
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**AMEC FOSTER WHEELER USA CORPORATION (USA),
PROCESS CONSULTANTS, INC. (USA), AND
JOINT VENTURE FOSTER WHEELER USA CORPORATION AND PROCESS CONSULTANTS, INC.
(USA)**
Claimants

v.

THE REPUBLIC OF COLOMBIA
Respondent

ICSID Case No. ARB/19/34

**CLAIMANTS' COUNTER-MEMORIAL
ON PRELIMINARY OBJECTIONS**

October 14, 2021

**CLAIMANTS’ COUNTER-MEMORIAL
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I. INTRODUCTION

1. Colombia relies heavily on respondent party and non-party submissions in other investment cases under other treaties. There are at least 90 points in the Memorial at which Colombia cites to U.S. non-party submissions alone. Such submissions are not a generally recognized source of international law under the Vienna Convention, and party and non-party submissions are of questionable value because of the obvious incentive for States to attempt to limit the scope and reach of investment claims against them.¹ In fact, as set out below, many of Colombia's arguments are made without any supporting authorities other than those party and non-party submissions.

2. This failing is particularly evident in Colombia's objection to Claimants' fair and equitable treatment claim.² Colombia bases its objection by relying on the long-superseded standard of treatment towards investors articulated over 80 years ago in *Neer*,³ which has been consistently rejected by ICSID tribunals, including in other cases against Colombia.⁴ Indeed, Colombia itself recently agreed in another ICSID arbitration that *Neer*'s relevance was questionable.⁵

3. Colombia then mischaracterizes the relevance of a party's legitimate expectations to fair and equitable treatment by erroneously asserting that Claimants are raising claims that their legitimate expectations (and the acts that typify such expectations such as stability and

¹ See *infra*, Section IV.

² Memorial on Preliminary Objections, ¶ 196 *et seq.*

³ *Id.*

⁴ *Glencore Int'l A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, Aug. 27, 2019 (CL-005) (in which the tribunal rejected the "ripeness" argument that Colombia raises here regarding damages); *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award, Dec. 23, 2019, ¶¶ 183 – 86 (CL-052) (rejecting argument regarding fair-and-equitable treatment protecting investments and not investors).

⁵ *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, Sept. 9, 2021, ¶ 744 (CL-050) (In which Colombia accepts that the Tribunal is not rigidly bound by the *Neer* treatment standard it urges in this arbitration, as well as the freezing of the claim at the time of initial submissions.).

transparency) were violated as stand-alone claims.⁶ Rather, like numerous investors before it, Claimants rely on the frustration of their legitimate expectations as a factor in its FET claim.⁷

4. Colombia's jurisdictional objections do not promote the "procedural efficiency and economy" it claimed when requesting an opportunity for a suspension of these proceedings while its preliminary objections were briefed and considered,⁸ but only increase cost and delay while Colombia attempts to collect the underlying CGR Decision. Nowhere is this more evident than in Colombia's assertion that Claimants' investment is not "covered" under the TPA.⁹ Claimants' investment falls squarely within the TPA's broad definition of investment.¹⁰

5. Colombia's wasteful jurisdictional objections do not stop there. Colombia also argues, *e.g.*, that due to its status as a "contractual joint venture," FPJVC does not qualify as a "national of another Contracting State" under ICSID Article 25(2)(b).¹¹ Yet, even a cursory review of the law under which FPJVC was created makes it abundantly obvious that is not true, as does the express language of the TPA addressing joint ventures.¹²

6. As set out in detail below, Colombia's preliminary objections advance no argument that could dispose of Claimants' claims as a matter of law under TPA Article 10.20.4. Colombia has failed to meet its burden, its objections should be denied, and the case should move forward on the merits.

7. Claimants' Counter-Memorial is organized as follows:

⁶ Memorial on Preliminary Objections, ¶ 199.

⁷ *See, infra*, Section IV.A.3.

⁸ *See* Letter from Claudia Frutos-Peterson, Curtis, Mallet-Prevost, Colt & Mosle LLP, to the Tribunal, dated August 24, 2020.

⁹ Memorial on Preliminary Objections, ¶¶ 281-84.

¹⁰ *See, infra*, Section VII.B.

¹¹ Memorial on Preliminary Objections, ¶¶ 299-303.

¹² *See, infra*, Section VII.B.

- a) Section II provides an update on relevant factual occurrences that have occurred since Colombia's July 1, 2021 Memorial, as well as corrections to Colombia's version of certain facts;¹³
- b) Section III sets out why Colombia's "ripeness" objection should be refused;
- c) Section IV sets forth why Colombia's "prima facie" objections should be refused;
- d) Section V sets forth that Claimants have properly established that it suffered damages from Respondent's Treaty breaches;
- e) Section VI explains why the Tribunal has the power to order the remedies requested by Claimants;
- f) Section VII addresses Colombia's jurisdictional objections and why this Tribunal has jurisdiction over the claims of Claimants; and
- g) Section VIII explains why Colombia is liable for fees and cost due to the frivolous nature of its objections.

II. THE UNDERLYING PROCEEDINGS IN COLOMBIA

8. For the convenience of the Tribunal and because the same facts apply herein, Claimants restate the Factual Background contained in the Application for Provisional Measures and Emergency Temporary Relief dated September 2, 2021 (the "**Application**").

9. From the opening of the investigation in the fiscal liability process, Colombia has ridden roughshod over Claimants' rights under the Treaty, customary international law, and Colombian law. In the underlying Project, the scope of Claimants' work was dramatically reduced by Reficar before the work began, and in accordance with the terms of the Contract, Claimants essentially seconded some personnel to Reficar, which took on the management of its own Project.

10. Nonetheless, the CGR's position in the underlying proceeding has been that Claimants were "fiscal managers" subject to the CGR's jurisdiction under its organic statute, Law 610. Under that law, as in existence when Claimants made their investment in Colombia, a "fiscal manager" is one that has power over the expenditure of public funds. Claimants had no such power.

¹³ Given that Colombia engaged in a discussion of the facts that is inappropriate at this stage, Claimants did not proceed to refute every single one of Colombia's mischaracterizations of the facts in this counter-memorial. To be clear, Claimants deny refute Colombia's version of events unless expressly stated otherwise.

11. Nonetheless, the CGR pressed its case against Claimants, at same time that it dismissed the case against the directors of Ecopetrol, Reficar’s corporate parent, who actually did have power, although supposedly not final authority, over the expenditure of Reficar’s funds. Each of those respondents is a prominent Colombian citizen. The CGR proceeding concluded with an award against Claimants for \$US881 million, based on newly devised theories advanced only in the CGR’s decision itself.

12. The CGR proceeding is riddled with denials of the most basic due process to Claimants. The history of the CGR proceeding and the Project is set forth in greater detail in Claimant’s pending Application to which Claimants respectfully refer, without replicating here.

III. THE CLAIMS ARE RIPE FOR REVIEW

13. Colombia asserts that this arbitration is premature because “[a] mere administrative act that is not final and is subject to judicial control cannot, by itself, constitute a measure that is capable of constituting a breach of a substantive Treaty obligation...”¹⁴ As discussed in further detail below, this is simply not true. Nothing further than what has been set forth in the Request for Arbitration is required for Claimants’ claims to be sufficiently “ripe.” The national treatment claim is based on the CGR’s refusal to apply the same legal standard to the Claimants as it did to the similarly-situated Colombian Ecopetrol Board members who were released from the CGR proceedings even though they, unlike FPJVC, had actual decision-making authority.¹⁵ The expropriation of Claimants’ fundamental protections in the Contract occurred when the CGR stripped it of such rights by forcing FPJVC into the proceedings without legitimate legal or factual bases.¹⁶ The fair and equitable treatment claim arises from the CGR’s acts that were contrary to Claimants’ due process rights, as well as breaching Claimants’ legitimate expectations, including that its contract rights would be respected and that it would receive fair treatment from Colombian governmental entities like the CGR in accordance with Colombian law and the provisions of the TPA, among other acts and omissions. Claimants’ fair and equitable treatment claim also arises from the denial of justice suffered by Claimants arising from, among other acts and omissions, the

¹⁴ Memorial on Preliminary Objections, ¶ 176.

¹⁵ See Request for Arbitration, ¶¶ 174–78 (This is also explained in the Application, ¶¶ 50–51).

¹⁶ *Id.* at ¶¶ 179–87.

numerous due process violations that plagued the entirety of the CGR proceedings.¹⁷ Claimants’ umbrella clause claims and Investment Agreement claims both occurred with the CGR’s initial acts to deprive FPJVC of its contract rights by initiating the proceedings.¹⁸ Additional claims may arise if Colombia is allowed to proceed with enforcing the CGR Decision, a process which, as described above, Colombia acknowledges has begun.¹⁹

14. Recent events in connection with the CGR proceeding have exacerbated the violations of law at issue.²⁰ As thoroughly recounted in the Application for Provisional Measures and Emergency Preliminary Relief (the “**Application**”) and related subsequent communications between the Parties, the CGR issued an US\$881 million²¹ award against FPJVC on April 26, 2021.²² FPJVC’s appeal was summarily rejected on July 6, 2021.²³ Claimants asked Colombia to agree to cease enforcement of the CGR Decision. Colombia refused. This led to Claimants’ submission of its Application on September 2, 2021, as a means of protecting the jurisdiction of

¹⁷ *Id.* at ¶¶ 97–173.

¹⁸ *Id.* at ¶¶ 188–205.

¹⁹ See Colombia’s Letter to Claimants, dated September 1, 2021 (**C-003**) (denying Claimants’ request to agree to a stay of enforcement proceedings while this arbitration is pending and searching for Claimants’ assets worldwide “from which to satisfy the Ruling”); Respondent’s Answer to Claimants’ Application for Emergency Temporary Relief, Sept. 30, 2021, ¶¶ 34, 36 – 45 (“**Resp. Answer**”) (explaining how the CGR has initiated collection efforts). Colombia took initial steps in the midst of the proceedings in 2018. See Application at ¶ 92 (“The CGR has since begun preparing the enforcement proceedings against PFJVC. For example, the CGR has sent a letter to the United States Department of Justice requesting its help locating FPJVC assets in the United States in order to collect on a potential judgment.”); see also *Informe Gestion 2018-2019 (CWS-1_6)*. This report, issued by the CGR to Congress and the President, describes the CGR’s requests for reciprocal judicial assistance during the period covered by the report. Regarding the Reficar case, it mentions the following requests: (1) letter 2019EE0002681 sent to the Department of Justice of the United States of America dated January 15, 2019; (2) letter 2019EE0002677 sent to the International Criminality Unit of the United Kingdom dated January 15, 2019; (3) letter 2018EE0002682 sent to the Department of International Affairs and Legal Assistance in Criminal Matters of the Netherlands dated January 15, 2019; and (4) letter 2019EE0040807 sent to the head of Interpol’s Colombia National Central Bureau dated April 5, 2019. The report generally states that the purpose of the letters was locating the assets of the parties involved in the fiscal liability proceeding. The report mentions that the CGR had a meeting with officers from the U.S. Department of State and the Federal Bureau of Investigation.

²⁰ This Tribunal may certainly include relevant events that occurred subsequent to Claimants’ Request for Arbitration when analyzing the Parties’ current arguments. See *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, April 29, 2014, ¶ 333 (**RL-045**) (In deciding whether a breach had occurred, the tribunal took into account developments occurring after the Claimants 2012 Request for Arbitration: “Given that these ‘new developments’ from December 2013 onwards are not presented as the high point of the Claimant’s case, the Tribunal concentrates on these new events for the purpose of its decisions below, albeit that it has kept much in mind the factual context in which the Claimant has earlier presented its case.”).

²¹ The Application described the amount as “US\$811 million.” This was an inadvertent typo.

²² See Application, ¶¶ 72-88; Memorial on Preliminary Objections at ¶ 148.

²³ Auto – ORD-801119-158-021 (**C-009**).

this Tribunal. Colombia confirms that the CGR’s enforcement proceedings are underway and has stated that it cannot, nor will it attempt to, halt the CGR from enforcement.²⁴ Clearly, the CGR’s acts and omissions underlying Claimants’ claims are not “speculative” or “mere threats”. As further explained below, these acts go beyond those cited in Colombia’s Memorial on Preliminary Objections.

15. Colombia’s argument that further judicial remedies must be exhausted for the claims to ripen is groundless.²⁵ FPJVC exhausted its administrative appeals when the FSS formally rejected FPJVC’s appeal on July 6, 2021, and affirmed the CGR Decision in its entirety by issuance of Auto – ORD-801119-158-021.²⁶ Clearly, Colombia agrees that the CGR Decision is now final and enforceable under Colombian law, given that the CGR has begun worldwide enforcement efforts against FPJVC’s assets,²⁷ which, as explained above, Colombia has acknowledged. All affirmative acts necessary for Claimants’ claims to be admissible have occurred.

16. *Corona Materials v. Dominican Republic*, cited by Colombia in support of its position,²⁸ is not at all analogous to the present circumstance. There, claimant sent respondent a two-page letter that it asserted was a motion for reconsideration to reopen its case and reconsider the denial of an environmental permit for its mining concession.²⁹ Claimant alleged that respondent’s failure to respond to the motion for reconsideration was a denial of justice.³⁰ The tribunal held that

²⁴ *Supra* note 27.

²⁵ Memorial on Preliminary Objections, ¶ 178.

²⁶ *See* Application, ¶ 7, and accompany witness statement of Cesar Torrente (CWS-1), at ¶¶ 13, 14, 22.

²⁷ Colombia Letter to Tribunal, dated September 9, 2021 (the “Colombia’s Sept. 9 Letter”) (stating that the CGR is seeking assets of Claimants to freeze or seize); Colombia letter to Claimants, dated September 1, 2021 (refusing Claimants’ August 24 and August 31, 2021 letter proposals asking Colombia to stop the CGR’s collection and enforcement efforts, stating: “We regret to inform you that Colombia is unable to agree to your request. Colombia can only represent and provide assurances that it will continue to comply with its Constitution and laws, and that each of its organs will continue to act within the bounds of their competence.”).

²⁸ Memorial on Preliminary Objections, ¶¶ 177-178.

²⁹ *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, May 31, 2016, ¶¶ 45–46, 251 (RL-041).

³⁰ *Corona Materials v. Dominican Republic*, Award, ¶ 241 (RL-041).

there was no administrative adjudicatory proceeding in existence at the time of the Motion's submission. Indeed the very purpose of the Motion was to have the Ministry re-open the proceeding and render a different decision. In the Tribunal's view, it would be straining the meaning of the term 'administrative adjudicatory proceeding' to treat the Ministry's receipt of such a motion and alleged inaction as in itself an 'adjudicatory proceeding.'³¹

17. Here, there can be no dispute that the CGR Decision is the result of an administrative adjudicatory proceeding falling squarely within the ambit of Article 10.5.2(a) of the TPA. Claimants have also exhausted all of their administrative appeals. Colombia's suggestion that Claimants could seek further review is also irrelevant because it would be futile or manifestly ineffective given that the CGR, as confirmed by Colombia, is already seeking to enforce its award against Claimants' assets.

18. Further, the *Corona Materials* tribunal explicitly confirmed that "a denial of justice can originate in a State's administrative acts..."³² While it is true that the tribunal also determined that the particular denial of justice claim raised there required the exhaustion of local remedies, what Colombia crucially omits is that the tribunal also stated that (1) the "[e]xhaustion of local remedies is... typically not a jurisdictional prerequisite to an investor's submitting an international claim", and (2) "there is an exception to the requirement to exhaust local remedies, where seeking such an appeal domestically would be obviously futile or manifestly ineffective..."³³ It is sufficient at this stage that the CGR Decision is final, Claimants have exhausted their administrative remedies, and that, as Claimants have pleaded, further appealing the CGR Decision would be futile or manifestly ineffective.³⁴

19. Colombia also argues, in effect, that if the claims were not ripe when the case was commenced, which Claimants dispute, subsequent events cannot make them so.³⁵ The *Chevron v. Ecuador* tribunal's discussion of subsequent events is instructive on that point. Ecuador made a jurisdictional objection to claimants' denial of justice claim under the treaty because it was not

³¹ *Id.* at ¶ 251.

³² *Id.* at ¶ 248.

³³ *Id.* at ¶¶ 259-261.

³⁴ *See* Application, ¶¶ 5-9.

³⁵ Memorial on Preliminary Objections, n. 371.

pleaded in claimants' original notice of arbitration and only introduced in a supplemental memorial on the merits.³⁶ First, the tribunal found no "material delay" on the part of the claimants because they had raised factual allegations related to fair and equitable treatment and denial of justice in their notice of arbitration and had promptly informed the tribunal of new factual developments.³⁷ Second, the tribunal found that Ecuador suffered no material prejudice because it was "afforded a full opportunity . . . [to] address the Claimants' amended claims and to present its own case."³⁸ Third, the tribunal found that "that no such circumstance exists for the Tribunal to disallow the Claimants' amended claims."³⁹ The tribunal explained:

[T]his is not a case where a new disputing party has sought to join as a co-claimant, or where an existing party advances an entirely new claim wholly unrelated to the parties' existing dispute. The Claimants' amended claims . . . were made by existing claimants advancing claims under the same FET standard . . . [and] arose from the same evolving dispute between the same disputing parties that had led directly to the issuance and enforcement of the Lago Agrio Judgment in the same Lago Agrio Litigation.⁴⁰

20. Finally, the tribunal noted that

in all the circumstances . . . it would be an unreasonable, if not absurd, result for the Claimants to advance their amended claims as new claims in a new arbitration before a new arbitral tribunal, at unnecessarily greater expense and delay, with the risk of inconsistent decisions. It could serve no useful purpose to any of

³⁶ See *Chevron Corp., et al. v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, Part VII, Section 7.156-157, at 46, Aug. 30, 2018 (CL-042). The tribunal explained "[t]he Claimants' claims for denial of justice under the FET standard in Article II(3)(a) of the Treaty, based on the alleged 'ghostwriting' of the Lago Agrio Judgment, were not pleaded in their original Notice of Arbitration submitted under Article 2 of the UNCITRAL Arbitration Rules. Nor could they be. The Claimant's Notice was submitted on 23 September 2009. The Lago Agrio Judgment was subsequently issued on 14 February 2011 and declared to be enforceable on 1 March 2012 by the Lago Agrio Appellate Court. Within five weeks, on 20 March 2012, the Claimants introduced Chevron's claims for denial of justice in this arbitration by their Supplemental Memorial on the Merits, as thereafter supplemented in writing and orally up to and including the Track II Hearing."

³⁷ *Id.* at 7.165-166.

³⁸ *Id.* at 7.167.

³⁹ *Id.* at 7.168.

⁴⁰ *Id.*

the Parties. If the Claimants had sought to do so, the Respondent would have had every right to object to such an abuse of process.⁴¹

21. Here, too, this is not a case where Claimants have asserted an entirely new claim – all subsequent factual developments in this ICSID arbitration are related to the CGR proceeding in Colombia, which is discussed at length in Claimants’ Notice of Arbitration and Request for Arbitration.

22. Colombia has advanced versions of this same objection in two recent ICSID arbitrations and failed both times. Most recently, in *Eco Oro Minerals Corp. v. Colombia*, the ICSID tribunal roundly rejected Colombia’s efforts to freeze the claims at the time of the Notice of Intent:

[I]t cannot be the case that a claim becomes frozen in time once a Notice of Intent is filed. Just because an investor takes the step of filing a Notice of Intent does not mean that a State will automatically cease its activity in relation to the disputed property. Claims are not static and Government action may continue in parallel with inter-party consultations and the progress of arbitral proceedings. An investor must be entitled to continue to seek remedies in relation to continuing activity which it asserts is (or may come to be) in breach of the relevant Treaty, even after it has commenced arbitration, insofar as those breaches are related to claims set out in the Notice of Intent. The alternative – to expect an investor to file a new Notice of Intent each time a further measure occurs – is hardly realistic or practical, as it would result in unnecessary waste of time and financial resources.⁴²

⁴¹ *Id.* at 7.170. The tribunal relied on *Encana v Ecuador* (2006) LCIA Case No. UN3481, Award, Feb. 3, 2006, ¶ 164 (CL-210), where the UNCITRAL tribunal decided: “... a balance must be struck between, on the one hand, unreasonably requiring that new proceedings be commenced where the substance of a claim of breach of the BIT [the Ecuador-Canada BIT] may arguably have been made out or very nearly made out, and subsequent events put the question of breach beyond doubt, and, on the other, allowing what are in essence new claims or new causes of action which in reality have no real relation to the events initially relied upon, to be added onto existing proceedings on the basis of events subsequent to the commencement of proceedings.”

⁴² *Eco Oro v. Colombia*, Decision on Jurisdiction Liability and Directions on Quantum, ¶ 328 (CL-050).

23. ICSID tribunals have likewise accepted new but related events not raised in the Request for Arbitration when determining treaty violations, even including facts first raised in much later phases of the arbitration, such as in the memorial on the merits.⁴³

24. The basic damages principle of full reparation for damages caused by a State's violations of its international obligations⁴⁴ would be impossible if only damages incurred as of the start of the arbitration were considered, with no recognition or consideration of ongoing or further damages that are typical of almost every investor-state arbitration.⁴⁵

25. It has also been established that damages do not need to be fixed at the time of the Request for Arbitration. That is something for the merits, a principle that Colombia is aware of after a similar objection was rejected in *Glencore v. Colombia*: “Respondent argues that the measures adopted by Colombia (through the CGR) have caused no loss or damage to Claimants. The argument is without merit. Determination of loss and damages is a question which can only

⁴³ See *Enkev Beheer v. Poland*, First Partial Award, ¶ 333 (RL-045) (In deciding whether a breach had occurred, the tribunal took into account developments occurring after the Claimants 2012 Request for Arbitration: “Given that these ‘new developments’ from December 2013 onwards are not presented as the high point of the Claimant’s case, the Tribunal concentrates on these new events for the purpose of its decisions below, albeit that it has kept much in mind the factual context in which the Claimant has earlier presented its case.”); see also *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, July 6, 2012, ¶138 (CL-054); *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003, ¶¶ 107, 109, 119 (CL-055); *Ethyl Corporation v. The Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction, June 24, 1998, ¶¶ 85 – 88 (CL-056).

⁴⁴ A principle that Colombia was most recently reminded of in the *Glencore* arbitration. See *Glencore*, ICSID Case No. ARB/16/6, Award, ¶¶ 1566, 1571 (CL-005) (“The legal standard which the Tribunal must apply is not disputed by the parties: is the principle of full reparation of the injury caused, firmly established in jurisprudence since the PCIJ’s seminal *Chorzów Factory* decision. The PCIJ held that full reparation was an essential and consistent principle of customary international law and should be applied even in the absence of any specific provision setting forth an indemnification obligation in the treaty underlying the dispute . . . This principle of full reparation has been consistently applied by investment tribunals – including in cases of non-expropriatory breaches.”).

⁴⁵ Full reparation to the investor for injury caused by the internationally wrongful act of a State would be impossible to accomplish here if Colombia’s objections were valid because Claimants’ recent damages far exceed those it suffered at the time of the Request for Arbitration. As established in *Chorzów Factory* by the Permanent Court of International Justice (PCIJ): The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. *Case Concerning the Factory at Chorzów (Germany v. Poland)* (Merits) PCIJ Series A, No. 17, September 13, 1928, p. 46 (CL-057); see also International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries*, 2 Y.B. Int’l L. (2001), Art. 34 (“ILC Articles”) (CL-058) (“Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination”).

be adjudicated once the merits of the claims have been established.”⁴⁶ This follows accepted ICSID practice that proof of damages is not a prerequisite for establishing the existence of a claim in an ICSID arbitration.⁴⁷

26. The recent award in *Glencore v. Colombia* further bolsters Claimants’ position. As Colombia itself acknowledges, the *Glencore* claimants were in a similar position to Claimants here having exhausted their administrative remedies, and the tribunal considered *Glencore*’s claim to be ripe.⁴⁸ Colombia attempts to distinguish the case from those present here by arguing that the relevant treaty in that case, the Colombia-Switzerland Bilateral Investment Treaty (the “**Colombia-Swiss BIT**”), “stipulated that a claim based on an administrative act could be submitted to arbitration, provided that the claimant had exhausted administrative remedies”, and that this is a “fundamental difference” with the TPA.⁴⁹ However, the provision Colombia relies on, Ad. Article 11(3), is simply a requirement to exhaust local *administrative* remedies before proceeding to arbitration: “With respect to Colombia, in order to submit a claim for settlement under the said Article, domestic administrative remedies shall be exhausted in accordance with applicable laws and regulations.”⁵⁰ There can be no serious argument that FPJVC has not done so.

