IN THE MATTER OF AN ARBITRATION UNDER
THE UNCITRAL ARBITRATION RULES (2013)

ALBERTO CARRIZOSA GELZIS,
FELIPE CARRIZOSA GELZIS,
ENRIQUE CARRIZOSA GELZIS,
Claimants,

v.

THE REPUBLIC OF COLOMBIA,
Respondent

PCA Case No. 2018-56

Colombia's Answer on Jurisdiction

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21 October 2019

Arnold & Porter

Glossary

Term	Full Name or Description
Administrative Judicial Tribunal	First Section of the Administrative Tribunal of Cundinamarca
2005 Administrative Judicial Tribunal Judgment	Judgment dated 27 July 2005 issued by the Administrative Judicial Tribunal, rejecting Claimants' claims
Annulment Petition	Petition filed by Claimants (through their Holding Companies) on 11 December 2011 to annul the 2011 Constitutional Court Judgment
CAV	*Corporación de Ahorro y Vivienda*, a specific type of financial entity whose object was to obtain capital via deposits and with that capital provide loans
Capitalization Order	Order issued by the Superintendency on 2 October 1998, directing Granahorrar to raise capital to offset its insolvency
Carrizosa Family	Julio Carrizosa Mutis (Claimants' father); Astrida Benita Carrizosa (Claimants' mother); and Claimants
Central Bank	*Banco de la Republica*
Central Bank Technical Unit	*Subgerencia Monetaria y de Reservas*, a body of experts of the Central Bank that conducts financial analyses
Chapter 10 MFN Clause	Article 10.4 ("Most-Favored Nation Treatment") of the U.S.-Colombia Trade Promotion Agreement
Chapter 12 MFN Clause	Article 12.3 ("Most-Favored Nation Treatment") of the U.S.-Colombia Trade Promotion Agreement
Chapter 10 MFN Footnote	Article 10.4, footnote 2, of the U.S.-Colombia Trade Promotion Agreement

Claimants	Alberto Carrizosa Gelzis, Enrique Carrizosa Gelzis, and Felipe Carrizosa Gelzis
Colombia	Republic of Colombia or Respondent
Colombia-Switzerland BIT	Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments
2014 Confirmatory Order	Order No. 188/14 issued by the Constitutional Court on 25 June 2014, confirming the 2011 Constitutional Court Judgment
Constitutional Court	*Corte Constitucional*, the highest court of the Colombian court system adjudicating issues of constitutionality, which is charged with protecting the integrity and supremacy of the Colombian Constitution
2011 Constitutional Court Judgment	Judgment SU-447 issued by the Constitutional Court on 26 May 2011, dismissing Claimants' claims
Contentious Administrative Code	Contentious Administrative Code of Colombia in force in 1998
COP	Colombian peso (in accordance with the ISO 4217 currency standard)
Council of State	*Consejo de Estado*, the highest tribunal adjudicating administrative matters in the Colombian court system
2007 Council of State Judgment	Judgment issued by the Council of State on 1 November 2007, revoking the 2005 Administrative Judicial Tribunal Judgment
Creditor Banks	*Acreedores*, or financial entities to whom the Carrizosa Family had pledged their Granahorrar shares in exchange for financing, (namely, *Bancafe Colombia y Bancafe (Panama)*; *Corfivalle*; *Banco Ganadero*; *Bancolombia*; *Banco Popular*; *Banco Superior*; *Interbanco*; *Comercia*; *Findesarrollo*; *Banco Santander*; and *Banco Del Estado*)

Financial Act	*Estatuto Orgánico del Sistema Financiero de Colombia de 1993*, or "EOSF"
First Set of Critical Dates	The set of dates on which the alleged breaches of the TPA occurred, namely June to October 1998, 26 May 2011, and 24 June 2014
Fogafín	*Fondo de Garantía de Instituciones Financieras*
Fogafín Agreement	Agreement executed by Granahorrar and Fogafín on 6 July 1998, through which Fogafín agreed to guarantee Granahorrar's interbank financing and overdraft obligations (Granahorrar and Fogafín amended the Fogafín Agreement 13 times, to increase the ceiling of support, modify the type of support to include direct financing, and extend the contractual term)
Fogafín Board	Board of Directors of Fogafín
Granahorrar	Corporación Grancolombiana de Ahorro y Vivienda "Granahorrar"
Holding Companies	Companies owned by the Carrizosa Family, through which they held their shares in Granahorrar (namely, *Asesorías e Inversiones C.G. S.A.* ("Asesorías e Inversiones"); *Inversiones Lieja Ltda.* ("Inversiones Lieja"); I.*C. Interventorías y Construcciones Ltda.* ("Interventorías y Construcciones"); *Exultar S.A.* ("Exultar"); *Compto S.A.* ("Compto"); and Fultiplex S.A. ("Fultiplex"))
IACHR	Inter-American Commission of Human Rights
ILC Articles on State Responsibility	Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001)
Notice of Appeal	Claimants' notice of appeal dated 5 August 2005, challenging the 2005 Administrative Judicial Tribunal Judgment

