independently actionable. In particular, the *Spence* tribunal considered whether “the [post-treaty] breaches . . . are independently actionable breaches, separable from the pre-entry into force conduct in which they are deeply rooted.”⁸¹
45. There is no single or uniform test that must be met. Instead, the jurisprudence calls for an assessment of a claimant’s claims in the light of various factors, to determine whether the measures being challenged are within the jurisdiction *ratione temporis* of the tribunal. In its Counter-Memorial, Colombia demonstrated that the application of the factors identified by previous tribunals prove that Claimant’s claims indeed fall outside of the jurisdiction *ratione temporis* of this Tribunal.⁸² Specifically, Colombia showed that Claimant’s claims based on the 2014 Confirmatory Order did not alter the pre-treaty status quo of Claimant’s investment,⁸³ and also that the 2014 Confirmatory Order is not “independently actionable.”⁸⁴

⁸⁰ Colombia’s Counter-Memorial (ICSID), ¶ 171 (“The fact that the fourth measure, i.e., 2014 Confirmatory Order, occurred after the entry into force of the TPA does not negate the Tribunal’s lack of jurisdiction *ratione temporis* over all of Claimant’s claims. Such is the conclusion that must be drawn from the application of the principles of non-retroactivity and intertemporal law discussed above, which have been observed by various other investment tribunals when deciding jurisdictional objections concerning acts that straddle the entry into force of a treaty. Indeed, as discussed below, several tribunals have upheld jurisdictional objections *ratione temporis* over acts that post-date the entry into force of the treaty in circumstances in which such acts were rooted in pre-treaty conduct.”).

⁸¹ **RL-0024**, *Spence* (Interim Award), ¶ 246.

⁸² Colombia’s Counter-Memorial (ICSID), ¶¶ 188, 199.

⁸³ See **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 212.

⁸⁴ See **RL-0024**, *Spence* (Interim Award), ¶ 221.

46. Third, Claimant asserts that, to establish the jurisdiction *ratione temporis* of a tribunal, it suffices for a claimant to identify a single State act that post-dates the entry into force of the relevant treaty.⁸⁵ In support of this self-serving and inaccurate generalization, Claimant refers to four cases: *Chevron v. Ecuador*, *Blaga v. Romania*, *Singarosa v. Sri Lanka*, and *Kouidis v. Greece*.⁸⁶ Only one of those cases, *Chevron v. Ecuador*, is an investment treaty arbitration. The *Chevron* award is inapposite, however, because as explicitly noted by the tribunal in that case, the applicable treaty contained a clause that “ma[de] an exception to the principle of non-retroactivity in accordance to Article 28 VCLT.”⁸⁷ In the light of that clause, pursuant to which the “BIT applies as long as there are ‘investments existing at the time of entry into force,’”⁸⁸ the *Chevron* tribunal noted that there was “not an issue of the non-retroactivity of treaties.”⁸⁹ Accordingly, the *Chevron* case is inapposite here, since the TPA contains no exception of the sort that existed in the BIT at issue in that case.
47. The other three cases cited by Claimant are complaints by individuals brought before the U.N. Human Rights Committee (“UNHRC”) alleging violations of a multilateral human rights treaty—the International Covenant on Civil and Political Rights. These three cases are likewise inapposite. In each of them, the

⁸⁵ Claimant’s Reply (ICSID), ¶ 80 (“[W]hen State actions straddle a relevant cut-off date, what is required is ‘conduct of the State after that date which is itself a breach.’ The Constitutional Court’s Order 188/14 is precisely such conduct in this case.”); *Id.*, p. 12 (“The Tribunal has jurisdiction *ratione temporis* because this matter was timely commenced and concerns a State measure that was taken after the TPA’s entry into force.”).

⁸⁶ See Claimant’s Reply (ICSID), ¶¶ 100–06.

⁸⁷ CL-0157, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 34877 (Böckstiegel, Brower, van den Berg), Interim Award, 1 December 2008 (“*Chevron (Interim Award)*”), ¶ 265.

⁸⁸ CL-0157, *Chevron (Interim Award)*, ¶ 265.

⁸⁹ CL-0157, *Chevron (Interim Award)*, ¶ 281.

UNHRC was faced with allegations of “continuing breaches” of the Covenant,⁹⁰ which are a type of treaty breach that is conceptually distinct from other types of breach, for the purposes of the assessment of jurisdiction *ratione temporis*.⁹¹ Claimant here is not invoking the doctrine of “continuing acts” which was at issue in the three above-mentioned cases. Accordingly, the three UNHRC cases are likewise inapposite here.

48. Moreover, in all of the above-mentioned cases, the decision-makers carefully analyzed the ties (or lack thereof) between the pre- and post-treaty conduct.⁹² Such analysis thus undermines Claimant’s theory that simply identifying a single post-treaty act suffices to establish jurisdiction *ratione temporis*.
49. In conclusion, it is not sufficient for Claimant to point to a single State act that post-dates the entry into force of the TPA (namely, the 2014 Confirmatory Order), as a basis for jurisdiction *ratione temporis*. Instead, the existence of alleged pre- and post-treaty conduct requires an assessment as to whether Claimant’s claims are in fact rooted in pre-treaty conduct. That assessment can be guided by the legal test adopted by other tribunals, including: (1) whether the post-treaty act altered the pre-treaty status quo of Claimant’s investment;

⁹⁰ See **CL-0338**, *Nallaratnam Singarasa v. Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (Human Rights Committee), Communication No. 1033/2001, 30 July 2004, ¶ 6.3 (discussing the Committee’s jurisprudence concerning “continuing violation[s]”); **CL-0339**, *Alexandros Kouididis v. Greece*, UN Doc. CCPR/C/86/D/1070/2002 (Human Rights Committee), Communication No. 1070/2002, 31 March 2006, ¶ 6.5; **CL-0340**, *Aurel Blaga and Lucia Blaga v. Romania*, UN Doc. CCPR/C/86/D/1158/2003 (Human Rights Committee), Communication No. 1158/2003, 30 March 2006, ¶ 6.4.

⁹¹ See **RL-0010**, ILC Articles on State Responsibility, Art. 14.

⁹² See **CL-0157**, *Chevron (Interim Award)*, ¶ 298; **CL-0338**, *Nallaratnam Singarasa v. Sri Lanka*, UN Doc. CCPR/C/81/D/1033/2001 (Human Rights Committee), Communication No. 1033/2001, 30 July 2004, ¶ 6.3; **CL-0339**, *Alexandros Kouididis v. Greece*, UN Doc. CCPR/C/86/D/1070/2002 (Human Rights Committee), Communication No. 1070/2002, 31 March 2006, ¶ 6.5; **CL-0340**, *Aurel Blaga and Lucia Blaga v. Romania*, UN Doc. CCPR/C/86/D/1158/2003 (Human Rights Committee), Communication No. 1158/2003, 30 March 2006, ¶ 6.4.

and (2) whether the post-treaty act is “independently actionable,” such that the “alleged breach [can] be evaluated on the merits without requiring a finding going to the lawfulness of pre-[treaty] conduct.”⁹³

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

50. Despite Claimant’s constantly shifting position concerning the precise State conduct of which she complains,⁹⁴ in her Reply Claimant seems to settle on a single State act as the alleged source of Colombia’s liability under the TPA: the 2014 Confirmatory Order. Such decision post-dated the entry into force of the TPA. However, as demonstrated in Colombia’s Counter-Memorial, and for the reasons elaborated below, the 2014 Confirmatory Order: (1) did not alter the pre-treaty status quo of Claimant’s investment; and (2) is not independently actionable (i.e., Claimant’s claims cannot be evaluated without also assessing the lawfulness of the (non-actionable) pre-treaty conduct (namely, the 2011 Constitutional Court Judgment and the 1998 Measures)). As a result, all of Claimant’s claims fall outside of the jurisdiction *ratione temporis* of the TPA.

⁹³ See **RL-0024**, *Spence* (Interim Award), ¶ 237(b); Colombia’s Counter-Memorial (ICSID), ¶ 186.

⁹⁴ Claimant’s Memorial (ICSID), ¶ 293 (“[T]he Republic of Colombia is responsible, through the actions and omissions of its executive and judicial authorities, for the breach of a number of treaty obligations contained in the TPA and the Colombia-Switzerland BIT”), ¶ 295 (“The Constitutional Court in its 2011 and 2014 Opinions committed serious abuses of jurisdiction and authority, and radically renounced universal principles of justice and due process”), ¶ 307 (“As demonstrated in Section II of this Memorial on Jurisdiction, both the regulatory and the judicial treatments imposed by the Republic of Colombia on Claimant was discriminatory and in breach of the provisions under Article 12.2 of the TPA”).

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

51. As explained in Colombia's Counter-Memorial,⁹⁵ when faced with acts that straddle the entry into force of the TPA, the *Spence*, *Corona*, *Eurogas*, and *ST-AD* tribunals have assessed the relevant post-treaty acts to determine whether those acts changed the pre-treaty status quo of the claimant's investment.⁹⁶ Here, the single post-treaty act invoked by Claimant (i.e., the 2014 Confirmatory Order) did *not* change the pre-2012 status quo.
52. In her Reply, Claimant asserts that the question as to whether the 2014 Confirmatory Order changed the pre-treaty status quo is not relevant.⁹⁷ In support of this argument, Claimant discusses the decisions that Colombia cited in its Counter-Memorial: *Corona*, *Eurogas*, and *ST-AD*. According to Claimant, these rulings have no bearing in the present case, because they involved the application of treaties other than the TPA to facts other than those at issue here. However, Claimant's attempt to distinguish those three cases from the instant case is unpersuasive.
53. First, Claimant alleges that the definition given by the *Eurogas* tribunal to the term "dispute" is different from the accepted use of that term.⁹⁸ As should be obvious, a previous case need not present identical issues of law and fact in order to be apposite. If identical treaties and factual circumstances were always required – as Claimant seems to suggest – no tribunal would ever be able to rely upon the reasoning of one of its predecessors.

⁹⁵ Colombia's Counter-Memorial (ICSID), Section B.1.b.i.

⁹⁶ See **RL-0024**, *Spence* (Interim Award), ¶ 246; **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 212; **RL-0013**, *Eurogas* (Award), ¶ 455; **RL-0011**, *ST-AD* (Award on Jurisdiction), ¶ 318.

⁹⁷ See, e.g., Claimant's Reply (ICSID), p. 56, heading a.

⁹⁸ Claimant's Reply (ICSID), ¶ 72.

54. Second, Claimant emphasizes that the tribunal in *Corona* was applying a limitations period treaty provision rather than the principle of non-retroactivity. That may be true, but the case is nevertheless instructive insofar as the *Corona* tribunal was required to assess its jurisdiction *ratione temporis* in light of the fact that the alleged State conduct had occurred both before and after the critical date established by the limitations period. Such reasoning is plainly relevant to the present case: the existence of acts that straddle the relevant date (be it the entry into force of a treaty or the critical date for purposes of a limitations period) will require a tribunal to assess such acts and their relationship to determine whether the dispute is within the tribunal's jurisdiction *ratione temporis*.
55. Third, the *Corona*, *Eurogas*, and *ST-AD* decisions are all directly apposite and offer useful guidance for analyzing whether a claimant's claims are within a tribunal's jurisdiction *ratione temporis* in a context in which the conduct at issue straddles the entry into force of the treaty. Specifically, those tribunals assessed whether the acts that occurred after the relevant date (i) produced a separate effect on the claimant's investment,⁹⁹ or (ii) instead, did *not* change the circumstances that existed at the time of the treaty's entry into force.
56. For instance, in *Corona*, the Respondent State had denied the claimant's application for a mining license. As explained above, the tribunal in that case was assessing its jurisdiction *ratione temporis* in the context of a limitations period prescribed by the treaty. The denial of the mining license had taken place before the "critical date" for purposes of the relevant treaty's limitations period. *After* such critical date, the claimant had requested reconsideration of the license

⁹⁹ See, e.g., **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 212 (analyzing whether the act after the relevant date "was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision").

denial, but had received no response. The claimant then filed for arbitration, arguing that the tribunal had jurisdiction *ratione temporis* because the reconsideration request post-dated the critical date. However, the tribunal rejected the claimant’s argument, finding that there had been no change in the status quo inasmuch as the claimant’s status after the critical date had remained exactly the same as before the critical date, i.e., the claimant did not have a mining license. As a result, the tribunal found that the “claims [were] time-barred by DR-CAFTA Article 10.18.1.”¹⁰⁰

57. The tribunal in *Corona* also observed that the reconsideration request (referred to by the tribunal as “Motion for Reconsideration”) filed by the claimant after the critical date was “only aimed at having the same administration review its own decision.”¹⁰¹ As such, “the very purpose of the Motion for Reconsideration was to have the Ministry re-open the proceeding and render a different decision.”¹⁰² Accordingly, in the view of the tribunal, the respondent’s post-critical date conduct “[wa]s nothing but an implicit confirmation of its previous decision.”¹⁰³ Notably, the fact that the claimant in *Corona* alleged that the later-in-time act amounted to a denial of justice did not alter the tribunal’s analysis. What the Claimant is attempting here is precisely what the claimant in *Corona* attempted, unsuccessfully: she is trying to establish jurisdiction on the basis of a post-TPA State act—the 2014 Confirmatory Order—that merely confirmed pre-TPA decisions by the State and that thus maintained the pre-TPA status quo.
58. In *Eurogas*, certain mining rights held by the claimant had been reassigned by the State prior to the relevant treaty’s entry into force. In arguing that its treaty

¹⁰⁰ **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 238.

¹⁰¹ **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 211.

¹⁰² **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 211.

¹⁰³ **RL-0112**, *Corona* (Award on Preliminary Objections), ¶ 211.

arbitration claims fell within the tribunal's jurisdiction, the claimant sought to rely on certain post-entry into force decisions in which the Slovakian judiciary had refused to reconstitute the relevant mining rights to the claimant. As discussed in Colombia's Counter-Memorial,¹⁰⁴ the *Eurogas* tribunal considered whether judicial decisions issued after the entry into force of the treaty had "change[d] [the claimant's] legal and factual situation."¹⁰⁵ The tribunal concluded that the post-treaty government decisions had not altered the pre-treaty status quo, but rather had merely confirmed it; on that basis, the tribunal held that it did not have jurisdiction *ratione temporis* over such decisions (even though they had post-dated the treaty's entry into force).¹⁰⁶ The same is true here, in respect of the 2014 Confirmatory Order, insofar as the latter did not change the legal or factual situation that Claimant was in following the 2011 Constitutional Court Judgment (which predated the entry into force of the TPA).

59. In *ST-AD*, the claimant as part of its claim invoked alleged State conduct that had occurred *before* the claimant became a protected investor under the BIT, including a judicial decision by a lower court concerning the investment, as well as the rejection by the Supreme Cassation Court of an application by the claimant for a set-aside of the lower court decision.¹⁰⁷ Subsequently, *after* the critical date, the claimant filed a new set-aside application with the Supreme Cassation Court, which was also rejected.¹⁰⁸ The tribunal observed that the latter judicial decision was "the only possible relevant event that happened after the critical date."¹⁰⁹ It also characterized the post-critical date set-aside application as merely "a 'repackaging' of the first application to set aside that

¹⁰⁴ Colombia's Counter-Memorial (ICSID) ¶ 177.

¹⁰⁵ **RL-0013**, *Eurogas* (Award), ¶ 455; see Colombia's Counter-Memorial (ICSID), ¶ 177.

¹⁰⁶ See **RL-0013**, *Eurogas* (Award), ¶¶ 455-458.

¹⁰⁷ **RL-0011**, *ST-AD* (Award on Jurisdiction), ¶¶ 307-308, 311.

¹⁰⁸ **RL-0011**, *ST-AD* (Award on Jurisdiction), ¶ 311.

¹⁰⁹ **RL-0011**, *ST-AD* (Award on Jurisdiction), ¶ 316.

same Decision, rendered six years before the [critical date].”¹¹⁰ Having confirmed that “nothing new happened after” the relevant date,¹¹¹ the tribunal upheld the respondent’s objection to its jurisdiction *ratione temporis*. Precisely the same can be said in the instant case about the 2014 Confirmatory Order. Such order did not alter the status quo of Claimant’s alleged investment, and amounts merely to a confirmation of the pre-TPA status quo.

60. As Dr. Ibáñez explains, pursuant to Article 241 of the Colombian Constitution, “the judgments by the Constitutional Court are final.”¹¹² Article 49 of Decree No. 2067 of 1991 also provides that “there are no appeals for Constitutional Court judgments.”¹¹³ Judgments of the Constitutional Court thus “resolve the issues raised before it in an unappealable manner, in the case of constitutionality proceedings and *tutela* proceedings.”¹¹⁴ Claimant’s Colombian law experts do not deny that judgments of the Constitutional Court are final. Through the 2011 Constitutional Court Judgment, the Constitutional Court

¹¹⁰ **RL-0011**, *ST-AD* (Award on Jurisdiction), ¶ 331.

¹¹¹ **RL-0011**, *ST-AD* (Award on Jurisdiction), ¶ 318.

¹¹² Second Expert Report of Dr. Jorge Enrique Ibáñez Najjar (“**Second Ibáñez Expert Report**”), ¶ 146 (Spanish Original: “*De conformidad con el artículo 241 de la Constitución Política, las sentencias que emita la Corte Constitucional tienen carácter definitivo.*”).

¹¹³ **Ex. R-0250**, Decree 2067, 4 September 1991, Art. 49 (English translation: “There is no appeal against a Constitutional Court judgment. Nullity of a proceeding before the Constitutional Court may only be alleged before the decision is issued. Only irregularities implying violation of due process may serve as a basis for the Plenary of the Court to annul a proceeding”) (Spanish original: “*Contra las sentencias de la Corte Constitucional no procede recurso alguno. La nulidad de los procesos ante la Corte Constitucional sólo podrá ser alegada antes de proferido el fallo. Sólo las irregularidades que impliquen violación del debido proceso podrán servir de base para que el Pleno de la Corte anule el Proceso.*”). See also Second Ibáñez Expert Report, ¶ 152 (English translation: “There is no appeal against a Constitutional Court judgment. This is expressly provided in Article 49, paragraph one, of Decree 2067 of 1991”) (Spanish original: “*Contra las sentencias de la Corte Constitucional no procede recurso alguno. Así lo dispone expresamente el inciso primero del artículo 49 del Decreto 2067 de 1991.*”).

¹¹⁴ Second Ibáñez Expert Report, ¶ 146 (Spanish Original: “*Tales sentencias resuelven de manera inapelable los asuntos que se plantean ante la Corte Constitucional, cuando se trate de procesos de constitucionalidad en estricto sentido o procesos de tutela.*”).

reversed the 2007 Council of State Judgment and dismissed Claimant's claims. As a result, the 2007 Council of State Judgment no longer had any legal effect;¹¹⁵ as affirmed Dr. Ibáñez, "the 2011 Constitutional Court Judgment put an end to the entire judicial proceeding that initiated with the Nullification and Reinstatement Action [(i.e., Claimant's lawsuit)] before the contentious administrative jurisdiction."¹¹⁶

61. On 9 December 2011, Claimant filed its petition to annul the 2011 Constitutional Court Judgment ("**Annulment Petition**").¹¹⁷ As discussed in Colombia's Counter-Memorial,¹¹⁸ Colombian law allows a litigant to seek the annulment of a final judgment of the Constitutional Court under extraordinary circumstances.¹¹⁹ However, the Constitutional Court has explicitly stated that the potential for such annulment "**does not mean that there is an appeal against the [Constitutional Court's] decisions**, nor does it become a new opportunity to reopen the debate or examine disputes that have already been

¹¹⁵ Expert Report of Dr. Jorge Enrique Ibáñez Najar ("**First Ibáñez Expert Report**"), ¶ 131.

¹¹⁶ Second Ibáñez Expert Report, ¶ 145 (Spanish original: "*La Sentencia de la Corte Constitucional (2011), puso término definitivo a todo el proceso judicial que inició con la Acción de Nulidad y Restablecimiento ante la jurisdicción contencioso administrativa*").

¹¹⁷ See generally **Ex. R-0059**, Annulment Petition by the Holding Companies, Constitutional Court, 9 December 2011.

¹¹⁸ See Colombia's Counter-Memorial (ICSID), ¶¶ 183–85. See also First Ibáñez Expert Report, ¶¶ 131–43.

¹¹⁹ See Second Ibáñez Expert Report, ¶ 143 (English translation: "Like all the sentences issued when reviewing a tutela action that was already judged at the first and second instance, the 2011 Constitutional Court Judgment was a final and definitive decision of the dispute at the constitutional level") (Spanish original: "*La Sentencia de la Corte Constitucional (2011), como todas sus sentencias proferidas al revisar una acción de tutela que ya había sido despachada en primera y en segunda instancia, fue una decisión final y definitiva sobre la controversia planteada en sede constitucional*"); *id.* ¶ 143 (English translation: "[T]he proceeding was selected by the Constitutional Court in its capacity as the highest and final constitutional court, to review the decisions adopted in said proceeding from the perspective of the Constitution") (Spanish original: ("*[E]l procedimiento fue seleccionado por la Corte Constitucional, en su capacidad de máximo tribunal de cierre constitucional, para revisar desde la perspectiva de la Constitución las decisiones que se adoptaron en dicho procedimiento.*").

concluded”¹²⁰ (emphasis added). As explained by Dr. Ibáñez, only under exceptional and extreme circumstances can there be such an annulment of a judgment by the Constitutional Court.¹²¹ In sum, a petition seeking to annul a

¹²⁰ **Ex. R-0254**, Order No. 031A/02, Constitutional Court, 30 April 2002, § 3 (p. 7) (Spanish original: “[N]o significa que haya un recurso contra sus providencias, ni llega a convertirse en una nueva oportunidad para reabrir el debate o examinar controversias que ya fueron concluidas.”); see also **Ex. R-0256**, Order No. 068/07, Constitutional Court, 14 March 2007, p. 1 (English translation: “An incident of annulment cannot be understood as a new procedural instance, where closed debates and discussions regarding the facts and the assessment of evidence are reopened. It is only a mechanism aimed at safeguarding the fundamental right to due process. Hence the exceptional nature offered by said incident and the burden on the applicant to adequately frame his petition within the grounds recognized by constitutional jurisprudence. If a request for annulment does not prove the existence of at least one of said grounds, where appropriate, the exceptional and extraordinary nature that identifies these types of incidents must lead to the denial of the petition.”) (Spanish original: “No cabe entender el incidente de nulidad como una nueva instancia procesal, en la cual se reabran debates y discusiones culminados en relación con los hechos y la apreciación de las pruebas, sino tan sólo como un mecanismo encaminado a salvaguardar el derecho fundamental al debido proceso. De allí el carácter excepcional que ofrece dicho incidente y la carga que tiene el accionante de enmarcar adecuadamente su petición dentro de alguna de las causales reconocidas por la jurisprudencia constitucional, pues si la solicitud de nulidad no demuestra la existencia de al menos una de dichas causales de procedencia, la naturaleza excepcional y extraordinaria que identifica este tipo de incidentes debe conducir a la denegación de la solicitud impetrada”); **Ex. R-0257**, Order No. 050/13, Constitutional Court, 13 March 2013, § 2 (pp. 5-6) (English translation: “The Constitutional Court has repeatedly stressed that a request for annulment “is not a new procedural instance where the debate on the substantive issue that has already concluded in the review judgment can be reopened. It is only a mechanism aimed at preserving the fundamental right to due process, which may have been injured during the issuance of the tutela review judgment.”) (Spanish original: *La Corte Constitucional ha destacado reiteradamente que la solicitud de nulidad “no es una nueva instancia procesal en la cual pueda reabrirse el debate sobre el tema de fondo que ya ha concluido en la sentencia de revisión sino apenas un mecanismo encaminado a preservar el derecho fundamental al debido proceso, que pudiera haber sido lesionado con ocasión de la expedición de la sentencia de revisión de tutela.”*)

¹²¹ Second Ibáñez Expert Report, ¶ 155 (English translation: “The Constitutional Court established that annulment of a judgment is ‘strictly exceptional’ when there are undoubted, proven, notorious, significant and transcendental violations of the due process guarantee that has substantial and direct repercussions on the decision or its effects”) (Spanish original: “La Corte Constitucional ha establecido que la nulidad de sus sentencias es ‘estrictamente excepcional’ cuando hay una violación ‘indudable, probada, notoria, significativa y trascendental a la garantía del debido proceso que tenga repercusiones sustanciales y directas sobre la decisión o sus efectos.”).

Constitutional Court Judgment is not part of the ordinary course of a litigation proceeding in Colombia,¹²² but rather is extraordinary in nature.¹²³

62. The annulment petition filed by Claimant (through the Holding Companies) thus constituted an attempt to reopen the closed proceeding regarding the 1998 Regulatory Measures, which had produced a final judgment dismissing Claimant's claims. In that sense, it is akin to the reconsideration request filed by the claimant in *Corona*—a unilateral measure by the claimant designed to elicit a post-critical date act or decision by the State which the claimant could then invoke as the basis for temporal jurisdiction. It is manifest and incontrovertible that the 2014 Confirmatory Order did not change the status quo; prior to the TPA's entry into force, there was a final court judgment that had dismissed Claimant's claims regarding the 1998 Regulatory Measures, and the litigation was closed; after the TPA's entry into force, the situation was *exactly* the same.
63. In attempting to rebut Colombia's argument, Claimant mischaracterizes a number of important points. For instance, Claimant suggests that Colombia has

¹²² See First Ibáñez Expert Report, ¶ 143; Second Ibáñez Expert Report, ¶ 160 (English translation: “The Constitutional Court has repeatedly stressed that an annulment petition ‘is not a new procedural instance where a substantive issue that was concluded in the review judgment can be reopened. It is only a mechanism aimed at preserving the fundamental right to due process, which may have caused harm during the issuance of the tutela review judgment’”) (Spanish original: “La Corte Constitucional ha destacado reiteradamente que la solicitud de nulidad ‘no es una nueva instancia procesal en la cual pueda reabrirse el debate sobre el tema de fondo que ya ha concluido en la sentencia de revisión sino apenas un mecanismo encaminado a preservar el derecho fundamental al debido proceso, que pudiera haber sido lesionado con ocasión de la expedición de la sentencia de revisión de tutela’”), ¶ 162 (English translation: “An annulment petition does not imply a new procedural instance, and it does not entail attacking the substantive decision so that it is reviewed and a new judgment is issued instead to replace it or modify it”) (Spanish original: “[L]a solicitud de nulidad del proceso no implica el trámite de una nueva instancia procesal y no conlleva atacar la decisión de fondo para que ella sea revisada y en su lugar se profiera una nueva sentencia que la reemplace o la modifique.”).

¹²³ See First Ibáñez Expert Report, ¶ 139; Second Ibáñez Expert Report, ¶ 155 (English translation: “The Constitutional Court established that annulment of its judgments is ‘strictly exceptional’”) (Spanish original: “La Corte Constitucional ha establecido que la nulidad de sus sentencias es ‘estrictamente excepcional[.]’”).

argued that the 2014 Confirmatory Order “is not a State measure attributable to Respondent.”¹²⁴ However, Colombia has never said any such thing – the 2014 Confirmatory Order is indeed a State measure. Moreover, Colombia has never denied that petitions for the annulment of Constitutional Court judgments are permitted under Colombian law.¹²⁵ Those arguments are strawmen erected by Claimant, based on mischaracterizations of Colombia’s statements.

64. Claimant also appears to question the status under Colombian law of judgments of the Constitutional Court. For instance, Claimant asserts that “an annulment petition presents a meaningful opportunity for judicial recourse, notwithstanding the **supposedly** ‘final’ nature of the Constitutional Court decision” (emphasis added).¹²⁶ Yet, as was explained above and by Dr. Ibáñez, there can and should be no question that a judgment of the Constitutional Court is final.
65. Claimant’s ultimate conclusion is that the 2014 Confirmatory Order “end[ed] all judicial labor in the litigation that had been brought by Claimant’s companies with respect to her investments.”¹²⁷ Claimant’s strange reference to “judicial labor” is an obvious attempt to ignore the fact that the judicial proceeding itself was closed in 2011 – and remained closed thereafter. In other words, Claimant’s claims for compensation were definitively extinguished in 2011, and the 2014 Confirmatory Order did nothing to change that fact.
66. So desperate is Claimant to breathe life into the 2014 Confirmatory Order and to confer on it a significance that it simply does not have, that she is now

¹²⁴ Claimant’s Reply (ICSID), ¶ 89 (“There can be no serious contention that Order 188/14 is not a State measure attributable to Respondent.”).

¹²⁵ Claimant’s Reply (ICSID), ¶ 91 (suggesting that Colombia was “forced to acknowledge” the validity of such petitions under Colombia law).

¹²⁶ Claimant’s Reply (ICSID), ¶ 91.

¹²⁷ Claimant’s Reply (ICSID), ¶ 88.

brazenly arguing that the 2014 Confirmatory Order “**dramatically** changed the pre-treaty *status quo*”¹²⁸ (emphasis added). Such statement is wildly inaccurate and divorced from reality. The 2014 Confirmatory Order merely “den[ied] the petition to annul Judgment SU-477 of 2011 delivered by the plenary of the Constitutional Court;”¹²⁹ it did not alter the status of the 2011 Constitutional Court Judgment that dismissed Claimant’s claims. The 2014 Confirmatory Order thus did not change the legal and factual status quo that resulted from the 2011 Constitutional Court Judgment; moreover, it did not do so *in any way*—let alone “dramatically”¹³⁰ so.

67. Claimant’s theory is simply a Trojan horse, designed to potentiate a claim that, at its core, challenges pre-treaty rather than post-treaty conduct. Under Claimant’s theory, a claimant in a treaty arbitration would always be able to (i) present a post-treaty motion or extraordinary request before the domestic courts (i.e., any form of “judicial labor”)—even if the relevant domestic litigation has reached judicial finality—for the sole purpose of propitiating some form of post-treaty State conduct in response; and (ii) use such conduct as a post-treaty jurisdictional hook for its claims.
68. Previous tribunals have cautioned against allowing claimants to do that. For example, the *Eurogas* tribunal held that to rule that it did have jurisdiction *ratione temporis* over the claimant’s claims “‘would require the Tribunal to engineer a legalistic and artificial reasoning to bypass’ the temporal limits on the application of the treaty.”¹³¹

¹²⁸ Claimant’s Reply (ICSID), ¶ 88.

¹²⁹ **Ex. R-0049**, 2014 Confirmatory Order, p. 78 (Spanish Original: “*DENEGAR las solicitudes de nulidad frente a la Sentencia SU-477 de 2011 proferida por la Sala Plena de la Corte Constitucional.*”).

¹³⁰ Claimant’s Reply (ICSID), ¶ 88.

¹³¹ **RL-0013**, *Eurogas* (Award), ¶ 458; see also **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 450 (“To allow an investor to [base its claim on the most recent transgression in a series would] ‘render the limitations provisions ineffective.’”).

69. In sum: the 2014 Confirmatory Order did not alter the pre-treaty status quo; Claimant’s claim based on such order is in fact rooted in pre-treaty conduct (specifically, the 2011 Constitutional Court Judgment and the 1998 Measures), and such 2014 measure is consequently outside the jurisdiction *ratione temporis* of the Tribunal.

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

70. When faced with situations in which the alleged State conduct straddles the entry into force of the treaty, tribunals have also assessed the post-treaty conduct to determine whether it is “independently actionable.”¹³² As explained by the *Spence* tribunal, a claim based on post-treaty conduct is independently actionable if the post-treaty conduct can be “evaluated on the merits without requiring a finding going to the lawfulness of pre-[treaty] conduct.”¹³³ In its Counter-Memorial, Colombia discussed the relevant case law (including the *Spence* and *ST-AD* decisions), demonstrating that Claimant’s claims based on the 2014 Confirmatory Order are not independently actionable because such order cannot be evaluated on the merits without a finding going to the lawfulness of pre-TPA (namely, the 2011 Constitutional Court Judgment and the 1998 Measures).¹³⁴

71. In her Reply, Claimant’s position with respect to the “independently actionable” analysis is confusing. On the one hand, she does not go so far as to outright deny that the question as to whether its post-treaty claims are “independently actionable” is relevant.¹³⁵ On the other hand, she asserts that

¹³² See **RL-0024**, *Spence* (Interim Award), ¶ 237(b).

¹³³ **RL-0024**, *Spence* (Interim Award), ¶ 237(b).

¹³⁴ Colombia’s Counter-Memorial (ICSID), ¶¶ 187–92.

¹³⁵ Compare Claimant’s Reply (ICSID), p. 56 (where Claimant outright rejected the relevance of the “status quo” analysis) *with id.*, p. 69 (where Claimant addresses the “Meaning of the ‘Independently Actionable’ Requirement”).

Colombia's arguments are based on an "expansive interpretation" of the *Spence* interim award.¹³⁶ Subsequently, however, Claimant appears to acknowledge—as it must—that the *Spence* tribunal did in fact analyze whether the claimant's claims were "independently actionable."¹³⁷

72. The reasoning of the *Spence* interim award is apposite and offers useful guidance. As discussed in Colombia's Counter-Memorial,¹³⁸ in *Spence* the claimants had alleged that Costa Rica's development of a national park for the protection of nesting leatherback turtles had unlawfully deprived them of real estate property.¹³⁹ The claimants took issue with regulatory conduct that had occurred prior to the entry into force of the applicable treaty, but based their treaty claims on the State's alleged post-treaty conduct (i.e., the State's alleged failure to pay compensation for the alleged taking).¹⁴⁰ Costa Rica raised a *ratione temporis* objection based on the "uncontroversial . . . general rule of customary international law . . . of non-retroactivity" of treaties,¹⁴¹ pointing out that the post-treaty acts represented no more than "the lingering effects of pre-[entry into force] acts" or "dependent acts that did not in-and-of-themselves constitute independent breaches of the CAFTA."¹⁴² The tribunal applied the customary international law principle¹⁴³ that the treaty does not bind any party in relation

¹³⁶ Claimant's Reply (ICSID), ¶ 81.

¹³⁷ See Claimant's Reply (ICSID), ¶ 84 (summarizing the *Spence* tribunal's reasoning as follows: "A claim is therefore not 'independently justiciable' under the treaty if it is based upon 'a finding going to the lawfulness of conduct judged against treaty commitments that were not in force at the time.'").

¹³⁸ Colombia's Counter-Memorial (ICSID), ¶ 193.

¹³⁹ See generally **RL-0024**, *Spence* (Interim Award).

¹⁴⁰ **RL-0024**, *Spence* (Interim Award), ¶ 228.

¹⁴¹ **RL-0024**, *Spence* (Interim Award), ¶ 215.

¹⁴² **RL-0024**, *Spence* (Interim Award), ¶ 233.

¹⁴³ The applicable treaty included a clause to this effect, but the tribunal noted that "[i]t is uncontroversial that [the relevant treaty provision] restates the general rule of customary international law reflected in Article 28 of the Vienna Convention on the Law of Treaties." **RL-0024**, *Spence* (Interim Award), ¶ 215.

to any act or fact that took place or any situation that ceased to exist before the date of entry into force of the treaty,¹⁴⁴ and determined on that basis that it had to assess whether the claimants' claims based on post-treaty acts fell within its jurisdiction *ratione temporis*.

73. The *Spence* tribunal observed that pre-treaty conduct can “constitute circumstantial evidence that confirms or vitiates an apparent post-entry into force breach, for example, going to the intention of the respondent.”¹⁴⁵ The tribunal emphasized, however, that the post-treaty conduct must “constitute an actionable breach in its own right.”¹⁴⁶ Along similar lines, the tribunal also stated that an “alleged breach must relate to independently actionable conduct within the permissible period.”¹⁴⁷ The tribunal cautioned that merely identifying a post-treaty act and characterizing that act as the source of liability is not sufficient. Instead, “it will be necessary to assess whether the claim that is alleged can be **sufficiently detached from pre-entry into force acts and facts** so as to be independently justiciable” (emphasis added).¹⁴⁸ The tribunal then applied this test to the facts at issue. It observed that “[t]he appreciations that lie at the core of every allegation that the [c]laimants advance can be traced back to . . . pre-[treaty] conduct, by the [r]espondent.”¹⁴⁹ The tribunal further found that the alleged breach could not “properly be evaluated on the merits without requiring a finding going to the **lawfulness of pre-[treaty] conduct**” (emphasis added).¹⁵⁰ The tribunal thus dismissed the claim, on the basis that the post-

¹⁴⁴ RL-0024, *Spence* (Interim Award), ¶ 214.

¹⁴⁵ RL-0024, *Spence* (Interim Award), ¶ 217.

¹⁴⁶ RL-0024, *Spence* (Interim Award), ¶ 217.

¹⁴⁷ RL-0024, *Spence* (Interim Award), ¶ 221.

¹⁴⁸ RL-0024, *Spence* (Interim Award), ¶ 222.

¹⁴⁹ RL-0024, *Spence* (Interim Award), ¶ 245.

¹⁵⁰ RL-0024, *Spence* (Interim Award), ¶ 246.

treaty conduct was rooted in pre-treaty conduct that lay outside the temporal scope of the treaty.¹⁵¹

74. The scenario in the instant case is similar to that in *Spence*. Claimant complains of regulatory conduct (i.e., the 1998 Regulatory Measures)¹⁵² that allegedly affected her indirect shareholding interest in Granahorrar. Such regulatory conduct occurred more than a decade prior to the entry into force of the TPA. Claimant, however, points to a single post-treaty act (*viz.*, the 2014 Confirmatory Order) and purports to base all of her claims on that lone post-treaty act, in an attempt to sweep her claims within the temporal scope of the TPA.

¹⁵¹ See **RL-0024**, *Spence* (Interim Award), ¶ 247.

¹⁵² See, e.g., Claimant's Memorial (ICSID), p. 11. ("In a nutshell, Colombia's financial regulatory authorities unlawfully expropriated Claimant's investment in that jurisdiction."); *Id.*, ¶ 54. ("[T]he Constitutional Court's Opinion approves and cloaks with the mantle of legal legitimacy the Superintendency's denial of due process as to GRANAHORRAR arising from the Superintendency's resolution (C-0019) [(i.e., the 1998 Regulatory Measures)], which was devoid of factual premises in support of its findings."); *Id.*, ¶ 59. ("[T]he Constitutional Court's Opinion is an aberration and extreme departure from fundamental legality because it adopts as legally sufficient FOGAFIN's resolution [(i.e., the 1998 Regulatory Measures)] reducing the value of GRANAHORRAR's shares to COP 0.01 , notwithstanding the resolution's lack of factual premises and methodological bases."); Request for Arbitration, p. 1 ("This case is about the inordinate abuse of regulatory sovereignty."); *Id.*, ¶ 179 ("FOGAFIN and the Superintendency of Banking imposed a treatment regime on GRANAHORRAR, including the U.S. shareholders, substantially and materially less favorable than that accorded to nationals of Colombia who invested in the financial sector and to investors of third States."); *Id.*, ¶¶ 190–91 ("At no time did they contemplate or could they have contemplated that the leading government financial agencies and instrumentalities, FOGAFIN and the Superintendency of Banking, would deny them the institutional support that these agencies are charged with granting to financial institutions, let alone that in so being deprived of such services by design, the U.S. shareholders were to be treated less favorably than investors in the financial sector who were similarly situated but of Colombian nationality and nationals of third States who also invested in the financial sector. The acts and omissions of FOGAFIN and the Superintendency of Banking . . . caused GRANAHORRAR and the U.S. investors, among other harm, the artificial demise of GRANAHORRAR's solvency status[.]"); *Id.*, ¶ 212 ("The underlying expropriation [comprised of the 1998 Regulatory Measures] . . . deprived the U.S. shareholders in absolute terms of the value of her investments.").

75. Claimant's claims about the 2014 Confirmatory Order are not "independently actionable" because adjudication of these claims would require a finding on the lawfulness of pre-treaty conduct (i.e., of the 1998 Regulatory Measures and of the 2011 Constitutional Court Judgment). To recall, in her Request for Arbitration and in her Memorial, Claimant had presented claims based upon acts and conduct that took place *before* the entry into force of the TPA. Specifically, Claimant alleged the following in the referenced early pleadings:
- a. That the 1998 Regulatory Measures violated the TPA's national treatment clause;¹⁵³
 - b. That the 1998 Regulatory Measures violated the TPA's most-favored nation clause;¹⁵⁴
 - c. That the 1998 Regulatory Measures violated the TPA's fair and equitable treatment clause;¹⁵⁵

¹⁵³ See Request for Arbitration, ¶ 179 ("FOGAFIN and the Superintendency of Banking imposed a treatment regime on GRANAHORRAR, including the U.S. shareholders, substantially and materially less favorable than that accorded to nationals of Colombia who invested in the financial sector and to investors of third States.").

¹⁵⁴ Request for Arbitration, ¶¶ 190-191 ("At no time did they contemplate or could they have contemplated that the leading government financial agencies and instrumentalities, FOGAFIN and the Superintendency of Banking, would deny them the institutional support that these agencies are charged with granting to financial institutions, let alone that in so being deprived of such services by design, the U.S. shareholders were to be treated less favorably than investors in the financial sector who were similarly situated but of Colombian nationality and nationals of third States who also invested in the financial sector. The acts and omissions of FOGAFIN and the Superintendency of Banking . . . caused GRANAHORRAR and the U.S. investors, among other harm, the artificial demise of GRANAHORRAR's solvency status[.]").