27. The fact that the TPA includes no requirement to exhaust any local remedies (whether administrative or judicial) before proceeding to arbitration only reinforces Claimants’

⁴⁶ *Glencore*, ICSID Case No. ARB/16/6, Award, ¶¶ 1133 – 35 (**CL-005**). Colombia’s petition for annulment of this award was recently denied. See IAREporter (**C-021**), <https://www.iareporter.com/articles/analysis-ad-hoc-committee-refuses-to-annul-glencore-v-colombia-award-rejecting-colombias-arguments-based-on-illegality-and-corruption-allegations-committee-finds-that-procedural-orders-ma/>.

⁴⁷ See, e.g., C. Schreuer, “What is a legal dispute?” in I. Buffard, J. Crawford, A. Pellet, S. Wittich (eds.), *International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner* (Koninklijke Brill NV, 2008), 970 (**CL-059**) (it is well-established that “[a]ctual or concrete damage is not required before such a party may bring legal action. But the dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.”); C. Schreuer, *The ICSID Convention: A Commentary* 94 (Cambridge 2d Ed. 2009) (**CL-060**) (“The disagreement between the parties must also have some practical relevance to their relationship and must not be purely theoretical. It is not the task of the Centre to clarify legal questions *in abstracto*. The dispute must relate to clearly identified issues between the parties and must not be merely academic. This is not to say that a specific action must have been taken by one side or that the dispute must have escalated to a certain level of confrontation, but merely that it must be of immediate interest to the parties.”).

⁴⁸ Memorial on Preliminary Objections, ¶ 179. See also *Glencore*, ICSID Case No. ARB/16/6, Award, ¶¶ 1112, 1117 (**CL-005**).

⁴⁹ Memorial on Preliminary Objections, ¶ 179.

⁵⁰ Colombia-Swiss BIT, May 17, 2006 (entered into force June 10, 2009), Art. 11 (**RL-43**).

position that its claims are ripe. In other words, the Colombia-Swiss BIT includes an additional requirement before ICSID jurisdiction is proper in comparison to the TPA—not a lesser requirement as Colombia claims.

28. Moreover, Article 10.5.2(a) of the TPA provides that “‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, **or** administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world[.]”⁵¹ Other tribunals interpreting identical language have found claims based solely on administrative acts to be ripe.⁵²

29. Finally, Colombia cites to a string of expropriation cases in which the tribunals supposedly rejected claims of treaty breaches because they were “‘raised prematurely.”⁵³ However, these cases are not at all analogous to the circumstances here. In *Achmea B.V. v. Slovak Republic II*, the tribunal dismissed claimant’s expropriation claim because the expropriation had not yet occurred, and because the Slovak Republic could expropriate claimant’s investment lawfully, the Tribunal was “‘being invited to engage in a speculative exercise, looking into the future to examine a State conduct that has not yet materialized and whose features may not be determined with certainty at this stage.”⁵⁴ Similarly, in *Enkev v. Poland*, the tribunal determined that claimant’s asset was its shares in the local subsidiary (not the subsidiary’s assets), that the expropriation had not yet occurred, and that the diminution in value to claimant’s shares was not yet so severe as to render them useless.⁵⁵ Here, on the other hand, all of the acts that Claimants have alleged to be a breach have already occurred and already caused Claimants substantial damages.⁵⁶

⁵¹ TPA, **CL-001** (emphasis added).

⁵² See e.g., *TECO Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, December 19, 2013, ¶¶ 457-465, 471-484 (**CL-061**).

⁵³ *Id.* at ¶ 180.

⁵⁴ *Achmea B.V. v. Slovak Republic II*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, May 20, 2014, ¶¶ 244-251 (**RL-047**).

⁵⁵ *Enkev Beheer v. Poland*, First Partial Award, ¶¶ 339-346 (**RL-045**).

⁵⁶ See also Section V *infra* (discussing Claimants’ damages resulting from Colombia’s breaches).

30. Similarly, in *Glamis Gold v. U.S.*, the tribunal agreed that breaches based on alleged future events were not ripe for review.⁵⁷ However, crucially, the tribunal found that a claim based on past events—in that case that the legislation that had passed “caused such significant harm to its investment as to effect an expropriation *on the date of their passage*”—was ripe.⁵⁸ Thus, *Glamis Gold* actually supports Claimants’ position here, which is based on breaches by Colombia that have already occurred.⁵⁹

31. In sum, while the CGR’s more recent decision and subsequent enforcement efforts have increased the harm to Claimants, the claim was ripe long before the decision’s issuance. To suggest otherwise would encourage absurd results, such as the need to initiate a second arbitration when the harm to Claimants is fully realized.⁶⁰ Claimants’ claims are sufficiently ripe.

IV. CLAIMANTS HAVE MADE OUT *PRIMA FACIE* VIOLATIONS OF THE TPA

32. Claimants have more than met the standard for *prima facie* proof of Colombia’s TPA violations. First, as set forth in TPA Article 10.20.4(c) (“Conduct of the Arbitration”): “[i]n deciding [preliminary] . . . objection[s], the tribunal *shall* assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof).” Moreover, “it is appropriate that a claimant’s request for arbitration be construed liberally and that, in cases of doubt or uncertainty as to the scope of a claimant’s allegation(s), any such doubt or uncertainty should be resolved in favor of the claimant.”⁶¹

⁵⁷ *Glamis Gold, Ltd. v. United States of America*, UNCITRAL (NAFTA), Award, June 8, 2009 ¶ 342 (RL-040).

⁵⁸ *Id.*

⁵⁹ Colombia also cites to non-treaty awards. Colombia also cites to *The American Independent Oil Company v. Government of the State of Kuwait*, Final Award, March 24, 1982 and *Mariposa Development Company and Others (United States) v. Panama*, June 27, 1933, for the banal proposition that a claimant does not have a claim until the expropriation is effectuated. As discussed above, this is not applicable to the case here.

⁶⁰ See, e.g., *Pan-American Energy LLC & BP Argentina Exploration v. Argentine Republic* (ARB/03/3) Decision on Preliminary Objections, July 27, 2006, ¶ 179 (RL-174) (“It is not possible to limit this Tribunal’s competence to damage that is real and averred at the time at which the issue of jurisdiction is being examined. If it were otherwise, the part of the case related to damage that has not materialised yet but may have done so at the merits stage, would never be decided, save for an unnecessary new arbitration.”).

⁶¹ *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, Dec. 10, 2010, ¶ 6.1.3 (CL-063).

33. Moreover, Colombia fails to establish, as it must, that the facts alleged by the claimant, if established, are incapable of forming the basis for a treaty violation.⁶² A “tribunal must not attempt at this stage to examine the claim itself in any detail, but the Tribunal must only be satisfied that prima facie the claim, as stated by the Claimants when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration, and consequently of this Tribunal.”⁶³ In particular, where “a further examination of [jurisdiction] would be so closely related to the further examination of the merits,” the “jurisdictional examination should be joined to the merits.”⁶⁴

34. As to TPA Article 10.20.4, which permits a tribunal to grant a preliminary objection if “as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made,” a previous ICSID tribunal construing identical language in another treaty found:

[A] tribunal must have reached a position, both as to all relevant questions of law and all relevant alleged or undisputed facts, that an award should be made finally dismissing the claimant’s claim. Depending on the particular circumstances of each case, there are many reasons why a tribunal might reasonably decide not to exercise such a power against a claimant even where it considered that such claim appeared likely (*but not certain*) to fail if assessed only at the time of the preliminary objection.⁶⁵

35. “The threshold is thus put quite high: the claim must be deemed at the outset of the arbitration proceedings ‘certain—and not simply ‘likely’—to fail.’”⁶⁶ Colombia does not even approach this threshold with any of its preliminary objections.

⁶² Yarik Kryvoi, *International Centre for Settlement of Investment Disputes* (Kluwer 2020), p. 67 (CL-064); see also Audley Sheppard, *The Jurisdictional Threshold of a Prima-Facie Case*, in *The Oxford Handbook of International Investment Law* (Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds., Oxford 2008), p. 960 (RL-038) (“The formulation of the approach and of the prima-facie test, which appears to find most favour, is the following: The tribunal should be satisfied that, if the facts alleged by the claimant ultimately prove true, they would be capable of falling within (or coming within) (or constituting a violation of) the provisions of the investment treaty.”).

⁶³ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, Sept. 25, 1983, 1 ICSID Reports 389, ¶ 35 (CL-065).

⁶⁴ *Tradex v. Albania*, ICSID Case No. Arb/94/2, Decision on Jurisdiction, Dec. 24, 1996, 14 ICSID Rev. 161 (1999), ¶ 46 (CL-066).

⁶⁵ *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, Aug. 2, 2010, ¶ 110 (RL-036).

⁶⁶ Michele Potestà & Marija Sobat, *Frivolous Claims in International Adjudication: A Study of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily*, 3 J. Int. Disp. Settl. 137 (2012), p. 22 (CL-067).

36. Here, Colombia advances its view of the merits at great length. That description is wrong, but more important for present purposes, it is irrelevant. An application on preliminary issues is not the appropriate setting to determine the merits, and Colombia’s effort to do so should be rejected.

A. The Fair and Equitable Treatment Claim Meets the *Prima Facie* Test

1. Claimants’ investment enjoys FET protection

37. Another objection that has been repeatedly rejected by ICSID tribunals is Colombia’s argument that the FET claim cannot proceed because Article 10.5.1—like most FET clauses in investment treaties, such as those based on the U.S. Model BIT—refers to, and thus only protects, “investments” and not “investors.”⁶⁷ Claimants have made such an investment, as explained below,⁶⁸ rendering Colombia’s objection moot. Moreover, in the words of Colombia’s own cited authority in this context,⁶⁹ the International Law Commission’s 2015 Report on MFN Clauses, “the definition of investment is a matter relevant to the investment agreement as a whole and does not raise any systemic issues about MFN [or other substantive provisions, by Colombia’s logic] or about their interpretation. Accordingly, the Study Group did not see any need to consider this matter further.”⁷⁰ Even more pertinent, Colombia makes no mention of the 2019 investment treaty award in *Mohamed Abdel Raouf Bahgat v. Egypt*, where the tribunal rejected an identical “protected investment, not investor” objection, reasoning:

The success of investments depends on more factors than the unrestricted flow of capital or the absence of measures against the property. Apart from the financial aspect, the success of investments depends upon effective management and making use of the adequate technical expertise, amongst other factors. Measures against an investor or the management, or measures deteriorating circumstances which were favourable for the investment, may equally have a negative impact upon the investment. *It would reduce the effectiveness of the system of investment protection*

⁶⁷ Memorial on Preliminary Objections, ¶ 187.

⁶⁸ See, infra, § VII.A. See also Request for Arbitration, at ¶¶ 28-29.

⁶⁹ Memorial on Preliminary Objections, ¶ 189 n.378.

⁷⁰ International Law Commission, *Final Report of the Study Group on the Most-Favoured-Nation Clause*, 2 Yearbook of the Int’l L. Comm. (2015), ¶ 70 (RL-060).

*system if it would only prohibit limitations to the flow of capital or infringements of property.*⁷¹

38. Even more recently, in *Lion Mexico v. Mexico*, another tribunal also rejected this “investment, not investor” objection:

the Tribunal finds that NAFTA Art. 1105 [which, like the TPA, refers only to “investments”] does indeed grant protection to *Lion* as an investor. . . . The reference to ‘aliens’, in a context of investment protection, can only mean investors. A multitude of NAFTA Tribunals have also construed Art. 1105 as a source of protection for investors rather than solely for their investments.⁷²

39. Likewise, here TPA Article 10.5.2 makes clear that “[f]or greater certainty, paragraph 1 [of Article 10.5] prescribes the customary international law minimum *standard of treatment of aliens* as the minimum standard of treatment to be afforded to covered investments.”⁷³

40. Indeed, it is revealing that Colombia, in an argument bereft of applicable authorities, fails to cite to a single award, treatise, or other secondary source in which a tribunal excluded an FET claim because the treaty supposedly protected investments and not investors. *Nelson v. Mexico*, one of the cases cited by Colombia in support, agreed that the enterprise established in Mexico was the investment and fully considered whether Mexico’s treatment of the enterprise violated FET.⁷⁴ The tribunal did not hold, for example, that certain actions were against the investor, and not the investment, and therefore not subject to NAFTA’s protection, so the decision does not support Colombia’s argument here. In the only other case cited by Colombia, *Belokon v. Kyrgystan*, the tribunal declined to consider criminal proceedings brought against a bank, but not against “former directors and management,” qualifying that holding explicitly by

acknowledge[ing] that the distinction between providing FET to the directors and employees of an investment as opposed to the investment itself may in certain contexts be artificial. However, given the presence in this BIT of [a non-

⁷¹ *Bahgat v. Egypt*, Final Award, ¶¶ 183-86 (emphasis added) (CL-052). Likewise, a tribunal in a NAFTA award published after Colombia’s submission of its Memorial rejected the same objection raised by the host State. *See supra* note 72.

⁷² *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, Sept. 20, 2021, ¶¶ 356-58 (CL-068).

⁷³ (Emphasis added).

⁷⁴ *Mr. Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1 (NAFTA), Final Award, June 5, 2020, ¶¶ 315-85 (RL-057).

impairment clause] the Tribunal considers it more appropriate for such considerations to be analysed under that treaty obligation.⁷⁵

41. No such clause is present in the TPA. Finally, both commentators cited by Colombia are discussing the proper interpretation of MFN clauses, not FET clauses.⁷⁶ The awards cited here by Claimants rejected this same objection, and none of the authorities cited by Colombia support its contention that a distinction should be drawn protecting only the investment, and not the investor.

2. Claimants base their FET claim on the correct standard

42. Colombia points to the TPA's reference to "customary international law" as the minimum standard to argue that the fair and equitable treatment standard is somehow less demanding here than under "autonomous standards" in other investment treaties.⁷⁷

43. This objection regarding the appropriate FET standard is wrong for two reasons. First, it ignores ample arbitral authorities that have found the FET standard to be indistinguishable from the requirements imposed by customary international law. Second, Colombia does not appear to appreciate that customary international law itself, by definition, evolves, and that the vast majority of tribunals construing that evolving standard have determined that customary international law has evolved far past *Neer*, the authority on which Colombia relies. In all, this is yet another example of an argument that has been resolved contrary to Colombia's position by many ICSID tribunals.

44. As to the first point, numerous authorities have arrived at the conclusion that the minimum standard of treatment is indistinguishable from or materially identical to that of the FET

⁷⁵ *Valeri Belokon v. Kyrgyz Republic*, UNCITRAL, Award, October 24, 2014, ¶¶ 244-46, 252 (RL-058) ("Neither Contracting party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.").

⁷⁶ Jeswald Salacuse, *The Law of Investment Treaties* (Oxford 2015), p. 281 (RL-059) (discussing that "some treaties grant MFN treatment only to investment of a treaty counterpart"); see also ILC, *Final Report of the Study Group on the Most-Favoured-Nation Clause*, ¶ 69 (RL-060) ("Some agreements limit the benefit of an MFN provision to the investment.").

⁷⁷ Memorial on Preliminary Objections, ¶¶ 193-94.

standard found in other investment treaties.⁷⁸ Indeed, this has led to some commentators doubting “the relevance of this whole debate.”⁷⁹ In the words of one tribunal,

it appears that the difference between the Treaty standard laid down in [that treaty] and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real. To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied.⁸⁰

45. Other tribunals have reached the same conclusion,⁸¹ noting, for instance, that the discussion was futile because the international minimum standard of treatment is “as little defined as the BIT’s FET standard.”⁸² Rather, “[a] requirement that aliens be treated fairly and equitably in relation to business, trade and investment . . . has become sufficiently part of widespread and

⁷⁸ See, e.g., *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, Aug. 22, 2016, ¶ 520 (CL-069) (noting that customary international minimum standard “has developed and today is indistinguishable from the FET standard and grants investors an equivalent level of protection as the latter. The whole discussion of whether . . . the BIT incorporates or fails to incorporate the [customary international minimum] standard when defining FET has become dogmatic: there is no substantive difference in the level of protection afforded by both standards”); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶ 611 (CL-070) (“[The tribunal] shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law.”); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, ¶ 592 (CL-071) (“[T]he Arbitral Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law.”); *Azurix Corp. v. Republic of Argentina*, Award, July 14, 2006, ¶ 361 (CL-072) (“[T]he minimum requirement to satisfy this standard [fair and equitable treatment] has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.”); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, Aug. 18, 2008, ¶¶ 335-337 (CL-073) (concurring with *Azurix* and noting “that the standards are essentially the same”).

⁷⁹ Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (OUP 2012), p. 138 (CL-074) (citing Stephan W. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law, in International Investment Law and Comparative Public Law* (Schill ed., OUP 2010), pp. 152-54 (CL-075)).

⁸⁰ *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006, ¶ 291 (CL-076).

⁸¹ *Azurix v. Argentina*, Award, ¶¶ 361, 364 (CL-072); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, Oct. 5, 2012, ¶ 190 (CL-077); *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶¶ 282-84 (CL-078); *Biwater v. Tanzania*, Award, ¶ 592 (CL-071); *Rumeli v. Kazakhstan*, Award, ¶ 611 (CL-070); *Duke Energy v. Ecuador*, Award, ¶¶ 332-37 (CL-073); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, June 21, 2011, ¶¶ 287-89 (CL-079).

⁸² *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, Oct. 31, 2011, ¶ 335 (CL-080).

consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*.”⁸³ As such, “[t]he content of the standard must . . . be determined on a basis which is common to all . . . States, and not applying the specific perspective of any particular State or legal system.”⁸⁴

46. As to the second point, *i.e.*, that customary international law itself evolves, the *ADF* tribunal remarked “that the customary international law referred to in Article 1105(1) is not ‘frozen in time’ and that the minimum standard of treatment does evolve.”⁸⁵ Reflecting on the evolving nature of the FET standard, Professor McLachlan explains that modern investment claims “are a far cry from the mistreatment of aliens in jail, or the failures in the investigation of crimes against the person, which populate the early twentieth-century reports.”⁸⁶ Professor Schreuer, in turn, most recently added that it “seems to be generally accepted in investment jurisprudence that the content of the international minimum standard is to be determined in accordance with present notions of international law and cannot be regarded as whatever may have been its content at a certain historical point in time.”⁸⁷ Indeed, just last month, an ICSID tribunal ruled against Colombia, finding that “the Tribunal does not accept that the meaning of [the minimum standard of treatment] under customary international law must remain static. The meaning must be permitted to evolve as indeed international customary law itself evolves.”⁸⁸

⁸³ *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, ¶ 210 (RL-105).

⁸⁴ Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2017), ¶ 7.80 (CL-081).

⁸⁵ *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, Jan. 9, 2003, ¶ 179 (CL-082) (“[W]hat customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.”).

⁸⁶ McLachlan, et. al., *supra* note 84, ¶¶ 7.05; 7.10 (CL-081) (“This controversy is misguided and the dichotomy presented by the opposing views is a false one on a number of levels. It takes an overly simplistic view of differences in formulation of the right on different treaties. It suggests that the only choice open to a tribunal is between a complete discretion to determine whether a particular conduct is ‘unfair and inequitable’ on the one hand, and the application of a conception of customary international law ‘frozen in amber’ at some point in the past. Most seriously of all, it falsely presents the minimum standard of treatment of aliens in customary international law as having a well-settled content. In so doing, it ignores the level of dissent among States throughout much of the twentieth century not only over the content of such a standard, but even over whether it existed at all.”).

⁸⁷ Christoph Schreuer & August Reinisch, *International Protection of Investments: Substantive Standards* (Cambridge 2020), ¶ 314 (CL-083).

⁸⁸ *Eco Oro v. Colombia*, Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 744 (CL-050).

47. The shared understanding of the parties to the TPA regarding customary international law only reaffirms its generally accepted definition.⁸⁹ Obviously then, “[t]he central inquiry . . . is: what does customary international law *currently* require in terms of the minimum standard of treatment to be accorded to foreigners?”⁹⁰

48. Relying on *Neer*, Colombia asserts that conduct must be “egregious and shocking, such as a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons.”⁹¹ Although Colombia’s conduct here would meet even this long-superseded articulation of the governing standard, Judge Schwebel pointed out the impropriety of relying on *Neer* in today’s investment disputes:

[The contention that *Neer*] is an authority that today governs the interpretation [of the minimum standard of treatment] contention spawns its inherent refutation. . . . *Neer* . . . did not concern the treatment of foreign investors or investment. As aptly recognized in *Mondev*, *Neer* was adopted in 1926, when the standing of the individual (and corporation) in international law were, procedurally and substantively, far less developed than they have today become to be. *Neer* is argued to be key to the meaning of the minimum standard of treatment of aliens, but the very concept of the minimum standard in the treatment of aliens and their property is hardly found in contemporary international law. It does not appear in the draft Articles on State Responsibility of the International Law Commission produced after two decades of learned and searching work.⁹²

⁸⁹ Compare TPA, Annex 10-A (CL-001) (“Customary International Law. The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.”), with *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, (Feb. 3), p. 122 (CL-084) (“In particular . . . the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*.”) (citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 44, Feb. 20, ¶ 77 (CL-085)), and *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13, June 3, pp. 29-30 (CL-086) (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States[.]”).

⁹⁰ *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009, ¶ 283 (RL-070).

⁹¹ Memorial on Preliminary Objections, ¶ 196.

⁹² Stephen M. Schwebel, *The Misinterpretation and Misapplication of the Minimum Standard of International Law, in Resolving Conflicts in the Law: Essays in Honour of Lea Brilmayer* (Chiara Giorgetti, C., & Natalie Klein eds, Brill Nijhoff 2019), p. 400 (CL-087).

49. In the same vein, Professor Paulsson has observed that “*Neer* is relevant only in cases of failure to arrest and punish private actors of crimes against aliens,” and that “the *Neer* formulation . . . no longer reflects contemporary customary international law, or is to be confined to the particular context of insufficiency of state action to apprehend and punish private criminals, or both.”⁹³ It is perhaps due to these overwhelming authorities that Colombia, in another ICSID arbitration, “accept[ed] that the Tribunal is not rigidly bound by the standard set out in *Neer*.”⁹⁴

50. Today, the most widely cited formulation of the applicable test holds that “the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety,” where, *e.g.*, the treatment is in breach of “representations made by the host State which were reasonably relied on by the claimant.”⁹⁵ That articulation “has achieved wide accept[ance] by subsequent tribunals as a useful statement of the standard in its contemporary application, irrespective of the position that [those tribunals] have taken on the connection between the treaty standard and general or customary international law.”⁹⁶

3. Legitimate expectations is a significant factor in an FET claim, but not the only one

51. Colombia appears to argue that Claimants’ fair and equitable treatment claim is solely based on breaches of its legitimate expectations, although Claimants have clearly explained that it is just one of several components of its claim, which, as detailed in the Request for Arbitration, also includes denial of justice and due process.⁹⁷ First, regarding the elements of denial of justice and due process, Colombia concedes that denial of justice and due process

⁹³ Jan Paulsson & Georgios Petrochilos, *Neer-ly Mised?*, 32 Miami Law Research Paper Series 242 (2010), pp. 247, 250 (citations omitted) (CL-088).