Nullification and Reinstatement Action	Claimants' complaint dated 28 July 2000 before the Administrative Judicial Tribunal, challenging the 1998 Regulatory Measures
Petitioners	Individuals who filed a petition dated 11 December 2011, seeking to annul the 2011 Constitutional Court Judgment (namely, Claimants, along with Magistrate Mauricio Fajardo, a member of the Council of State)
1998 Regulatory Measures	Collectively, the Capitalization Order and the Value Reduction Order
Resolution No. 25	Resolution No. 25 of 1995, regulating the issuance of temporary liquidity infusions by the Central Bank
Second Critical Date	24 January 2018, the date of the submission of Claimants' Request for Arbitration
Superintendency	*Superintendencia Financiera* or *Superintendencia Bancaria*
TLI	Temporary Liquidity Infusion, or funds disbursed by the Central Bank to financial entities experiencing temporary liquidity shortfalls
TPA	U.S.-Colombia Trade Promotion Agreement
***Tutela* Petitions**	*Tutela* Petitions filed by Fogafín and the Superintendency on 5 March 2008 before the Fifth Section of the Council of State, challenging the 2007 Council of State Judgment
Value Reduction Order	Resolution No. 002 of 1998 issued by Fogafín on 3 October 1998, which ordered Granahorrar to reduce the nominal value of its shares to COP 0.01
VCLT	Vienna Convention on the Law of Treaties
UNCITRAL	United Nations Commission on International Trade Law

I. INTRODUCTION

1. The present dispute arises out of the investment by a wealthy Colombian family, the Carrizosas, in a Colombian financial institution, *Corporación Grancolombiana de Ahorro y Vivienda* ("**Granahorrar**"). The family was led by patriarch Julio Carrizosa, a well-known Colombian businessman. In the 1980s, his three sons—Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis, and Enrique Carrizosa Gelzis ("**Claimant**s")—as well as his wife (and Claimants' mother), Astrida Benita Carrizosa, acquired majority shares in Granahorrar, and held such shares through several holding companies.[1]

2. In the midst of a nationwide financial crisis in 1998, Granahorrar experienced a liquidity crisis caused by (i) an intractable and widely publicized dispute amongst its shareholders (including Claimants), which caused account holders to lose trust in the bank, and (ii) the risky business strategy of the bank's management. The shareholder dispute was so damaging to the image of Granahorrar that, at a meeting of Granahorrar's Board of Directors held in July 1998, the President of Granahorrar attributed the bank's financial instability to what he characterized as the "noxious effects" of the shareholder dispute.[2]

3. Unable to put its own house in order and faced with an undeniable liquidity crisis, Granahorrar turned to the Colombian regulatory authorities for assistance.[3] Beginning in June 1998 and for several months thereafter, Granahorrar repeatedly

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[1] **Ex. C-0001**, Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 25.

[2] **Ex. R-0008**, Minutes of Granahorrar Board of Directors Meeting, 24 July 1998, p. 1 (English translation: "[Granahorrar] had lost a significant participation in the collection of [certificates of deposit] in pesos and savings accounts resulting in large part from the noxious effects from publications made at the end of 1997 and the beginning of this year, regarding a dispute between shareholders") (Spanish original: "[Granahorrar] *había perdido de manera importante su participación en captación en [certificados de depósito] en pesos y en cuentas de ahorro como consecuencia en gran parte de los efectos nocivos que trajeron las publicaciones efectuadas a fines del año 1997 e inicios del presente año, respecto del enfrentamiento entre accionistas*").

[3] *See e.g.*, **Ex. R-0018**, Letter from Granahorrar (R. Navarro) to Central Bank (M. Urrutia), 2 June 1998; **Ex. R-0089**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 2 July 1998.

sought, and was granted, financial assistance from the Colombian State. Thus, the *Banco de la Republica* ("**Central Bank**") provided Granahorrar with a liquidity infusion, repeatedly increased the amount of such infusion, and modified the amortization schedule at Granahorrar's request.[4] On the same day that the Central Bank granted Granahorrar's final request for an increase to its liquidity infusions, Granahorrar turned to another Colombian financial regulatory entity, the *Fondo de Garantía de Instituciones Financieras* ("**Fogafín**"), for even more liquidity assistance.[5] On 6 July 1998, Fogafín agreed to guarantee Granahorrar's obligations to third parties ("**Fogafín Agreement**"), and thereafter also provided Granahorrar with direct financing.[6] Over the course of nearly two months, Granahorrar and Fogafín executed 13 addenda to the Fogafín Agreement, pursuant to which Fogafín increased the amount of that support and extended its lifespan.[7] Ultimately, Colombia authorized more than USD 487 million in liquidity

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[4] *See, e.g.*, **Ex. R-0084**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 2 June 1998; **Ex. R-0067**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 1 July 1998; **Ex. R-0069**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 3 July 1998; **Ex. R-0073**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 31 July 1998; **Ex. R-0075**, Letter from Central Bank (A. Velandia) to Granahorrar (R. Navarro), 1 September 1998; **Ex. C-0007**, *Análisis Solicitud Nuevo Plan de Amortización Apoyo Especial de Liquidez C.A.V. Granahorrar*, Central Bank, 1 October 1998.