¹⁵⁵ Request for Arbitration, ¶¶ 190-191 ("At no time did they contemplate or could they have contemplated that the leading government financial agencies and instrumentalities, FOGAFIN and the Superintendency of Banking, would deny them the institutional support that these agencies are charged with granting to financial institutions, let alone that in so being deprived of such services by design, the U.S. shareholders were to be treated less favorably than investors in the financial sector who were similarly situated but of Colombian nationality and nationals of third States who also invested in the financial sector.").

- d. That the 1998 Regulatory Measures violated the TPA’s expropriation clause;¹⁵⁶
 - e. That the 2011 Constitutional Court Judgment violated the TPA’s fair and equitable treatment clause;¹⁵⁷ and
 - f. That the 2011 Constitutional Court Judgment violated the TPA’s expropriation clause.¹⁵⁸
76. Claimant openly recognized that the determinations that the Tribunal would need to make in order to adjudicate her claims centered on pre-treaty conduct. For example, she stated:

[T]he Tribunal is being invited to determine whether the [2011] Constitutional Court’s Opinion is so extreme in its manifest deficits so as to impress upon a qualified reader that pretextual exercises of judicial sovereignty were employed far beyond the ambit or expectation of any legal rubric so as to warrant the reasonable conclusion that actions far afield from any reasonable expectations were

¹⁵⁶ See Request for Arbitration, ¶ 212 (“The underlying expropriation [comprised of the 1998 Regulatory Measures] . . . deprived the U.S. shareholders in absolute terms of the value of her investments.”); First Argiz Expert Report, ¶ 1 (Claimant’s damages expert was retained (in his words) “to provide expert opinions on damages incurred by the Claimant as a result of the Colombian government’s (“Respondent”) actions through its agencies (e.g. Central Bank, FOGAFIN and Superintendency of Banking) to expropriate Corporacion Colombiana de Ahorro y Vivienda (“Granahorrar”), resulting in loss of value of Claimant’s interest in Granahorrar [(i.e., the 1998 Regulatory Measures)].”).

¹⁵⁷ See, e.g., Claimant’s Memorial (ICSID), ¶ 43 (“The [2011] Constitutional Court’s Opinion presents fundamental due process challenges at multiple levels.”), ¶ 45 (“The [2011] Constitutional Court’s Opinion represents an emblematic denial of justice”), ¶ 50 (“[T]he [2011] Constitutional Court’s Opinion represents a flagrant denial of due process, in part, because . . . it approves discriminatory treatment directed at the GRANAHORRAR shareholders [through the 1998 Regulatory Measures]).”).

¹⁵⁸ See Request for Arbitration, ¶ 200 (“Colombia engaged in judicial expropriation because the outcome of the [2011] Constitutional Court’s opinion (Exhibit 23) was to deprive in its entirety the U.S. shareholders of their property in the form of a readily enforceable decree that the Council of State issued. In this regard, the Constitutional Court’s opinion amply meets the type of judicial action that treaty based investor-state arbitral tribunals have identified as an actionable taking of property in violation of public international law.”).

undertaken to the detriment of the investor (Claimant) here at issue.¹⁵⁹ (Emphasis added)

77. Claimant has since seemed to abandon the above-listed claims predicated on the 1998 Regulatory Measures and the 2011 Constitutional Court Judgment. In her Reply, Claimant pivoted and now insists that she is submitting claims that are based exclusively on the (post-TPA) 2014 Confirmatory Order.¹⁶⁰
78. However, it remains unclear precisely what those claims are at this point. Whereas in her Memorial Claimant had asserted *sixteen* different reasons why the 2011 Constitutional Court allegedly violated the TPA,¹⁶¹ Claimant has provided *no* such argumentation as to why or how the 2014 Confirmatory Order assertedly violated the TPA. As far as Colombia can discern, Claimant's complaint is that the 2014 Confirmatory Order did not succeed in overturning the 1998 Regulatory Measures or the 2011 Constitutional Court Judgment;¹⁶² in Claimant's words, the 2014 Confirmatory Order marked the end of all "judicial labor"¹⁶³ in Claimant's domestic litigation concerning the 1998 Regulatory Measures.
79. In sum, the only articulation or description that Claimant has offered so far in this arbitration of the nature of her merits claims relate to the alleged unlawfulness of the 2011 Constitutional Court Judgment and the 1998 Regulatory Measures (both of which are pre-TPA measures). Confronted with

¹⁵⁹ Claimant's Memorial (ICSID), ¶ 97. *See also* Claimant's Memorial (ICSID), ¶ 98 (citing the text of the 2011 Constitutional Court Judgment as the "best evidence" of the asserted TPA breaches). *See also* Request for Arbitration (ICSID), ¶¶ 141-60.

¹⁶⁰ *See, e.g.*, Claimant's Reply (ICSID), p. 13, ¶¶ 3, 34, 38, 72, 80, 86, 98.

¹⁶¹ *See* Claimant's Memorial (ICSID), ¶ 47 ("Analysis of the Constitutional Court's Opinion establishes, without limitation, that it violated the U.S. shareholder's procedural and substantive due process rights by adopting, condoning, and ratifying, far beyond the ambit of its jurisdictional purview, and contrary to the most fundamental principles of due process, on at least the following sixteen (16) propositions.").

¹⁶² Claimant's Reply (ICSID), ¶ 34.

¹⁶³ *See* Claimant's Reply (ICSID), ¶¶ 34, 88.

the reality that such claims fall outside of the jurisdiction *ratione temporis* of the Tribunal, Claimant now purports to base all of her claims on the 2014 Confirmatory Order. However, Claimant's complaints concerning the 2014 Confirmatory Order seem to consist solely of the criticism that such measure failed to declare unlawful the 1998 Regulatory Measures and 2011 Constitutional Court Judgment. The result is that the lawfulness of the 2014 Confirmatory Order, of which she complains, cannot be established without evaluating the lawfulness of the pre-treaty conduct (namely, the 1998 Regulatory Measures and 2011 Constitutional Court Judgment). Consistent with the reasoning of the *Spence* tribunal, Claimant's claim based upon the 2014 Confirmatory Order is therefore not independently actionable.

80. The fact that Claimant's earlier complaints about the pre-treaty conduct are predicated on the "same theory of liability" as her complaints about the 2014 Confirmatory Order further evidences that her claims are not independently actionable. In this respect, the reasoning of the *Corona v. Dominican Republic* tribunal is instructive. As discussed above,¹⁶⁴ as well as in Colombia's Counter-Memorial on Jurisdiction,¹⁶⁵ the applicable treaty in the *Corona* case contained a limitations period that precluded claims "if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach."¹⁶⁶ To recall, prior to the critical date for the purpose of the limitations period, the Dominican Republic had denied the claimant's application for a mining license. Subsequently, *after* the critical date, the claimant filed a motion for reconsideration, to which the Dominican Republic did not reply.¹⁶⁷ In the arbitration, the claimant insisted that all of its

¹⁶⁴ See Section I.A.iii.a.

¹⁶⁵ See Colombia's Counter-Memorial (ICSID), ¶ 179-80.

¹⁶⁶ **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 184.

¹⁶⁷ See Colombia's Counter-Memorial (ICSID), ¶ 175.

claims were based on the post-treaty act—i.e., the State’s failure to respond to the motion for reconsideration.¹⁶⁸ The Dominican Republic raised a jurisdictional objection on the basis that the tribunal lacked “jurisdiction to hear the [c]laimant’s claims because the alleged acts and omissions on which the [c]laimant’s claims are allegedly based took place outside of the three-year period required under DR-CAFTA Article 10.18.1.”¹⁶⁹

81. The *Corona* tribunal thus had to determine whether the Dominican Republic’s conduct with respect to the motion for reconsideration could “be considered as . . . a separate breach of the treaty.”¹⁷⁰ In that regard, the tribunal held: “[A]ll of the alleged breaches relate to **the same theory of liability**”¹⁷¹ (emphasis added). Specifically, all of the claimant’s claims were “‘predicated on the notion that ‘the [State] refused to permit [the claimant] to proceed with its mining project for reasons that are not legitimate.’”¹⁷² The tribunal thus concluded that the claimant had actual knowledge of the alleged breach before the critical date, and “as a consequence, its claims [were] time-barred by DR-CAFTA Article 10.18.1.”¹⁷³
82. The same reasoning was applied by the tribunal in *Sociedad Anónima Eduardo Vieira v. Chile*.¹⁷⁴ There, prior to the entry into force of the relevant treaty, the State had partially denied the claimant’s application for a fishing license. Thereafter, the claimant repeatedly but unsuccessfully sought review of such denial, before different State bodies. At least one of those denials post-dated the

¹⁶⁸ **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 201.

¹⁶⁹ **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 54.

¹⁷⁰ **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 210.

¹⁷¹ **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 210.

¹⁷² **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 210.

¹⁷³ **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 238.

¹⁷⁴ **RL-0075**, *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7 (von Wobeser, Czar de Zalduendo, Reisman), Award, 21 August 2007 (“*Vieira (Award)*”).

treaty's entry into force. The claimant based its treaty claims on such post-entry into force acts. However, the tribunal dismissed the case for lack of jurisdiction *ratione temporis*, reasoning that in each successive appeal, the claimant was ultimately complaining about the same thing: the allegedly improper denial of its fishing license application.¹⁷⁵ In other words, the tribunal concluded that the same theory of liability applied both to the pre- and post-treaty conduct, rendering the latter not independently actionable.

83. In the present case, Claimant's complaints about the pre-treaty conduct and her claims based on the (post-treaty) 2014 Confirmatory Order are likewise predicated on the "same theory of liability."¹⁷⁶ This theory of liability is based on the wrongfulness of the 1998 Regulatory Measures and 2011 Constitutional Court Judgment; in Claimant's own words:

- a. "This case is about the inordinate abuse of **regulatory** sovereignty"¹⁷⁷ (emphasis added).
- b. "In a nutshell, Colombia's **financial regulatory** authorities unlawfully expropriated Claimant's investment [(i.e., her shares in Granahorrar)] in that jurisdiction"¹⁷⁸ (emphasis added).
- c. "The value of [Claimant's] investment was 'reduced' . . . based on upon discriminatory, irregular, extreme, excessive, and unprecedented **treatment on the part of the Central Bank of Colombia ("Banco de la República" or "the Central Bank"), Fondo de Garantías de Industrias**

¹⁷⁵ **RL-0075**, *Vieira* (Award), ¶ 303.

¹⁷⁶ **RL-0012**, *Corona* (Award on Preliminary Objections), ¶ 210.

¹⁷⁷ Request for Arbitration, p. 1.

¹⁷⁸ Claimant's Memorial (ICSID), p. 11.

Financieras (“FOGAFIN”) and Superintendency of Banking”¹⁷⁹
(emphasis added).

- d. “[T]he Constitutional Court’s Opinion [i.e., the 2011 Constitutional Court Judgment] **approves and cloaks with the mantle of legal legitimacy the Superintendency’s denial of due process as to GRANAHORRAR** arising from the Superintendency’s resolution (C-0019) [(i.e., one of the 1998 Regulatory Measures)], which was devoid of factual premises in support of its findings”¹⁸⁰ (emphasis added). (In her Memorial, Claimant referred to the 2011 Constitutional Court Judgment as “the Constitutional Court’s Opinion.”¹⁸¹).
- e. “[T]he Constitutional Court’s Opinion is an aberration and extreme departure from fundamental legality because **it adopts as legally sufficient FOGAFIN’s resolution** [(i.e., one of the 1998 Regulatory Measures)] reducing the value of GRANAHORRAR’s shares to COP 0.01, notwithstanding the resolution’s lack of factual premises and methodological bases”¹⁸² (emphasis added).
- f. “[T]he Constitutional Court’s June 25, 2014 issuance of Order 188/14 . . . **denied the motions for annulment of the Constitutional Court’s May 26, 2011 opinion.** This coincided with the end of all judicial labor in Colombia concerning the Claimant’s investment”¹⁸³ (emphasis added).

84. The allegations identified above show Claimant’s theory of liability is that the Colombian regulatory authorities acted inappropriately with respect to

¹⁷⁹ Claimant’s Memorial (ICSID), ¶ 5.

¹⁸⁰ Claimant’s Memorial (ICSID), ¶ 54.

¹⁸¹ See Claimant’s Memorial (ICSID), ¶ 3 (defining the term as follows: “the Constitutional Court’s Opinion of May 26, 2011 (“Constitutional Court’s Opinion) (C-0023)”).

¹⁸² Claimant’s Memorial (ICSID), ¶ 59.

¹⁸³ Claimant’s Reply (ICSID), ¶ 34.

Claimant's shares in Granahorrar. Thus, exactly the same premise underlies Claimant's complaints about (i) the pre-treaty conduct (i.e., the 1998 Regulatory Measures, and the 2011 Constitutional Court Judgment (which allowed the 1998 Regulatory Measures to stand)), and (ii) her claims about the sole post-treaty act that she invokes (i.e., the 2014 Confirmatory Order, which declined to annul the 2011 Constitutional Court Judgment).

85. Moreover, the fact that Claimant's claims are based on her theory that the pre-treaty measures were wrongful is also illustrated by Claimant's damages claims, insofar as she is seeking compensation for

damages incurred by the Claimant as a result of the Colombian government's . . . **actions through its agencies (e.g. Central Bank, FOGAFIN and Superintendency of Banking)** to expropriate Corporación Colombiana de Ahorro y Vivienda ("Granahorrar"), resulting in loss of value of Claimant's interest in Granahorrar.¹⁸⁴

86. In other words, Claimant seeks compensation for the *pre-treaty* regulatory conduct.
87. For all of the foregoing reasons, Claimant's claims based upon the 2014 Confirmatory Order are not "independently actionable," and thus fall outside of the jurisdiction *ratione temporis* of this Tribunal.

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

88. In its Counter-Memorial, Colombia demonstrated that the TPA not only does not apply retroactively to *State conduct* that occurred prior to the date of its entry into force, but also that it does not apply to *disputes* that arose prior to such date. In her Reply, Claimant argues that pre-treaty disputes *do* fall within this

¹⁸⁴ First Argiz Expert Report, ¶ 1.

Tribunal's jurisdiction, and that in any event the present dispute did not arise until 2014, with the issuance of the 2014 Confirmatory Order.

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

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

90. For the reasons explained in Colombia's Counter-Memorial, pursuant to the customary international law principle of non-retroactivity, an investment treaty does not apply to disputes that arose before the treaty's entry into force (unless the treaty expressly provides otherwise).¹⁸⁵

91. In her Reply, Claimant acknowledges the principle of non-retroactivity of treaties,¹⁸⁶ but asserts that it only applies to *acts* (not disputes) that occurred prior to the entry into force of the relevant treaty.¹⁸⁷ In support of her argument, Claimant notes that some treaties include a provision that explicitly excludes from the temporal scope of the treaty disputes that arose prior to the entry into force of the treaty. According to Claimant, such provisions "would be superfluous if pre-existing disputes were already excluded as a general

¹⁸⁵ See Colombia's Counter-Memorial (ICSID), § III.B.2.a.

¹⁸⁶ Claimant's Reply (ICSID), ¶ 112.

¹⁸⁷ Claimant's Reply (ICSID), ¶ 113.

principle.”¹⁸⁸ Claimant concludes from this that the TPA applies to disputes that arose before its entry into force, simply because the treaty contains no explicit exclusionary clause.¹⁸⁹

92. Claimant is mistaken, however. As a threshold matter, the fact that some treaties include provisions that expressly exclude pre-treaty disputes does not mean *a fortiori*, as Claimant suggests,¹⁹⁰ that the general principle of non-retroactivity of treaties does not apply to disputes (as opposed to State acts). It is often the case that a treaty will expressly incorporate into the treaty language that reflects a given rule of international law. For example, some treaties codify the customary international law principle¹⁹¹ that treaties do not bind States in relation to acts or omissions that took place prior to entry into force,¹⁹² whereas other treaties do not.¹⁹³ However, such difference in treaty practice does not undermine or alter the existence of the customary international law principle of non-retroactivity, which will apply regardless of whether it is expressly stated in the treaty or not.

¹⁸⁸ Claimant’s Reply (ICSID), ¶ 120.

¹⁸⁹ Claimant’s Reply (ICSID), ¶ 115.

¹⁹⁰ See Claimant’s Reply (ICSID), ¶ 120.

¹⁹¹ Claimant’s Reply (ICSID), ¶ 99 (“Respondent’s argument is premised upon the unremarkable proposition that the TPA does not apply to acts that occurred prior to its entry into force. Claimant has no quarrel with this proposition, which, as Respondent notes, is grounded in Art. 28 of the VCLT.”).

¹⁹² See, e.g., **RL-0001**, TPA, Art. 10.1.3 (“For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement”); Dominican Republic – Central America – United States Free Trade Agreement, Chapter 10, Art. 10.1.3 (“For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.”).

¹⁹³ See, e.g., **RL-0096**, Agreement between the Government of the Italian Republic and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments, 19 July 1997.

93. In its Counter-Memorial on Jurisdiction, Colombia had identified a number of tribunals that have applied the principle of non-retroactivity to bar disputes that arose prior to the relevant treaty's entry into force, notwithstanding the absence of specific treaty language to that effect.¹⁹⁴ For example, the *MCI* tribunal stated unequivocally that silence in the treaty concerning its applicability to pre-treaty disputes did not mean that the principle of non-retroactivity did not apply:

The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force. Any dispute arising prior to that date will not be capable of being submitted to the dispute resolution system established by the BIT. **The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the nonretroactivity of treaties.**¹⁹⁵ (Emphasis added)

94. In her Reply, Claimant attempts to distinguish the case law cited by Colombia. However, such attempt fails, for at least three reasons.

95. First, Claimant misrepresents Colombia's arguments concerning the referenced case law. For instance, Claimant asserts that *Lucchetti v. Peru* is the "principal case" on which Colombia relied in support of the principle that treaties do not apply retroactively to pre-treaty disputes,¹⁹⁶ and argues that the tribunal in that case was interpreting a provision of the applicable treaty that specifically excluded pre-treaty disputes. However, Colombia did not cite the *Lucchetti* case

¹⁹⁴ See Colombia's Counter-Memorial (ICSID), ¶¶ 198–202.

¹⁹⁵ **RL-0008**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6 (Vinuesa, Greenberg, Irarrázabal), Award, 31 July 2007 ("**MCI (Award)**"), ¶ 61. See also **RL-0019**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9 (Paulsson, Salpius, Voss), Award, 16 September 2003 ("**Generation Ukraine (Award)**"), ¶ 17.1 ("The Tribunal's jurisdiction extends to any dispute arising out of or relating to an 'alleged breach of any right conferred or created by [the] Treaty' . . . to the extent that the dispute arose on or after 16 November 1996 [i.e., the date of the treaty's entry into force].").

¹⁹⁶ Claimant's Reply (ICSID), ¶ 118.

as support for its position on the scope of application of the general principle of non-retroactivity. Rather, Colombia referred to the *Lucchetti* award in connection with the definition of the term “dispute” under international law.¹⁹⁷ Claimant’s criticism of Colombia’s reliance on *Lucchetti* therefore is not only misplaced but also misleading. Unfortunately, Claimant recurrently mischaracterizes Colombia’s arguments in that fashion, whether deliberately or otherwise.¹⁹⁸

96. Second, Claimant’s criticism in respect of the cases that Colombia cited concerning the principle of non-retroactivity is also unavailing. For example, Colombia relied on *ATA v. Jordan*, wherein the tribunal observed that the treaty did not apply “retroactive[ly] with respect to disputes existing prior to the entry into force of the [treaty].”¹⁹⁹ Unable to present a substantive rebuttal, Claimant contents itself with the self-serving and unsubstantiated assertion that “that the *ATA* award is simply not a persuasive precedent on this point.”²⁰⁰
97. Colombia also relied on the *MCI* and *Generation Ukraine* awards. Claimant asserts that these two awards are inapposite because they referred to a “narrow[er]” definition of a dispute.²⁰¹ However, nowhere in these awards do

¹⁹⁷ Colombia’s Counter-Memorial (ICSID), ¶ 201 (“As explained by the *Lucchetti* tribunal, the term ‘dispute’ ‘has an accepted meaning’ under international law. The Permanent Court of International Justice defined a dispute as ‘a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’ The ICJ similarly defined a dispute as the ‘situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance’ of a legal obligation. The *Lucchetti* tribunal adopted these definitions.”) (internal citations omitted).

¹⁹⁸ Claimant similarly mischaracterized Colombia’s argument with respect to the *Vieira v. Chile* case. See Claimant’s Reply (ICSID), ¶ 120.

¹⁹⁹ **RL-0018**, *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2 (Fortier, El-Kosheri, Reisman), Award, 18 May 2010 (“**ATA (Award)**”), ¶ 98.

²⁰⁰ Claimant’s Reply (ICSID), ¶ 126.

²⁰¹ Claimant’s Reply (ICSID), ¶¶ 124–25.

these tribunals offer an alternative to the classic definition of a dispute (as highlighted in the *Lucchetti* case²⁰²).

98. Third, Claimant relies upon the *Chevron* and *Mondev* awards for the proposition that a treaty does in fact apply to disputes that arose prior to its entry into force. However, the treaty in *Chevron* contained a unique clause that, as pointed out by the tribunal, “makes an exception to the principle of non-retroactivity in accordance to Article 28 VCLT”²⁰³ (emphasis added). In *Chevron*, the “BIT applies as long as there are ‘investments existing at the time of entry into force.’”²⁰⁴ The tribunal held that because of that unique clause, it saw “no need to conduct a separate examination of jurisdiction over disputes.”²⁰⁵ Claimant’s reliance on the *Chevron* award is thus misplaced, since the TPA contains no treaty clause that is similar or analogous to the one in *Chevron* discussed above.
99. Claimant likewise mischaracterizes *Mondev*.²⁰⁶ The award in that case did not address the issue of pre-entry into force *disputes*, but rather only that of *continuing acts*, some of which predated the entry into force of the treaty.²⁰⁷ In the latter regard, while the tribunal in *Mondev* stated that “events or conduct

²⁰² See Colombia’s Counter-Memorial (ICSID), ¶ 201 (“As explained by the *Lucchetti* tribunal, the term ‘dispute’ ‘has an accepted meaning’ under international law. The Permanent Court of International Justice defined a dispute as ‘a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’ The ICJ similarly defined a dispute as the ‘situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance’ of a legal obligation. The *Lucchetti* tribunal adopted these definitions.”) (internal citations omitted).

²⁰³ CL-0157, *Chevron* (Interim Award), ¶ 265.

²⁰⁴ CL-0157, *Chevron* (Interim Award), ¶ 265.

²⁰⁵ CL-0157, *Chevron* (Interim Award), ¶ 264.

²⁰⁶ Claimant’s Reply (ICSID), ¶ 122 (“A similar example is provided by *Mondev v. United States*, where the parties were in agreement that ‘the dispute as such arose before NAFTA’s entry into force’, but the tribunal found jurisdiction *ratione temporis* over the claims concerning State conduct after that date. The tribunal expressly noted the intertemporal principle as the basis for its focus on the timing of conduct as the governing standard.”).

²⁰⁷ CL-0045, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Stephen, Crawford, Schwebel), Award, 11 October 2002 (“*Mondev (Award)*”), ¶¶ 57–58, 70.

prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation[.]”²⁰⁸ it specifically emphasized that “it must still be possible to point to conduct of the State after that date which is itself a breach.”²⁰⁹ In other words, the source of liability must still be an act that post-dates the entry into force of the treaty. The claimant in *Mondev* alleged that decisions by local courts and the Supreme Court of the United States amounted to NAFTA violations, but the tribunal clarified that “[u]nless those [post-entry into force] decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-[treaty] conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist [the claimant].”²¹⁰ In other words, the *Mondev* case (i) did not address the issue of the timing of the relevant *dispute*, and (ii) supports Colombia’s position with respect to the timing of the relevant State *conduct*.

100. In sum, Claimant fails in her effort to dispute the proposition that, pursuant to the customary international law principle of non-retroactivity, the TPA does not apply to *disputes* that arose before the TPA’s entry into force.

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

101. Having established as a conceptual and doctrinal matter that the TPA does not apply to disputes that arose prior to its entry into force, the next step of the analysis is to determine when the dispute in the present case arose.²¹¹ In her

²⁰⁸ CL-0045, *Mondev* (Award), ¶ 70.

²⁰⁹ CL-0045, *Mondev* (Award), ¶ 70.

²¹⁰ CL-0045, *Mondev* (Award), ¶ 70.

²¹¹ See Colombia’s Counter-Memorial (ICSID), ¶ 201.

Reply, Claimant (i) advocates a “narrow” definition of a dispute;²¹² and (ii) insists that new State conduct triggers a new dispute each time.²¹³

102. Contrary to Claimant’s claims, and as demonstrated in the following subsections, under the well-established definition of “dispute,” it is not the case that each new State act in a series will trigger a new dispute.

i. The definition of “dispute” under international law

103. In its Counter-Memorial, Colombia had recalled the accepted definition of “dispute” articulated by the Permanent Court of International Justice (“PCIJ”) in the *Mavrommatis* Advisory Opinion: “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”²¹⁴ Colombia applied this definition in order to identify the dispute in the instant case.²¹⁵

104. In her Reply, Claimant appears to reject this well-established and uncontroversial definition of “dispute.” Although Claimant rightly characterizes the PCIJ’s definition as the “classic definition”²¹⁶ of a dispute, she later suggests that there are in fact different definitions, and that tribunals must interpret the same term differently in different treaties (including in the TPA).²¹⁷

²¹² Claimant’s Reply (ICSID), ¶ 124. *See also id.*, ¶¶ 130–34.

²¹³ *See* Claimant’s Reply (ICSID), ¶ 134.

²¹⁴ **RL-0022**, *The Mavrommatis Palestine Concessions (Greece v. Britain)*, PCIJ, Judgment, 30 August 1924 (“*Mavrommatis (Advisory Opinion)*”), p. 5.

²¹⁵ *See* Colombia’s Counter-Memorial (ICSID), ¶ 208 (“To the extent that Claimant’s argument is that the dispute did not arise until the 2014 Confirmatory Order, that assertion is patently incorrect. As discussed above, the dispute concerns the 1998 regulatory measures, and a conflict of legal views or interests with respect to such measures developed almost immediately after those measures were adopted, and in any event no later than the date on which claims relating thereto were filed in Colombian courts by Colombian companies owned and controlled by Claimant.”).

²¹⁶ Claimant’s Reply (ICSID), ¶ 131.

²¹⁷ *See* Claimant’s Reply (ICSID), ¶ 132 (wherein Claimant appears to argue that the Tribunal should not apply the established definition, but instead “analyz[e] the term in its context within the relevant treaty and in light of the treaty’s object and purposes”).

The reason for Claimant’s attempt to deviate from the general, well-established definition of dispute, is obvious: under that definition, Claimant’s case must be dismissed on jurisdictional grounds, because the dispute in the case *sub judice* arose well before the entry into force of the TPA (as will be discussed in **Section II.A.2.c** below).

105. However, contrary to Claimant’s contention, there are no different, shifting definitions of the concept of “dispute.” To the contrary, the ICJ²¹⁸ and other international tribunals²¹⁹ have consistently—even uniformly—applied the above-cited definition articulated by the PCIJ.
106. Claimant criticizes several tribunals (including that in *Lucchetti*) that have recognized and relied upon the PCIJ definition. She argues, for instance, that such tribunals “rested upon an assumption that facts and circumstances sharing the same ‘real cause’ formed part of the same, indivisible ‘dispute’” and failed to not analyze the term “dispute” within each treaty.²²⁰ However, Claimant was unable to come up with any reason—either on the basis of the TPA text or of the case law—for which the recognized, time-honored definition of “dispute” should not apply in this case.

²¹⁸ See, e.g., **RL-0098**, *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, ICJ, Judgment, 5 October 2016, ¶ 37 (“According to the established case law of the Court, a dispute is ‘a disagreement on a point of law or fact, a conflict of legal views or of interests’ between parties”); **RL-0023**, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ, Advisory Opinion, 30 March 1950 (“**Interpretation of Peace Treaties (Advisory Opinion)**”), ¶ 74 (defining a dispute as the “situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance” of a legal obligation).

²¹⁹ See, e.g., **RL-0075**, *Vieira* (Award); **CL-0037**, *Impregilo-Pakistan* (Decision on Jurisdiction), ¶¶ 302–03; **RL-0018**, *ATA* (Award), ¶ 99; **CL-0074**, *Siemens* (Decision on Jurisdiction), ¶ 159; **RL-0008**, *MCI* (Award), ¶ 63; **RL-0021**, *Gambrinus Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, Award, 15 June 2015 (Bernardini, Lalonde, Dupuy) (“**Gambrinus (Award)**”), ¶ 198.

²²⁰ Claimant’s Reply (ICSID), ¶ 132.

107. In its Counter-Memorial, Colombia explained that, consistent with the case law, a dispute is deemed to arise when a disagreement or conflict of views emerges between the parties. However, a prospective claimant need not have articulated a specific legal basis for a claim in order for the dispute to have arisen.²²¹ Nor does the prospective respondent need to have explicitly opposed the position or complaint of the other party.²²² Rather, the test for determining whether a dispute has arisen is an objective one, and accordingly does not depend on the subjective belief of one of the parties.²²³

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

108. In her Reply, Claimant appears to suggest that any new State act in a series automatically triggers a new dispute. Specifically, she asserts that “a dispute based upon an act or omission after the treaty has entered into force is distinct from even related disputes that predate the treaty.”²²⁴ This assertion, which is not supported by the case law, is proffered in an effort to define the dispute so narrowly as to bring it within the scope of the TPA.

109. The reality is that new State conduct does not necessarily trigger a new dispute. Acts or facts that take place after a dispute has arisen may confirm or prolong the same dispute, without thereby triggering an entirely new dispute. This reality was confirmed by the PCIJ, which observed that “subsequent factors”

²²¹ See **RL-0013**, *EuroGas* (Award), ¶ 437 (“As regards the occurrence of a dispute, the Tribunal agrees with the Respondent’s submission that the relevant consideration is the articulation of opposing views and interests, as opposed to the articulation of a specific legal basis for the claim.”).

²²² **RL-0025**, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ, Advisory Opinion, 26 April 1988, ¶ 38.

²²³ **RL-0015**, *Lao Holdings N.V. v. Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6 (Binnie, Hanotiau, Stern), Decision on Jurisdiction, 21 February 2014, ¶ 124.

²²⁴ Claimant’s Reply (ICSID), ¶ 134.

may constitute “confirmation or development of earlier situations or facts constituting the real cause of the dispute.”²²⁵ In other words, a decision-maker must assess on a case-by-case basis whether State conduct that occurs after a dispute has arisen forms part of the same dispute, or instead has triggered a new one. A number of tribunals have undertaken this analysis. For example, the *Lucchetti* tribunal explained that “the critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter.”²²⁶ The tribunal thus set out “to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute.”²²⁷

110. The reasoning of the *ATA v. Jordan* tribunal is also instructive. The *ATA* claimant and a Jordanian entity controlled by the Government of Jordan had in 2000 submitted a contractual dispute to arbitration, which produced an arbitral award in 2003.²²⁸ The Jordanian entity applied to the local courts to have the Final Award annulled. The Jordanian Court of Appeal annulled the award – *before* the BIT entered into force.²²⁹ After the BIT entered into force, the Jordanian Court of Cassation upheld the Court of Appeal’s judgment.²³⁰ The claimant therefore attempted to base all of its claims on the Court of Cassation decision (i.e., the only post-treaty act), arguing that “the decision of the Court of Cassation ‘crystallized’ the contractual dispute into a new claim.”²³¹ The *ATA* claimant thus sought to demonstrate that such single post-treaty act (*viz.*, the

²²⁵ **RL-0026**, *Phosphates in Morocco*, PCIJ (Guerrero, *et al.*), Judgment, 14 June 1938, p. 18.

²²⁶ **RL-0020**, *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4 (Buergenthal, Cremades, Paulsson), Award, 7 February 2005 (“*Lucchetti (Award)*”), ¶ 50.

²²⁷ **RL-0020**, *Lucchetti (Award)*, ¶ 50.

²²⁸ See **RL-0018**, *ATA (Award)*, ¶¶ 33–34.

²²⁹ See **RL-0018**, *ATA (Award)*, ¶ 34.

²³⁰ See **RL-0018**, *ATA (Award)*, ¶¶ 34, 37.

²³¹ **RL-0018**, *ATA (Award)*, ¶ 101.

decision by the Jordanian Court of Cassation) had triggered a new dispute, which fell within the jurisdiction *ratione temporis* of the tribunal. However, the ATA tribunal easily discerned the claimant's strategem:

[C]laimant attempts to present a denial of justice as an independent violation of the BIT and to invite the Tribunal to treat it as if it were unconnected to the dispute in order to shift the moment of its occurrence forward and to locate it in time after the entry into force of a BIT.²³²

111. The tribunal explained that it could "only exercise jurisdiction *ratione temporis* over the Claimant's claims if it finds that the dispute arose after the entry into force of the Treaty on 23 January 2006."²³³ Citing *Lucchetti*, the tribunal noted that "[w]here an analysis purports to identify two distinct disputes and the 'second' dispute is comprised of the same subject-matter and has the same origin or source (in this case the collapse of Dike No. 19) as the first dispute, *Lucchetti* concluded that the disputes are legally equivalent."²³⁴ Applying that reasoning, the ATA tribunal concluded that the parties had first expressed disagreement over the validity of the Final Award before the relevant BIT entered into force, and that the subsequent proceedings were merely a continuation of the same dispute:

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

²³² **RL-0018**, ATA (Award), ¶ 108.

²³³ **RL-0018**, ATA (Award), ¶ 98.

²³⁴ **RL-0018**, ATA (Award), ¶ 102.

over this initial difference of legal opinion regarding the issue of annulment.”²³⁵

112. The ATA tribunal further reasoned that attempts to rely on the final judicial decision in a series “must fail if, as in this case, the occurrence is part of a dispute which originated before the entry into force of the BIT. For this reason, the Tribunal has concluded that the claim of denial of justice is also inadmissible for lack of jurisdiction *ratione temporis*.”²³⁶ In response, Claimant invokes three authorities: a dissenting opinion in *Eurogas*; the *MCI* award; and the *Jan de Nul* decision on jurisdiction.²³⁷ However, all three of those decisions by those tribunals undermine her argument (that new acts trigger new disputes), as the tribunal in those cases (i) relied on the “classic” definition of a dispute,²³⁸ and (ii) actually assessed the specific facts of the case to determine whether a new dispute had arisen.²³⁹

²³⁵ **RL-0018**, *ATA* (Award), ¶ 104.

²³⁶ **RL-0018**, *ATA* (Award), ¶ 108.

²³⁷ See Claimant’s Reply (ICSID), ¶¶ 133–35.

²³⁸ See, e.g., **RL-0008**, *MCI* (Award), ¶ 63 (“The Tribunal recognizes that under the general international law applicable, a dispute means a disagreement on a point of fact or of law, a conflict of legal opinions or of interests as between the parties.”); **RL-0013**, *EuroGas* (Award), ¶ 437 (“As regards the occurrence of a dispute, the Tribunal agrees with the Respondent’s submission that the relevant consideration is the articulation of opposing views and interests, as opposed to the articulation of a specific legal basis for the claim. The landmark case on this point remains the PCIJ *Mavrommatis* case, where the Court stated that a dispute is ‘[a] disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’ A conflict of legal views does not require the expression of all possible legal arguments and grounds in support of one’s position.”).

²³⁹ **RL-0013**, *EuroGas* (Award), ¶ 458 (“Since no new State conduct has given rise to a new dispute after 14 March 2009 (or even (re)crystallised an old dispute), the Tribunal must conclude that it lacks jurisdiction over Belmont’s claims.”); **RL-0008**, *MCI* (Award), ¶¶ 51–58 (discussing the parties’ argument with respect to the time at which the dispute arose); **CL-0038**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13 (Kaufmann-Kohler, Mayer, Stern), Decision on Jurisdiction, 16 June 2006 (“*Jan de Nul* (Award)”), ¶ 127 (“Admittedly, the previous dispute is one of the sources of the present dispute, if not the main one. It is clear, however, that the reasons, which may have motivated the alleged wrongdoings of the SCA at the time of the conclusion and/or performance of the

113. Further, the practical implications of Claimant’s theory cannot be ignored. If a new act or fact were deemed to create a new dispute each time, then a claimant would always be able to circumvent the non-retroactivity principle by pointing to some post-treaty State act – or by precipitating such an act – and then argue that such act gave rise to a new dispute. For instance, the claimant could filing a new lawsuit (however frivolous) or submit some sort of reconsideration request, designed to elicit a reaction or response by the State. A claimant would thus be able to artificially manufacture a “new” dispute, and thereby always evade the intertemporal limitations of a treaty. Such a result cannot be correct. Yet that is precisely the type of situation that the *ATA*, *Corona*, *Lucchetti*, and *Spence* tribunals warned against: a claimant should not be allowed to artificially shift the date on which a dispute arose in order to bring its claims within a tribunal’s jurisdiction.

114. In sum, contrary to Claimant’s claim, a new act or fact will not automatically create a new dispute. Claimant’s self-serving approach finds no support in the well-established and widely-accepted definition of “dispute” recognized in the case law.

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

115. In its Counter-Memorial, Colombia demonstrated that the present dispute arose before the TPA entered into force.²⁴⁰ In her Reply, Claimant attempts to overcome that evidence by pointing to a single post-treaty State act (i.e., the 2014 Confirmatory Order), and arguing on that basis that the present dispute arose after the TPA’s entry into force. In that sense, Claimant here – like the one in *ATA* – hopes that the Tribunal will treat the 2014 Confirmatory Order “as if

Contract, do not coincide with those underlying the acts of the organs of the Egyptian State in the post-contract phase of the dispute. Since the Claimants also base their claim upon the decision of the Ismailia Court, the present dispute must be deemed a new dispute.”).

²⁴⁰ See Colombia’s Counter-Memorial (ICSID), ¶ 221.

it were unconnected to the dispute in order to shift the moment of its occurrence forward and to locate it in time after the entry into force of a BIT.”²⁴¹ Despite Claimant’s obvious gambit, the evidence shows that a dispute arose between Claimant and Colombia at the latest on 28 July 2000 – more than a decade before the TPA entered into force. On that date, Claimant, through her Holding Companies, initiated the Nullification and Reinstatement Action before the Administrative Judicial Tribunal, through which she challenged the lawfulness of the 1998 Regulatory Measures²⁴² and sought compensation from the State.²⁴³ Such lawsuit undeniably evidences a disagreement or conflict of views between the Parties. The real cause of the dispute at issue in this arbitration is therefore the treatment of Claimant’s shares and the legality under Colombian law of the 1998 Regulatory Measures.

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

²⁴¹ **RL-0018**, *ATA* (Award), ¶ 108.

²⁴² Claimant’s Memorial (ICSID), ¶ 28; Request for Arbitration, ¶ 131.

²⁴³ See **Ex. R-0050**, Nullification and Reinstatement Action, 28 July 2000, pp. 2-3.

Commission on Human Rights (“IACHR”), in which she explicitly asserted that the 2011 Constitutional Court Judgment and 2014 Confirmatory Order *together* violated her human rights:

Request that the Colombian State leave without effect the following sentences: (i) SU.447/11 of the Constitutional Court of 26 May 2011; and (ii) 188/14 of the Constitutional Court of 25 June 2014. **Said decisions**, as we have expressed, **became the principal instruments of the violation of the petitioners’ human rights**, since they impaired the reparation decided by the sentence issued by the Council of State in domestic law.²⁴⁴ (Emphasis added)

118. Even though Claimant now purports to consider the 2014 Confirmatory Order in isolation (so as to generate the impression of a separate dispute relating to such measure), she has nevertheless continued to present her claims in this arbitration as part of a single dispute beginning with the 1998 Regulatory Measures. Indeed, she has expressly challenged regulatory conduct (*viz.*, 1998 Regulatory Measures) and judicial conduct (*viz.*, 2011 Constitutional Court Judgment) that took place *before* the 2014 Confirmatory Order (and before the TPA’s entry into force):

a. “In a nutshell, Colombia’s **financial regulatory authorities** unlawfully expropriated Claimant’s investment in that jurisdiction”²⁴⁵ (emphasis added).

²⁴⁴ **Ex. R-0120**, Revision Petition to the Inter-American Commission on Human Rights, 20 March 2017, p. 116 (Spanish Original: “*Solicite al Estado Colombiano deje sin efecto las sentencias: (i) SU.447/11 de la Corte Constitucional del 26 de mayo de 2011; y (ii) 188/14 de la Corte Constitucional del 25 de junio de 2014. Dichas decisiones tal como hemos expresado, se convierten en principales instrumentos de la violación de los derechos humanos de los peticionarios, ya que impidieron la reparación decidida por la sentencia del Consejo de Estado en el derecho interno.*”).

²⁴⁵ Claimant’s Memorial (ICSID), p. 11.

- b. “[B]oth the regulatory and the judicial treatments imposed by the Republic of Colombia on Claimant were discriminatory and in breach of the provisions under Article 12.2 of the TPA²⁴⁶” (emphasis added).
- c. “[T]he Republic of Colombia is responsible, through the actions and omissions of its **executive and judicial authorities**, for the breach of a number of treaty obligations contained in the TPA and the Colombia-Switzerland BIT”²⁴⁷ (emphasis added).

