ICSID CASE NO. ARB/18/5

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ASTRIDA BENITA CARRIZOSA

The Claimant

v.

REPUBLIC OF COLOMBIA

The Respondent

AWARD

ARBITRAL TRIBUNAL
Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Prof. Diego P. Fernández Arroyo, Arbitrator
Mr. Christer Söderlund, Arbitrator

Secretary of the Tribunal
Ms. Alicia Martín Blanco

Assistant to the Tribunal
Mr. David Khachvani

Date of dispatch to the Parties: 19 April 2021

THE PARTIES AND THEIR REPRESENTATIVES

THE CLAIMANT

Ms. Astrida Benita Carrizosa, represented by:

Mr. Pedro J. Martínez-Fraga
Mr. C. Ryan Reetz
Mr. Craig O'Dear
Mr. Mark Leadlove
Ms. Rachel Chiu
Mr. Joaquín Moreno Pampín
Mr. Domenico Di Pietro
Bryan Cave LLP
200 S. Biscayne Boulevard, Suite 400
Miami, Florida 33131
USA

THE RESPONDENT

The Republic of Colombia, represented by:

Mr. Camilo Gómez Alzate
Mrs. Ana María Ordóñez Puentes
*Mr. Andrés Felipe Esteban Tovar**
Agencia Nacional de Defensa Jurídica del Estado
Carrera 7 No. 75-66 – 2do y 3er piso
Bogotá
Colombia

Mr. Paolo Di Rosa
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Mr. Brian Vaca
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601 Massachusetts Avenue NW
Washington, DC 20001
USA

Mr. Patricio Grané Labat
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25 Old Broad Street
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* As of January 2021, Mr. Andrés Felipe Esteban Tovar no longer works for the Agencia Nacional de Defensa Jurídica del Estado.

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SELECTED ABBREVIATIONS AND TERMS

TERM OR ABBREVIATION	DEFINITION
1998 Measures	Collectively, the Capitalization Order and the Value Reduction Order
2005 Judgment	Judgment dated 27 July 2005 issued by the First Section of the Administrative Tribunal of Cundinamarca
2007 Judgment	Judgment issued by the Council of State on 1 November 2007, revoking the 2005 Judgment
2011 Decision	Decision SU-447 issued by the Constitutional Court on 26 May 2011
2014 Order	Order No. 188/14 issued by the Constitutional Court on 25 June 2014, confirming the 2011 Decision
C-	Claimant's exhibit
CAFTA	The Dominican Republic – Central America – United States Free Trade Agreement (2004)
Capitalization Order	Order issued by the Superintendency on 2 October 1998, directing Granahorrar to raise capital
Carrizosa Family	The Claimant, her husband Julio Carrizosa and three sons Alberto, Felipe, and Enrique
Central Bank	*Banco de la República*
Centre	International Centre for Settlement of Investment Disputes
CL-	Claimant's legal authority
Claimant	Ms. Astrida Benita Carrizosa

TERM OR ABBREVIATION	DEFINITION
Claimant's observations to the US Submission	Claimant's Observations Concerning Non-Disputing Party Submission of The United States of America, dated 26 May 2020
Claimant's Submission on Costs	Claimant's Statement of Costs, dated 15 January 2021
CMJ	Claimant's Memorial on Jurisdiction, dated 13 June 2019
Colombia or Respondent	Republic of Colombia
Colombia's observations to the US Submission	Colombia's Written Observations on the United States' Non-Disputing Party Submission, dated 26 May 2020
Colombia-Switzerland BIT	Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments
Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
COP	Colombian peso
Council of State	*Consejo de Estado*, the highest tribunal adjudicating administrative matters in the Colombian court system
CRJ	Claimant's Reply on Jurisdiction, dated 20 December 2019
Exh.	Exhibit
Financial Act	*Estatuto Orgánico del Sistema Financiero de Colombia de 1993*, or "EOSF"
Fogafín	*Fondo de Garantía de Instituciones Financieras*
Fogafín Agreement	Agreement executed by Granahorrar and Fogafín on 6 July 1998

TERM OR ABBREVIATION	DEFINITION
Granahorrar	*Corporación Grancolombiana de Ahorro y Vivienda "Granahorrar"*
Holding Companies	*Asesorías e Inversiones C.G. S.A., Inversiones Lieja LTDA*, and *I.C. Interventorías y Construcciones LTDA*
IACHR	Inter-American Commission of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICSID or Centre	International Centre for Settlement of Investment Disputes
ILC Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001)
MFN	Most-Favored-Nation
NAFTA	The North American Free Trade Agreement (1994)
R-	Respondent's exhibit
RCMJ	Respondent's Counter-Memorial on Jurisdiction, dated 23 October 2019
Respondent's Submission on Costs	Respondent's Submission on Costs, dated 15 January 2021
RFA	Claimant's Request for Arbitration, dated 24 January 2018
RL-	Respondent's legal authority
RRJ	Respondent's Rejoinder on Jurisdiction, dated 21 February 2020

TERM OR ABBREVIATION	DEFINITION
Superintendency	*Superintendencia Financiera or Superintendencia Bancaria*
TLI	Temporary Liquidity Infusion, *i.e.* funds disbursed by the Central Bank to financial entities experiencing temporary liquidity shortfalls
TPA	The US-Colombia Trade Promotion Agreement
***Tutela* Petitions**	*Tutela* Petitions filed by Fogafín and the Superintendency on 5 March 2008 before the Fifth Section of the Council of State, challenging the 2007 Judgment
UNCITRAL	United Nations Commission on International Trade Law
US Submission	US's Non-Disputing Party Submission, dated 1 May 2020
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	The Vienna Convention on the Law of Treaties (1969)

I. INTRODUCTION

A. PARTIES AND THEIR REPRESENTATIVES

1. The claimant is Ms. Astrida Benita Carrizosa (the "Claimant" or "Ms. Carrizosa"), a natural person and a national of the United States of America. She is represented in this arbitration by:

Mr. Pedro J. Martínez-Fraga
Mr. C. Ryan Reetz
Mr. Domenico Di Pietro
Mr. Joaquín Moreno Pampín
Mr. Mark Leadlove
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2. The respondent is the Republic of Colombia ("Colombia" or the "Respondent"), a sovereign State, party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention" or the "Convention"), and the US-Colombia Trade Promotion Agreement (the "TPA"). Colombia is represented in this arbitration by:

Mrs. Ana María Ordóñez Puentes
Mr. Andrés Felipe Esteban Tovar
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Tower 42
25 Old Broad Street
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xColombiaCarrizosa@arnoldporter.com

B. ARBITRAL TRIBUNAL

3. As set out in paragraph 2.1 of Procedural Order No. 1, the Tribunal was constituted on 11 December 2018 in accordance with the ICSID Convention and the ICSID Arbitration Rules. The Parties have confirmed that the Tribunal was properly constituted and that they had no objection to the appointment of the Members of the Tribunal. The Tribunal comprises the following members:

(i) Co-arbitrator appointed by the Claimant:

Prof. Diego P. Fernández Arroyo
Sciences Po Law School
13 rue de l'Université
Paris 75007
France
Tel.: +33 662 08 70 47
Email: diego.fernandezarroyo@dpfa-arb.com

(ii) Co-arbitrator appointed by the Respondent:

Mr. Christer Söderlund
P.O. BOX 3277 SE-103 65
Stockholm
Sweden
Tel.: +46 70 388 41 22
Email: christer.soderlund@mornyc.com

(iii) Presiding arbitrator appointed by the agreement of the Parties:

Prof. Gabrielle Kaufmann-Kohler
3-5, rue du Conseil-Général
P.O. Box 552
CH-1211 Geneva 4
Switzerland
Tel.: +41 22 809 62 08
Email: gabrielle.kaufmann-kohler@lk-k.com

C. ICSID SECRETARIAT

4. As set out in paragraph 7.1 of Procedural Order No. 1, the ICSID Secretariat has appointed as the Secretary of the Tribunal:

> **Ms. Alicia Martín Blanco**
> ICSID
> MSN J2-200
> 1818 H Street, N.W.
> Washington, D.C. 20433
> USA
> Tel.: + 1 (202) 473-9105
> Fax: + 1 (202) 522-2615
> Email: amartinblanco@worldbank.org
> Paralegal email: jargueta@worldbank.org

D. ASSISTANT TO THE TRIBUNAL

5. By letter of 9 January 2019, the ICSID Secretariat, acting on instructions of the President of the Tribunal, noted that the Tribunal considered that it would assist the overall cost and time efficiency of the proceedings if it had an Assistant and that it proposed the appointment of an attorney of the President's law firm as Assistant in the person of:

> **Mr. David Khachvani**
> c/o Lévy Kaufmann-Kohler
> 3-5, rue du Conseil-Général
> CP 552
> 1211 Geneva 4
> Switzerland
> Tel.: +41 22 80 96 200
> Fax: +41 22 80 96 201
> Email: david.khachvani@lk-k.com

6. The Secretariat's letter also set out the Assistant's tasks and stated that the Assistant was subject to the same confidentiality obligations as the Members of the Tribunal and circulated the Assistant's CV and declaration of independence. As set out in paragraph 8.3 of Procedural Order No. 1, the Parties agreed to the appointment of Mr. Khachvani.

E. OVERVIEW OF THE DISPUTE

7. The present dispute arises out of the Republic of Colombia's fiscal, administrative and judicial, including the 2014 Order, measures allegedly resulting in the loss of the

Claimant's indirect shareholding interests in Granahorrar, a Colombian financial institution. The Claimant argues that Colombia's measures violated multiple provisions of the TPA and claims compensation for damages.

8. The Respondent disputes the claims. As a preliminary matter, it submits that the dispute is outside the jurisdiction of the Tribunal. It further explains that its fiscal, administrative and judicial measures were required to protect the country's financial market stability in face of a severe economic crisis, and were thus in line with Colombia's obligations under international law and the TPA.

F. REQUESTS FOR RELIEF

9. The Claimant formulated her final request for relief in respect of jurisdiction in her Reply on Jurisdiction ("CRJ") as follows:

> For the foregoing reasons, authority, premises, and evidence, Claimant, Astrida Benita Carrizosa, respectfully requests that this Arbitral Tribunal reject Respondent's, the Republic of Colombia, objections to jurisdiction, and proceed to a merits hearing in furtherance of the equitable administration of justice.[1]

10. On the merits, the Claimant set out her request for relief in the Request for Arbitration in the following terms:

> Reserving its right to amend, supplement, or otherwise restate its claims and the relief requested in connection with such demand, claimant request an award granting, without limitation, the following relief:
>
> (i) A declaration that Colombia has violated the Treaties [TPA and Colombia-Switzerland BIT], customary international law, and Colombian law with respect to claimant's investments;
>
> (ii) Compensation to claimant for all damages that she has suffered, to be developed, and quantified in the course of this proceeding, but including, without limitation, Colombia's failure to provide claimant and her investments fair and equitable treatment, national treatment, fair judicial recourse, and for its arbitrary and discriminatory interference with claimant's use and enjoyment of its investments;
>
> (iii) Such compensation, exclusive of attorney's fees and costs must be no less than USD 40,000,000.
>
> (iv) All costs and fees associated with this proceeding, including all professional fees and disbursements;

[1] CRJ, p. 502.

> (v) An award of compound interest until the date of Colombia's final satisfaction of the award at a rate to be fixed by the Tribunal; and
>
> (vi) Such other relief as counsel may advise and the Tribunal may deem appropriate.[2]

11. The Respondent formulated its final request for relief in respect of jurisdiction in its Rejoinder on Jurisdiction ("RRJ") as follows:

> 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.[3]

12. The Respondent did not seek relief on the merits.

G. ARBITRATION AGREEMENT

13. The present proceedings are conducted under the ICSID Convention, Article 25 of which contains a jurisdictional requirement of, *inter alia*, a written consent of the parties to the dispute to submit their investment dispute to the jurisdiction of the International Centre for Settlement of Investment Disputes (the "Centre" or "ICSID"). While the Claimant has provided her consent in her Request for Arbitration (the "RFA"),[4] the Parties dispute whether Colombia has also given its consent to arbitrate.

14. The Claimant invokes two legal instruments as Colombia's purported consent to submit the present dispute to the jurisdiction of the Centre, the US-Colombia Trade Promotion Agreement (the "TPA"), and in particular its Chapter 12 (Financial Services), and the Colombia-Switzerland BIT. Article 12.1.2(b) of the TPA reads as follows:

> Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter

[2] RFA, para. 225.

[3] RRJ, para. 399.

[4] RFA, para. 215.

> 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.

15. Pertinent parts of Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) of the TPA, in turn, reads as follows:

> Section B: Investor-State Dispute Settlement
>
> Article 10.15: Consultation and Negotiation
>
> 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 non-binding, third-party procedures.
>
> Article 10.16: Submission of a Claim to Arbitration
>
> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached
>
> (A) an obligation under Section A,
>
> (B) an investment authorization, or
>
> (C) an investment agreement;
>
> and
>
> (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
>
> (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim
>
> (i) that the respondent has breached
>
> (A) an obligation under Section A,
>
> (B) an investment authorization, or
>
> (C) an investment agreement;
>
> and
>
> (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,
>
> provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to

> be established or acquired, in reliance on the relevant investment agreement.
>
> 2. 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"). The notice shall specify:
>
> (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
>
> (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
>
> (c) the legal and factual basis for each claim; and
>
> (d) the relief sought and the approximate amount of damages claimed.
>
> 3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:
>
> (a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;
>
> (b) under the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention;
>
> (c) under the UNCITRAL Arbitration Rules; or
>
> (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

16. In addition, through the Most-Favored-Nation ("MFN") clause found in Article 12.3.1 of the TPA, the Claimant purports to invoke Article 11 of the Colombia-Switzerland BIT as Colombia's alleged consent to arbitrate. In relevant part, this provision, which the Claimant quotes in the RFA, has the following content:

> (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 may be referred to the courts or administrative tribunals of the Party concerned or to international arbitration. In the latter event the investor has the choice between either of the following:
>
> (a) ..the International Centre for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and

> Nationals of other States, opened for signature at Washington on March 18, 1965; and
>
> (b) ..an ad hoc-arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).
>
> (3) Each Party hereby gives its unconditional and irrevocable consent to the submission of an investment dispute to an international arbitration in accordance with paragraph 2 above, except for disputes with regard to Article 10 paragraph 2 of this Agreement.
>
> (4) Once the investor has referred the dispute to either a national tribunal or any other international arbitration mechanism provided for in paragraph 2 above, the choice of the procedure shall be final.
>
> (5) An investor may not submit a dispute for resolution according to this Article if more than five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.
>
> […]
>
> (8) The arbitral award shall be final and binding for the pa1iies to the dispute and shall be executed without delay according to the law of the Party concerned.

17. Article 12.3.1, namely the MFN clause of Chapter 12 of the TPA, which the Claimant invokes,[5] 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.

H. PROCEDURAL RULES

18. This arbitration is governed by the ICSID Convention; any rules of procedure agreed upon by the Parties; and the ICSID Rules of Procedure for Arbitration Proceedings (the "ICSID Rules"). If a question of procedure arises which is not covered by the instruments listed in the preceding sentence, the Tribunal has the power to set a rule pursuant to Article 44 of the ICSID Convention. Accordingly, the Tribunal has

[5] An MFN provision is also contained in Chapter 10 (Investment) of the TPA at Article 10.4.

issued various procedural directions, including, but not limited to, Procedural Orders Nos. 1, 2, 3 and 4.