⁹⁴ *Eco Oro v. Colombia*, Decision on Jurisdiction, Liability and Directions on Quantum ¶ 744 (CL-050).

⁹⁵ *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004, ¶ 98 (RL-096).

⁹⁶ McLachlan, et. al., *supra* note 84, ¶ 7.175 (CL-081).

⁹⁷ Request for Arbitration, ¶¶ 96 – 173.

violations are part of the applicable FET standard under customary international law.⁹⁸ As Professor Paulsson observes in his book on denial of justice, “[i]n international law, denial of justice is about due process, nothing else—and that is plenty.”⁹⁹ Due process of law requires that the respondent state afford:

[A]n actual and substantive legal procedure for a foreign investor to raise its claims [or defenses] against the depriving actions already taken *or about to be taken* against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of such a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims [or defenses] heard.¹⁰⁰

52. As such, the standard provides for “interve[ti]on when the process itself fails to afford the basic qualities that justify its existence.”¹⁰¹ In the paradigmatic *Loewen* case, for instance, the tribunal found a due process violation by the United States, where a state court in Mississippi had awarded USD 500 million in damages, including USD 400 million in punitive damages, and where a 125% appeal bond requirement rendered meaningless the investors’ ability to appeal.¹⁰² The tribunal found on those facts that “[b]y any standard of measurement, the trial . . . was a disgrace By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.”¹⁰³

53. More recently, the tribunal in *Chevron v. Ecuador* articulated the applicable test as “whether any shock or surprise to an impartial tribunal . . . leads, on reflection, to justified concerns as to the judicial propriety of the [local court judgment], as left materially uncorrected or

⁹⁸ Memorial on Preliminary Objections, ¶ 197.

⁹⁹ Jan Paulsson, *Denial of Justice in International Law* (CUP 2005), p.7 (CL-089).

¹⁰⁰ *ADC Affiliate Ltd. and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006, ¶ 435 (emphasis added) (CL-090).

¹⁰¹ McLachlan, et. al., *supra* note 84, ¶ 7.109 (CL-081).

¹⁰² *See generally Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003 (CL-091).

¹⁰³ *Id.* at ¶ 119 (CL-091).

unremedied within the Respondent’s own legal system.”¹⁰⁴ The *Chevron* tribunal considered that “there was before [the respondent’s courts and prosecutorial authorities] at least strong prima facie evidence of judicial misconduct, procedural fraud and (particularly) ‘ghostwriting’, raising justifiable concerns as to the judicial propriety of the Lago Agrio Litigation and the Lago Agrio Judgment”¹⁰⁵ before finding a denial of justice due to the “corrupt misconduct of the Lago Agrio Court . . . together with the absence of any appropriate relief within the Respondent’s own legal system.”¹⁰⁶

54. In addition to judicial wrongs, the investor may also invoke the FET standard “as a mode to redress against administrative wrongs,” *i.e.*, it “may pursue a claim for breach of the treaty standards that is based directly upon allegations of administrative misconduct,” and the investor may do so “irrespective of whether he has sought redress before the local courts.”¹⁰⁷ Moreover, “process” penetrates the content of the judgment or adjudicative decisions in that a tribunal “may evaluate the merits of the judgment for the purpose of enquiring whether it affords evidence of bias, fraud dishonest, or lack of impartiality.”¹⁰⁸

55. Furthermore, public statements from the CGR in this arbitration demonstrate prejudgment and bias, which flies in the face of due process and violates the FET standard.¹⁰⁹ As explained in the Request for Arbitration, as the CGR proceeding was in its earliest stages in 2016, a CGR press release publicly described FPJVC’s “management control” as “shameful”, and that “[t]he management control carried out by [FPJVC] is really embarrassing.”¹¹⁰ This continued into

¹⁰⁴ *Chevron Corp. v. Ecuador*, Second Partial Award on Track II, ¶ 8.26 (CL-042).

¹⁰⁵ *Id.* at ¶ 8.33.

¹⁰⁶ *Id.* at ¶¶ 8.76-77.

¹⁰⁷ McLachlan, et. al., *supra* note 84, ¶¶ 7.104, 7.174 (CL-081); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, Mar. 10, 2015, 491 (RL-157) (“The obligation of FET can be violated . . . [t]rough administrative actions, taken by administrative authorities for which the State is responsible, directly against the investor.”).

¹⁰⁸ Gerald G. Fitzmaurice, *The Meaning of the Term Denial of Justice*, 13 Brit. Y.B. Int’l L. 93 (1932), pp. 112-13 (CL-092).

¹⁰⁹ *Glencore*, ICSID Case No. ARB/16/6, Award, ¶ 1348 (“Bias of a decision maker results in a breach of the FET standard.”) (CL-005).

¹¹⁰ Request for Arbitration, ¶ 165 (quoting Comunicado de Prensa No. 82, available at https://protect-us.memecase.com/s/SILMCG69jMhmPpKqUKUq_0, and *Contralor reconoce que debio ser mas diligente durante cuatro anos Reficar*, LA OPINION, May 6, 2016, available at [23](https://www.laopinion.com.co/colombia/contralor-</p></div><div data-bbox=)

the 2018 CGR indictment when the CGR declared in a public document (which is one of Colombia’s most cited authorities in this arbitration) that “[t]he construction of the refinery of Cartagena (Reficar) . . . became the biggest example of improvisation, lack of controls and waste of resources,”¹¹¹ and that “(t)olerance with certain conduct, as it happened with the Reficar case, is frankly unacceptable. Three years later the CGR rendered its decision against FPJVC.¹¹²

56. Regarding the element of legitimate expectations, whether there has been an FET violation depends, in large part, on whether the State has breached the investors’ legitimate expectations.¹¹³ Here, Claimants had a legitimate expectation to a stable legal framework and that Colombia would respect its contractual rights.

57. As to the former, “[n]umerous tribunals have stressed that the legal framework as it existed at the time of making the investment was decisive for any legitimate expectations,” thereby recognizing “the investor’s concern for planning and stability based on [the host state’s legal and economic] order at the time of the investment.”¹¹⁴ In particular, “[w]hereas the prudent

[reconoce-que-debio-ser-mas-diligente-durante-cuatro-anos-reficar-111371#OP](#) (C-022). This statement was clearly intended for republication and had nothing to do with the merits of the underlying CGR proceedings.

¹¹¹ Office of the Comptroller General of the Republic of Colombia, GRANDES HALLAZGOS; ASÍ DESTAPÓ LA CONTRALORÍA GENERAL DE LA REPÚBLICA LOS CASOS MÁS SONOROS DE CORRUPCIÓN EN COLOMBIA. DEL CARTEL DE HEMOFILIA A LOS ESTRAFALARIOS SOBRECOSTOS DE REFICAR PASANDO POR EL SAQUEO AL PLAN DE ALIMENTACIÓN ESCOLAR (Imprenta Nacional 2018), pp. 16, 45 (R-49).

¹¹² In *Glencore*, ICSID Case No. ARB/16/6, Award, ¶ 1348 (CL-005), the Tribunal granted an offsetting award against Colombia based on an improper CGR decision. In commenting on the CGR’s campaign of vilification against the Claimant there, the tribunal stated that the public comments in that matter from the CGR’s highest authority were “reprehensible and ill-advised.”

¹¹³ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, Oct. 8, 2009, ¶ 216 (CL-093) (“The Tribunal shares the view expressed by other tribunals that one of the major components of the FET standard is the parties’ legitimate and reasonable expectations with respect to the investment they have made.”).

¹¹⁴ Dolzer and Schreuer, *supra* note 79, p. 146 (CL-074); *see also, e.g.,* *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, Feb. 19, 2019, ¶ 388 (CL-094) (“[I]t is enough that a regulatory regime be established with the overt aim of attracting investments by holding out to potential investors the prospect that the investments will be subject to a set of specific regulatory principles that will, as a matter of deliberate policy, be maintained in force for a finite length of time. Such regimes are plainly intended to create expectations upon which investors will rely; and to the extent that those expectations are objectively reasonable, they give rise to legitimate expectations when investments are in fact made in reliance upon them.”); *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, May 31, 2019, ¶ 294 (CL-095) (“[T]he Tribunal accepts as correct the observation . . . that legitimate expectations may arise from ‘rules not specifically addressed to a particular investor but which are put in place with a specific arm to induce foreign investments and on which the foreign investor relied on making his investment.’”).

investor will, . . . carefully examine the laws before investing, the host state must at all times be aware that its legal order forms the basis of legitimate expectations.”¹¹⁵

58. For example, “the failure to put in place an independent, impartial regulator, insulated from political influence, constitutes a breach of the fair and equitable treatment standard, in that it represents a departure from [claimant’s] legitimate expectation that an impartial regulator would be established.”¹¹⁶ Similarly, the *Yukos* tribunal found:

It is common ground between the Parties that Yukos and its competitors viewed positions taken by the tax authorities on issues of tax liability to be exigent, erratic and unpredictable. The Tribunal however is unable to accept that the expectations of Yukos should have included the extremity of the actions which in the event were imposed upon it [Claimant] and his colleagues surely could not have been expected to anticipate the rationale and immensity of the tax assessments and fines They could not have been expected to anticipate that more than thirteen billion dollars in unpaid taxes and fines would be imposed on Yukos for unpaid VAT on oil exports¹¹⁷

59. Here, Colombia has frustrated Claimants’ legitimate expectations that Colombia would provide a fair and predictable legal framework and apply its laws consistently. As explained in the Request for Arbitration, some of the most egregious examples include:

- Colombia’s misapplication of its own laws to assist the CGR’s effort to maintain jurisdiction over FPJVC;
- Colombia’s discriminatory application of those same laws in favor of Colombian nationals;
- Colombia’s failure to protect Claimants’ due process rights, including Claimants’ expectation that it could not be held liable without proof of gross negligence, fault or causation;

¹¹⁵ Dolzer and Schreuer, *supra* note 79, p. 146 (CL-074).

¹¹⁶ *Biwaterv. Tanzania*, Award, ¶ 615 (CL-071).

¹¹⁷ *Yukos Universal Ltd. (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, July 18, 2014, ¶ 1578 (CL-096); see also *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, Mar. 3, 2010, ¶ 441 (CL-097) (finding that an investor held “throughout the term of his investment the legitimate expectation that Georgia would conduct itself vis-à-vis his investment in a manner that was reasonably justifiable and did not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination”).

- Colombia’s assessment of grossly disproportionate and irrationally-determined damages;
- Colombia’s changes in its damage theories during the CGR proceeding, without affording Claimants an opportunity to address them;
- Colombia’s retroactive application to Claimants of a statute broadening the definition of “fiscal manager,” and hence the CGR’s jurisdiction, adopted after the CGR proceeding had been pending for years, and after it was clear that Claimants would seek relief under the TPA on grounds, among others, that they were not fiscal managers; and
- Colombia’s failure to respect and protect Claimants contractual rights.¹¹⁸

60. As to the latter, legitimate expectations may also consist of specific commitments, such as contractual terms between the State and an investor, made by the State. In the words of the *Glencore* tribunal, which found such a violation by Colombia,

[legitimate] expectations arise when a State (or its agencies) makes representations or commitments or gives assurances, upon which the foreign investor (in the exercise of an objectively reasonable business judgement) relies, and the frustration occurs when the State thereafter changes its position as against those expectations in a way that causes injury to the investor.¹¹⁹

61. Here, too, FPJVC expected Colombia to uphold its rights under the Contract with Reficar, an arm of the Colombian state, including FPJVC’s rights to [REDACTED]

[REDACTED]

¹¹⁸ Request for Arbitration, ¶¶ 168 – 73. With regard to the retroactive application of Colombia’s new statutory standard, which came after the request for arbitration was filed, see the Application at ¶¶ 64-71.

¹¹⁹ *Glencore*, ICSID Case No. ARB/16/6, Award, ¶¶ 1366-67 (CL-005).

62. Legitimate expectations are of paramount importance to the fair and equitable treatment of investors.¹²⁰ Indeed, they “have been accepted in case law as a key and probably the most far-reaching element of the international standard.”¹²¹ As one recent ICSID tribunal held,

the breach of an expectation that a State would conduct itself impartially, regularly and reasonably does not represent a separate legal basis for finding a breach of the FET standard. The FET standard, in and of itself, establishes such an obligation. There is therefore no need to place this legal construct under the legitimate expectations rubric.¹²²

63. For all of these reasons, Claimants have established *prima facie* their FET claim.

B. The Expropriation Claim Meets the *Prima Facie* Test

64. Claimants are a contractual joint venture that invested in Colombia by entering into the Contract and performing under that agreement, including the establishment of a significant presence in Colombia through which those services were rendered. Article 10.7.1 provides that

[n]o Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (‘expropriation’), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 10.5.

65. Colombia has deprived FPJVC of two core Contract rights, including [REDACTED]

[REDACTED]

¹²⁰ See, e.g., *Waste Management v. Mexico*, Award, ¶ 98 (RL-096) (“In applying [the FET] standard [under customary international law] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”); *Merrill & Ring Forestry v. Canada*, Award, ¶ 233 (RL-105) (“[A]ny investor will have an expectation that its business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy objectives.”); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, Mar. 21, 2007, ¶¶ 67-68 (CL-098) (finding that legitimate expectations are relevant to the application of FET even if they could not, on their own, form a treaty violation outside of FET); see also Dolzer and Schreuer, *supra* note 79, p. 145 (CL-074) (“Specific representations play a central role in the creation of legitimate expectations.”).

¹²¹ Martins Paparinskis, *International Minimum Standard and Fair and Equitable Treatment* (OUP 2013), p. 251 (CL-099).

¹²² *Marfin Investment Group Holdings S.A. and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, July 26, 2018, ¶ 315 (CL-100).

66. Article 10.7 of the TPA provides that Colombia may not “expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization” except for certain exceptions.¹²³ TPA Annex 10-B states that an indirect expropriation occurs when “an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.” Pursuant to the TPA, among the factors to be considered in an indirect expropriation inquiry are:

[T]he economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

- The extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
- The character of the government action.¹²⁴

67. In fact, “[i]t is now a well-accepted principle of international law that expropriation may occur by a direct and deliberate formal taking, or indirectly, by measures resulting in a substantial deprivation of the use and value of the investment even though the actual title of the asset remains with the investor.”¹²⁵ As one ICSID tribunal explained, an indirect expropriation is a:

[C]overt or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.¹²⁶

68. In considering indirect expropriation claims, tribunals have required “some form of deprivation of the investor in the control of the investment, the management of day-to-day operation of the company, interfering in the administration, impeding the distribution of dividends,

¹²³ For a finding of indirect expropriation, the inquiry is whether a government’s interference deprived the investor, in whole or in significant part, of the use or reasonably-to-be-expected benefit of its investment.

¹²⁴ TPA, Annex 10-B, Expropriation ¶ 3 (CL-001).

¹²⁵ N. Blackaby & C. Partasides, *Redfern and Hunter on International Arbitration* (5th ed Oxford 2009), ¶ 8.81 (CL-101).

¹²⁶ See *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000, ¶ 130 (CL-102).

interfering in the appointment of officials and managers, or depriving the company of its property or control in total or in part.”¹²⁷

69. Colombia’s contention that “it is impossible – as a matter of law – for . . . specific contractual rights to be indirectly expropriated”¹²⁸ is contrary to long-standing jurisprudence on the subject. As early as 1926, the Permanent Court of International Justice ruled in *Certain German Interests in Upper Silesia* that “the duty to compensate in the event of expropriation cannot be evaded by . . . apply[ing] the concept only to certain kinds of property.”¹²⁹ The Iran-US Claims Tribunal concurred, finding that international law covers expropriation whether it ‘is formal or de facto and whether the property is tangible, . . . , or intangible, such as the contract rights involved in the present Case.’¹³⁰ As one ICSID tribunal explained, that “the Tribunal [cannot] accept the argument that the term ‘expropriation’ applies to *jus in rem*. The Respondent’s cancellation of the project had the effect of taking certain important rights and interests of the Claimants. In that regard, there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation thereof.”¹³¹ Another ICSID tribunal explained that “[t]here can be no doubt that contractual rights are capable of being expropriated, and a number of treaty cases have arisen out of contractual disputes. The same act that may violate a treaty may also violate a contract, or both the treaty and the contract. The fact that there is overlap does not prevent a tribunal from considering the act as a possible treaty breach.”¹³²

¹²⁷ *PSEG Global, Inc. and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007, ¶ 278 (CL-103).

¹²⁸ Memorial on Preliminary Objections, ¶ 219.

¹²⁹ *Case Concerning Certain German Interests in Polish Upper Silesia* (Germany v. Poland), Judgment, Aug. 25, 1925, ¶ 168 (CL-104).

¹³⁰ *Phillips Petroleum Co. Iran v. National Iranian Oil Co.*, IUSCT Case No. 39, Award No. 425-39-2, June 29, 1989, ¶ 76 (CL-105).

¹³¹ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, May 20, 1992, ¶ 165 (RL-168).

¹³² See, e.g., *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, Aug. 20, 2007, ¶ 7.5.4 (CL-106); see also *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, Jan. 17, 2007, ¶ 271 (CL-107) (contract rights can be expropriated based on a state’s termination of a contract by decree, or through a series of “sovereign acts designed illegitimately to end the concession.”); *Saipem v. Peoples’ Republic of Bangladesh*, ICSID Case No. ARB/05/07 (CL-108) (Holding that contractual rights had been expropriated by judicial action, noting that “[i]t is widely accepted under general international law that immaterial rights can be the subject of expropriation”); *European Media Ventures S.A. v. The Czech Republic*, UNCITRAL, Partial Award on

70. In situations like the present concerning a foreign investor’s contractual rights, ICSID tribunals have ruled that such rights can be expropriated based on a state’s termination of a contract by decree, or through a series of “sovereign acts designed illegitimately to end the concession.”¹³³ Here, Claimants’ contractual rights were expropriated by the imposition of a lawless decree requiring them to pay to Colombia many times the revenue they received for doing their work precisely in accordance with the Contract.¹³⁴ In sum, Claimants’ expropriation claim meets the *prima facie* test.

C. The Most-Favored-Nation Treatment Claim Meets the *Prima Facie* Test

71. Colombia, in objecting to the application of the umbrella clause from the Colombia-Swiss BIT, puts forth a series of arguments that, for all practical purposes, would render most-favored-nation clauses a nullity under international investment law by reading exceedingly restrictive conditions into the MFN clause that have no basis in the language of the TPA or otherwise.

1. The TPA provides for importation of substantive protections

72. TPA Article 10.4 provides:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Liability, July 8, 2009, ¶¶ 64-65 (CL-109) (finding that rights pursuant to a private contract were capable of being expropriated).

¹³³ See *Siemens v. Argentina*, Award, ¶ 271 (CL-107) (contract rights can be expropriated based on a State’s termination of a contract by decree, or through a series of “sovereign acts designed illegitimately to end the concession.”).

¹³⁴ *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, Oct. 30, 2017, ¶ 7.49 (CL-110).

73. In addition, a footnote to the Article confirms that “[f]or greater certainty, treatment . . . referred to in paragraphs 1 and 2 of Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements.” There is no corresponding language excluding substantive provisions.

74. Contrary to Colombia’s contentions, it is well established that MFN provisions may be used to import substantive treaty protections from other treaties. In fact, it is the animating principle—“the very essence”—of MFN provisions.¹³⁵ “MFN clauses allow for the importation of better substantive rights contained in other treaties entered into by the host State.”¹³⁶ Put another way, “MFN clauses elevate the level of protection in any given host State to the maximum level granted in any of that State’s investment treaties.”¹³⁷

MFN clauses—in particular those that refer simply to ‘better’ treatment or ‘all’ treatment, but possibly also those applying to ‘treatment related to the management, maintenance, use, or disposal of investment’ with or without a qualifier clarifying that investors must be ‘in similar situations’—can faithfully be interpreted as allowing covered investors to rely on better substantive standards of treatment granted in one of the host state’s third-country IIAs.¹³⁸

75. Thus, “[t]he weight of authority clearly supports the view that an MFN rule grants a claimant the right to benefit from substantive guarantees contained in third treaties.”¹³⁹

¹³⁵ *Vladimir Berschader and Moïse Berschader v. Russia*, Case No. 080/2004, Award, Apr. 21, 2006, ¶ 179 (CL-111) (“[I]t is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties[.]”); *White Industries Australia Ltd. v. The Republic of India*, UNCITRAL, Final Award, Nov. 30, 2011, ¶¶ 11.2.3-11.2.4 (CL-209) (importing a more favorable substantive provision does not upset the negotiated balance of the BIT but rather “achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause”).

¹³⁶ Patrick Dumberry, *The Importation of “Better” Fair and Equitable Treatment Standard Protection Through MFN Clauses: An Analysis of NAFTA Article 1103*, 14 *Trans’n'l Disp. Management J.* 1 (2017), pp. 2, 13-14 (CL-112).

¹³⁷ Stephan W. Schill, *The Multilateralization of International Investment Law* (CUP 2009), p. 142 (CL-113).

¹³⁸ Stephan W. Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, 111 *Am. J. Int'l L.* 914 (2017), p. 921 (CL-114).

¹³⁹ Dolzer and Schreuer, *supra* note 79, p. 211 (CL-074); see e.g., *ICS Inspection and Control Services Limited v. Argentine Republic*, PCA Case No. 2010-09, Award on Jurisdiction, Feb. 10, 2012, ¶ 286 (CL-115) (recognizing that “treatment” in MFN clauses encompasses substantive treatment provisions); see also *Ieva Kalnina, White Industries v. The Republic of India: A Tale of Treaty Shopping and Second Chances*, 9 *Transnat'l Disp. Mgmt.* 1 (2012), p. 6 (CL-116) (concurring that the importation of substantive provisions through MFN provisions is not controversial); J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012), p. 177 (CL-117); Scott Vesel, *Clearing a Path Through a*

76. Moreover, consistent with Article 31(1) of the Vienna Convention, TPA Article 10.4 “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁴⁰ Applying those interpretive rules, it is noteworthy both that the language of Article 10.4 *does not* contain a ban on importation of substantive treaty protections from other treaties, and further that it does— “[f]or greater certainty”¹⁴¹—contain an exclusion for resorting to dispute resolution mechanisms of other treaties.¹⁴²

77. Clearly then, the parties to the TPA contemplated the contours of the MFN provision when they negotiated the TPA’s language. And “[u]nder the well-established presumption *expressio unius est exclusio alterius*,”¹⁴³ the express *exclusion* of resort to dispute resolution mechanisms available under other treaties must be read as an *inclusion* of other types of provisions—namely substantive protections. In accordance with this maxim, another tribunal, for instance, held that an express exclusion of tax matters from MFN protection meant that resort to dispute resolution mechanisms under other treaties was permissible:

Article 7 expressly excludes the transfer of MFN-protection from other treaties with regard [inter alia, taxation] It presents a clear decision of the two States when concluding the BIT that the MFN clauses shall not apply to such taxation issues In view of the careful drafting of Article 8 and the limiting language therein, it can certainly not be presumed that the Parties “forgot” arbitration when drafting and agreeing on Article 7. Had the Parties intended that the MFN-clauses should also not apply to arbitration, it would indeed have been easy to add a sub-section (c) to that effect in Article 7. The fact that this was not done, in the view of the Tribunal, is further

Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties, 32 Yale J. Int’l L. 125 (2007), p. 163 (CL-118).

¹⁴⁰ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Art. 31(1) (RL-053) (“**Vienna Convention**”).

¹⁴¹ TPA, Art. 10.4 n.2 (CL-001).