[5] **Ex. R-0069**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 3 July 1998 (the Central Bank confirming that it had approved Granahorrar's request on the prior day); *see also generally* **Ex. R-0089**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 2 July 1998.

[6] *See generally* **Ex. C-0005**, Agreement between Fogafín and Granahorrar, 6 July 1998 ("**Fogafín Agreement**"); **Ex. R-0092**, Addendum No. 1 to the Fogafín Agreement, 3 August 1998, Art. 1.

[7] **Ex. R-0092**, Addendum No. 1 to the Fogafín Agreement, 3 August 1998, Art. 1; **Ex. R-0093**, Addendum No. 2 to the Fogafín Agreement, 6 August 1998, Art. 1; **Ex. R-0094**, Addendum No. 3 to the Fogafín Agreement, 21 August 1998, Art. 1; **Ex. R-0095**, Addendum No. 4 to the Fogafín Agreement, 31 August 1998, Art. 1; **Ex. R-0104**, Addendum No. 5 to the Agreement between Fogafín and Granhorrar, 2 September 1998, Art. 1; **Ex. R-0096**, Addendum No. 6 to the Fogafín Agreement, 4 September 1998, Art. 1; **Ex. R-0105**, Addendum No. 7 to the Fogafín Agreement, 7 September 1998, Art. 1; **Ex. R-0097**, Addendum No. 8 to the Fogafín Agreement, 8 September 1998, Art. 1; **Ex. R-0098**, Addendum No. 9 to the Fogafín Agreement, 10 September 1998, Art. 1; **Ex. R-0099**, Addendum No. 10 to the Fogafín Agreement, 21 September 1998, Arts. 1, 2; **Ex. R-0106**, Addendum No. 11 to the Fogafín Agreement, 24 September 1998, Art. 1; **Ex. R-0027**, Addendum No. 12 to the Fogafín Agreement, 30 September 1998, Art. 1; **Ex. R-0028**, Addendum No. 13 to the Fogafín Agreement, 1 October 1998, Arts. 1, 2.

assistance to the beleaguered bank, on terms that were not only reasonable but also favorable to Granahorrar.[8]

4. Despite Colombia's timely and decisive liquidity assistance to Granahorrar, on 2 October 1998 various banks informed the *Superintendencia Financiera* ("**Superintendency**") that checks issued by Granahorrar had been returned due to insufficient funds. That same day, Granahorrar informed the Superintendency that it had recorded a negative balance in its accounts.[9] In other words, Granahorrar had defaulted on its payment obligations, thereby breaching the Fogafín Agreement and becoming insolvent.[10] This insolvency, combined with Granahorrar's failure to pay the interest due on its liquidity infusions, led to the termination of the Central Bank's support.[11]

5. Nevertheless, Colombia gave Granahorrar yet one more opportunity to help itself out of its ruinous financial situation: On 2 October 1998, the Superintendency issued an order directing Granahorrar to raise capital from its own shareholders

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[8] *See infra* **Section II.C**; *see also* **Ex. R-0069**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 3 July 1998 (The Central Bank increasing its liquidity assistance to Granahorrar to COP 315 billion (c. USD 231 million); **Ex. R-0028**, Addendum No. 13 to the Agreement between Fogafín and Granahorrar, 1 October 1998, Art. 1 (Fogafín increasing its liquidity assistance to Granahorrar to COP 400 billion (c. USD 256 million)). Colombia has converted COP figures to USD in reliance on the daily COP to USD exchange rate provided by the Central Bank, using the exchange rate of the first date to which the specific figure relates. Where the relevant COP figure relates to a whole month, Colombia has used the exchange rate existing on the last day of the relevant month. As this Answer on Jurisdiction is a jurisdictional pleading, the USD values of the respective COP figures are solely intended to assist the Tribunal. Colombia reserves the right to provide more detailed conversions should the need arise.

[9] **Ex. R-0033**, Letter from Superintendency (S. Ordoñez) to Fogafín (F. Azuero), 2 October 1998; **Ex. R-0034**, Letter from Superintendency (S. Ordoñez) to Central Bank (M. Urrutia), 2 October 1998; **Ex. R-0032**, Letter from Granahorrar (A. Arciniegas) to Superintendency (M. Arango), 2 October 1998.