I. LAW GOVERNING JURISDICTION

19. The jurisdiction of the Tribunal is governed under the ICSID Convention, the TPA and international law.

20. When applying the law, the Tribunal is not bound by the arguments and sources invoked by the Parties. The principle of *iura novit arbiter* allows the Tribunal to form its own opinion of the meaning of the law, provided that it does not surprise the Parties with a legal theory that was not subject to debate and that the Parties could not anticipate.[6]

J. RELEVANCE OF PRIOR DECISIONS AND AWARDS

21. Both Parties have relied on previous decisions or awards in support of their positions, either to conclude that the same solution should be adopted in the present case, or in an effort to explain why this Tribunal should depart from that solution.

22. The Tribunal considers that it is not bound by prior decisions under any rule of international law. At the same time, pursuant to the general principles of legal certainty, the Tribunal must pay due consideration to relevant decisions of international tribunals. Specifically, subject to the text of the treaty or to compelling grounds to the contrary, it should adopt legal solutions firmly established in a series of consistent cases, thereby contributing to the harmonious development of international investment law.

K. LANGUAGE

23. Pursuant to paragraph 12.1 of Procedural Order No. 1, the procedural languages of the arbitration are English and Spanish.

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[6] *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 295; *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 57; *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, Exh. RL-0042, para. 287; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, Exh. CL-0291-A, para. 118.

24. Pursuant to paragraph 12.13 of Procedural Order No. 1, as modified by the agreement of the Parties reflected in their communications of 3 and 5 August 2019, the present award is issued in English and Spanish. Both language versions shall be equally authentic.

L. PLACE OF PROCEEDINGS

25. Pursuant to Articles 62 and 63 of the ICSID Convention and paragraph 11 of Procedural Order No. 1, Washington D.C. is the place of the proceedings.

26. With the agreement of the Parties, as reflected in Procedural Order No. 3, the hearing on jurisdiction was held by videoconference.

M. SCOPE OF THIS AWARD

27. As reflected in the Procedural Calendar at Annex 1 to Procedural Order No. 1, the Parties have agreed to bifurcate the proceedings between jurisdiction and merits. Therefore, the present Award addresses the Respondent's jurisdictional objections.

II. PROCEDURAL HISTORY

28. On 25 January 2018, ICSID received a Request for Arbitration dated 24 January 2018 from Ms. Carrizosa against the Republic of Colombia (the "Request").

29. On 9 March 2018, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

30. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention, as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be selected by the co-arbitrators and appointed by agreement of the Parties.

31. Pursuant to this method, the Tribunal was composed of Prof. Diego Fernández Arroyo, a national of Argentina and Spain, appointed by the Claimant; Mr. Christer

Söderlund, a national of Sweden, appointed by the Respondent; and Prof. Gabrielle Kaufmann-Kohler, President, a national of Switzerland, appointed by agreement of the Parties.

32. On 11 December 2018, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Alicia Martín Blanco, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

33. In accordance with Rules 13(1) and 20(1) of the ICSID Rules, the Tribunal held a first session and preliminary procedural consultation with the Parties ("First Session") on 5 February 2019 by telephone conference.

34. Following the First Session, on 19 February 2019, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable ICSID Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington, DC. Procedural Order No. 1 also sets out the Parties' agreement to appoint Mr. David Khachvani of Lévy Kaufmann-Kohler as Assistant to the Tribunal, and includes a schedule for a bifurcated jurisdictional phase of the proceedings. The schedule was later amended on several occasions.

35. On 7 March 2019, the Tribunal issued Procedural Order No. 2 on transparency of the proceedings.

36. On 13 June 2019, the Claimant submitted her Memorial on Jurisdiction and accompanying documents, including the witness statement of Ms. Astrida Benita Carrizosa and the expert reports of Mr. Antonio L. Argiz, Dr. Martha Teresa Briceño, Prof. Jack J. Coe Jr., Dr. Alfonso Vargas Rincón, Prof. Loukas Mistelis, Mr. Olin L. Wethington, and Dr. Luis Fernando López Roca.

37. On 23 October 2019, the Respondent submitted its Counter-Memorial on Jurisdiction and accompanying documents, including the expert report of Jorge Enrique Ibáñez.

38. On 21 December 2019, the Claimant submitted its Reply on Jurisdiction and accompanying documents, including a second and third expert reports of Prof. Jack

J. Coe Jr., as well as second expert reports of Dr. Luis Fernando López Roca, Dr. Martha Teresa Briceño, Prof. Loukas Mistelis, and Mr. Olin L. Wethington.

39. On 29 January 2020, the Tribunal confirmed that the Hearing on Jurisdiction had been postponed from March to November 2020.

40. On 21 February 2020, the Respondent submitted its Rejoinder on Jurisdiction and accompanying documents, including a second expert report of Jorge Enrique Ibáñez Najar.

41. On 1 May 2020, the United States of America filed a submission as non-disputing treaty Party, pursuant to Article 10.20.2 of the TPA (the "US Submission").

42. On 5 May 2020, the Claimant requested leave to file written observations on the US Submission, to which the Respondent objected on 8 May 2020. On 12 May 2020, the Tribunal decided to grant the Parties an opportunity to file observations in writing on the US Submission.

43. On 26 May 2020, the Parties submitted simultaneous written observations on the US Submission.

44. On 20 July 2020, the Tribunal invited the Parties to consider whether they would be agreeable to holding a virtual Hearing. The Parties indicated their preferences on the format of the Hearing on 27 July 2020. The Claimant did not object and the Respondent indicated that it would not object if the Tribunal determined that an in-person hearing would not be feasible or advisable in view of the ongoing COVID-19 pandemic.

45. On 28 August 2020, the Respondent wrote to inform the Tribunal of the election the day before of its legal expert Dr. Jorge Enrique Ibáñez Najar as a justice (*magistrado*) of the Constitutional Court of Colombia. On 1 September 2020, the Respondent (i) informed the Tribunal that Dr. Ibáñez's appointment meant that, pursuant to Colombian law, he would not be permitted to participate in the upcoming Hearing; (ii) submitted that "the unique circumstances that would prevent Dr. Ibañez from participating in the Hearing constitute a valid reason pursuant to Section 19.13 of Procedural Order No. 1 for his failure to appear if summoned to the Hearing"; and (iii) requested that the Tribunal "exercise its authority and discretion and consider Dr. Ibáñez's written reports (dated 23 October 2019 and 21 February 2020), notwithstanding his inability to testify orally at the hearing."

46. On 1 September 2020, the Parties informed the Tribunal of the witnesses and experts that they wished to examine at the Hearing. The Respondent called Dr. Martha Teresa Briceño de Valencia, and the Claimant called Dr. Jorge Enrique Ibáñez Najar. In addition, the Claimant requested that the Tribunal call six of her experts to appear at the Hearing (Prof. Mistelis; Mr. Wethington; Prof. Coe; Dr. Briceño; Dr. López Roca; and Dr. Vargas Rincón). In the alternative, the Claimant sought leave to present said experts pursuant to Section 19.7 of Procedural Order No. 1. On 4 September 2020, the Respondent objected to the Claimant's primary and alternative requests.

47. On 4 September 2020, the Claimant responded to the Respondent's September 1 letter concerning its expert Dr. Ibáñez, and requested that: "unless Dr. Ibáñez appears for cross-examination at the hearing, the Tribunal should disregard his two expert reports."

48. A pre-hearing conference was held on 8 September 2020 by videoconference.

49. On 24 September 2020, the Tribunal issued Procedural Order No. 3 on the organization of the Hearing. The order established *inter alia* (i) that the Hearing would take place on 29 September 2020 and on 9-12 November 2020, with the September session dedicated to the examination of Dr. Ibáñez – before being sworn in as a Constitutional Court Justice; (ii) that the Tribunal would only hear testimony on jurisdiction at this Hearing and therefore that Prof. Coe, Dr. López Roca and Dr. Vargas Rincón would not be heard; and (iii) that the Claimant had not established compelling reasons to examine Prof. Mistelis or Mr. Wethington in the sense of Section 19.7 and the Tribunal did not deem it necessary to call them *ex officio* per Section 19.10 of Procedural Order No. 1.

50. The September Hearing was held on 29 September 2020. The list of participants was as follows:

Tribunal:

Prof. Gabrielle Kaufmann-Kohler	President
Prof. Diego P. Fernández Arroyo	Arbitrator
Mr. Christer Söderlund	Arbitrator

ICSID Secretariat:

Ms. Alicia Martín Blanco	Secretary of the Tribunal

Assistant to the Tribunal:

Mr. David Khachvani	Assistant to the Tribunal

For the Claimant:

Mr. Pedro J. Martinez-Fraga	Bryan Cave Leighton Paisner LLP
Mr. Ryan Reetz	Bryan Cave Leighton Paisner LLP
Mr. Craig S. O'Dear	Bryan Cave Leighton Paisner LLP
Mr. Domenico Di Pietro	Bryan Cave Leighton Paisner LLP
Ms. Rachel Chiu	Bryan Cave Leighton Paisner LLP
Mr. Joaquin Moreno	RRM Legal

For the Respondent:

Mr. Paolo Di Rosa	Arnold & Porter Kaye Scholer LLP
Mr. Patricio Grané Labat	Arnold & Porter Kaye Scholer LLP
Ms. Katelyn Horne	Arnold & Porter Kaye Scholer LLP
Mr. Brian Vaca	Arnold & Porter Kaye Scholer LLP
Ms. Natalia Giraldo-Carrillo	Arnold & Porter Kaye Scholer LLP
Mr. Kelby Ballena	Arnold & Porter Kaye Scholer LLP
Mr. Camilo Gómez Alzate	*Agencia Nacional de Defensa Jurídica del Estado*
Dra. Ana María Ordóñez Puentes	*Agencia Nacional de Defensa Jurídica del Estado*
Dr. Andrés Felipe Esteban Tovar	*Agencia Nacional de Defensa Jurídica del Estado*
Mr. Giovanny Andrés Vega Barbosa	*Agencia Nacional de Defensa Jurídica del Estado*
Ms. Elizabeth Prado López	*Agencia Nacional de Defensa Jurídica del Estado*
Dr. Jorge Enrique Ibáñez Najar	Legal Expert

Court Reporters:

Mr. Dante Rinaldi	DR-ESTENO Spanish court reporter
Ms. Margie Dauster	B&B Reporters English court reporter

Interpreters:

Mr. Luis Eduardo Arango	Interpreter
Ms. Estela G Zaffaroni	Interpreter
Mr. Javier Larravide	Interpreter

51. During the September Hearing, Dr. Ibáñez was examined.

52. On 29 October 2020, the Claimant informed the Tribunal that Ms. Carrizosa would be unable to attend the November Hearing and had requested to be represented at the Hearing by her son, Mr. Alberto Carrizosa. On the same day, the Respondent objected to the attendance of Mr. Carrizosa.

53. On 2 November 2020, the Tribunal found that it would not be appropriate to deny the Claimant's right to appoint a person of her choice as representative at the Hearing, and invited the Claimant to notify the appointment of Mr. Alberto Carrizosa as her representative to the Secretary-General. On 2 November 2020, the Claimant submitted her notification to the Secretary-General of ICSID. On 4 November 2020, the Tribunal referred to the Claimant's letter of November 2, 2020 addressed to the Secretary-General of ICSID and confirmed that the appointment had been properly notified.

54. On 6 November 2020, the Claimant objected to the participation at the Hearing of three persons listed in the Respondent's list of participants for the November Hearing, to which the Respondent replied on 8 November 2020. On the same date, the Tribunal decided that the three representatives should be admitted to attend the November Hearing, and requested that the Respondent provide evidence of their authority to attend on behalf of Colombia, which the Respondent did on 11 November 2020.

55. On 9 November 2020, the Claimant requested that the Hearing be postponed by one day on account of tropical storm conditions in Miami, to which the Respondent did not object. On the same day the Tribunal confirmed its agreement that the Hearing be postponed by one day.

56. The November Hearing was held on 10-13 November 2020. The list of participants was as follows:

Tribunal:

Prof. Gabrielle Kaufmann-Kohler	President
Prof. Diego P. Fernández Arroyo	Arbitrator
Mr. Christer Söderlund	Arbitrator

ICSID Secretariat:

Ms. Alicia Martín Blanco	Secretary of the Tribunal

Assistant to the Tribunal:

Mr. David Khachvani	Assistant to the Tribunal

For the Claimant:

Mr. Pedro J. Martinez-Fraga	Bryan Cave Leighton Paisner LLP
Mr. Ryan Reetz	Bryan Cave Leighton Paisner LLP
Mr. Craig S. O'Dear	Bryan Cave Leighton Paisner LLP
Mr. Domenico Di Pietro	Bryan Cave Leighton Paisner LLP
Ms. Rachel Chiu	Bryan Cave Leighton Paisner LLP
Mr. Joaquin Moreno	RRM Legal
Mr. Alberto Carrizosa	Representative
Ms. Martha Teresa Briceño de Valencia	Expert

For the Respondent:

Mr. Paolo Di Rosa	Arnold & Porter Kaye Scholer LLP
Mr. Patricio Grané Labat	Arnold & Porter Kaye Scholer LLP
Ms. Katelyn Horne	Arnold & Porter Kaye Scholer LLP
Mr. Brian Vaca	Arnold & Porter Kaye Scholer LLP
Ms. Cristina Arizmendi	Arnold & Porter Kaye Scholer LLP
Ms. Natalia Giraldo-Carrillo	Arnold & Porter Kaye Scholer LLP
Mr. Kelby Ballena	Arnold & Porter Kaye Scholer LLP
Mr. Camilo Gómez Alzate	*Agencia Nacional de Defensa Jurídica del Estado*
Dra. Ana María Ordóñez Puentes	*Agencia Nacional de Defensa Jurídica del Estado*
Dr. Andrés Felipe Esteban Tovar	*Agencia Nacional de Defensa Jurídica del Estado*
Mr. Giovanny Andrés Vega Barbosa	*Agencia Nacional de Defensa Jurídica del Estado*
Ms. Elizabeth Prado López	*Agencia Nacional de Defensa Jurídica del Estado*
Mr. Gerardo Hernández	*Banco de la República*
Ms. Dina Maria Olmos Aponte	*Fondo de Garantías de Instituciones Financieras*
Mr. Álvaro Andres Torres Ojeda	*Superintendencia Financiera*

Non-Disputing Treaty Party (USA)

Ms. Lisa Grosh	Department of State
Mr. John Daley	Department of State
Ms. Nicole Thornton	Department of State
Mr. John Blanck	Department of State
Mr. Khalil Gharbieh	Office of the United States Trade Representative

Ms. Amanda Blunt	Office of the United States Trade Representative
Amy Zuckerman	U.S. Department of the Treasury

Court Reporters:

Mr. Dante Rinaldi	DR-ESTENO Spanish court reporter
Mr. David Kasdan	B&B Reporters English court reporter
Ms. Maggie Dauster	B&B Reporters English court reporter
Mr. Randy Salzman	B&B Reporters English court reporter

Interpreters:

Mr. Luis Eduardo Arango	Interpreter
Ms. Estela G Zaffaroni	Interpreter
Mr. Javier Larravide	Interpreter

57. During the November Hearing, Dr. Briceño was examined.

58. On 12 November 2020, the Tribunal informed the Parties that the United States, which had reserved the possibility of making an oral submission, had just expressed the wish to make a submission of not more than 15 minutes before the close of the jurisdictional hearing. On the same day, the Claimant objected to the United States' request to make oral submissions at the Hearing, and the Respondent indicated that the Claimant's objection was unfounded and should be rejected.