¹⁴² In fact, whether or not to resort to dispute-resolution provisions (as opposed to importation of substantive protections) of third-party treaties is permissible has been the focus of much of the debate around MFN clauses. Dolzer and Schreuer, *supra* note 79, p. 211 (CL-074) (“The larger group of cases [in the MFN context] deals with the applicability of MFN clauses not to substantive guarantees but to dispute settlement. . . . [P]ractice in that field [unlike importation of substantive guarantees] is less straightforward and to some extent divided.”).

¹⁴³ *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, Apr. 29, 2004, ¶ 30 (CL-119).

confirmation that the MFN-clauses in Article 3 are also applicable to submissions to arbitration in other Treaties.¹⁴⁴

78. Similarly, another tribunal, relying on standard treaty structure alone, held that

[t]he text of the Treaty indicates that its drafters recognised a distinction between *substantive rights* in relation to investments, and *remedial procedures* in relation to those rights. The substantive rights in relation to *investments* are found in Articles II-VI of the Treaty, and the procedures for the resolution of *disputes* in relation to those rights are set out in Article VII. This distinction suggests strongly that the ‘treatment’ of ‘investments for which MFN rights were granted was intended to refer only to the scope of the *substantive rights* identified and adopted in Article II-VI.¹⁴⁵

79. The same structural inference further confirms that the MFN clause in the TPA imports substantive protections from other treaties. In the TPA, “the grant of substantive rights in relation to investments is established by the provisions of [Chapter 10, Section A, Articles 10.1-14 (“Investment”)], whereas procedures (or modalities) for resolving disputes in relation to the protection of those substantive rights are addressed in [Chapter Ten, Section B, Articles 10.15-28 (“Investor-State Dispute Settlement”)].”¹⁴⁶ As explained *supra*, the footnote to Article 10.4 makes this conclusion all the more apparent.

80. If further confirmation of this interpretation of Article 10.4 were necessary, the recent United States-Mexico-Canada Agreement, unlike the TPA, contains specific language addressing the importation of substantive obligations:

For the purposes of this paragraph: (i) the ‘treatment’ referred to in Article 14.5 (Most-Favored-Nation Treatment) *excludes provisions* in other international trade or investment agreements that establish international dispute resolution procedures or *impose substantive obligations*; and (ii) the ‘treatment’ referred to in Article 14.5 only encompasses measures adopted or maintained by the other Annex

¹⁴⁴ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, Oct. 1, 2007, ¶ 135 (CL-120); see also *National Grid plc v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, June 20, 2006, ¶ 82 (CL-121); *Suez Sociedad General de Aguas de Barcelona S.A. & InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006, ¶ 56 (CL-122); *Siemens v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004, ¶¶ 83-86 (CL-123).

¹⁴⁵ *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, July 2, 2013, ¶ 7.3.9 (CL-124).

¹⁴⁶ *Id.* at ¶ 7.3.1 (CL-124).

Party, which for greater clarity may *include measures adopted in connection with the implementation of substantive obligations* in other international trade or investment agreements.¹⁴⁷

81. The treaty negotiators for Colombia and the United States drafted the MFN language deliberately and know how to effectuate an exclusion of specific obligations from MFN importation. No such exclusion for substantive protections exists in the TPA, and Colombia's effort to have the Tribunal in effect amend the Treaty should be rejected.

2. The TPA permits importation of umbrella clauses

82. Colombia also argues that “even if the MFN clause could have be [*sic*] used as an importation mechanism as Claimants argue (*quad non*), it would not be possible to use the MFN clause of the Treaty to import a new right from an investment treaty concluded with a third country (as would be the case of the umbrella clause) that is not found in the base treaty.”¹⁴⁸ That rule, in effect, that a substantive provision can be imported into a treaty only if it is already there, is *not* found in the treaty language and is contrary to investor State jurisprudence, which recognizes that MFN clauses are designed precisely to import standards of treatment so long as there is no specific treaty language to the contrary.¹⁴⁹ As a case in point, the *Consutel Group v. Algeria* tribunal permitted the importation of an umbrella clause from another treaty.¹⁵⁰ Other tribunals have reached the same result¹⁵¹ and so have well-known scholars.¹⁵²

¹⁴⁷ USMCA, Chapter 14, n.22 (CL-208) (emphases added).

¹⁴⁸ Memorial on Preliminary Objections, ¶ 233.

¹⁴⁹ See, e.g., *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, ¶ 104 (CL-125); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, Aug. 27, 2009, ¶ 107 (CL-126); *White Industries v. India*, Final Award, ¶¶ 11.2.3-11.2.4 (CL-209); *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Award, Dec. 15, 2014, ¶¶ 540-55 (CL-127).

¹⁵⁰ *Consutel Group S.P.A. in Liquidazione v. People's Democratic Republic of Algeria*, PCA Case No. 2017-33, Final Award, Feb. 3, 2020, ¶¶ 358-59 (RL-131).

¹⁵¹ See, e.g., *EDF v. Argentina*, ICSID Case No. ARB/03/23, Final Award, June 11, 2012, ¶ 933 (CL-128); *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, Apr. 8, 2013, ¶ 396 (CL-129); *MTD v. Chile*, Award, ¶ 104 (CL-125).

¹⁵² Borzu Sabahi & Don Wallace, Jr., *National Treatment, Most-Favoured Nation Treatment, and Discriminatory Impairment, in Investor-State Arbitration* (Borzu Sabahi et al., OUP 2019), ¶ 17.62 (CL-130) (“The majority of the arbitral tribunals until recently have followed a similar analysis importing various protection standards such as fair and equitable treatment, full protection and security, the effective means, and umbrella clauses from other treaties[.]”); Stephan W. Schill, *Multilateralizing Investment Treaties through Most-Favourite-Nation Clauses*, 27 Berkeley J. Int'l L. 496 (2009), p. 524 (CL-131); Noah Rubins, Thomas-Nektarios Papanastasiou, & N. Stephan Kinsella, *The Substantive*

83. Yet another reason to permit the importation of an umbrella clause here is that several of Colombia’s investment treaties do contain umbrella clauses.¹⁵³ Accordingly, as expressed in one recent treatise, “to the extent that the host State has entered into at least one investment treaty that provides *pacta sunt servanda* coverage, the investor should be able to ‘import’ the third-party clause into the applicable instrument.”¹⁵⁴

84. Relatedly, Colombia also objects to the importation of an umbrella clause on the theory that the TPA provides for submission of only “investment agreement” disputes to arbitration,¹⁵⁵ and to permit reliance on an umbrella clause contained in another treaty would, according to Colombia, “expand the universe of contractual claims that could be submitted to arbitration under the Treaty.”¹⁵⁶

85. This objection runs contrary to Colombia’s preceding objection that importation of an umbrella clause would be a “new right” “not found in the base treaty.”¹⁵⁷ What is more, Colombia’s “public policy” rationale, *i.e.*, that umbrella clause importation is preempted by virtue of such clauses not being present in the contracting parties’ more recent investment treaties,¹⁵⁸ is unmoored from the reality that, as discussed *supra*, the TPA, and apparently all of the parties’ investment treaties, *do* contain MFN provisions. Importing a more favorable substantive provision does not upset the negotiated balance of the BIT—quite the opposite: “it achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause.”¹⁵⁹ Once again, had the parties intended to effectuate a broad preemption to exclude reliance on all other treaties’ umbrella clauses, they could and would have done so, as the United States-Canada-Mexico agreement does.

Law of Contemporary International Investment Protection, in International Investment, Political Risk, and Dispute Resolution: A Practitioner’s Guide (Noah Rubins et al., OUP 2020), ¶ 6.130 (CL-132).

¹⁵³ Colombia-Japan BIT, Dec. 9, 2011 (entered into force Nov. 9, 2015) (CL-137), Art. 4(3); Colombia-Swiss BIT, May 17, 2006 (entered into force June 10, 2009), Art. 4(3) (RL-043).

¹⁵⁴ Noah Rubins, et al., *supra* note 152, ¶ 6.145 (CL-132).

¹⁵⁵ Memorial on Preliminary Objections, ¶ 234.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at ¶ 233.

¹⁵⁸ *Id.* at ¶ 234.

¹⁵⁹ *White Industries v. India*, Final Award, ¶¶ 11.2.3-11.2.4 (CL-209).

86. Next, Colombia draws another unwarranted inference from the TPA’s language to the effect that “[e]ach Party shall accord . . . treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.”¹⁶⁰ Supposedly, “[t]his requires a comparison of the *factual situations of treatment actually accorded*.”¹⁶¹

87. Once again, Colombia fails to interpret the language itself, which on its face bears no indication that Colombia must have accorded to another investor or another investment “treatment no less favorable.” Rather, it merely refers in the present tense (“accord”), not the past tense, to such treatment “in like circumstances” with no qualifier restricting MFN protection to instances of a *de facto* comparator.

88. The ILC Draft Articles on MFN clauses state that “[t]he mere fact that the third State has not availed itself of the benefits which are due to it under the agreement concluded with the granting State cannot absolve the granting State from its obligation under the clause.”¹⁶² Investment tribunals likewise decline to require a concrete comparator¹⁶³ as does the WTO and the ICJ.¹⁶⁴ And commentators concur, finding that “[t]he beneficiary of the MFN clause, however, does not need to show that the third-party state (or its nationals) have, in fact, invoked the benefits of the third-party treaty. The mere existence of the third-party treaty is sufficient.”¹⁶⁵

¹⁶⁰ TPA Art. 10.4(1), 10.4(2) (CL-001).

¹⁶¹ Memorial on Preliminary Objections, ¶ 232 (emphasis in original).

¹⁶² ILC, *Draft Articles on Most-Favoured-Nation Clauses*, p. 23 (RL-060).

¹⁶³ See, e.g., *European American Investment Bank AG v. The Slovak Republic*, UNCITRAL, PCA Case No. 2010-17, Award on Jurisdiction, Oct. 22, 2012, ¶ 435 (CL-133); *Bayindir v. Pakistan*, Award, ¶¶ 156-58 (CL-126); *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010, ¶ 73 (CL-134).

¹⁶⁴ Schill, *supra* note 138, p. 924 (CL-114) (“The same result, namely that MFN clauses apply to better treatment under the granting state’s international agreements with third states, has also been consistently accepted by international courts and tribunals outside the investment context.”).

¹⁶⁵ Cohen Smutny, Petr Poláček & Chad Farrell, *The MFN Clause and Its Evolving Boundaries*, in *Arbitration Under International Agreements: A Guide to the Key Issues* (K. Yannaca-Small ed., OUP 2018), ¶ 23.20 (CL-135).

89. In contrast, the two awards cited by Colombia¹⁶⁶—in both of which Colombia’s counsel acted on behalf of Turkmenistan—are not in accord with jurisprudence on the subject. Unsurprisingly then, Professor Schill has explained that the reasoning in *İçkale* (and by extension *Cap* which interprets the same treaty) was “entirely sealed off” from how tribunals and authorities have applied and interpreted MFN clauses, calling the reasoning employed “highly problematic.”¹⁶⁷

90. Finally, Colombia objects to the importation of the umbrella clause from the Colombia-Swiss BIT because “while the Colombia-Switzerland BIT contains an umbrella clause, it does not contain a consent to submit to arbitration any claims that may arise from a breach of that umbrella clause.”¹⁶⁸ In support, Colombia cites to a single award—the decision in *Glencore*—where the tribunal found, outside of the MFN context, that “Colombia has given its consent to arbitrate investment disputes which may arise from the Treaty, except for those which fall under the Umbrella Clause.”¹⁶⁹ Here, in contract, there is no such exclusionary language in the TPA, and Claimants are only seeking to import the umbrella clause in the Colombia-Swiss BIT—the consent to jurisdiction is still based on the TPA.¹⁷⁰ Thus, *Glencore* is inapposite here.

3. Colombia’s other BITs include umbrella clause

91. In the alternative, Claimants note that Colombia’s investment treaty with Japan also includes an umbrella clause.¹⁷¹ Article 4.3 states:

Each Contracting Party shall observe any obligation deriving from a written agreement concluded between its central government or agencies thereof and an investor of the other Contracting Party with regard to specific investments by the investor, which the investor

¹⁶⁶ *İçkale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, Mar. 8, 2016 (CL-136); *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, May 4, 2021 (RL-114).

¹⁶⁷ Schill, *supra* note 138, p. 930 (CL-114).

¹⁶⁸ Memorial on Preliminary Objections, ¶ 235.

¹⁶⁹ *Glencore*, ICSID Case No. ARB/16/6, Award, ¶ 1003 (CL-005).

¹⁷⁰ See Colombia-Swiss BIT, Art. 11(3) (RL-043) (“[E]ach Party hereby gives its unconditional and irrevocable consent to the submission of an investment dispute to international arbitration in accordance with paragraph 2 above, except for disputes with regard to Article 10 paragraph 2 of [the Treaty]”).

¹⁷¹ Colombia-Japan BIT (CL-137).

could have relied on at the time of establishment, acquisition or expansion of such investments.

92. Further, unlike the Colombia-Swiss BIT, the Colombia-Japan BIT does not withhold consent to arbitration for umbrella clause claims.¹⁷²

93. Thus, Colombia’s dispute resolution process objection is beside the point, and Article 4.3 of the Colombia-Japan BIT provides an alternate basis for Claimants to invoke umbrella clause protection.

D. The National Treatment Claim Meets the *Prima Facie* Test

94. Article 10.3 of the TPA requires Colombia to accord foreign investors “treatment no less favorable than that it accords, in like circumstances, to its own investors” and “to investments in its territory of its own investors.” Claimants have stated a *prima facie* claim that Colombia has breached this provision.

95. As set forth in the Request for arbitration, in June 2018, the CGR dismissed all charges against the Ecopetrol Board of Directors, which is comprised of prominent Colombian nationals, stating that the board’s members did not qualify as “fiscal managers” under Law 610 because they lacked *exclusive* decision-making authority over the expenditure of funds on the Project, and that definitive decision-making authority was vested in Reficar.¹⁷³ The CGR did not dismiss the charges against FPJVC—claiming, implausibly, that FPJVC, unlike the board members, *was* a fiscal manager. Given that a fiscal manager under Law 610 is, by definition, a person or entity with power over the expenditure of public funds—which the Ecopetrol directors had, and FPJVC did not—the only possible explanation for the CGR’s decision is bias against non-Colombians, violating both the national treatment and FET obligations under the TPA. Indeed, even on the face of the order itself, this purported distinction falls apart: the CGR described the

¹⁷² *Id.*, Art. 28 (CL-137) (“1. Each Contracting Party hereby consents to the submission of investment disputes by a disputing investor to arbitration set forth in paragraph 5 of Article 27 chosen by the disputing investor, except for disputes with regard to paragraph 3 of Article 4.

(2. For investment disputes with regard to paragraph 3 of Article 4: (a) necessary consent for the submission to the arbitration will be given by the competent authority of the disputing Party set out in Article 41; and (b) in cases where the written agreement referred to in paragraph 3 of Article 4 stipulates a dispute settlement procedure, such procedure shall prevail over this Chapter.”).

¹⁷³ See Request for Arbitration, ¶¶ 174-78; Application, ¶¶ 50-51 and n. 42.

involvement of both the Colombian national board members and the FPJVC as “provid[ing] advice and consultation to Reficar.”¹⁷⁴ And critically, the Ecopetrol Board of Directors, unlike FPJVC, approved the Change Controls.

96. These are the facts as alleged, which pursuant to TPA Article 10.20.4(c) this “tribunal *shall* assume to be true,” and which are to “be construed liberally [such that] in cases of doubt or uncertainty as to the scope of a claimant’s allegation(s), any such doubt or uncertainty should be resolved in favour of the claimant.”¹⁷⁵

97. Colombia, in arguing for dismissal of the national treatment claim, not only ignores the above facts but also, once more, the applicable legal standard. Specifically, Colombia asserts that because “both natural persons . . . and juridical persons . . . , of Colombian and foreign nationality, were charged,” FPJVC could not have received treatment no less favorable than that accorded to those Colombian persons.¹⁷⁶ That contention, however, does not address the unequal dismissal based on nationality. More important for present purposes, such factual issues prevent dismissal on a *prima facie* review.¹⁷⁷

98. Colombia goes so far as to twice argue that the “like circumstances” element of a national treatment claim fails because fiscal management did not play a role in the CGR’s decision to drop the charges against the Ecopetrol directors. According to Colombia, the charges were dropped because “no willful or grossly negligent conduct was found, and not because such members were not considered to have exercised fiscal management.”¹⁷⁸ The CGR, however, said otherwise, expressly stating that fiscal management was a primary consideration for dropping the charges. According to a publicly-available CGR publication that Colombia extensively cites for “Background”, Ecopetrol’s board members were exonerated because “the element of gross negligence required by the law was not established,” and “because the fiscal responsibility over

¹⁷⁴ Compare excerpts from CGR Charge at 4441-4458 (C-001) (supplemented with additional pages), *with id.* at 3474, 3579-80, 3715 (C-001) (supplemented with additional pages).

¹⁷⁵ *RSM v Grenada*, Award, ¶ 6.1.3 (CL-063).

¹⁷⁶ Memorial on Preliminary Objections, ¶ 226.

¹⁷⁷ *RSM v Grenada*, Award, ¶ 6.1.3 (CL-063).

¹⁷⁸ Memorial on Preliminary Objections, ¶ 226 & n.451. *See also id.* at ¶ 145.

the control and execution of the investments was a task for the board of Reficar.”¹⁷⁹ This is consistent with the text of Auto 773, the fiscal liability charge.¹⁸⁰ But more importantly, Colombia’s implausible explanation of the favorable treatment given to its own nationals hardly constitutes a basis for terminating the case in advance of a hearing on the merits.

99. Colombia’s remaining objection to the national treatment claim is also poorly conceived. The bulk of Colombia’s “authorities” consist of citations to non-party submissions in pending, undecided investor-state disputes and mostly *without* explanation as to what those submissions, even if deemed persuasive, would stand for other than that Article 10.3 means what it states.¹⁸¹

100. Similarly, Colombia’s citations to a total of three arbitral awards shed no light on why Claimants’ national treatment claim should not proceed to the merits stage. The citation to *S.D. Myers* ignores over twenty years of jurisprudence, treaty practice, and scholarship on the subject of national treatment.¹⁸² Besides, here, unlike in *S.D. Myers*, “the measure, on its face,” *does* “appear to favour [Colombia’s] national[s] over non-nationals.”¹⁸³ In another early NAFTA case cited by Colombia, *Feldman v. Mexico*, the tribunal actually found a national treatment violation—a fact somehow omitted from the Memorial.¹⁸⁴ Finally, the national treatment claim in *Casinos Austria v. Argentina* is entirely different from the one advance here. As that tribunal noted, the comparison there was “of conditions between the tender process in 1999/2000 and the

¹⁷⁹ See **R-49**, at 45. This CGR publication remains publicly available on the CGR’s website. See https://www.contraloria.gov.co/documents/20181/472298/Libro_grandes+hallazgos+CGR.pdf/6b2543f3-4faa-40c8-900d-5f47d08180ff (last visited October 5, 2021) (**C-012**).

¹⁸⁰ See Auto 773 of June 5, 2018 at 4442, 4443, 4444, 4446, 4447, 4450, 4452, 4454, 4456, and 4457 (**C-013**).

¹⁸¹ Memorial on Preliminary Objections, ¶ 227 & n.453 (citing four pending cases *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6; *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/2; *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2; *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, Case No. 2018-55).

¹⁸² Memorial on Preliminary Objections, n.456.

¹⁸³ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, Nov. 13, 2020, ¶ 252 (**CL-138**).

¹⁸⁴ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1. Award, Dec. 16, 2002, ¶ 187 (**CL-207**) (“[T]he Tribunal concludes that Mexico has violated the Claimant’s rights to non-discrimination under Article 1102 of NAFTA.”).

award of new operating licenses in 2013/2014,” which ran counter to “ensur[ing] equal treatment . . . at any given time, not to freeze market regulation over time.”¹⁸⁵

101. In conclusion, the recognized “purpose of the [national treatment] clause is to oblige a host state to make no negative differentiation between foreign and national investors when . . . applying its rules and regulations and thus to promote the position of the foreign investor to the level accorded to nationals.”¹⁸⁶ It is of that obligation that Colombia ran afoul here on the facts alleged. Colombia’s attempt to summarily dispose of the allegations has no merit and should be rejected.

E. The Breach of an Investment Agreement Claim Meets the *Prima Facie* Test

102. Based on an admitted “cursory analysis,” Colombia argues that Claimants have not stated a claim for breach of an investment agreement because (i) the Contract is not an “investment agreement”, (ii) the Contract was not entered into by a “national authority of a Party”, and (iii) that this Tribunal does not have jurisdiction to hear purely contractual claims alleging breach of the Contract.¹⁸⁷ Colombia is mistaken on all counts.

103. *First*, the Contract is an investment agreement. TPA Article 10.16.1(a)(i)(C) allows the Claimants to “submit to arbitration under this Section a claim that the respondent has breached . . . an investment agreement,” which Article 10.28 defines as:

[A] written agreement between a national authority of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor: (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale; (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines,

¹⁸⁵ *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, June 29, 2018, ¶ 250 (CL-139).

¹⁸⁶ Dolzer and Schreuer, *supra* note 79, p. 198 (CL-074).

¹⁸⁷ Memorial on Preliminary Objections, ¶¶ 240-250.

that are not for the exclusive or predominant use and benefit of the government.

104. As set forth in the Request for Arbitration, the Contract is an “investment agreement” because it was executed between, on one hand, Reficar, a “State entity” as defined by Colombian law, and a “national authority of a Party,” as defined by the TPA, and on the other hand, FPJVC, an “investor of another Party.”¹⁸⁸ Additionally, under Colombian law, the Contract is a “State Contract” – given that one of the parties is a state entity.¹⁸⁹ The Contract also concerns the undertaking of the State’s infrastructure – i.e. the expansion and refurbishment of one of the State’s oil refineries – with respect to natural resources as the purpose of the Project was to “improve the quality of the fuels to meet Colombian and international environmental specifications” by producing “ultra low sulfur gasoline and diesel” that would boost the supply of “environmentally clean more fuels ... to meet Colombian demand and then export to Caribbean and US Markets.”¹⁹⁰ Agreements similar to the Contract have frequently been recognized as “investment agreements” by international tribunals.¹⁹¹

105. Colombia argues, however, that the Contract is not an investment agreement because Claimants did not establish or acquire a covered investment other than the written agreement itself.¹⁹² Colombia further claims that the subject matter of the claim and the claimed damages does not directly relate to the covered investment established or acquired in reliance on the investment agreement, as required by Article 10.16.1.¹⁹³ Neither of these contentions has merit.

¹⁸⁸ Request for Arbitration, ¶¶ 203-05.

¹⁸⁹ See Ley 80 de 1993, Articles 2 and 13 (CL-140).

¹⁹⁰ See Contract at Appendix 6 (Description and Scope of the PMDC) (C-007).

¹⁹¹ See *PSEG Global Inc., the North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, June 4, 2004 (CL-141) (finding that contract involving the development of a lignite-fire electric power plant was an investment agreement); *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, July 1, 2004 (RL-169) (finding that an oil exploration and production participation contract between a California company and a State-owned corporation of Ecuador is an investment agreement under the Ecuador-US BIT).

¹⁹² Memorial on Preliminary Objections, ¶ 244.

¹⁹³ *Id.*

106. As Claimants explained in the Request for Arbitration, in reliance on the Contract, “Claimants invested significant amounts of time, capital, personnel, and labor in [the] Colombian territory.”¹⁹⁴ As also further discussed *infra*, in reliance on the investment agreement, Claimants provided various goods and services to Colombia.¹⁹⁵ Article 10.28 defines investment broadly as “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” Examples of an investment include *inter alia* tangible, intangible, and related property rights.¹⁹⁶ Other tribunals have found such know-how, goods, and services to be an investment.¹⁹⁷ Thus, Claimants have made an additional covered investment in reliance on the Contract, making it an investment agreement.