[10] **Ex. R-0033**, Letter from Superintendency (S. Ordoñez) to Fogafín (F. Azuero), 2 October 1998, p. 2; **Ex. R-0034**, Letter from Superintendency (S. Ordoñez) to Central Bank (M. Urrutia), 2 October 1998, p. 2; **Ex. R-0035**, Letter from Fogafín (F. Azuero) to Superintendency (S. Ordoñez), 2 October 1998.

[11] **Ex. R-0036**, Letter from Granahorrar (J. Amaya) to Superintendency (S. Ordoñez), 2 October 1998; **Ex. R-0037**, Letter from Central Bank (J. Uribe) to Granahorrar (J. Amaya), 2 October 1998.

or from third parties to redress its insolvency ("**Capitalization Order**").[12] In that Order, the Superintendency explained that "the urgent deadline is due to the precarious liquidity situation of [Granahorrar]," and warned that a failure by the bank to act "will inevitably lead to [its] collapse, definitely leading to a systemic crisis and eventual economic panic."[13] The Superintendency rightly emphasized that "in such circumstances the interest of savers and depositors prevails over the interests of shareholders."[14]

6. The Superintendency sent the Capitalization Order to the President of Granahorrar,[15] who in turn notified the bank's shareholders of the Order.[16] However, the shareholders—including Claimants—proved either unable or unwilling to save Granahorrar. The shareholders simply gave up, seemingly resigned to let the bank collapse, heedless of the effect that such collapse would have on the bank's account-holders and the Colombian economy.

7. On the evening of 3 October 1998, the Superintendency issued a report indicating that Granahorrar had become insolvent, was illiquid, and had defaulted on its payments.[17] Faced with the imminent collapse of Granahorrar, and concerned about the potentially devastating ripple effects of any such collapse on the Colombian economy,[18] the Fogafín Board resolved to step into the breach and do

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[12] *See* **Ex. R-0038**, Letter from Superintendency (S. Ordoñez) to Granahorrar (J. Amaya), 2 October 1998 ("**1998 Capitalization Order**"), p. 3.

[13] **Ex. R-0038**, 1998 Capitalization Order, p. 3 (Spanish original: "*lo perentorio del plazo atiende a la situación precaria de liquidez de [Granahorrar] . . . Si la capacidad de [Granahorrar] para devolver los depósitos no se ha restablecido el próximo lunes . . . inevitablemente la conducirá al colapso, propiciando, sin lugar a dudas, una crisis sistémica y un eventual pánico económico*").

[14] **Ex. R-0038**, 1998 Capitalization Order, p. 3 (Spanish original: "*en tales circunstancias el interés de los ahorradores y depositantes prevalece sobre los intereses de los accionistas*").

[15] *See* **Ex. R-0038**, 1998 Capitalization Order.

[16] *See* **Ex. R-0038**, 1998 Capitalization Order; **Ex. R-0039**, Letter from Granahorrar (J. Amaya) to Superintendency (S. Ordoñez), 3 October 1998.

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

[18] **Ex. C-0003**, Minutes of Fogafín Board of Directors Minutes, 3 October 1998, p. 9.

what the bank's own shareholders (including Claimants) had failed to do: capitalize Granahorrar. To "ensure the public's confidence in the financial system, and a normal performance of the payment system,"[19] Fogafín ordered Granahorrar to reduce the nominal value of its shares to COP 0.01 ("**Value Reduction Order**").[20] Thereafter, Fogafín capitalized Granahorrar, thus preventing its demise.[21]

8. Shortly thereafter, the President of Granahorrar wrote a letter to the Superintendency and Fogafín to express his gratitude for the latter's swift action to rescue the bank.[22] Julio Carrizosa, the former Chairman of the Board of Granahorrar (and the patriarch of the Carrizosa Family), similarly praised the Superintendency and Fogafín; for example, a press article dated 5 October 1998 attributed to him the observation that the regulators deserved recognition for the extraordinary efforts and for the necessary action that they took to save Granahorrar.[23]

9. Two years later, however—after Granahorrar had been nursed to financial health by Colombian regulatory authorities—Claimants filed a lawsuit in which they second-guessed and challenged the swift and effective actions of the Colombian regulatory authorities. Accordingly, on 28 July 2000, Claimants, through their Holding Companies,[24] commenced judicial proceedings against the

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[19] **Ex. C-0003**, Minutes of Fogafín Board of Directors Minutes, 3 October 1998, p. 9 (Spanish original: "*para asegurar la confianza del público en el sistema financiero y el normal desarrollo de sistema de pagos*").

[20] **Ex. R-0042**, Resolution No. 002 (Fogafín), 3 October 1998 ("**1998 Value Reduction Order**"), Clause 13.

[21] **Ex. R-0153**, Letter from Fogafín (I. Quintana) to Granahorrar (A. Arciniegas), 5 October 1998.