59. On 13 November 2020, the Tribunal confirmed that the US would be given the opportunity to make oral submissions regarding the interpretation of the TPA at the beginning of the day's session for 15 minutes. The Tribunal added that, in the event that, at the end of the hearing, one of the Parties requested the opportunity to file brief additional written submissions limited to comments to the US oral submission, the Tribunal would accept the request.

60. On 18 November 2020, the Tribunal issued Procedural Order No. 4 on post-hearing matters.

61. On 4 December 2020, the Parties filed agreed corrections to the transcript.

62. On 11 December 2020, the Parties filed simultaneous comments on the US oral presentation at the November Hearing.

63. On 15 January 2021, the Respondent filed its submission on costs, and the Claimant did so on 19 January 2021.

64. The proceeding was closed on 19 April 2021.

III. FACTUAL BACKGROUND

65. This section summarizes the factual background of the dispute that gave rise to this arbitration. It does not purport to be exhaustive and is meant to provide a general overview of the key facts and factual allegations to put the Tribunal's analysis on jurisdiction in proper context.

A. CLAIMANT AND HER INTERESTS IN COLOMBIA

66. The Claimant, Ms. Astrida Benita Carrizosa, is a citizen of the United States of America since 1954.[7] At the center of her controversy with the Republic of Colombia are the shares that she and her family held in Corporación Grancolombiana de Ahorro y Vivienda ("Granahorrar").

67. Granahorrar was a financial institution founded in Colombia in 1972 as a subsidiary of Banco de Colombia, a Colombian private bank.[8] It was a *Corporación de Ahorro y Vivienda* ("CAV"), a type of financial institution authorized to obtain capital via deposits and to finance the construction industry through loans and mortgages.[9]

68. The Claimant, her husband Julio Carrizosa and three sons Alberto, Felipe, and Enrique (the "Carrizosa Family") acquired shares in Granahorrar in 1986.[10] Within the following two years, the Carrizosa Family became a majority shareholder in Granahorrar.[11] They subsequently restructured their holdings, such that, by 1998, Ms. Carrizosa indirectly owned 2.3307% of Granahorrar through three holding companies incorporated in Colombia: (i) Asesorías e Inversiones C.G. S.A., (ii) Inversiones Lieja LTDA, (iii) I.C. Interventorias y Construcciones LTDA (the "Holding Companies"). The entire Carrizosa Family in turn (indirectly) owned 58.76% of Granahorrar. Mr. Julio Carrizosa served as Chair of Granahorrar's Board of Directors.

[7] Witness Statement of Ms. Astrida Benita Carrizosa, 7 June 2019, paras. 1-3.

[8] Granahorrar Information Memorandum (Lehman Brothers), August 1998, Exh. C-0001, p. 6.

[9] Decree No. 678 of 1972, Republic of Colombia, 2 May 1972, Exh. R-0156, Article 2(a).

[10] Granahorrar Information Memorandum (Lehman Brothers), August 1998, Exh. C-0001, p. 25.

[11] *Ibid*.

B. THE 1997-2001 ECONOMIC CRISIS

69. In the 1990s, Colombia began deregulating its financial sector following the global shift toward market liberalization. It privatized State-run banks, admitted foreign financial institutions, and recapitalized the national bank. As a result, in the first half of the decade, the Colombian economy attracted a significant influx of foreign capital and achieved an impressive growth of its gross domestic product.

70. The global tide started to change in 1996, as different regions took turns facing economic recessions and financial crises. From 1997 through 2001, the Colombian economy experienced what experts have termed as "the most severe economic crisis in its history."[12] At the heart of the crisis, which resulted in a significant contraction of the gross domestic product and record levels of unemployment, was the collapse of the country's currency exchange regime and of the system of financial services.

71. The crisis prompted the Government to increase the level of regulation in multiple fields of economic activity. The financial sector was one of the first to face the increased Governmental regulation. Throughout 1998, the Colombian financial regulatory authorities adopted a variety of measures that applied to multiple actors of the financial sector. Three administrative regulatory agencies were leading the effort of the Government:

    i. The Central Bank, which is established by the Constitution and among various functions, serves as the lender of last resort to Colombian financial entities;[13]

    ii. The Superintendency, a regulatory body tasked with supervising the Colombian financial system, ensuring, *inter alia*, that financial entities maintain appropriate liquidity levels and preventing the public's loss of confidence in the financial system;[14] and

[12] Alejandro Torres G., *La Crisis Colombiana de Finales del Siglo XX: ¿Un choque real o financiero?, Perfil de Coyuntura Económica* No. 18, 18 December 2011, Exh. C-0002, p. 7. *See*, Clara Elena Parra and Natalia Salazar, *La Crisis Financiera y la Experiencia Internacional, Boletines de Divulgación Económica, Unidad de Análisis Macroeconómico del Departamento Nacional de Planeación*, January 2000, Exh. C-0002, pp. 21-22.

[13] Colombian Constitution, 4 July 1991, Exh. R-0124, Article 371.

[14] Financial Act, 2 April 1993, Exh. R-0129, Article 325.

iii. Fogafín - a regulatory entity tasked with protecting depositors, preventing unjustified enrichment by shareholders, and temporarily managing distressed financial institutions to ensure their financial recovery.[15]

72. In the process, the regulatory agencies conducted so-called *oficialización* of a number of banks and financial institutions.[16] Under this practice, the agencies injected capital to rescue banks from a liquidity crisis. Depending on the volume of the injections, the banks could eventually pass into the Government's control and ownership.

73. The Government's efforts enjoyed a varied degree of success. Be it for those efforts or otherwise, in the beginning of the new millennium, the Colombian economy started to stabilize in line with the regional recovery.

C. FISCAL ADMINISTRATIVE MEASURES INVOLVING GRANAHORRAR

74. Granahorrar, as an entity involved in finance and construction – two severely affected sectors – unsurprisingly suffered harsh consequences of the 1997-2001 economic crisis. The Parties dispute the extent to which the crisis contributed to Granahorrar's financial hardship. The Respondent submits that the effects of the crisis were exacerbated by a dispute between Granahorrar's shareholders that lasted from late 1997 to mid-1998,[17] with the result that, by October 1998, Granahorrar was in a severe liquidity crisis that created an insolvency emergency, warranting the Government's regulatory interference.[18] The Claimant disputes this account. She calls Granahorrar's condition at that time a "temporary liquidity deficit" and argues that it was Colombia's purported regulatory measures and its discriminatory decisions to withhold requisite support that led to the deterioration of the company's financial standing.[19]

75. The Parties also disagree on the nature and motives of the Governmental intervention in Granahorrar's business. For the purposes of the jurisdictional

[15] Financial Act, 2 April 1993, Exh. R-0129, Article 316(2).

[16] *El Gobierno Oficializó el Banco Uconal*, EL TIEMPO, 26 September 1998, Exh. R-0162.

[17] *Pelea de Socios*, SEMANA, 12 January 1998, Exh. R-0063, p. 1.

[18] RCMJ, paras. 37-41.

[19] CMJ, para. 9.

analysis, the Tribunal can dispense with entering into these controversies. It suffices to summarize the relevant administrative measures.

76. In June and July 1998, the Central Bank provided Granahorrar with temporary liquidity infusions ("TLIs") in the amount of approximately USD 194 million.[20] Pursuant to Resolution No. 25 of the Central Bank, TLIs constitute direct deposits by the Central Bank on a given financial institution's Central Bank account. They aim at aiding financial institutions which suffer from a temporary liquidity squeeze but are still solvent.[21]

77. On 6 July 1998, Granahorrar and Fogafín executed an agreement, pursuant to which Fogafín undertook to guarantee up to COP 300 billion (approximately USD 222 million) of Granahorrar's interbank financing and overdraft obligations, until 6 August 1998 (the "Fogafín Agreement"). In exchange, Granahorrar agreed to issue to Fogafín promissory notes valued at 134% of the guarantee amount actually relied upon by Granahorrar.[22] In subsequent months, the parties amended the Fogafín Agreement 13 times, modifying the amounts, converting the guarantee into direct funding by Fogafín and extending the maturity of the financing.[23]

78. In a report issued on 22 July 1998, Fogafín recorded that, despite its interventions, Granahorrar had lost approximately COP 311 billion (approximately USD 226 million) in savings accounts and certificates of deposit.[24] The report also stated that "restoration of trust in [Granahorrar] could be propelled by its sale" and thus recommended that any further financial support be conditioned on a change in Granahorrar's ownership.[25]

79. In the following months, Granahorrar's financial standing continued to deteriorate. The Parties diverge on Granahorrar's precise condition at this time. The Respondent

[20] Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 1 July 1998, Exh. R-0067; Letter from Granahorrar (R. Navarro) to Central Bank (M. Urrutia), 17 June 1998, Exh. R-0068.

[21] External Resolution No. 25, 31 October 1995, Exh. R-0142, Article 29.

[22] 1998 Fogafín Agreement, 6 July 1998, Exh. C-0005.

[23] *See*, Addendum No. 1 to the Fogafín Agreement, 3 August 1998, Exh. R-0092; Addendum No. 2 to the Fogafín Agreement, 6 August 1998, Exh. R-0093; Addendum No. 3 to the Fogafín Agreement, 21 August 1998, Exh. R-0094, *et seq*.

[24] *Documento a Consideración de la Junta Directiva*, Fogafín Managment, 22 July 1998, Exh. R-0090.

[25] *Ibid*., p. 4.

argues that, by October 1998, Granahorrar defaulted on its payment obligations toward its creditor banks, returned multiple checks and defaulted on its TLI interest payments to the Central Bank, thereby becoming insolvent and violating the Fogafín Agreement.[26] The Claimant denies these allegations and argues that the financial authorities withheld requisite support from Granahorrar compared to its competitors.[27]

80. Be this as it may, on 2 October 1998, the Central Bank terminated the TLIs and took possession of Granahorrar's promissory notes.[28] On the same date, the Superintendency directed Granahorrar to raise COP 157 billion (approximately USD 99.8 million) in new capital to offset its alleged insolvency (the "Capitalization Order").[29] It gave Granahorrar until 3:00 pm on the next day, 3 October 1998, to raise the additional capital, citing the risk of a "systemic crisis" and "economic panic."[30] While the Parties dispute whether the authorities have properly notified the Capitalization Order to the shareholders of Granahorrar, it is common ground that Granahorrar did not raise the additional capital as required by the Capitalization Order.

81. On 3 October 1998, the Superintendency issued a report to Fogafín, concluding that Granahorrar was insolvent and illiquid, citing its default on payments due to multiple creditors.[31] On the same day, it decided to proceed with the *oficialización* of Granahorrar, by recapitalizing it. Thus, still on 3 October 1998, Fogafín ordered Granahorrar to reduce the nominal value of its shares to COP 0.01 (the "Value Reduction Order").[32]

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[26] RCMJ, paras. 82-83.

[27] CMJ, paras. 10-12.

[28] Letter from Central Bank (J. Uribe) to Granahorrar (J. Amaya), 2 October 1998, Exh. C-0018; External Resolution No. 25, 31 October 1995, Exh. R-0142, Article 29 (English translation: "Without prejudice to the effects foreseen by other rules in this resolution, a return of the resources shall be made immediately enforceable if, while Central Bank resources are being used, or when contracts expire, it becomes evident that the credit establishment is in a situation of insolvency.").

[29] 1998 Capitalization Order, 2 October 1998, Exh. R-0038.

[30] *Ibid*., p. 3.

[31] Letter from Superintendency (S. Ordoñez) to Fogafín (Board of Directors), 3 October 1998, Exh. R-0048, pp. 1–5.

[32] 1998 Value Reduction Order, 3 October 1998, Exh. R-0042.

82. Once Granahorrar had complied with the Value Reduction Order, Fogafín capitalized Granahorrar first with COP 30 billion (approximately USD 19 million) on 3 October 1998 and second by an additional COP 127 billion (approximately USD 80.4 million) on 5 October 1998.[33] As the capitalization was effected through the acquisition of shares, Fogafín became Granahorrar's majority shareholder. The Parties disagree on whether the Value Reduction Order was properly notified to the Carrizosa Family.

83. On 16 October 1998, Granahorrar held a general assembly of shareholders, at which the attending shareholders – which did not include the Carrizosa Family – unanimously approved new corporate statutes and elected a new board of directors.[34]

84. These measures contained the collapse that Granahorrar was allegedly facing at that period. Following the stabilization of the Colombian economy, on 31 October 2005, Fogafín sold Granahorrar to Banco Bilbao Vizcaya Argentaria, a Spanish bank.[35]

D. ADMINISTRATIVE JUDICIAL PROCEEDINGS

85. On 28 July 2000, the Claimant through her Colombian holding companies initiated a judicial challenge of the administrative measures that the Governmental agencies took in 1998 before the Administrative Tribunal of Cundinamarca. In particular, she requested the nullification of the Value Reduction Order and the Capitalization Order (collectively, the "1998 Measures") and compensation for the value of the shares that she held in Granahorrar together with interest.[36]

86. Among other substantive and procedural defects, the Claimant argued that Fogafín and the Superintendency had failed to properly notify her of the 1998 Measures, and that the measures lacked substantive justification, since Granahorrar was not

[33] Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 3 October 1998, Exh. R-0168; Letter from Fogafín (I. Quintana) to Granahorrar (A. Arciniegas), 5 October 1998, Exh. R-0153.

[34] Minutes of Granahorrar Shareholders' Assembly, 16 October 1998, Exh. R-0047.

[35] *Gobierno vende Banco Granahorrar a grupo español BBVA*, DINERO, 31 October 2005, Exh. R-0045.

[36] Nullification and Reinstatement Action, 28 July 2000, Exh. R-0050.

insolvent.[37] The Superintendency and Fogafín replied that the Claimant's challenge was barred by the applicable statute of limitations, and explained that the agencies' actions had a sound basis in fact and law .[38]

87. On 27 July 2005, the First Section of the Administrative Judicial Tribunal issued a judgment, which dismissed the claims on the merits (the "2005 Judgment").[39] In doing so, however, the court rejected the Governmental agencies' defense founded on the statute of limitation, as it held that the agencies had not properly notified the 1998 Measures to the Claimant.

88. The Claimant appealed. In her notice of appeal, she submitted that the Administrative Judicial Tribunal had failed to: (i) decide her claims; (ii) assess the evidence; (iii) properly interpret the 1998 Measures; and (iv) recognize Fogafín's and the Superintendency's abuse of power.[40] The appeal was assigned to the Fourth Section of the Council of State. The Council of State is Colombia's highest judicial organ with jurisdiction in administrative matters.

89. On 1 November 2007, the Council of State issued its judgment (the "2007 Judgment"), in which it reversed the 2005 Judgment.[41] According to the Council of State, at the time of taking the 1998 Measures, the Governmental agencies had insufficient evidence to conclude that Granahorrar had become insolvent.[42] In turn, the Council of State upheld the Administrative Judicial Tribunal's finding that the Superintendency and Fogafín had not complied with the applicable notification requirements and therefore the Claimant's appeal was not barred under the statute of limitation.[43] Consequently, the Council of State ordered the Superintendency and

[37] *Ibid*., pp. 2-3.

[38] Answer of the Superintendency to the Nullification and Reinstatement Action, Case No. 20000521, 3 August 2001, Exh. R-0127; Answer of Fogafín to the Nullification and Reinstatement Action, Case No. 20000521, Administrative Judicial Tribunal, 23 November 2001, Exh. R-0128.