107. It is equally not true that the subject matter of Claimants’ claims and damages do not relate to the time, capital, personnel, goods, and labor provided in reliance on the investment agreement. The CGR Decision is premised on the argument that Claimants were grossly negligent in providing their services and therefore must pay Colombia nearly a billion dollars paid to the actual contractor, Chicago Bridge & Iron (“CBI”), based on the fact that the final cost of the project exceeded CBI’s initial estimate. It cannot seriously be disputed that the impropriety of the CGR Decision is at the heart of this arbitration, and arises directly out of FPJVC’s investments. Claimants’ claims and damages are therefore directly related to the covered investment provided in reliance on the Contract (which is an investment agreement).

108. *Second*, Reficar is a national authority of Colombia. “National authority” in the TPA refers to “an authority at the central level of government,”¹⁹⁸ which the TPA defines “for Colombia, [as] the national level of government.”¹⁹⁹ As explained in the Request for Arbitration, Colombia, through its internal laws, has delegated to Ecopetrol and its wholly owned subsidiary Reficar, the signatory to the Contract, “governmental authority,” including the ability to “approve

¹⁹⁴ Request for Arbitration, ¶ 29.

¹⁹⁵ See ¶¶ 152-153 *infra*.

¹⁹⁶ TPA, Art. 10.28 (CL-001).

¹⁹⁷ See ¶¶ 154-155 *infra*.

¹⁹⁸ TPA, Art. 10.28 n.17 (CL-001).

¹⁹⁹ *Id.* at Art. 1.3.

commercial transactions.”²⁰⁰ By law, Colombia owns all hydrocarbons found within its national territory.²⁰¹ The National Hydrocarbons Agency (or *Agencia Nacional de Hidrocarburos*) manages the extraction, sale, and leasing of those natural resources as well as the supply of energy for the benefit of Colombia and various Colombian-owned and controlled entities, including Ecopetrol.²⁰² Before 2003, Ecopetrol had responsibility for administering the hydrocarbons reserves of Colombia.²⁰³ Under Colombian law, Ecopetrol has been granted the function of concluding contracts for the exploration, exploitation, refinement, transportation, distribution, and commercialization of hydrocarbons.²⁰⁴ Although there is no actual delegation of the functions of the National Hydrocarbons Agency to Ecopetrol, that does not take away from the fact that Ecopetrol is part of the Colombian government and conducts its activities with the purpose of generating revenue for the State, its majority shareholder. That purpose generally extends to its subsidiaries, like Reficar.

109. [REDACTED]

²⁰⁰ *Id.* at Art. 10.1.2. Request for Arbitration, ¶¶ 194-195.

²⁰¹ Under article 2 of Decree 1056 of 1953, “oil is the property of the Nation (...).” State property over oil was reaffirmed by article 332 of the Colombian Constitution, which states that “The State is the owner of the subsoil and of the non-renewable natural resources (...).” According to the Colombian Constitutional Court, the concept of non-renewable natural resources includes, among others, precious metals, and fossil fuels. Colombian Constitutional Court, Judgment C-221/97, April 29, 1997, No. D-1458, at 20 (CL-142).

²⁰² According to Article 1.2.1.1.1. of Decree 1073 of 2015 (CL-143), “The National Hydrocarbons Agency has as its objectives integrally administering the hydrocarbons reserves and resources property of the Nation, promoting the optimal and sustainable exploitation of hydrocarbon resources, and contributing to the national energetic security.” Separately, Article 3.3. of Decree 714 of 2012 (CL-144) assigns to the Agency the function of designing, promoting, entering into, and administering contracts for the exploration and exploitation of hydrocarbons that belong to the Nation, with the exception of the association contracts concluded by Ecopetrol before December 31, 2003.

²⁰³ Decree 1760 of 2003 (CL-145) took away Ecopetrol’s power to administer hydrocarbon reserves and gave it to the National Hydrocarbons Agency. This is why, under Article 3.3. of Decree 714 of 2012 (CL-144), association contracts of Ecopetrol for the exploration and exploitation of hydrocarbons concluded before December 2003 are still administered by Ecopetrol and not by the National Hydrocarbons Agency. Contracts after 2003 are concluded and administered by the agency.

²⁰⁴ In a brief filed before the Constitutional Court, Ecopetrol’s General Counsel explained that Ecopetrol’s activities serve the public because their purpose is to generate revenue for the State. Colombian Constitutional Court, Judgment SU 095/18 (brief filed by Fernan Ignacio Bejarano, General Counsel of Ecopetrol), October 11, 2018, No. T-6.298.958 at 282-283 (CL-146).

[REDACTED]²⁰⁵ Furthermore, as a subsidiary of Ecopetrol, Reficar’s voting stock is owned 88% by Colombia and its board, and thereby its CEO, is majority appointed and controlled by Colombia.²⁰⁶ Colombia, throughout the relevant period, has appointed high-ranking government officials to Ecopetrol’s board and, in turn, also to Reficar’s board.²⁰⁷ Colombia’s law on public procurement provides that mixed economy corporations in which the State has a majority stake are public entities for the purposes of that law.²⁰⁸ As such, Reficar’s Contract with FPJVC must be attributed to Colombia.

110. “[T]he practice of tribunals is consistent with the position that delegating the state’s activities to separate entities will not permit avoidance of responsibility for breach of a treaty.”²⁰⁹ Specifically, under ILC Article 5, any instance in which an entity is “empowered by the law of that State to exercise elements of the governmental authority”, and actually exercises that authority, is attributable to the state.²¹⁰ Moreover, ILC Article 8 makes clear that any entity’s conduct “shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”²¹¹ The Commentaries to the ILC Articles add that “the three terms

²⁰⁵

[REDACTED]

²⁰⁶ Request for Arbitration, ¶¶ 19-21. Virtually all the rest of Reficar’s stock is owned by Colombian public pension funds.

²⁰⁷ From 2006 to the present, Reficar’s Board of Directors has included Colombia’s Minister of Mines, Vice Minister of Mines, Director or Special Administrative Unit for Pension Management and Contributions to Social Protection, Director of the National Mining Agency, Vice Minister of Energy, and the Executive Director of the Energy and Gas Regulation Commission. Reficar’s Board of Directors also includes the CEO, CFO, Downstream Vice President, and Senior Financial Officer of Ecopetrol. Similarly, from 2010 to 2018, Ecopetrol’s Board of Directors has consisted of Colombian government officials, including Colombia’s Director of National Planning Department, Minister of Finance, Minister of Mines and Energy, Minister of Internal Affairs, Finance Regulation Director at the Ministry of Finance, Technical Vice Minister at the Minister of Finance, and Minister of Health. *Id.*, ¶ 21.

²⁰⁸ See Ley 80 de 1993, Article 2(1) (CL-140).

²⁰⁹ Dolzer and Schreuer, *supra* note 79, p. 225 (CL-074).

²¹⁰ ILC Articles, p. 42 (CL-058) (“The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”).

²¹¹ *Id.* at p. 47

‘instructions’, ‘direction’ and ‘control’ are *disjunctive*; it is sufficient to establish any one of them.”²¹²

111. In any event, the attribution issue is not appropriate for decision at this phase of the arbitration. “[A]s a practical matter, th[e] question of [attribution] is usually best dealt with at the merits stage, in order to allow for an in-depth analysis [to the extent warranted] of all the parameters of the complex relationship between certain acts and the State.”²¹³ “[I]t is not for the Tribunal at the jurisdictional stage to examine whether the case is in effect brought against the State and involves the latter’s responsibility. An exception is made in the event that it is manifest that the entity involved has no link whatsoever with the State.”²¹⁴ Colombia could not possibly oppose attribution under that test under any standard of proof, let alone a “manifest” lack of any link to the acts at issue.

112. Claimants have established that *prima facie* Reficar’s conduct is attributable to Colombia, and that Claimants therefore entered into the Contract with a national authority of Colombia.

113. *Third*, Article 10.6.1 of the TPA *does* give the Tribunal jurisdiction for claims of breach of an investment agreement, and Claimants are not alleging claims that fall within the ICC

²¹² *Id.* at p. 48 (Comment 7 to Article 8) (emphasis added).

²¹³ *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, ¶ 144 (RL-128) (citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 28, 2006, ¶ 85); *see also* Csaba Kovács, Attribution in International Investment Law (Kluwer 2018), p. 297 (CL-148) (“As a rule, the international law attribution rules should be applied only in the merits phase, typically before determining whether the State has breached an international law obligation.”).

²¹⁴ *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, Feb. 28, 2020, ¶ 303 (CL-149) (quoting *Hamester*, ¶ 144). Other tribunals have gone so far as to adopt an irrebuttable attribution presumption at the jurisdictional stage. *See, e.g., Consutel v. Algeria*, Final Award, ¶ 316 (RL-131) (“Le Tribunal estime que les questions d’attribution discutées entre les parties sont des questions de fond et non de compétence. Par conséquent, sous réserve de ce qui va suivre, le Tribunal doit, au stade de son analyse sur la compétence, tenir pour acquis que les actes et omissions reprochés à Algérie Telecom peuvent être attribués à la Défenderesse.”); *cf. Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, Mar. 5, 2008, ¶ 166 (CL-150) (“[I]t is not for the Tribunal at the jurisdictional stage to examine whether the acts complained of give rise to the State’s responsibility, except if it were manifest that the entity involved had no link whatsoever with the State, which is not the case here. This is a matter for the Tribunal to decide when assessing the merits of the dispute. If it becomes necessary . . . , the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83.”).

Tribunal’s jurisdiction. Colombia’s argument that Article 10.16.1 does not give the Tribunal jurisdiction to hear contractual claims regarding an investment agreement is difficult to follow given that Colombia concedes “that provision only grants jurisdiction to a tribunal constituted under the Treaty itself to hear claims of alleged breaches of substantive obligations under the Treaty or an investment agreement...”²¹⁵ Article 10.16.1(a) is also clear on its face: “the claimant, on its own behalf, may submit to arbitration under this Section a claim (i) that the respondent has breached ... (C) an investment agreement; and (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach.” Notably, Colombia fails to quote the actual provision.²¹⁶

114. Further, Claimants are not asking the Tribunal to determine whether Reficar breached the Contract. [REDACTED]

[REDACTED] Rather, Claimants’ claims relate to CGR’s, and thus Colombia’s, actions which constitute breaches of the Contract. [REDACTED]

[REDACTED] in an evident effort to avoid the substantive protections for which Claimants bargained.²¹⁷

115. For all the above reasons, Claimants have properly submitted, per Article 10.16.1(a)(i)(C), “a claim that the respondent has breached . . . an investment agreement[.]”

V. CLAIMANTS HAVE SUFFERED LOSS OR DAMAGE RESULTING FROM COLOMBIA’S BREACHES

116. Colombia alleges that loss or damage arising out of its breaches must exist at the time of filing the Notice of Arbitration, and that Claimants have not suffered any loss or damage to date thereby rendering their claims inadmissible.²¹⁸ According to Colombia, because Claimants have not made any payments in the Fiscal Liability proceedings, Claimants have not been

²¹⁵ Memorial on Preliminary Objections, ¶ 248 (emphasis added).

²¹⁶ Colombia also states that Claimants have either not requested any relief for Colombia’s breaches of the Contract or seek relief that is barred by the TPA. *See id.*, ¶ 249 n. 503. As discussed in Section VI, *infra*, the relief that Claimants have requested is allowed pursuant to the TPA.

²¹⁷ Colombia also bases part of its objection on a misreading of the Request for Arbitration. *See id.*, ¶ 248. Claimants do not assert that the Contract is an investment agreement that binds Colombia [REDACTED], rather that the Contract is an investment agreement that Claimants relied [REDACTED].

²¹⁸ Memorial on Preliminary Objections, ¶¶ 251-254.

damaged.²¹⁹ Colombia also asserts that the loss or damage incurred must be to the covered investment, rather than the investor, and Claimants have not and cannot allege damages to the Contract.²²⁰

117. Colombia's assertion that the damages must be to the covered investment, rather than the investor, are based on the faulty premise that only investments, and not investors, are covered by the TPA's protections.²²¹ Claimants have already addressed that contention above.

118. In an effort to concoct an argument that Claimants suffered no damage, Colombia misrepresents the nature of Claimants' investment and spends several pages explaining that FPJVC was paid for services invoiced, as required by the Contract, and that it was reimbursed for expenses incurred.²²² As with many of Colombia's other arguments, this is beside the point.

119. *First*, there is more to Claimants' investment than what Colombia has presented. As explained in the Request for Arbitration and in this Counter-Memorial, Claimants contributed know-how, employed additional resources to implement the Project as directed by Reficar, and maintained a branch office of PCI in Colombia, all of which reflects Claimants' investment in Colombia.²²³

120. Additionally, the amount of the CGR Decision, if enforced against Claimants (who are subject to joint and several liability under Colombian law), would not only erase any profit earned in connection with the Project under the Contract, [REDACTED], [REDACTED].²²⁴ It appears to be Colombia's position that FPJVC has no claim until Colombia succeeds in collecting the amount assessed by the CGR, [REDACTED], but that defies both law and logic.

²¹⁹ *Id.*, ¶¶ 255-257.

²²⁰ *Id.*, ¶¶ 258-260.

²²¹ *Id.*

²²² Memorial on Preliminary Objections, ¶ 39. *See also id.*, ¶ 53 (setting forth the amounts paid to FPJVC).

²²³ Request for Arbitration, ¶¶ 15-16, 29. CWS-2, Steve Conway at ¶ 7.

²²⁴ CWS-2, Steve Conway at ¶¶ 10-12. CWS-3, Thomas Grell at ¶¶ 10-12.

121. Colombia is wrong in positing that the only way Claimants can incur loss or damage is by making a payment in response to the improper fiscal liability proceedings or by having its assets seized. As explained in its Request for Arbitration, and not contested by Colombia, Claimants have already incurred both reputational damages resulting from being named in the fiscal liability proceedings and significant attorney’s fees in defending itself in those proceedings.²²⁵ The existence of the CGR Decision itself is also sufficient basis for jurisdiction. The CGR Decision is now final, and Colombia has admitted to beginning the search for Claimants’ assets against which to collect.²²⁶

122. Moreover, in *Mobil Investments v. Canada*, the Tribunal, relying on *Grand River*, confirmed “that it is not required that there be an ‘immediate outlay of funds’ for there to be damage which can be compensated under NAFTA Article 1116. A call for payment may be sufficient.”²²⁷ The Tribunal also explicitly confirmed that the Tribunal had jurisdiction to compensate “for damages that accrued after the Notice of Arbitration but in the course of the proceedings....”²²⁸

123. Claimants have already suffered loss or damage resulting from Colombia’s breaches which continue to accrue through the present day, and to the extent that Colombia asserts Claimants’ breaches can only be considered as of the Notice of Arbitration, this contention is plainly wrong too.

VI. THE REMEDIES REQUESTED ARE WITHIN THE TRIBUNAL’S POWER

124. Colombia also argues that Claimants seek relief that this Tribunal is not empowered to grant. Specifically, Colombia claims the Tribunal may not “(A) award moral damages; (B)

²²⁵ Request for Arbitration, ¶ 206.

²²⁶ See Application, ¶¶ 21-22, 90; Resp. Answer, ¶¶ 33, 39-40. Strikingly, in the *Glencore* case, which awarded the claimant an amount equal to the amount assessed by the CGR in a fatally flawed proceeding and paid by the claimant, Colombia took exactly the opposite tack and argued that the claim was barred because Glencore had not sought to prevent Colombia from collecting the flawed award. See *Glencore*, ICSID Case No. ARB/16/6, Award, ¶¶ 1562, 1579, 1583-1584 (CL-005).

²²⁷ *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, ¶ 428 (CL-151).

²²⁸ *Id.* at ¶ 430 (CL-151).

award non-monetary damages or injunctions; nor (C) issue an offsetting award.”²²⁹ Not true. Claimants are entitled to the remedies sought and the Tribunal may, and should, award them.

A. Moral Damages Are Available Under Article 10.26 of the TPA

125. Colombia, in arguing that this Tribunal may not grant moral damages, characterizes such damages as punitive.²³⁰ Correctly understood, moral damages are compensatory, not punitive, thus providing a remedy for the considerable damage to Claimants’ reputation caused by Colombia’s actions.²³¹

126. Colombia points to the TPA’s text but cites no actual treaty language for what amounts to its *lex specialis* argument. That is because “[f]or the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.”²³²

127. No such conflict is present here. Rather, TPA Article 10.26.1 provides, *inter alia*, that “[w]here a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest[.]” Article 10.26.3, in turn, makes clear that “[a] tribunal may not award punitive damages.” As such, the TPA—like the U.S. Model BIT’s identical damages clause²³³—affirms simply the long-running precepts of international law with respect to damages: “[b]oth according to the official commentary to the [International Law Commission] and to international legal doctrine, compensation is not concerned with punishing the responsible State and is not exemplary but restorative in nature.”²³⁴ In particular, the ILC provides that “the award of punitive damages is not recognized in international law,” and further that “satisfaction is not intended to be punitive in

²²⁹ Memorial on Preliminary Objections, ¶ 262.

²³⁰ *Id.*, ¶¶ 263-68.

²³¹ See Request for Arbitration, ¶¶ 206-14.

²³² ILC Articles, Art. 55, comment 4 (CL-058).

²³³ 2012 U.S. Model BIT, Art. 34.1 (CL-152) (“Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest”); Art. 34.3 (“A tribunal may not award punitive damages.”).

²³⁴ Ceren Zeynep Pirim, *Reparation by Pecuniary Means of Direct Moral Damages Suffered by States as a Result of Internationally Wrongful Acts*, 11 J. Int’l Disp. Settlement 242, 258-59 (2020) (CL-153).

character, nor does it include punitive damages.”²³⁵ Indeed, the identical Article 34 of the U.S. Model BIT is interpreted the same way: “Article 34(3) prohibits an award of punitive damages, consistent with the principle that a loss arising out of State responsibility requires full reparation, but no more.”²³⁶ Accordingly, both international law and the TPA *exclude* punitive damages, but “[t]here is no controversy as to whether moral damages can be obtained under classical principles of public international law.”²³⁷

128. In contrast, neither international law nor the TPA exclude *moral* damages. That is because, contrary to Colombia’s attempt to conflate the two,²³⁸ moral damages are not punitive. Professor Dumberry, for example, remarks that “[m]oral damages, of course, must be distinguished from punitive damages, a concept which is not recognized under international law.”²³⁹ Another treatise, cited by Colombia’s counsel here and co-authored by one of its partners,²⁴⁰ agrees that “[m]oral damages are normally distinct from punitive damages.”²⁴¹ That partner goes on to explain elsewhere that “[t]he term ‘moral’ damage, in public international law, is used to refer to those categories of harms that are non-material or non-financial. Three types of non-material harms may be distinguished [, including] . . . Damage to reputation.”²⁴² Compensation for such harm “should not be considered punitive”²⁴³ because “the purposes of

²³⁵ ILC Articles, pp. 111, 107 (CL-058).

²³⁶ Lee M. Caplan & Jeremy K. Sharpe, *United States*, in *Commentaries on Selected Model Investment Treaties* (Chester Brown ed., Oxford 2013), p. 83 (RL-037).

²³⁷ McLachlan, et. al., *supra* note 84, ¶ 9.148 (CL-081); *see also* Pirim, *supra* note 234, at 244-45 (CL-153) (“Thus, the existence and status of the concept of moral damage in public international law is uncontroversial.”).

²³⁸ Memorial on Preliminary Objections, ¶¶ 263-68.

²³⁹ Patrick Dumberry, *Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration* (Christina L. Beharry ed., Brill 2018), p. 158 (CL-154).

²⁴⁰ Memorial on Preliminary Objections, ¶ 264 n. 524 (citing Borzu Sabahi, Noah Rubins & Don Wallace, Jr., *Investor-State Arbitration* (Oxford 2019)).

²⁴¹ Borzu Sabahi, Noah Rubins & Don Wallace, Jr., *Investor-State Arbitration* (Oxford 2019), ¶ 21.93 (RL-140) (citing Stephen Wittich, *Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility*, 3 *Austrian Rev. Int’l & Eur. L.* 101, 150-51 (1998)).

²⁴² Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice*, ¶ 6.2.3 (RL-142).

²⁴³ *Id.*, p. 147 (RL-142); *see also* Juan Pablo Moyano Garcia, *Moral Damages in Investment Arbitration: Diverging Trends*, 6 *J. Int’l Disp. Settlement* 485, 496 (2015) (RL-154) (“The general objective of moral damages is to repair non-material injuries, not to enrich the claimant or to punish the respondent. Even though this statement might appear simple, in a few cases tribunals and claimants alike have misconstrued the reparatory nature of moral damages, and have attempted to equate them to a different legal concept such as punitive damages or material damages.”).

punitive and moral damages are different. While punitive damages are motivated by deterrence and punishment, moral damages aim at compensating the injury.”²⁴⁴

129. Excluding moral damages would run afoul not only the treaty language and international law but also of the principle that “reparation must, *as far as possible*, wipe out *all* the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”²⁴⁵ “Naturally, the purpose of the principle of full reparation could not be achieved without the recognition of moral damages.”²⁴⁶ After all, “injury,” as defined by the ILC, “includes any material or *moral* damages caused thereby . . . broadly understood,”²⁴⁷ rendering *non sequitur* Colombia’s bewildering assertion that the ILC articles “exclud[e] moral damages.”²⁴⁸ If anything, “[t]he fact that in cases of moral damages the degree of the discretion is higher compared to that in cases of material damages would not make moral damages into punitive damages but should rather be considered as a consequence of their nature.”²⁴⁹ Therefore, “[m]oral damages are a remedy for injuries [actually suffered], not a premium or a method through which the tribunal can . . . punish a party” for “moral damages are . . . meant to be reparatory.”²⁵⁰

130. Tribunals concur, finding, *e.g.*, that “[i]t is generally accepted in most legal systems that moral damages may also be recovered” and “[t]here [is] indeed no reason to exclude them.”²⁵¹ Moral damages in ICSID proceedings are, for instance, “appropriate” where “staff members of a

²⁴⁴ Pirim, *supra* note 234, at 259 (CL-153).

²⁴⁵ *Chorzów Factory*, Merits, at 47 (CL-057) (emphases added); *see also Lusitania Cases*, Opinion (1923) 7 RIAA 32, p. 40 (CL-155); ILC Articles, Art. 31. (CL-058).

²⁴⁶ Pirim, *supra* note 234, at 244 (CL-153); Sabahi, et al., *supra* note 241, at p. 135 (RL-140) (noting that the ILC Articles “clearly state that reparation due for the commission of a wrongful act should eliminate all injury caused thereby, whether material or moral”).

²⁴⁷ ILC Articles, p. 91 (CL-058) (emphasis added).

²⁴⁸ Memorial on Preliminary Objections, ¶ 265 (citing ILC Article 36); *cf.* ILC Articles, p. 99 (CL-058) (“Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.”).

²⁴⁹ Pirim, *supra* note 234, at 260 (CL-153).

²⁵⁰ Garcia, *supra* note 243, at 497 (RL-154).