119. Having thus explicitly complained of the State’s regulatory action (i.e., the 1998 Regulatory Measures) and of the subsequent judicial conduct concerning those regulatory measures (i.e., the 2011 Constitutional Court Judgment),²⁴⁸ Claimant cannot credibly argue that the present dispute is *exclusively* about the 2014 Confirmatory Order. It seems obvious and incontrovertible that the dispute between Claimant and Colombia at issue in this arbitration arose well before the entry into force of the TPA. The Tribunal therefore lacks jurisdiction *ratione temporis* over Claimant’s claims.

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

120. In its Counter-Memorial, Colombia demonstrated that Claimant failed to comply with the three-year limitations requirement set forth in Article 10.18.1 of the TPA (“**TPA Limitations Period**”).²⁴⁹ That provision provides as follows:

No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date

²⁴⁶ Claimant’s Memorial (ICSID), ¶ 307.

²⁴⁷ Claimant’s Memorial (ICSID), ¶ 293.

²⁴⁸ Notably, even if the 2011 Constitutional Court Judgment had in fact triggered a “new” dispute (*quod non*), such dispute would still have arisen prior to the entry into force of the TPA (in 2012), and therefore would fall outside of the Tribunal’s jurisdiction *ratione temporis* in any event.

²⁴⁹ See Colombia’s Counter-Memorial (ICSID), § III.B.3.

on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.²⁵⁰

121. Claimant alleges, however, that the TPA Limitations Period does not apply to her claims, and that in any event she can use the MFN Clause in Chapter 12 of the TPA to circumvent the TPA Limitations Period.²⁵¹ For the reasons discussed below, the TPA Limitations Period applies to and bars Claimant's claims (**Section A.3.a**). Furthermore, the Chapter 12 MFN Clause *cannot* be used to circumvent conditions of consent to jurisdiction (**Section A.3.b.i**), but, even if Claimant could use the Chapter 12 MFN Clause in this way, she in any event failed to comply with the five-year limitations period contained in the Colombia-Switzerland BIT (see **Section A.3.b.ii** below). For this reason, too, the Tribunal lacks jurisdiction *ratione temporis* over Claimant's claims.

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

122. In her Reply, Claimant alleges that TPA Article 10.18.1 does not apply to her claims.²⁵² However, Claimant is mistaken. She has submitted her claims under Chapter 12 of the TPA. Chapter 12 of the TPA does not include an investor-State

²⁵⁰ **RL-0001**, TPA, Art. 10.18.1. Article 10.16 is entitled "Submission of a Claim to Arbitration." *Id.*, Art. 10.16.

²⁵¹ See Claimant's Reply (ICSID), ¶ 4 ("Claimant is entitled to benefit from the more favorable five-year limitations period contained in the Colombia-Switzerland BIT"); *id.*, ¶ 5 ("As explained in Claimant's Memorial on Jurisdiction (dated June 13, 2019) (at ¶¶ 203-266), in the accompanying Expert Report of Olin L. Wethington (dated May 16, 2019) (at ¶¶ 26-35), and in the Jurisdiction Ratione Voluntatis section of this Reply (at Part II), the MFN clause in Art. 12.3 of the TPA extends to Claimant the protections of more favorable procedural, as well as substantive, treatment extended by Colombia to investors of other nations.").

²⁵² See Claimant's Reply (ICSID), ¶ 4 ("The three-year limitations period set forth in Art. 10.18 of the TPA is inapplicable to Claimant's claims in this arbitration.").

dispute settlement procedure, but instead incorporates the dispute resolution provisions of Chapter 10 (i.e., Section B of Chapter 10).²⁵³ The conditions of consent set forth in Section B of Chapter 10 therefore apply to Claimant's claims. Article 10.18.1 represents such a condition to consent; as a result – and contrary to Claimant's argument – the TPA Limitations Period of Article 10.18.1 does in fact apply to Claimant's claims.

123. The foregoing is fatal to Claimant's claim, because she failed to comply with the relevant limitations period. To recall, Claimant submitted her claims on 24 January 2018. The cut-off date pursuant to Article 10.18.1 is therefore **24 January 2015** (i.e., three years before Claimant submitted her claims). This means that, in order to comply with the limitations period, Claimant must not have known prior to 24 January 2015 of the alleged breach(es) or that she had incurred loss or damage. The *latest* alleged breach about which Claimant complains, and about which she alleges a resulting loss, was the 2014 Confirmatory Order, which was issued on **25 June 2014** – i.e., six months *before* the cut-off date. Moreover, Claimant appears to concede that she did not comply with Article 10.18.1, when she states in her Reply that "Claimant's claims arise from Order 188/14 [of 25 June 2014] ..." and that "the relevant State measure occurred . . . within the five years preceding commencement of the arbitration."²⁵⁴ Claimant thus failed to comply with the TPA Limitations Period, and her claims must be dismissed.

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

124. Claimant invokes the Chapter 12 MFN Clause because she knows that her claims are barred by the TPA Limitations Period. Specifically, Claimant seeks

²⁵³ **RL-0001**, TPA, Art. 12.1.2(b).

²⁵⁴ Claimant's Reply (ICSID), ¶ 3.

to use the Chapter 12 MFN Clause to import the dispute resolution provision of the Colombia-Switzerland BIT, which contains a longer limitations period (five years) than the TPA (three years).²⁵⁵

125. Claimant is thus positing that the Chapter 12 MFN Clause can be used to circumvent a condition of consent to arbitration that was explicitly in the TPA. However, as explained by Colombia in its Counter-Memorial and discussed further below, Claimant cannot use the Chapter 12 MFN Clause in this manner. Even if, *arguendo*, she could do that, Claimant failed to comply even with the longer, five-year limitations period of the third-party treaty that she is invoking pursuant to the Chapter 12 MFN Clause (namely, the Colombia-Switzerland BIT). As a result, the whole issue of which treaty's statute of limitations period is applicable here is moot in any event.

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

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

127. The Parties agree that the Chapter 12 MFN Clause should be interpreted in accordance with the customary principles of treaty interpretation codified in Article 31 of the VCLT: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context

²⁵⁵ **RL-0004**, Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, 17 May 2006 ("**Colombia-Switzerland BIT**"), Art. 11(5) ("An investor may not submit a dispute for resolution according to this Article if *five years* have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.") (emphasis added).

and in the light of its object and purpose.”²⁵⁶ However, the Parties disagree as to the outcome of this interpretative exercise. For the reasons set forth below, a proper interpretation of the Chapter 12 MFN Clause in accordance with the VCLT and the relevant case law leads to the conclusion that such clause cannot be used to circumvent the TPA’s express conditions of consent to arbitration.

1) The ordinary meaning of the Chapter 12 MFN Clause

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

Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of any other Party or of a non-Party, in like circumstances.²⁵⁷

129. The Parties appear to agree that the above-referenced clause does not explicitly address whether or not it applies to conditions of consent (which Claimant refers to as “procedural rights”²⁵⁸). The question therefore is whether an MFN clause that does not expressly state whether it applies to conditions of consent can nevertheless be used by a claimant to import more favorable conditions of consent. The answer is that it cannot.

²⁵⁶ **RL-0084**, VCLT, Art. 31(1).

²⁵⁷ **RL-0001**, TPA, Art. 12.3.1.

²⁵⁸ *See, e.g.*, Claimant’s Reply (ICSID), ¶¶ 163, 260, 322.

130. Colombia showed in its Counter-Memorial²⁵⁹ that there is a persuasive line of jurisprudence²⁶⁰ – including the majority of recent decisions on the subject²⁶¹ – that has held that an MFN clause cannot be used to import conditions of consent

²⁵⁹ See Colombia’s Counter-Memorial (ICSID), ¶¶ 252–60.

²⁶⁰ See generally **CL-0054**, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Salans, van den Berg, Veeder), Decision on Jurisdiction, 8 February 2005 (“**Plama (Decision on Jurisdiction)**”), ¶ 223 (“[The] MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the [treaty in question] leaves no doubt that the Contracting Parties intended to incorporate them”); **CL-0081**, *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15 (Goodem, Allard, Marriott), Award, 13 September 2006 (“**Telenor (Award)**”), ¶ 93 (“[T]he effect of the wide interpretation of the MFN clause is to expose the host State to treaty-shopping by the investor among an indeterminate number of treaties to find a dispute resolution clause wide enough to cover a dispute that would fall outside the dispute resolution clause in the base treaty”); **CL-0086**, *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080-2004 (Sjövall, Lebedev, Weier), Award, 21 April 2006 (“**Berschader (Award)**”), ¶ 206 (“The Tribunal has applied the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the Contracting Parties”); **RL-0034**, *ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9 (Dupuy, Torres Bernárdez, Lalonde), Award on Jurisdiction, 10 February 2012 (“**ICS (Award on Jurisdiction)**”), ¶ 277 (“[T]he duty of the Tribunal is to discover and not to create [the] meaning” of an MFN clause); **RL-0033**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1 (Dupuy, Brower, Bello Janeiro), Award, 22 August 2012 (“**Daimler (Award)**”), ¶ 176 (States may “perfectly well decide in the framework of a BIT to extend the bearing of a most-favored nation (MFN) clause to the international settlement of their disputes relating to investments. But this choice cannot be presumed or artificially constructed by the arbitrator; it can only result from the demonstrated expression of the states’ will”); **RL-0091**, *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1 (Rowley, Park, Sands), Award, 2 July 2013 (“**Kılıç (Award)**”), ¶ 7.8.10 (“This is consistent too with the view expressed by Professor Zachary Douglas, namely that an MFN clause in a basic investment treaty ‘does not incorporate by reference provisions relating to the jurisdiction of the arbitral tribunal, in whole or in part, set forth in a third investment treaty, unless there is an unequivocal provision to that effect in the basic investment treaty.’”).

²⁶¹ See generally **CL-0006**, *Austrian Airlines v. The Slovak Republic*, UNCITRAL (Kaufmann-Kohler, Brower, Trapl), Final Award, 9 October 2009 (“**Austrian Airlines (Final Award)**”); **RL-0034**, *ICS (Award on Jurisdiction)*; **RL-0033**, *Daimler (Award)*; **RL-0035**, *European American Investment Bank AG v. Slovak Republic*, PCA Case No. 2010-17 (Greenwood, Petsche, Stern), Award on Jurisdiction, 22 October 2012 (“**Euram (Award on Jurisdiction)**”).

unless the text of the clause “clearly and unambiguously” provides for such application.²⁶² For example, the *Daimler* tribunal held that States

may also perfectly well decide in the framework of a BIT to extend the bearing of a most-favored nation (MFN) clause to the international settlement of their disputes relating to investments. But this choice cannot be presumed or artificially constructed by the arbitrator; **it can only result from the demonstrated expression of the states’ will.**²⁶³ (Emphasis added)

131. Claimant’s only response in her Reply to this case law is to muse that the jurisprudence is “in an intriguing and inviting state of flux,”²⁶⁴ and to characterize the line of jurisprudence cited by Colombia as “controversial.”²⁶⁵ Claimant also once again emphasizes that the Chapter 12 MFN Clause guarantees to investors “treatment” that is no less favorable than that given to third-State parties,²⁶⁶ and argues (along with her expert, Professor Mistelis²⁶⁷) that the use of the word “treatment” means that the Chapter 12 MFN Clause

²⁶² CL-0086, *Berschader* (Award), ¶ 206.

²⁶³ RL-0033, *Daimler* (Award), ¶ 176 (internal citations omitted).

²⁶⁴ Claimant’s Reply (ICSID), ¶ 486.

²⁶⁵ Claimant’s Reply (ICSID), ¶ 481. Similarly, in his Second Expert Report, Professor Mistelis summarily dismisses the decisions in *Salini v. Jordan* and *Plama v. Bulgaria*. Professor Mistelis claims that in both cases the tribunals did not take into account the ordinary meaning of the term “treatment.” However, as explained in paragraphs 261–271 of Colombia’s Counter-Memorial, the tribunals in *Salini* and *Plama*, among other tribunals, did analyze the terms of the MFN clause (as well as the terms that were missing from the MFN clause).

²⁶⁶ Claimant’s Reply (ICSID), ¶ 5 (“As explained in Claimant’s Memorial on Jurisdiction (dated June 13, 2019) (at ¶¶ 203–66), in the accompanying Expert Report of Olin L. Wethington (dated May 16, 2019) (at ¶¶ 26–35), and in the Jurisdiction Ratione Voluntatis section of this Reply (at Part II), the MFN clause in Art. 12.3 of the TPA extends to Claimant the protections of more favorable procedural, as well as substantive, treatment extended by Colombia to investors of other nations.”).

²⁶⁷ See Second Mistelis Expert Report, ¶¶ 9–12.

can be used to import conditions of consent.²⁶⁸ In an attempt to support this argument, Claimant relies upon the same cases that she had cited in her Memorial: *Maffezini*, *Siemens*, *AWG*, *Suez*, *National Grid*, and *Impregilo*. But Colombia showed in its Counter-Memorial²⁶⁹ that multiple other tribunals have explicitly refused to interpret the word “treatment” in an MFN clause as permitting the importation of dispute resolution clauses from other treaties, absent express language to that effect.²⁷⁰ Claimant and Professor Mistelis also fail to respond to the discussion in Colombia’s Counter-Memorial of the *Maffezini* line of cases.²⁷¹

132. To recall, the *Maffezini* line of cases is inapposite, for three reasons. First, most of those cases allowed for the importation of more favorable conditions of consent based on treaty language that is broader than that in the Chapter 12 MFN Clause.²⁷² For example, in deciding to allow for the importation of more favorable conditions of consent to arbitration, the *Suez* tribunal stated:

²⁶⁸ Claimant’s Reply (ICSID), ¶ 6 (“[T]he test articulated by VCLT Art. 31 makes it plain that the MFN provision of TPA Art. 12.3 extends to all ‘treatment’, including treatment with respect to procedural remedies”); *id.*, ¶ 9 (“The provision guarantees to investors of a Party, and their investments, ‘treatment no less favorable’ than that given by the other Party to any other country’s investors and investments. This guarantee is not limited to the application of the substantive protection standards of the TPA, which are provided for in the treaty regardless of any MFN treatment. Nor is the guarantee limited to substantive protection standards at all.”).

²⁶⁹ See Colombia’s Counter-Memorial (ICSID), ¶¶ 256–59.

²⁷⁰ See, e.g., **CL-0054**, *Plama* (Decision on Jurisdiction); **CL-0081**, *Telenor* (Award); **CL-0086**, *Berschader* (Award); **CL-0006**, *Austrian Airlines* (Final Award); **RL-0034**, *ICS* (Award on Jurisdiction); **RL-0033**, *Daimler* (Award); **RL-0035**, *Euram* (Award on Jurisdiction); **CL-0088**, *Wintershall* (Award); **CL-0040**, *Kılıç* (Decision on Jurisdiction).

²⁷¹ For example, Claimant and Professor Mistelis did not address *Berschader*, which determined that an MFN clause can only be used to import elements of a dispute resolution clause (*i.e.*, conditions of consent) if the MFN clause “clearly and ambiguously” provides for such application. **CL-0086**, *Berschader* (Award), ¶ 206.

²⁷² See **CL-0030**, *Maffezini* (Decision on Jurisdiction), ¶ 38; **CL-0079**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Inter Aguas Servicios Integrales del Agua S.A. v. The Argentine Republic*,

[I]t must be noted that the most-favored-nation-clause in the Argentina-Spain BIT is **much broader in scope** than was the language of the Bulgaria-Cyprus BIT in *Plama*. Whereas the Argentina-Spain BIT states that “**In all matters** governed by this Agreement, ...treatment shall be no less favorable than that accorded by each Party to investment made in its territory by investors of a third country”, the comparable clause in the Bulgaria-Cyprus BIT stated “Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favorable than that accorded to investments by investors of third states.”²⁷³ (Emphasis added)

133. This statement in the *Suez* decision – a decision that Claimant frequently cites – contradicts Claimant’s theory that the *default* rule is that an MFN clause can be used to circumvent conditions of consent to arbitration. The *Suez* tribunal’s reasoning rests – as it should – on the relevant specific treaty language. The Chapter 12 MFN Clause does not contain the broad language (“[i]n all matters governed by this Agreement”) that appeared in the treaty interpreted by the tribunal in *Suez* – language that led the tribunal to conclude that the MFN clause in that case did apply to conditions of consent.²⁷⁴
134. Second, *all* of the post-*Maffezini* line of cases cited by Claimant involved a claimant’s attempt to circumvent an 18-month litigation clause in the applicable treaty. Such clauses, which appear in many of Argentina’s treaties, require the claimant to pursue local remedies for eighteen months before initiating arbitration. There is an important distinction between such 18-month litigation clauses and the limitations period clause at issue here: the purpose of the former

ICSID Case No. ARB/03/17 (Salacuse, Kaufmann-Kohler, Nikken), Decision on Jurisdiction, 16 May 2006 (“*Suez (Decision on Jurisdiction)*”), ¶ 55; CL-0007, AWG (Decision on Jurisdiction), ¶ 65.

²⁷³ CL-0079, *Suez* (Decision on Jurisdiction), ¶ 65.

²⁷⁴ See CL-0079, *Suez* (Decision on Jurisdiction), ¶ 68.

is to *allow* a claimant to submit the dispute to arbitration after a specified period of time, whereas the purpose of the latter is to *foreclose* the possibility of arbitration after a specified period of time. In other words, despite a requirement to comply with the 18-month litigation clause, a party will still be able to seek recourse in arbitration afterwards. By contrast, in the case of a limitations period clause, non-compliance with the relevant limitations period *bars* a party from pursuing arbitration. Not surprisingly, the International Law Commission stressed in its Final Report on the Study Group on the Most-Favoured-Nation Clause (2015) that the use of an MFN clause to circumvent an 18-month litigation clause is unique: “Attempts to use MFN to add other kinds of dispute settlement provisions, going beyond an 18-month litigation delay, have generally been unsuccessful.”²⁷⁵

135. Third, and in any event, a number of tribunals have criticized the reasoning and effects of the *Maffezini* decision, and of its progeny.²⁷⁶ For instance, the *Telenor* tribunal observed that “the effect of the wide interpretation of the MFN clause is to expose the host State to treaty-shopping by the investor among an indeterminate number of treaties.”²⁷⁷ MFN clauses were not intended to enable claimants to create a “greatest hits” collection of the least stringent consent requirements from the relevant State’s various treaties. Such an interpretation

²⁷⁵ **CL-0126**, International Law Commission, Study Group on the Most-Favoured Nation Clause, 29 May 2015 (“**ILC Study**”), ¶ 127.

²⁷⁶ See **CL-0081**, *Telenor* (Award), ¶ 93; **CL-0054**, *Plama* (Decision on Jurisdiction), ¶ 203; **CL-0067**, *Salini-Jordan* (Decision on Jurisdiction), ¶ 115; **RL-0097**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17 (Danelius, Brower, Stern), Concurring and Dissenting Opinion of Brigitte Stern, 21 June 2011, ¶ 6; **CL-0145**, Zachary Douglas, The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails, *JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT*, p. 102 (2011).

²⁷⁷ **CL-0081**, *Telenor* (Award), ¶ 93; see also **CL-0054**, *Plama* (Decision on Jurisdiction), ¶ 203 (“The specific exclusion in the draft FTAA is the result of a reaction by States to the expansive interpretation made in the *Maffezini* case. That interpretation went beyond what State Parties to BITs generally intended to achieve by an MFN provision in a bilateral or multilateral investment treaty.”).

would render nugatory the careful balance reached in each treaty by the parties' negotiators with respect to the conditions for consent; that therefore cannot be the proper interpretation of these clauses.

136. In conclusion, and consistent with the majority line of cases on the subject, the plain language of the Chapter 12 MFN Clause does not enable the importation of more favorable conditions of consent to arbitration.

2) The context of the Chapter 12 MFN Clause

137. An analysis of the context of the Chapter 12 MFN Clause likewise leads to the conclusion that such clause cannot be used to circumvent conditions of consent to jurisdiction.

138. In her Reply, Claimant highlights other TPA protections—the national treatment provisions (Articles 10.3 and 12.2), and the MFN clause of Chapter 10 (“**Chapter 10 MFN Clause**”) (Article 10.4)—and argues that a comparison of those provisions to the Chapter 12 MFN Clause indicates that the latter applies to conditions of consent.²⁷⁸ For example, Claimant emphasizes that a footnote to the Chapter 10 MFN Clause (“**Chapter 10 MFN Footnote**”) explicitly excludes dispute resolution provisions from the scope of the MFN clause.²⁷⁹ To recall, the Chapter 10 MFN Footnote states:

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

²⁷⁸ See Claimant’s Reply (ICSID), ¶ 11.

²⁷⁹ See Claimant’s Reply (ICSID), ¶ 17 (“Respondent makes much of footnote 2 to Art. 10.4 of the TPA, which clarifies that the specific language of that Article is not intended to ‘encompass dispute resolution mechanisms, such as those in Section B [of Chapter 10], that are provided for in international investment treaties or trade agreements.’”).

international investment treaties or trade agreements.²⁸⁰
(Emphasis added)

139. Claimant argues that because the Chapter 12 MFN Clause does not contain a provision similar to that quoted above, that must mean that it was not meant to exclude consent requirements such as those set forth in dispute resolution clauses. However, Claimant ignores other aspects of the context of the Chapter 12 MFN Clause.
140. Chapter 10 of the TPA includes an investor-State dispute settlement mechanism. Chapter 10 also includes an MFN clause, which—as discussed above—includes a footnote precluding the application of the MFN clause to the investor-State dispute settlement mechanism. As Claimant concedes,²⁸¹ the conditions of consent to arbitration in Chapter 10 are thus “locked in” and not subject to change. A claimant filing claims under Chapter 10 therefore cannot circumvent the Chapter 10 conditions of consent in any way.
141. Chapter 12 does not include an endogenous investor-State dispute settlement mechanism. Instead, it partially imports the investor-State dispute settlement mechanism of Chapter 10.²⁸² In other words, Chapter 12 imports the “locked in” conditions of consent from Chapter 10.
142. However, under Claimant’s theory, a claimant filing claims under Chapter 12 (and thereby invoking the Chapter 10 dispute resolution provisions) would always be able to circumvent the conditions of consent contained in Chapter 10.

²⁸⁰ See **RL-0001**, TPA, Art. 10.4(2), fn. 2.

²⁸¹ See Colombia’s Counter-Memorial (ICSID), ¶ 17 (“Respondent makes much of footnote 2 to Art. 10.4 of the TPA, which clarifies that the specific language of that Article is not intended to ‘encompass dispute resolution mechanisms, such as those in Section B [of Chapter 10], that are provided for in international investment treaties or trade agreements.’ However, as Claimant has noted,¹⁷ the parties to the TPA chose not to include such a limiting footnote to the MFN clause in Art. 12.3.”).

²⁸² See Colombia’s Counter-Memorial (ICSID), ¶ 267.

Such a result is illogical and untenable; Chapter 12 cannot be used to import a more expansive scope of consent to arbitration than that contained in Chapter 10. Put differently, but for the importation of the investor-State dispute settlement mechanism of Section B of Chapter 10 into Chapter 12, there would be no State consent to investor-State dispute settlement in respect of investments in financial services. The limitations to consent included in Section B of Chapter 10 are not somehow shed in the act of importing such consent into Chapter 12.

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

3) The object and purpose of the TPA

144. In arguing whether the Chapter 12 MFN Clause can be used to circumvent conditions of consent to jurisdiction, Claimant devotes the following, single sentence of her argument to the interpretation of the object and purpose of the TPA: “[I]nterpreting ‘treatment’ in Art. 12.3 of the TPA to extend to treatment in connection with dispute-resolution proceedings is most consistent with the TPA’s object and purpose.”²⁸³ This conclusory and unsubstantiated statement by Claimant does nothing to support her thesis.
145. There is no support for the notion that unrestricted investor-State dispute settlement is part of the TPA’s object and purpose. If that were the case, every investment treaty MFN clause that does not contain specific exclusionary

²⁸³ Claimant’s Reply (ICSID), ¶ 29.

language would have to be interpreted to allow for the importation from other treaties of conditions of consent with respect to investor-State dispute settlement. Yet tribunals have explicitly refused to interpret MFN clauses in that way.²⁸⁴ Moreover, tribunals faced with similar arguments—e.g., that the purpose of providing for dispute settlement should influence decision-makers to err on the side of interpreting treaties as *allowing* jurisdiction—have likewise rejected those arguments.²⁸⁵

²⁸⁴ See generally **CL-0054**, *Plama* (Decision on Jurisdiction), ¶ 223 (“[The] MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the [treaty in question] leaves no doubt that the Contracting Parties intended to incorporate them”); **CL-0081**, *Telenor* (Award), ¶ 93 (“[T]he effect of the wide interpretation of the MFN clause is to expose the host State to treaty-shopping by the investor among an indeterminate number of treaties to find a dispute resolution clause wide enough to cover a dispute that would fall outside the dispute resolution clause in the base treaty”); **CL-0086**, *Berschader* (Award), ¶ 206 (“The Tribunal has applied the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the Contracting Parties”); **RL-0034**, *ICS* (Award on Jurisdiction), ¶ 277 (“[T]he duty of the Tribunal is to discover and not to create [the] meaning” of an MFN clause); **RL-0033**, *Daimler*, (Award), ¶ 176 (States may “perfectly well decide in the framework of a BIT to extend the bearing of a most-favored nation (MFN) clause to the international settlement of their disputes relating to investments. But this choice cannot be presumed or artificially constructed by the arbitrator; it can only result from the demonstrated expression of the states’ will”); **RL-0091**, *Kılıç* (Award), ¶ 7.8.10 (“This is consistent too with the view expressed by Professor Zachary Douglas, namely that an MFN clause in a basic investment treaty “does not incorporate by reference provisions relating to the jurisdiction of the arbitral tribunal, in whole or in part, set forth in a third investment treaty, unless there is an unequivocal provision to that effect in the basic investment treaty.”).

²⁸⁵ See **CL-0081**, *Telenor* (Award), ¶ 95 (“Those who advocate a wide interpretation of the MFN clause have almost always examined the issue from the perspective of the investor. But what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties. The importance to investors of independent international arbitration cannot be denied, but in the view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties.”).

146. Claimant thus has failed to demonstrate that the object and purpose of the TPA supports her expansive interpretation of the Chapter 12 MFN Clause.

4) The Parties' alleged "treaty practice"

147. In her Reply, Claimant devotes three sections of her interpretative analysis of the Chapter 12 MFN Clause to the alleged "treaty practice" of the United States and Colombia.²⁸⁶ Claimant and Professor Mistelis describe the structure and provisions of a variety of other treaties entered into by the United States and Colombia.²⁸⁷ Some of these treaties have MFN clauses in separate investment and financial services chapters, which are similar to the Chapter 10 and Chapter 12 MFN Clauses of the TPA, respectively.²⁸⁸ However, Claimant's argument based on the States' alleged "treaty practice" fails, for two reasons.

148. First, although Claimant acknowledges that the TPA should be interpreted in accordance with the VCLT, the latter does not direct or authorize an interpretation based upon a State's alleged "treaty practice" (i.e., based on an analysis of the treaties that a State has concluded with *other* States).²⁸⁹ Indeed, the VCLT does not authorize a party to interpret a treaty by reference to some other agreement unless the latter is between the same parties as the treaty being interpreted.²⁹⁰

149. Second, Claimant identifies and quotes other treaties with a similar structure to the TPA: those treaties have (i) an MFN clause in an investment chapter that is

²⁸⁶ See Claimant's Reply (ICSID), §§ I.A.1., III.B and III.C.

²⁸⁷ See, e.g., Claimant's Reply (ICSID), ¶ 23; Second Mistelis Expert Report, ¶¶ 86-93.

²⁸⁸ See, e.g., Claimant's Reply (ICSID), ¶ 24.

²⁸⁹ See generally, **RL-0084**, VCLT, Art. 31.

²⁹⁰ See **RL-0084**, VCLT, Art. 31(2)(a) ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: Any agreement relating to the treaty which was made **between all the parties** in connection with the conclusion of the treaty") (emphasis added); *id.*, Art. 31(3)(a) ("There shall be taken into account, together with the context: Any subsequent agreement **between the parties** regarding the interpretation of the treaty or the application of its provisions") (emphasis added).

limited by language precluding its application to conditions of consent, and (ii) an MFN clause in the financial services chapter that does not include such preclusive language. Having identified these other treaties, Claimant baldly asserts that these treaties prove her interpretation of the Chapter 12 MFN Clause. Claimant does not, however, refer to any decision by a tribunal or other body that has interpreted these other treaties in a manner that would support Claimant's theory. In the absence of such support, Claimant's "treaty practice" argument contributes nothing to her analysis, other than to show that the States Parties have employed similar language in other treaties. However, that does not get Claimant very far, because the correct interpretation of those other treaties is the same interpretation that Colombia posits here.

150. For all of the reasons articulated above, Claimant is not allowed to circumvent the TPA's conditions of consent by means of the importation (through the Chapter 12 MFN Clause) of the longer limitations period from the Colombia-Switzerland BIT.

ii. Even if Claimant could circumvent the conditions of consent under the TPA using the Chapter 12 MFN Clause, Claimant did not comply with the five-year limitations period that she invokes

151. In any event, even if Claimant were allowed to import the longer (five-year) limitations period of the Colombia-Switzerland BIT (which she cannot), Claimant did not comply with such limitations period. Article 11(5) of the Colombia-Switzerland BIT establishes the following:

An investor may not submit a dispute for resolution according to this Article if five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.²⁹¹

²⁹¹ **RL-0004**, Colombia-Switzerland BIT, Art. 11(5).

152. The Parties agree that Article 11(5) of the Colombia-Switzerland BIT precludes the submission of a dispute to international arbitration if Claimant obtained knowledge, or should have obtained knowledge, of the events giving rise to the dispute more than five years before she submitted her claims to arbitration, i.e., before **24 January 2013**, which is the “cut-off date.”²⁹²
153. Claimant alleges that she complied with this limitations period. However, her argument is premised upon a unique, self-serving definition of “dispute.” The case law establishes a single, well-accepted definition of “dispute,” and pursuant to that definition, Claimant first acquired or should have acquired the requisite knowledge (i.e., of the events giving rise to this dispute) *before* the 24 January 2013 cut-off date under the Colombia-Switzerland BIT.
- 1) Claimant has created her own, self-serving definition of “dispute,” even though the term has an accepted meaning under international law
154. In her Reply, Claimant argues that “the relevant dispute [in the present case] is the controversy (1) between Claimant and Respondent (2) involving Claimant’s claims that Respondent has engaged in a measure in violation of the relevant treaty. Such a controversy could not arise **until a challenged** state measure, alleged to **violate the TPA**, had occurred”²⁹³ (emphasis added). However, the narrow definition of “dispute” which Claimant is asking this Tribunal to adopt has no basis in law. As explained in **Section II.A.2.b.i** above, the definition of

²⁹² See Claimant’s Reply (ICSID), ¶ 33. See also *id.*, ¶ 4 (“[T]he claims she is asserting arose after January 24, 2013 (i.e., within the five years prior to submitting the claims to arbitration).”).

²⁹³ Claimant’s Reply (ICSID), ¶¶ 35.

“dispute” recognized and adopted by international courts²⁹⁴ and tribunals²⁹⁵ is “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.”²⁹⁶ Moreover, tribunals have affirmed that a party need not have invoked a particular legal obligation for a dispute to have arisen.²⁹⁷

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

155. Since the cut-off date under Article 11(5) of the Colombia-Switzerland BIT is 24 January 2013, if the date on which Claimant first acquired or should have acquired knowledge of the events giving rise to the dispute predates 24 January 2013, Claimant’s claims are barred even under the longer, five-year limitations period contained in the Colombia-Switzerland BIT.
156. Applying the established definition of a “dispute,” it becomes clear that the present dispute arose before the cut-off date of 24 January 2013. As discussed at length in **Section II.A.2.c** above, the dispute arose at the latest on 28 July 2000.

²⁹⁴ See, e.g., **RL-0022**, *Mavrommatis* (Advisory Opinion), p. 11; **RL-0098**, *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, ICJ, Judgment, 5 October 2016, ¶ 37 (“According to the established case law of the Court, a dispute is ‘a disagreement on a point of law or fact, a conflict of legal views or of interests’ between parties”).

²⁹⁵ See, e.g., **RL-0020**, *Lucchetti* (Award); **RL-0075**, *Vieira* (Award); **CL-0039**, *Impregilo-Pakistan* (Decision on Jurisdiction), ¶¶ 302–303; **RL-0018**, *ATA* (Award), ¶ 99; **CL-0074**, *Siemens*, ¶ 159; **RL-0008**, *MCI* (Award), ¶ 63; **RL-0021**, *Gambrinus* (Award), ¶ 198.

²⁹⁶ **RL-0022**, *Mavrommatis* (Advisory Opinion), p. 11.

²⁹⁷ See **RL-0013**, *EuroGas* (Award), ¶ 437 (“As regards the occurrence of a dispute, the Tribunal agrees with the Respondent’s submission that the relevant consideration is the articulation of opposing views and interests, as opposed to the articulation of a specific legal basis for the claim”); **RL-0025**, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ, Advisory Opinion, 26 April 1988, ¶ 38 (“In the view of the Court, where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty.”).

It was on that date that Claimant, through her Holding Companies, initiated the Nullification and Reinstatement Action before the Administrative Judicial Tribunal, through which she challenged the lawfulness of the 1998 Regulatory Measures²⁹⁸ and sought compensation from the Colombian State.²⁹⁹ The subsequent judicial actions concerned the same point of disagreement: the 2007 Council of State Judgment held that the 1998 Regulatory Measures were unlawful, and the 2011 Constitutional Court Judgment in turn overturned the 2007 Council of State Judgment.

157. Contrary to Claimant's claim, the dispute relating to the 2014 Confirmatory Order cannot be disaggregated from the underlying dispute and treated as a "new" dispute. Claimant's own written submissions in this arbitration describe the dispute at issue as one that encompasses the 1998 Regulatory Measures and the 2011 Constitutional Court Judgment:

- a. "In a nutshell, Colombia's **financial regulatory authorities** unlawfully expropriated Claimant's investment in that jurisdiction"³⁰⁰ (emphasis added). The only "regulatory" conduct took place in 1998, through the 1998 Regulatory Measures adopted by Fogafin.
- b. "[B]oth the regulatory and the judicial treatments imposed by the Republic of Colombia on Claimant were discriminatory and in breach of the provisions under Article 12.2 of the TPA³⁰¹" (emphasis added). Again, the regulatory authorities adopted the relevant measures in 1998.
- c. "[T]he Republic of Colombia is responsible, through the actions and omissions of its **executive and judicial authorities**, for the breach of a

²⁹⁸ Claimant's Memorial (ICSID), ¶ 28; Request for Arbitration, ¶ 131.

²⁹⁹ See **Ex. R-0050**, Nullification and Reinstatement Action, 28 July 2000, pp. 2-3.

³⁰⁰ Claimant's Memorial (ICSID), p. 11.

³⁰¹ Claimant's Memorial (ICSID), ¶ 307.

number of treaty obligations contained in the TPA and the Colombia-Switzerland BIT”³⁰² (emphasis added).

158. Because—by her own admission—Claimant had knowledge of the events giving rise to this dispute before 24 January 2013, Claimant’s claims fail to satisfy even the longer five-year limitations period set forth in the Colombia-Switzerland BIT. Accordingly, the Tribunal lacks jurisdiction *ratione temporis* over Claimant’s claims.

* * *

159. In conclusion, for the reasons articulated above, the Tribunal lacks jurisdiction *ratione temporis* over Claimant’s claims, because (1) the claims are based on alleged State acts that took place before the TPA entered into force; (2) the present dispute arose prior to the entry into force of the TPA; and (3) Claimant did not comply with the three-year TPA Limitations Period (or even with the more generous five-year limitations period under the Colombia-Switzerland BIT, which Claimant impermissibly seeks to invoke via the TPA Chapter 12 MFN Clause).

B. The Tribunal lacks jurisdiction *ratione voluntatis*

160. In its Counter-Memorial, Colombia argued that the Tribunal lacks jurisdiction *ratione voluntatis* because Claimant has not satisfied several of the TPA’s conditions of consent to arbitration. Colombia also demonstrated that Claimant cannot submit fair and equitable treatment or national treatment claims under the TPA.³⁰³

³⁰² Claimant’s Memorial (ICSID), ¶ 293.

³⁰³ See generally Colombia’s Counter-Memorial (ICSID), § III.C.

161. In her Reply, Claimant argues that the TPA's conditions of consent do not apply to her.³⁰⁴ In addition, in an attempt to manufacture jurisdiction where none exists, she advances an incorrect interpretation of the TPA, and also improperly invokes the Chapter 12 MFN Clause.³⁰⁵ For the reasons discussed below, those arguments by Claimant must be rejected. Specifically, Colombia will show that:

- a. The conditions of consent in TPA Chapter 10 *do* apply to Claimant's claims, and Claimant has not satisfied some of those conditions(**Section B.1**);
- b. Claimant cannot submit fair and equitable treatment claims because Chapter 12 neither includes nor incorporates a fair and equitable treatment obligation (**Section B.2**); and
- c. Claimant cannot submit to arbitration either fair and equitable treatment or national treatment claims because such claims fall outside of the States' consent to arbitration under Chapter 12 (**Section B.3**).

1. *Claimant has not satisfied several of the conditions of consent under TPA Chapter 10*

162. As discussed in greater detail below, Chapter 10 of the TPA contains several conditions of consent to arbitration, which are incorporated into Chapter 12 by virtue of Article 12.1.2(b). Those conditions of consent must be given effect. In the words of the International Court of Justice: "When [a State's] consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon."³⁰⁶

³⁰⁴ Claimant's Reply (ICSID), ¶¶ 502, 566.

³⁰⁵ Claimant's Reply (ICSID), ¶ 569.

³⁰⁶ **RL-0099**, *Case Concerning Armed Activities in the Territory of Congo (New Application: 2002)*, ICJ, Judgment, 3 February 2006, ¶ 88.

163. Consistent with that principle, and in accordance with the TPA, Colombia in its Counter-Memorial objected to Claimant's failure to comply with the following requirements of the TPA: the consultation and negotiation requirement (TPA Article 10.15), the notice of intent requirement (TPA Article 10.16.2), and the waiver requirement (TPA Article 10.18.2).³⁰⁷ In her Reply, Claimant alleges: (1) that the above-mentioned conditions of consent do not apply to her claims; (2) that such conditions are not mandatory or enforceable; and (3) that Colombia's objections have been asserted in bad faith.³⁰⁸ In the subsections that follow, Colombia will demonstrate that, contrary to Claimant's arguments: (1) the conditions of consent set forth in the TPA *do* apply to her claims (**Section 1.a**); (2) those conditions are mandatory, and Claimant failed to comply with them (**Sections 1.b-d**); and (3) Colombia's objections are well-founded and were made in good faith (**Section 1.e**).

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

164. In her Reply, Claimant posits that the consultation and negotiation, notice of intent, and waiver requirements set forth in Chapter 10 do not apply to her claims, because she is submitting claims under Chapter 12:

[t]he procedural rights contained in Chapter 10 of the TPA have not been invoked. Claimant and her investment in the Colombian Financial Services sector are governed by the specific provisions of the TPA's Chapter 12 (Financial Services).³⁰⁹

165. As a preliminary matter, this argument is inconsistent with the position that Claimant took in response to ICSID's inquiries concerning the registration of

³⁰⁷ See Colombia's Counter-Memorial (ICSID), ¶¶ 281-99.

³⁰⁸ Claimant's Reply (ICSID), ¶ 579.

³⁰⁹ Claimant's Reply (ICSID), ¶ 502.

her claims. Specifically, in a letter to the Centre dated 9 February 2018, Claimant invoked Colombia's consent to arbitration under Chapter 10:

Pursuant to Art. 10.17 of the U.S.-Colombia Trade Protection Agreement ('TPA') the Republic of Colombia consents to arbitration. . . . Consent to arbitration also appears in Chapter 12 (Financial Services) of the TPA. **Art. 12.1.2 incorporates the Chapter 10 (investment) arbitration rubric . . .**³¹⁰ (Emphasis added)

166. Claimant's original position is consistent with the TPA: the *only* basis on which Claimant can bring claims against Colombia for disputes concerning measures that affect investments in the financial sector is through Article 12.1.2(b), and the latter in turn incorporates by reference Section B of Chapter 10:

Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter.³¹¹

Absent the incorporation by reference in the above-quoted clause, Claimant would have no basis to commence an investor-State arbitration against Colombia concerning measures adopted or maintained by Colombia relating to her investment in Granahorrar, which is a financial institution in Colombia. Put simply, Claimant cannot conduct an investor-State arbitration under the TPA yet at the same time argue that TPA Chapter 10 and the conditions of consent therein do not apply to her claims.

³¹⁰ Letter from Claimant to ICSID, 9 February 2018, pp. 1-2.

³¹¹ See **RL-0001**, TPA, Art. 12.1.2(b) ("Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter.").

167. As Colombia noted in its Counter-Memorial,³¹² Chapter 12 does not contain an endogenous dispute resolution procedure, and instead incorporates by reference the dispute resolution procedure of Chapter 10 (with certain limitations).³¹³ Specifically, Article 12.1.2(b) incorporates “Section B (Investor-State Dispute Settlement) of Chapter Ten,” albeit only for certain types of claims.³¹⁴ Section B of Chapter 10 includes the three conditions of consent identified above by Colombia (namely, consultation and negotiation (Article 10.15), notice of intent (Article 10.16.2), and waiver (Article 10.18.2)). In other words, by operation of Article 12.1.2(b), the above-listed three conditions of consent are incorporated by reference into Chapter 12, and thus apply to Claimant’s claims.
168. In her Reply, Claimant also argues that the TPA Chapter 10 conditions of consent do not apply to her because she has invoked the Chapter 12 MFN Clause to import the dispute resolution provision of the Colombia-Switzerland BIT.³¹⁵
169. As discussed in **Section II.A.3.b** above, an MFN clause cannot be used to import more favorable conditions of consent to arbitration in the absence of express language in the MFN clause indicating the parties’ intent to enable that.³¹⁶ The Chapter 12 MFN Clause includes no such language, and therefore cannot be used to bypass the TPA’s conditions of consent.³¹⁷ Just as Claimant cannot circumvent the TPA’s three-year limitations period (see **Section II.A.3.b** above),

³¹² Colombia’s Counter-Memorial (ICSID), ¶ 267.