[39] 2005 Administrative Judicial Tribunal Judgment, 27 July 2005, Exh. R-0051.

[40] Holding Companies' Notice of Appeal, Case No. 20000521, Administrative Judicial Tribunal, 5 August 2005, Exh. R-0134.

[41] 2007 Council of State Judgment, 1 November 2007, Exh. R-0054.

[42] *Ibid*., p. 43.

[43] *Ibid*., pp. 32-33.

Fogafín to pay Claimant and her sons more than COP 226 billion (approximately USD 114 million) in compensation.[44]

90. The 2007 Judgment put an end to the ordinary administrative judicial proceedings concerning the 1998 Measures. However, Colombian law envisages a limited possibility for a party to initiate so-called *tutela* proceedings to claim that acts or omissions of the State authorities violated its fundamental rights.

91. On 5 March 2008, the Superintendency and Fogafín each filed a *tutela* petition against the 2007 Judgment before the Fifth Section of the Council of State, alleging substantive, procedural and factual errors.[45] The Ministry of Finance of Colombia filed a pleading to support these *tutela* petitions.[46]

92. On 10 April 2008, the Fifth Section of the Council of State dismissed the *tutela* petitions on the merits.[47] The Superintendency and Fogafín appealed that decision to the First Section of the Council of State. The First Section affirmed the Fifth Section's dismissal.[48]

93. The Superintendency and Fogafín then submitted a request for review of the Council of State's decisions to the Constitutional Court.[49]

E. CONSTITUTIONAL COURT PROCEEDINGS

94. The Parties dispute whether the Constitutional Court, which is the highest judicial organ in constitutional matters, has a constitutional power to entertain requests for

[44] *Ibid*., pp. 61-62.

[45] Fogafín's Tutela Petition, Council of State, 5 March 2008, Exh. R-0140, p. 28; Superintendency's Tutela Petition, Council of State, 5 March 2008, Exh. R-0141.

[46] Pleading of Tercero Coadyuvante by the Ministry of Finance, Council of State, 31 March 2008, Exh. R-0146.

[47] Rejection of Superintendency Tutela Petition, Case No. 11001-03-15-000-2008-00226-00, Fifth Section of the Council of State, 10 April 2008, Exh. R-0056; Rejection of Fogafín Tutela Petition, Case No. 11001-03-15-000-2008-00226-00, Fifth Section of the Council of State, 10 April 2008, Exh. R-0187.

[48] Rejection of Superintendency Tutela Petition, Case No. 11001-03-15-000-2008-00226-00, First Section of the Council of State, 4 September 2008, Exh. R-0057; Rejection of Fogafín Tutela Petition, Case No. 11001-03-15-000-2008-00225-00, First Section of the Council of State, 4 December 2008, Exh. R-0055.

[49] Fogafín's Request for Tutela Revision, Constitutional Court, 10 February 2009, Exh. R-0160; Supreintendency's Request for Tutela Revision, Constitutional Court, 27 October 2008, Exh. R-0161.

review of judgments of the Council of State.[50] Be that as it may, in this instance, the Constitutional Court decided to select the petitions of the Superintendency and Fogafín for the full bench review with the aim of setting a judicial precedent.[51] It thus consolidated the two petitions in a single proceeding and issued a stay of the 2007 Judgment pending such review.[52]

95. On 26 May 2011, the Constitutional Court issued a unanimous judgment (the "2011 Decision") quashing the 2007 Judgment on the ground that the Council of State had committed substantive, procedural, and factual errors.[53] The Constitutional Court reasoned that the Superintendency and Fogafín had properly notified the Claimant of the 1998 Measures and, therefore, her judicial challenge of those measures was time barred.

96. The Claimant filed a petition to annul the 2011 Decision before the Constitutional Court. While the Parties agree that the Constitutional Court may annul its own judgments in certain circumstances, they dispute the legal nature of the annulment proceedings.

97. In support of its annulment action, the Claimant argued that the Constitutional Court had violated her due process rights by improperly assuming jurisdiction over a matter that fell within the exclusive jurisdiction of the Council of State.[54] The Claimant was joined in her petition by Magistrate Mauricio Fajardo, a then member of the Council of State, who also complained that the Constitutional Court had overstepped its mandate by reviewing the 2007 Judgment.

[50] CMJ, para. 136; RCMJ, para. 128.

[51] Selection of Superintendency Tutela Petition for Review, Constitutional Court, 18 November 2008, Exh. R-0147; Selection of Fogafín Tutela Petition for Review, Constitutional Court, 30 January 2009. Exh. R-0148.

[52] Order No. 133 of 2009, to consolidate the Tutela Petitions, Constitutional Court, 25 March 2009, Exh. R-0149.

[53] 2011 Constitutional Court Judgment, 26 May 2011, Exh. C-0023, one justice issued a separate opinion.

[54] Annulment Petition by the Holding Companies, Constitutional Court, 9 December 2011, Exh. R-0059.

98. On 25 June 2014, the Constitutional Court issued an order (the "2014 Order"), dismissing the Claimant's annulment petition and confirming the 2011 Decision.[55] Colombian law does not envisage any further recourse against such final order of the Constitutional Court.

IV. ANALYSIS

99. The Parties agree that these proceedings are instituted under the ICSID Convention. Pursuant to Article 41 of the ICSID Convention, the Tribunal has the authority to determine its jurisdiction:

> (1) The Tribunal shall be the judge of its own competence.
>
> (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

100. To discharge this mandate, the Tribunal must analyze the facts and the Parties' positions to determine whether the present dispute is within its jurisdiction. The starting point of the analysis is Article 25(1) of the ICSID Convention, which reads as follows:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

101. It is well established that a State does not automatically consent to the jurisdiction of the Centre by virtue of being Parties to the ICSID Convention. As is clear from Article 25 of the Convention, in addition there must exist a "consent in writing" between the disputing Parties to submit their dispute to arbitration (not to speak of the other requirements contained in Article 25).

[55] Order No. 188/14 issued by the Constitutional Court on 25 June 2014, confirming the 2011 Constitutional Court Judgment ("2014 Confirmatory Order") Exh. R-0049.

102. The Claimant invokes the TPA and the Colombia-Switzerland BIT as Colombia's written offer to arbitrate, which she purports to have accepted in her Request for Arbitration of 24 January 2018 (the "RFA").[56] The Respondent objects that it has not consented to submit this dispute to this Tribunal. More specifically, Colombia raises objections to the Tribunal's jurisdiction *ratione temporis*, *ratione voluntatis* and *ratione materiae*. The Claimant rejects these objections.

103. In this Section, the Tribunal will analyze the jurisdictional objections. Before setting out its analysis on an objection, it will briefly summarize the Parties' respective positions. If the Tribunal finds one or more of the jurisdictional objections to be dispositive of the case, it may dispense with analyzing the rest of the objections.

A. TEMPORAL SCOPE OF THE TPA

104. The Parties disagree on whether the dispute and the claims fall within the temporal scope of Colombia's consent to arbitration under the TPA, which entered into force on 15 May 2012. In particular, they dispute whether the fact that the bulk of Colombia's impugned conduct took place before the entry into force of the TPA places the dispute outside the Tribunal's jurisdiction.

1. The Respondent's Position

105. The Respondent submits that the Claimant has failed to establish that the Tribunal has jurisdiction *ratione temporis*. According to Colombia, the present dispute and the claims fall outside the temporal scope of the Tribunal's jurisdiction pursuant to Article 10.1.3 of the TPA[57] and the customary international law principle of non-retroactivity.

106. Under the principle of non-retroactivity of treaties, as codified in Article 28 of the VCLT, State conduct that occurred before the entry into force of the TPA could not

[56] The relevant provisions of the TPA are quoted at *supra* paras. 14 and 15. The Claimant has also invoked the India-Colombia BIT in the RFA, however, she no longer referred to it in subsequent submissions.

[57] Article 10.1.3 reads as follows: "For greater certainty, this Chapter [10] 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." Free Trade Agreement between the United States and Colombia, 22 November 2006, Exh. CL-0101.

possibly amount to a violation of that treaty.[58] Indeed, as Article 13 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Articles") clarifies:

> 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.[59]

107. Article 10.1.3 of the TPA reflects this customary rule by limiting the temporal scope of the Contracting States' consent to arbitrate. It provides 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."[60]

108. The Respondent points out that, except for the 2014 Order of the Constitutional Court, all of the acts of which the Claimant complains predate the entry into force of the TPA on 15 May 2012.[61] Therefore, the claims flowing from those acts are outside the Tribunal's jurisdiction *ratione temporis*.

109. With respect to the 2014 Order, Colombia submits that, when faced with conduct postdating the entry into force of the treaty, the test is whether the conduct changes

[58] Vienna Convention on the Law of Treaties, United Nations, 23 May 1969 ("VCLT") Exh. RL-0084, Article 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.").

[59] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 ("ILC Articles on State Responsibility"), Exh. RL-0010, Article 13.

[60] Free Trade Agreement between the United States and Colombia, 22 November 2006, ("TPA"), Exh. RL-0001, Article 10.1.3. In interpreting the non-retroactivity provision of the CAFTA-DR, which is identical to that in Article 10.1.3 of the TPA, the *Spence v. Costa Rica* tribunal noted that "[i]t is uncontroversial that Article 10.1.3 [of CAFTA-DR] restates the general rule of customary international law reflected in Article 28 of the Vienna Convention on the Law of Treaties." *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, 25 October 2016 ("*Spence v. Costa Rica*"), Exh. RL-0024, para. 215.

[61] RCMJ, para. 170.

the pre-treaty *status quo* of the claimant's investment.[62] That is not the case of the 2014 Order, which merely confirmed the 2011 Decision.[63]

110. The Respondent's legal expert, Dr. Ibáñez, testified that the remedy that the Claimant sought against the 2011 Decision was an extraordinary recourse, which does not provide for a possibility of appeal.[64] Thus, according to the Respondent, the 2014 Order merely put an end to an attempt to reopen the closed proceedings regarding the 1998 Measures, which had ended with a final judgment dismissing the Claimant's claims. It is manifest that the 2014 Order did not change the *status quo* that prevailed before the TPA's entry into force.[65] For the Respondent, the Claimant seeks to use the 2014 Order as a "Trojan horse, designed to potentiate a claim that, at its core, challenges pre-treaty rather than post-treaty conduct."[66]

111. Furthermore, in reliance on the reasoning of the *Spence* tribunal, the Respondent argues that for post-treaty conduct to come under the jurisdiction of the treaty tribunal, it must "constitute an actionable breach in its own right."[67] According to Colombia, the claims concerning the 2014 Order are not independently actionable, because the adjudication of these claims would require a finding on the lawfulness of pre-treaty conduct (*i.e.*, of the 1998 Measures and of the 2011 Decision).[68]

112. For Colombia, it is not only the claims that are outside the Tribunal's temporal jurisdiction, but also the legal dispute as a whole. The notion of dispute has a broad definition in international law. It denotes "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[69] According to the

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[62] RRJ, para. 40, *citing Spence v. Costa Rica*, Interim Award, Exh. RL-0024, para. 246; *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Preliminary Objections, 31 May 2016, Exh. RL-0012, para. 212; *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, Exh. RL-0013, para. 455; *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, Exh. RL-0011, para. 332.

[63] RRJ, para. 51.

[64] Second Ibáñez Expert Report, 21 February 2020, para. 155.

[65] RRJ, para. 62.

[66] RRJ, para. 67.

[67] RRJ, para. 73, *citing Spence v. Costa Rica*, Interim Award, Exh. RL-0024, para. 217.

[68] RRJ, para. 75.

[69] *The Mavrommatis Palestine Concessions (Greece v. Britain)*, PCIJ, Judgment, 30 August 1924, Exh. RL-0022, p. 5.

Respondent, conduct that takes place after a dispute has arisen may confirm or prolong the same dispute, without thereby triggering a new dispute.[70]

113. Colombia submits that the present dispute arose at the latest on 28 July 2000, when the Claimant initiated the judicial action before the Administrative Judicial Tribunal, through which she challenged the lawfulness of the 1998 Measures and sought compensation.[71] It cannot be seriously argued that the 2014 Order triggered a new dispute.

114. Therefore, according to Colombia, the present dispute predates the entry into force of the TPA and is thus outside the Tribunal's jurisdiction *ratione temporis*.

2. The Claimant's Position

115. The Claimant submits that her claims and the overall dispute are within the temporal scope of the TPA, since the conduct of which she complains transcends the TPA's entry into force in 2012. The Claimant does not oppose what she calls Colombia's "unremarkable proposition" that the TPA does not apply to acts that occurred prior to its entry into force.[72] Nor does she challenge that this proposition is grounded on Article 28 of the VCLT.[73] However, this does not, so the Claimant argues, exempt the Respondent from responsibility for the measures it took after the TPA's entry into force, *i.e.* responsibility for the 2014 Order.

116. Relying on *Chevron v. Ecuador*, the Claimant contends that an investor may maintain a treaty claim based upon a State measure after the treaty's entry into force, even though other State conduct related to the measure may have occurred prior to the treaty's effective date.[74] In this vein, the *Chevron* tribunal was "satisfied that the alleged improper action or inaction by the Ecuadorian courts post-dating the BIT's entry into force could still amount to a denial of justice" even though the

[70] RRJ, para. 109, *citing Phosphates in Morocco, PCIJ (Guerrero, et al.)*, Judgment, 14 June 1938, Exh. RL-0026, p. 18.

[71] RRJ, para. 115, *citing* Nullification and Reinstatement Action, 28 July 2000, Exh. R-0050, pp. 2–3.

[72] CRJ, para. 99.

[73] *Ibid*.

[74] CRJ, para. 100, *citing Chevron Corp. v. Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, Exh. CL-0157, paras. 282-84.

claimant's investment had "been influenced by acts and omissions occurring prior to the entry into force of the BIT."[75] To bolster her position, the Claimant further relies on several decisions concerning the *ratione temporis* scope of the International Covenant on Civil and Political Rights ("ICCPR") and its Optional Protocol.[76]

117. Furthermore, according to the Claimant, the non-retroactivity presumption anchored in Article 28 of the VCLT and the intertemporal principle embodied in Article 13 of the ILC Articles concern the temporal application of treaties to State acts -- not to disputes. There is no general principle of international law that would render the TPA inapplicable to "disputes", as distinct from "acts", pre-dating its entry into force.

118. In this respect, the Claimant opposes the Respondent's reliance on Article 10.1.3 of the TPA for the proposition that "[i]n the application of investment treaties, one of the temporal dimensions that is governed by the principle of non-retroactivity relates to the moment in which the dispute arose."[77]

119. According to the Claimant, this provision merely restates the general rule of non-retroactivity of treaties, and does not purport to place *disputes* that may have arisen before the entry into force of the TPA outside the scope of the treaty's consent to arbitration.

120. The Claimant considers that the decisions in *Lucchetti v. Peru* and *Vieira v. Chile*, on which Colombia relies, are inapposite. There, the tribunals' rejection of pre-treaty disputes on *ratione temporis* grounds was premised on express exclusions in the relevant treaty language of the Chile-Peru and Chile-Spain BITs, which provided that the treaties:

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[75] CRJ, para. 100, *citing Chevron Corp. v. Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, Exh. CL-0157, paras. 282-84; *see also*, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 ("*Mondev v. USA*"), Exh. CL-0045, para. 69.

[76] *E.g.* Comm. 1158/2003, U.N. Doc. A/61/40, Vol II, at 242 (HRC 2006) Exh. CL-0340; Comm. 1033/2001, U.N. Doc. A/59/40, Vol. II, at 246 (HRC 2004) Exh. CL-0338; Comm. 1070/2002, U.N. Doc. A/61/40, Vol. II, at 145 (HRC 2006) Exh. CL-0339.