[22] **Ex. R-0165**, Letter from Jorge Enrique Amaya Pachecho to Fogafín (F. Azuero), 5 October 1998.

[23] *See* **Ex. C-0023**, Judgment No. SU-447/11 (Constitutional Court), 26 May 2011 ("**2011 Constitutional Court Judgment**"), p. 165 (quoting a press article).

[24] As discussed in greater detail below, Claimants' held shares in Granahorrar indirectly through their holding companies: *Asesorías e Inversiones C.G. S.A.*; *Inversiones Lieja Ltda.*; I.*C. Interventorías y Construcciones Ltda.*; *Exultar S.A.*; *Compto S.A.*; and Fultiplex S.A.

Superintendency and Fogafín, challenging the validity of the Capitalization Order and Value Reduction Order (jointly, "**1998 Regulatory Measures**").[25] Pursuant to their claims, which were brought before the *Tribunal Administrativo de Cundinamarca* ("**Administrative Judicial Tribunal**"), Claimants sought compensation for the alleged loss associated with the 1998 Regulatory Measures.[26] The Superintendency and Fogafín objected to the timeliness of the claims,[27] because Colombian law provides that challenges to a regulatory measure must be filed within four months of its issuance.[28]

10. After Claimants, the Superintendency, and Fogafín had produced evidence and filed submissions, on 27 July 2005, the Administrative Judicial Tribunal issued its judgment ("**2005 Administrative Judicial Tribunal Judgment**"). In that ruling, the Court declined to accept the timeliness objection that had been raised by the Superintendency and Fogafín, on the basis that those agencies had not provided Claimants with proper notification.[29] (This finding was later reversed on appeal, as discussed below.)

11. Despite rejecting the statute-of-limitations objection, the court nevertheless found in favor of the regulatory authorities, on the merits. Specifically, it found that the evidence in the record demonstrated that Granahorrar had become insolvent in

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[25] *See generally* **Ex. R-0050**, Nullification and Reinstatement Action, *Compto S A. en Liquidación, et al. v. Superintendencia Bancaria and Fogafín*, Case No. 2000-00521, Administrative Judicial Tribunal of Cundinamarca, 28 July 2000 ("**Nullification and Reinstatement Action**").

[26] *See* **Ex. R-0050**, Nullification and Reinstatement Action, pp 2–3.

[27] *See* **Ex. R-0127**, Answer of the Superintendency to the Nullification and Reinstatement Action, Case No. 20000521, Administrative Judicial Tribunal, 3 August 2001, pp. 29–30; **Ex. R-0128**, Answer of Fogafín to the Nullification and Reinstatement Action, Case No. 20000521, Administrative Judicial Tribunal, 23 November 2001, pp. 45–46.

[28] *See* Decree No. 01 of 1984, Reform of the Contentious Administrative Code of Colombia, 2 January 1984 ("**Contentious Administrative Code**"), Art. 136.

[29] *See* **Ex. R-0051**, Judgment, Compto S.A. en Liquidación, et al. v. Superintendency and Fogafín, Case No. 2000-00521, Administrative Judicial Tribunal of Cundinamarca, 27 July 2005 ("**2005 Administrative Judicial Tribunal Judgment**"), pp. 25-26.

early October 1998—which meant that the 1998 Regulatory Measures had been justified.[30]

12. Claimants then appealed the 2005 Administrative Judicial Tribunal Judgment to the Council of State, which is the highest judicial body that hears cases concerning administrative matters.[31] In 2007, the Council of State issued a decision in which it (i) affirmed the Administrative Judicial Tribunal's conclusion that the Superintendency and Fogafín had not complied with the applicable notification procedure under the general administrative code, and (ii) reversed the Administrative Judicial Tribunal's finding that Granahorrar had become insolvent in October 1998 ("**2007 Council of State Judgment**").[32] Accordingly, the Council of State ordered the Superintendency and Fogafín to pay to Claimants more than COP 226 billion (approximately USD 114 million).[33]

13. In response, the Superintendency and Fogafín challenged the 2007 Council of State Judgment by means of *tutela* petitions.[34] Such petitions are a mechanism under Colombian law for the expedited resolution of claims that the State has breached a party's fundamental rights.[35] The Constitutional Court has the authority to review such petitions (including petitions concerning judicial decisions).[36]

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[30] *See* **Ex. R-0051**, 2005 Administrative Judicial Tribunal Judgment, pp. 32-33.

[31] *See* **Ex. R-0134**, Holding Companies' Notice of Appeal, Case No. 20000521, Administrative Judicial Tribunal, 5 August 2005.

[32] *See generally* **Ex. R-0054**, Council of State Judgment and Dissent, *Compto S.A. en Liquidación et al. v. Superintendency and Fogafín*, Case No. 2000-00521-02(15728), 1 November 2007 ("**2007 Council of State Judgment**").