³¹³ See **RL-0001**, TPA, Art. 12.1.2(b).

³¹⁴ **RL-0001**, TPA, Art. 12.1.2(b).

³¹⁵ See Claimant’s Reply (ICSID), ¶¶ 504, 570.

³¹⁶ See *supra* Section II.A.b.i. See also **CL-0054**, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No.ARB/03/24 (Salans, van den Berg, Veeder), Decision on Jurisdiction, 8 February 2005 (“**Plama (Decision on Jurisdiction)**”); **CL-0081**, *Telenor* (Award).

³¹⁷ See **RL-0001**, TPA, Art. 12.3.1.

it cannot circumvent the TPA's consultation and negotiation, notice of intent, and waiver requirements.

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

170. In its Counter-Memorial, Colombia demonstrated that Claimant failed to comply with the consultation and negotiation requirement set forth in TPA Article 10.15.³¹⁸ Claimant does not deny that she did not consult and negotiate with Colombia prior to commencing the present arbitration. Instead, in her Reply, she argues that Article 10.15 does not impose a mandatory requirement. Claimant is mistaken.

171. Article 10.15 provides as follows:

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party procedures.³¹⁹

172. Claimant erroneously asserts that “[t]here is no predicate mandatory requirement under this provision.”³²⁰ Claimant emphasizes the word “should,” which, according to Claimant, “does nothing more than suggest what, in general, would be a desirable rule of engagement.”³²¹ However, this interpretation has been rejected in the jurisprudence. In its Counter-Memorial,³²² Colombia discussed various awards, including that in *Murphy v.*

³¹⁸ See Claimant's Reply (ICSID), § II.C.1.a.

³¹⁹ **RL-0001**, TPA, Art. 10.15.

³²⁰ Claimant's Reply (ICSID), ¶ 605.

³²¹ Claimant's Reply (ICSID), ¶ 606.

³²² See Colombia's Counter-Memorial (ICSID), ¶ 285.

Ecuador, which have interpreted similar provisions—including ones that featured the word “should” —as mandatory requirements.³²³

173. In her Reply, Claimant alleges that the *Murphy* tribunal interpreted a treaty that “is not at all comparable” to the TPA.³²⁴ Yet the provision that the *Murphy* tribunal was interpreting was Article VI(2) of the U.S.-Ecuador BIT, which states: “In the event of an investment dispute, the parties to the dispute **should** initially seek a resolution through consultation and negotiation”³²⁵ (emphasis added). That provision is therefore nearly identical to Article 10.15 of the TPA. The *Murphy* tribunal held that negotiations are “**required** under Article VI(2) of the Ecuador BIT”³²⁶ (emphasis added). The reasoning of the *Murphy* tribunal is therefore directly apposite, and supports Colombia’s position herein.
174. Moreover, the Spanish version of Article 10.15 of the TPA (which is “equally authentic”³²⁷) confirms that the consultation and negotiation requirement is mandatory:

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

³²³ See **RL-0048**, *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4 (Blanco, Grigera Naón, Vinuesa), Award on Jurisdiction, 15 December 2010 (“**Murphy (Award on Jurisdiction)**”), ¶ 149. See also **CL-0067**, *Salini-Jordan* (Decision on Jurisdiction), ¶ 16; **RL-0047**, *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Orrego Vicuña, Espiell, Tschanz), Decision on Jurisdiction, 14 January 2004, ¶ 88; **RL-0100**, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17 (Júdice, Conthe, Vinuesa), Award, 31 January 2014, ¶ 390 (English translation: “The Tribunal concludes that, at least in this case, the ‘prior negotiation period’ constitutes a jurisdictional barrier that conditions the jurisdiction of the Tribunal *ratione voluntatis* . . .”) (Spanish Original: “El Tribunal concluye que, al menos en este caso, el “período de negociación previa” constituye una barrera de carácter jurisdiccional que condiciona la jurisdicción del Tribunal *ratione voluntatis* . . .”).

³²⁴ Claimant’s Reply (ICSID), ¶ 615.

³²⁵ **RL-0048**, *Murphy* (Award on Jurisdiction), ¶ 95.

³²⁶ **RL-0048**, *Murphy* (Award on Jurisdiction), ¶ 139. See also *id.* at ¶¶ 116, 133.

³²⁷ **RL-0001**, TPA, Art. 23.6 (“The English and Spanish texts of this Agreement are equally authentic.”).

negociación, lo que puede incluir el empleo de procedimientos de carácter no obligatorio con la participación de terceras partes.” Art. 10.15 of the TPA.³²⁸ (Emphasis added)

175. The Spanish word “deben” means “must.” As a result, the *Real Academia Española* (which is the maximum authority on the Spanish language and vocabulary) explains that the word “deben” conveys an obligation.³²⁹ Moreover, multiple Spanish-to-English translation platforms, including *Word Reference*, *Spanish Dict.com*, and *Google Translate*, all translate “deben” as “must.”³³⁰ The text of the Spanish version of the TPA thus confirms that the consultation and negotiation requirement is mandatory. Claimant does not deny that she did not conduct any consultations or negotiations. Accordingly, she has failed to satisfy that requirement of TPA Chapter 10.
176. Finally, Claimant asserts that even if Article 10.15 were indeed binding, it would be binding on both States, and Colombia has likewise failed to satisfy that obligation.³³¹ This argument defies common sense: it is the claimant who must notify the respondent State of a dispute and to initiate consultation and negotiation, since it is the claimant who is invoking the TPA’s investor-State dispute settlement mechanism. In other words, if Claimant wishes to have an arbitration, it is incumbent on her (and not Colombia) to demonstrate that the

³²⁸ **RL-0001**, TPA (Spanish), Art. 10.15.

³²⁹ See **Ex. R-0229**, Spanish definition of the word “*Deben*,” REAL ACADEMIA ESPAÑOLA, last accessed 13 February 2020 (English translation: defining “deber” as “to be obliged to do something because of divine natural or positive law”) (Spanish Original: defining “deber” as “*Estar obligado a algo por la ley divina, natural o positiva*”).

³³⁰ See **Ex. R-0230**, Spanish to English translation of the word “*Deben*,” WORD REFERENCE, last accessed 13 February 2020; **Ex. R-0231**, Spanish to English translation of the word “*deben*,” SPANISHDICT, last accessed 13 February 2020; **Ex. R-0232**, Spanish to English translation of the word “*Deben*,” GOOGLE TRANSLATE, last accessed 13 February 2020.

³³¹ Claimant’s Reply (ICSID), ¶ 609 (“The provision addresses both parties in dispute, not just the Claimant. . . . There is no evidence on record of Respondent having tried to engage in consultation or negotiation with Claimant.”).

TPA's conditions of consent have been met. It is also nonsensical to argue (as Claimant seems to do) that the respondent State has to demonstrate that it complied with an obligation to conduct consultations in order to establish that a tribunal does *not* have jurisdiction.

177. It is not surprising, therefore, that similar language in other treaties (i.e., that both parties "should initially seek a resolution through consultation and negotiation") has never been interpreted as an obligation that the respondent State must satisfy for the purpose of establishing that jurisdiction is lacking.³³²

178. In any event, Claimant's *tu quoque* argument is unavailing, as the Tribunal needs to satisfy itself, independently, that all of the relevant jurisdictional conditions have been met. Thus, a failure by Claimant to comply with the consultation and negotiation requirement will suffice for the Tribunal to lack jurisdiction (irrespective of what Colombia may have done with respect to such requirement).

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

179. In its Counter-Memorial, Colombia demonstrated that Claimant failed to comply with the notice of intent requirement set forth in TPA Article 10.16.2.³³³ In her Reply, Claimant does not deny that she did not provide notice of intent before commencing this arbitration. Instead, she argues that the notice of intent requirement is "not enforceable,"³³⁴ and that it would be "unfair"³³⁵ to enforce such requirement against her.

³³² See **RL-0048**, *Murphy* (Award on Jurisdiction), ¶¶ 90, 95.

³³³ See Colombia's Counter-Memorial (ICSID), § II.C.1.b.

³³⁴ Claimant's Reply (ICSID), ¶ 639.

³³⁵ Claimant's Reply (ICSID), ¶ 639.

180. Claimant's assertion that Article 10.16.2 "is not enforceable" is directly contradicted by the plain text of the TPA, which provides:

At least 90 days before submitting any claim to arbitration under this Section, a claimant **shall deliver to the respondent a written notice of its intention** to submit the claim to arbitration ("notice of intent").³³⁶ (Emphasis added)

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

181. In its Counter-Memorial, Colombia quoted *Western Enterprise's* statement that "[p]roper notice is an important element of the State's consent."³³⁷ Claimant retorts that the *Western Enterprise* tribunal gave the claimant in that case the opportunity to provide proper notice after it had filed its claims. However, Claimant fails to point out that the treaty applied by the *Western Enterprise* tribunal did *not* include an explicit notice of intent requirement such as that imposed by TPA Article 10.16.2. In other words, even in the *absence* of a legal requirement to provide advance notice of an intent to submit claims to arbitration, tribunals have recognized that proper notice is an important element of the State's consent. In the instant case, proper notice was formally required by Article 10.16.2 of the TPA, and Claimant failed to provide such notice, and her claims must therefore be dismissed.

182. Claimant has cited three other decisions in support of her theory that TPA Article 10.16.2 does not establish an obligation to provide notice: *B-Mex v. Mexico*, *Chemtura v. Canada*, and *Bayindir v. Pakistan*.³³⁸ The first two of these

³³⁶ **RL-0001**, TPA, Art. 10.16.2.

³³⁷ **RL-0049**, *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2 (Blanco, Paulsson, Pryles), Order, 16 March 2006 ("**Western NIS (Order)**"), ¶ 5.

³³⁸ See Claimant's Reply (ICSID), ¶¶ 668–78.

cases are inapposite, because the issue there was whether notices of intent filed by the claimants had been adequate; thus, those tribunals were not called upon to assess the consequences of a *total* failure to file notice – which is the case here. In particular, in *B-Mex v. Mexico*, Mexico objected to the omission of the names of certain investors on the notice of intent.³³⁹ The tribunal considered the text of the NAFTA notice of intent requirement, and determined that it would not further the objectives of NAFTA to “bar[] access to that dispute resolution mechanism on the basis that the names of certain investors were omitted from the notice of intent.”³⁴⁰ In *Chemtura v. Canada*, the claimant had filed a notice of intent, but Canada complained that such notice had not adequately previewed all of the claimant’s claims.³⁴¹ However, the tribunal rejected this objection.³⁴² Thus, neither of these NAFTA cases supports Claimant’s proposition that a notice requirement is not mandatory.

183. The third case cited by Claimant is *Bayindir v. Pakistan*. In that case, the tribunal interpreted a notice of intent requirement and decided that it “should not be interpreted as a precondition to jurisdiction.”³⁴³ The *Bayindir* tribunal focused on the fact that “to require a formal notice would simply mean that *Bayindir*

³³⁹ See **CL-0155**, *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3 (Verhoosel, Born, Vinuesa), Partial Award, 19 July 2019 (“**B-Mex (Partial Award)**”), ¶ 76.

³⁴⁰ **CL-0155**, *B-Mex (Partial Award)*, ¶ 117.

³⁴¹ **CL-0017**, *Chemtura Corp. v. Government of Canada*, UNCITRAL (Kaufmann-Kohler, Brower, Crawford), Award, 2 August 2010 (“**Chemtura (Award)**”), ¶ 100 (“The Respondent, however, disputes the jurisdiction of the Tribunal to hear the claim for breach of Article 1103 of NAFTA. It argues, in essence, that the Claimant’s Memorial ‘advances an Article 1103 claim that cannot be traced in any way to its Notices of Intent and Arbitration . . .’) (internal citations omitted).

³⁴² See **CL-0017**, *Chemtura (Award)*, ¶ 103 (“It is true that the main argument made in such notices in connection with Article 1103 did not concern the potential import of a fair and equitable treatment provision from another treaty through the MFN clause in Article 1103. Yet, the facts mentioned therein are essentially the same as those subsequently referred to in the Claimant’s Memorial in support of the claim under Article 1103”).

³⁴³ **CL-0012**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 (Kaufmann-Kohler, Berman, Böckstiegel), Decision on Jurisdiction, 14 November 2005 (“**Bayindir (Decision on Jurisdiction)**”), ¶ 95.

would have to file a new request for arbitration.”³⁴⁴ In other words, the *Bayindir* tribunal focused on the practical implications of the requirement. In doing so, however, the *Bayindir* tribunal failed to address how the plain language of the applicable treaty (which stated that a party “shall” provide notice) could be read as non-mandatory. Instead, the *Bayindir* tribunal simply applied what it “consider[ed] that the real meaning” of the provision was.³⁴⁵ In other words, it simply substituted its own judgment for that of the treaty negotiators, on the basis that it did not consider the requirement practical or logical. In doing so, the tribunal exceeded its mandate.

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

d. Claimant failed to comply with the TPA waiver requirement

185. In its Counter-Memorial, Colombia also demonstrated that Claimant failed to comply with the waiver requirement set forth in TPA Article 10.18.2(b),³⁴⁶ which provides:

No claim may be submitted to arbitration under this Section unless . . . the notice of arbitration is accompanied, (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant’s written waiver, and (ii)

³⁴⁴ CL-0012, *Bayindir* (Decision on Jurisdiction), ¶ 100.

³⁴⁵ CL-0012, *Bayindir* (Decision on Jurisdiction), ¶ 96.

³⁴⁶ See Colombia’s Counter-Memorial (ICSID), § II.C.1.b.

for claims submitted to arbitration under Article 10.16.1(b), **by the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding** with respect to any measure alleged to constitute a breach referred to in Article 10.16.³⁴⁷ (Emphasis added)

186. Claimant does not deny that she failed to provide a written waiver of her right to initiate or continue other proceedings in relation to the measures of which she complains in this arbitration.

187. Instead, in her Reply, she makes a series of arguments about the meaning of the waiver requirement, and about its application in the present case. For the reasons set forth below, Claimant's arguments fail.

i. Contrary to Claimant's claims, the waiver requirement applies to Claimant's case

188. In an attempt to avoid the application of the waiver requirement to her case, Claimant advances several arguments concerning the waiver requirement under Article 10.18.2. Each of those arguments is discussed in turn below.

189. *First*, Claimant contends that the waiver requirement only "accrue[s]" when a parallel proceeding already exists.³⁴⁸ However, the plain text of the TPA contradicts this argument, as Article 10.18.2(b) does not include any language indicating that the waiver requirement is in any way conditional, or that it applies only if a parallel proceeding already exists. Indeed, the fact that the waiver requirement includes the word "initiate" (claimant must waive the right to "**initiate** or continue . . . any proceeding "³⁴⁹ (emphasis added)) unequivocally shows that the existence of a parallel proceeding is *not* a

³⁴⁷ RL-0001, TPA, Art. 10.18.2(b).

³⁴⁸ Claimant's Reply (ICSID), ¶ 511.

³⁴⁹ RL-0001, TPA, Art. 10.18.2(b).

condition to the submission of a written waiver. If it were, the text of Article 10.18.2 would have required waiver only of the right to “continue” other proceedings, and not of the right to “initiate” such proceedings. In any event, Claimant’s argument is rendered moot by the fact that, as explained in Colombia’s Counter-Memorial and discussed further below, Claimant has indeed failed to discontinue a parallel proceeding against the measures that she challenges in the present arbitration.

190. Claimant’s *second* argument concerning the waiver requirement is that such requirement only applies if the parallel proceeding is a domestic litigation involving the same claims as those submitted to arbitration.³⁵⁰ Specifically, Claimant contends that the requirement only applies when “the *same*, overlapping claims for the breach of the *same* provisions and protections under the US-Colombia TPA [are] brought before domestic means of dispute resolution, and before an international investment treaty arbitral tribunal”³⁵¹ (emphasis in original). In other words, according to Claimant, “the legal basis [of the parallel claims] must be the *same* and there must be an *imminent risk of double recovery*”³⁵² (emphasis in original). Claimant bases this conclusion on the alleged “operational objective” of Article 10.18.2(b).³⁵³ However, Claimant’s speculations on the treaty negotiator’s objective cannot override the plain text of the relevant treaty provision, and in any event Claimant’s theory suffers from at least the following four fatal flaws:

- a. The text of Article 10.18.2(b) does not limit the waiver to domestic proceedings only,³⁵⁴ but instead requires a claimant also to waive its

³⁵⁰ Claimant’s Reply (ICSID), ¶ 509.

³⁵¹ Claimant’s Reply (ICSID), ¶ 509.

³⁵² Claimant’s Reply (ICSID), ¶ 554.

³⁵³ Claimant’s Reply (ICSID), ¶ 509.

³⁵⁴ See Claimant’s Reply (ICSID), ¶ 516 (“[T]he waiver provision expressly concerns the filing of a (i) domestic proceeding, (ii) in the courts of the host-State”).

right to pursue “other dispute settlement procedures;” thus, the relevant treaty provision contradicts Claimant’s argument that the waiver requirement only “accrue[s]”³⁵⁵ if there is a *domestic* proceeding involving the same claims;³⁵⁶

- b. The text of Article 10.18.2(b) does not limit the waiver to “the *same*, overlapping claims for the breach of the *same* provisions and protections under the US-Colombia TPA,” but instead requires a claimant to waive its right to “initiate or continue . . . **any** proceeding **with respect to any measure** alleged to constitute a breach referred to in Article 10.16”³⁵⁷ (emphasis added);
- c. The text of Article 10.18.2(b) does not include any language to suggest that “there must be an imminent risk of double recovery”³⁵⁸ for the waiver requirement to apply; and
- d. Claimant’s musings about the “operational objective” of the waiver requirement are in any event unsupported, as they have no basis in the plain text of the relevant treaty provision or in any other authoritative interpretative source.

191. Claimant’s *third* argument concerning the waiver requirement is that the requirement can be satisfied at any time prior to the merits phase. Claimant asserts that “understandably Tribunals that have addressed this concern [(i.e., a waiver requirement)] have found that the requirement can be met *at any time* prior to the merits phase”³⁵⁹ (emphasis in original). However, Claimant provides no support for this assertion, other than an oblique reference to the

³⁵⁵ Claimant’s Reply (ICSID), ¶ 511.

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

³⁵⁷ **RL-0001**, TPA, Art. 10.18.2(b).

³⁵⁸ Claimant’s Reply (ICSID), ¶ 554.

³⁵⁹ Claimant’s Reply (ICSID), ¶ 517.

Thunderbird v. Mexico award,³⁶⁰ which does not support Claimant's argument. In *Thunderbird*, the claimant had filed a waiver with its statement of claim, rather than with its notice of arbitration, and the tribunal assessed whether such waiver was timely.³⁶¹ Given that a waiver had in fact been filed, and that there was no allegation of a parallel proceeding, the tribunal dismissed Mexico's objection that the waiver was deficient.³⁶² In this case, by contrast, (i) Claimant did not submit any waiver (whether in writing or otherwise); and (ii) Claimant *is* pursuing a parallel proceeding. Accordingly, the scenario in the present case is very different from that in *Thunderbird*, and the latter case is therefore inapposite.

ii. Claimant did not comply with the waiver requirement

192. In its Counter-Memorial, Colombia pointed out that Claimant had initiated a parallel proceeding against Colombia before the IACHR for the same measures that she is challenging in this arbitration.³⁶³ Claimant argues that the waiver requirement does not apply because the nature of the parallel proceeding before the IACHR is different from this arbitration.
193. Colombia explained in its Counter-Memorial that tribunals applying provisions similar to TPA Article 10.18.2(b) have determined that a waiver requirement entails two conditions: "(i) 'a 'form' requirement, whereby [a claimant] must in fact submit a waiver,'" and (ii) "a 'material' requirement, whereby [a claimant] must abide by such waiver by discontinuing" parallel proceedings before

³⁶⁰ Claimant's Reply (ICSID), ¶ 555.

³⁶¹ See **RL-0052**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL (van den Berg, Wälde, Ariosa), Arbitral Award, 26 January 2006 ("**International Thunderbird Gaming (Arbitral Award)**"), ¶ 116.

³⁶² See **RL-0052**, *International Thunderbird Gaming (Arbitral Award)*, ¶¶ 117-18.

³⁶³ See Colombia's Counter-Memorial (ICSID), ¶¶ 297-98.

proceeding with arbitration.³⁶⁴ It is undisputed that Claimant has not satisfied the “form requirement”³⁶⁵ because she has not submitted a waiver—as Claimant has expressly conceded.³⁶⁶

194. Claimant also fails to comply with the “material requirement”³⁶⁷ because she did not discontinue the parallel IACHR proceeding when she initiated the present ICSID arbitration. As Colombia explained in its Counter-Memorial,³⁶⁸ the IACHR proceeding falls within the scope of the waiver requirement because it is (i) a “dispute settlement procedure[];”³⁶⁹ (ii) “with respect to a[] measure alleged to constitute a breach” of the TPA.³⁷⁰

195. First, the parallel claims before the IACHR unquestionably constitute a “dispute settlement procedure[],” within the meaning of Article 10.18.2(b).³⁷¹ In her Reply, Claimant alleges that “Respondent is raising this defense [under the waiver requirement] on an ‘incorrect’ reading of the Inter-American Human Rights system.”³⁷² According to Claimant, the proceeding before the IACHR is “non-judicial” and therefore “political” in nature,³⁷³ and thus falls outside of the scope of TPA Article 10.18.2(b). However, the latter provision of the TPA does not distinguish between “political” and “judicial” (or administrative) proceedings. Rather, it refers to claims before “any administrative tribunal or

³⁶⁴ **RL-0054**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17 (van den Berg, Grigera Naón, Thomas), Award, 14 March 2011 (“**Commerce Group (Award)**”), ¶ 71 (quoting the respondent’s argument).

³⁶⁵ **RL-0054**, *Commerce Group* (Award), ¶ 71 (quoting the respondent’s argument).

³⁶⁶ See Claimant’s Reply (ICSID), ¶ 517 (“Claimant stands ready to file a waiver . . .”).

³⁶⁷ **RL-0054**, *Commerce Group* (Award), ¶ 71 (quoting the respondent’s argument).

³⁶⁸ Colombia’s Counter-Memorial (ICSID), ¶¶ 297–98.

³⁶⁹ **RL-0001**, TPA, Art. 10.18.2(b).

³⁷⁰ **RL-0001**, TPA, Art. 10.18.2(b).

³⁷¹ **RL-0001**, TPA, Art. 10.18.2(b).

³⁷² Claimant’s Reply (ICSID), ¶ 529.

³⁷³ Claimant’s Reply (ICSID), ¶ 528.

court under the law of any Party, **or any other dispute settlement procedures**”³⁷⁴ (emphasis added). The IACHR indisputably qualifies as a “dispute settlement procedure,” and therefore the TPA waiver provision applies squarely with respect to the IACHR proceeding.

196. The IACHR is a body established by the American Convention on Human Rights that is composed of independent experts. The American Convention defines as follows the tasks that must be undertaken by the Commission with respect to petitions filed by individuals alleging violations of the Convention by a Member State: (i) reviewing the admissibility of the petition; (ii) “examin[ing] the matter set forth in the petition or communication in order to verify the facts;” (iii) requesting the State concerned to provide information; (iv) if so requested, receiving written and oral statements from the disputing parties; (v) issuing a confidential report “setting forth the facts and stating its conclusions; (vi) if the matter is not settled, issuing an opinion and “prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation;” and (vii) submitting the dispute to the Inter-American Court of Human Rights.³⁷⁵ It is self-evident that the process delineated above is designed to settle disputes as to alleged human rights violations, and that it therefore qualifies as a “dispute settlement procedure[.]” Claimant cannot credibly deny that she filed an IACHR petition with the view to resolving a dispute about the alleged human rights violations.

197. In her Reply, Claimant also argues that the reports and opinions issued by the IACHR are not binding.³⁷⁶ That is irrelevant, as nowhere does the text of the TPA create a requirement that the “dispute settlement procedure[.]” be binding.

³⁷⁴ **RL-0001**, TPA, Art. 10.18.2(b).

³⁷⁵ **R-0235**, American Convention on Human Rights, 18 July 1978, Arts. 33–51.

³⁷⁶ See Claimant’s Reply (ICSID), ¶¶ 531, 545.

The IACHR dispute settlement procedure thus falls within the scope of Article 10.18.2(b) of the TPA.

198. An additional argument that Claimant advances—in an attempt to persuade that the waiver requirement does not apply with respect to the IACHR—is an argument concerning the Inter-American *Court* of Human Rights (as opposed to the IACHR, which is the Inter-American *Commission* of Human Rights). First, Claimant appears to concede that the Inter-American Court of Human Rights has “judicial functions” and thus would fall within the scope of Article 10.18.2(b).³⁷⁷ However, she implies that because her petition is not being adjudicated by the Inter-American Court (but rather by the IACHR), it does not fall within the scope of the waiver requirement.
199. Such argument is predicated on a faulty understanding of the Inter-American Human Rights System, and in particular (i) of the procedures for the filing and adjudication of claims, and (ii) of the respective spheres of competence of the Court and Commission in that system. The official guidance provided by the ICHR includes the following description:

Only the States parties to the American Convention who have accepted the Court’s contentious jurisdiction and the Commission may submit a case to the Inter-American Court. Individuals do not have direct recourse to the Inter-American Court; they **must first submit their petition to the Commission** and go through the procedure for cases before the Commission.³⁷⁸ (Emphasis added)

200. Thus, Claimant must first submit her claims to the Commission before such claims can reach the Court. The Inter-American Commission is therefore the necessary first step to achieving resolution of her human rights dispute, and it

³⁷⁷ See Claimant’s Reply (ICSID), ¶ 532 (“The only judicial organ within the Inter-American Human Rights Organization is the Inter-American Court”).

³⁷⁸ **R-0234**, *Petition and Case System: Informational Brochure*, Inter-American Commission on Human Rights, 2010, § 13.

is disingenuous for Claimant to claim that the IACHR (as opposed to the Court) does not qualify as a “dispute settlement procedure[]” under the TPA.

201. Second, Claimant’s argument concerning the waiver requirement fails because the IACHR proceeding relates to the same measures at issue in the present ICSID proceeding. In her Reply, Claimant insists that the IACHR proceeding is not relevant to the waiver requirement because she is not claiming any breach of the TPA before the IACHR.³⁷⁹ On this much the Parties agree: the IACHR does not adjudicate claims of breach of investment treaties. But TPA Article 10.18.2(b) is not limited only to investment claims, as it refers more generally to proceedings “with respect to any **measure** alleged to constitute a breach”³⁸⁰ (emphasis added). In other words, a claimant does not need to invoke the same legal rules or assert exactly the same legal claims for the other proceeding to fall within the scope of the TPA waiver requirement.
202. Importantly, Claimant does not deny that her IACHR complaint is based on the same *measures* of which she complains before this Tribunal. Further, the below chart from Colombia’s Counter-Memorial illustrates the direct substantive overlap between the two proceedings:

³⁷⁹ See Claimant’s Reply (ICSID), ¶ 542–43 (“The present arbitration is being brought for the breach of a number of obligations under an international agreement for trade and the protection of foreign investors and foreign investments in the Colombian Financial Services sector. The proceeding before the IACHR was filed based on the alleged breach of the American Convention on Human Rights. The subject matter and the causes of action could not be more distinct.”).

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

Measures about which Claimant Complains before this Tribunal	Measures about which Claimant Complains before the IACHR
The 1998 Capitalization Order ³⁸¹	The 1998 Capitalization Order ³⁸²
The 1998 Value Reduction Order ³⁸³	The 1998 Value Reduction Order ³⁸⁴
The 2011 Constitutional Court Judgment ³⁸⁵	The 2011 Constitutional Court Judgment ³⁸⁶
The 2014 Confirmatory Order ³⁸⁷	The 2014 Confirmatory Order ³⁸⁸

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

204. For the reasons articulated above, Claimant’s attempt to excuse her failure to satisfy the waiver requirement under TPA Article 10.18.2(b) is futile. Her claims must therefore be dismissed for failure to comply with that requirement.

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

205. Claimant also argues that Colombia’s objections based on the three TPA conditions of consent discussed above are “abusive”³⁸⁹ and constitute an

³⁸¹ See Claimant’s Memorial (ICSID), p. 11, ¶¶ 5–22.

³⁸² See **Ex. R-0118**, Petition to the Inter-American Commission for Human Rights, 6 June 2012, p. 7.

³⁸³ See Claimant’s Memorial (ICSID), p. 11, ¶¶ 5–22.

³⁸⁴ See **Ex. R-0118**, Petition to the Inter-American Commission for Human Rights, 6 June 2012, p. 7.

³⁸⁵ See Claimant’s Memorial (ICSID), p. 13, ¶¶ 42–77.

³⁸⁶ See **Ex. R-0118**, Petition to the Inter-American Commission for Human Rights, 6 June 2012, p. 1.

³⁸⁷ See Claimant’s Memorial (ICSID), ¶¶ 1, 78–101.

³⁸⁸ See **Ex. R-0119**, Supplementary Petition to the Inter-American Commission for Human Rights, 20 July 2016, p. 12.

³⁸⁹ Claimant’s Reply (ICSID), ¶ 579.

“attempt to negate Claimant’s access to justice.”³⁹⁰ In its Counter-Memorial, and again in the preceding sections, Colombia has articulated the well-founded legal and factual bases for its objections. Therefore, there is no basis whatsoever for Claimant’s assertion that Colombia’s exercise of its right to raise jurisdictional objections on the basis of consent conditions is “abusive.”

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

206. Claimant has asserted fair and equitable treatment claims in this arbitration.³⁹¹ In the following sections, Colombia will demonstrate that Claimant cannot submit a fair and equitable treatment claim under Chapter 12, for two reasons: (i) because Chapter 12 neither includes directly nor incorporates by reference any fair and equitable treatment obligation; and (ii) because Claimant cannot import such an obligation from other treaties using the Chapter 12 MFN Clause.

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

207. The claims advanced in this arbitration by Claimant are being asserted under TPA Chapter 12 . However, Chapter 12 does not include a fair and equitable treatment provision.³⁹² For that reason, Claimant has invoked the fair and equitable treatment provision of TPA Chapter 10 (i.e., Article 10.5).³⁹³ However, that is not impermissible because Article 10.5 is not incorporated by reference in Chapter 12. As explained by Colombia in its Counter-Memorial,³⁹⁴ Article

³⁹⁰ Claimant’s Reply (ICSID), ¶ 580.

³⁹¹ See Claimant’s Memorial (ICSID), ¶¶ 294, 303–07.

³⁹² See generally **RL-0001**, TPA, Ch. 12.

³⁹³ See Claimant’s Memorial (ICSID), ¶ 294 (“Colombia was under an obligation to treat US investors and investments in compliance with the customary international law minimum standard of treatment. That obligation arises . . . through the express provision under Article 10.5 of the TPA . . .”).

³⁹⁴ See Colombia’s Counter-Memorial (ICSID), ¶¶ 309–11.

12.1 (which defines the “Scope and Coverage” of Chapter 12) provides an exhaustive list of the provisions from other Chapters of the TPA that are incorporated by reference into Chapter 12:

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

(a) Articles 10.7 (**Expropriation and Compensation**), 10.8 (Transfers), 10.11 (**Investment and Environment**), 10.12 (Denial of Benefits), 10.14 (**Special Formalities and Information Requirements**), and 11.11 (**Denial of Benefits**) are hereby incorporated into and made a part of this Chapter.³⁹⁵ (Emphasis added)

208. Accordingly, Article 12.1.2(a) identifies only the four substantive protections (highlighted in bold type above) that are incorporated by reference into Chapter 12 from Chapter 10. The drafting of this clause makes it clear that such list of four protections is an exhaustive one. Because Article 10.5 (fair and equitable treatment) is not included in the list, that provision is not incorporated into Chapter 12. This means that Claimant cannot invoke Article 10.5 as a basis to assert fair and equitable claims in the present arbitration.

209. In her Reply, Claimant concedes that pursuant to Article 12.1.2(a), “only four provisions from Chapter 10 are incorporated into Chapter 12.”³⁹⁶ However, Claimant contradicts herself when, elsewhere in her Reply, she asserts that “[f]air and [e]quitable [t]reatment is a [c]ore Chapter 12 [o]bligation,”³⁹⁷ and that “Chapter 12 is laced with protection standards akin to *both* the customary

³⁹⁵ RL-0001, TPA, Art. 12.1.2(a).

³⁹⁶ Claimant’s Reply (ICSID), ¶ 158.

³⁹⁷ Claimant’s Reply (ICSID), p. 280.

international law and the convention international law iterations of the Fair and Equitable Treatment ('FET') protection standard"³⁹⁸ (emphasis in original).

210. Claimant's position thus is not clear at all, but in any event the text of the TPA is abundantly clear: Chapter 12 does not include a free-standing fair and equitable treatment obligation, and it does not incorporate by reference the fair and equitable treatment obligation established in Article 10.5. Claimant therefore cannot submit any claim under Chapter 12 for violation of the fair and equitable treatment standard.

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

211. Because Chapter 12 does not impose any fair and equitable treatment obligation, Claimant seeks to use the Chapter 12 MFN Clause to import into the TPA the fair and equitable treatment provision of the Colombia-Switzerland BIT.

212. As discussed in Colombia's Counter-Memorial, a claimant cannot import into a treaty ("primary treaty") an entirely different substantive protection contained in some other treaty, in circumstances in which no similar protection exists in the primary treaty.³⁹⁹ Claimant therefore cannot import a fair and equitable treatment provision using the MFN clause.

³⁹⁸ Claimant's Reply (ICSID), ¶ 458.

³⁹⁹ See Colombia's Counter-Memorial (ICSID), ¶¶ 374-79. See also **RL-0059**, *Ickale Insaat Ltd. Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24 (Heiskanen, Lamm, Sands), Award, 8 March 2016 ("**Ickale (Award)**"), ¶ 332 ("The Claimant's argument that it is entitled to import substantive standards of protection not included in the Treaty from other investment treaties concluded by Turkmenistan, and to rely on such standards of protection in the present arbitration, must be rejected."); **RL-0060**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01 (Buergenthal, Alvarez, Hossain), Award, 21 July 2017, ¶¶ 884-85; **RL-0056**, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31 (Lowe, Brower, Thomas), Decision on Jurisdiction, 24 October 2011 ("**Hochtief (Decision on Jurisdiction)**"), ¶ 79.

213. In her Reply, Claimant attempts to get around the absence of an FET protection in Chapter 12 by advancing a new and creative argument. Claimant argues that she is not using the Chapter 12 MFN Clause to import a right that does not exist in Chapter 12, because Chapter 12 includes something like a fair and equitable treatment obligation. However, such argument is fatally flawed.
214. Claimant's new argument is predicated on the fanciful notion that because other protections in Chapter 12 have what Claimant considers to be "FET-like" features, it must be deemed that Chapter 12 does in fact contain a fair and equitable treatment clause: "Chapter 12 is laced with protection standards akin to *both* the customary international law and the conventional international law iterations of the Fair and Equitable Treatment ('FET') protection standard."⁴⁰⁰ Specifically, Claimant points to Articles 12.4 (Market Access for Financial Institutions), 12.5 (CrossBorder Trade), 12.10(4) (Exceptions), and 12.11 (Transparency and Administration of Certain Measures) as provisions that assertedly "command treatment conceptually indistinguishable from FET."⁴⁰¹ Claimant concludes from this that "these provisions demonstrate[] that they supply Financial Services investors with rights that directly comport with the technical workings and content of FET."⁴⁰² Hence, Claimant says, "[t]he importation of FET is hardly the incorporation of non-existing rights that would violate the Parties' consent."⁴⁰³
215. Aside from strained and contorted, Claimant's new argument fails for the simple reason that it is inconsistent with elemental principles of treaty interpretation. A treaty either does or does not include within its text a given substantive protection. Chapter 12 of the TPA does not include a fair and

⁴⁰⁰ Claimant's Reply (ICSID), ¶ 458.

⁴⁰¹ Claimant's Reply (ICSID), ¶ 459.

⁴⁰² Claimant's Reply (ICSID), ¶ 460.

⁴⁰³ Claimant's Reply (ICSID), ¶ 463.

equitable treatment provision. Claimant cannot simply posit the existence of a non-existent treaty provision by pointing to other provisions of the same treaty which, in Claimant's imagination, share certain features or qualities with the non-existent provision. The fact that Chapter 12 contains protections that Claimant considers in some way similar or analogous in some way to fair and equitable treatment does not suffice as a basis to conclude that Chapter 12 in fact contains a fair and equitable treatment clause.

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

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

217. The fact that Claimant is barred from asserting fair and equitable treatment claims because there is no fair and equitable treatment clause in Chapter 12 is confirmed by the limited scope of consent to arbitration delineated in TPA Article 12.1.2(b).⁴⁰⁴

218. As discussed in more detail below, Article 12.1.2(b) does not extend to fair and equitable treatment claims, since such provision provides consent to the arbitration of claims only for the violation of certain specified treaty protections, which do not include fair and equitable treatment.

⁴⁰⁴ **RL-0001**, TPA, Art. 12.1.2(b) ("Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements), as incorporated into this Chapter.").

219. Such protections also do not include national treatment. Therefore, aside from confirming that Claimant cannot assert any FET claims, Article 12.1.2(b) serves to bar Claimant’s claims under Article 12.2 (“Chapter 12 National Treatment”) as well.⁴⁰⁵
220. In its Counter-Memorial, Colombia had already demonstrated that Claimant’s fair and equitable treatment and national treatment claims fall outside of the scope of Colombia’s consent under TPA Chapter 12. In her Reply, Claimant responds by arguing that Claimant is free to submit to arbitration claims for violation of *any* provision of TPA Chapter 12.⁴⁰⁶
221. In the following sections, Colombia will explain why Claimant is not entitled to submit any fair and equitable treatment or national treatment claims under Chapter 12. Specifically, that is so for the following reasons:
- a. The exhaustive list of protections for which Colombia provided consent to arbitration in TPA Article 12.1.2(b) does not include fair and equitable treatment or national treatment (**Section 3.a**); and
 - b. Claimant cannot create consent to arbitration of such claims by means of the Chapter 12 MFN Clause (**Section 3.b**).
 - a. Article 12.1.2(b) excludes fair and equitable treatment and national treatment claims from the scope of Colombia’s consent to arbitration under Chapter 12
222. As discussed above, Claimant has submitted her claims under Chapter 12, but such chapter does not include its own investor-State dispute settlement mechanism. Instead, Article 12.1.2(b) imports the investor-State dispute

⁴⁰⁵ See Claimant’s Memorial (ICSID), ¶¶ 294, 303–07.

⁴⁰⁶ See Claimant’s Reply (ICSID), ¶ 138 (“Art. 12.1.2(b) renders enforceable all substantive protections in Chapter 12, including Art. 12.2 (National Treatment) . . . Hence, it is here established that the Parties consented to submitting to investor-State arbitration the treatment protection standards contained in Chapter 12.”). See also *id.*, p. 113, heading 1.

settlement mechanism from Chapter 10, providing consent to arbitration *for a limited category of claims*:

Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter **solely for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and Information Requirements)**, as incorporated into this Chapter.⁴⁰⁷ (Emphasis added)

223. Accordingly, Colombia provided consent to arbitration under Chapter 12 only of claims for the violation of four specific protections contained in Chapter 10 (which are the four protections highlighted above in bold type). Claimant concedes that Article 12.1.2(b) “limits the number of substantive protection standards that are imported from Chapter 10 to Chapter 12 for which the Chapter 10 dispute resolution procedural rights are available.”⁴⁰⁸
224. As with the clause relating to the substantive protections incorporated by reference into Chapter 12 from Chapter 10 (i.e., Article 12.1.2(a), which was discussed above), the drafting of the clause quoted above ((Article 12.1.2(b)) renders it clear that the list contained therein is exhaustive. Importantly for present purposes, such list does **not** include either of the following two protections from Chapter 10: the fair and equitable treatment obligation (Article 10.5); or the national treatment obligation (Article 12.2). Consequently, Claimant cannot submit claims under Chapter 12 for asserted violations of fair and equitable treatment or national treatment.
225. The Parties also disagree as to the broader import of Article 12.1.2(b). In Claimant’s view, a claimant can submit to arbitration under Chapter 12 a claim not only under the Chapter 10 provisions that are specifically identified and

⁴⁰⁷ **RL-0001**, TPA Art. 12.1.2(b).

⁴⁰⁸ Claimant’s Reply (ICSID), ¶ 163.

incorporated by reference in Article 12.1.2(b),⁴⁰⁹ *but also* a claim under any of the substantive protections set forth in Chapter 12.⁴¹⁰

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

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

227. Claimant devotes almost the entirety of her analysis of the text and effects of Article 12.1.2(b) to an interpretation of the analogous (and nearly identical) provision in NAFTA, which is Article 1401(2). That provision states: "Articles 1115 through 1138 [(i.e., the dispute resolution provisions of Chapter 11 (the investment chapter)] are hereby incorporated into and made a part of this Chapter solely for breaches by a Party of Articles 1109 through 1111, 1113 and 1114, as incorporated into this Chapter."⁴¹¹

⁴⁰⁹ See Claimant's Reply (ICSID), ¶ 163.