[77] CRJ, para. 116. Article 10.1.3 reads as follows: "For greater certainty, this Chapter [10] 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."

> [S]hall not, however, apply to differences or disputes that arose prior to its entry into force.[78]
>
> [S]hall not apply [...] to disputes or claims arising or resolved prior to its entry into force.[79]

121. No comparable language is found in the TPA. Accordingly, so says the Claimant, it should not be assumed that the Parties have excluded pre-TPA disputes from the treaty's scope of application.

122. In any event, even if the TPA excluded from its ambit all "disputes" that arose before its entry into force, this dispute arose in 2014. In this respect, the Claimant defines the term "dispute" as a controversy on an alleged violation of the applicable treaty. In this respect, the Claimant distinguishes a dispute that alleges a treaty violation based upon post-treaty State conduct from an earlier (related) dispute over conduct that preceded the treaty. She argues that, the former category of controversy could not have arisen until the challenged State measure alleged to violate the TPA, had occurred. Since the TPA only entered into force in 2012, there could have been no dispute about its violation prior to that date.

123. Therefore, the Claimant submits that the present dispute, which arose after the 2014 Order, is within the Tribunal's jurisdiction *ratione temporis*.

3. Analysis

124. It is common ground between the Parties that the TPA does not apply to conduct that predates its entry into force.[80] It is indeed uncontroversial that, pursuant to the customary international law rule about non-retroactivity, a treaty does not bind the Contracting States in respect of their pre-treaty actions or omissions, unless it provides otherwise. Article 28 of the VCLT codifies this rule also known as the principle of non-retroactivity of treaties:

> 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

[78] Chile-Peru BIT, cited at *Empresas Lucchetti, S.A. et al. v. Republic of Perú*, ICSID Case No. ARB/03/04, Award, 7 February 2005, Exh. RL-0020.

[79] Chile-Spain BIT cited at *Sociedad Anónima Eduardo Vieira v. República de Chile*, ICSID Case No. ARB/04/7, Award, 21 August 2007, Exh. RL-0075, paras. 227-34, Article 2.3.

[80] CRJ, para. 99; RCJ, para. 170.

> 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.[81]

125. The TPA does not provide otherwise. Instead, its Article 10.1.3 confirms the customary rule of non-retroactivity in the following terms:

> 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.[82]

126. The TPA entered into force on 15 May 2012.[83] Among the measures that the Claimant alleges as the basis of her claims, only the 2014 Order postdates the entry into force of the TPA. The prior conduct of Colombia, including the 1998 Measures and the 2011 Decision took place before the TPA's effective date and cannot possibly constitute a breach of the TPA. This conclusion is confirmed by the rule of State responsibility, according to which there can be no breach of an international obligation if that obligation did not apply at the time of the commission of the allegedly unlawful conduct:

> 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.[84]

127. Article 12.1.2(b) of the TPA – the purported basis for the consent to arbitration in this case – limits the Tribunal's jurisdiction "solely" to:

> [C]laims 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).[85]

128. Colombia could not have violated those provisions by conduct that predated the entry into force of the TPA. Thus, any claim of unlawfulness of the Respondent's pre-TPA conduct is outside the Tribunal's jurisdiction.

129. That being so, it remains to be seen whether the Tribunal could exercise jurisdiction over the claim that the 2014 Order violated the provisions of the TPA, *e.g.* because

[81] VCLT, Exh. RL-0084, Article 28.

[82] TPA, Exh. RL-0001, Article 10.1.3; *see*, *Spence v. Costa Rica*, Exh. RL-0024, para. 215.

[83] TPA, Exh. RL-0001.

[84] ILC Articles on State Responsibility, Exh. RL-0010, Article 13.

[85] TPA, Exh. RL-0001, Article 12.1.2(b).

that order constituted an unlawful judicial expropriation of the Claimant's alleged investment.

130. Colombia submits that such claim is also beyond the temporal scope of the Tribunal's jurisdiction. In the Tribunal's view, the Respondent's objection in this respect can be divided in two principal arguments.

- First, Colombia argues that the Tribunal cannot separately entertain a claim arising out of the 2014 Order, the reason being that the principle of treaty non-retroactivity – as embodied in Article 10.1.3 of the TPA – carves out from the Tribunal's jurisdiction the present dispute as a whole, since it arose prior to the TPA's entry into force.
- Second, the Respondent submits that a claim related to the lawfulness of the 2014 Order lies beyond the Tribunal's competence, since that order is not an independently actionable breach of the TPA.

131. In addition, Colombia also asserts that the 2014 Order did not change the pre-treaty *status quo* of the Claimant's alleged investment. This argument is, however, closely intertwined with the Respondent's defense that the 2014 Order does not constitute an independently actionable treaty breach. The Tribunal will therefore deal with these issues together.

132. The Tribunal will address the two prongs of the Respondent's objection in turn.

a. The scope of the TPA is not limited to post-treaty disputes

133. The Respondent argues that the principle of treaty non-retroactivity excludes from the treaty's scope of application not only pre-treaty conduct, but also any dispute that would have arisen prior to the treaty's entry into force.[86] Resorting to what it calls the "classic" definition of dispute found in the PCIJ's *Mavrommatis* judgment,[87] Colombia submits that the dispute between Ms. Carrizosa and Colombia arose well before the TPA's entry into force, and in particular when Colombia's competent organs took the 1998 Measures. Thus, even though one of the impugned acts – the

[86] Transcript, 10 November 2020, 287:19-22.

[87] *The Mavrommatis Palestine Concessions (Greece v. Britain)*, PCIJ, Judgment, 30 August 1924, Exh. RL-0022, p. 5.

2014 Order – postdates the treaty's effective date, for the Respondent, the entire dispute lies beyond the temporal scope of the Tribunal's jurisdiction.

134. The Claimant's refutation of this objection is twofold. First, she disagrees with the proposition that the customary international law principle of treaty non-retroactivity applies to disputes. Second, she considers that the Respondent's proposed general definition of dispute should be discarded in favor of a more specific definition based on Chapter 10 of the TPA, which refers to investment disputes involving claims of a violation of the TPA. According to the Claimant, no dispute could have existed under that definition prior to the TPA's entry into force. Thus, Colombia's contention that the dispute predates the TPA has no merit.

135. The Tribunal is not persuaded that the temporal scope of its jurisdiction is limited to disputes that have arisen after the entry into force of the TPA. The text of the TPA contains no temporal limitation with respect to disputes that may come under the Tribunal's jurisdiction. The language of Article 10.1.3 of the TPA, which reflects the customary international law principle of treaty non-retroactivity, excludes any pre-treaty "act or fact", but is silent on pre-treaty disputes.

136. The PCIJ's definition of dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"[88] covers a situation where a single dispute encompasses several claims related to various actions and omissions, each of which may constitute a self-standing violation of applicable legal norms. If, while the dispute is unfolding, a disputing State accedes to an international treaty, which prohibits a type of conduct that underlies the existing dispute, subsequent acts of the same type are not outside the treaty's scope of application simply because such acts may be deemed part of the existing dispute.

137. As an example, assume an ongoing dispute between State A and State B arising out of State A's pollution of a shared river. If the two States enter into a treaty that prohibits such environmental pollution, it would hardly be a valid defense for State A to argue that it should be allowed to continue polluting the river, because the dispute over the pollution arose prior to the treaty's entry into force.

[88] The Mavrommatis Palestine Concessions (Greece v. Britain), PCIJ, Judgment, 30 August 1924, Exh. RL-0022, p. 5.

138. Here too, if the 2014 Order could give rise to a self-standing breach of the TPA – an issue that will be addressed in the subsequent section – the principle of treaty non-retroactivity would not place that post-TPA breach outside the treaty's temporal scope. The fact that the broader dispute concerning the alleged mistreatment of the Claimant's purported investment in Colombia may have arisen before the TPA's effective date does not mean that the TPA condoned Colombia's repeated mistreatment of the Claimant's investment after its entry into force. Such an outcome would not be warranted by the ordinary meaning of the terms of Article 10.1.3 of the TPA, their context, or the object and purpose of the TPA.

139. To substantiate its position, the Respondent cites several investment awards.[89] These awards do not, however, support the proposition that the principle of treaty non-retroactivity excludes pre-treaty disputes from the treaty's scope of application, especially in cases where the disputed conduct continues after the treaty's entry into force.

140. It is correct that the tribunal in *MCI v. Ecuador* held that "[a]ny dispute arising prior to [the BIT's effective] date will not be capable of being submitted to the dispute resolution system established by the BIT."[90] Yet, it went on to clarify that a distinction should be drawn between pre- and post-treaty acts and that it had jurisdiction over claims of alleged violations of the BIT arising from post-treaty conduct:

> With respect to acts or omissions alleged by the Claimants to be breaches of the BIT subsequent to its entry into force, the Tribunal considers that it has Competence insofar and as those facts are proven to be a violation of the BIT.[91]

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[89] RCMJ, para. 199, footnotes 497-498, *citing ATA Construction, Industrial and Trading Co. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 ("*ATA v. Jordan*"), Exh. RL-0018, para. 98; *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, Exh. RL-0008, para. 61; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, Exh. RL-0019, para. 17.1; *ibid*., footnote 495 *citing* in general for treaty non-retroactivity: *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, Exh. RL-0014, para. 166; *Lao Holdings N.V. v. The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, 21 February 2014, Exh. RL-0015, para. 114; *Sergei Paushok, et al. v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, Exh. RL-0016, para. 468; *see also*, Transcript, 10 November 2020, 288:15-289-2.

[90] *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, Exh. RL-0008, para. 61.

[91] *Ibid*., para. 64.

141. In other words, the *MCI* tribunal confirmed that, if a post-treaty act constitutes an independently actionable breach of the treaty, the principle of treaty non-retroactivity would not prevent the treaty tribunal from exercising jurisdiction over claims arising out of such breach.

142. Similarly, in *Generation Ukraine v. Ukraine*, the tribunal confirmed that it would have jurisdiction on a "cause of action" arisen after the treaty's effective date:

> The obligations assumed by the two state parties to the BIT relating to the minimum standards of investment protection (including the prohibition against expropriation) did not become binding, and hence legally enforceable, until the BIT entered into force on 16 November 1996. It follows that a cause of action based on one of the BIT standards of protection must have arisen after 16 November 1996.[92]

143. Thus, if post-treaty conduct can constitute an independent cause of action under the treaty, it will come under the treaty tribunal's jurisdiction, irrespective of whether such conduct may pertain to a broader pre-treaty dispute.

144. In *ATA v. Jordan* the tribunal held that the treaty did not apply retroactively to pre-treaty investment disputes:

> Under the plain meaning of Article IX(1), the Tribunal may 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.[93]

145. Article IX(1) of the Turkey-Jordan BIT on which the tribunal based this conclusion, however, does not appear to substantiate the application of the principle of treaty non-retroactivity to disputes.[94] While the provision makes clear that the treaty shall apply to pre-existing investments it does not mention pre-treaty disputes. It is therefore difficult to understand the basis on which the tribunal concluded that pre-treaty disputes were beyond the scope of its jurisdiction.

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[92] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, Exh. RL-0019, para. 11.2.

[93] *ATA v. Jordan*, Award, Exh. RL-0018, para. 98.

[94] It reads as follows: "This Agreement shall enter into force on the date on which the exchange of instruments of ratification has been completed. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter." *ATA v. Jordan*, Award, Exh. RL-0018, para. 59.

146. In any event, the *ATA* tribunal acknowledged the reasoning of the NAFTA tribunal in *Mondev v. USA*, according to which a treaty tribunal can exercise jurisdiction over post-treaty acts, which are "themselves inconsistent with applicable provisions of [the treaty]", even if the dispute arose prior to the treaty's effective date.[95] The *ATA* tribunal did not purport to override this reasoning. Instead, it moved on to set out an alternative reasoning that justified declining jurisdiction in that case:

> Even if the Tribunal were to assume, *arguendo*, that the alleged denial of justice represented a discrete claim, unconnected to the dispute which is the gravamen of the Claimant's case on this point, and thus may be conceived as occurring after the entry into force of the BIT, does an international commercial arbitral award constitute an investment that could be, as it were, expropriated by an otherwise lawful annulment by a national court?[96]

147. This Tribunal considers the reasoning of the *Mondev v. USA* tribunal more persuasive. In that case, the dispute arose prior to the entry into force of the NAFTA. When the NAFTA entered into force, the claimant's judicial challenge of the impugned measures was pending before the Massachusetts courts. The claimant argued that, since a claim for denial of justice could not be perfected until the exhaustion of local remedies and since local remedies were not exhausted until after the entry into force of NAFTA, the tribunal could entertain a denial of justice claim. While the tribunal rejected that argument, it did acknowledge that it could have assumed jurisdiction if the judicial decisions post-dating the NAFTA amounted to breaches of the NAFTA:

> Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach. In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States, which between them put an end to LPA's claims under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev. The mere fact that earlier conduct has gone unremedied or unredressed when a

[95] *ATA v. Jordan*, Award, Exh. RL-0018, para. 109, *citing*, *Mondev v. USA*, Award, Exh. CL-0045, para. 70.

[96] *ATA v. Jordan*, Award, Exh. RL-0018, para. 110.

> treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.[97]

148. Consequently, as the operative part of the award shows, the *Mondev* tribunal concluded that it had jurisdiction, albeit "limited to Mondev's claims concerning the decisions of the United States courts."[98]

149. Thus, if post-treaty conduct is in itself an actionable breach of the treaty, the principle of non-retroactivity does not place such conduct outside the reach of the treaty even if the dispute to which the conduct pertains had arisen before the treaty entered into force. For this reason, the Tribunal need not determine whether the notion of dispute found in Chapter 10 of the TPA prevails over the broad notion found in customary international law. In either case, the Tribunal would be competent to entertain a claim which arises from a particular post-treaty conduct and which is capable of constituting a breach of the TPA.

150. In the following section, the Tribunal will now review whether the 2014 Order is capable of constituting an independently actionable breach of the TPA.

b. The 2014 Order is not an independently actionable breach of the TPA

151. As set out above, the Parties agree that, pursuant to the principle of non-retroactivity, the TPA does not apply to acts and facts that took place before the treaty's entry into force. The 2014 Order is the only contested act that occurred after the TPA's effective date. The Respondent argues, however, that the claims related to the 2014 Order are not independently actionable, "because adjudication of these claims would require a finding on the lawfulness of pre-treaty conduct."[99]

152. The Claimant concurs with what she calls "the uncontroversial proposition that the challenged State measure during the relevant timeframe (post-entry-into-force and after the limitations cut-off date) must give rise to a claim under the treaty."[100]

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[97] *Mondev v. USA*, Award, Exh. CL-0045, para. 70.

[98] *Ibid*., p. 58, on the merits, the Tribunal found that "the decisions of the United States courts did not involve any violation of Article 1105(1) of NAFTA or otherwise."

[99] RRJ, para. 75.

[100] CRJ, para. 81.

However, for the Claimant, this proposition does not entail that the post-treaty claim must be unrelated to the pre-treaty conduct.