[33] *See* **Ex. R-0054**, 2007 Council of State Judgment, pp. 61–62.

[34] *See generally* **Ex. R-0140**, Fogafín's Tutela Petition, Council of State, 5 March 2008; **Ex. R-0141**, Superintendency Tutela Petition , Council of State, 5 March 2008.

[35] *See* **Ex. R-0124**, Political Constitution of Colombia, 4 July 1991 ("**Colombian Constitution**"), Arts. 86, 241.

[36] *See* **Ex. R-0124**, Colombian Constitution, Art. 241; **Ex. R-0057**, Rejection of Superintendency Tutela Petition, Case No. 11001-03-15-000-2008-00226-00, First Section of the Council of State, 4 September 2008, p. 64; **Ex. R-0055**, Rejection of Fogafín Tutela Petition, Case No. 11001-03-15-000-2008-00225-00, First Section of the Council of State, 4 December 2008, p. 50.

14. On 26 May 2011, the Constitutional Court issued a judgment on the *tutela* petitions filed by the Superintendency and Fogafín ("**2011 Constitutional Court Judgment**").[37] In this ruling, which constituted a final judicial decision that closed the proceedings,[38] the Constitutional Court reversed the lower court decisions. Specifically, it determined that the Superintendency and Fogafín had in fact complied with the applicable notification procedure.[39] Because Granahorrar had been provided proper notice of the 1998 Regulatory Measures, the statute of limitations had in fact run (as the Superintendency and Fogafín had been arguing), and on that basis dismissed Claimants' claims.[40]

15. Shortly thereafter, on 11 December 2011, Claimants filed an extraordinary recourse before the Constitutional Court—in essence, an application for reconsideration—seeking to annul the 2011 Constitutional Court Judgment.[41] On 15 May 2012, while a decision on Claimants' application was pending, the Trade Promotion Agreement between Colombia and the United States ("**TPA**") entered into force. On 25 July 2014, the Constitutional Court rejected Claimants' extraordinary annulment petition, and issued an order ("**2014 Confirmatory Order**") confirming its earlier decision (i.e., the 2011 Constitutional Court Judgment).[42]

16. Dissatisfied with the judicial decisions of the Colombian Administrative Judicial Tribunal and the Constitutional Court, Claimants are now appealing their case to multiple international tribunals, specifically (i) to this Tribunal, (ii) to an ICSID tribunal (pursuant to a claim filed by Claimants' mother, Astrida Benita Carrizosa,

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[37] *See generally* **Ex. C-0023**, 2011 Constitutional Court Judgment.

[38] **RER-1**, Dr. Jorge Enrique Ibáñez Najar Expert Report, 21 October 2019 ("**Expert Report of Jorge Ibáñez**"), ¶ 11.

[39] *See* **Ex. C-0023**, 2011 Constitutional Court Judgment, pp. 139–159.

[40] *See* **Ex. C-0023**, 2011 Constitutional Court Judgment, pp. 139–159.

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

[42] *See* **Ex. R-0049**, 2014 Confirmatory Order, ¶¶ 4.4.2.1, 4.4.3.1–4.4.3.2.

on the basis of the same facts that undergird the case *sub judice*[43]), and (iii) to the Inter-American Commission on Human Rights (also on the basis of the same facts).[44]

17. This Tribunal is faced with the critical question as to whether it has jurisdiction over the Carrizosas' claims in this proceeding. For the Tribunal to decide that this case should advance to the merits, it must have absolute certainty that it has jurisdiction. Indeed, the requirement for certainty of a State's consent to international adjudication has been confirmed by the International Court of Justice ("**ICJ**"), in terms that leave no room for interpretation: "The consent allowing for the Court to assume jurisdiction must be certain."[45] The ICJ has also stated that the consent of the respondent State must be unequivocal, voluntary, and indisputable: "[W]hatever the basis of consent, the attitude of the respondent State must 'be capable of being regarded as 'an unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable' manner'"[46] (internal citations omitted).

18. In the present case, Claimants have invoked the TPA as the basis for Colombia's alleged consent to arbitration. However, Colombia did not consent to arbitration of any of the claims submitted by Claimants in this case.

19. Such absence of consent manifests itself in a variety of forms. For example, in accordance with customary international law, Colombia did not consent to the retroactive application of the TPA.[47] Accordingly, the Tribunal does not have

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[43] *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/05.

[44] *See generally* **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012.

[45] **RLA-0079**, *Certain Questions of Mutual Assistance in Criminal Matters*, ICJ (Higgins, *et al.*), Judgment, 4 June 2008 ("***Certain Questions of Mutual Assistance* (Judgment)**"), ¶ 62.

[46] **RLA-0079**, *Certain Questions of Mutual Assistance* (Judgment), ¶ 62.