⁴¹⁰ See Claimant's Reply (ICSID), ¶ 164 ("Article 12.1.2(b) does not contain any language referencing a limitation on Chapter 12 substantive protection standards. This Article expressly limits only the Chapter 10 (Investment) provisions imported into Chapter 12 and enforceable pursuant to the Chapter 10 dispute mechanism that were not present in Chapter 12.").

⁴¹¹ CLA-0104, NAFTA, Art. 1401(2).

228. The only investment tribunal that has interpreted NAFTA Article 1401(2) so far was that in *Fireman's Fund v. Mexico*.⁴¹² There, the tribunal adopted an interpretation that is consistent with Colombia's position in this arbitration—and directly demonstrates that Claimant's interpretation of Article 12.1.2(b) is mistaken. Notably, the *Fireman's Fund* tribunal based its interpretation in part on the express views of Mexico and Canada (i.e., two of the three States Parties to NAFTA).⁴¹³
229. Claimant and Colombia agree that the structure and text of the relevant NAFTA provisions are similar to those of the TPA, insofar as:
- a. NAFTA Chapter 11 governs investments and includes an investor-State dispute settlement mechanism.⁴¹⁴
 - b. NAFTA Chapter 14, which governs financial services, does not include its own investor-State dispute settlement mechanism.⁴¹⁵
 - c. NAFTA Article 1401 (the "Scope and Coverage" provision of Chapter 14) incorporates by reference certain substantive protections from the investment chapter (Chapter 11).⁴¹⁶
 - d. NAFTA Article 1401 also incorporates by reference the investor-State dispute settlement mechanism from the investment chapter (Chapter 11), but "solely" for a limited set of claims.⁴¹⁷ Specifically, Article 1401(2) provides: "Articles 1115 through 1138 are hereby incorporated into and

⁴¹² See generally **RL-0101**, *Fireman's Fund* (Decision).

⁴¹³ See generally **RL-0102**, *Fireman's Fund* (Mexico's Submission); **RL-0103**, *Fireman's Fund* (Canada's Submission).

⁴¹⁴ See generally **CLA-0104**, NAFTA, Ch. 11.

⁴¹⁵ See generally **CLA-0104**, NAFTA, Ch. 14.

⁴¹⁶ See **CLA-0104**, NAFTA, Art. 1401(2) ("Articles 1109 through 1111, 1113, 1114 and 1211 are hereby incorporated into and made a part of this Chapter.").

⁴¹⁷ See **CLA-0104**, NAFTA, Art. 1401(2).

made a part of this Chapter **solely for breaches** by a Party of **Articles 1109 through 1111, 1113 and 1114**, as incorporated into this Chapter”⁴¹⁸ (emphasis added).

230. The structure and relevant provisions of the TPA are thus nearly identical to those of NAFTA:
- a. TPA Chapter 10 governs investments and includes an investor-State dispute settlement mechanism.⁴¹⁹
 - b. TPA Chapter 12, which governs financial services, does not include its own investor-State dispute settlement mechanism.⁴²⁰
 - c. TPA Article 12.1 (the “Scope and Coverage” provision of Chapter 12) incorporates by reference certain substantive protections from the investment chapter (Chapter 10).⁴²¹
 - d. TPA Article 12.1 also incorporates by reference the investor-State dispute settlement mechanism from the investment chapter (Chapter 10), but “solely” for a limited set of claims.⁴²² Specifically, Article 12.1.2(b) provides: “Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter **solely for claims** that a Party has breached Articles 10.7 (**Expropriation and Compensation**), 10.8 (**Transfers**), 10.12 (**Denial of Benefits**), or

⁴¹⁸ **CLA-0104**, NAFTA, Art. 1401(2).

⁴¹⁹ See generally **RL-0001**, TPA, Ch. 10.

⁴²⁰ See generally **RL-0001**, TPA, Ch. 12.

⁴²¹ See **RL-0001**, TPA, Art. 12.1.2(a) (“Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.11 (Investment and Environment), 10.12 (Denial of Benefits), 10.14 (Special Formalities and Information Requirements), and 11.11 (Denial of Benefits) are hereby incorporated into and made a part of this Chapter.”).

⁴²² See **RL-0001**, TPA, Art. 12.1.2(b).

10.14 (**Special Formalities and Information Requirements**), as incorporated into this Chapter.”⁴²³ (emphasis added).

231. The *Fireman’s Fund v. Mexico* tribunal interpreted NAFTA in exactly the same manner that Colombia is interpreting the TPA herein. In *Fireman’s Fund*, the claimant had asserted claims under Chapter 11. The respondent, Mexico, had argued that the claimant should have brought its claims under Chapter 14, because the claimant had invested in a financial institution.⁴²⁴ The tribunal therefore had to determine: (i) whether the claimant’s claims were properly governed by Chapter 14; and (ii) whether such claims fell within the scope of the tribunal’s jurisdiction under Chapter 14.⁴²⁵
232. The latter legal issue is the same that arises in the present case. In *Fireman’s Fund*, the claimant had submitted claims alleging violations of the fair and equitable treatment and national treatment obligations. The tribunal considered whether these claims fell within the scope of the States Parties’ consent under NAFTA Chapter 14.
233. The tribunal was aided in its analysis by the written submissions of Mexico and Canada (the latter as a non-disputing party under NAFTA Article 1138).⁴²⁶ Mexico and Canada agreed that the fair and equitable treatment obligation fell outside of the scope of consent to arbitration under Chapter 14.
234. Mexico, relying on the text of Article 1401(2) (the “Scope and Coverage” provision), argued the following:

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

⁴²³ **RL-0001**, TPA, Art. 12.1.2(b).

⁴²⁴ See **RLA-0101**, *Fireman’s Fund* (Decision), ¶ 78.

⁴²⁵ See **RLA-0101**, *Fireman’s Fund* (Decision), ¶¶ 67, 79.

⁴²⁶ The United States also filed a written submission, but it did not address the subject of the scope of consent to arbitration under Chapter 14.

the above. Article 1401(2) expressly incorporates the entire section B of Chapter XI (the provisions that establish and regulate the investor-State procedure), but with the important reservation that these provisions “are hereby incorporated . . . solely for breaches by a Party of Articles 1109 through 1111, 1113 and 1114, as incorporated into” Chapter XIV. In other words, **an investor in a financial institution can only resort to investor-State dispute settlement procedure with respect to those provisions of Chapter XI that have been expressly incorporated into Chapter XIV**, and may not invoke any of the remaining obligations from Chapter XI or Chapter XIV in such proceeding.⁴²⁷ (Emphasis added)

⁴²⁷ **RL-0102**, *Fireman's Fund* (Mexico's Submission), ¶ 24(e) (Spanish Original: “[S]i se trata de una reclamación relativa a una inversión en una institución financiera, rige únicamente el capítulo XIV, acorde con lo señalado. El artículo 1401(2) incorpora expresamente toda la sección B del capítulo XI (las disposiciones que establecen y regulan el procedimiento inversionista-Estado), pero con la importante reserva de que esas disposiciones “se incorporan... sólo para el caso de que una Parte incumpla los artículos 1109 a 1111, 1113 y 1114, en los términos de su incorporación” al capítulo XIV. En otras palabras, un inversionista en una institución financiera sólo puede recurrir al procedimiento de solución de controversias inversionista-Estado respecto de aquellas disposiciones del capítulo XI que han sido expresamente incorporadas al capítulo XIV, y no puede invocar ninguna de las obligaciones restantes del capítulo XI o del capítulo XIV en tal procedimiento.”). See also *id.* ¶ 13 (English Translation: “In the case of measures relating to investors and their investments in financial institutions in Mexican territory, Mexico consented to submit itself to investor-State arbitration only in cases where it is alleged that Mexico has violated Articles 1109 through 1111, 1113 and 1114. Mexico did not consent, and does not consent, to the submission to investor-State arbitration of claims that deal with measures relating to an investment in a financial institution, based on alleged violations of obligations that are not incorporated into Chapter XIV of NAFTA through Article 1401(2), such as Articles 1102 and 1105. Nor did it consent, and does not consent, to submit itself to arbitration in accordance with the provisions of Articles 1115 to 1138, incorporated in Chapter XIV, for claims based on alleged violations of Article 1405, since recourse to the investor-State mechanism is explicitly excluded.”) (Spanish Original: “[T]ratándose de medidas relativas a inversionistas y sus inversiones en instituciones financieras en territorio mexicano, México consintió en someterse al arbitraje inversionista-Estado sólo en los casos en que se alegue que México ha violado los artículos 1109 al 1111, 1113 y 1114. México no consintió, y no consiente, en someter al arbitraje inversionista-Estado las reclamaciones que versen sobre medidas relativas a una inversión en una institución financiera, sustentadas en supuestas violaciones a preceptos que no están incorporados en el capítulo XIV del TLCAN a través del artículo 1401(2), como es el caso de los artículos 1102 y 1105. Tampoco consintió, y no consiente, en someterse a arbitraje conforme a las disposiciones de los artículos 1115 al 1138, incorporadas en el capítulo XIV, respecto de reclamaciones sustentadas en supuestas violaciones al artículo 1405, puesto que el recurso al mecanismo inversionista-Estado está explícitamente excluido.”).

235. Relying on the text of NAFTA Article 1402(2), Mexico explained that “[r]egarding investments in the financial sector, Mexico has only consented to submit itself to investor-State arbitration on a limited basis.”⁴²⁸ Thus, in Mexico’s view, the claimant’s fair and equitable treatment and national treatment claims fell outside of the “limited” scope of consent to investor-State arbitration under Chapter 14.
236. Canada aligned with Mexico in its interpretation of NAFTA Article 1402(2), explaining in its non-disputing party submission that the NAFTA Parties had intended “to create a separate regime to govern measures relating to financial services,”⁴²⁹ and that “a comparison of the protection afforded to investors under Chapters Eleven and Fourteen is irrelevant.”⁴³⁰ Instead, Canada recalled that “the issues in dispute are to be decided in accordance with the express provisions of the NAFTA.”⁴³¹ Canada emphasized that the express provision of Chapter 14 limits the scope of consent to arbitration:

The NAFTA Parties incorporated into Chapter Fourteen the investor-state dispute settlement provisions of Section B of Chapter Eleven (Articles 1116 through 1138) solely for breaches of Articles 1109 through 1111, 1113 and 1114, as incorporated into Chapter Fourteen by Article 1401(2).⁴³² (Emphasis in original)

237. The *Fireman’s Fund* tribunal agreed with Mexico’s and Canada’s interpretation of the NAFTA equivalent of Article 12.1.2(b) of the TPA. Specifically, the tribunal held that Article 1401(2) lists the only substantive obligations that can

⁴²⁸ **RL-0102**, *Fireman’s Fund* (Mexico’s Submission), ¶ 18 (Spanish Original: “*En materia de inversiones en el sector financiero, México sólo ha consentido en someterse al arbitraje inversionista-Estado en forma limitada*”).

⁴²⁹ **RL-0103**, *Fireman’s Fund* (Canada’s Submission), ¶ 10.

⁴³⁰ **RL-0103**, *Fireman’s Fund* (Canada’s Submission), ¶ 17.

⁴³¹ **RL-0103**, *Fireman’s Fund* (Canada’s Submission), ¶ 17.

⁴³² **RL-0103**, *Fireman’s Fund* (Canada’s Submission), ¶ 16.

be submitted to investor-State arbitration under Chapter 14.⁴³³ The tribunal accordingly held that it “lack[ed] jurisdiction” over the claimant’s fair and equitable treatment and national treatment claims, because such claims were not listed in Article 1401(2).⁴³⁴

238. Given the similarities in the treaty text of NAFTA Article 1401 and TPA Article 12.1.2, respectively, as well as their analogous design and structure, the interpretation of such provisions according to the VCLT rules of treaty interpretation (discussed in the following section) should be the same. Claimant appears to concur in that regard.⁴³⁵ The reasoning and conclusion of the *Fireman’s Fund* tribunal, therefore, offer useful guidance for the present case: a claimant can submit to arbitration under Chapter 12 of the TPA only claims that are based on substantive provisions that are expressly listed in TPA Article 12.1.2(b). Since such list does not include fair and equitable treatment or national treatment provisions, claims based on those protections cannot be submitted to investor-State arbitration under Chapter 12.

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

239. The Parties agree that TPA Article 12.1.2(b) must be interpreted in accordance with the customary principles of treaty interpretation set forth in Articles 31 and

⁴³³ See **RL-0101**, *Fireman’s Fund* (Decision), ¶ 66 (rejecting the claimant’s claim under Article 1405 because “Article 1405 is not included among the provisions to which the procedural provisions of Chapter Eleven apply (Articles 1115-1138)”).

⁴³⁴ **RL-0101**, *Fireman’s Fund* (Decision), ¶ 66 (“Several provisions of Chapter Eleven are incorporated into Chapter Fourteen, including, as here relevant, Article 1110 concerning Expropriation and Compensation, and Articles 1115-1138 concerning the procedural aspects of dispute resolution by a tribunal such as the present one. Article 1102 on National Treatment and Article 1105 on Minimum Standard of Treatment are not incorporated into Chapter Fourteen. Accordingly, if the measures alleged to have been taken on behalf of the Government of Mexico are covered by Chapter Fourteen, this Tribunal lacks jurisdiction of the claims under Articles 1102 and 1105.”).

⁴³⁵ See, e.g., Claimant’s Reply (ICSID), ¶ 270 (relying on NAFTA to interpret the TPA).

32 of the VCLT.⁴³⁶ Such principles provide that a treaty must be interpreted (a) in accordance with the plain meaning to be given to its terms, (b) in their context, and (c) in the light of the treaty’s object and purpose.⁴³⁷ In the event that the meaning remains ambiguous or unreasonable, the preparatory works may be consulted.⁴³⁸ In the sections that follow, Colombia will apply each of these principles of interpretation to Article 12.1.2(b), and will also rebut the arguments related to these principles that Claimant scattered throughout her Reply.

240. As noted above, Claimant devoted much time and energy to an interpretation of NAFTA—as did Claimant’s experts.⁴³⁹ In light of that, although the subsections that follow immediately below address those of Claimant’s arguments that were specific to the TPA, Colombia will subsequently address Claimant’s arguments concerning NAFTA.

1) The ordinary meaning of Article 12.1.2(b)

241. The “starting point of all treaty interpretation is the elucidation of the meaning of the text.”⁴⁴⁰ Such elucidation in turn is achieved principally by reference to the plain text of the relevant treaty, construing its terms in their ordinary meaning.⁴⁴¹

⁴³⁶ See Claimant’s Reply (ICSID), ¶ 278.

⁴³⁷ **RL-0084**, VCLT, Art. 31(1).

⁴³⁸ **RL-0084**, VCLT, Art. 32.

⁴³⁹ See generally First and Second Wethington Reports.

⁴⁴⁰ **CLA-0088**, *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14 (Narimann, Bernárdez, Bernardini), Award, 8 December 2008 (“**Wintershall (Award)**”), ¶ 78. See also **CL-0186**, *Methanex Corporation v. United States of America*, UNCITRAL (Rowley, Reisman, Veeder), Final Award, 3 August 2005, Part II, Ch. B, ¶ 22 (“[T]he approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation.”).

⁴⁴¹ See **RL-0084**, VCLT, Art. 31(1).

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

Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter **solely for claims that a Party has breached** Articles 10.7 (**Expropriation and Compensation**), 10.8 (Transfers), 10.12 (**Denial of Benefits**), or 10.14 (**Special Formalities and Information Requirements**), as incorporated into this Chapter.⁴⁴² (Emphasis added)

243. As Colombia noted in its Counter-Memorial, the word “solely” limits the type of claims that can be submitted to investor-State dispute settlement under Chapter 12.⁴⁴³ The result is that a financial services investor can only submit to arbitration claims that the State has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), and/or 10.14 (Special Formalities and Information Requirements). Conversely, a financial services investor *cannot* submit to arbitration claims that the State has breached any other type of substantive protection (such as fair and equitable treatment, or national treatment).

244. As explained in the previous section, this analysis of the ordinary meaning of the terms of Article 12.1.2(b) has been confirmed by the *Fireman’s Fund* tribunal.⁴⁴⁴ Notably, Claimant did not mention the *Fireman’s Fund* decision, either in her Memorial or in her Reply.

245. Another tribunal that gave effect to a provision limiting the States’ consent to arbitration to certain types of claims was that in *Telenor v. Hungary*. Article XI of the Norway-Hungary BIT, which was the relevant treaty in that case, provided:

⁴⁴² **RL-0001**, TPA, Art. 12.1.2(b).

⁴⁴³ See Colombia’s Counter-Memorial (ICSID), ¶ 305.

⁴⁴⁴ See **RL-0101**, *Fireman’s Fund* (Decision), ¶ 66.

1. This Article shall apply to any legal disputes between an Investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Article V and VI of the present Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article VI of the present Agreement or concerning the consequences of the non-implementation or of the incorrect implementation of Article VII of the present agreement.⁴⁴⁵

246. The *Telenor* tribunal held in no uncertain terms that “in article XI of their BIT[,] Hungary and Norway have made a deliberate choice to limit arbitration to the categories specified in that Article and have eschewed the wide form of dispute resolution clause adopted in many of their other BITs.”⁴⁴⁶ On that basis, and stressing that the scope of the relevant dispute resolution clause was limited to expropriation claims, the *Telenor* tribunal dismissed the claimant’s fair and equitable claims.⁴⁴⁷ Accordingly, it reached a similar conclusion to that espoused herein by Colombia with respect to Article 12.1.2(b) of the TPA.
247. Notwithstanding the plain meaning of Article 12.1.2(b), and the relevant case law discussed above, Claimant insists that she can indeed submit claims to arbitration even for violations of substantive protections that are not listed in Article 12.1.2(b). Claimant concedes that Article 12.1.2(b) limits the Chapter 10 claims that can be submitted to arbitration,⁴⁴⁸ but argues that Article 12.1.2(b) does not apply to the rest of Chapter 12, and therefore does not prevent her from forcing arbitration of claimed violations of other substantive protections

⁴⁴⁵ CL-0081, *Telenor* (Award), ¶ 25.

⁴⁴⁶ CL-0081, *Telenor* (Award), ¶ 97. *See also id.*, ¶ 81 (discussing “the Tribunal’s jurisdiction, which is limited by Article XI to expropriation claims”).

⁴⁴⁷ *See* CL-0081, *Telenor* (Award), ¶ 81.

⁴⁴⁸ Claimant’s Reply (ICSID), ¶ 163 (“Article 12.1.2(b) limits the number of substantive protection standards that are imported from Chapter 10 to Chapter 12 for which the Chapter 10 dispute resolution procedural rights are available.”).

contained in Chapter 12.⁴⁴⁹ Thus, Claimant posits that “Article 12.1.2(b) supplements and does not restrict” the set of claims under Chapter 12 that can be submitted to arbitration.⁴⁵⁰ In other words, Claimant contends that a claimant can submit to arbitration under Chapter 12 claims not only for breach of the protections set forth in Articles 10.7, 10.8, 10.12, or 10.14 (which are the ones expressly identified in the Article 12.1.2(b) list), *but in addition* for breach of any of the substantive provisions contained in Chapter 12 itself.⁴⁵¹ Colombia agrees with the former prong, but not the latter.

248. Claimant’s proposed interpretation fails for at least three reasons. First, Claimant’s interpretation runs counter to the plain meaning of Article 12.1.2(b). As discussed above, Article 12.1.2(b) incorporates the investor-State dispute mechanism of Chapter 10 “solely” for four (specifically identified) types of claims.⁴⁵² Accordingly, the list set forth in Article 12.1.2(b) is an exhaustive one. In arguing that such provision merely “supplements and does not restrict” the types of claims that can be submitted to arbitration,⁴⁵³ Claimant is depriving the word “solely” of any meaning.⁴⁵⁴

⁴⁴⁹ See Claimant’s Reply (ICSID), ¶ 163 (“Article 12.1.2(b) does not provide that Financial Services investors cannot enforce Chapter 12 substantive rights.”), ¶ 285 (“Claimant does not read into the word ‘solely’ as extending in *any* matter to *any* substantive provision contained in Chapter 12.”); Second Mistelis Expert Report, ¶ 76 (“[W]ithout doubt, Article 12.1 cannot apply to Articles 12.2 (National Treatment) and 12.3 (Most-Favoured-Nation Treatment).”).

⁴⁵⁰ Claimant’s Reply (ICSID), ¶ 137.

⁴⁵¹ See Claimant’s Reply (ICSID), ¶¶ 285–86.

⁴⁵² **RL-0001**, TPA, Art. 12.1.2(b).

⁴⁵³ Claimant’s Reply (ICSID), ¶ 137.

⁴⁵⁴ Notably, Claimant’s interpretation is contradicted by one of her own experts. In his “expert declaration” (which is a document separate from his expert report), Professor Coe recognizes that it is at least “plausible” that the word “solely” in Article 12.1.2(b) could mean that the four types claims listed in Article 12.1.2(b) are the only four claims that a Chapter 12 investor can assert against a respondent State. Expert Declaration of Jack Coe, p. 6. Of course, given the plain text of Article 12.1.2(b), such thesis is more than merely “plausible.”

249. Second, there is simply no other treaty interpretation basis for Claimant’s argument. Claimant has not identified any aspect of the TPA text that supports her interpretation. Since she cannot identify a single word or phrase in the treaty that supports her proposition that Article 12.1.2(b) merely “supplements and does not restrict” the types of protections that are subject to arbitrable claims,⁴⁵⁵ Claimant contents herself with proclaiming what she “understands,”⁴⁵⁶ and what she “read[s]”⁴⁵⁷ into the provision. The irony appears to be lost on Claimant that the “plain meaning interpretation”⁴⁵⁸ that she purports to offer in her Reply is completely divorced from the plain meaning of the actual terms of the treaty.
250. Third, Claimant criticizes Colombia’s analysis of the plain meaning of the text of the TPA on the asserted basis that such interpretation “depriv[es]” Claimant of her alleged right to enforce the substantive obligations of Chapter 12.⁴⁵⁹ Claimant’s argument appears to be predicated on the erroneous assumption that an investor has an inherent right to submit claims against a State. However, no such inherent right exists: rather, a claimant may only submit claims to the extent that a State has provided its consent for such claims.⁴⁶⁰

⁴⁵⁵ Claimant’s Reply (ICSID), ¶ 137.

⁴⁵⁶ Claimant’s Reply (ICSID), ¶ 285.

⁴⁵⁷ Claimant’s Reply (ICSID), ¶ 285.

⁴⁵⁸ Claimant’s Reply (ICSID), ¶ 285.

⁴⁵⁹ See Claimant’s Reply (ICSID), ¶ 153 (“Respondent’s plain meaning analysis is foundationally flawed when extended to its necessary and legal consequences. *It ignites a dynamic that renders unenforceable and unworkable all of the Chapter 12 substantive provisions* while inviting tortured constructions of the Chapter’s procedural provisions: Articles 12.18 (Dispute Settlement), and 12.19 (Investment Dispute in Financial Services).”) (emphasis added).

⁴⁶⁰ See, e.g., **RL-0034**, ICS (Award on Jurisdiction), ¶ 280 (“Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given

251. Previous tribunals have consistently applied provisions that limited the scope of consent to certain claims, even though the effect of such determination was to leave certain asserted substantive rights without enforcement.⁴⁶¹ For example, the *Emmis v. Hungary* tribunal interpreted and applied two treaties, both of which contained dispute resolution provisions that limited the scope of consent to arbitrate solely to expropriation claims.⁴⁶² In its analysis, the *Emmis* tribunal noted that, although the substantive protections offered in the treaty “go well beyond the protection from expropriation,”⁴⁶³ “the Contracting States decided to limit the scope of the right of an investor to invoke the jurisdiction of an international arbitral tribunal to a single cause of action [i.e., expropriation].”⁴⁶⁴ On this basis, the *Emmis* tribunal concluded that “the Tribunal lacks jurisdiction over all claims except expropriation.”⁴⁶⁵ Thus, in *Emmis* the fact that the other substantive protections could not be the subject of investor-State arbitration claims did not in and of itself constitute an

respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined”); **RL-0079**, *Certain Questions of Mutual Assistance* (Judgment), ¶ 62 (“[W]hatever the basis of consent, the attitude of the respondent State must ‘be capable of being regarded as ‘an unequivocal indication’ of the desire of that State to accept the Court’s jurisdiction in a ‘voluntary and indisputable’ manner’”) (internal citations omitted).

⁴⁶¹ See, e.g., **CL-0081**, *Telenor* (Award), ¶ 97 (“It therefore seems clear that in Article XI of their BIT Hungary and Norway have made a deliberate choice to limit arbitration to the categories specified in that Article and have eschewed the wide form of dispute resolution clause adopted in many of their other BITs.”).

⁴⁶² **RL-0104**, *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2 (McLachlan, Lalonde, Thomas), Award, 16 April 2014 (“*Emmis (Award)*”), ¶ 142 (“[I]t is a striking feature of the investor-state arbitration agreements in both Treaties that they limit the scope of disputes capable of submission to arbitration by an investor to expropriation claims only”).

⁴⁶³ **RL-0104**, *Emmis* (Award), ¶ 143.

⁴⁶⁴ **RL-0104**, *Emmis* (Award), ¶ 143.

⁴⁶⁵ **RL-0104**, *Emmis* (Award), ¶ 144. See also *id.*, ¶ 142 (“Disputes concerning any other [substantive obligation (other than expropriation)] may be submitted to arbitration only with the consent of both disputing parties. Hungary gave no such consent in the case of the present dispute.”).

impediment to dismissal of the claims, given the plain language of the treaty and the limits on consent set forth therein. The same reasoning and result should obtain here.

2) The context of Article 12.1.2(b)

252. Article 31 of the VCLT also requires that the terms of a treaty be interpreted “in their context.”⁴⁶⁶ The Parties herein agree that the “context” of a treaty term includes the surrounding terms and provisions.⁴⁶⁷

253. Claimant argues that Article 12.1.2(b) does not apply to the substantive protections that are indigenous to Chapter 12 itself, and that therefore a claimant can submit to arbitration under Chapter 12 claims for violation of *any* of the Chapter 12 substantive provisions. However, the context of Article 12.1.2(b) shows that Claimant’s theory is misguided, and that Claimant is interpreting Article 12.1.2(b) in a vacuum. The foregoing is demonstrated by the following contextual factors:

- a. The title of Article 12.1 is “Scope and Coverage,” which is a clear indication that the Article governs the content and defines the scope of Chapter 12 (in its entirety).
- b. Article 12.1.2 (which is the *chapeau* of Article 12.1.2(b)) provides: “Chapters Ten (Investment) and Eleven (Cross-Border Trade in Services) apply to measures described in paragraph 1 **only to the extent** that such Chapters or Articles of such Chapters are incorporated into this Chapter”⁴⁶⁸ (emphasis added). Put differently, the investor-State dispute resolution provisions of Chapter 10 apply to Chapter 12 “only to the

⁴⁶⁶ **RL-0084**, VCLT, Art. 31(1).

⁴⁶⁷ See Claimant’s Reply (ICSID), ¶ 11.

⁴⁶⁸ **RL-0001**, TPA, Art. 12.1.2.

extent” provided for in Article 12.1.2(b). Thus, Article 12.1.2(b) restricts the set of claims that can be submitted to arbitration under Chapter 12.

254. Despite the foregoing, Claimant asserts that the context of Article 12.1.2(b) supports her interpretation. Claimant presents two arguments in this respect, both of which fail. First, Claimant points to the allegedly “wide and generous panoply of substantive and procedural rights” set forth in Chapter 12.⁴⁶⁹ Specifically, Claimant argues that Article 12.1.2(b) must be interpreted in such a way as to “accord[] meaning, textual relevance, and enforcement” to the other provisions of Chapter 12.⁴⁷⁰
255. However, contrary to what Claimant suggests, neither the VCLT nor customary international law requires a treaty provision to be interpreted in such a way as to “enforce” other provisions of the treaty. Indeed, the International Court of Justice has affirmed that the interpretation of a treaty provision must be based on the ordinary meaning of the relevant text, even if that meaning deprives a party of a remedy. For example, in the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the Court was called upon to interpret the dispute resolution provision of a treaty. The Court noted that by a “plain meaning” interpretation of such provision, either party could unilaterally derail the dispute settlement process, thereby preventing the other party from enforcing its rights.⁴⁷¹ Notwithstanding the foregoing, the Court refused to deviate from the plain meaning of the treaty terms, observing that “[i]t is the duty of the Court to interpret the treaties, not to revise them.”⁴⁷²

⁴⁶⁹ Claimant’s Reply (ICSID), ¶ 167.

⁴⁷⁰ Claimant’s Reply (ICSID), ¶ 167.

⁴⁷¹ See **RL-0110**, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ, Advisory Opinion, 18 July 1950 (“*Interpretation of Peace Treaties (Second Phase Advisory Opinion)*”), pp. 228–29.

⁴⁷² **RL-0110**, *Interpretation of Peace Treaties (Second Phase Advisory Opinion)*, p. 229.

256. The above-referenced *Emmis v. Hungary* tribunal adopted a similar approach when assessing its jurisdiction. In that case there were two applicable treaties, both of which contained dispute resolution provisions that provided consent to arbitrate only for claims of expropriation. Consistent with these provisions, the *Emmis* tribunal dismissed all but the claimants' expropriation claims, for lack of jurisdiction.⁴⁷³ Claimant's argument that Colombia's interpretation of Article 12.1.2(b) – in accordance with its plain meaning – would leave other provisions without enforcement therefore is inapposite.
257. Second, Claimant calls attention to Footnote 1 of Chapter 11 (the "Cross-Border Trade in Services" Chapter), which states:
- The Parties understand that nothing in this Chapter [11], including this paragraph, is subject to investor-state dispute settlement pursuant to Section B of Chapter Ten (Investment).⁴⁷⁴
258. Claimant argues that if the Treaty Parties had intended for the substantive provisions of Chapter 12 not to be subject to investor-State dispute settlement, then Chapter 12 would have included a footnote similar to the above-quoted one contained in Chapter 11.
259. However, Claimant's observation is misguided. Whereas Chapter 11 excludes investor-State dispute settlement for *all* substantive protections, Chapter 12 enables dispute settlement for certain substantive protections explicitly listed in Article 12.1.2(b). A footnote similar to Footnote 1 of Chapter 11 was not needed in Chapter 12 because Colombia and the United States did not want to exclude investor-State dispute settlement for *all* substantive protections – as they did in respect of Cross-Border Trade in Services – but rather wishes to exclude only those protections that were not explicitly listed in Article 12.1.2(b).

⁴⁷³ See **RL-0104**, *Emmis* (Award), ¶¶ 142–43.

⁴⁷⁴ **RL-0001**, TPA, Ch. 11, fn. 1.

260. In light of the foregoing analysis, the context of Article 12.1.2(b) confirms that investor-State dispute settlement under Chapter 12 is limited to the four types of claims listed in Article 12.1.2(b).

3) The object and purpose of the TPA

261. Article 12.1.2(b) must also be interpreted “in light of [the TPA’s] object and purpose.”⁴⁷⁵ Claimant’s assertions about the object and purpose of the TPA do not support her interpretation of Article 12.1.2(b).

262. Claimant argues that Chapter 12 of the TPA, and the TPA as a whole, must not be interpreted as if it were a BIT.⁴⁷⁶ According to Claimant, “[t]he policies attendant to an agreement that covers both trade *and* investment protection objectives are broader than those incident to most BITs.”⁴⁷⁷

263. However, the rules of treaty interpretation are the same in respect of any and all treaties, and apply equally to free trade agreements as they do to international investment treaties. The cardinal rule of interpretation is that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and *in the light of its object and purpose*.⁴⁷⁸ However, nothing in the object and purpose of the TPA either requires or justifies disregarding the ordinary meaning to be given to the terms therein (including in Article 12.1.2), nor does it justify expanding the scope of consent of the State Parties to provide investor-State dispute settlement for *all* substantive protections (either from Chapter 10 or Chapter 12). Yet that it is precisely what Claimant is attempting to do herein.

⁴⁷⁵ **RL-0084**, VCLT, Art. 31(1).

⁴⁷⁶ Claimant’s Reply (ICSID), ¶ 142.

⁴⁷⁷ Claimant’s Reply (ICSID), ¶ 281.

⁴⁷⁸ See **RL-0084**, VCLT, Art. 31(1).

264. Claimant appears to be arguing that the object and purpose of the TPA supports her interpretation because providing a mechanism for the submission of claims for investors is necessary to effectuate the TPA's general purpose of protecting investments.⁴⁷⁹ However, this argument ignores the very "cornerstone" of investment arbitration: "An arbitral tribunal owes its jurisdiction solely to the consent of the parties."⁴⁸⁰ Consistent with the fundamental principle of consent, States are free to limit the scope of their consent to arbitration. States often do so through the dispute resolution clauses in their treaties, including by expressly limiting the types of claims that investors can submit to arbitration. For example, the *A11Y Ltd. v. Czech Republic* interpreted and applied a dispute resolution clause that limited consent to arbitration to claims under four specified substantive provisions of the treaty.⁴⁸¹ The tribunal dismissed for lack of jurisdiction all but the claims made under those four specified substantive provisions.⁴⁸²
265. Similarly, as discussed above, the *Emmis v. Hungary* interpreted the Netherlands-Hungary BIT, which provided consent to arbitrate "[a]ny dispute between either Contracting Party and the investor of the other Contracting

⁴⁷⁹ See Claimant's Reply (ICSID), ¶ 13 ("Respondent's interpretive analysis of Art. 12.1.2(b) carves out of Chapter 12 (Financial Services) the conceptual content and practical application of Articles 12.2 (National Treatment) and 12.3 (MFN), reducing these and all other substantive provisions in Chapter 12 to the status of rights without remedies, a result that frustrates the workings, purpose and objectives of that Chapter.").

⁴⁸⁰ **RL-0104**, *Emmis* (Award), ¶ 140. See also ICSID Convention, Art. 25 ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment . . . which the parties to the dispute consent in writing to submit to the Centre").

⁴⁸¹ **RL-0072**, *A11Y Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1 (Fortier, Alexandrov, Joubin-Bret), Decision on Jurisdiction, 9 February 2017 ("**A11Y (Decision on Jurisdiction)**"), ¶ 65.

⁴⁸² **RL-0072**, *A11Y* (Decision on Jurisdiction), ¶ 90 ("In summary, the Tribunal concludes that it has jurisdiction over alleged violations of Articles 2(3), 4, 5 and 6 of the Treaty but not over violations of other Articles of the Treaty.").

Party concerning expropriation or nationalization of an investment’”⁴⁸³ (emphasis added). By Claimant’s reasoning, such an express limitation would contravene the general purpose of a treaty to protect investments, which obviously is not the case.

266. Importantly, in interpreting jurisdictional provisions, previous tribunals have explicitly affirmed that the general object of protecting investments does not translate into a presumption in favor of jurisdiction.⁴⁸⁴ To the contrary, tribunals have adopted a neutral approach to the question of jurisdiction,⁴⁸⁵ basing their analysis – as they should – on the terms of the treaty, as required by the VCLT.

4) The *travaux préparatoires* of the TPA

⁴⁸³ **RL-0104**, *Emmis* (Award), ¶ 142.

⁴⁸⁴ See, e.g., **RL-0101**, *Fireman’s Fund* (Decision), ¶ 64 (“Claimant submits that, as a general policy consideration, direct investor recourse to arbitration has become the rule in modern investment agreements, although there may be exceptions, and that the value of investor-state arbitral mechanism is so substantial that it should only be foreclosed when that result is unmistakably required by treaty provision. Whilst it is correct that there are more than 1,400 (some say more than 2,000) Bilateral Investment Treaties which contemplate investor-state arbitration (albeit under differing conditions) and that the value of investor-state arbitral mechanism is substantial, the Tribunal does not believe that under contemporary international law a foreign investor is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement.”); **CLA-0048**, *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7 (Veeder, Fortier, Stern), Award, 3 April 2014, ¶ 117 (“As was decided by the International Court of Justice in *Bosnia-Herzegovina v Yugoslavia*, there must be an “‘unequivocal indication’ of a ‘voluntary and indisputable’ acceptance” of consent; and, as was also decided by a NAFTA arbitration tribunal, in the case *Fireman’s Fund v. Mexico*, a claimant ‘is not entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement’”).

⁴⁸⁵ See, e.g., **RL-0108**, *El Paso Energy International Co. v. The Argentine Republic*, ICSID Case No ARB/03/15 (Caflisch, Stern, Bernardini), Decision on Jurisdiction, 27 April 2006 (“**El Paso Energy (Decision on Jurisdiction)**”), ¶¶ 68, 70 (“[I]nvestors often contend that, as a BIT’s purpose is to protect them, the interpretation of treaties for the promotion and the protection of investments, viewed in their context and according to their object and purpose, leads to an interpretation in favour of the investors. . . . This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State’s responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow.”).

267. Pursuant to Article 32 of the VCLT, the *travaux préparatoires* of a treaty provide a supplementary means of interpretation of such treaty. Specifically, the *travaux préparatoires* are to be consulted only “when the interpretation according to article 31 [of the VCLT]: (a) [l]eaves the meaning ambiguous or obscure; or (b) [l]eads to a result which is manifestly absurd or unreasonable.”⁴⁸⁶

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

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

269. Perhaps because her arguments based upon the customary principles of interpretation are manifestly insufficient, Claimant in her Reply proffers other asserted means of interpretation. In particular, Claimant (i) relies on the alleged “treaty practice” of the United States and Colombia;⁴⁸⁷ and (ii) purports to interpret the TPA but in doing so substitutes NAFTA for the TPA. Colombia will briefly address below each of these unorthodox (and ill-founded) interpretive arguments.

1) The States Parties’ alleged “treaty practice”

270. Claimant (and her expert⁴⁸⁸) rely upon the alleged “treaty practice” of the United States and Colombia in their analysis of Article 12.1.2(b).⁴⁸⁹ Referring to treaties concluded by the United States and Colombia with other States,

⁴⁸⁶ **RL-0084**, VCLT, Art. 32.

⁴⁸⁷ Claimant’s Reply (ICSID), ¶ 141.

⁴⁸⁸ See Second Wethington Expert Report, ¶ 32 (discussing the Parties’ “treaty practice”).

⁴⁸⁹ Claimant’s Reply (ICSID), ¶ 141.

Claimant posits that, as a rule, “the US and Colombia explicitly state in writing any qualifications or restrictions to a right or obligation in a treaty or agreement.”⁴⁹⁰ Claimant alleges that Article 12.1.2(b) must be interpreted in light of this alleged “treaty practice.”⁴⁹¹ According to Claimant, such practice supports her interpretation of Article 12.1.2(b) as a provision that “supplements and does not restrict” the claims that can be submitted to arbitration under Chapter 12.⁴⁹²

271. Colombia notes, as a threshold matter, that there is no such thing as a rule of treaty interpretation based on States’ alleged “treaty practice.” As observed by the *Rompetrol v. Romania* tribunal:

There is nothing in the Vienna Convention that would authorize an interpreter to bring in as interpretative aids when construing the meaning of one bilateral treaty the provisions of other treaties concluded with other partner States.⁴⁹³

272. In any event, in the TPA, Colombia and the United States have explicitly stated in writing certain qualifications and restrictions concerning (a) the rights that an investor may invoke in respect of measures covered by Chapter 12, and (b) the scope of their consent to submit claims to investor-State arbitration. For instance, Article 12.1.2(b) explicitly articulates such a restriction, by narrowly limiting the scope of investor-State dispute settlement under Chapter 12 to four specific types of claims: claims under Articles 10.7, 10.8, 10.12, and 10.14.

- 2) Claimant bases her interpretation on NAFTA rather than the TPA

⁴⁹⁰ Claimant’s Reply (ICSID), ¶ 288.

⁴⁹¹ Claimant’s Reply (ICSID), ¶ 293.

⁴⁹² Claimant’s Reply (ICSID), ¶ 137.

⁴⁹³ **CL-0082**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Berman, Donovan, Lalonde), Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008 (“*Rompetrol (Decision)*”), ¶ 108.

273. In her Reply, Claimant explicitly states that she “interprets Art. 12.1.2(b), Chapter 12 (Financial Services), and the entirety of the TPA in accordance with Art. 102 (Objectives) of the NAFTA.”⁴⁹⁴ In other words, Claimant openly admits that she is substituting the object and purpose of NAFTA—a trilateral agreement negotiated decades before the TPA—for the object and purpose of the TPA when interpreting the TPA. Claimant also asserts—bizarrely, since Colombia is not a party to NAFTA—that “[t]he NAFTA is in effect the *travaux préparatoires* of the TPA.”⁴⁹⁵ Parting from this erroneous premise, Claimant and her expert set out to analyze what they consider to be relevant strands of the NAFTA *travaux*. Tellingly, however, Claimant failed to submit *any* documentary evidence related to the negotiation of the TPA. Instead, Claimant and her focus exclusively on the NAFTA negotiating history. For example, Mr. Wethington posits that the drafting history of NAFTA “derivatively applies to Chapter 12 of the TPA.”⁴⁹⁶ Claimant, for her part, submitted as “evidence” U.S. congressional testimony from the 1990’s concerning NAFTA,⁴⁹⁷ excerpts of a book about the drafting of NAFTA, and academic articles on the history of NAFTA.⁴⁹⁸
274. However, none of that is at all relevant in this proceeding. Neither the VCLT nor customary international law authorizes the interpretative exercise that Claimant has undertaken. The object and purpose and drafting history of

⁴⁹⁴ Claimant’s Reply (ICSID), ¶ 281. *See also* Claimant’s Reply (ICSID), ¶ 282 (citing Article 102 of NAFTA in support of arguments about the object and purpose of the TPA).