²⁵¹ *Desert Line Projects L.L.C. v. Yemen*, ICSID Case No. ARB/05/7, Award, Feb. 6, 2008, ¶¶ 289-291 (CL-156); *see also Benvenuti v. Congo*, ICSID Case No. ARB/77/2, Award, Aug. 8, 1980, VIII Y.B. Comm. Arb. 144, 151 (1983) (CL-157) (“the measures to which Claimant has been subject and the suit that was the consequence thereof [made it] equitable to award it the amount of CFA 5,000,000 for moral damages”).

company have recourse to competent, fair tribunals that can reflect the consequences of their poor treatment in an award of moral damages in favour of their employer.”²⁵² Yet another tribunal held with respect to reputational injury in particular:

[T]he Plaintiff company is entitled to a compensation for the moral damages it incurred as a result of the damage to its *worldwide professional reputation* after the Defendants’ abusive cancellation of the important project [of which] they previously approved its establishment and investment . . . for a period of 83 years, and for the execution of which the Plaintiff had negotiated and entered into contracts with international companies. . . . [T]he Plaintiff Company is highly qualified in the execution of huge investment projects and is renowned worldwide in this field Accordingly, [t]he Arbitral Tribunal decides that the Plaintiff is entitled to the sum of USD 30,000,000 (thirty million US dollars) in compensation for the moral damages it incurred as a result of the damage caused to its reputation in the stock market, as well as in the business and construction markets in Kuwait and around the world.²⁵³

131. In sum, as noted by Professor Born in discussing moral damages, “[i]t is ancient law that there is no right without a remedy (*Ubi jus ibi remedium*) and that adage applies here no less than elsewhere.”²⁵⁴ Claimants suffered moral damages, and their injury must be remedied.

B. Offsetting Awards Are Available Under Article 10.26 of the TPA

132. Colombia argues that “the payment of an offsetting award” is not relief that this tribunal can grant because the CGR Decision is not yet final so Claimants’ damages are hypothetical.²⁵⁵ That the CGR Decision is now final, that Colombia has requested assistance from several other countries to locate Claimants’ assets in anticipation of their seizure, and that Colombia refuses to agree to halt enforcement proceedings, renders this argument moot.²⁵⁶ There

²⁵² *Pezold v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶ 916 (CL-158).

²⁵³ *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. State of Libya and others*, Final Arbitral Award, Mar. 22, 2013, ¶¶ 368-69 (CL-159).

²⁵⁴ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Concurring and Dissenting Opinion of Gary Born, July 18, 2008, ¶¶ 32, 33 (CL-160) (“The Republic’s conduct caused moral damages to BGT, as well as the legal costs inevitable, given the Republic’s refusal to acknowledge in any fashion the effects and nature of its conduct, in BGT obtaining international recognition of the violation of its rights.”).

²⁵⁵ Memorial on Preliminary Objections, ¶ 272.

²⁵⁶ See Application, ¶¶ 89-91; Resp. Answer, ¶¶ 33-34, 39-43.

is nothing “merely hypothetical” or “undeterminate” about the damages incurred by Claimant.²⁵⁷ Colombia has quantified the amount of property or money it intends to take from Claimant (without basis), and this proceeding represents Claimants’ best efforts to prevent that injustice. ■■■■■
■■■■■
■■■■■

133. Colombia reads *Glencore* to require Claimants to have “voluntarily paid” the damages Colombia seeks before Claimants can commence an arbitration seeking those damages.²⁵⁸ That is absurd. As the tribunal in *Glencore* stated, “Colombia has committed an international wrong, and Claimants are entitled to full reparation. The hypothetical future outcome [of domestic proceedings] does not affect Claimants’ right *hic et nunc* to have their existing damage compensated.”²⁵⁹ Colombia cannot credibly claim that Claimants have not sustained existing damage against which the Tribunal can render a concrete offsetting award.

VII. THIS TRIBUNAL HAS JURISDICTION

A. Claimants Have a Protected “Investment” Under the Express Terms of TPA and the ICSID Convention

134. Colombia argues that Claimants have not made an investment because both the TPA and the ICSID Convention require an assumption of risk that is different from ordinary commercial risk and Claimants have not assumed that risk in this case because they were paid for their services, and because the Contract is, according to Colombia, an ordinary commercial contract.²⁶⁰ However, the Contract expressly meets the definition of an investment pursuant to the TPA. Moreover, even if a further inquiry is required, the Contract also meets the definition of an investment pursuant to the ICSID Convention. This Tribunal has jurisdiction *ratione materiae* over the investment, and Colombia’s arguments to the contrary ought to be rejected.

135. The TPA defines an investment as follows:

²⁵⁷ Memorial on Preliminary Objections, ¶ 273 (quoting *Southern Pacific Properties v. Egypt*, Award on the Merits, ¶ 189 (RL-168)).

²⁵⁸ *Id.*, ¶ 277. As noted above at note 226, in *Glencore*, Colombia argued precisely the opposite, claiming that because *Glencore* had paid the CGR award at issue there, it was barred from such relief.

²⁵⁹ *Glencore*, ICSID Case No. ARB/16/6, Award, ¶¶ 1581 (CL-005).

²⁶⁰ Memorial on Preliminary Objections, ¶¶ 281-289, 292-298.

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- a) an enterprise;
- b) shares, stock, and other forms of equity participation in an enterprise;
- c) bonds, debentures, other debt instruments, and loans;
- d) futures, options, and other derivatives;
- e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- f) intellectual property rights;
- g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges[.]²⁶¹

136. That level of detail is not at all unusual as “[a]lmost all BITs contain definitions of the term investment.”²⁶² Article 10.28 is a standard formulation in that the definition is “introduced by a broad, general description followed by a non-exhaustive list of typical rights.”²⁶³ Indeed, Professor Schreuer lists the 2004 U.S. Model BIT, which contains verbatim the TPA’s definition, among the “typical” examples referred to.²⁶⁴

²⁶¹ TPA Article 10.28 (footnotes omitted) **(CL-001)**.

²⁶² Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge 2010), ¶ 140 **(RL-187)**.

²⁶³ *Id.* “A broad definition of investment . . . is not at all an exceptional situation. On the contrary, most contemporary bilateral treaties of this kind refer to ‘every kind of asset’ or to all assets’, including the listing of examples that can qualify for coverage; claims to money and to any performance having a financial value are prominent features of such listings.” *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, July 11, 1997, ¶ 34 **(CL-161)** (citing Antonio R. Parra, *The Scope of New Investment Laws and International Instruments*, in *Economic Development Foreign Investment and the Law* (Roberty Pritchard ed., 1996), pp. 35-36).

²⁶⁴ Schreuer, *supra* note 262, ¶ 142 **(RL-187)**.

137. Among the non-exhaustive list (“including”) of examples are “turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts” as well as “other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.”²⁶⁵ Thus, by its terms, the Contract meets the definition of an investment pursuant to the TPA.

138. “The types of contracts usually considered as having a character of investment in bilateral investment treaties (BITs) when listed, ICSID practice and doctrinal writings are: construction, turnkey, management/service, production, profit-sharing, leasing, technology/knowhow transfer, and joint-venture contracts.”²⁶⁶ As such, the TPA’s very language exposes the artificial nature of Colombia’s “commercial transaction” objection because like “most BITs consenting to ICSID arbitration,” the TPA “define[s] ‘investment’ in a way that comfortably encompasses so-called ‘ordinary commercial transactions.’”²⁶⁷ To ignore the text, as Colombia would have it, would not only run counter to the Vienna Convention but also tribunals’ “intention . . . not to read limiting phrases into treaties where none exist in the text.”²⁶⁸ As another ICSID tribunal observed in ruling against a State represented by the same firm that represents Colombia here on the definition of an investment, “[t]he Respondent’s attempt to read into the language of the BIT a condition” that is not to be found in the language of the applicable provision.²⁶⁹

139. By its plain terms, the TPA also does not necessarily require an assumption of risk as Colombia claims. Rather, Article 10.28 states that the investment must have “characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, **or** the assumption of risk.” It cannot be seriously disputed that

²⁶⁵ TPA Art. 10.28 (CL-001) (emphasis added).

²⁶⁶ Velimir Zivkovic, Recognition of Contracts as Investments in International Investment Arbitration, 5 Eur. J. Legal Stud. 174, 176 (2012) (CL-162) (emphasis added); see also, e.g., *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Award on Jurisdiction, Aug. 6, 2003, ¶¶ 134-35 (CL-163) (finding that a services contract for the inspection of goods was an investment under the BIT because an investment included “claims to money” and any “right given by law” and “by contract”).

²⁶⁷ Stratos Pahis, *Investment Misconceived: The Investment-Commerce Distinction in International Investment Law*, 45 Yale J. Int’l L. 69, 104 (2020) (CL-164); see also *SGS v. Pakistan*, Decision on Objections to Jurisdiction, ¶ 133 n.153 (CL-163) (“only exceptionally has a treaty excluded claims to money that arise solely from commercial contracts for the sale of goods or services from the definition of investment”).

²⁶⁸ McLachlan, et. al., *supra* note 84, ¶ 6.47 (CL-081).

²⁶⁹ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, Dec. 19, 2016, ¶ 231 (CL-165).

Claimants committed capital and other resources with the expectation of profit—already meeting two of the investment characteristics outline by the TPA. Though Claimants did assume sufficient risk when entering into the Contract, including the risk of non-payment, and in its performance,²⁷⁰ an assumption of risk is plainly not required by the TPA. If anything, the preamble’s disjunctive language (“or”) further confirms that the criteria are, as Schreuer put it in the ICSID Convention context, “merely . . . typical characteristics of investments under the Convention.”²⁷¹

140. As the Tribunal in *Garanti Koza v. Turkmenistan* explained, so long as the definition of investment in the relevant treaty does not exceed what is permissible under the ICSID Convention, then by meeting the definition of investment in that treaty, it is also an investment for purposes of Article 25 of the ICSID Convention.²⁷² Here, Colombia cannot show that the definition of investment in the TPA exceeds the scope of what is permissible under the ICSID Convention or “is ‘absurd or patently incompatible with [the] object and purpose’ of the ICSID Convention.”²⁷³ Thus, the inquiry as to whether Claimants have made a qualifying investment can end there.

141. However, to the extent that the Tribunal disagrees and were to adopt the so-called “double keyhole” approach, Claimants also separately meet the definition of investment in Article 25 of the ICSID Convention.

142. ICSID Convention Article 25 does not define “investment.” The Vienna Convention instructs that in interpreting an undefined term, “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.”²⁷⁴ Professor Julian Mortenson concurs: “‘investment’ is a quintessentially ‘ambiguous’ term justifying “[r]ecourse [to] . . . the preparatory work of the treaty

²⁷⁰ See ¶¶ 150-153 *infra*.

²⁷¹ Schreuer, *supra* note 262, ¶ 122 (RL-187).

²⁷² *Garanti Koza v. Turkmenistan*, Award, ¶¶ 238-242 (CL-165)

²⁷³ *Id.* at ¶ 241 (quoting VCLT, Art. 32(b)).

²⁷⁴ Vienna Convention (RL-053).

and the circumstances of its conclusion.”²⁷⁵ Whereas commentators for a time had “commonly assumed that like-minded delegates at the drafting convention were forced to leave ‘investment’ undefined because of their inability, as a practical drafting matter, to formulate a single, clean definition,” “[t]he historical evidence demonstrates that this assumption is simply incorrect” and that the understanding reached was to “extend jurisdiction to any plausibly economic asset or activity.”²⁷⁶ It should thus come as no surprise that the vast majority of tribunals confronted with the “investment” question have affirmed their own jurisdiction.²⁷⁷

143. Tribunals have analyzed the existence of an investment by applying a number of criteria, such as (i) a contribution, (ii) of a certain duration, and (iii) an element of risk.²⁷⁸

144. Though sometimes mistakenly treated as mandatory jurisdictional prerequisites, Professor Schreuer has clarified that “[t]hese features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention.”²⁷⁹ A decade ago, he added that “[t]he development in practice from a descriptive list of typical features towards a set of mandatory legal requirements is unfortunate. The First Edition of the Commentary cannot serve as authority for this development.”²⁸⁰ Of course, “[t]he decisions of ICSID tribunals are not binding precedents and every case must be examined in the

²⁷⁵ Julian D. Mortenson, *The Meaning of Investment: ICSID’s Travaux and the Domain of International Investment Law*, 51 Harv. Int’l L.J. 257, 260 (2010) (CL-166) (citing Vienna Convention on the Law of Treaties, Art. 32, May 23, 1969, 1155 U.N.T.S. 331).

²⁷⁶ *Id.*, at 259-60, 301 (CL-166) (quoting World Bank General Counsel Aaron Broches who was recorded in the authoritative history of the ICSID Convention as stating that “[i]n the case of investments’ courts issue ‘decision[s] that a party owed to the other party a certain sum of money.’ If we take Broches’ explanation seriously, the best sense to make of the Convention’s unrestricted reference to ‘investment’ is that ICSID doors were left open to any plausible economic activity or asset.”); *see also* Zivkovic, *supra* note 266, at 180 (2012) (CL-162) (citing Mortenson).

²⁷⁷ Schreuer, *supra* note 262, ¶ 159 (RL-187).

²⁷⁸ *See e.g.*, *Mabco Constructions S.A. v. Republic of Kosovo*, ICSID Case No. ARB/17/25, Decision on Jurisdiction, Oct. 30, 2020, ¶ 96 (CL-167) (“Under one well-established line of arbitral case law, an asset does not qualify as an investment under the ICSID Convention unless, cumulatively, it represents a substantial capital contribution, entails a certain risk, and presents a certain duration.”); *Krederi ld. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of Award, July 2, 2018, ¶ 237 (CL-168).

²⁷⁹ Schreuer, *supra* note 262, ¶ 122 (RL-187).

²⁸⁰ *Id.*, ¶¶ 171-74 (RL-187) (criticizing the restrictive tribunals’ “rigid list of criteria” and emphasizing that “[a] test that turns on the contribution to the host State’s development should be treated with particular care” and “be treated with some flexibility”).

light of its own circumstances.”²⁸¹ Accordingly, tribunals now are more likely to eschew such “definitional criteria” and “prefer[] to retain a greater degree of flexibility”²⁸² that keeps with Article 25’s deliberately inclusive scope.²⁸³

145. Nevertheless, Colombia urges this tribunal to adhere to a demonstrably incorrect conception of “investment” in Article 25 to absolve itself of the violations committed against Claimants.²⁸⁴ Notably, Colombia limits its arguments to one of the *Salini* criteria by contending that the investment here constitutes merely an “ordinary commercial contract” that should not enjoy treaty protection because it lacks “[i]nvestment or operational risk.”²⁸⁵

146. This “commercial transaction test fail[s] to provide a principled or predictable basis for distinguishing between investment and non-investment activities. [It] instead inject[s] uncertainty into investor-State arbitration.”²⁸⁶ What is more, as a matter of treaty interpretation, it must be stressed that the risk criterion was in fact “explicitly considered and rejected during the [ICSID Convention] drafting process” – an “embarrassing historical problem” for Colombia’s argument.²⁸⁷ Indeed, if that were not enough, “[i]n the majority of cases tribunals were satisfied that the facts before them actually met these criteria.”²⁸⁸ And more specifically as to the criterion actually raised by Colombia, it is telling that “[t]he existence of a *risk* was always confirmed by

²⁸¹ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision of Jurisdiction (Ancillary Claim), Aug. 2, 2004, ¶ 25 (CL-169).

²⁸² McLachlan, et. al., *supra* note 84, ¶ 6.07 (CL-081).

²⁸³ See, e.g., *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, ¶ 165 (CL-170) (“The Tribunal states that the requirements that were taken into account in some arbitral precedents for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) must be considered as mere examples and not necessarily as elements that are required for its existence. Nevertheless, the Tribunal considers that the very elements of the Seacoast project and the consequences thereof fall within the characterizations required in order to determine the existence of protected investments.”).

²⁸⁴ Memorial on Preliminary Objections, ¶ 286.

²⁸⁵ *Id.*

²⁸⁶ Stratos Pahis, *Invesmtnet Misconceived: The Investment-Commerce Distinction in International Investment Law*, 45 *Yale J. Int’l L.* 69, 74 (2020) (CL-164).

²⁸⁷ Mortenson, *supra* note 275, at 260, 299 (2010) (CL-166) (also stating that “it is clear that the restrictive approach’s core jurisdictional criteria were rejected during the negotiation process, despite strenuous and repeated efforts to incorporate them”).

²⁸⁸ Schreuer, *supra* note 262, ¶ 159 (RL-187).

tribunals. The very existence of the dispute was seen as an indication of risk. Also, tribunals found that risk was inherent in any long-term commercial contract.”²⁸⁹

147. Even assuming *arguendo* that the criterion could play a salient role in the jurisdictional analysis, Colombia has failed to identify a single analogous authority that supports its conclusion that no investment was made here. Rather, the awards cited by Colombia include cases where the relevant contract was for a single sale of goods (*Romak v. Uzbekistan*²⁹⁰; *Nova Scotia v. Bolivia*²⁹¹; and *Jin Hae Seo v. South Korea*²⁹²), where the planned investment never got off the ground (*Doutremepuich v. Mauritius*²⁹³ and *Charles Eyre v. Sri Lanka*²⁹⁴), or are otherwise inapplicable to this case (*Poštová v. Greece*²⁹⁵).

²⁸⁹ Schreuer, *supra* note 262, ¶ 163 (RL-187) (emphasis in original).

²⁹⁰ Claimant entered into a supply agreement to deliver up to 50,000 tons of wheat during a five-month period in 1996 and did not receive compensation for the deliveries. *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, Award, Nov. 26, 2009, ¶¶ 28-42 (RL-181). The Tribunal held that the supply agreement provided for a one-off sale of goods and therefore was not an investment. *Id.* at ¶¶ 213-232, 242-243.

²⁹¹ The Tribunal characterized the potential investment as the commitment “to pay for and receive coal under the 2007 Confirmation Letters.” *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Award, Apr. 30, 2014, ¶¶ 91-92 (RL-182). Consequently, the Tribunal held that “[a] commitment to simply pay money in the future after delivery of goods is inadequate to be considered as the contribution which forms the basis of an investment.” *Id.* at ¶ 97.

²⁹² The case concerned the purchase of a “relatively modest residential property . . . used exclusively as the private dwelling of the owner’s family,” and therefore, the tribunal found “both the expectation of gain or profit and the assumption of risk [to be] very weak.” *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Final Award, Sept. 27, 2019, ¶ 130 (RL-195).

²⁹³ Claimants planned to set up a laboratory in Mauritius but never effectuated any of those plans, instead only setting up the companies that would own the laboratory, transferring €300,000, and purportedly contributing know-how. *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, Aug. 23, 2019, ¶¶ 121-122 (RL-193). The Tribunal determined that the €300,000 was transferred between different bank accounts all owned by Claimants and transferred back out of the Mauritius account only 9-11 months later, with only a small portion used for one-off payments for goods or services. *Id.* at ¶¶ 128-137, 143-144. The Tribunal also found that Claimants failed to meet their burden to prove know-how was contributed. *Id.* at ¶¶ 138-140. Finally, while the Tribunal acknowledged their planned future activities would have entailed investment risk, the early preparatory activities did not. *Id.* at ¶ 147.

²⁹⁴ The Tribunal determined that Claimants never paid for the land that was alleged to be the investment, nor contributed substantially to the planned hotel project before the State lawfully expropriated the land. *See Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award, ¶¶ 280-282, 289-303 (RL-194).

²⁹⁵ The Tribunal determined that one of the claimant’s rights in sovereign debt securities or bonds did not fit within the definition of an investment in the relevant treaty. *See Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, Apr. 9, 2015, ¶¶ 317, 331-350 (RL-192). Applying *arguendo* the objective test to ICSID jurisdiction, the Tribunal also determined that since the securities were used solely for Greece’s budget needs, claimant only took on “sovereign risk” and no investment was made. *Id.* at ¶¶ 363-365, 367-371.

148. Colombia also cites to the recent award in *Standard Chartered Bank (Hong Kong) v. Tanzania*.²⁹⁶ That tribunal found, however, that all criteria were *present* and thus asserted jurisdiction *ratione materiae*, noting with respect to risk that “Respondent’s suggestion that the Claimant’s expectation of receiving an economic return through the repayment of the money loaned with interest is indicative that it is a normal commercial transaction with usual commercial risks and nothing more, fails to account for the risks assumed in granting, maintaining and restructuring the loans in relation to the establishment and maintenance of the Facility.”²⁹⁷

149. In sum, none of the cases cited by Colombia support its position that Claimants’ provision of services to Reficar for several years carried no risk and was not an investment just because Reficar ultimately compensated Claimants for their services.

150. Claimants set out facts sufficient to make out their investment in Colombia.²⁹⁸ From the start, Claimants explained that “Claimant FPJVC is a contractual joint venture that, among other things, provides engineering, management and consulting services to the oil and gas sector.”²⁹⁹ They further explained that: Claimants have a long history of investment in Colombia, which began in 1975 with a local engineering company called Tecniavance.³⁰⁰

151. If that were not enough, Claimants also explained:

Claimants contracted with Reficar, a Colombian-owned enterprise, to provide project management services in connection with the construction and expansion of an oil refinery owned by Colombia to supply environmentally clean motor fuels to meet Colombian demand. In doing so, Claimants invested significant amounts of time, capital, personnel, and labor in Colombian territory. All of these acts were done with the expectation that Claimants would return a profit. The Contract also created rights, both tangible and intangible, to a contractual benefit having economic value to

²⁹⁶ See Memorial on Preliminary Objections, ¶ 285, fn. 570.

²⁹⁷ *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, Oct. 11, 2019, ¶¶ 220, 230, 246, 235, 239 (RL-188).

²⁹⁸ See ¶¶ 32 *supra* (explaining the test for *prima facie* review).

²⁹⁹ Request for Arbitration, ¶ 15.

³⁰⁰ *Id.*, ¶ 16.

Claimants. As such, Claimants are “investor[s] of a Party” and have made an “investment” under the TPA.³⁰¹

152. Contemporaneous media reporting noted that “[t]he overall project will relieve regional refining constraints and will enable REFICAR to produce clean, ultra-low sulfur gasoline and diesel from heavy crude” and noted that the project was “key to enhancing Ecopetrol’s position as a leading producer for the entire region.”³⁰² Claimants contracted to and did provide services in connection with the construction and expansion of an oil refinery, significant capital, labor, and time in connection with those services over the course of many years, and personnel with respect to engineering and project management, among other things.³⁰³

153. Finally, the parties agreed that FPJVC’s services would last for approximately 45 months.³⁰⁴ In fact, they lasted for over six years.³⁰⁵

154. As noted above, “[t]he vast majority” of ICSID tribunals have “found that the disputes before them did indeed concern investments as defined in the respective BITs.”³⁰⁶ Among them, the *Bayindir v. Pakistan* tribunal held that a substantial commitment of resources could not “be seriously contested” given that the claimant trained “approximately 63 engineers” and provided “significant equipment and personnel.”³⁰⁷ The tribunal further found that a three-year contract was of a sufficient duration.³⁰⁸ And with respect to the risk factor, the tribunal found that “besides the inherent risk in long-term contracts, the . . . the very existence of a defect liability

³⁰¹ *Id.*, ¶ 29.

³⁰² CB&I (CBI) Awarded \$1.4B Refiar Project, STREETINSIDER.COM (Nov. 17, 2009 at 7:27 AM), <https://www.streetinsider.com/Corporate+News/CB%26I+%28CBI%29+Awarded+%241.4B+REFICAR+Project/5116725.html> (C-014).

³⁰³ Claimants’ Letter to Tribunal dated Sept. 8, 2020, pp. 11-12.

³⁰⁴ Contract, Section 20 (C-007).

³⁰⁵ Request for Arbitration, ¶ 53.

³⁰⁶ Schreuer, *supra* note 262, ¶ 145 (RL-187).

³⁰⁷ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, Nov. 14, 2005, ¶ 115 (RL-052); *see also Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Award on Jurisdiction, July 16, 2001, ¶¶ 50-56 (CL-171) (concluding that an Italian consortium to which a private entity, majority-owned by the government and in charge of developing the Kingdom’s road network, awarded a contract to build part of a new highway in Morocco had an “investment” because of the transfers of funds, equipment, personnel and know-how to Morocco valued at US\$ 33 million and because the “[c]onstruction that spans several years, the cost of which cannot be established with certainty in advance, creates a manifest risk for the contractor”).