[47] *See* **RLA-0001**, Free Trade Agreement between the United States and Colombia, Chapter Ten (Investment), 22 November 2006 ("**TPA**"), Art. 10.1.3 ("For greater certainty, this Chapter does

jurisdiction *ratione temporis* over alleged breaches that pre-date the entry into force of the TPA (i.e., 15 May 2012), or over disputes that arose before that date. According to Claimants, "[t]his case is about the inordinate abuse of regulatory sovereignty,"[48] because "Colombia's financial regulatory authorities unlawfully expropriated Claimants' investment."[49] Yet the regulatory measures that Claimants are challenging, viz., the 1998 Regulatory Measures, date back to 1998—more than 10 years *before* the entry into force of the TPA.[50] The dispute concerning those measures arose at the latest in July 2000, when Claimants formally challenged the validity of those regulatory measures in Colombian courts[51]—yet that too was long *before* the entry into force of the TPA in 2012.

20. Claimants further claim that the proceedings in the case they commenced before the Colombian courts amounted to a denial of justice. However, that too is beyond the temporal scope of the TPA: the final decision in the judicial proceeding in question was issued in May 2011, nearly a year *before* the entry into force of the TPA in May 2012. All of Claimants' claims are thus barred due to lack of *ratione temporis* jurisdiction. And as discussed below, Claimants' extraordinary, *in extremis* attempt to annul the Constitutional Court's final decision of 26 May 2011, which led to the issuance by that same court of the 2014 Confirmatory Order, does not serve to manufacture *ratione temporis* jurisdiction over Claimants' claims. Ultimately, to invoke Claimants' own words, "[t]his case is about the inordinate abuse of regulatory sovereignty,"[52] and as explained, all of the relevant regulatory measures occurred prior to the TPA's entry into force.

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not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.")

[48] Notice of and Request for Arbitration, p. 1.

[49] Claimants' Memorial (PCA), p. 12.

[50] *See* **Ex. R-0038**, Capitalization Order; **Ex. R-0042**, Value Reduction Order.

[51] *See generally* **Ex. R-0050**, Nullification and Reinstatement Action.

[52] Notice of and Request for Arbitration, p. 1.

21. Furthermore, Colombia did not consent to the submission of the *type* of claims raised by Claimants, as a result of which the claims are vitiated by a lack of jurisdiction *ratione voluntatis*. Colombia and the United States agreed to a set of rules under Chapter 12 of the TPA concerning financial services. Claimants acknowledge that Chapter 12 governs the present proceeding,[53] but they conveniently disregard the express limits to consent set forth in Chapter 12. For example, Claimants are asserting claims for alleged breaches of the fair and equitable treatment and national treatment obligations, ignoring the fact that Chapter 12 precludes those types of claims.[54] Moreover, Claimants' attempt to manufacture consent using the TPA's most-favored nation clause fails, because such attempt is inconsistent with the text of the TPA (as well as with the relevant case law).

22. The fatal flaws in Claimants' claims do not end there. As discussed in more detail below, such claims were not asserted by *foreign* investors, as required by the TPA, as a result of which there is no jurisdiction *ratione personae*. Claimants are dual US-Colombian nationals.[55] Pursuant to the TPA, in order to be able to assert claims against Colombia, Claimants must demonstrate that their dominant and effective nationality is their US nationality.[56] However, the evidence indicates that Claimants' dominant and effective nationality is that of Colombia.

23. Yet another insurmountable flaw of Claimants' case is that their alleged investment is not a qualifying "investment" under the TPA, and thus their claims are rendered inviable by the absence of jurisdiction *ratione materiae*. The TPA provides a detailed definition of "investment,"[57] which specifically excludes "an

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[53] *See* **Ex. R-0101**, Claimant's Memorial (PCA), ¶ 337 ("Claimants have filed this proceeding under Chapter 12.").

[54] *See* **RLA-0001**, TPA, Art. 12.1.2(b).

[55] Claimants' Memorial (PCA), p. 11 ("Claimants are dual US-Colombian citizens.").

[56] *See* **RLA-0001**, TPA, Art. 10.28 ("[A] natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality").

[57] *See* **RLA-0001**, TPA, Art. 10.28.

order or judgment entered in a judicial or administrative action" from qualifying as an investment.[58] Yet Claimants repeatedly assert that the 2007 Council of State Judgment (rather than their indirect shareholding in Granahorrar) is their investment for purposes of this arbitration.[59] But even if Claimants were arguing that their shareholding interest in Granahorrar qualified as an investment (quod non), such interest would not qualify for protection under the TPA. That is so because under the TPA a qualifying investment must have been made in accordance with local law,[60] and Claimants failed to comply with requirements under Colombian law concerning the registration of foreign investments with relevant Colombian authorities.