⁴⁹⁵ Claimant’s Reply (ICSID), fn. 206.

⁴⁹⁶ Claimant’s Reply (ICSID), ¶ 404.

⁴⁹⁷ *See Ex. C-0032*, Hearing before the Committee on Banking, House of Representatives, 28 September 1993; *Ex. C-0033*, Report of the Services Policy Advisory Committee (SPAC), 11 September 1992. *See also* Second Wethington Expert Report, fns. 3, 6.

⁴⁹⁸ *See* Second Wethington Expert Report, fn. 4 (citing **CL-0349**, Jennifer A. Heindl, “Toward a History of NAFTA’s Chapter Eleven”, Berkeley J. Int’l Law, 2006).

NAFTA cannot be imported into the analysis of the TPA, which is a separate treaty.

275. In any event, there are a variety of problems with Claimant's interpretation of NAFTA. For the sake of brevity, Colombia will highlight below three illustrative examples.
276. First, Claimant appears to rely upon Mr. Wethington's testimony as if that testimony itself were part of the drafting history of NAFTA. However, as discussed in Colombia's Counter-Memorial, and despite Claimant's bizarre statements in her Reply,⁴⁹⁹ Mr. Wethington's personal recollections about the NAFTA negotiations do not constitute either a primary or supplementary means of interpretation under the VCLT.⁵⁰⁰ Moreover, Claimant impermissibly blurs the line between an expert and a fact witness, asserting for example that "Mr. Wethington has offered this testimony as a matter of expert legal opinion . . . [but] has testified to this proposition *also* as a matter of factual personal knowledge."⁵⁰¹
277. Second, Mr. Wethington's views on the meaning of the "Scope and Coverage" provision of NAFTA Chapter 14 are directly contradicted by the written submissions of Mexico and Canada on the same subject in the *Fireman's Fund* arbitration, as discussed above. (The United States did not address this issue in its written submission in that case.)
278. Third, the documentary evidence upon which Claimant relies does not substantiate Claimant's interpretation of NAFTA Chapter 14. For instance,

⁴⁹⁹ See Claimant's Reply (ICSID), ¶ 308 ("When stripped to its core meaning, Respondent asserts that because Mr. Wethington is a natural person and not an inanimate draft piece of paper, his testimony is of no moment. This proposition speaks for itself and defies characterization."). To the contrary, what should "speak for itself" is the self-evident fact that a *person* cannot qualify as part of "the preparatory work of [a] treaty." **RL-0084**, VCLT, Art. 32.

⁵⁰⁰ Colombia's Counter-Memorial (ICSID), ¶ 353.

⁵⁰¹ Claimant's Reply (ICSID), ¶ 299.

Claimant, Mr. Wethington, and Professor Mistelis all place great emphasis on statements by U.S. Deputy Assistant Secretary for International Affairs Barry Newman before the U.S. Congress in the early 1990s.⁵⁰² In particular Claimant and her experts assert that Mr. Newman’s testimony proves that the substantive protections of NAFTA Chapter 14 are indeed subject to investor-State arbitration (as Claimant contends herein with respect to Chapter 12 of the TPA). However, Mr. Newman’s testimony does no such thing.

279. For example, Mr. Wethington relies on the following statement by Mr. Newman:

‘The benefits that Mexico gets in the financial services area—I can only speak to that—is the guarantee that the provisions for national treatment, for transparency, and so and so forth will apply to them when they are in the United States market. And, in addition, if we perchance violate those, they have a dispute settlement arrangement where they will be able to redress their grievances for US violations.’⁵⁰³

280. Mr. Wethington argues that this statement by Mr. Newman proves that *all* financial services protections are subject to investor-State dispute settlement.⁵⁰⁴ However, the context reveals that Mr. Newman was referring to the *State-to-State* dispute settlement provisions of Chapter 14, not to the investor-State dispute settlement provisions. Indeed, he discussed “[t]he benefits that **Mexico** gets” (emphasis added), and then observed that “if we [(i.e., the United States)] perchance violate those, they [(i.e., Mexico)] have a dispute settlement

⁵⁰² See, e.g., Claimant’s Reply (ICSID), ¶ 387; Second Wethington Expert Report, ¶¶ 43–44; Second Mistelis Expert Report, ¶¶ 82–83.

⁵⁰³ Second Wethington Expert Report, ¶ 43.

⁵⁰⁴ See Second Wethington Expert Report, ¶ 44.

arrangement”⁵⁰⁵ Thus, even if they were relevant herein (which they are not), Claimant’s arguments about the drafting history of NAFTA would not withstand scrutiny.

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

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

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

a. First, Claimant seeks to use the Chapter 12 MFN Clause to import more favorable conditions of consent to arbitration (e.g., by replacing the

⁵⁰⁵ Second Wethington Expert Report, ¶ 43. *See also* Claimant’s Reply (ICSID), ¶ 387. Claimant’s quote the following statement: “Mr. Newman: They will have assurances that in the future we will not take discriminatory actions [national treatment protection] against Mexican firms as a result of the NAFTA and that, if we were to do so, they will have a mechanism by which to resolve any disputes.” The context of this statement reveals that when Mr. Newman observed that “**they** will have a mechanism by which to resolve any disputes” (emphasis added), he was referring to the Mexican Government.

- TPA's three-year limitations period with the Colombia-Switzerland BIT's five-year limitations period) (discussed in **Section II.A.3** above);
- b. Second, Claimant seeks to use the Chapter 12 MFN Clause to import and invoke a substantive protection contained under the Colombia-Switzerland BIT that is not contained in the TPA (discussed in **Section II.B.2** above); and
 - c. Third, Claimant seeks to use the Chapter 12 MFN Clause to create consent to arbitrate, under Chapter 12, claims with respect to obligations beyond those contained in the exhaustive list set forth in Article 12.1.2(b).
283. Claimant's third and final purported use of the Chapter 12 MFN Clause is discussed in this section. Claimant seeks to use the Chapter 12 MFN Clause to import the dispute resolution provisions of the Colombia-Switzerland BIT. Such provisions do not limit the types of claims that can be submitted to arbitration.
284. Claimant cannot use the Chapter 12 MFN Clause to submit her fair and equitable treatment and national treatment claims. In the following sections, Colombia will demonstrate that (i) Claimant cannot use the Chapter 12 MFN Clause to manufacture consent to arbitration; (ii) Claimant's attempt to use the Chapter 12 MFN Clause in this way contravenes the text of the TPA; and (iii) in any event, even if Claimant could import the dispute resolution provisions of the Colombia-Switzerland BIT, she failed to satisfy the conditions of consent contained therein. For these reasons, Claimant's fair and equitable treatment and national treatment claims remain outside of the jurisdiction *ratione voluntatis* of this Tribunal.
- i. The Chapter 12 MFN Clause cannot be used to *create* consent to arbitrate a claim

285. For the reasons discussed above, Colombia did not consent to the submission of claims under Chapter 12 for violations of the TPA's fair and equitable treatment provision (Article 10.5) or national treatment provision (Article 12.2).⁵⁰⁶ Claimant is invoking the Chapter 12 MFN Clause in an attempt to create consent for the submission of those categories of claims.
286. As Colombia explained in its Counter-Memorial, the clear rule that emerges from the jurisprudence is that an MFN clause cannot be used to create consent to arbitrate where it otherwise did not exist.⁵⁰⁷ In other words, if the TPA does not provide Colombia's consent to arbitrate fair and equitable treatment claims, Claimant cannot use the Chapter 12 MFN Clause to create such consent.
287. In her Reply, Claimant insists that she indeed use the Chapter 12 MFN Clause in that manner. Specifically, she argues that she is using the Chapter 12 MFN Clause to import the entire dispute resolution provision (i.e., Article 11) of the Colombia-Switzerland BIT.⁵⁰⁸ Article 11 of that BIT does not limit the types of claims that can be submitted to arbitration.⁵⁰⁹ Claimant thus believes that, having invoked Article 11 of the Colombia-Switzerland BIT via the Chapter 12 MFN Clause, she can assert arbitration claims for violations of any and all of the TPA's substantive protections.
288. Claimant's argument fails for the following three reasons: (i) the Chapter 12 MFN Clause cannot be used to *create* consent to arbitrate a claim, where no such consent exists otherwise; (ii) Claimant cannot use the Chapter 12 MFN Clause in a manner that contradicts the plain text of the TPA; and (iii) in any event,

⁵⁰⁶ See Section II.B.2; **RL-0001**, TPA, Art. 12.1.2(b).

⁵⁰⁷ Colombia's Counter-Memorial (ICSID), ¶¶ 327-43.

⁵⁰⁸ Claimant's Reply (ICSID), ¶ 569 ("Colombia has offered Swiss investors more favorable dispute resolution protection. As also explained and argued in other sections of this Reply, the present dispute must be settled pursuant to the provisions of Article 11 of the Colombia-Switzerland BIT").

⁵⁰⁹ See generally **RL-0004**, Colombia-Switzerland BIT, Art. 11.

Claimant failed to satisfy the conditions of consent in Article 11 of the Colombia-Switzerland BIT.

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

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

. . . The Tribunal therefore concludes that in the present case the MFN clause cannot be used to extend the Tribunal's jurisdiction to categories of claim other than expropriation, for this would subvert the common intention of Hungary and Norway in entering into the BIT in question.⁵¹⁰

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

Arbitral rulings draw a distinction between the application of an MFN clause to a more favorable dispute resolution provision where the investor has the right to arbitrate under the basic treaty, albeit under less favorable conditions, and the substitution of nonexistent consent to arbitration by virtue of an MFN clause. While case law

⁵¹⁰ CL-0081, *Telenor* (Award), ¶¶ 97, 100.

confirms that the former is possible, it has almost consistently found that the latter is not.⁵¹¹

291. The other cases discussed in Colombia’s Counter-Memorial reached similar conclusions.⁵¹²

292. In response, Claimant seems to argue that (i) Article 12.1.2(b) does not actually limit the scope of Colombia’s consent to arbitration, and (ii) that therefore the case law cited by Colombia on the use of an MFN clause to expand the scope of consent is inapposite.⁵¹³ However, Claimant’s argument directly contradicts the plain text of Article 12.1.2(b). As discussed above, Article 12.1.2(b) *does* in fact explicitly limit Colombia’s consent to arbitration—specifically, to the set of four types of claims listed therein (*viz.*, Articles 10.7, 10.8, 10.12, and 10.14). Decisions such as *Telenor* and *A11Y* are therefore squarely apposite.

ii. Claimant’s argument contravenes the text of the TPA

293. Furthermore, the use of the Chapter 12 MFN Clause in the manner suggested by Claimant would deprive Article 12.1.2 of any meaning, and would thus contradict the basic principle of effectiveness (*effet utile*) in treaty interpretation. As discussed above, Article 12.1.2(b) lists the “sole[]” types of claims that can

⁵¹¹ **RL-0072**, *A11Y* (Decision on Jurisdiction), ¶ 98.

⁵¹² See, e.g., **RL-0032**, *Sanum Investments Ltd. v. Government of the Lao People’s Democratic Republic*, PCA Case No. 2013-13 (Rigo Suerda, Hanotiau, Stern), Award on Jurisdiction, 13 December 2013, ¶ 358 (“[T]o read into that clause a dispute settlement provision to cover all protections under the Treaty when the Treaty itself provides for very limited access to international arbitration would result in a substantial re-write of the Treaty and an extension of the States Parties’ consent to arbitration beyond what may be assumed to have been their intention, given the limited reach of the Treaty protection and dispute settlement clauses.”).

⁵¹³ See Claimant’s Reply (ICSID), ¶ 456 (“Respondent’s analysis is misplaced for two fundamental reasons. First, Respondent mistakenly assumes that Art. 12.1.2(b) renders unenforceable all of the Financial Services investor protection standards in Chapter 12. Hence, Respondent concludes that Art. 12.2 (National Treatment) and other provisions in Chapter 12 (Financial Services) are not subject to Section B as incorporated into Chapter 12 by dint of Art. 12.1.2(b).”). See also *id.*, p. 278 (“Respondent Conflates the Importation of Procedural Rights with the Exercise of an MFN Clause to Create Consent”).

be submitted to investor-State arbitration under Chapter 12.⁵¹⁴ If the MFN clause could be used to create consent to arbitration for other types of claims (beyond those expressly listed in Article 12.1.2(b)), such provision would be rendered meaningless. Such cannot be a correct interpretation.

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

294. In its Counter-Memorial, Colombia observed that even if Claimant could rely upon the Chapter 12 MFN Clause to create consent for the submission of her fair and equitable treatment and national treatment claims (*quod non*), this Tribunal would still lack jurisdiction *ratione voluntatis*, because Claimant fails to satisfy the conditions of consent contained in the dispute resolution provision of the Colombia-Switzerland BIT.⁵¹⁵ In particular, as Colombia explained, Claimant failed to comply with the fork-in-the-road provision and the six-month waiting period set forth in Article 11 of the Colombia-Switzerland BIT. Such provisions are applicable here because Claimant purports to be incorporating by reference *the entirety* of the dispute resolution clause of that BIT (i.e., Article 11 thereof), and therefore must comply with the requirements imposed by that clause.

295. Claimant's responses to these arguments in her Reply are somewhat difficult to follow. As far as Colombia can discern, Claimant is contending (a) that Article 11 of the Colombia-Switzerland BIT does not impose any conditions that a claimant must satisfy before submitting a claim to arbitration,⁵¹⁶ and (b) that the fork-in-the-road provision of the Colombia-Switzerland BIT does not apply

⁵¹⁴ **RL-0001**, TPA, Art. 12.1.2(b).

⁵¹⁵ Colombia's Counter-Memorial (ICSID), ¶¶ 353–71.

⁵¹⁶ See Claimant's Reply (ICSID), ¶ 577.

here.⁵¹⁷ (Claimant does not address the issue of the six-month waiting period.) In the following subsections, Colombia will demonstrate that (i) the Colombia-Switzerland BIT contains conditions of consent; (ii) Claimant failed to comply with the fork-in-the-road provision of that BIT; and (iii) Claimant failed to observe the six-month waiting period of that BIT.

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

296. Throughout her Reply, Claimant repeatedly asserts that she has brought her claims under Article 11 of the Colombia-Switzerland BIT.⁵¹⁸ Yet Claimant simultaneously asserts that “no provision under Article 11 can be seen or should be understood as creating a condition precedent for a dispute to be validly submitted.”⁵¹⁹ In other words, Claimant seeks to import the entire dispute resolution provision of the Colombia-Switzerland BIT in order to escape the conditions of consent contained in the TPA,⁵²⁰ and thereby be able to submit to arbitration a broader range of claims than those to which Colombia consented under the TPA.⁵²¹ At the same time, however, Claimant disregards

⁵¹⁷ See Claimant’s Reply (ICSID), ¶ 720.

⁵¹⁸ See, e.g., Claimant’s Reply (ICSID), ¶ 569 (“As also explained and argued in other sections of this Reply, the present dispute must be settled pursuant to the provisions of Article 11 of the Colombia-Switzerland BIT.”), ¶ 683 (“Claimant apologizes to the Tribunal for having to repeat that the present claim is brought pursuant to Chapter 12 of the TPA and not Chapter 10. Pursuant to Article 12.3 of the TPA, Claimant imports the more favorable dispute resolution provisions offered under Articles 11–12 of the Colombia-Switzerland BIT.”), ¶ 637 (“As already pointed out many times, the dispute resolution provisions under Chapter 10 of the TPA are not applicable to this case. This dispute is being arbitrated under the dispute resolution provisions (Articles 11 and 12) of the Colombia-Switzerland BIT.”).

⁵¹⁹ Claimant’s Reply (ICSID), ¶ 577.

⁵²⁰ For example, Claimant seeks to shirk the notice of intent requirement, waiver requirement, and three-year limitations period of the TPA.

⁵²¹ See Claimant’s Reply (ICSID), ¶ 569 (“Colombia has offered Swiss investors more favorable dispute resolution protection. As also explained and argued in other sections of this Reply, the present dispute must be settled pursuant to the provisions of Article 11 of the Colombia-Switzerland BIT.”).

the conditions of consent set forth in the Colombia-Switzerland BIT. Claimant's convoluted effort to 'have her cake and eat it too' fails.

297. If Claimant were entitled to submit her claims under Article 11 of the Colombia-Switzerland BIT, as she erroneously argues, then the conditions of consent set forth in that treaty would apply to her claims. For the reasons discussed below, Claimant failed to satisfy two of those conditions: the fork-in-the-road provision, and the six-month consultation period requirement.

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

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

Once the investor has referred the dispute to either national tribunal or any of the international arbitration mechanisms provided for in paragraph 2 above, the choice of the procedure shall be final.⁵²²

299. In her Reply, Claimant invents a test for the application of this fork-in-the-road provision, without any citation or legal basis.⁵²³ Specifically, Claimant asserts that "[t]here are two elements to a fork-in-the-road objection: (i) an action commenced by the party against whom the fork-in-the-road provision is intended to be enforced; and (ii) the existence of an actual judicial alternative (the two alternative jurisdictions constituting the fork-in-the-road allegory)."⁵²⁴ Claimant then declares that "[n]either element is present here."⁵²⁵

300. As discussed at length in Colombia's Counter-Memorial,⁵²⁶ previous tribunals have interpreted and applied similar fork-in-the-road provisions in a consistent

⁵²² **RL-0004**, Colombia-Switzerland BIT, Art. 11(4).

⁵²³ See Claimant's Reply (ICSID), ¶ 723.

⁵²⁴ Claimant's Reply (ICSID), ¶ 723.

⁵²⁵ Claimant's Reply (ICSID), ¶ 723.

⁵²⁶ Colombia's Counter-Memorial (ICSID), ¶¶ 356-68.

manner. Such fork-in-the-road provisions preclude the exercise of jurisdiction when (i) the claimant itself or companies owned or controlled by it⁵²⁷ (ii) has submitted for resolution to domestic courts⁵²⁸ (iii) claims that share the same fundamental basis of the treaty claims.⁵²⁹

301. These three elements are satisfied in the present case. First, Claimant's Holding Companies submitted claims to Colombian courts. Although Claimant in her Reply now emphasizes that she herself was not a named party to the relevant domestic litigation, in her previous submissions she had explicitly (and repeatedly) taken responsibility for the domestic litigation. For example, in her Memorial on Jurisdiction, the section on the start of local proceedings is entitled "**Claimant Commences Judicial Proceedings Against FOGAFIN and the Superintendency of Banking**"⁵³⁰ (emphasis added). Second, there is no dispute between the parties that claims relating to Claimant's shares in Granahorrar were in fact submitted to Colombian courts. Third, such domestic claims share

⁵²⁷ Colombia's Counter-Memorial (ICSID), ¶ 367. See also **RL-0050**, *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4 (von Wobeser, Klock, Romero), Award, 18 January 2017 ("**Supervisión (Award)**"), ¶¶ 324–325 (holding that it suffices for a "corporate vehicle that acts according to the interests and instructions of Claimant" to have pursued the local court claim).

⁵²⁸ See **RL-0004**, Colombia-Switzerland BIT, Art. 11(4).

⁵²⁹ See **RL-0073**, *Pantehniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21 (Paulsson), Award, 30 July 2009 ("**Pantehniki (Award)**"), ¶ 61 ("It is common ground that the relevant test is the one expressed by the America-Venezuela Mixed Commission in the Woodruff case (1903): whether or not 'the fundamental basis of a claim' sought to be brought before the international forum, is autonomous of claims to be heard elsewhere. This test was revitalized by the ICSID Vivendi annulment decision in 2002. It has been confirmed and applied in many subsequent cases. The key is to assess whether the same dispute has been submitted to both national and international fora."); **RL-0050**, *Supervisión (Award)*, ¶¶ 308, 310 ("In order to determine whether the proceedings before the local tribunals relate to the same dispute submitted to arbitration, the Tribunal will apply the fundamental basis of a claim test. . . . One can only consider that the dispute submitted before the national tribunals is the same as the one submitted to arbitration if both of them share the fundamental cause of the claim and seek for the same effects.").

⁵³⁰ Claimant's Memorial (ICSID), § II.A. See also Claimant's Memorial (ICSID), ¶¶ 28, 31.

the same fundamental basis as Claimant's claims under the TPA. Before the Colombian courts, Claimant sought compensation for the alleged harm to the value of her shares in Granahorrar caused by the Colombian Government. Claimant has characterized the dispute that she submitted to this Tribunal as follows: "In a nutshell, Colombia's financial regulatory authorities unlawfully expropriated Claimant's investment in that jurisdiction."⁵³¹ Moreover, as explained at length by Claimant's damages expert, Claimant is seeking compensation in the present arbitration for alleged damages to her shares in Granahorrar.⁵³² The domestic and international claims thus share a fundamental normative source, and ultimately pursue the same purpose.⁵³³

302. The fork-in-the-road provision of the Colombia-Switzerland BIT thus precludes Claimant's claims.

⁵³¹ Claimant's Memorial (ICSID), p. 11.

⁵³² See First Argiz Expert Report, ¶ 1 ("I, Antonio L. Argiz, of Morrison, Brown, Argiz & Farra, LLC ("MBAF") was retained by the law firm Bryan Cave Leighton Paisner LLP, counsel for Astrida Benita Carrizosa ("Carrizosa" or "Claimant") to provide expert opinions on damages incurred by the Claimant as a result of the Colombian government's ("Respondent") actions through its agencies (e.g. Central Bank, FOGAFIN and Superintendency of Banking) to expropriate Corporacion Colombiana de Ahorro y Vivienda ("Granahorrar"), resulting in loss of value of Claimant's interest in Granahorrar").

⁵³³ See **RL-0050**, *Supervisión* (Award), ¶ 315 ("The Tribunal considers that the actions filed in the local proceeding and in the arbitration share a fundamental normative source and pursue ultimately the same purposes. The fundamental normative source is the same because compensation was claimed for lost profits derived from the failure of Costa Rica to adjust the VTI service rates according to what Claimant alleges was established in the Contract, notwithstanding that the specific administrative acts alleged in each proceeding may not be exactly the same"); **RL-0073**, *Pantechniki* (Award), ¶¶ 64-68 ("To the extent that this prayer was accepted it would grant the Claimant exactly what it is seeking before ICSID - and on the same 'fundamental basis'. The Claimant's grievances thus arises out of the same purported entitlement that it invoked in the contractual debate it began with the General Roads Directorate. The Claimant chose to take this matter to the Albanian courts. It cannot now adopt the same fundamental basis as the foundation of a Treaty claim.").

- 3) Claimant has failed to comply with the six-month consultation requirement of the Colombia-Switzerland BIT

303. Article 11 of the Colombia-Switzerland BIT also contains a six-month consultation requirement as a condition of consent to arbitration:

(1) If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he may request consultations with a view to resolving the matter amicably.

(2) **Any such matter which has not been settled within a period of six months from the date of written request for consultations** [with a view to resolving the matter amicably] **may be referred to** the courts or administrative tribunals of the Party concerned or **to international arbitration**.⁵³⁴ (Emphasis added)

304. Claimant devotes only one paragraph of her Reply to this objection, and alleges therein that the six-month consultation period in Article 11 amounts merely to a “suggestion,” because of the “permissive” language contained therein.⁵³⁵

305. However, as explained in Colombia’s Counter-Memorial (and ignored in Claimant’s Reply), the provision is not merely hortatory. Interpreting this very provision of the Colombia-Switzerland BIT, the tribunal in *Glencore v. Colombia* determined that “consultations with [Colombia] under Art. 11(1) of the Treaty” constituted “a measure **necessary** to start a claim for breach of the BIT”⁵³⁶ (emphasis added). The interpretation in *Glencore* is consistent with the language and structure of the relevant treaty language, which makes clear that a claimant

⁵³⁴ **RL-0004**, Colombia-Switzerland BIT, Art. 11.

⁵³⁵ Claimant’s Reply (ICSID), ¶ 572.

⁵³⁶ **RL-0057**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6 (Fernández-Armesto, Garibaldi, Thomas), Award, 27 August 2019 (“*Glencore (Award)*”), ¶ 907.

cannot file an arbitration claim until six months after the date of the claimant's request for consultations.

306. In her Reply, Claimant does not deny that, prior to filing for arbitration, she did not request consultations *at all*—let alone six months before commencing the arbitration (as required by Article 11).
307. Thus, even if the dispute resolution provision of the Colombia-Switzerland BIT applied in the present case, as Claimant mistakenly argues, Claimant's claims would still be precluded, due to Claimant's failure to comply with the fork-in-the-road provision and the six-month consultation requirement of that BIT.
308. For all of the foregoing reasons, Claimant's claims of violation of the TPA's fair and equitable treatment provision (Article 10.5) and national treatment provision (Article 12.2) fall outside of the jurisdiction *ratione voluntatis* of this Tribunal.

C. The Tribunal lacks jurisdiction *ratione materiae*

309. Claimant initially argued in this arbitration that the investment that had been allegedly harmed by Colombia's actions consisted of her indirect shareholding interest in Granahorrar.⁵³⁷ But after Colombia noted that it would be raising jurisdictional objections, and perhaps realizing that identifying her indirect interest in Granahorrar as the relevant investment would inevitably lead to the dismissal of her case on *ratione temporis* and *ratione materiae* grounds, Claimant

⁵³⁷ Claimant's Request for Arbitration (ICSID), ¶ 1 ("In the case before this Tribunal the investment of a U.S. citizen in one of the Republic of Colombia's leading financial institutions [Granahorrar] was reduced to the peppercorn value of COP1 0.01 based upon discriminatory, irregular, and unprecedented treatment on the part of the Central Bank of Colombia . . . FOGAFIN . . . and Superintendency of Banking."); Witness Statement of Astrida Benita Carrizosa, 7 June 2019, ¶¶ 23-24 ("Our investments in Granahorrar were made through several companies that our family owned The six companies were vehicles to invest in Granahorrar. We acquired Granahorrar's shares through these companies from private investors and on the stock exchange in Colombia. My family members acquired -through the companies - close to 60% of Granahorrar.").

pivoted in her Memorial. Therein she advanced instead – for the first time – the thesis that the investment that was allegedly harmed by Colombia’s actions consisted of the 2007 Council of State Judgment:

Claimant’s ownership of shares in GRANAHORRAR, as set forth in paragraphs 280-282 above, meets the Art. 10.28(b) definition of an investment. More importantly, however, **for purposes of pleading and/or proof of *ratione materiae*, the Council of State’s November 1, 2007 Judgment represents and constitutes Claimant’s investment as alleged and demonstrated in this proceeding.**⁵³⁸ (Emphasis added)

310. Despite this tactical *volte face*, Claimant’s revised theory of the affected investment yields the same result as her original theory. In its Counter-Memorial, Colombia explained that the 2007 Council of State Judgment, too, is not a qualifying investment under the TPA. Specifically, Footnote 15 of Article 10.28 of the TPA (“**Judgment Exclusion Provision**”) explicitly excludes judicial orders and decisions from the scope of qualifying investments: “**The term ‘investment’ does not include an order or judgment entered in a judicial or administrative action**”⁵³⁹ (emphasis added).
311. The above-quoted provision unequivocally excludes the 2007 Council of State Judgment from the scope of the TPA. This is so because the 2007 Council of State Judgment is a judgment issued by the Council of State of Colombia, which is the highest judicial body that hears cases concerning administrative matters.⁵⁴⁰ The Judgment was issued in response to an appeal in a judicial action filed by Claimant (through her Holding Companies)⁵⁴¹ against an unfavorable ruling by

⁵³⁸ Claimant’s Memorial (ICSID), ¶ 287.

⁵³⁹ **RL-0001**, TPA, Art. 10.28, fn. 15.

⁵⁴⁰ Colombia’s Counter-Memorial (ICSID), § D.1.

⁵⁴¹ The three Holding Companies are: (i) *Asesorías e Inversiones C.G. S.A.* (“**Asesorías e Inversiones**”); (ii) *Inversiones Lieja Ltda.* (“**Inversiones Lieja**”); and (iii) *I.C. Interoventorías y*

the first instance court. The 2007 Council of State Judgment was subsequently overturned by another judicial body – the Constitutional Court – in the latter’s 2011 Constitutional Court Judgment.⁵⁴² The 2007 Council of State Judgment is therefore incontrovertibly a judicial decision, issued in a judicial action. It thus falls squarely within the Judgment Exclusion Provision, and does not qualify as an investment under the TPA.

312. Colombia also demonstrated in its Counter-Memorial that even if Claimant were to revert to her original theory of investment – according to which it was her indirect interest in Granahorrar that constituted the relevant investment (whether in addition to, or in lieu of, the 2007 Council of State Judgment) – that investment would not constitute a qualifying investment under the TPA, because such shares were obtained in violation of Colombian law.⁵⁴³
313. In her Reply, Claimant once again pivots on the elemental issue of what investment forms the basis of her claim in this arbitration. Thus, Claimant advances yet another thesis, which is that “the investment was transformed into different modes at different times.”⁵⁴⁴ Claimant’s theory now appears to be that the Granahorrar shares constituted her “original investment,” but that somehow those shares then “transformed” into the 2007 Council of State Judgment.⁵⁴⁵

Construcciones Ltda. (“**Interventorías y Construcciones**”). See Claimant’s Request for Arbitration (ICSID), ¶¶ 16–19. See also **Ex. R-0050**, Nullification and Reinstatement Action, pp. 1–3.

⁵⁴²See generally **Ex. C-0023**, 2011 Constitutional Court Judgment.

⁵⁴³Colombia’s Counter-Memorial (ICSID), § D.2.

⁵⁴⁴Claimant’s Reply (ICSID), p. 14.

⁵⁴⁵Claimant’s Reply (ICSID), ¶ 796 (“[T]his is a case in which an original investment was made in the financial services sector. That investment was subject to the illegal, inappropriate and discriminatory actions of various organs of the Colombian government, **which resulted in that investment being transformed into a judgment.**”) (emphasis added).

314. Claimant’s latest characterization of her investment is somewhat confusing, and appears to amount to a conceptually untenable amalgam of the Granahorrar shares and the 2007 Council of State Judgment. In any event, this fanciful new theory does not help Claimant to overcome the *ratione materiae* jurisdictional hurdle, for the following reasons:

- a. The 2007 Council of State Judgment is not a qualifying investment under the TPA because it falls within the Judgment Exclusion Provision (see **Section C.1** below); and
- b. Claimant’s indirectly-owned Granahorrar shares also do not constitute a qualifying investment under the TPA, because (i) Granahorrar and its shares – and therefore Claimant’s interest in such shares – had ceased to exist before the critical jurisdictional dates for purposes of the TPA (see **Section C.2** below), and (ii) such shares were obtained in violation of Colombian law (see **Section C.3** below).

315. For the foregoing reasons, discussed in greater detail below, the Tribunal lacks jurisdiction *ratione materiae*. In any event, if the 2007 Council of State Judgment was not a qualifying investment, and the Granahorrar shares also were not a qualifying investment, then *a fortiori* an amalgam of such decision and such shares cannot amount to an investment.

1. *The 2007 Council of State Judgment is not a qualifying investment under the TPA because it falls within the TPA’s Judgment Exclusion Provision*

316. To the extent that Claimant is still asserting that her purported investment is the 2007 Council of State Judgment, such investment is not a qualifying investment under the TPA, by direct application of the exception contained in the Judgment Exclusion Provision (i.e., Footnote 15 of Article 10.28 of the TPA), which to recall, states as follows: “The term ‘investment’ does not include an

order or judgment entered in a judicial or administrative action.”⁵⁴⁶ As explained above, the 2007 Council of State Judgment is clearly a judgment entered in a judicial action, and it is therefore excluded from the definition of “investment” under the TPA.

317. In her Reply, Claimant attempts to circumvent the Judgment Exclusion Provision by arguing that (i) notwithstanding the text of such provision, certain jurisprudence nevertheless permits her to rely on the 2007 Council of State Judgment as the requisite investment⁵⁴⁷ (see **Section C.1.a** below); (ii) the Judgment Exclusion Provision does not apply to the 2007 Council of State Judgment⁵⁴⁸ (see **Section C.1.b** below); and (iii) Colombia cannot rely on its own (allegedly) wrongful conduct (i.e., the 1998 Regulatory Measures) to argue that the 2007 Council of State Judgment does not qualify as an investment⁵⁴⁹ (see **Section C.1.c** below). Each of Claimant’s foregoing arguments is addressed and rebutted in the sub-sections below. In any event, Claimant cannot invoke any TPA protections with respect to the 2007 Council of State Judgment for the simple reason that such decision had already been overturned before the critical jurisdictional dates (see **Section C.1.d** below).

a. Claimant’s reliance on jurisprudence cannot override the plain text of the TPA

318. Claimant’s first argument is that certain jurisprudence permits her to rely on the 2007 Council of State Judgment as her qualifying investment, despite the TPA’s Judgment Exclusion Provision.⁵⁵⁰ Specifically, Claimant and her expert rely on *Saipem v. Bangladesh* as alleged support for Claimant’s assertion that the

⁵⁴⁶ **RL-0001**, TPA, Art. 10.28, fn. 15.

⁵⁴⁷ Claimant’s Reply (ICSID), ¶ 790–93.

⁵⁴⁸ Claimant’s Reply (ICSID), ¶¶ 794–96.

⁵⁴⁹ Claimant’s Reply (ICSID), ¶¶ 797–803.

⁵⁵⁰ Claimant’s Reply (ICSID), ¶¶ 790–93.

2007 Council of State Judgment can serve as her qualifying investment because it represents her Granahorrar shares in the form of an “entitlement to money.”⁵⁵¹ Claimant also asserts that *Mondev v. United States* supports the proposition that the Judgment Exclusion Provision does not preclude “claims arising out of failed ‘investments’ that continue to be unresolved.”⁵⁵² However, Claimant’s attempt to circumvent the Judgment Exclusion Provision by relying on those (and any other) legal authorities is hopeless.

319. As a threshold matter, Claimant ignores the simple fact that no amount of jurisprudence can override the plain text of the applicable treaty.⁵⁵³ In the present case, the Judgment Exclusion Provision expressly and unequivocally excludes from the concept of “investment under the TPA” any and all judgments issued in judicial actions.⁵⁵⁴ Importantly, the Judgment Exclusion Provision contains no exceptions, provisos, or qualifications. Accordingly, the *Sapiem* decision, the *Mondev* award, and any other legal authority invoked by Claimant are simply irrelevant, insofar as they cannot alter the plain text of the Judgment Exclusion Provision.
320. The *Saipem* decision and *Mondev* award are inapposite for an additional reason, which is that the applicable treaty in each of those cases contains a definition of investment that is materially different than that in the TPA. The *Saipem* tribunal applied the Italy-Bangladesh BIT, which does *not* contain any provision equivalent to the Judgment Exclusion Provision excluding judicial or administrative decisions from the definition of “investment.”

⁵⁵¹ Claimant’s Reply (ICSID), ¶ 790.

⁵⁵² Claimant’s Reply (ICSID), ¶ 793.

⁵⁵³ See **RL-0088**, *Case Concerning The Territorial Dispute*, ICJ, Judgment, 3 February 1994, ¶ 41 (“Interpretation must be based above all upon the text of the treaty.”).

⁵⁵⁴ **RL-0001**, TPA, Art. 10.28, fn. 15.

321. In *Saipem*, a previous commercial arbitration award had found that a State entity of the respondent had breached an underlying contract that required such State entity to make certain payments to the claimant.⁵⁵⁵ The *Saipem* tribunal held that “the parties’ rights and obligations under the original contract” constituted an investment, as a credit for sums of money.⁵⁵⁶ Importantly, however, the *Saipem* tribunal did not hold that the previous commercial arbitration award constituted an investment.
322. In *Mondev*, the claimant asserted claims under NAFTA. Unlike the TPA, NAFTA does not expressly exclude judicial decisions from qualifying as investments. As in *Saipem*, the *Mondev* tribunal did not hold that an adjudicatory ruling (in that case, a judicial decision by a United States court) constituted an investment. Instead, the *Mondev* tribunal held that it was the claimant’s domestic claims arising out of a failed contract that qualified as an investment.⁵⁵⁷
323. The *Saipem* and *Mondev* tribunals applied entirely different treaty language to a very different sets of facts, and reached a conclusion entirely different from the one Claimant is proposing here. As a result, the reasoning and findings of the *Saipem* and *Mondev* tribunals is simply inapposite.

⁵⁵⁵ CL-0066, *Saipem* (Decision on Jurisdiction), ¶ 34.

⁵⁵⁶ CL-0066, *Saipem* (Decision on Jurisdiction), ¶ 127. Further, the *Saipem* tribunal held: “[The] view . . . that the Award itself does constitute an investment under Article 25(1) of the ICSID Convention, [is a view] **which the Tribunal is not prepared to accept**” (emphasis added). *Id.*, ¶ 113.

⁵⁵⁷ Article 1139(h) of NAFTA defines investments as encompassing “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory.” NAFTA excludes “claims to money” as a qualifying investment if they “do not involve the kinds of interests set out in [Article 1139] subparagraphs (a) through (h).” CL-0104, North American Free Trade Agreement, 1 January 1994, Arts. 1139(h), 1139(j). The *Mondev* tribunal held that the claimant’s domestic law claims arising out of the failed contract “were not caught by the exclusionary language” in the NAFTA because they were claims for money that did involve the kind of interests included in Article 1139(h). See CL-0045, *Mondev* (Award), ¶ 80.

324. In sum, Claimant cannot rely on any jurisprudence—and certainly not the specific two cases that she cites—to circumvent the Judgment Exclusion Provision’s express limitation on the definition of investment, by virtue of which the 2007 Council of State Judgment is excluded as a qualifying investment.

b. Contrary to Claimant’s argument, the TPA excludes from its definition of qualifying investments all judgments entered in judicial actions

325. Claimant next argues that the Judgment Exclusion Provision only concerns certain types of judgments or orders, and that it does not encompass the 2007 Council of State Judgment. Specifically, Claimant alleges that the Judgment Exclusion Provision is only “intended to cover orders and court judgments as investments in their own right” (such as a judgment rendered in favor of a different party that is then “acquire[d] at a discount” by the investor).⁵⁵⁸

326. However, there is simply no basis in the TPA for Claimant’s argument. The Judgment Exclusion Provision precludes *all* judgments entered in judicial actions from qualifying as an investment, since as noted above it contains no exceptions, provisos, or qualifications. Once again, the Judgment Exclusion Provision provides in sweeping terms that “[t]he term ‘investment’ does not include an order or judgment entered in a judicial or administrative action.”⁵⁵⁹

327. Beyond her *ipse dixit*, Claimant fails to provide any support whatsoever for her assertion that the Judgment Exclusion Provision only applies to court judgments that are “acquire[d]” by the investor.⁵⁶⁰ Because the actual text of the Judgment Exclusion Provision is unambiguous and so self-evidently lethal to her argument, Claimant unsurprisingly does not even attempt to engage in any

⁵⁵⁸ Claimant’s Reply (ICSID), ¶ 795.

⁵⁵⁹ **RL-0001**, TPA, Art. 10.28, fn. 15.

⁵⁶⁰ Claimant’s Reply (ICSID), ¶ 795.

discussion of the text of such provision. Nor does she make any reference to the context of that provision, or more generally to the TPA's object and purpose. Indeed, Claimant does not offer a single citation in support of her interpretation of the Judgment Exclusion Provision. She does not do so because there simply is no basis whatsoever for the distinction that she purports to draw between different types of judgments.

328. The TPA must be interpreted in accordance with the rules of treaty interpretation under customary international law, as reflected in the VCLT, starting with the ordinary meaning to be given to its terms.⁵⁶¹ Since (i) the text of the Judgment Exclusion Provision is unequivocal, and (ii) Claimant does not deny that the 2007 Council of State Judgment is a judgment entered in a judicial action, such decision does not qualify as an investment under the TPA.

c. Colombia is not estopped from objecting to the absence of a qualifying investment

329. Claimant's third and final argument is that Colombia should be estopped from relying on what she characterizes as Colombia's own "wrongful actions" (i.e., the 1998 Regulatory Measures) to argue that the 2007 Council of State Judgment is not a qualifying investment.⁵⁶² According to Claimant, "[Colombia] itself caused [the Judgment Exclusion Provision] to become effective through the unlawful expropriation of Claimant's [Granahorrar shares]," because the 1998 Regulatory Measures led to the issuance of the 2007 Council of State Judgment.⁵⁶³ Claimant contends that such history estops Colombia from

⁵⁶¹ **RL-0084**, VCLT, Art. 31(1).

⁵⁶² Claimant's Reply (ICSID), § V(A)(3).

⁵⁶³ See Claimant's Reply (ICSID), ¶¶ 798–99.

invoking the Judgment Exclusion Provision as a defense in the present proceeding.⁵⁶⁴ Claimant's argument fails for at least three reasons.