153. The Tribunal recalls that its jurisdiction under Article 12.1.2(b) of the TPA is limited to claims of violations of a specific set of substantive provisions of Chapter 10 of the TPA. Those provisions in turn are temporally limited to post-treaty acts and facts pursuant to Article 10.1.3 of the TPA. The cumulative result of these two limitations is that the Tribunal has no jurisdiction to assess the lawfulness of the Respondent's pre-treaty conduct, be it under the TPA or under any other source, such as customary international law. It follows that, unless the post-treaty conduct (i.e. the 2014 Order) is itself capable of constituting a breach of the TPA, independently from the question of (un)lawfulness of the pre-treaty conduct, claims arising out of such post-treaty conduct would also fall outside the Tribunal's jurisdiction.

154. The Tribunal finds support for its reasoning in multiple investment treaty awards. In particular, as set out above, when addressing the issue of treaty non-retroactivity, the tribunal in *Mondev v. USA* reasoned that the post-treaty judicial decisions would come under its jurisdiction only if they were "*themselves* inconsistent" with the NAFTA:

> Unless those [post-NAFTA] decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev.[101]

155. A more recent decision in *Spence v. Costa Rica* is also instructive. The case related to Costa Rica's environmental regulations for the protection of leatherback turtles, which allegedly resulted in an unlawful expropriation of the claimant's property. While the regulatory measures predated the applicable treaty's effective date, the judicial decisions that determined the compensation due for the alleged expropriation were taken after the treaty came into force. When interpreting Article 10.1.3 of the applicable treaty[102] – equivalent to Article 10.1.3 of the TPA – the tribunal reasoned that pre-treaty conduct could "constitute circumstantial evidence that confirms or vitiates an apparent post-entry into force breach, for example, going

[101] *Mondev v. USA*, Award, Exh. CL-0045, para. 70.

[102] Dominican Republic – Central America – United States Free Trade Agreement (the "CAFTA").

to the intention of the respondent."[103] However, in order for the post-treaty conduct to come under the tribunal's jurisdiction, it needed to "constitute an actionable breach in its own right."[104] The tribunal went on to emphasize that:

> [I]t 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.[105]

156. In the present case, the single post-treaty conduct of which the Claimant complains fails to meet this test. The Parties and their legal experts extensively debated various points of disagreement in respect of the legal nature of the 2014 Order. In particular, the discussion focused on whether the annulment proceedings leading to the issuance of the 2014 Order were in the nature of an extraordinary recourse (*recurso extraordinario*) under Colombian law.[106] The Claimant acknowledged that annulment is an "exceptional possibility" which does "not involve a *de novo* review of the merits of the case", and is allowed in "special circumstances where due process is seriously affected."[107] In addition, the experts did not dispute that through this order, the Constitutional Court reviewed the Claimant's and the Council of State's petition for the annulment of its 2011 Decision.[108] In other words, the legal effect of the 2014 Order was to leave unaltered the outcome of the 2011 Decision, which in turn had annulled the 2007 Judgment.

157. As discussed earlier, the Tribunal lacks jurisdiction to assess the lawfulness of the Respondent's pre-TPA conduct. The mere fact that in 2014 the Constitutional Court did not annul or otherwise redress the outcome of the pre-treaty measures does not

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[103] *Spence v. Costa Rica*, Interim Award, Exh. RL-0024, para. 217.

[104] *Ibid*., para. 217.

[105] *Ibid*., para. 222.

[106] Decree 2067, 4 September 1991, Exh. R-0250, Article 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*.").

[107] CRJ, para. 92.

[108] 2014 Confirmatory Order, Exh. R-0049; Annulment Petition by the Holding Companies, Constitutional Court, 9 December 2011, Exh. R-0059.

place those measures within the scope of the Tribunal's jurisdiction. To borrow the words of the *Mondev* tribunal:

> The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct.[109]

158. The Claimant did assert that the 2014 Order "coincided with the end of all judicial labor in Colombia concerning the Claimant's investment" and that her "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."[110], but nowhere did she raise any specific allegations that impugn the lawfulness of the 2014 Order separately from her complaints about the 1998 Measures and the 2011 Decision.

159. To the extent the Claimant's challenge of the 2014 Order were to mean that the Order constitutes a self-standing denial of justice, that claim could not prosper as a matter of jurisdiction. Indeed, denial of justice is one of the components of the FET standard and the latter is not available to an investor under Chapter Twelve of the TPA, not to speak of the fact that the claim would have been barred by the three year limitation period, as explained in the following section.

160. At the Hearing, the Tribunal asked the Claimant to articulate whether she raised any complaint specifically directed at the 2014 Order and, if so, whether she claimed damages caused by such order and distinct from the compensation sought for the pre-treaty conduct. Her answer was the following:

> The 2014 Constitutional Court's opinion had the effect of finally removing, without compensation, Claimant's entitlement to the value of her investment in Granahorrar that had been embodied in the 2007 Judgment that the Council of State had rendered.[111]

161. This statement does not point to an independent allegation raised against the 2014 Order. It rather corroborates that the proceedings ending with the 2014 Order necessarily called for a finding about the lawfulness of the 2011 Decision. It was the 2011 Decision that - to borrow the Claimant's words – would have "removed" the Claimant's alleged investment embodied in the 2007 Judgment, assuming a

[109] *Mondev v. USA*, Award, Exh. CL-0045, para. 70.

[110] CRJ, paras. 3, 34.

[111] Transcript, 13 November 2020, 469:4-9.

judgment can embody an investment. If the 2011 Decision was lawful, the 2014 Order, which refused to annul it, would inevitably also be lawful, as the Claimant has alleged no independent violation perpetrated through the proceedings leading to the 2014 Order, such as a denial of justice, through the order itself. This being so, the Claimant does not dispute that the 2011 Decision cannot amount to a breach of the TPA, for the reason that the 2011 Decision predated the TPA's entry into force in 2012.[112] Given that the Tribunal's jurisdiction is limited to the adjudication of alleged breaches of the TPA,[113] the Tribunal is not competent to resolve a claim that in its essence arises out of measures predating the entry into force of the TPA.

162. Moreover, the Claimant's categorization of the damages claimed undoubtedly shows that she does not claim redress for losses suffered from the 2014 Order in and of itself. As the Claimant's damages expert, Mr. Argiz explains, the Claimant retained him to:

> [P]rovide 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.[114]

163. The Tribunal would not be able to decide on such damages without reviewing the lawfulness of the pre-TPA measures that are indisputably beyond the temporal scope of the TPA.

164. For the avoidance of doubt, the Tribunal adds that it is not the Claimant's failure to articulate a *prima facie* case on the merits that results in a finding of lack of jurisdiction. Rather, it is the fact that the only measure that postdates the TPA's entry into force is not separately impeachable, or in the words of the *Spence* tribunal, does not "constitute an actionable breach in its own right."[115]

165. The Claimant is correct that the *Spence* tribunal held that a court judgment postdating the treaty's effective date, which determined the amount of compensation

[112] CRJ, para. 99.

[113] And more precisely its specific provisions, *see*, Article 12.1.2(b) of the TPA, Exh. RL-0001.

[114] Argiz First Expert Report, 31 May 2019, para. 1.

[115] *Spence v. Costa Rica*, Interim Award, Exh. RL-0024, para. 217.

for a pre-treaty expropriation, could constitute "an independently actionable breach, a distinct and legally significant event that is capable of founding a claim in its own right."[116] However, there is a significant difference between a judgment that sets the compensation for an expropriation and may thus breach the treaty if the compensation is not adequate or effective, and a court decision that resolved a challenge over an alleged prior administrative expropriation.

166. Indeed, a judicial decision dealing with the amount of compensation for expropriation can be independently challenged, e.g. for violating the treaty's standard of adequate and effective compensation. The same cannot be said of the 2014 Order, which merely rejected the bid to annul the 2011 Decision and is not alleged to amount to a treaty violation separate and distinct from the prior challenged measures. Hence, the Claimant's statement that the "2014 Order constituted a new State measure on which Claimant's claims are based"[117] is unpersuasive.

167. For these reasons, the Tribunal comes to the conclusion that the measures giving rise to the claims in this arbitration predate the entry into force of the TPA and are therefore not capable of constituting breaches of the TPA. As a result, the claims are beyond the temporal scope of the Tribunal's jurisdiction. The Tribunal could stop its analysis here. Out of an abundance of caution, it will nevertheless address the Respondent's other objection to its temporal jurisdiction, which relate to the three-year limitation period under Article 10.18.1 of the TPA.

B. LIMITATION UNDER ARTICLE 10.18.1 TPA

168. The Parties disagree whether the three-year limitation period contained in Article 10.18.1 of the TPA bars the claims in this arbitration.

1. The Respondent's Position

169. The Respondent submits that the claims are time barred under Article 10.18.1 of the TPA, which provides for a three-year limitation period as one of the conditions to Colombia's consent to arbitration.[118]

[116] *Spence v. Costa Rica*, Interim Award, Exh. RL-0024, para. 276.

[117] CRJ, para. 72.

[118] TPA, Exh. RL-0001, Article 10.18.1. Article 10.16 is entitled "Submission of a Claim to Arbitration."

170. Colombia opposes the Claimant's argument that the limitation of Article 10.18.1 does not apply to her claims, which are submitted under Chapter 12 of the TPA. It argues that Chapter 12 of the TPA does not itself include an investor-State dispute settlement procedure, but instead incorporates the dispute resolution provisions of Chapter 10. In doing so, it does not purport to abandon the limitations to arbitration set forth in Chapter 10.

171. Therefore, according to the Respondent, the cut-off date for the claims pursuant to Article 10.18.1 is 24 January 2015 (*i.e.*, three years before the Claimant submitted her claims). The latest alleged breach of which the Claimant complains is the 2014 Order, which was issued on 25 June 2014, *i.e.*, six months before the cut-off date. As a result, her claims are time-barred in their entirety.

172. Colombia further challenges the Claimants' contention that the MFN provision of Chapter 12 of the TPA would allow her to resort to a more favorable five-year limitation period contained in the BIT which Colombia concluded with Switzerland.[119] As an initial matter, the Respondent argues that the Claimant cannot rely on the MFN provision, since it is outside the scope of the TPA's consent to arbitration contained in Article 12.1.2(b).[120] In any event, the MFN provision, which is contained in Article 12.3.1 of the TPA[121] does not specify whether it applies to conditions to consent to arbitration. According to a consistent line of investment jurisprudence, an MFN clause cannot be used to circumvent conditions of consent unless its text "clearly and unambiguously" so provides.[122]

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

[120] Transcript, 13 November 2020, 567:2-7.

[121] TPA, Exh. RL-0001, Article 12.3.1 ("Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of any other Party or of a non-Party, in like circumstances.").

[122] RRJ, para. 130, *citing Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, Exh. CL-0054, para. 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."); *Telenor Mobile Communications A.S. v.*

173. For the Respondent, the Claimant's reference to the object and purpose of the TPA is ill-placed. Nothing in the object and purpose of the TPA suggests that a general MFN provision can be applied to the consent to arbitrate. As for the Claimant's argument in respect of Colombia's treaty practice, the Respondent argues that, such practice is not a proper source of treaty interpretation under the Vienna Convention on the Law of Treaties ("VCLT").

174. By contrast, an interpretative agreement of the Contracting States is authoritative pursuant to Article 31.3(b) of the VCLT and the Tribunal must take such agreement into account.[123] As the US Submission makes clear, the US and Colombia agree on the interpretation of the TPA. This includes the interpretation of Article 12.1.2(b) which "incorporate[s] into Chapter Twelve the dispute resolution provisions of Chapter Ten, Section B, 'solely' with respect to claims brought under the specific Chapter Ten Articles incorporated into Chapter Twelve."[124] As a result, "an investor-State Tribunal has no jurisdiction to consider any procedural or substantive treatment extended by a TPA Party to a third-State investor or investment through a multilateral or bilateral agreement of a TPA Party with a third State."[125]

Republic of Hungary, ICSID Case No. ARB/04/15, Award, 13 September 2006, Exh. CL-0081, para. 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."); *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080-2004, Award, 21 April 2006, Exh. CL-0086, para. 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."); *ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, Exh. RL-0034, para. 277 ("[T]he duty of the Tribunal is to discover and not to create [the] meaning" of an MFN clause.); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, Exh. RL-0033, para. 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."); *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, Exh. RL-0091, para. 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.'").

[123] Colombia's observations to the US Submission, para. 7.

[124] US Submission, para. 8.

[125] Colombia's observations to the US Submission, para. 40, *quoting* US Submission, para. 15.

175. For Colombia, even if the Claimant were permitted to use the MFN clause to resort to the limitation period contained in the Colombia-Switzerland BIT, this would not help her case, as she also failed to meet the five-year statute of limitation set in that treaty. Indeed, the application of the five-year limitation would defer the cut-off date to 24 January 2013. Pursuant to the Colombia-Switzerland BIT, the Claimant would need to have acquired knowledge of the events giving rise to the dispute after that date. Yet, so argues Colombia, these events occurred well before that date in January 2013. Therefore, the claims would in any event be time barred.

176. More specifically, Colombia asserts that the dispute arose at the latest on 28 July 2000, the date on which the Claimant initiated the judicial action before the Administrative Judicial Tribunal, through which she challenged the lawfulness of the 1998 Measures and sought compensation.[126] The Claimant's attempt to portray the 2014 Order as an event triggering a new dispute ignores that it merely confirmed the 2011 Decision. The 2014 Order, so submits the Respondent, cannot be divorced from Colombia's prior conduct. The Claimant's submissions in this arbitration confirm as much, considering that she challenges the lawfulness of "both the regulatory and the judicial treatments imposed by the Republic of Colombia."[127] Therefore, for the Respondent, it is evident that the 2014 Order did not give rise to a new dispute.[128]

177. For these reasons, the Respondent submits that, the claims are time-barred under Article 10.18.1 of the TPA and, therefore, outside the Tribunal's jurisdiction.

2. The Claimant's Position

178. The Claimant submits that the three-year limitation period set forth in Article 10.18.1 of the TPA is not applicable to her claims. She rather contends that, by virtue of the MFN provision enshrined in Article 12.3.1 of the TPA, she is entitled to benefit from the more favorable five-year bar contained in the Colombia-Switzerland BIT.[129] According to the Claimant, the Tribunal is entitled to apply the MFN clause contained

[126] RRJ, para. 115, *citing* Nullification and Reinstatement Action, 28 July 2000, Exh. R-0050, pp. 2-3.

[127] RRJ, para. 118, *quoting* CMJ, para. 307.

[128] RRJ, paras. 155-158.

[129] CRJ, p. 20.

in Article 12.3.1 of the TPA, since it has jurisdiction over all the substantive provisions of Chapter 12 of the TPA.[130]

179. In reliance on the expert report of Olin L. Wethington[131], the Claimant argues that the MFN clause in Article 12.3.1 of the TPA is a broadly worded provision that captures more favorable procedural as well as substantive treatment extended by Colombia to investors of other states. According to the Claimant, dispute resolution procedures, being part and parcel of the modern investment protection regime, must be regarded as a key aspect of the treatment of foreign investors.

180. According to the Claimant, the interpretation of Article 12.3.1 of the TPA in accordance with Article 31 of the VCLT makes it plain that the MFN provision extends to all "treatment", including treatment with respect to procedural remedies. In particular, the ordinary meaning of Article 12.3.1 supports Claimant's interpretation, as it guarantees most-favored-nation "treatment", in like circumstances, without any other restriction. As the Claimant's expert, Professor Loukas Mistelis, emphasizes in his report:

> Dispute settlement provisions by their very nature belong to the same category as substantive protections for foreign investors. In other words, the way a right is procedurally exercised is part and parcel of substantive protection.[132]

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[130] Transcript, 13 November 2020, 462:10-17.