³⁰⁸ *Bayindir v. Pakistan*, Decision on Jurisdiction, ¶¶ 132-33 (RL-052).

period of one year and of a maintenance period of four year against payment, creates an obvious risk.”³⁰⁹

155. Similarly, the *Jan de Nul v. Egypt* tribunal found the criteria of the “*Salini test*” “clearly” met, reasoning that

[i]n particular, the amount of work involved (including the mobilization of two heavy ships for a period of approximately 19 months) and the related compensation [cost of work was estimated US\$ 130 million] show that the Claimants’ contribution was substantial. Moreover, there can be no question that an operation of such magnitude and complexity involves a risk and one cannot seriously deny that the operation of the Suez Canal is of paramount significant for Egypt’s economy and development.³¹⁰

156. In light of the facts as plead and the applicable authorities, Claimants have an investment.

B. FPJVC Is a “National of another Contracting State” Under Article 25 of the ICSID Convention

157. Colombia states that that “Claimant FPJVC does not qualify as a ‘national of another Contracting State’ under Article 25(2)(b) of the ICSID Contention [sic] because it is a contractual joint venture and not a ‘juridical person.’”³¹¹ Once again, Colombia’s objection is meritless.

158. The ICSID Convention leaves “juridical person” undefined because “countries might differ in their treatment of partnerships, associations or companies.”³¹² It is common ground that the relevant definition of “juridical person” is that “under the law of [FPJVC’s] place of constitution (New York law).”³¹³ Unlike in *Impregilo*, however, where Swiss law governed that

³⁰⁹ *Id.* at ¶¶ 134-36.

³¹⁰ *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, ¶ 92 (CL-172).

³¹¹ Memorial on Preliminary Objections, ¶ 299.

³¹² Schreuer, *supra* note 262, ¶ 689 (RL-187).

³¹³ Memorial on Preliminary Objections, ¶ 309.

definition and the entity at issue had “no legal personality under Swiss law,”³¹⁴ the joint venture *is* a juridical person under New York law.

159. Under New York law, “[i]t is well settled that ‘[a] joint venture . . . is in a sense a partnership for a limited purpose, and it has long been recognized that the legal consequences of a joint venture are equivalent to those of a partnership,’ and, as a result, it is proper to look to the Partnership Law to resolve disputes involving joint ventures.”³¹⁵ Because “[t]wo or more persons conducting a business as a partnership may sue or be sued in the partnership name”,³¹⁶ so too may joint ventures, as merely a particular type of partnership under the applicable law.

160. Colombia cites to New York caselaw for the proposition that joint ventures are akin to partnerships and argues that this is somehow evidence FPJVC does not have separate legal personality.³¹⁷ Colombia also relies on an opinion rendered in 1935, ignoring nearly a century worth of New York law that has firmly rejected it since then.³¹⁸ To illustrate just how outdated that 1935 opinion is, it is worth noting that the opinion is based on the proposition that a husband could not be liable for personal injury against his wife, in part because a married woman had no separate right to property.³¹⁹ In any event, New York law recognizes joint ventures as juridical persons with the capacity to sue and be sued, and they routinely appear as parties in New York litigation.³²⁰

³¹⁴ *Impreglio S.p.A. v. Islamic Republic of Pakistan*, ICSID Cas No. Arb/03/3, Decision on Jurisdiction, Apr. 22, 2005, ¶¶ 118-19 (RL-129).

³¹⁵ *Eskenazi v. Schapiro*, 27 A.D.3d 312, 315 (N.Y. App. Div., 1st Dep’t 2006) (CL-173).

³¹⁶ New York Civil Practice Law and Rules, C.P.L.R. § 1025 (CL-174); *see also* 15A N.Y. Jur. 2d Business Relationships § 1498 (CL-175) (“For certain purposes, however, the fiction of a partnership as a legal entity existing independently and apart from its members may be entertained. The legislature may consider a partnership apart from its members and has recognized partnerships as legal entities for procedural purposes, allowing suit to be brought either against or by the partnership in partnership name.”).

³¹⁷ Memorial on Preliminary Objections, ¶ 302.

³¹⁸ *Id.*, ¶ 302 n. 603.

³¹⁹ *Caplan v. Caplan*, 268 N.Y. 445, 448-449 (N.Y. 1935) (RL-204). *See also* *People v. Morton*, 308 N.Y. 96, 98 (N.Y. 1954) (CL-176), a decision from New York’s court of last resort (explaining the reasoning behind decisions like *Caplan* and that they were no longer good law).

³²⁰ *Michelman-Cancelliere Iron Works, Inc. v. Kiska Const. Corp.-USA*, 18 A.D.3d 722, 723 (N.Y. 2nd Dep’t 2006) (CL-177); *County of Monroe v. Raytheon Co.*, 156 Misc.2d 445, 454 (N.Y. Sup. Ct. 1991) (CL-178) (distinguishing the argument “that it is a well-established principle that a partnership is not a separate entity distinct from the persons who

161. A closer review of Colombia's more recent cited cases also reveals that they, in fact, support Claimants' position. In *Deutsche Bank v. Bills*, one of the cases cited by Colombia, the court stated that "it is proper to look to the Partnership Law to resolve disputes involving joint ventures."³²¹ The court then noted that "the act of every partner, *including the execution in the partnership name of any instrument*, ...binds the partnership...."³²² Indeed, the Contract that forms part of Claimants' investment was entered into by Reficar on the one hand, and FPJVC (not each entity of the joint venture) on the other.³²³

162. Similarly, in *Tehran-Berkeley Civil & Environmental Engineers v. Tippetts-Abbett-McCarthy-Stratton*, the other case cited by Colombia, the Court of Appeals for the Second Circuit was presented with the question of whether two entities had entered into a contract as an entity or as individuals, and whether either precluded one of the entities from being sued individually.³²⁴ In affirming that although the two entities both executed the contract as a joint venture, they could still be sued separately, the Second Circuit noted that "[j]oint liability for contract obligations of a partnership ...does not preclude a suit against an individual partner in all circumstances."³²⁵ Similarly, the fact that a shareholder might, under some circumstances, be sued alongside the corporation of which he is an owner hardly means that a corporation is not a juridical person..

163. Moreover, Section 130 of New York's General Business Law "defines 'person' as 'an individual, partnership, corporation, and unincorporated association'". General Business Law Section 130 is applicable to joint ventures as a joint venture is merely "a special combination of two or more persons wherein some specific venture is jointly sought without any actual partnership

compose it" because "for many purposes a partnership is regarded by courts as a separate entity" and "a partnership is regarded as a legal entity for pleading purposes").

³²¹ *Deutsche Bank Natl. Trust Co. v. Bills*, 2012 N.Y. Misc. LEXIS 4842, at *10 (N.Y. Sup. Ct. Oct. 15, 2012) (**RL-201**).

³²² *Id.* at *10 n. 4 (quoting Partnership Law § 201). *See also id.* at *12 ("a conveyance executed by a partner in the partnership name... passes the equitable interest of the partnership, provided the act is one within the authority of the partner....").

³²³ *See* Contract at prefatory language prior to section 1; § 31.3 (signature block) (**C-005**).

³²⁴ *Tehran-Berkeley Civil & Environmental Engineers v. Tippetts-Abbett-McCarthy-Stratton*, 888 F.2d 239, 242 (2d Cir. 1989) (**RL-202**).

³²⁵ *Id.* at 243.

or corporation designation.”³²⁶ Thus, FPJVC qualifies as a “national of another Contracting State” for purposes of ICSID Convention Article 25(2)(b).

164. Colombia’s objection also suggests that there is some independent test in the ICSID Convention regarding who qualifies as an investor, and that consent through the TPA is somehow insufficient. This too is not so.

165. As an initial matter, Colombia concedes the obvious in agreeing that Claimant FPJVC is an “investor” under the terms of the TPA.³²⁷ It is not in dispute that FPJVC is a U.S. joint venture, and Article 10.28, in turn, states that “enterprise means . . . joint venture.” Nevertheless, Colombia asserts, in an “argument” devoid of legal authorities, that this “is not sufficient for enabling this Tribunal to exercise jurisdiction *ratione personae* over Claimant FPJVC because the Tribunal is constituted under the ICSID Convention.”³²⁸

166. Article 25 (“Jurisdiction of the Centre”) of the ICSID Convention states in relevant part:

(1) 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.

(2) ‘National of another Contracting State’ means: . . . (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute

167. Meanwhile, TPA Article 10.17 provides:

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of: (a)

³²⁶ *Eleven Fifteen Joint Venture v. LIU Imports, Inc.*, 2000 WL 33952042 at *2 (N.Y. Sup. Ct. Oct 13, 2000) (CL-179).

³²⁷ Memorial on Preliminary Objections, ¶ 307.

³²⁸ *Id.*

Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute

Accordingly, Colombia gave its standing “consent[] to the submission of a claim” under the TPA when it ratified that treaty, thereby also “satisfy[ing]” the consent requirements of ICSID Convention Article 25.

168. As a commentary on the 2012 U.S. Model BIT makes clear:

Article 25 [TPA Article 10.17] recognizes the cornerstone principle that investor-State arbitration under a US BIT, like other forms of arbitration, requires the consent of the disputing parties. Article 25(1) [10.17.1 here] represents the standing consent of each Party to investor-State arbitration in accordance with the terms set forth therein. . . . A Party’s consent under Article 25(1) is irrevocable for as long as a US BIT remains in force Together, a Party’s standing consent and the investor’s submission of the notice of arbitration establish the requisite agreement to arbitrate. *Article 25(2) confirms that this . . . process satisfies the requirements for mutual consent to arbitration under either the ICSID Convention . . .*³²⁹

169. To be sure, not only is Article 25 of the 2012 U.S. Model BIT identical to the language of TPA Article 10.17, but Article 25 is unchanged from its 2004 predecessor “on which this Treaty is based.”³³⁰

170. The conclusion regarding the interplay between the TPA and ICSID Article 25 is universally supported by tribunals and acclaimed commentators, including those cited by Colombia on this very subject. Professor Schreuer, whose treatise Colombia cites yet again while omitting its relevant parts,³³¹ explains that:

Consent must be obtained from both or all parties. Traditionally this would take place by way of a direct agreement between the host State and the investor Consent may also result from a unilateral offer by the host State, expressed in its legislation or in a treaty. . . .

³²⁹ Caplan and Sharpe, *supra* note 236, at p. 65-66 (RL-037) (emphasis added).

³³⁰ Memorial on Preliminary Objections, ¶ 234.

³³¹ *See id.*, ¶ 308.

Nowadays the vast majority of cases are based on consent given in this indirect way.³³²

171. Most important with respect to Colombia's objection, "[c]onsent through BITs has become accepted practice."³³³ In the words of one ICSID tribunal, "[i]t is now [as of 2010] uniformly accepted that the ratification of a bilateral investment treaty containing such provisions constitutes a State's written consent to arbitration of covered disputes."³³⁴ This is what yet another treatise refers to as "a sort of compulsory jurisdiction against the host state."³³⁵ In sum, FPJVC is a national of another Contracting Party.

C. Respondent Received Proper Notice of Intent

172. The Tribunal has jurisdiction *ratione voluntatis* and the claims are admissible in their entirety. Article 10.17 provides that "[e]ach party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement." Article 10.16.2, in turn, sets out the requirements for a notice of intent:

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.

173. Colombia readily concedes that it received ninety days written notice from FPJVC of its intention to submit a claim to arbitration, but finds fault with the fact that "the Notice of

³³² Schreuer, *supra* note 262, p. 191 (RL-187).

³³³ *Id.* at 205.

³³⁴ *SGS Societe Generale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, Feb. 12, 2010, ¶ 70 (CL-180).

³³⁵ Andrea M. Steingruber, *Consent in International Arbitration* (Oxford 2012), p. 202 (CL-181).

Intent to submit the present dispute to arbitration . . . was only sent by Claimant FPJVC and not by Foster Wheeler and Process Consultants.”³³⁶ That is so, according to Colombia, because “[t]he delivery of a notice of intent is not a mere ‘formality’, or an act of courtesy, but an explicit requirement under the Treaty.”³³⁷

174. That is simply not true. In 2019, the *B-Mex v. Mexico* tribunal rejected this exact argument in a detailed Vienna Convention and case law analysis of NAFTA provisions paralleling those of the TPA.³³⁸

175. There, the notice of intent “did not provide the names and addresses of . . . 31 [out of 69] Additional Claimants or of Operadora Pesa.”³³⁹ Mexico argued that this omission deprived the tribunal of jurisdiction and rendered the claims by the Additional Claimants inadmissible.³⁴⁰ Mexico’s arguments, however, did not sway the tribunal. Indeed, the tribunal’s analysis as to jurisdiction applies verbatim here:

Article 1119 [here Article 10.16.2] is stated in mandatory terms: “shall”. However, it is entirely silent on the consequences of a failure to include all the required information in the notice of intent. Article 1119 does not in terms refer to Article 1122(1) [here Article 10.17]; does not provide that satisfaction of the requirements of Article 1119 [Article 10.16.2] is a condition precedent to a NAFTA Party’s consent; and does not state that failure to satisfy those requirements will vitiate a NAFTA Party’s consent. The text of Article 1119 [Article 10.16.2] alone therefore does not compel the conclusion that a failure to include all the required information in the notice of intent vitiates a NAFTA Party’s consent under Article 1122(1) [Article 10.17].³⁴¹

³³⁶ Memorial on Preliminary Objections, ¶ 310.

³³⁷ *Id.*, ¶ 315 (emphasis in original).

³³⁸ See *B-Mex, LLC, et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3 (NAFTA), Partial Award, July 19, 2019, ¶¶ 54-139 (RL-216).

³³⁹ *B-Mex v. Mexico*, Partial Award, ¶ 65 (RL-216).

³⁴⁰ *Id.* at ¶¶ 72, 73 (“Jurisdiction pertains to whether a tribunal *has* the power to adjudicate a particular dispute, whereas admissibility pertains to whether a tribunal—which does have that adjudicative power—should *exercise* that power over a particular claim. Commentators have emphasized the practical relevance of the distinction: whereas findings pertaining to jurisdiction are subject to set-aside review in most jurisdictions, findings pertaining to admissibility are not.”).

³⁴¹ *Id.* at ¶ 81 (emphasis in original)

176. As the *B-Mex* tribunal further explained, “[i]t is axiomatic that the ‘arbitration’ to which the Respondent gives consent in Article 1122(1) does not commence or come into existence until the submission of a claim,” and although “[f]iling a notice of intent is, put at its highest, a ‘procedure’ to be followed *prior* to an arbitration, if any; it is not a procedure with which the subsequent *arbitration* itself, if any, must accord,” meaning that “[n]othing in those provisions can be said to condition the ‘validity’ of the submission of a claim to arbitration on the satisfaction of Article 1119.”³⁴²

177. The *B-Mex* tribunal also roundly rejected Mexico’s proffer that there is a “*jurisprudence constante* to the effect that all pre-conditions and formalities . . . must be satisfied,” finding instead that tribunals “have dismissed the proposition that a failure to satisfy [notice of intent requirements] must result in the loss of jurisdiction.”³⁴³

178. As to admissibility, “[w]hile some treaty tribunals have dismissed claims and required a refiling upon the defect being cured, others have admitted the claims when doing so best served the interests of justice, considering facts such as futility, efficiency, due process, prejudice and a balancing of the parties’ interests.”³⁴⁴ Thus, a tribunal “must do what best serves the interests of justice.”³⁴⁵

179. As Colombia well knows, AFWUSA and PCI form the joint venture FPJVC, and Claimants all bring the same claims against Colombia. Indeed, Colombia argues elsewhere that FPJVC does not exist, but consists solely of its two members. Certainly, Colombia knew that FPJVC was a joint venture consisting of its two members, because the notice of intent said so, as

³⁴² *Id.* at ¶¶ 84, 97, 99 (emphases in original).

³⁴³ *Id.* at ¶¶ 118-19 (citations omitted).

³⁴⁴ In what may be the most comprehensive footnote in arbitral jurisprudence, the tribunal cited a string of NAFTA and non-NAFTA awards in support of its conclusion. *See id.* at ¶ 126 n.117.

³⁴⁵ *Id.* at ¶ 128; n.118 (“The Tribunal notes that other tribunals have sometimes gone further, considering they had a margin of judicial appreciation even where a pre-arbitral step is an express condition on a party’s consent to arbitration. The Tribunal does not (and does not need to) follow that approach.”).

did the CGR Charge and the CGR Decision. On these facts then, Colombia's citation to yet another United States non-party submission is a sorry substitute for actual legal authorities.³⁴⁶

180. Indeed, despite the vehemence of Colombia's papers on this point, it does not, and could not in good faith, claim to have suffered any prejudice, however slight, from the supposed omission on which this argument rests.³⁴⁷ The correct approach to this claim, which has been repeatedly raised by State respondents and rejected, is set out in the award in *B-Mex v. Mexico*, as follows:

While the Tribunal takes the Respondent's point that the omission of the names of the Additional Claimants is not a "minor flaw" akin to a misspelling of their names, the fact remains that the addition of those names would not have expanded on the notice given to the Respondent as regards the nature of the dispute. The claims by the Additional Claimants being co-extensive with those asserted by the Original Claimants in the Notice, the Notice still provided the Respondent with sufficient information regarding the dispute to enable a meaningful settlement effort. This is therefore not a situation where a respondent State has been ambushed, hearing about the dispute as such for the first time upon receipt of the request for arbitration.³⁴⁸

181. Nor did it "deprive [Colombia of] . . . the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim."³⁴⁹ Here, "the Notice did in fact contain information sufficient to enable meaningful settlement discussions *prior to the arbitration*, [meaning that] there is no discernible prejudice to the Respondent."³⁵⁰

³⁴⁶ See Memorial on Preliminary Objections, ¶¶ 192-93 (quoting *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/05, Submission of the United States of America, May 1, 2020, ¶¶ 28-29 (RL-206)).

³⁴⁷ In fact, Colombia let the 90 day cooling off period lapse without a response or acknowledgment. After Claimants reached out in writing after that period to invite consultations, Claimants were invited to meet with ANDJE in Bogotá, and traveled there for that purpose, only to be told that Colombia had no interest in attempting to resolve the dispute.

³⁴⁸ *B-Mex v. Mexico*, Partial Award, ¶¶ 132-33 (RL-216).

³⁴⁹ Memorial on Preliminary Objections, ¶¶ 192-93 (quoting *Methanex Corp. v. United States of America*, UNCITRAL, Partial Award, Aug. 7, 2002, ¶ 120) (RL-209); *Astrida Benita Carrizosa v. Colombia*, Submission of the United States of America, ¶¶ 28-29 (RL-206)).

³⁵⁰ *B-Mex v. Mexico*, Partial Award, ¶ 137 (RL-216) (emphasis in original).

182. For all these reasons, Colombia’s lament that it is due additional notice is little more than a farce.

D. Respondent’s Fork-in-the-Road Objection Disregards the Nature of the Local Action and the Applicable Triple Identity Test

183. Colombia argues that “Claimants cannot submit their claim for an alleged breach of the Treaty’s FET obligation to arbitration under the Treaty because they definitively elected to submit such a claim before Colombian courts.”³⁵¹ That is false both because the action filed in Colombia was necessary to preserve Claimants’ rights, and because that action fails to meet the triple identity test that would need to be met to give the action in Colombia preclusive effect.

184. The action giving rise to Colombia’s assertion is the first *acción de tutela* filed on September 14, 2018 (the “**First Tutela**”) before Colombian courts by Claimants.³⁵² The First Tutela sought nothing more than a preservation of Claimants’ rights before the CGR under Colombian law, and no tutela can trigger an election under a fork-in-the-road provision. Indeed, Colombia’s argument here is inherently at odds with its claim that Claimants have allegedly failed to exhaust local remedies (though no such requirement exists).³⁵³

185. As Colombia concedes, an *acción de tutela* is only “a mechanism for *immediate* judicial protection of the fundamental rights” that is “subsidiary and residual”.³⁵⁴ These are not

³⁵¹ Memorial on Preliminary Objections, ¶ 319.

³⁵² While Colombia object to Claimants’ Request for Arbitration on several grounds, the only alleged “election” by Claimants that Respondent argues is definitive for purposes of the Treaty’s “fork in the road” provision is “the first of the *acciones de tutela* before Colombian courts.” *Id.*, ¶ 323.

³⁵³ See Christoph Schreuer, *Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 *The Law and Practice of International Courts and Tribunals*, 1 (2005), p. 16 (CL-183) (“[P]roblems are likely to arise if it becomes generally accepted that local remedies must be attempted before international arbitration becomes available. For instance, it is unclear how such a requirement can be combined with a fork in the road provision in an applicable BIT.”); *Mytilineos Holdings v. Serbia & Montenegro*, Partial Award on Jurisdiction, September 8, 2006, ¶ 221 (CL-184) (“To assume the BIT had not tacitly dispensed with the requirement to exhaust local remedies would imply that an investor, before making his or her choice between domestic courts and international arbitration, would have to exhaust domestic remedies. This would in effect render the ‘domestic courts’ alternative of the fork-in-the-road clause meaningless and thus such an assumption cannot be made. . . . Thus, one cannot require the exhaustion of local remedies as a precondition to arbitration.”).

³⁵⁴ Memorial on Preliminary Objections, ¶ 136 & n.283 (emphasis added); see also Constitución Política de Colombia, Art. 86 (CL-004) (an *acción de tutela* allows a litigant to seek “the *immediate* protection of its fundamental constitutional rights, when they are violated or threatened by the action or omission of any public authority” (emphasis added)).

Under Colombian law, a tutela is an “extraordinary judicial remedy specifically conceived for the protection of constitutional rights that can be filed against harms or threats inflicted to such rights not only by authorities but also by individuals.” See Allan R. Brewer-Carías, *The Latin American “Amparo”. A General Overview*, LATIN AMERICA

qualities of an autonomous claim that constitute a definitive “election” to “a court or administrative tribunal”.³⁵⁵ That is why Colombia in *Glencore* declined to even attempt to argue that an *acciones de tutela* (or an appeal of its denial) could constitute a definitive election and trigger the fork-in-the-road provision.³⁵⁶

186. Here, Colombia’s own actions forced Claimants to file *this* First Tutela because they had no other reasonable alternative to attempt to preserve their rights under Colombian law. The Colombia Constitution itself makes this clear, providing that—*per definition*—tutelas may be granted “only when the affected party does not have access to other means of judicial defense.”³⁵⁷ Specifically, the Claimants filed this First Tutela only after the CGR issued a fiscal liability indictment order that found Claimants (among others) jointly and severally liable for over \$2 billion.³⁵⁸ Under Colombian law, a tutela can later be denied if it is not filed “immediately.”³⁵⁹ The First Tutela requested injunctive relief to prevent irreparable harm that could have occurred.³⁶⁰

187. Several tribunals have held that a fork-in-the-road” provision cannot apply to local actions brought defensively to preserve claimants’ rights:

- The *Occidental v. Ecuador* tribunal held that “the ‘fork in the road’ mechanism by its very definition assumes that the investor has made a choice between alternative avenues . . . the choice [must] be made entirely free and not under any form of duress.

WORKSHOP ON HUMAN RIGHTS & LEGAL THEORY, LEITNER CENTER FOR INTERNATIONAL LAW AND JUSTICE, FORDHAM LAW SCHOOL at 1-2 (CL-185). The court seized of a tutela can issue an order “for the protection of the threatened rights or for the restoration of the enjoyment of the harmed one.” *Id.* The order can consist of “a decision commanding or preventing an action, or commanding someone to do, not to do or to undo some action.” *Id.*

A tutela is intended to protect “fundamental constitutional rights.” See Colombian Constitutional Court, Judgment T-095/16, February 25, 2016, No. T- 5.193.939 at 17 (CL-186) (emphasis added). The Constitutional Court of Colombia has held that the concept of “fundamental constitutional rights” includes rights recognized by the Constitution itself and, under article 93 of the Constitution, rights recognized in international human rights treaties. See Colombian Constitutional Court, Judgment C-067/03, February 4, 2003, No. D-4111 at 14 (CL-187).