330. First, Claimant's estoppel argument would require that the Tribunal make a ruling on the merits at the jurisdictional stage. Claimant essentially is asking the Tribunal to assume jurisdiction on the basis that (according to Claimant) Colombia committed a "wrongful act" under public international law.⁵⁶⁵ Specifically, Claimant's argument would require a Tribunal finding that the 1998 Regulatory Measures constituted an internationally "wrongful act."⁵⁶⁶ Accordingly, Claimant is not asking the Tribunal merely to assume facts for the purpose of determining whether it has jurisdiction; rather, she is asking the Tribunal to assume *liability*.⁵⁶⁷ It hardly needs stating that jurisdictional requirements must be independently satisfied before the Tribunal can embark on any analysis of whether the State has committed a wrongful act giving rise

⁵⁶⁴ Claimant's Reply (ICSID), § V(A)(3).

⁵⁶⁵ Claimant's Reply (ICSID), ¶¶ 801-04.

⁵⁶⁶ Claimant's Reply (ICSID), ¶¶ 801-04.

⁵⁶⁷ Tribunals have affirmed that they cannot assume any facts to be true for the purpose of finding the respondent's conduct to be unlawful. *See, e.g., CL-0073, SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29 (Alexandrov, Donovan, Mexía), Decision on Jurisdiction, 12 February 2010 ("**SGS-Paraguay (Decision on Jurisdiction)**"), ¶¶ 51-52 ("[A]t the jurisdictional stage, the Tribunal need not decide whether, assuming the factual allegations were proven, the claim would prevail as a matter of law If the rule were otherwise, the inquiry could not properly be considered jurisdictional. A determination that a given set of alleged facts, even if proven, would not constitute a violation of a legal right is, in effect, a holding on the merits . . . Thus, so long as the objection goes only to the authority of the Tribunal to hear claims for the breach of the legal right identified by the Claimant, the Tribunal's review of the sufficiency of the legal allegations, like its review of the factual allegations, is limited."). *See also CL-0051, Pan American Energy LLC and BP Argentina Exploration Company v. the Argentine Republic*, ICSID Case No. ARB/03/13 (Caflisch, Stern, van den Ber), Decision on Preliminary Objections, 27 July 2006, ¶ 50 ("[I]f everything were to depend on characterisations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them under Article 41(1) of the ICSID Convention.").

to liability under international law.⁵⁶⁸ Claimant cannot bypass that logical sequence in the legal analysis by asking the Tribunal to conclude or simply assume that Colombia has committed a wrongful act. The issue of whether the 2007 Council of State Judgment is covered by the TPA is an issue of consent and jurisdiction, not of liability. The issue of consent and jurisdiction must be decided *before* the Tribunal can make any determination on liability.

331. Second, even assuming *arguendo* that the Tribunal could rule at this jurisdictional phase on the lawfulness of the 1998 Regulatory Measures (quod non), the Tribunal lacks jurisdiction *ratione temporis* to do so. As Colombia explained in **Section II.A.1** above, the 1998 Regulatory Measures fall outside the temporal scope of the TPA.⁵⁶⁹ Even Claimant recognizes this.⁵⁷⁰ Because Claimant’s estoppel argument would require a finding that the 1998 Regulatory Measures were a “wrongful act” and constituted an “unlawful expropriation,”⁵⁷¹ such argument would require the Tribunal to make a legal determination on liability despite not having jurisdiction *ratione temporis* to do so, which is an untenable proposition.
332. Third, the Judgment Exclusion Provision applies to the 2007 Council of State Judgment *irrespective of the 1998 Regulatory Measures*. To assess the applicability of the Judgment Exclusion Provision in the present case, the only determination that the Tribunal needs to make is whether the alleged investment constitutes a judgment entered in a judicial or administrative action. If the answer is yes, the

⁵⁶⁸ See e.g., **RL-0090**, *Getma International et al. v. The Republic of Guinea*, ICSID Case No. ARB/11/29 (Van Houtte, Cremades, Tercier), Decision regarding Jurisdiction, 19 December 2012, ¶ 96 (“[T]he Arbitral Tribunal is also of the opinion that its decision regarding jurisdiction is to be made independently of any issue regarding the merits.”).

⁵⁶⁹ See Section II.A.1.

⁵⁷⁰ Claimant’s Reply (ICSID), ¶ 117 (“Thus, nothing in the TPA alters the general rule that the treaty does not impose obligations with respect to *acts* (as opposed to disputes) that predated its entry into force.”).

⁵⁷¹ Claimant’s Reply (ICSID), ¶¶ 803, 799.

Judgment Exclusion Provision indeed applies and summarily disqualifies Claimant's alleged investment from protection under the TPA. The foregoing means that the 1998 Regulatory Measures have no bearing at all on whether the 2007 Council of State Judgment falls within the scope of the Judgment Exclusion Provision. That the 2007 Council of State Judgment is a judgment entered in a judicial action is undeniable, and it is therefore excluded from protection under the TPA.

333. For all of the foregoing reasons, the 2007 Council of State Judgment is not a qualifying investment under the TPA.

d. Claimant cannot invoke protections under the TPA in relation to the 2007 Council of State Judgment because it was overturned before the critical jurisdictional dates

334. Aside from the reasons articulated above, the 2007 Council of State Judgment is not a qualifying investment under the TPA because such decision had already been overturned by the time of the critical jurisdictional dates. As Colombia further elaborates in **Section II.C.2** below, pursuant to Article 12.1 of the TPA, Article 28 of the VCLT, and Article 13 of the ILC Articles on State Responsibility,⁵⁷² an investment must have existed on two critical jurisdictional dates for the purposes of a TPA claim: (i) the date on which the TPA entered

⁵⁷² See **RL-0001**, TPA, Art. 12.1.1 ("This Chapter applies to measures adopted or maintained by a Party relating to . . . (b) investors of another Party, and investments of such investors, in financial institutions in the Party's territory"); **RL-0084**, VCLT, Art. 28 ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to . . . any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."); **RL-0010**, ILC Articles on State Responsibility, Art. 13 ("An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.").

into force⁵⁷³ (i.e., 15 May 2012), and (ii) the date of the challenged measure⁵⁷⁴ (in this case, 25 June 2014, which is the date of the 2014 Confirmatory Order).⁵⁷⁵ The 2007 Council of State Judgment was overturned by the Constitutional Court on 26 May 2011⁵⁷⁶ – nearly a year before the entry into force of the TPA. Thus, even if the 2007 Council of State Judgment could in principle be regarded as a qualifying investment under the TPA (quod non), such decision had already ceased to exist by the time of each of the critical jurisdictional dates. For that reason, too, the 2007 Council of State Judgment does not constitute a qualifying investment subject to the TPA’s protection.

⁵⁷³ See Section II.C.2. See also **RL-0001**, TPA, Art. 12.1; **RL-0084**, VCLT, Art. 28; **RL-0010**, ILC Articles on State Responsibility, Art. 13.

⁵⁷⁴ See Section II.C.2. See also **RL-0001**, TPA, Art. 12.1; **CL-0053**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, (Stern, Bucher, Fernández-Armesto) (“*Phoenix Action (Award)*”), ¶ 70 (“[T]he Tribunal lacks jurisdiction for [State] acts directed against BP and its subsidiary BG, after the sale of BP – and consequently of its interests in BG . . . as it is not contested that there was no longer any investment of the Claimant after that date [i.e., the date of the State acts.]”); **RL-0092**, *Peter Franz Voecklinghaus v. The Czech Republic*, UNCITRAL (Beechey, Klein, Lévy), Final Award, 19 September 2011 (“*Voecklinghaus (Final Award)*”), ¶ 165 (“The Tribunal concludes that [the claimant] retained no legal or beneficial ownership interest in [a Czech entity] after 8 March 2001, some seven months prior to . . . any alleged wrongdoing by the Czech Republic. Accordingly, the Tribunal holds that it has no jurisdiction to hear [the claimant’s] claims in respect of receivables owed to [the Czech entity].”).

⁵⁷⁵ Claimant has challenged a series of measures, including the 1998 Regulatory Measures and 2011 Constitutional Court Judgment. See Section II.A.1. However, for the sake of her argument about the jurisdiction *ratione temporis* of the Tribunal, Claimant insists that the only measure that she is challenging herein is the 2014 Confirmatory Order. See Claimant’s Reply (ICSID), ¶ 38. For the purpose of its *ratione materiae* objection, Colombia will demonstrate that even if the 2014 Confirmatory Order were in fact the only challenged measure (quod non), the Tribunal would lack jurisdiction *ratione materiae*.

⁵⁷⁶ **Ex. C-0023**, Judgment No. SU-447/11 (Constitutional Court), 26 May 2011 (“**2011 Constitutional Court Judgment**”).

2. *Claimant's indirect interest in Granahorrar shares does not constitute a qualifying investment under the TPA because such shares ceased to exist before the critical jurisdictional dates*

335. In the event that Claimant were still alleging that her indirectly owned Granahorrar shares (rather than the 2007 Council of State Judgment) constitutes her qualifying investment, her claims would also need to be dismissed on jurisdictional grounds, because she did not have an interest in those shares at the critical jurisdictional dates. Specifically, as explained below, Claimant did not have an interest in the shares either on (i) the date of entry into force of the TPA, or (ii) the date of the challenged measure. As a result, Claimant's indirect interest in Granahorrar shares is not a qualifying investment under the TPA, and the Tribunal lacks jurisdiction *ratione materiae*.

- a. Claimant no longer had an interest in Granahorrar shares at the time that the TPA entered into force

336. For an alleged investment to be protected by Chapter 12 of the TPA, it must have existed at the time that the TPA entered into force (i.e., 15 May 2012). To the extent that Claimant alleges that her indirect interest in Granahorrar's shares constitutes her investment for purposes of her TPA claims, such interest ceased to exist before the entry into force of the TPA, and therefore cannot constitute a qualifying investment under the TPA.

337. As mentioned above, the text of Chapter 12 of the TPA, Article 28 of the VCLT, and Article 13 of the ILC Articles on State Responsibility confirm that for an investment to qualify for protection under the TPA, such investment must have existed at or after the time that the TPA entered into force. Thus, Article 12.1 of the TPA (entitled "Scope and Coverage") provides that the set of protections contained in Chapter 12 "applies to measures adopted or maintained by a Party relating to . . . investors of another Party, and **investments of such investors**"⁵⁷⁷

⁵⁷⁷ RL-0001, TPA, Art. 12.1.1(b).

(emphasis added). Article 28 of the VLCT for its part establishes that “[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to . . . any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”⁵⁷⁸ And Article 13 of the ILC Articles on State Responsibility, which codifies the intertemporal principle of customary international law, provides that “[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”⁵⁷⁹

338. Thus, Article 12.1 of the TPA makes the existence of an investment a condition precedent for the application of TPA Chapter 12. If a claimant no longer held an interest in its alleged investment by the time of the TPA’s entry into force, such condition precedent has not been met. Similarly, an investment that ceased to exist before the entry into force of a treaty would constitute a “situation which ceased to exist before the date of entry into force of the treaty” for purposes of Article 28 of the VCLT.⁵⁸⁰ In accordance with these rules, TPA Chapter 12 will not apply to an investment that had already ceased to exist before the the TPA’s entry into force. Such being the case, and in accordance with Article 13 of the ILC Articles on State Responsibility, a measure implemented by Colombia after the investment had already ceased to exist could not possibly “constitute a breach of an international obligation” with respect to such investment.⁵⁸¹

339. In the present case, Claimant’s indirect interest in Granahorrar ceased to exist – at the latest – when Granahorrar ceased to exist in 2006 (i.e., 6 years before the

⁵⁷⁸ **RL-0084**, VCLT, Art. 28. Notably, Claimant accepts that Article 28 of the VCLT applies to Chapter 12 of the TPA. *See* Claimant’s Reply (ICSID), ¶¶ 99, 116–17.

⁵⁷⁹ **RL-0010**, ILC Articles on State Responsibility, Art. 13.

⁵⁸⁰ **RL-0084**, VCLT, Art. 28.

⁵⁸¹ **RL-0010**, ILC Articles on State Responsibility, Art. 13.

entry into force of the TPA in 2012).⁵⁸² As the tribunal will recall, Claimant held an interest in Granahorrar indirectly: she owned shares in three Holding Companies, which in turn owned shares in Granahorrar.⁵⁸³ On 3 October 1998, Granahorrar underwent a process called *oficialización*, through which Fogafín became Granahorrar's majority shareholder.⁵⁸⁴ Under Colombian law, Fogafín has the power to capitalize, via the acquisition of new shares, a financial institution that has failed to comply with a capitalization order issued by the Superintendency.⁵⁸⁵ In exchange for the acquisition, Fogafín deposits the value

⁵⁸² **Ex. R-0233**, Certificate of Existence and Legal Representation of BBVA, Chamber of Commerce of Colombia, 12 February 2020, p. 7 (“English Translation: “CERTIFIES: That by Public Deed No. 1177 of April 28, 2006 of Notary 18 of Bogotá DC, registered on April 28, 2006, under No. 1052635 of Book IX, the referenced company absorbs by fusion the company GRANAHORRAR BANCO COMERCIAL SA, which dissolves without liquidation.”) (Spanish Original: “CERTIFICA: Que por Escritura Pública No. 1177 del 28 de abril de 2006 de la Notaría 18 de Bogotá D.C., inscrita el 28 de abril de 2006 bajo el No. 1052635 del libro IX, la sociedad de la referencia absorbe mediante fusión a la sociedad GRANAHORRAR BANCO COMERCIAL S.A., que se disuelve sin liquidarse.”).

⁵⁸³ Claimant's Memorial (ICSID), ¶ 280. Claimant alleges that before the *oficialización* her three Holding Companies owned shares in Granahorrar in the following amount: *Asesorías e Inversiones C.G. Ltda* owned 6,511,830,512 Granahorrar shares; *Inversiones Lieja Ltda* owned 3,717,567,931 Granahorrar shares; and *Interventorías y Construcciones Ltda.* owned 176,720,030 Granahorrar shares. See Claimant's Memorial (ICSID), ¶ 282. Claimant does not provide any financial statements establishing the number of Granahorrar shares her Holding Companies owned in October of 1998. Thus, Colombia reserves the right to challenge the amount of Claimant's shareholding in Granahorrar at a subsequent phase of this proceeding.

⁵⁸⁴ **Ex. C-0003**, Minutes of Fogafín Board of Directors Minutes, 3 October 1998, p. 9; **Ex. R-0163**, *La Oficialización de Granahorrar*, EL TIEMPO, 5 October 1998; **Ex. R-0162**, *El Gobierno Oficializó el Banco Uconal*, EL TIEMPO, p. 2; **Ex. R-0047**, Minutes of Granahorrar Shareholders Assembly, 16 October 1998, p. 1 (showing that Fogafín, owning 15,700,000,000,000 shares, was Granahorrar's majority shareholder).

⁵⁸⁵ Second Ibáñez Expert Report, ¶ 70-73. See also **Ex. R-0129**, Decree No. 633, President of Colombia, 2 April 1993 (“**Financial Act**”), Art. 320(4)(2) (English Translation: “When a financial institution fails to comply with a capitalization order issued by the Banking Superintendency, in accordance with the provisions of numeral 2. of article 113 of this Statute, [Fogafín] may carry out capital increases without the need of a decision of the assembly, a subscription regulation, or acceptance by the legal representative. The capital increase will be understood as having been perfected with the payment of the same via a deposit into the financial institution's account by the Fund.”) (Spanish Original: “Cuando una entidad financiera

of the acquired shares into the financial institution's account, thereby capitalizing it.⁵⁸⁶ However, Fogafín does not dispossess the financial institution's shareholders of their existing shares.

340. As Colombia explained in its Counter-Memorial, on 2 October 1998, the Superintendency issued an order directing Granahorrar to raise new capital to offset its insolvency ("**Capitalization Order**").⁵⁸⁷ Granahorrar and its shareholders failed to comply with the Capitalization Order.⁵⁸⁸ Therefore, Fogafín capitalized Granahorrar via the *oficialización* procedure.⁵⁸⁹ New Granahorrar shares were created, and Fogafín became Granahorrar's majority shareholder in exchange for capitalizing Granahorrar.⁵⁹⁰ Claimant's Holding Companies retained the same number of shares that they had held in Granahorrar before the *oficialización*.⁵⁹¹

incumpla una orden de capitalización expedida por la Superintendencia Bancaria, de conformidad con las disposiciones del numeral 2. del artículo 113 de este Estatuto, [Fogafín] podrá efectuar las ampliaciones de capital sin que para el efecto se requiera decisión de la asamblea, reglamento de suscripción o aceptación del representante legal. La ampliación de capital se entenderá perfeccionada con el pago del mismo mediante consignación en cuenta a nombre de la institución financiera por parte del Fondo.")

⁵⁸⁶ **Ex. R-0129**, Decree No. 633, President of Colombia, 2 April 1993 ("**Financial Act**"), Art. 320(4)(2).

⁵⁸⁷ See Colombia's Counter-Memorial (ICSID), ¶ 85. See also **Ex. R-0038**, 1998 Capitalization Order.

⁵⁸⁸ Colombia's Counter-Memorial (ICSID), ¶¶ 89-91.

⁵⁸⁹ Colombia's Counter-Memorial (ICSID), ¶¶ 91-92.

⁵⁹⁰ See **Ex. R-0246**, Certificate of Granahorrar Share Structure as of 2 October 1998, Granahorrar, 8 October 2002 (showing that on 2 October 1998 Granahorrar had a total of 36,427,121,681 shares in circulation); **Ex. R-0047**, Minutes of Granahorrar Shareholders Assembly, 16 October 1998, p. 1 (showing that after *oficialización* the total number of Granahorrar shares in circulation were had increased to 15.7 trillion); see also *id.* (showing that Fogafín, owning 15,700,000,000,000 shares, was Granahorrar's majority shareholder).

⁵⁹¹ Claimant alleges that before the *oficialización*, her three Holding Companies owned shares in Granahorrar in the following amount: *Asesorías e Inversiones* owned 6,511,830,512 Granahorrar shares; *Inversiones Lieja* owned 3,717,567,931 Granahorrar shares; and *Interventorías y Construcciones* owned 176,720,030 Granahorrar shares. See Claimant's Memorial

341. Several years later, in late 2005, BBVA purchased Granahorrar from Fogafín and became Granahorrar's majority shareholder.⁵⁹² Granahorrar continued operating as a distinct legal entity until 28 April 2006, when BBVA merged with Granahorrar.⁵⁹³ Through this merger, BBVA dissolved Granahorrar and absorbed all of the latter's assets.⁵⁹⁴ Thus, Granahorrar, Granahorrar's shares,

(ICSID), ¶¶ 281-82. Assuming those numbers are accurate, Claimant's Holding Companies maintained the same number of shares after the *oficialización*. See **Ex. R-0244**, Certification of Number of Granahorrar Shares Owned by Asesorías e Inversiones C.G. on 3 October 1998, Granahorrar, 24 July 2000 (showing that *Asesorías e Inversiones* owned 6,511,830,512 shares out of the 15.7 trillion in circulation after *oficialización*); **Ex. R-0245**, Certification of Number of Granahorrar Shares Owned by Inversiones Lieja Ltda. on 3 October 1998, Granahorrar, 24 July 2000 (showing that *Inversiones Lieja* owned 3,717,567,931 shares out of the 15.7 trillion in circulation after *oficialización*); **Ex. R-0249**, Certification of Number of Granahorrar Shares Owned by I.C. Interventorías y Construcciones Ltda. on 3 October 1998, Granahorrar, 24 July 2000 (showing that *I.C. Interventorías y Construcciones* owned 176,720,030 shares out of the 15.7 trillion in circulation after *oficialización*).

⁵⁹² See **Ex. R-0247**, Resolution No. 0568 of 2006, Financial Superintendency, 21 March 2006, p. 1.

⁵⁹³ See **Ex. R-0247**, Resolution No. 0568 of 2006, Financial Superintendency, 21 March 2006, pp. 1-2. See also **Ex. R-0259**, Certificate of Existence and Legal Representation of Granahorrar, Financial Superintendency, 18 February 2020, p. 2 (English Translation: "That through Resolution S.B. 0568 March 21, 2006, the Financial Superintendency did not object to the proposed merger operation pursuant to which GRANAHORRAR BANCO COMERCIAL S.A. was dissolved without liquidation to be absorbed by BANCO BILBAO VIZCAYA ARGENTARIA COLOMBIA S.A. - BBVA COLOMBIA S.A., formalized by Public Deed No. 1177 of April 28, 2006, Notary 18 of Bogotá D.C.") (Spanish Original: "*Que mediante Resolución S.B. 0568 de marzo 21 de 2006, la Superintendencia Financiera, no objetó la operación de fusión propuesta en virtud de la cual GRANAHORRAR BANCO COMERCIAL S.A., se disolvió sin liquidarse para ser absorbido por el BANCO BILBAO VIZCAYA ARGENTARIA COLOMBIA S.A. - BBVA COLOMBIA S.A., protocolizada mediante Escritura Pública No. 1177 del 28 de abril de 2006, Notaría 18 de Bogotá D.C.*").

⁵⁹⁴ See **Ex. R-0233**, Certificate of Existence and Legal Representation of BBVA, Chamber of Commerce of Colombia, 12 February 2020, p. 7 ("English Translation: "CERTIFIES: That by Public Deed No. 1177 of April 28, 2006 of Notary 18 of Bogotá DC, registered on April 28, 2006, under No. 1052635 of Book IX, the referenced company absorbs by merger the company GRANAHORRAR BANCO COMERCIAL SA, which dissolves without liquidation.") (Spanish Original: "*CERTIFICA: Que por Escritura Pública No. 1177 del 28 de abril de 2006 de la Notaría 18 de Bogotá D.C., inscrita el 28 de abril de 2006 bajo el No. 1052635 del libro IX, la sociedad de la referencia absorbe mediante fusión a la sociedad GRANAHORRAR BANCO COMERCIAL S.A., que se disuelve sin liquidarse.*"). See also **Ex. R-0129**, Decree No. 633, President of Colombia, 2

and Claimant's indirect interest in such shares ceased to exist in 2006, and all that remained was BBVA.⁵⁹⁵

342. As a result, Claimant's alleged investment (i.e., her indirect interest in Granahorrar shares) is a "situation that ceased to exist before the date of entry into force"⁵⁹⁶ of the TPA on 15 May 2012. Colombia is therefore not bound by the provisions of the TPA in relation to Claimant's former indirect interest in Granahorrar shares, nor can Colombia's actions constitute a breach of an obligation under the TPA with respect to such shares.
343. Claimant attempts to overcome this fatal jurisdictional flaw in her case by arguing that her interest in Granahorrar shares somehow "transformed" (to use Claimant's term) into the 2007 Council of State Judgment.⁵⁹⁷ However, this argument fails, for at least two reasons.
344. First, as Colombia explained above, the Judgment Exclusion Provision expressly excludes judgments in judicial actions from qualifying as an investment, and therefore the 2007 Council of State Judgment does not qualify as an investment. The Judgment Exclusion provision applies regardless of the subject matter of the judgment (in this case, regulatory action concerning Granahorrar shares).
345. Second, and in any event, the 2007 Council of State Judgment was overturned by the Constitutional Court on 26 May 2011 – a year before the TPA entered into

April 1993 ("**Financial Act**"), Art. 60(3) (English Translation: "Once formalized, the merger will have the following effects . . . the absorbing entity . . . fully acquires the totality of the assets, rights, and obligations of the dissolved entity, without the need for further proceedings.") (Spanish Original: "*Una vez formalizada, la fusión tendrá los siguientes efectos . . . la entidad absorbente . . . adquiere de pleno derecho la totalidad de los bienes, derechos y obligaciones de las entidades disueltas, sin necesidad de trámite adicional alguno.*").

⁵⁹⁵ **Ex. R-0248**, *BBVA Colombia a story of 60 years*, BBVA, 18 April 2016, p. 12 ("In May 2006, the two institutions merged under the brand BBVA Colombia").

⁵⁹⁶ **RL-0084**, VCLT, Art. 28.

⁵⁹⁷ Claimant's Reply (ICSID), ¶ 796.

force.⁵⁹⁸ As a result, and for the reasons discussed above, the 2007 Council of State Judgment no longer existed by the time of the TPA's entry into force, and for that reason too it cannot constitute a qualifying investment.⁵⁹⁹

346. In sum, Granahorrar, its shares, and Claimant's indirect interest in those shares ceased to exist in 2006.⁶⁰⁰ And the 2007 Council of State Judgment, for its part, ceased to exist on 26 May 2011. Thus, when the TPA entered into force in May of 2012, Claimant no longer held any qualifying investment in Colombia, regardless of whether it is the shares or the Council of State decision that is deemed to be the relevant investment. Accordingly, the provisions of TPA Chapter 12 do not apply to Claimant's alleged investment, and Claimant cannot assert claims of breach of the TPA on the basis thereof. Further, Claimant's fanciful theory that her Granahorrar shares somehow metamorphosed into the 2007 Council of State Judgment leads to the same result.

347. Because Claimant did not have a qualifying investment at the time the TPA entered into force, the Tribunal lacks jurisdiction *ratione materiae*.

b. Claimant no longer had an interest in Granahorrar shares at the time of the challenged measure

348. The preceding section centered on the fact that Claimant no longer had an interest in the Granahorrar shares by the time of the TPA's entry into force. In

⁵⁹⁸ **Ex. C-0023**, 2011 Constitutional Court Judgment.

⁵⁹⁹ See Section II.C.1. See also **RL-0001**, TPA, Art. 12.1.1(b); **RL-0084**, VCLT, Art. 28; **RL-0010**, ILC Articles on State Responsibility, Art. 13.

⁶⁰⁰ See **Ex. R-0233**, Certificate of Existence and Legal Representation of BBVA, Chamber of Commerce of Colombia, 12 February 2020, p. 7 ("English Translation: "CERTIFIES: That by Public Deed No. 1177 of April 28, 2006 of Notary 18 of Bogotá DC, registered on April 28, 2006, under No. 1052635 of Book IX, the referenced company absorbs by fusion the company GRANAHORRAR BANCO COMERCIAL SA, which dissolves without liquidation.") (Spanish Original: "CERTIFICA: Que por Escritura Pública No. 1177 del 28 de abril de 2006 de la Notaría 18 de Bogotá D.C., inscrita el 28 de abril de 2006 bajo el No. 1052635 del libro IX, la sociedad de la referencia absorbe mediante fusión a la sociedad GRANAHORRAR BANCO COMERCIAL S.A., que se disuelve sin liquidarse.").

addition, however, TPA Article 12.1 and Article 13 of the ILC Articles on State Responsibility also require that a qualifying investment exist *as of the date of the challenged measure*.⁶⁰¹ In the present case, Claimant insists that the only measure that she is challenging in this arbitration is the 2014 Confirmatory Order.⁶⁰² That being the case—and leaving aside for the time being that Claimant makes contradictory and ever-shifting assertions in her pleadings about the specific measure(s) that she is challenging⁶⁰³—Claimant’s claims should be dismissed for lack of jurisdiction *ratione materiae* because she no longer possessed any interest in Granahorrar shares at the time that the 2014 Confirmatory Order was rendered by the Constitutional Court.

349. As explained above, Article 12.1 of the TPA provides that Chapter 12 “**applies to measures adopted or maintained by a Party relating to . . . investors of another Party, and investments of such investors**”⁶⁰⁴ (emphasis added). The existence of an investment at the time of the challenged measure is thus a condition precedent for the application of TPA Chapter 12. If no investment exists at the time of the challenged measure, by definition that measure cannot

⁶⁰¹ **RL-0001**, TPA, Art. 12.1; **RL-0010**, ILC Articles on State Responsibility, Art. 13.

⁶⁰² Claimant’s Reply (ICSID), ¶ 3 (“Here, Claimant’s claims arise from Order 188/14, the Constitutional Court’s June 25, 2014 denial of the motion for annulment of its May 26, 2011 opinion.”). In truth, Claimant has challenged a series of measures, including the 1998 Regulatory Measures and 2011 Constitutional Court Judgment. *See* Section II.A.1. However, for the sake of her argument about the jurisdiction *ratione temporis* of the Tribunal, Claimant insists that the only measure she is challenging is the 2014 Confirmatory Order. *See* Claimant’s Reply (ICSID), ¶ 38. For the purpose of its present *ratione materiae* objection, Colombia will demonstrate that even if the 2014 Confirmatory Order were Claimant’s only challenged measure (quod non), the Tribunal would lack jurisdiction *ratione materiae*.

⁶⁰³ *Compare* Claimant’s Reply (ICSID), ¶ 38 (“Here, the challenged measure occurred on June 25, 2014) *with* Claimant’s Request for Arbitration (ICSID), ¶ 1 (“In the case before this Tribunal the investment of a U.S. citizen in one of the Republic of Colombia’s leading financial institutions [Granahorrar] was reduced to the peppercorn value of COP1 0.01 based upon discriminatory, irregular, and unprecedented treatment on the part of the Central Bank of Colombia . . . FOGAFIN . . . and Superintendency of Banking.”).

⁶⁰⁴ **RL-0001**, TPA, Art. 12.1.1(b).

be one “relating to” an investment, as required by Chapter 12. The 2014 Confirmatory Order therefore falls outside the scope of Chapter 12, since by the time of such order, Claimant’s interest in the Granahorrar share (i.e., her investment) had already ceased to exist.

350. The correctness of the above legal analysis, based on the application of TPA Article 12.1 and rules of customary international law, is confirmed by the international arbitration jurisprudence,⁶⁰⁵ including in the *Cementownia v. Republic of Turkey* award:

The investor must evidence all the necessary conditions for the Arbitral Tribunal to affirm its jurisdiction. **The first condition in that regard is the Claimant’s ownership of the share certificates at the time of the alleged [breach].** The Claimant must therefore prove: - that it had effectively and validly acquired the share certificates . . . and - that it acquired them before **the alleged [breach] . . . and that it still was the owner of the shares on that date.**⁶⁰⁶ (Emphasis added)

⁶⁰⁵ **RL-0086**, *Mesa Power Group LLC v. Government of Canada*, UNCITRAL (Kaufmann-Kohler, Brower, Landau), Award, 24 March 2016 (“*Mesa Power (Award)*”), ¶ 325 (“[T]here is no jurisdiction if disputed measures are not ‘relating to investors’ or to ‘investments of an investor.’ In addition to these express provisions of Chapter 11 [of the NAFTA], the same conclusion arises as a general matter from the principle of nonretroactivity of treaties. State conduct cannot be governed by rules that are not applicable when the conduct occurs.”); **RL-0085**, *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB/06/8 (Tercier, Lalonde, Thomas), Award, 17 September 2009 (“*Cementownia (Award)*”), ¶¶ 112-13 (“It is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, i.e., at the moment when the events on which its claim is based occurred . . . [claimant] bore the burden of proving that it owned or controlled the [companies’] shares at all relevant times.”).

⁶⁰⁶ **RL-0085**, *Cementownia* (Award), ¶ 114.

Investment arbitration tribunals have repeatedly dismissed claims on the same basis, i.e., that a claimant had already lost its interest in the alleged investment by the time of adoption of the challenged measures.⁶⁰⁷

351. Accordingly, Claimant must prove that her indirect interest in Granahorrar shares still existed on the date that the Constitutional Court issued the 2014 Confirmatory Order. However, as explained above, Granahorrar and its shares—and therefore Claimant’s indirect interest in such shares—ceased to exist in 2006.⁶⁰⁸ Accordingly, that investment no longer existed by the time of issuance of the 2014 Confirmatory Order. Therefore, Claimant’s indirect interest in Granahorrar shares is not a qualifying investment under the TPA.
352. For the foregoing reasons, Claimant’s indirect interest in Granahorrar shares does not constitute a qualifying investment, and the Tribunal lacks jurisdiction *ratione materiae*.

⁶⁰⁷ See e.g., **CL-0053**, *Phoenix Action* (Award), ¶ 70 (“[T]he Tribunal lacks jurisdiction for acts directed against BP and its subsidiary BG, after the sale of BP – and consequently of its interests in BG . . . as it is not contested that there was no longer any investment of the Claimant after that date.”); **RL-0092**, *Voelkinghaus* (Final Award), ¶ 165 (“The Tribunal concludes that [the claimant] retained no legal or beneficial ownership interest in [a Czech entity] after 8 March 2001, some seven months prior to . . . any alleged wrongdoing by the Czech Republic. Accordingly, the Tribunal holds that it has no jurisdiction to hear [the claimant’s] claims in respect of receivables owed to [the Czech entity].”).

⁶⁰⁸ **Ex. R-0233**, Certificate of Existence and Legal Representation of BBVA, Chamber of Commerce of Colombia, 12 February 2020, p. 7 (“English Translation: “CERTIFIES: That by Public Deed No. 1177 of April 28, 2006 of Notary 18 of Bogotá DC, registered on April 28, 2006, under No. 1052635 of Book IX, the referenced company absorbs by fusion the company GRANAHORRAR BANCO COMERCIAL SA, which dissolves without liquidation.”) (Spanish Original: “CERTIFICA: Que por Escritura Pública No. 1177 del 28 de abril de 2006 de la Notaría 18 de Bogotá D.C., inscrita el 28 de abril de 2006 bajo el No. 1052635 del libro IX, la sociedad de la referencia absorbe mediante fusión a la sociedad GRANAHORRAR BANCO COMERCIAL S.A., que se disuelve sin liquidarse.”).

3. *Claimant acquired her indirect interest in Granahorrar in violation of Colombian law*

353. An investment made in violation of the host State's laws is not eligible to enjoy protection under an investment treaty. In its Counter-Memorial, Colombia demonstrated that in obtaining her interest in Granahorrar shares, Claimant failed to comply with Colombian laws governing the establishment of foreign investments, which required her to: (i) seek and obtain approval to make the investment; and (ii) register the investment.⁶⁰⁹ Colombia further demonstrated that Claimant failed to comply with Colombian laws requiring the approval and registration of the foreign capital that she likely used to acquire her indirect interest in Granahorrar.⁶¹⁰ Colombia thus demonstrated that the Tribunal lacks jurisdiction *ratione materiae* because Claimant's indirect interest in Granahorrar was not made in accordance with Colombia's laws.

354. In her Reply, Claimant raised the following arguments in response: (i) that there is no general jurisdictional requirement under international law that an investment be made in accordance with the host State's law;⁶¹¹ (ii) that even if there is a jurisdictional requirement of conformity with local law, Claimant's violations were not severe enough to warrant dismissal of her claims;⁶¹² (iii) that Colombia has not proved that Claimant's (alleged) investment was subject to the approval and registration requirements prescribed by Colombian law;⁶¹³ and (iv) that Colombia is estopped from relying on Claimant's violations of local law, because Colombia never imposed sanctions on Claimant for any such violations.⁶¹⁴

⁶⁰⁹ Colombia's Counter-Memorial (ICSID), ¶¶ 393–409, 416–19.

⁶¹⁰ See Colombia's Counter-Memorial (ICSID), ¶¶ 410–15.

⁶¹¹ See Claimant's Reply (ICSID), ¶¶ 805–70.

⁶¹² See Claimant's Reply (ICSID), ¶¶ 871–84.

⁶¹³ See Claimant's Reply (ICSID), ¶¶ 885–91.

⁶¹⁴ See Claimant's Reply (ICSID), ¶¶ 892–900.

355. The arguments delineated above fail for the following reasons: (i) pursuant to international law, an investment made in violation of the host State's laws is not eligible to enjoy the substantive protections of an investment treaty (**Section 3.a**); (ii) an investment made in violation of a host State's laws governing the establishment of foreign investments will not be subject to investment treaty protection (**Section 3.b**); (iii) Claimant in fact made her alleged investment in Granahorrar in violation of Colombian law (**Section 3.c**); and (iv) Colombia is not estopped from raising a jurisdictional objection on the basis of Claimant's violation of Colombian law, because Colombia was unaware of such violation until the present proceeding (**Section 3.d**). As a result, the Tribunal lacks jurisdiction *ratione materiae*. Each of the strands identified above is developed in greater detail below.

- a. International law requires that an investment be made in compliance with the host State's law for such investment to be eligible for treaty protection

356. As Colombia noted in its Counter-Memorial, international law establishes that an investment made in violation of the law of the host State is not eligible to receive protection under the relevant treaty ("**Conformity Requirement**").⁶¹⁵ This is so irrespective of the presence or absence of explicit treaty language to that effect ("**conformity clause**").⁶¹⁶ In her Reply, Claimant asserts that given the absence of an express conformity clause in the TPA, a violation of Colombian law is not a jurisdictional matter but rather one that goes to the merits.⁶¹⁷ Claimant is mistaken, however, for the reasons discussed below.

⁶¹⁵ Colombia's Counter-Memorial, ¶¶ 386-91.

⁶¹⁶ Colombia's Counter-Memorial, ¶ 386.

⁶¹⁷ Claimant's Reply (ICSID), ¶¶ 805, 872.

- i. The weight of the jurisprudence confirms the existence of a Conformity Requirement under international law

357. Numerous investment arbitral tribunals have confirmed the existence of the Conformity Requirement under international law (including in the absence of a conformity clause in the relevant treaty). For instance, in 2003, the *Yuang Chi OO v. Myanmar* tribunal recognized “the general rule that for a foreign investment to enjoy treaty protection it must be lawful under the law of the host State.”⁶¹⁸ In its Counter-Memorial, Colombia cited four cases (*Phoenix Action v. the Czech Republic*, *Hamester v. Republic of Ghana*, *SAUR v. Republic of Argentina*, and *Plama v. Bulgaria*) in which tribunals confirmed the existence of the Conformity Requirement.⁶¹⁹ In addition to those cases, the tribunals in *Oxus Gold v. Uzbekistan* and *Achmea v. Slovak Republic* have also confirmed the existence of the Conformity Requirement.⁶²⁰ In four of those cases, the

⁶¹⁸ **RL-0093**, *Yuang Chi OO Trading PTE Ltd., v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1 (Sucharitkul, Crawford, Delon), Award, 31 March 2001 (“*Yuang Chi OO (Award)*”), ¶ 58.

⁶¹⁹ **CL-0053**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5 (Stern, Bucher, Fernández-Armesto), Award, 15 April 2009 (“*Phoenix Action (Award)*”), ¶¶ 101; **RL-0036**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24 (Stern, Cremades, Landau), Award, 18 June 2010 (“*Hamester (Award)*”), ¶¶ 123-24 (“[An investment] will also not be protected if it is made in violation of the host State’s law (as elaborated, e.g. by the tribunal in Phoenix) **These are general principles that exist independently of specific language to this effect in the Treaty.**”) (emphasis added); **RL-0038**, *SAUR International S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4 (Fernández-Armesto, Hanotiau, Tomuschat), Decision on Jurisdiction and Liability, 6 June 2012 (“*SAUR (Decision on Jurisdiction and Liability)*”), ¶ 308; **RL-0037**, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Salans, van den Berg, Veeder), Award, 27 August 2008 (“*Plama (Award)*”), ¶¶ 138, 143.

⁶²⁰ **RL-0087**, *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13 (Lowe, van den Berg, Veeder), Final Award, 7 December 2012 (“*Achmea (Final Award)*”), ¶¶ 166, 170; **RL-0095**, *Oxus Gold v. The Republic of Uzbekistan*, UNCITRAL (Tercier, Lalonde, Stern), Final Award, 17 December 2015 (“*Oxus Gold (Final Award)*”), ¶¶ 698, 706-08.

applicable treaty did *not* include a conformity clause;⁶²¹ in the remaining three, the treaties included conformity clauses but the tribunals affirmed the existence of the Conformity Requirement irrespective of the existence of such clause.⁶²²

358. In support of its position, Claimant now cites the minority view represented by three tribunals – *Bear Creek Mining v. Peru*, *Stati v. Kazakhstan*, and *Liman Caspian Oil v. Kazakhstan* – for the proposition “that there is no jurisdictional requirement that an investment be made in accordance with the laws of the host State in the absence of express treaty language to that effect.”⁶²³ On this basis, Claimant alleges that any alleged violation of domestic law by her should be considered only at the merits phase.⁶²⁴

359. However, the majority view in the investment arbitration jurisprudence recognizes the existence of a Conformity Requirement in international law *even in the absence of an express treaty provision to that effect*.⁶²⁵ The three tribunals relied upon by Claimant did not analyze or address that consistent line of jurisprudence confirming the existence of the Conformity Requirement, and instead made summary conclusions about the perceived irrelevance (in those cases) of compliance with domestic law for the tribunals’ analysis of jurisdiction.⁶²⁶ Moreover, the decision on this issue in all three of those cases

⁶²¹ See **RL-0038**, *SAUR* (Decision on Jurisdiction and Liability), ¶ 308; **RL-0037**, *Plama* (Award), ¶¶ 138, 143; **RL-0087**, *Achmea* (Final Award), ¶ 166; **RL-0095**, *Oxus Gold* (Final Award), ¶¶ 698, 706-08.

⁶²² See **RL-0093**, *Yaung Chi OO* (Award), ¶ 58; **CL-0053**, *Phoenix Action* (Award), ¶ 101; **RL-0036**, *Hamester* (Award), ¶¶ 123-24.

⁶²³ Claimant’s Reply (ICSID), ¶¶ 811, 812-13.

⁶²⁴ Claimant’s Reply (ICSID), ¶¶ 805, 872.

⁶²⁵ See **RL-0093**, *Yaung Chi OO* (Award), ¶ 58; **CL-0053**, *Phoenix Action* (Award), ¶ 101; **RL-0036**, *Hamester* (Award), ¶¶ 123-24; **RL-0038**, *SAUR* (Decision on Jurisdiction and Liability), ¶ 308; **RL-0037**, *Plama* (Award), ¶¶ 138, 143; **RL-0087**, *Achmea* (Final Award), ¶¶ 166, 170; **RL-0095**, *Oxus Gold* (Final Award), ¶¶ 698, 706-08.