[131] Wethington First Expert Report, 16 May 2019, paras. 26-35.

[132] Mistelis First Expert Report, 8 March 2019, para. 93; *see also*, *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, Exh. CL-0030, para. 54 ("there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors."); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction 3 August 2004, Exh. CL-0074, para. 102 (access to dispute resolution mechanisms "is part of the treatment of foreign investors and investments and of the advantages accessible through an MFN clause."); *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, 17 June 2005, Exh. CL-0033, paras. 29, 31 (investor-State dispute resolution mechanisms "are universally regarded – by opponents as well as by proponents – as essential to a regime of protection of foreign direct investment", and "provision for international investor-state arbitration in bilateral investment treaties is a significant substantive incentive and protection for foreign investors."); *Suez, Sociedad General de Aguas de Barcelona S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, Exh. CL-0079, para. 57 ("From the point of view of the promotion and protection of investments, the stated purposes of both the Argentina-Spain BIT and the Argentina-U.K. BIT, dispute settlement is as important as other matters governed by the BITs and is an integral part of the investment protection regime that the respective sovereign states have agreed upon."); *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, Exh. RL-0056, paras. 66-67 ("the ('procedural') right to enforce another ('substantive') right is one component of the bundles of

181. In connection with the context of Article 12.3.1 of the TPA, the Claimant refers to three other provisions of that treaty, which, according to her, provide investors with comparable protections (the national treatment under Article 10.3; most-favored-nation treatment under Article 10.4; and national treatment under Article 12.2). Yet, these guarantees are limited to specified aspects of treatment, in contrast to the general treatment guarantee of Article 12.3.[133]

182. In addition, the Claimant points out that a footnote to the MFN provision contained in Article 10.4 of the TPA clarifies that it 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." Tellingly, the parties to the TPA chose not to include a similar restrictive footnote to the MFN clause in Article 12.3, which is the clause that is contained in the TPA's financial services chapter and is relevant to this case. The logical consequence of such an omission, so the Claimant argues, is that, unlike Article 10.4, Article 12.3.1 does extend to dispute resolution.[134]

183. The Claimant further invokes the Contracting States' treaty practice, arguing that they have expressly excluded dispute resolution from MFN provisions, whenever they intended to do so.[135] Further, according to the Claimant, interpreting "treatment" in Article 12.3.1 of the TPA to extend to treatment in connection with dispute resolution proceedings is consistent with the TPA's object and purpose, which is to promote the protection of foreign investment.

184. For the Claimant, Colombia's interpretation of Article 12.1.2(b) of the TPA, pursuant to which that provision does not apply to the MFN clause, deprives the entire Chapter 12 of its conceptual content and practical application, reducing Article 12.3.1 to a

rights and duties that make up the legal concept of what property is", and "the right to enforcement is an essential component of the property rights themselves, [...] not a wholly distinct right.").

[133] CRJ, paras. 12-15.

[134] CRJ, para. 17.

[135] CRJ, paras. 23-26, *citing* Korea-U.S. Free Trade Agreement, as amended effective 1 January 2019, Exh. CL-0330, Article 11.4; Pacific Alliance Additional Protocol (2014), Exh. CL-0322, Articles 10.4, 10.5, 11.3, 11.4; Canada-Colombia Free Trade Agreement (2011), Exh. CL-0308, Articles 803, 804, 1102, 1103; Colombia-Costa Rica Free Trade Agreement (entered into force 1 August 2016), Exh. CL-0322-A, Articles 12.2, 12.3, 14.2, 14.3.

right without a remedy, a result that "frustrates the workings, purpose and objectives of that Chapter."[136]

185. Thus, by virtue of the MFN provision in Article 12.3.1 of the TPA, Claimant insists that she is not bound by the three-year time bar found in Article 10.18.1. Instead, she claims to be entitled to invoke the more favorable treatment granted by Colombia to Swiss investors under Article 11(5) of the Colombia-Switzerland BIT, which provides a five-year limitation.[137]

186. The Claimant submitted this dispute to arbitration on 24 January 2018. Hence, pursuant to the limitation period of the Colombia-Switzerland BIT, the cut-off date is 24 January 2013. According to the Claimant, the measure, which gave rise to this treaty dispute was the 2014 Order, which denied the motions for annulment of the 2011 Decision.[138]

187. The Claimant refutes Colombia's argument that the dispute arose no later than 28 July 2000, when Claimant's investment companies filed administrative proceedings against the Superintendency and Fogafín before the domestic administrative courts. According to her, the term "dispute" in Article 11(5) of the Colombia-Switzerland BIT should not be construed broadly. Instead, the dispute should be understood as a controversy involving the claim that the Respondent has breached the treaty. Such a dispute could not have arisen until the challenged measure had occurred. Since the TPA entered into force in 2012, there can be no dispute about the breach of that treaty prior to that time.

188. In addition, the existence of prior State actions, says the Claimant, does not deprive the Tribunal of jurisdiction *ratione temporis*. The existence of "background facts" does not serve to accelerate the accrual of claims for the purposes of the limitation period.[139] In this respect, the Claimant opposes what she calls the Respondent's

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[136] CRJ, p. 13.

[137] "An investor may not submit a dispute for resolution according to this Article if more than five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute." Colombia-Switzerland BIT, Exh. RL-0004, Article 11(5).

[138] CRJ, para. 34.

[139] CRJ, paras. 49 *et seq*., *citing Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, Exh. CL-0173, para. 348; *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Award, 16 March 2017, Exh. CL-0167; *Mondev v. USA*, Award, Exh. CL-0045, para. 87.

"invented" two-prong test, which requires the Claimant to show that the 2014 Order "fundamentally changed the *status quo* of the Claimant's investment", and that such measure is "independently actionable" and can be "evaluated on the merits without requiring a finding going to the lawfulness of pre-[treaty] conduct."[140] According to her, the three cases that Colombia cites in favor of this alleged test – *Corona Materials v. Dominican Republic*, *Eurogas v. Slovak Republic* and *ST-AD v. Bulgaria*[141] - do not support the Respondent's position.

189. In any event, the Claimant asserts that the 2014 Order dramatically changed the pre-treaty *status quo* by dismissing the petitions for annulment of the 2011 Decision and thereby denying the Claimant her last avenue of judicial recourse. The exceptional nature of the annulment proceedings does not change this outcome. What matters is that the annulment petitions, if granted, would have had substantial legal consequences, *i.e.*, the reversal of the 2011 Decision and restoration of Claimant's rights.[142]

190. For these reasons, the Claimant submits that Article 10.18.2 does not bar her claims and that the present dispute falls within the Tribunal's jurisdiction.

3. Analysis

191. Article 12.1.2(b), reads as follows:

> 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.

192. This provision thus incorporates Section B on investor-State dispute settlement of Chapter 10 of the TPA into Chapter 12 to make it available to investors of the financial sector. Section B affords investors of one Contracting State the right to

[140] CRJ, paras. 58 *et seq*., *citing* RCJ, para. 172.

[141] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on Preliminary Objections, 31 May 2016, Exh. RL-0012, para. 212; *Eurogas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, Exh. RL-0013, para. 455; *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, Exh. RL-0011, para. 318.

[142] CRJ, para. 90.

submit an "investment dispute" against the other Contracting State to international arbitration.[143] This right comes with certain conditions and limitations that are contained in the same Section B, and in particular in Article 10.18. One of these limitations is found in Article 10.18.1, which establishes a time limitation for claims in the following terms:

> Article 10.18: Conditions and Limitations on the Consent of Each Party
>
> 1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.[144]

193. The Parties do not appear to dispute that Article 10.18.1 of the TPA is incorporated by reference into Chapter 12 by way of Article 12.1.2(b) of the TPA, and rightly so. As the language of Article 12.1.2(b) makes clear, Section B of Chapter 10 is incorporated into Chapter 12 of the TPA "solely for claims that a Party has breached" four specific provisions of Chapter 10. Hence, it is clear that Article 10.18.1, which forms part of Section B of Chapter 10 and is entitled "Conditions and Limitations on the Consent of Each Party", is incorporated by reference as a limitation to the Contracting States' consent to arbitration under Article 12.1.2(b) of the TPA.

194. The Parties do not dispute that the date on which the Claimant "first acquired, or should have first acquired, knowledge of the breach […] or damage" cannot be later than the date when the Claimant acquainted herself with the 2014 Order, i.e. shortly after the Constitutional Court handed down the order on 25 June 2014.[145] The Claimant commenced this arbitration on 24 January 2018,[146] that is more than three years after she first acquired knowledge of the alleged breach of the TPA. It follows that, by the time the Claimant sought to accept Colombia's offer to arbitrate under the TPA, that offer had been extinguished by operation of the limitation period set

[143] TPA, Exh. RL-0001, Articles 10.15 and 10.16.

[144] TPA, Exh. RL-0001, Article 10.18.1. Article 10.16 is entitled "Submission of a Claim to Arbitration."

[145] 2014 Confirmatory Order, Exh. R-0049.

[146] RFA.

out in Article 10.18.1 of the TPA. The consequence of this finding is that the disputing Parties have not agreed to arbitrate the claims that form part of the present dispute.

195. Faced with this obstacle, the Claimant invokes Colombia's offer to arbitrate included in another treaty, namely the Colombia-Switzerland BIT,[147] by virtue of the MFN clause contained in Article 12.3.1 of the TPA, which reads 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.[148]

196. On the basis of this MFN clause, the Claimant wishes to substitute the three-year period contained in Article 10.18.1 of the TPA with the allegedly "more favorable" five-year period encompassed in Article 11.5 of the Colombia-Switzerland BIT, a provision of the following content:

> 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.[149]

197. Leaving aside the question whether an MFN clause can at all be used to displace conditions of consent to arbitration, such as Article 10.18.1 of the TPA, there are two separate reasons why the Claimant cannot overcome the jurisdictional obstacle that she faces by virtue of the TPA's MFN provision and Article 11.5 of the Colombia-Switzerland BIT. The Tribunal will discuss each one in turn.

a. Article 12.3.1 is itself beyond the Tribunal's jurisdiction

198. As the Tribunal explained at the outset of this section, the subject-matter scope of Colombia's consent to arbitrate under Article 12.1.2(b) of the BIT is limited to four substantive provisions of the TPA, namely Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), and 10.14 (Special Formalities and Information Requirements). It follows that, even assuming that the

[147] Colombia-Switzerland BIT, Exh. RL-0004.

[148] TPA, Exh. RL-0001, Article 12.3.1.

[149] Colombia-Switzerland BIT, Exh. RL-0004, Article 11(5).

MFN clause could in principle be used for jurisdictional purposes, it would be of no avail to the Claimant, since Article 12.3.1 is itself outside of the Tribunal's jurisdiction, not being among the four provisions of Chapter 10, to which Article 12.1.2(b) refers. In other words, it is not within the Tribunal's jurisdiction to apply the MFN clause.

199. The Contracting States to the TPA concur with this interpretation. Colombia argues that the Tribunal has no jurisdiction to apply the Chapter 12 MFN clause, since "there is no clause of the TPA that provides such jurisdiction,"[150] a view with which the US agrees:

> As a threshold matter, […] no claim brought via Article 12.3.1 may be brought by an investor against a State Party to the TPA. Thus, an MFN claim brought via Article 12.3.1 alleging that a Party extended more favorable treatment to a third-Party investor or investment than was accorded to the investor or investment of the other Party cannot be the subject of investor-State arbitration.[151]

200. The Parties dispute whether the convergence of views between the US Submission and Colombia's position in this arbitration constitute a subsequent agreement or subsequent practice of the Contracting States regarding the interpretation of the treaty within the meaning the VCLT's rules of treaty interpretation, and in particular of Articles 31.3(a) and (b):

> There shall be taken into account, together with the context:
>
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;[152]

201. The Claimant acknowledges that "to the extent that a subsequent agreement or subsequent practice exists, it would, of course, be taken into account by the Tribunal, together with the context, in conducting the Tribunal's interpretive analysis."[153] She adds, however, that a mere convergence of views in this arbitration does not amount to subsequent agreement or practice in the meaning of the VCLT.

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[150] Transcript, 13 November 2020, 567:5-7.

[151] US Submission, para. 15.

[152] VCLT, Exh. RL-0084, Article 31.3 (a-b).

[153] Transcript, 13 November 2020, 496:1-5.

202. In contrast, the US submits that "the concordant interpretations presented by the two TPA Parties in this proceeding" can qualify as "as a subsequent agreement under 31(3)(a), as a subsequent practice under 31(3)(b), or both."[154] It adds that Article 31.3 of the VCLT is a mandatory provision, which obligates the Tribunal to take the Contracting States' subsequent agreements and practice into account.[155] Colombia similarly puts forward that the Contracting States' statements, including in the context of contentious proceedings, constitute subsequent practice under Article 31.3(b) of the VCLT, insofar as they "contribute to the identification of an agreement as to the interpretation of the treaty."[156]

203. The Tribunal notes that the ILC in its work on subsequent agreements and subsequent practice expressed the view that "statements in the course of a legal dispute" can constitute a subsequent practice insofar as they help establish the Contracting States' agreements as to the interpretation of the treaty.[157] That said, it concurs with the Claimant that subsequent agreements and practice "cannot be used as a means for modifying or escaping the Treaty's terms."[158] However, in the present case, the common position of the TPA Contracting States merely confirms the clear language of Article 12.1.2(b), according to which the subject-matter scope of the Tribunal's jurisdiction is limited to four substantive provisions of the TPA, which do not include the MFN clause of Article 12.3.1.

204. It is the Claimant's submission that the Tribunal has jurisdiction to adjudicate *all* of the substantive provisions in Chapter 12 of the TPA, including Article 12.3.1. At the

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[154] Transcript, 13 November 2020, 437:12-16.

[155] Transcript, 13 November 2020, 435:2-5; 435:18-22; although the US has not ratified the VCLT, it accepts that Article 31 constitutes customary international law (*ibid*., 434:1-2); *see also*, ILC 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (Koskenniemi, Chair) UN Doc A/CN.4/L.702, Exh. CL-0125, para. 425.

[156] Colombia's Observations to the US Submission, para. 7.

[157] ILC, 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries', Adopted by the International Law Commission at its seventieth session, 2018 (A/73/10) Exh. RL-0111, conclusion 4, comment 18. The ILC also explains that subsequent agreement and subsequent practice often "coincide in specific cases and cannot be distinguished." (*Ibid*., conclusion 4, comment 11).

[158] Transcript, 13 November 2020, 509:5-6; *see*, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award of the Tribunal, 13 November 2019, para. 196.

Hearing, the Tribunal asked the Claimant to point to a textual basis in the TPA for her argument. She responded that there were four such bases:

> First, Article 10.22, the governing law. […] Second, Article 12.3, MFN. Third, Article 12.1.2(b). And fourth, the substantive provisions contained in Chapter 12 itself.[159]

205. The Tribunal fails to find the basis for its jurisdiction to adjudicate claims concerning Article 12.3.1 of the TPA in any of these four alleged sources.

206. First, Article 10.22 of the TPA provides that the Tribunal shall "decide the issues in dispute in accordance with this Agreement and applicable rules of international law." This provision deals with the TPA Contracting States' choice of the substantive law, which tribunals shall apply to disputes that come within their jurisdiction pursuant to the dispute settlement clauses of Chapters 10 and 12. It is a choice of law, not a choice of forum clause. It does not provide the Tribunal with jurisdiction to adjudicate claims concerning the entirety of the TPA or all rules of international law applicable between the Parties. Such interpretation would lead to far reaching consequences, vesting TPA tribunals with competence to settle practically any international law dispute between the disputing parties. It would also render the limiting language of Article 12.1.2(b) nugatory.