³⁵⁵ TPA, Annex 10-G (CL-001).

³⁵⁶ *Glencore*, ICSID Case No. ARB/16/6, Award, ¶ 1341, (CL-005).

³⁵⁷ Constitución Política de Colombia, Art. 86 (CL-004).

³⁵⁸ Memorial on Preliminary Objections, ¶¶ 128, 136.

³⁵⁹ See Memorial on Preliminary Objections, ¶ 136 & n.283. See also Colombian Constitutional Court, Ruling SU-108 of 2018 (CL-188) (holding that there is a “duty to file this judicial recourse in a fair and timely term” because the nature of a tutela action “constitutes an urgent and immediate response before a violation or threat to fundamental rights.”)

³⁶⁰ Acción de Tutela No. 2018-00182 presentada por Foster Wheeler y Process Consultants contra CGR, Sept. 14, 2021 (R-69); Constitutional Court, Ruling SU-108 of 2018 (CL-188); Constitutional Court, Ruling T-328 of 2010 (CL-189).

. . . Ecuadorian Tax Law requires the taxpayer to apply to the courts within the brief period of twenty days . . . [or] the resolution becomes final and binding. The Tribunal is of the view that in this case the investor did not have a real choice. Even if it took the matter instantly to arbitration, which is not that easy to do, the protection of its right to object to the adverse decision of the [local tax authority] would have been considered forfeited if the application before the local courts were not made within the period mandated by the Tax Code.”³⁶¹

- The *Chevron v. Ecuador* tribunal held that a “defense to a claim in the national courts, however, cannot properly be described as the submission of a dispute for settlement in those courts. The notion of ‘submission’ of a dispute connotes the making of a choice and a voluntary decision to refer the dispute to the court for resolution: as a matter of plain and ordinary meaning of the term, it does not extend to the raising of a defense to another’s claim submitted to that court.”³⁶²
- The *Enron v. Argentina* tribunal held that “the actions by [the claimant] itself have been mainly in the defensive so as to oppose the tax measures imposed, and the decision to do so has been ordered by ENARGAS, the agency entrusted with the regulation of the gas sector. The conditions for the operation of the principle *electa una via* or ‘fork in the road’ are thus simply not present.”³⁶³

188. Professor Schreuer, cited repeatedly by Colombia as a “renowned” authority,³⁶⁴ has clarified:

To see *any* utilization of domestic courts or administrative tribunals as a choice under the fork in the road provision would put the investor in an intolerable position. The investor would have to sit still and endure any form of injustice passively on pain of losing its access to international arbitration . . . the investor would have no means of asserting its right until the situation deteriorates to a point where it can be characterized as a violation of the BIT, thus opening the way to international arbitration. Such an interpretation would be in the interests neither of the investor nor of the host State. *It follows that legal action for limited purposes, notably defensive steps to contest administrative action, cannot be tantamount to submitting*

³⁶¹ *Occidental Exploration & Production Co. v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, July 1, 2004, ¶¶ 60-61 (CL-190).

³⁶² *Chevron Corp. v. The Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, Feb. 27, 2012 ¶ 4.82 (CL-191).

³⁶³ *Enron Corp., et v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, Jan 14, 2004, ¶ 98 (CL-192).

³⁶⁴ Memorial on Preliminary Objections, ¶¶ 269 & n. 536, 285 & n. 570, 304 (referring to his “renowned treatise”), 308.

*'the dispute' to the courts or administrative tribunals of the host state.*³⁶⁵

189. As a result, the Tutela cannot constitute an election for purposes of Article 10.18.4 and Annex 10-G.³⁶⁶ Indeed, had the Tutela not been brought, Colombia would, in all likelihood, now be arguing that Claimants had failed to exhaust local remedies, and would demand that the denial of justice claim be dismissed on that ground.

190. Even if the tribunal were to find that the First Tutela was not defensive or reactive, however, it *still* would not trigger the fork-in-the road provision because it does not meet the triple identity test which requires a tribunal “to consider whether the same claim is ‘on a different road,’ *i.e.*, that a claim with the same object, [the same] parties and [the same] cause of action is already brought before a different judicial forum.”³⁶⁷ The First Tutela fails to meet all three prongs.

191. *First*, the relief sought by Claimants in their Request is different. In this arbitration, Claimants ask for monetary damages due to their economic and reputational harm, costs and attorneys’ fees incurred in connection with responding to the CGR’s charges, and costs of arbitration or other proceedings, including all counsel fees and costs, and interest.³⁶⁸ In contrast, Claimants did not seek such relief from the Colombian judiciary, nor could they have even if they

³⁶⁵ Christoph Schreuer, *Travelling the BIT Route of Waiting Periods, Umbrella Clauses and Forks in the Road*, 9(2) *Offprints of The Journal of World Investment & Trade*, 241, 249 (2004) (CL-193) (emphasis added). *See also CMS v. Argentina*, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 78, 81 (CL-055) (noting that the local entity only took “defensive and reactive actions” and that Claimant thus did not constitute “a binding selection”).

³⁶⁶ The two provisions contain similar fork-in-the-road language. *Compare* TPA, Art. 10.18.4 (“(a) No claim may be submitted to arbitration . . . if the claimant (for claims brought under 10.16.1(a)) or the claimant or the enterprise (for claims brought under 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure. (b) For greater certainty, if a claimant elects to submit a claim of the type described in subparagraph (a) to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, that election shall be definitive, and the claimant may not thereafter submit the claim to arbitration under Section B.”), *with* Annex 10-G (“1. An investor of the United States may not submit to arbitration under Section B a claim that a Party has breached an obligation under Section A . . . if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of that Party. 2. For greater certainty, if an investor of the United States elects to submit a claim of the type described in paragraph 1 to a court or administrative tribunal of a Party other than the United States, that election shall be definitive, and the investor may not thereafter submit the claim to arbitration under Section B.”) (CL-001).

³⁶⁷ *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, Sept. 11, 2009, ¶ 211 (CL-194).

³⁶⁸ Request, ¶ 216.

wanted to: tutelas, except in extraordinary circumstances, cannot be brought for monetary damages.³⁶⁹ Thus, the object of the two actions is different.

192. *Second*, the parties are different. In the present arbitration, the parties are FPJVC and Colombia while in the First Tutela the parties are FPJVC and CGR, among others.

193. *Third*, the cause of action is necessarily different, as the Colombian court is not empowered to hear claims arising under international law brought under the TPA, just as this Tribunal is not empowered to hear claims brought under the Colombian Civil Code.³⁷⁰ Colombia states that Claimants “alleged that due process had been violated,” and that a due process violation “is not only a constitutional principle under Colombian law, but also part of the FET obligation under the Treaty.”³⁷¹ Nowhere does Colombia aver, however, that Claimants’ *cause of action* is the same in both proceeding; it only alleges that Claimants mentioned (as Colombia agrees) that due process under international standards is consistent with “the constitutional principles invoked” in the First Tutela.³⁷² Colombia cannot deny that Colombian constitutional claims are fundamentally different from claims under the TPA.³⁷³ “The passing reference” to “the BIT and the ICSID Convention” was not a “statement amount to a choice” of one forum or another and “[c]learly the local claim did not result in the submission of the BIT dispute to the [Colombian] courts.”³⁷⁴

³⁶⁹ See Constitución Política de Colombia, Article 86 (CL-004); Decree 2591 of 1991, Article 25 (CL-195). The Tutela was filed to obtain a decision terminating the fiscal liability proceedings vis-à-vis the Claimants, or, in the alternative, to obtain a stay until [REDACTED]. See Acción de Tutela No. 2018-00182 presentada por Foster Wheeler y Process Consultants contra CGR, Sept. 14, 2021 (R-69).

³⁷⁰ See *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, ¶ 332 (CL-196) (holding that though certain aspects of the facts that gave rise to the dispute were at issue in a domestic litigation that could only be litigated there, the investment dispute was not at issue in the domestic litigation and therefore the claimant was not barred from using the ICSID arbitration mechanism).

³⁷¹ Memorial on Preliminary Objections, ¶ 325.

³⁷² *Id.*, ¶ 324.

³⁷³ The Colombian Constitutional Court has held that investment treaties do not regulate fundamental constitutional rights. Colombian Constitutional Court, Judgment C-252/19 June 6, 2019, No. LAT-445, at 42 (CL-206). As a result, the TPA cannot and does not provide any rights that would be considered rights under Colombian law, and therefore any rights that could be within the scope of the Tutela.

³⁷⁴ *Pan-American Energy v. Argentina*, Decision on Preliminary Objections, ¶¶ 152, 157 (RL-174) (“The cause of action is also different. The local claim is not based on an alleged violation of the BIT, even though the BIT was referred to in passing.”).

194. For these reasons, the Tutela action and this arbitration fail the triple identity test.

195. , Colombia does not even address the triple identity test or its less robust cousin, the “fundamental basis” test, which puts the focus on the identity of the subject matter of the dispute.³⁷⁵ Yet it should be noted, for the sake of completeness, that the result under the “fundamental basis” test would be the same.

196. As one tribunal explained, the object of the fundamental basis test “is to ensure that the same dispute is not litigated before different fora.”³⁷⁶ Ironically, here it is Colombia that is fully responsible for the fact that Claimants have already been dragged into different fora. Colombia brought two separate proceedings against Claimants through the CGR, pursued a separate international arbitration against CB&I concerning the very same issues in addition to *yet another* international arbitration against Claimants requested this year.

197. In sum, Colombia’s objection must be denied for, in Professor Schreuer’s words, “any other interpretation would lead to the untenable conclusion that, if the BIT contains a fork in the road provision, guarantees of effective domestic remedies are traps designed to lure an investor into domestic proceedings with the consequence that the door to internal arbitration will be closed forever no matter what the outcome of the domestic proceedings may be.”³⁷⁷

³⁷⁵ See *H&H Enterprises Investments, Inc v. Egypt*, ICSID Case No. ARB/09/15, Award, May 6, 2014, ¶ 367 (CL-197) (explaining that “what matters [under the fundamental basis test] is the subject matter of the dispute rather than whether the parties are exactly the same”). Colombia halfheartedly cites an authority in a footnote for the proposition that a “tribunal interpreting [a waiver] provision does not need to apply the so-called triple identity test”, but it does not provide any analysis. Memorial on Preliminary Objections, ¶ 341 & n.664.

³⁷⁶ *H&H Enterprises Investments, Inc v. Egypt*, ICSID Case No. ARB/09/15, The Tribunal’s Decision on Respondent’s Objections to Jurisdiction, June 5, 2012, ¶ 367 (CL-198). Note, however, that the fundamental basis test has its share of detractors. See, e.g., *Khan Resources Inc. v. The Government of Mongolia*, Decision on Jurisdiction, PCA Case No. 2011-09, July 25, 2012, ¶ 391 (CL-199) (“The Respondents principally argue that . . . it is unrealistic to expect all three prongs of the [triple identity] test to be satisfied. It must first be replied that the test for the application of fork in the road provisions should not be too easy to satisfy, as this could have a chilling effect on the submission of disputes by investors to domestic fora, even when the issues at stake are clearly within the domain of local law. This may cause claims being brought to international arbitration before they are ripe on the merits, simply because the investor is afraid that by submitting the existing dispute to local courts or tribunals, it will forgo its right to later make any claims related to the same investment before an international arbitral tribunal.”).

³⁷⁷ Schreuer, *supra* note 365, p. 249 (CL-193).

E. Respondent’s Waiver is Valid Under the TPA

198. Colombia refashions its fork-in-the-road argumentation to assert that “Claimants did not effectively waive their right to initiate or continue proceedings with respect to the measure that they allege to be a breach of the substantive obligations under the Treaty.”³⁷⁸ This, too, is misguided. Such “waiver” arguments by Colombia have been rejected in the past by ICSID tribunals.³⁷⁹

199. Article 10.18.2(b) of the TPA requires that claims submitted to arbitration must be “accompanied . . . by the claimant’s written waiver . . . of any right to initiate or continue before any administrative tribunal or court under the law of any Party . . . any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.”³⁸⁰ Colombia readily asserts that “[t]he clear purpose of this condition is to prevent the same claim from being heard simultaneously by several local and international tribunals,”³⁸¹—or, in the words of one Tribunal, “the consent and waiver requirements . . . serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.”³⁸²

200. As an initial matter, Colombia’s waiver argument should be dismissed because it (not Claimants) has instituted multiple parallel proceedings. A party should not be permitted to invoke TPA clauses in the name of avoiding parallel or allegedly duplicative proceedings when it is the very cause of that procedural chaos.

201. More important, Colombia’s argument requires the tribunal to ignore Article 10.18.3, which expressly provides that

³⁷⁸ Memorial on Preliminary Objections, ¶ 329.

³⁷⁹ See *Eco Oro Minerals Corp. v. The Republic of Colombia*, Procedural Order No. 2, Decision on Bifurcation, 28 June 2018 (declining Colombia’s request to hear jurisdictional objections as a preliminary question, including waiver and other preconditions objections.) (CL-051).

³⁸⁰ TPA, Article 10.18.2(b) (CL-001); see also Memorial on Preliminary Objections, ¶ 330.

³⁸¹ Memorial on Preliminary Objections, ¶ 331

³⁸² *Railroad Development Corporation v. Guatemala*, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, Nov. 17, 2008, ¶ 72 (RL-224).

[n]otwithstanding paragraph 2(b), the claimant... may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant’s ... rights and interests during the pendency of the arbitration.

202. As discussed in paragraphs 72-75 *supra*, the tutelas filed by Claimants fall squarely within this exception.

203. Indeed, none of Colombia’s authorities supports the extraordinary argument that a request for arbitration must be accompanied by a waiver of any right to self-defense.

204. Colombia’s heavy reliance on *Renco v. Peru* buries in a footnote the dispositive terms of the claimant’s ineffective waiver there.³⁸³ Unlike here, the claimant in *Renco* attempted (to no avail) to provide that “[t]o the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant reserves the right to bring such claims in another forum for resolution on the merits.”³⁸⁴ Of course, reserving the right to bring a claimant’s offensive claims in an unspecified forum *after* the resolution of the international arbitration is completely different from the reservation of rights at issue here. To be sure, *none* of the arbitrations cited by Colombia involve a waiver that reserves a claimant’s right to defend itself.³⁸⁵ As such, Respondent points to no conduct by Claimants indicating that they have somehow failed to ensure “materially . . . that no other legal proceedings are ‘initiated’ or ‘continued.’”³⁸⁶

³⁸³ Memorial on Preliminary Objections, ¶¶ 332-334 & n.651.

³⁸⁴ *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1 (Peru-U.S. TPA), Partial Award on Jurisdiction, July 15, 2016 (“*Renco*”), ¶ 58 (RL-218) (emphasis added).

³⁸⁵ See *Waste Management, Inc. v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2 (NAFTA), Arbitral Award, June 2, 2000, ¶ 27 (RL-221) (“This waiver does not apply, however, to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by other sources of law, including the municipal law of Mexico,” reserving claimant’s right to bring brand new claims under other sources of law); *Detroit International Bridge Co. v. Government of Canada*, PCA Case No. 2012-25 (NAFTA), Award on Jurisdiction, April 2, 2015, ¶¶ 54, 67, 70 (RL-222) (three waivers that “shall not be construed to extent to or include any of the claims included in” specific civil complaints that Claimant filed offensively).

³⁸⁶ Memorial on Preliminary Objections, ¶ 335.

205. As also explained above,³⁸⁷ requiring an unbridled waiver of a right to self-defense would be unjust because “[t]he investor would have to sit still and endure any form of injustice passively on pain of losing its access to international arbitration.”³⁸⁸

206. Colombia’s argument is further belied by its assertion that Claimants are required “to abandon all of their proceedings.”³⁸⁹ But the proceedings at issue are not Claimants’—they are Colombia’s. The reservation of the right to self-defense necessarily refers to Colombia’s proceedings in which Claimants are forced to defend themselves. If Colombia wishes to discontinue all Colombian proceedings, Claimants would certainly not object.

VIII. COLOMBIA SHOULD BE ORDERED TO PAY ALL FEES AND COSTS INCURRED BY CLAIMANTS ON ITS FRIVOLOUS PRELIMINARY OBJECTIONS

207. TPA Article 10.20.6 empowers the Tribunal to award to the prevailing party reasonable costs and attorney’s fees incurred in opposing the objection. In considering whether to do this, the Tribunal may take into account “whether the respondent’s objection was frivolous Similarly, the tribunal can render an award of partial attorneys’ fees where a claim or objection was frivolous in part.”³⁹⁰ As detailed in this Counter-Memorial, Colombia’s Memorial is filled with objections that either lack or blatantly ignore established legal principles and support, while others are based on mischaracterizations of the facts. More important, Colombia’s claims rest on disputed issues of fact, which can never form the basis for preliminary objections.

208. Nevertheless, Colombia attempted to have its objections decided as preliminary questions even though, as explained in numerous instances above, such objections have been repeatedly rejected, including in arbitrations where Colombia was a party. For the others, Colombia either fails to muster support, mischaracterizes the findings in those sources, or misstates Claimants’ claim to construct an argument that can be supported by authorities. For this reason

³⁸⁷ See ¶¶ 184, 186-188 *supra*.

³⁸⁸ Schreuer, *supra* note 365, 249 (CL-193).

³⁸⁹ Memorial on Preliminary Objections, ¶ 341.

³⁹⁰ K. Vandeveld, U.S. International Investment Treaties (Oxford 2009), at 609 (RL-121).

alone, Claimants should recover all of their costs, including attorney’s fees, in their entirety, or at least for those objections that the Tribunal finds to be frivolous.

209. Recovery of its attorney’s fees and costs in defending against Colombia’s preliminary objections would also further the objectives of Article 10.20.6 of the TPA. The purpose of that Article is “to provide disincentive for routine invocation” of the preliminary questions mechanism.³⁹¹ Stated differently, “[a] possible safeguard against an abuse of preliminary objections under Article 10.20, paragraphs 4 and 5, may be found in the provision on costs contained in Article 10.20.6.”³⁹²

210. Such disincentive is particularly appropriate here because Colombia has routinely attempted to invoke preliminary objections and similar dispositive mechanisms. Colombia has 17 ICSID arbitrations against it, three of which are in the preliminary stages.³⁹³ In only three arbitrations did Colombia not file preliminary objections or seek to bifurcate proceedings.³⁹⁴ Colombia has otherwise filed preliminary objections or requested to address jurisdiction as a preliminary question in all eleven of the other ICSID arbitrations in which it is a respondent.³⁹⁵

³⁹¹ Vandeveldel, *supra* note 390, at 609.

³⁹² Michele Potestà & Marija Sobot, *Frivolous Claims in International Adjudication: A Study of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily*, 3 J. Int. Disp. Settl. 137, Feb. 1, 2012, p. 23, n.173 (CL-200).

³⁹³ The tribunal has not been constituted in two cases. See *Anglo American plc v. Republic of Colombia* (ICSID Case No. ARB/21/31) and *Glencore International A.G. v. Republic of Colombia* (ICSID Case No. ARB/21/30). The proceedings in the other two are in early stages. In *Neustar, Inc. v. Republic of Colombia* (ICSID Case No. ARB/20/7) only Procedural Order No. 1 has been issued and it is not publicly available. See ICSID, *Case Details*, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/7> (C-015).

³⁹⁴ These cases are: *Naturgy Energy Group S.A. and Naturgy Electricidad Colombia, S.L. (formerly Gas Natural SDG, S.A. and Gas Natural Fenosa Electricidad Colombia, S.L.) v. Republic of Colombia* (ICSID Case No. UNCT/18/1); *Angel Samuel Seda et. al. v. Republic of Colombia* (ICSID Case No. ARB/19/6); *South32 SA Investments Limited v. Republic of Colombia* (ICSID Case No. ARB/20/9).

³⁹⁵ Resp. Letter to the Tribunal, Aug. 24, 2020 (requesting to submit preliminary objections); *América Móvil S.A.B. de C.V. v. Republic of Colombia*, ICSID Case No. ARB(AF)/16/5, Award, May 7, 2021, ¶¶ 21-23, 502(i) (CL-201) (denying request for bifurcation and denying jurisdictional objections); *Glencore*, ICSID Case No. ARB/16/6, Award, ¶¶ 20-22, 1687(1) (CL-005) (dismissing Colombia’s request to bifurcate and most of Colombia’s jurisdictional objections); *Eco Oro v. Colombia*, Decision on Jurisdiction, Liability and Directions on Quantum, ¶¶ 23-26, 920(1) (CL-050) (denying Colombia’s request to bifurcate jurisdiction and merits and denying Colombia’s jurisdictional objections); *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Procedural Order No. 1, Feb. 19, 2019, at Annex A (bifurcating jurisdiction) (CL-202); *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation, Aug. 3, 2020 (rejecting Colombia’s request to bifurcate) (CL-203); *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3, Jan. 17, 2020 (CL-204) (denying Colombia’s request to bifurcate with respect to objection A, but allowing objection B to be bifurcated); *Gran*

211. Most of these applications have failed.³⁹⁶ Specifically with regard to preliminary objections, such as those raised here, Colombia has lost in all three prior instances.³⁹⁷ Yet, Colombia remains undeterred, continuing to bring frivolous preliminary objections, with the result being delay and increased cost. These are exactly the circumstances that the fee shifting provision in the TPA was created for and designed to deter.

212. Accordingly, Claimants respectfully request that the Tribunal award Claimants all costs and attorney's fees incurred opposing Respondent's Preliminary Objections.

IX. PRAYER FOR RELIEF

213. In view of the foregoing, Claimants respectfully request that:

- a. The Tribunal deny all of Colombia's Preliminary Objections in their entirety;
- b. Award Claimants all attorney's fees and costs related to Colombia's Preliminary Objections; and
- c. Award any other relief that the Tribunal considers to be just and proper.

Colombia Gold Corp. v. Republic of Colombia, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, Nov. 23, 2020 (CL-205) (dismissing Respondent's bifurcated jurisdictional objections and admitting ancillary claim). See also L. Bohmer, *Colombia Round-Up: An Update on 12 Treaty-Based Disputes Against the State*, IA Reporter, Feb. 28, 2020, <https://www.iareporter.com/articles/colombia-round-up-an-update-on-treaty-based-disputes-against-the-state> (C-016) (noting that tribunals have also denied Colombia's request to bifurcate in *Telefónica, S.A. v. Republic of Colombia* (ICSID Case No. ARB/18/3) and *Galway Gold Inc. v. Republic of Colombia* (ICSID Case No. ARB/18/13)); ICSID, *Decisions on Manifest Lack of Legal Merit*, <https://icsid.worldbank.org/cases/content/tables-of-decisions/manifest-lack-of-legal-merit> (visited Oct. 4, 2021) (C-017) (noting that Colombia's objections in *Glencore International A.G. and others v. Republic of Colombia* (ICSID Case No. ARB/19/22) was denied); ICSID, *Case Details: AFC Investment Solutions S.L. v. Republic of Colombia* (ICSID Case No. ARB/20/16), <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/16> (visited Oct. 4, 2021) (C-018) (noting that the Tribunal held a hearing on Respondent's preliminary objections on June 3, 2021).

³⁹⁶ See note 395 *supra*.

³⁹⁷ See *Gran Colombia*, Decision on the Bifurcated Jurisdictional Issue (CL-205) (dismissing Respondent's bifurcated jurisdictional objections and admitting ancillary claim); ICSID, *Decisions on Manifest Lack of Legal Merit*, <https://icsid.worldbank.org/cases/content/tables-of-decisions/manifest-lack-of-legal-merit> (visited Oct. 4, 2021) (C-019).

Dated: October 14, 2021

Respectfully submitted,

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