⁶²⁶ **CL-155A**, *Bear Creek Mining Corp v. Republic of Peru*, ICSID Case No. ARB/14/21 (Böckstiegel, Pryles, Sands), Award, 30 November 2017, ¶ 320; **CL-0179A**, *Liman Caspian Oil*

appears to have been driven by the opinion of a single arbitrator—Dr. Karl-Heinz Böckstiegel—who was the presiding arbitrator in each of those cases.⁶²⁷

360. Several other tribunals have addressed the question as to whether to address the subject of compliance with domestic law as a jurisdictional or merits issue. In particular, a number of tribunals have held that: (i) a violation of domestic law in the *making* of an investment (as is the case here) is a jurisdictional matter, whereas (ii) a post-establishment violation of domestic law (i.e., during the life of the investment) could be relevant to the merits of a claim.⁶²⁸ Such tribunals drew this distinction not only in circumstances in which the applicable treaty included a conformity clause,⁶²⁹ but also in circumstances in which it did not.⁶³⁰ Claimant failed to address this distinction or the underlying case law that supports it.

BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14 (Böckstiegel, Hobér, Crawford), Award, 22 June 2010, ¶ 187; **CL-0149-A**, *Antolie Stati et al. v. The Republic of Kazakhstan*, SCC Arbitration V No. 116/2010 (Böckstiegel, Haigh, Lebedev), Award, 19 December 2013, ¶ 812.

⁶²⁷ **CL-155A**, *Bear Creek Mining Corp v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (Böckstiegel, Pryles, Sands), ¶ 320; **CL-0179A**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14 (Böckstiegel, Hobér, Crawford), Award, 22 June 2010, ¶ 187; **CL-0149-A**, *Antolie Stati et al. v. The Republic of Kazakhstan*, SCC Arbitration V No. 116/2010 (Böckstiegel, Haigh, Lebedev), Award, 19 December 2013, ¶ 812.

⁶²⁸ See, e.g., **RL-0036**, *Hamester (Award)*, ¶ 127; **RL-0041**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 (Kaufmann-Kohler, Lalonde, Stern), Decision on Jurisdiction, 27 September 2012 (“**Quiborax (Decision on Jurisdiction)**”), ¶ 266; **RL-0042**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (Kaufmann-Kohler, Townsend, von Wobeser), Award, 4 October 2013 (“**Metal-Tech (Award)**”), ¶ 193; **RL-0039**, *Vladislav Kim et. al v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6 (Caron, Fortier, Landau), Decision on Jurisdiction, 8 March 2017 (“**Kim (Decision on Jurisdiction)**”), ¶ 375; **RL-0095**, *Oxus Gold (Final Award)*, ¶ 707.

⁶²⁹ See **RL-0036**, *Hamester (Award)*, ¶ 127; **RL-0041**, *Quiborax (Decision on Jurisdiction)*, ¶ 266; **RL-0042**, *Metal-Tech (Award)*, ¶ 193; **RL-0039**, *Kim (Decision on Jurisdiction)*, ¶ 375.

⁶³⁰ See **RL-0095**, *Oxus Gold (Final Award)*, ¶ 707.

361. In rejecting the notion that Claimant was required to comply with Colombian law in making her investment in order for such investment to qualify for TPA protection, Claimant also points to the existence of conformity clauses in other Colombia treaties. According to Claimant, the fact that the TPA does not include a conformity clause, whereas other treaties concluded by Colombia do feature such a clause, demonstrates a “policy choice made by the State parties [to the TPA] not to impose a limitation on covered investments.”⁶³¹ However, recourse to the text of other treaties is not an appropriate means of treaty interpretation under the VCLT.⁶³² Moreover, the Conformity Requirement *always* applies—regardless of the text of the applicable treaty.⁶³³ To illustrate, other principles of international law (e.g., the principle of non-retroactivity) likewise apply implicitly, even in instances in which the relevant treaty does not make explicit reference to the relevant principle.⁶³⁴

⁶³¹ Claimant’s Reply (ICSID), ¶ 816.

⁶³² See generally **RL-0084**, VCLT, Arts. 31–32.

⁶³³ See **RL-0093**, *Yaung Chi OO* (Award), ¶ 58; **CL-0053**, *Phoenix Action* (Award), ¶ 101; **RL-0036**, *Hamester* (Award), ¶¶ 123–24; **RL-0038**, *SAUR* (“Decision on Jurisdiction and Liability, ¶ 308; **RL-0037**, *Plama* (Award), ¶¶ 138, 143; **RL-0087**, *Achmea* (Final Award), ¶¶ 166, 170; **RL-0095**, *Oxus Gold* (Final Award), ¶¶ 698, 706–08.

⁶³⁴ See **RL-0001**, TPA, Art. 10.22(a) (requiring tribunals to “decide the issues in dispute in accordance with . . . applicable rules of international law”). See also **RL-0094**, *Manuel García Armas et al. v. the Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019 (Nunes Pinto, Gómez-Pinzón, Torres Bernárdez), ¶ 704 (“Los principios importados de la costumbre internacional general se aplican salvo derogación expresa. En otras palabras, el arbitraje internacional de inversiones no es una esfera enteramente divorciada del derecho internacional general.”); CL-0183, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (Mazon, Mikva, Mustill), Award, 26 June 2003, ¶ 160 (“An important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so.”); CL-0166, *Elettronica Sicula S.p.A.*, ICJ, Judgment, 20 July 1989, ¶ 50.

- ii. Claimant mischaracterizes Colombia's arguments and the relevant case law concerning the Conformity Requirement

362. Claimant repeatedly mischaracterizes Colombia's arguments, as well as the relevant case law, with respect to the Conformity Requirement. Three illustrative examples are provided below.

363. First, in many instances Claimant asserts that Colombia is relying on cases for a certain proposition, when Colombia in fact cited such cases for an entirely different proposition. For example, Claimant devotes 13 pages of her Reply to an analysis of three cases cited by Colombia: *Fraport v. Phillipines*, *Inceysa v. El Salvador*, and *Salini v. Morocco*.⁶³⁵ In that segment of her brief, Claimant seeks to establish that none of those cases supports the existence of a general Conformity Requirement under international law (i.e., even in the absence of a conformity clause in the relevant treaty).⁶³⁶ However, Colombia did not cite those cases for that proposition, but rather for the proposition that an investment made in violation of a host State's law is not eligible to enjoy treaty protection when the treaty at issue does include a conformity clause.⁶³⁷ Colombia cited a different and separate set of cases (*Phoenix Action v. the Czech Republic*, *Hamester v. Republic of Ghana*, *SAUR v. Republic of Argentina*, and *Plama v. Bulgaria*)⁶³⁸ in support of the existence of the Conformity Requirement even in the absence of a conformity clause in the relevant treaty.⁶³⁹

⁶³⁵ Claimant's Reply (ICSID), pp. 439-52.

⁶³⁶ See Claimant's Reply (ICSID), ¶ 841.

⁶³⁷ Colombia's Counter-Memorial (ICSID), ¶ 386.

⁶³⁸ See Colombia's Counter-Memorial (ICSID), ¶ 386.

⁶³⁹ See **CL-0053**, *Phoenix Action* (Award), ¶¶ 101; **RL-0036**, *Hamester* (Award), ¶¶ 123-124 ("[An investment] will also not be protected if it is made in violation of the host State's law (as elaborated, e.g. by the tribunal in Phoenix) **These are general principles that exist independently of specific language to this effect in the Treaty.**") (emphasis added); **RL-0038**, *SAUR* (Decision on Jurisdiction and Liability), ¶ 308; **RL-0037**, *Plama* (Award), ¶¶ 138, 143.

364. Second, Claimant mischaracterizes the reasoning and decisions of certain tribunals. For instance, Claimant states that the *Hamester v. Ghana* award “shows that there is no general requirement of conformity.”⁶⁴⁰ But the *Hamester* award states precisely the opposite: “[An investment] will also not be protected if it is made in violation of the host State’s law . . . **independently of specific language to this effect in the Treaty**”⁶⁴¹ (emphasis added).
365. Similarly, according to Claimant, the *Phoenix Action* tribunal decided that in the absence of a Conformity Clause, only violations of “core principles of domestic and international law, rising to the level of public policy or *ordre public*,” can preclude investments from enjoying treaty protection.⁶⁴² Yet the *Phoenix Action* tribunal said no such thing; to the contrary, it explicitly confirmed the existence of a broader Conformity Requirement, in the section of its award titled “The protection of foreign investments made in accordance with the laws of the host State:”⁶⁴³

States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws . . . These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process . . . **[T]he conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT** The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law.⁶⁴⁴ (Emphasis added)

⁶⁴⁰ Claimant’s Reply (ICSID), ¶ 847.

⁶⁴¹ **RL-0036**, *Hamester* (Award), ¶¶ 123–24.

⁶⁴² Claimant’s Reply (ICSID), ¶ 854.

⁶⁴³ **CL-0053**, *Phoenix Action* (Award), § V.C.1.

⁶⁴⁴ **CL-0053**, *Phoenix Action* (Award), ¶¶ 101–02.

Moreover, one of the categories of local law violation identified by the *Phoenix Action* tribunal as precluding an investment from enjoying treaty protection is the violation of a host State's law governing the establishment of foreign investments.⁶⁴⁵

366. Likewise, because the specific violation of domestic law at issue in *Plama* involved fraud, Claimant erroneously interprets that case to mean that only "a breach of fundamental principles of domestic law," such as fraud, would deprive an investment of treaty protection.⁶⁴⁶ However, the *Plama* tribunal clearly referred to violations of domestic law more broadly:

[T]he Tribunal has decided that the investment was obtained by deceitful conduct **that is in violation of Bulgarian law**. The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the principle *nemo auditor propriam turpitudinem allegans*⁶⁴⁷ (Emphasis added)

Nowhere in its award did the *Plama* tribunal state that a breach of a "fundamental" principle of domestic law is the only category of violation of domestic law that could deprive an investment of treaty protection.

367. Finally, Claimant incorrectly attributes to *SAUR* the assertion that "in order to affect an investor's ability to rely on the protection of a BIT, there must have been a serious breach of the judicial system."⁶⁴⁸ However, the *SAUR* tribunal merely referred to "serious" violations as part of a broader requirement to comply with domestic law:

⁶⁴⁵ CL-0053, *Phoenix Action* (Award), ¶ 101 ("If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system.").

⁶⁴⁶ Claimant's Reply (ICSID), ¶ 862.

⁶⁴⁷ See RL-0037, *Plama* (Award), ¶ 143.

⁶⁴⁸ Claimant's Reply (ICSID), ¶ 868.

The Tribunal understands that the object of the investment arbitration system **is to protect only legal and bona fide investments**. The fact that the BIT between France and Argentina mentions or fails to mention the requirement that the investor have acted in accordance with domestic law is not a relevant factor. The requirement of not having incurred a serious violation of the legal system is a tacit condition, implicit in every BIT, since **it cannot be understood in any case that a State is offering the benefit of protection through investment arbitration, when the investor, to achieve that protection, has taken an unlawful action.**⁶⁴⁹ (Emphasis added)

Thus, the SAUR tribunal was alluding to unlawful actions—generally—of which serious violations are a subset. Contrary to what Claimant argues, nowhere does the SAUR award state that *only* “serious” breaches of domestic law preclude an investment from enjoying treaty protection.

368. In sum, the cases discussed by Colombia confirm that the Conformity Requirement is indeed a principle of international law, irrespective of the presence of an express conformity clause in the relevant treaty. Such principle applies fully to Claimant and her alleged investment, which means that such alleged investment must have been made in compliance with Colombian law to be eligible to enjoy the investment protections conferred by the TPA.

⁶⁴⁹ See **RL-0038**, SAUR (Decision on Jurisdiction and Liability), ¶ 308 (Spanish Original: “El Tribunal entiende que la finalidad del sistema de arbitraje de inversión radica **en proteger únicamente inversiones legales y bona fide**. El hecho de que el APRI entre Francia y la Argentina mencione o deje de mencionar la exigencia de que el inversor haya actuado en conformidad con la legislación interna, no constituye un factor relevante. El requisito de no haber incurrido en una violación grave del ordenamiento jurídico es una condición tácita, ínsita en todo APRI, pues **no se puede entender en ningún caso que un Estado esté ofreciendo el beneficio de la protección mediante arbitraje de inversión, cuando el inversor, para alcanzar esa protección, haya incurrido en una actuación antijurídica.**”) (énfasis agregado).

- b. A foreign investment violates the Conformity Requirement if the investment did not comply with host State law governing the establishment of foreign investments

369. The Parties appear to agree that not every violation of a host State's law will preclude an investment from enjoying treaty protection, but they disagree as to what type of violations will suffice. The jurisprudence has identified multiple categories of violations of domestic law that would prevent an investment from qualifying for treaty protection.⁶⁵⁰ In its Counter-Memorial, Colombia demonstrated that Claimant's violation of Colombian law falls into one of those categories: the violation of domestic laws governing the establishment of foreign investments.⁶⁵¹
370. In her Reply, Claimant contends that, to the extent that a Conformity Requirement does exist, there are only two circumstances in which an investment is not subject to treaty protection: (i) if the applicable treaty *does not* include a conformity clause, where the violation of domestic law infringes fundamental principles of domestic or international law;⁶⁵² and (ii) if the applicable treaty does include a conformity clause, where the violation of domestic law compromises a significant interest of the host State.⁶⁵³ According to Claimant, neither of those two circumstances is present here, and her alleged investment is thus subject to the TPA's protection.⁶⁵⁴ Contrary to what Claimant argues, however, it is simply not true that an investment is precluded from enjoying treaty protection *only* if the violation of domestic law infringes fundamental principles of domestic or international law or compromises a significant interest of the host State.

⁶⁵⁰ Colombia's Counter-Memorial (ICSID), ¶ 420.

⁶⁵¹ Colombia's Counter-Memorial (ICSID), ¶¶ 420–22.

⁶⁵² See Claimant's Reply (ICSID), ¶ 873.

⁶⁵³ Claimant's Reply (ICSID), ¶ 880.

⁶⁵⁴ Claimant's Reply (ICSID), ¶¶ 878, 882–83.

371. There are at least four categories of violations of domestic law that can preclude an investment from enjoying treaty protection. The *Quiborax* and *Metal-Tech* tribunals, compiling the then-existing jurisprudence,⁶⁵⁵ identified the following three:
- a. “non-trivial violations of the host State’s legal order”;
 - b. “violations of the host State’s foreign investment regime”; and
 - c. “fraud – for instance, to secure the investment[] or profits.”⁶⁵⁶
372. The fourth category was identified by the *Kim v. Uzbekistan* tribunal, which concluded that a denial of treaty protection is warranted only when “noncompliance with a law . . . results in a compromise of a correspondingly significant interest of the Host State.”⁶⁵⁷
373. While the *severity* of a given violation can certainly prevent an investment from enjoying treaty protection,⁶⁵⁸ so can the *nature* of the violation. In that respect, a

⁶⁵⁵ See **RL-0041**, *Quiborax* (Decision on Jurisdiction), ¶ 266 (citing **RL-0055**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 (Weil, Bernadini, Price), Decision on Jurisdiction, 29 April, 2004, ¶ 86; **RL-0077**, *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3 (Tercier, Faurès, Gaillard), Decision, 12 July 2006, ¶ 83;); **CL-0164-D**, *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17 (Tercier, Paulsson, El-Kosheri), Award, 6 February 2008, ¶ 104; **RL-0078**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20 Award, 14 July 2010, (van Houtte, Lévy, Gaillard) (“*Saba Fakes (Award)*”), ¶ 119; **RL-0076**, *Inceysa (Award)*, ¶¶ 236–38; **RL-0036**, *Hamester (Award)*, ¶¶ 129, 135; **RL-0037**, *Plama (Award)*, ¶¶ 133–35; **RL-0040**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25 (Fortier, Cremades, Reisman), Award, 16 August 2007 (“*Fraport (Award)*”), ¶ 396); **RL-0042**, *Metal-Tech (Award)*, ¶ 165.

⁶⁵⁶ **RL-0041**, *Quiborax* (Decision on Jurisdiction), ¶ 266. See also **RL-0042**, *Metal-Tech (Award)*, ¶ 165.

⁶⁵⁷ **RL-0039**, *Kim* (Decision on Jurisdiction), ¶ 396.

⁶⁵⁸ In any event, Claimant’s argument is rendered moot by the fact that her failure to obtain approval or register her alleged investment (detailed below) does in fact violate fundamental principles of Colombian law. Thus, even under the higher standard proposed by Claimant, Claimant’s alleged investment would still be deprived of the TPA’s protection. While Claimant cites to *Hochtief v. Argentina* for the proposition that tribunals have denied treaty protection

number of tribunals (including those in *Saba Fakes*, *Phoenix Action*, *Quiborax*, *Metal-Tech*, and *Achmea*) have concluded that a violation of the host State's law regulating the establishment of foreign investments will preclude an investment from enjoying treaty protection.⁶⁵⁹

374. Claimant did not even address this issue in her Reply, nor did she address the above-referenced case law concerning violations of a host State's laws governing foreign investments. Claimant has thus failed to rebut Colombia's argument that the *nature* of her violation deprives her investment of the TPA's protections.

when an investment was made in violation of fundamental principles of domestic law (*see* Claimant's Reply (ICSID), ¶ 874), Claimant elides the important fact that the *Hochtief* tribunal held that a failure to obtain the government approvals required for making an investment is a violation of a fundamental principle of domestic law: "[I]n previous cases, tribunals have focused upon compliance with '**fundamental principles of the host State's law**'. This Tribunal considers that to be the correct focus when the question is addressed in the context of questions of jurisdiction and admissibility. Investments that are forbidden, or **dependent upon government approvals that were not in fact obtained** [should be denied treaty protection]" (emphasis added). **RL-0056**, *Hochtief* (Decision on Jurisdiction), ¶ 199.

⁶⁵⁹ *See* **RL-0078**, *Saba Fakes* (Award), ¶ 119 (applying the following conformity clause: "It is the Tribunal's view that the legality requirement contained therein concerns the question of the compliance with the host State's domestic laws governing the admission of investments in the host State."); **RL-0041**, *Quiborax* (Decision on Jurisdiction), ¶ 266; **RL-0042**, *Metal-Tech* (Award), ¶ 193; **RL-0087**, *Achmea* (Final Award), ¶ 170 ("[I]t is wholly unreasonable to suppose that the Parties could have intended to protect investments that violate, for example, a prohibition on foreign investment in a specified sector of the economy. The terms of the Treaty could not be interpreted in good faith to require such protection."); **CL-0053**, *Phoenix Action* (Award), ¶ 101 ("States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system.").

c. Claimant made her alleged investment in violation of Colombian law governing the establishment of foreign capital investments

375. In the present case, Claimant violated specific Colombian laws governing the establishment of foreign investments.⁶⁶⁰ As Colombia detailed in its Counter-Memorial, at the time that Claimant obtained her indirect interest in Granahorrar, she violated a series of provisions of Colombian law that required the approval and registration of foreign capital investments (“**Foreign Capital Investment Framework**”) and of foreign capital (“**Foreign Capital Control Provisions**”).⁶⁶¹ In her Reply, Claimant incorrectly alleges that Colombia merely assumes that her indirect interest in Granahorrar qualified as a foreign capital investment.⁶⁶² However, Claimant does not take a position on the critical issue of whether she made her investment using foreign capital.

376. In the following sections, Colombia will demonstrate that (i) Claimant violated the Foreign Capital Investment Framework; (ii) in the alternative, Claimant violated the Foreign Capital Control Provisions; and (iii) Claimant cannot bypass her burden of proof on this issue.

i. Claimant violated the Foreign Capital Investment Framework

377. In its Counter-Memorial, Colombia provided a detailed explanation of the foreign investment and capital regime that was in force in Colombia at the time that Claimant made her investment in Granahorrar.⁶⁶³ To recall, Colombia’s Foreign Capital Investment Framework consisted of a series of laws whose object was to “promote foreign capital investments, in harmony with the

⁶⁶⁰ Colombia’s Counter-Memorial (ICSID), ¶¶ 420–26.

⁶⁶¹ Colombia’s Counter-Memorial (ICSID), ¶¶ 392–419.

⁶⁶² Claimant’s Reply (ICSID), ¶¶ 886–87.

⁶⁶³ Colombia’s Counter-Memorial (ICSID), ¶¶ 392–419.

general interests of the national economy.”⁶⁶⁴ Among other things, the Foreign Capital Investment Framework regulated investments made with foreign capital.⁶⁶⁵

378. Between 1967 and 1991, the Foreign Capital Investment Framework required that foreign capital investments be (i) submitted to and approved by the *Departamento Administrativo de Planeación* (“**Planning Department**”) of Colombia, and (ii) if approved, registered at the *Oficina de Cambios* (“**Exchange Office**”) of the Central Bank.⁶⁶⁶ In 1991, the Planning Department approval requirement was removed from the Foreign Capital Investment Framework; however, the registration requirement before the Exchange Office was retained.⁶⁶⁷
379. The Foreign Capital Investment Framework was in force (i) at the time that Claimant alleges that she first obtained her interest in Granahorrar (i.e., 1986),⁶⁶⁸

⁶⁶⁴ **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967, Art. 1.d (Spanish original: “*d) Estímulo a la inversión de capitales extranjeros, en armonía con los intereses generales de la economía nacional.*”).

⁶⁶⁵ **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967, Art. 105 (English Translation: “The rules in this chapter shall apply to foreign capital investments in Colombia, to foreign currency credits granted in favor of a natural person or legal person resident in the country, and to investments or loans that the latter may grant to a natural person or legal person abroad.”) (Spanish Original: “*Las normas de este capítulo se aplicarán a las inversiones de capital extranjero en Colombia, a los créditos en moneda extranjera otorgados a favor de personas naturales o jurídicas residentes en el país y a las inversiones o préstamos que estas últimas hagan o concedan a favor de personas naturales o jurídicas del Exterior.*”).

⁶⁶⁶ **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967, Arts. 107, 109, 113, 120; **Ex. R-0109**, Decision No. 24, Special Commission, 14–31 December 1970, Art. 37; **Ex. R-0116**, Decree No. 1900, President of Colombia, 15 September 1973, Arts. 2, 4, 5; **Ex. R-0115**, Decree No. 1265, President of Colombia, 10 July 1987, Arts. 1, 5, 6.

⁶⁶⁷ **Ex. R-0111**, Law No. 9, Congress of Colombia, 17 January 1991, Art. 15; **Ex. R-0112**, Resolution No. 49, 28 January 1991, Arts. 19, 21; **Ex. R-0113**, Resolution No. 57, 26 June 1991, Arts. 0.0.0.01; 1.6.1.01; **Ex. R-0117**, External Resolution No. 21, Central Bank, 21 September 1993, Art. 37.

⁶⁶⁸ See Witness Statement of Astrida Benita Carrizosa, 7 June 2019, ¶ 20 (“My husband and I acquired Granahorrar in 1986.”). See also **Ex. C-0001**, Granahorrar Information Memorandum, Lehman Brothers, August 1998, p. 25.

and (ii) at the time that Claimant says that she obtained further interests in Granahorrar via some of the Holding Companies (i.e., between 1991 and 1997).⁶⁶⁹ Accordingly, to the extent that Claimant's interest in Granahorrar constituted a foreign capital investment, Claimant was required to obtain approval for, and register, such investment, in compliance with the Foreign Capital Investment Framework.

380. As Colombia noted in its Counter-Memorial, Claimant's own assertions suggest that she obtained her interest in Granahorrar with foreign capital, in which case it would have constituted a foreign capital investment. For example, in her witness statement, Claimant states that she moved with her family to the United States (Florida, to be precise) from February 1983 to September 1986.⁶⁷⁰ The last year in that period of time coincides with the year in which Claimant first acquired shares in Granahorrar. It is reasonable to conclude that Claimant invested in Granahorrar using foreign capital, derived from activities between the years 1983 and 1986, while Claimant was living in the United States. If such was the case, Claimant's alleged interest in Granahorrar shares would have been subject to the Foreign Capital Investment Framework's approval and registration requirements. In that scenario, if Claimant did not seek approval for or register her alleged interest in Granahorrar shares, she would have made such investment in violation of the Foreign Capital Investment Framework.

381. As Colombia noted in its Counter-Memorial,⁶⁷¹ the Central Bank confirmed in a letter dated 17 October 2019 that it had no record of any approval or registration of a foreign capital investment relating to Granahorrar or the

⁶⁶⁹ Witness Statement of Astrida Benita Carrizosa, 7 June 2019, ¶ 29 ("The Shareholders Registry of I.C. Interventorías y Construcciones Ltda. . . . reflects that I acquired up to 54,000 shares between 1991 and May 30, 1997.").

⁶⁷⁰ Witness Statement of Astrida Benita Carrizosa, 7 June 2019, ¶ 12.

⁶⁷¹ Colombia's Counter-Memorial (ICSID), ¶ 417.

Holding Companies.⁶⁷² Astoundingly, in her Reply, Claimant merely observes that she either complied with Colombian law, or did not.⁶⁷³ In other words, Claimant has not even asserted—let alone proved with evidence—that (i) she obtained her Granahorrar shares with Colombian capital, or (ii) that, having obtained her Granahorrar shares with foreign capital, she in fact complied with the Foreign Capital Investment Framework.

382. The only evidence in the record before the Tribunal suggests that Claimant obtained her interest in Granahorrar with foreign capital, but did not comply with the Foreign Capital Investment Framework. Such being the case, on the weight of probabilities the Tribunal must conclude that Claimant made her investment in violation of Colombia law, and such investment is therefore not protected by the TPA.

ii. In the alternative, Claimant violated the Foreign Capital Control Provisions

383. In the alternative, Claimant violated the Foreign Capital Control Provisions in the 1960s. Even if Claimant did not use “foreign capital” to invest in Granahorrar in 1986, she did bring foreign capital into Colombia at an earlier date. Specifically, Claimant admits that she brought all of her economic

⁶⁷² **Ex. R-0014**, Letter from Central Bank (A. Boada) from Central Bank to Agencia Nacional de Defensa Jurídica del Estado (A. Ordoñez), 17 October 2019, p. 2 (English Translation: “1. In the Central Bank’s database no records were found of foreign investment in . . . [the Holding Companies and Granahorrar] before 2006 2. The Annexes to this communication contain details of foreign investment made in . . . [the Holding Companies and Granahorrar], that were registered with the Bank in accordance with applicable regulations 3. There are no records of any foreign investment in Corporación de Ahorro y Vivienda – Granahorrar.”) (Spanish Original: “1. En la base de datos del Banco de la República no se encontraron registros de inversión extranjera en las sociedades consultadas antes de 2006. 2. En los Anexos a esta comunicación se encuentra el detalle de la inversión extranjera en las sociedades consultadas que fue registrada ante el Banco conforme la regulación aplicable. 3. No hay registros de inversión extranjera en la sociedad Corporación de Ahorro y Vivienda– Granahorrar.”).

⁶⁷³ See Claimant’s Reply (ICSID), ¶ 892.

resources to Colombia in 1964, when she married her husband.⁶⁷⁴ At that time, pursuant to the Foreign Capital Control Provisions, foreign capital brought into Colombia was subject to a requirement of registration with (i) the *División de Registro de Cambio de la Superintendencia de Comercio Exterior* (“**Exchange Registry Division**”)⁶⁷⁵ or (ii) a separate registration process,⁶⁷⁶ requiring (a) prior approval by the Planning Department, and (b) special registration with the Exchange Registry Division.⁶⁷⁷ Thus, Claimant’s foreign capital, which she imported in the 1960s, was subject at that time to those requirements. If Claimant obtained her investment in Granahorrar with capital that she failed to register as foreign capital at the time that she introduced it into Colombia, Claimant procured her alleged investment in a way that was not in accordance with Colombian law. Such investment is therefore not protected by the TPA.

384. In her Reply, Claimant fails to even mention the Foreign Capital Control Provisions—let alone address Colombia’s arguments concerning such provisions.

iii. Claimant cannot bypass her burden of proving jurisdiction

385. As explained in Colombia’s Counter-Memorial,⁶⁷⁸ it is a basic tenet of investment arbitration that a claimant bears the burden of proving the facts required to establish jurisdiction, including the existence of a qualifying investment. For example, the *Paushok v. Mongolia* tribunal stated that

⁶⁷⁴ Witness Statement of Astrida Benita Carrizosa, 7 June 2019, ¶¶ 9, 16 (“When I moved to Colombia to marry my husband [in 1964], I transferred all of my economic resources at the time to Colombia.”).

⁶⁷⁵ Ex. R-0227, Decree No. 1734, 17 July 1964, Art. 20; Ex. R-0225, Resolution No. 21, 7 July 1965, Arts. 1, 3; Ex. R-0228, Decree No. 2322, 2 September 1965, Arts. 15, 18, 20.

⁶⁷⁶ Ex. R-0228, Decree No. 2322, 2 September 1965, Art. 20.

⁶⁷⁷ Ex. R-0228, Decree No. 2322, 2 September 1965, Art. 21.

⁶⁷⁸ Colombia’s Counter-Memorial (ICSID), § II.A.

“[c]laimants bear the burden of the proof to demonstrate that their investment is protected by . . . the Treaty.”⁶⁷⁹ Similarly, the *Pac-Rim v. El Salvador* tribunal held that a claimant has the burden of proof to establish jurisdiction, and a tribunal cannot simply assume the existence of facts that are disputed by the respondent:

[T]he Tribunal considers that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant’s CAFTA claims on the basis of an assumed fact (i.e. alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent) [The] Tribunal is here required to determine finally whether it has jurisdiction over the Claimant’s CAFTA claims on the proven existence of certain facts because all relevant facts supporting such jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant’s favour.⁶⁸⁰

386. Here, Colombia has objected that Claimant’s alleged investment is not subject to the protection of the TPA because Claimant violated Colombian law in the making of her investment. To substantiate such jurisdictional objection, Colombia has relied on evidence in the record to demonstrate the following factual elements:

⁶⁷⁹ **RL-0016**, *Sergei Paushok, et al. v. The Government of Mongolia*, UNCITRAL (Lalonde, Grigera Naón, Stern), Award on Jurisdiction and Liability, 28 April 2011 (“*Paushok (Award on Jurisdiction and Liability)*”) ¶ 200.

⁶⁸⁰ **RL-0066**, *Pac Rim* (Decision on Jurisdiction), ¶¶ 2.8–2.9.

- a. Colombian laws required foreign capital investments and foreign capital to be approved and registered;
- b. Such laws were in force at the relevant times;
- c. The only available evidence in the record shows that Claimant was indeed subject to those laws;⁶⁸¹ and
- d. Claimant did not comply with those legal requirements.

387. Having thus supported its objection on the basis of objective evidence, the onus shifted to Claimant to rebut Colombia's objection – specifically, to rebut one or more of the above factual elements. However, Claimant not only has not produced any responsive evidence, but has not even attempted to advance the proposition that:

- a. The relevant Colombian laws *did not* require foreign capital investments and foreign capital to be approved and registered;
- b. Such laws *were not* in force at the relevant times;
- c. Claimant *was not* subject to those laws; or
- d. Claimant *did* comply with those laws.

The closest Claimant gets to disputing Colombia's factual assertions are ambiguous statements such as "had there been a violation of the approval and registration requirements . . .,"⁶⁸² and "Claimant's investment either comported

⁶⁸¹ Claimant asserts that she transferred all of her economic resources to Colombia in 1964. She also states that she spent long periods of time in the United States between 1970 and 1982, and that her family moved to the United States between 1983 and 1986. Claimant obtained her interest in Granahorrar shares in 1986. The foregoing facts suggest that Claimant used foreign capital obtained while living in the United States to purchase shares in Granahorrar. *See* Witness Statement of Astrida Benita Carrizosa, 7 June 2019, ¶¶ 9-16. Importantly, Claimant has not disputed Colombia's assertion in that regard.

⁶⁸² Claimant's Reply (ICSID), ¶¶ 889-90.

with Colombian law or . . . any infraction [was minor].”⁶⁸³ Such vacillation is insufficient to establish jurisdiction. Instead, “all relevant facts supporting . . . jurisdiction must be established by the Claimant at th[e] jurisdictional stage and not merely assumed in the Claimant’s favour.”⁶⁸⁴

388. Instead of meeting her burden of proving jurisdiction, Claimant seems to suggest that it is somehow Colombia’s burden to provide further documentary evidence that Claimant used foreign capital to obtain her interest in Granahorrar.⁶⁸⁵ In other words, Claimant seemingly believes—erroneously—that even after Colombia has established a *prima facie* basis for its objection, the burden remains with Colombia to produce even more evidence.
389. Claimant’s position is untenable, particularly considering the nature of the objection raised by Colombia. The factual issue is (i) whether Claimant used foreign capital to make her investment, and (ii) if so, whether Claimant complied with the relevant approval and registration requirements under Colombian law. Colombia has explained why it is reasonable to conclude, on the basis of the available evidence, that Claimant indeed did use foreign capital to acquire her alleged investment in Granahorrar. If that were not the case, surely Claimant would have adduced evidence to demonstrate—or at the very least to *assert*—that she made her alleged investment using Colombian rather than foreign capital. However, she did no such thing.
390. Further, Colombia showed that Claimant did not seek approval for or register her alleged investment as required by Colombian law. If that contention were inaccurate, Claimant presumably would have produced evidence to show—or

⁶⁸³ Claimant’s Reply (ICSID), ¶ 779. *See also id.*, ¶ 892.

⁶⁸⁴ **RL-0066**, *Pac Rim* (Decision on Jurisdiction), ¶ 2.9.

⁶⁸⁵ Claimant’s Reply (ICSID), ¶ 886 (“Respondent provides no authority for the assumed proposition that the investments made through Colombian entities would be considered ‘foreign capital investments’ under these regulations.”).

again, at the very least *assert* – that she complied with Colombian law, or that she was not subject to the relevant provisions of Colombian law to begin with. Yet, Claimant has remained silent on these issues for the whole of the written phase of this proceeding. The inference that must be drawn from such silence, and from Claimant’s failure to adduce evidence, is that Claimant did in fact use foreign capital to obtain her alleged investment, and that Claimant did in fact violate Colombian law in making such investment.

391. In sum, the Tribunal must conclude on the basis of the available evidence that Claimant failed to comply with the Foreign Capital Investment Framework or Foreign Capital Control Provisions, and that Claimant thus has failed to rebut Colombia’s objection predicated on Claimant’s failure to make the investment in conformity with domestic law. As a result, the Tribunal lacks jurisdiction *ratione materiae*.

d. Colombia is not estopped from raising a jurisdictional objection on the basis of Claimant’s violation of Colombian law

392. In her Reply, Claimant contends that Colombia is estopped from raising a jurisdictional objection on the basis that Claimant violated Colombian law, because Colombia never penalized her for any alleged violation of the Foreign Capital Investment Framework.⁶⁸⁶ (Once again, Claimant makes no mention of the Foreign Capital Control Provisions.) However, Claimant is misconstruing the doctrine of estoppel. A State is estopped from raising a violation of its domestic law as a defense only if the State: (i) knowingly overlooked such

⁶⁸⁶ Claimant’s Reply (ICSID), ¶¶ 892-900.

violation; or (ii) accepted an investment as legal with full knowledge of the relevant circumstances.⁶⁸⁷

393. The cases cited by Claimant herself confirm the foregoing. For example, the tribunal in *Fraport v. Philippines* held that “a government [is] estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlook[s] them and endorse[s] an investment which was not in compliance with its law.”⁶⁸⁸ Similarly, the *Kardassopoulos v. Georgia* and *Arif v. Moldova* tribunals held that the respondent State in each case was estopped from asserting defenses based on non-compliance with domestic law because the State had been aware of the relevant circumstances surrounding the making of the claimants’ investments, and notwithstanding that had accepted the legality of such investments.⁶⁸⁹
394. By contrast, a State will not be estopped from objecting to a claimant’s violation of domestic law if the State was unaware of such violation. Such was the holding in *Fraport*, for instance:

[A] covert arrangement, which by its nature is unknown to the government officials who may have given approbation

⁶⁸⁷ **RL-0040**, *Fraport* (Award), ¶¶ 346–47; **RL-0044**, *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18 (Fortier, Orrego Vicuña, Watts), Decision on Jurisdiction, 6 July 2007 (“*Kardassopoulos (Decision on Jurisdiction)*”), ¶ 191; **RL-0045**, *Frank Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Cremades, Hanotiau, Knieper), Award, 8 April 2013 (“*Arif (Award)*”), ¶¶ 374, 376.

⁶⁸⁸ See **RL-0040**, *Fraport* (Award), ¶ 346.

⁶⁸⁹ See **RL-0044**, *Kardassopoulos* (Decision on Jurisdiction), ¶ 191 (“The assurances given to Claimant regarding the validity of the JVA and the Concession were endorsed by the Government itself, and some of the most senior Government officials of Georgia . . . were closely involved in the negotiation of the JVA and the Concession. The Tribunal also notes that the Concession was signed and ‘ratified’ by the Ministry of Fuel and Energy, an organ of the Republic of Georgia.”); **RL-0045**, *Arif* (Award), ¶ 374 (“The reality was that at the time the investment was made, and for many months thereafter, both Parties believed and were allowed to trust that the July 1, 2008 Agreement and the Lease Agreement were valid, and that the investment had been made in accordance with the legislation of Moldova. Both Parties acted in good faith on this basis.”).

to the project, cannot be any basis for estoppel: the covert character of the arrangement would deprive any legal validity . . . that an expression of approbation or an endorsement might otherwise have had. There is no indication in the record that the Republic of the Philippines knew, should have known or could have known of the covert arrangements which were not in accordance with Philippine law when Fraport first made its investment in 1999.⁶⁹⁰

395. The *Arif* tribunal, for its part, held that the respondent was estopped from objecting to the claimant's non-compliance with domestic law because the situation was "not a case of a concealed illegality."⁶⁹¹
396. In the present case, Colombia could not have penalized Claimant for violating Colombian law, for the simple reason that Colombia was not even aware until the present arbitral proceeding that any violation had occurred. As a result, Colombia is not estopped from asserting that the Tribunal lacks jurisdiction *ratione materiae* due to Claimant's violation of the Foreign Capital Investment Framework.⁶⁹² Claimant asserts that Colombia knew or should have known of any violation of the Foreign Capital Investment Framework on her part when making her investment, because her Colombian son Alberto Carrizosa Gelzis held a high-ranking position in Granahorrar in 1998.⁶⁹³ However, Claimant's

⁶⁹⁰ **RL-0040**, *Fraport* (Award), ¶ 347.

⁶⁹¹ **RL-0045**, *Arif* (Award), ¶ 376.

⁶⁹² As discussed above, Claimant has failed to address or rebut Colombia's argument in the alternative that she violated the Foreign Capital Control Provisions. Indeed, Claimant has not alleged that Colombia is estopped from making such argument. In any event, Colombia's arguments on estoppel apply with equal force to Claimant's violation of the Foreign Capital Control Provisions. Specifically: (i) Claimant failed to register her foreign capital with the Exchange Registry Division or to undergo the separate registration process (see above); (ii) consequently, Colombia could not have known that Claimant had imported foreign capital; (iii) Colombia therefore could not have known that Claimant procured her alleged investment in Granahorrar in violation of Colombian law.

⁶⁹³ See Claimant's Reply (ICSID), ¶ 888 ("Claimant's son Alberto Carrizosa Gelzis served as a Director of Granahorrar from 1992 to 1998. On July 1, 1998, he was promoted to Chairman of

Colombian son's involvement in Granahorrar in 1998 would have had no bearing on whether Claimant complied with the Foreign Capital Investment Framework in 1986 and thereafter, and there is no reason that Colombia should have known of any failure by Claimant to comply with such framework.

397. The fact is that Claimant concealed from Colombia her violation of Colombian law. Specifically, she concealed the fact that her interest in Granahorrar was a foreign capital investment that required approval and registration by the relevant Colombia authorities – requirements that she failed to satisfy. It was Claimant's written submissions in this arbitral proceeding that suggested to Colombia, for the first time, that she had obtained her indirect interest in Granahorrar using foreign capital. Hence, Colombia did not and could not have known that Claimant was subject to the Foreign Capital Investment Framework and had violated the provisions of such framework.

398. As a result of the foregoing, Colombia is *not* estopped from objecting to the jurisdiction of the Tribunal *ratione materiae* on the basis of Claimant's violation of Colombian law, and Claimant's argument in that regard must be dismissed.

the Board of Directors of the financial institution. As a result of this high profile position, his duties as Chairman included, among other things, dealing with relations with government agencies that regulated Granahorrar, including the Central Bank. As such, Colombia very well knew of the Carrizosa family's role with Granahorrar"), ¶ 895 ("In the highly regulated banking and financial services sector in which Claimant's investment was made, particularly in light of the regulators' deep involvement with Granahorrar and its ownership, as well as the positions held by Claimant's son, Alberto Carrizosa Gelzis, there is no rational basis to believe that the Colombian government was unaware for years of Claimant's investment in Granahorrar. To the extent any supposed violations truly existed, Colombia knew, or should have known, of them for years, yet did nothing to enforce the regulations it now attempts to use as a shield in this arbitration.").

III. CONCLUSION AND REQUEST FOR RELIEF

399. For the foregoing reasons, Colombia respectfully requests that the Tribunal:
- a. render an award dismissing Claimant's claims in their entirety, for lack of jurisdiction; and
 - b. order Claimant to pay all of Colombia's costs, including the totality of the arbitral costs incurred by Colombia in connection with this proceeding, as well as the totality of Colombia's legal fees and expenses, plus interest.

Respectfully submitted,

[signed]

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