207. Second, Article 12.3.1 requires the Contracting States not to treat each other's financial sector investors less favorably than those of third States. Nowhere does it vest tribunals with jurisdiction over such less favorable treatment. If the mere presence of a standard of protection in the TPA provided the treaty tribunal with jurisdiction to adjudicate claims arising out of that standard, the limiting language of Article 12.1.2(b) would be devoid of any significance.

208. Third, Article 12.1.2(b) of the TPA, which the Claimant also cites as a basis for jurisdiction to apply the MFN clause, is clear: the Contracting States consent to arbitrate their disputes with financial sector investors only in respect of breaches of four provisions of the TPA, which do not include Article 12.3.1.

209. Fourth, the substantive provisions of Chapter 12 of the TPA cannot themselves constitute a basis for the Tribunal's jurisdiction. A contrary finding would obfuscate the distinction between the law that governs the merits of a dispute and a tribunal's

[159] Transcript, 13 November 2020, 462:10-17.

jurisdiction. To support her position, the Claimant submits that a "holistic and comprehensive" interpretation of the TPA suggests that the investor's rights contained in Chapter 12 must "provide investors with actual protection by virtue of compensatory damages."[160] According to her:

> [A] treatment protection standard has no practical remedial application if it does not provide for the right to pursue compensatory damages arising from its breach.[161]

210. The Tribunal cannot share this interpretation. States routinely enter into international treaties that contain obligations but no or limited mechanisms to adjudicate disputes arising out of such obligations. It is axiomatic in international law that an adjudicatory body, such as this Tribunal, cannot presume that a sovereign State has consented to its jurisdiction. This is in particular corroborated by Article 25.1 of the ICSID Convention, which requires written consent to arbitration. Hence, that consent is contained in Article 12.1.2(b) of the TPA and it does not cover the MFN clause.

211. As a result, the Tribunal concludes that the MFN clause of Article 12.3.1 is beyond its jurisdiction. Therefore, the Claimant cannot rely on this provision to substitute the limitation period of Article 10.18.1 with that of the Colombia-Switzerland BIT.

b. The claims are in any event time barred under the Colombia-Switzerland BIT

212. Even if it were within the Tribunal's jurisdiction to apply the MFN clause, *quod non,* and the latter allowed the Claimant to substitute the TPA's limitation period by the one of the Colombia-Switzerland BIT, the claims would still be time-barred. Article 11.5 of the Colombia-Switzerland BIT, which the Claimant purports to invoke, bars the submission of a dispute to arbitration if more than five years have elapsed since the investor first acquired knowledge of "the *events* giving rise to the dispute."[162] Thus, the Claimant would need to show that she became aware of these events only after 24 January 2013.[163]

213. The only disputed measure that took place after this date is the 2014 Order. By the 2014 Order, the Constitutional Court confirmed its 2011 Decision. The 2011

[160] Transcript, 13 November 2020, 464:11-21.

[161] *Ibid*., 464:17-21.

[162] Colombia-Switzerland BIT, Exh. RL-0004, emphasis added.

[163] Five years prior to the submission of the RFA on 24 January 2018.

Decision in turn reversed the Council of State's 2007 Decision, and thus left the consequences of the 1998 Measures unaltered. As discussed above, the claims in this arbitration arise out of the 1998 Measures and possibly out of the 2011 Decision, if one accepts that the 2007 Judgment may embody the investment.[164] The 2014 Order is not an independently actionable breach. In these circumstances, it would be difficult to find that the Claimant learned about "the events giving rise to the dispute" only after the 2014 Order.

214. The Claimant argues that the dispute arose after the 2014 Order, since the Parties could not have been in dispute about a violation of the TPA prior to the TPA's entry into force in 2012. It is true that the Parties could not disagree over breaches of the TPA before the TPA became effective. Yet, that does not mean that no disagreement arose between them over rights arising from the measures complained of well before the Treaty's entry into force. As was mentioned earlier, the 2014 Order did not give rise to an independently actionable breach of the TPA, let alone to a new dispute. Moreover, even assuming for the sake of discussion that the 2014 Order was an actionable breach in and of itself, this would still not turn it into the event "giving rise to the dispute" within the meaning of Article 11(5) of the Colombia-Switzerland BIT.

215. Furthermore, the Claimant's interpretation of the term "dispute" as a narrow notion aiming specifically at a disagreement on a possible violation of the applicable treaty is belied by Article 2 of the Colombia-Switzerland BIT. That provision states that it is "not applicable to claims or *disputes* arising out of events which occurred prior to its entry into force."[165] If the term "dispute" were understood narrowly, as a disagreement related to an alleged treaty violation, this provision of the Colombia-Switzerland BIT would serve no purpose. Indeed, if "dispute" meant what the Claimant suggests, there could be no "dispute arising out of events which occurred prior to [the treaty's] entry into force", since pre-treaty events cannot give rise to a treaty violation. The Claimant admits that much.[166] Thus, if the Claimant's

[164] *Supra*, para. 158.

[165] Colombia-Switzerland BIT, Exh. RL-0004, emphasis added.

[166] CRJ, para. 99.

interpretation of the term "dispute" was adopted, Article 2 of the Colombia-Switzerland BIT would be regulating an impossible eventuality.

216. At the Hearing, the Claimant herself referred the Tribunal to what she called "the cardinal rule of interpretation that 'treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.'"[167] The Tribunal concurs that the principle of *effet utile* is applicable in treaty interpretation.[168] Under this principle, the Tribunal cannot accept the Claimant's narrow interpretation of the term "dispute" used in the Colombia-Switzerland BIT.

217. The Tribunal finds support for its reasoning in the jurisprudence of investment tribunals. *ATA v. Jordan* is instructive here.[169] Prior to the entry into force of the applicable Turkey-Jordan BIT, the Jordanian Court of Appeal had annulled a commercial arbitral award that the claimant had obtained against a Jordanian State entity. After the BIT entered into force, the Supreme Court upheld the Court of Appeal's decision. The tribunal rejected the claimant's argument that the Supreme Court's decision had given rise to a separate dispute:

> [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.

218. The *ATA* tribunal's analysis is relevant here, considering that Article 11(5) of the Colombia-Switzerland BIT refers to the occurrence of "the events giving rise to the dispute" as the point from which the five-year limitation period starts to run.

219. Similarly, the tribunal in *Lucchetti v. Peru*, faced with pre- and post-treaty measures, sought to determine whether such measures formed part of the same legal dispute.[170] According to the tribunal, "the critical element in determining the

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[167] Transcript, 13 November 2020, 465:3-6, *citing Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, Exh. CL-0169.

[168] *See*, *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 68; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, Exh. CL-0067, para. 95; *Ceskoslovenska obchodní banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 39.

[169] ATA v. Jordan, Award, Exh. RL-0018.

[170] *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, Exh. RL-0020, para. 50.

existence of one or two separate disputes is whether or not they concern the same subject matter."[171] Applying this test, the tribunal went on to verify "whether and to what extent the subject matter or facts that were the real cause of the disputes differ from or are identical to the other."[172]

220. The 2014 Order did not alter the "subject matter" or "the real cause" of the dispute. The Parties were engaged in the same legal dispute at least since Colombia adopted the 1998 Measures against Granahorrar and the Claimant initiated a judicial challenge against those measures before the Colombia's administrative courts in 2000. The "subject-matter" and "the real cause" of that dispute has always been Colombia's treatment of the Claimant's interests in Granahorrar.

221. Assuming that the Claimant were correct that the present dispute could be divided up, the logical watershed moment would be the time of the Constitutional Court's 2011 Decision. One might argue that the Council of State put an end to the Parties' previous dispute concerning the 1998 Measures by its 2007 Decision and that the Constitutional Court's 2011 Decision thus gave rise to a new dispute, concerning that Court's alleged abuse of power by encroaching on the judicial mandate of the Council of State. Yet, even under this assumption, which the Tribunal does not accept, the Claimant would have acquired knowledge of such new dispute in 2011. Hence, her claims would in any event be time barred under Article 11(5) of the Colombia-Switzerland BIT.

222. As a consequence, the Tribunal finds that more than five years have elapsed between the time which the Claimant acquired knowledge of "the events giving rise to the dispute" and the commencement of this arbitration. Therefore, even if the Claimant were entitled to rely on Article 11(5) of the Colombia-Switzerland BIT, her claims would be time barred.

223. Having determined that the MFN provision of Article 12.3.1 is outside its jurisdiction, and that the claims would be in any event time barred under the Colombia-Switzerland BIT, the Tribunal can dispense with addressing whether Article 12.3.1 applies to substantive treatment only or whether it can also substitute jurisdictional

[171] *Ibid*., para. 50, *citing CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/ 8, 17 July 2003, 42 ILM 788, para. 109.

[172] *Ibid*., para. 50, *citing Electricity Company of Sofia and Bulgaria* (Preliminary Objection), 1939 P.C.I.J., p. 64.

requirements such as Article 10.18.1 of the TPA. Indeed, this question becomes irrelevant once it is clear that the limitation period of the Colombia-Switzerland BIT does not assist the Claimant in overcoming the jurisdictional obstacles that her claim faces in this arbitration.

224. By way of a summary, the Tribunal determined in the preceding two sections that there are two grounds for declining its jurisdiction over the present dispute: the claims lie beyond the temporal scope of the TPA and they are in any event time barred under Article 10.18.1 of the TPA.

225. Therefore, for reasons of judicial economy, the Tribunal dispenses with analyzing the Respondent's objections to its jurisdiction *ratione materiae* and so-called jurisdiction *ratione voluntatis*. It thus turns to the issue of allocation of costs of this arbitration.

V. COSTS

1. The Respondent's Costs

226. The Respondent has submitted that it incurred the following costs: (i) USD 344,066 arbitration costs; (ii) USD 1,370,125 legal fees and expenses;[173] (iii) USD 43,246.36 expert fees;[174] and (iv) USD 107,544.36 Colombia's personnel costs.[175]

227. The Respondent argues that the Claimant should pay all of Colombia's costs in connection with this proceeding, which amount in the aggregate to USD 1,864,981.72, plus interest.[176]

[173] In its Submission on Costs (footnote. 1), Colombia reserved its right to update this subtotal to reflect fees and expenses not yet invoiced. The Tribunal notes that there has been no substantive work involved after that submission and that none of the Parties has requested leave to update its cost submissions.

[174] The fees charged by the expert have been converted from COP to USD at a rate of COP 3,468.5/USD 1 (i.e., the average exchange rate for 2020). Respondent's Submission on Costs, footnote 2.

[175] The costs incurred by Colombia reflect time spent by personnel preparing documents, attending strategy meetings, reviewing and commenting on draft submissions, and attending the hearing. These costs have been converted from COP to USD at a rate of COP 3,468.5/USD 1 (i.e., the average exchange rate for 2020). Respondent's Submission on Costs, footnote 3.

[176] Respondent's Submission on Costs, para. 3.

2. The Claimant's Costs

228. The Claimant has submitted that it incurred the following costs:[177] (i) USD 369,066 arbitration costs; (ii) USD 2,351,332 legal costs; (iii) USD 334,981 costs of experts, witnesses and consultants; and (iv) USD 11,106 in other expenses.[178]

229. The Claimant seeks an award for such total costs in an amount of USD 3,066,485, plus interest.[179]

3. Analysis

230. Each Party seeks to recover the entirety of its costs related to this arbitration, including legal fees and interest.

231. Article 61(2) of the ICSID Convention provides as follows:

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

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

233. ICSID tribunals tend to award costs adopting allocations that range between two main approaches.[180] The first approach considers that ICSID costs should be apportioned in equal shares and that each party should bear its own costs. The second approach resorts to the principle "costs follow the event" according to which costs are apportioned based on the relative success of the parties' positions. In between these two approaches, solutions vary depending on the weight the tribunal

[177] In its Submission on Costs (para. 2), the Claimant reserved the right to seek costs incurred after the filing of this submission. The Tribunal notes that there has been no substantive work involved following this date and that none of the Parties has requested leave to update its cost submissions.

[178] Claimant's Submission on Costs, pp. 2-3.

[179] Claimant's Submission on Costs, para. 2.

[180] *See*, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, para. 583.

may place on various circumstances, including the conduct of the parties in the arbitration and other parameters.

234. Here, the Tribunal considers that the circumstances which it should take into account include the outcome of the dispute, the reasonableness of the Parties' costs, and the Parties' procedural conduct.

235. As set out above, the Tribunal upheld the Respondent's objection to its jurisdiction, with the result that the claims fail for lack of jurisdiction. The outcome of the dispute therefore militates in favor of an award of costs against the Claimant.

236. Further, the Tribunal considers that the Respondent's legal fees and other costs are reasonable in light of the number and complexity of the issues involved. They are also considerably lower than those of the Claimant.

237. Finally, the Tribunal notes that both sides conducted the proceedings in an efficient and professional manner. It emphasizes that the Claimant accepted the bifurcation of the proceedings between jurisdiction and merits, which contributed to significant savings in terms of costs considering the outcome.

238. For these reasons, in the exercise of its discretion, the Tribunal comes to the conclusion that it is appropriate that the Claimant bear the entirety of the arbitration costs and bear 50% of the Respondent's legal fees and other costs, i.e. USD 760,458.

239. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant and ICSID's administrative fees and direct expenses, amount to a total of USD 588,896.12 broken down as follows:

Arbitrators' fees and expenses	
Gabrielle Kaufmann-Kohler	USD 108,465.20
Diego Fernández Arroyo	USD 68,698.33
Christer Söderlund	USD103,500.00
Assistant's fees and expenses	USD 64,820.00
ICSID's administrative fees	USD168,000.00
Direct expenses	USD 75,412.59
Total	**USD 588,896.12**

240. These costs have been paid out of the advances made by the Parties in equal parts.[181] As a result, each Party's share of the costs of arbitration amounts to USD 294,448.06. Consequently, ICSID will reimburse 50% of the balance of advance payments to each Party, and the Claimant shall pay USD 294,448.06 to the Respondent.

241. Finally, the Tribunal notes that, while the Parties have claimed interest on costs, they have not substantiated their claim nor otherwise provided any indication about applicable rate, accrual date(s), compound or simple nature of the interest computation. Therefore, the Tribunal will not award interest.

VI. OPERATIVE PART

242. For the foregoing reasons, the Tribunal renders the following award:

i. The Tribunal lacks jurisdiction over the dispute before it;

ii. The arbitration costs amount in total to USD 588,896.12 and shall be borne by the Claimant, who shall thus pay USD 294,448.06 to the Respondent;

iii. The Claimant shall pay to the Respondent the amount of USD 760,458 for legal fees and costs incurred in connection with this arbitration.

[181] The Parties' advance payments were made in equal shares. The USD 25,000 difference in the amounts claimed by each Party as arbitration costs corresponds to the non-refundable lodging fee paid by the Claimant.

[Signed]

Prof. Diego P. Fernández Arroyo
Arbitrator

Date: 19 April 2021

Mr. Christer Söderlund
Arbitrator

Date:

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

Date:

[Signed]

Prof. Diego P. Fernández Arroyo
Arbitrator

Date:

Mr. Christer Söderlund
Arbitrator

Date: 19 April 2021

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

Date:

Prof. Diego P. Fernández Arroyo
Arbitrator

Date:

Mr. Christer Söderlund
Arbitrator

Date:

[Signed]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal

Date: 19 April 2021