24. In sum, Claimants' claims: (i) are based on events that took place years before the entry into force of the TPA, as a result of which jurisdiction *ratione temporis* is lacking in this case (**Section III.B**); (ii) are not subject to arbitration under the TPA, as a result of which there is also no jurisdiction *ratione voluntatis* (**Section III.C**); (iii) are not asserted by *foreign* investors as required by the TPA, as a result of which there is an absence of jurisdiction *ratione personae* (**Section III.D)**; and (iv) do not concern a qualifying "investment," as defined in the TPA, as a result of which there is an equally fatal absence of jurisdiction *ratione materiae* (**Section III.E**).[61] At the very least, it is plain that the level of certainty of the State's consent required by public international law, and recognized by the ICJ, is not attained in the instant case.[62] The totality of Claimants' claims must therefore be dismissed on one or more of the above-mentioned jurisdictional grounds.

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[58] **RLA-0001**, TPA, Art. 10.28, fn. 15.

[59] *See* Claimants' Memorial (PCA), ¶ 420 ("[F]or purposes of pleading and/or proof of *ratione materiae*, the Council of State's November 1, 2007 Judgment represents and constitutes Claimants' investment as alleged and demonstrated in this proceeding."); *see also id.*, ¶¶ 1, 23, 404.

[60] *See infra* **Section III.E**.

[61] *See* **RLA-0001**, TPA, Art. 10.28.

[62] **RLA-0079**, *Certain Questions of Mutual Assistance* (Judgment), ¶ 62.

25. These fundamental flaws in Claimants' case require Claimants to resort to legal and factual contortions, in an attempt to make their claims appear viable. For example, Claimants assert that the Tribunal should accept at face value their arguments on jurisdiction because of an alleged "presumption[] that would favor access to a merits hearing."[63] However, no such presumption exists under public international law, as discussed below. Claimants also either ignore[64] or misrepresent[65] the case law that plainly contradict Claimants' arguments on the burden of proof (**Section III.A**).

26. On a more general level, it appears that Claimants are either misapprehending the nature of the inquiry in the jurisdictional phase, or are improperly using their jurisdictional brief to address (at some length) issues that relate exclusively to the merits. Thus, they devote more than 100 pages of their Memorial *on Jurisdiction* to a discussion of alleged facts that are completely irrelevant to the jurisdictional

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[63] Claimants' Memorial (PCA), ¶ 159.

[64] In asserting that the TPA's most-favored nation clause can be used to expand the scope of consent to arbitration, Claimants' acknowledge that four cases contradict their theory. Claimants ignore a host of other cases. *See infra* **Section III.C.3**; *see also generally* **RLA-0034**, *ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9 (Dupuy, Torres Bernárdez, Lalonde), Award on Jurisdiction, 10 February 2012 ("***ICS* (Award on Jurisdiction)**"); **RLA-0033**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1 (Dupuy, Brower, Bello Janeiro), Award, 22 August 2012 ("***Daimler* (Award)**"); **RLA-0035**, *European American Investment Bank AG v. Slovak Republic*, PCA Case No. 2010-17 (Greenwood, Petsche, Stern), Award on Jurisdiction, 22 October 2012 ("***Euram* (Award on Jurisdiction)**"); **CLA-0043**, *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v.Turkmenistan*, ICSID Case No. ARB/10/1 (Rowley, Park, Sands), Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, 7 May 2012 ("***Kılıç***"); **RLA-0011**, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06 (Stern, Klein, Thomas), Award on Jurisdiction, 18 July 2013 ("***ST-AD* (Award on Jurisdiction)**"); **RLA-0032**, *Sanum Investments Ltd. v. Government of the Lao People's Democratic Republic*, PCA Case No. 2013-13 (Rigo Suerda, Hanotiau, Stern), Award on Jurisdiction, 13 December 2013 ("***Sanum* (Award on Jurisdiction)**").

[65] For example, Claimants argue that the Tribunal should adopt the burden of proof articulated by Judge Rosalyn Higgins in the case concerning *Oil Platforms*, and assert that "[t]he majority of tribunals in investor-State arbitrations have adopted Judge Higgins' test." Claimants' Memorial (PCA), ¶ 166. Claimants misrepresent the case law, which draws a clear distinction between jurisdictional objections like those at issue here, and the jurisdictional objection at issue in the *Oil Platforms* case (viz., whether the claims as pleaded could fall within the scope of the treaty at issue). *See infra* **Section III.A**.

issues at play during this phase of the proceeding. Moreover, it is a factual exposition rife with inaccuracies,[66] rhetorical flourishes,[67] and purported substantive arguments on the alleged breaches of the TPA.[68] Claimants even go so far in their Memorial on Jurisdiction as to submit expert reports purporting to analyze the alleged substantive TPA breaches,[69] and calculating the quantum of the alleged injury resulting from such alleged breaches.[70] All of the foregoing is both inappropriate and premature at the present stage of the proceedings. Colombia declines to emulate Claimants' procedural misconduct, and will focus on the jurisdictional issues rather than the merits ones—otherwise, the purpose of this bifurcated phase of the proceeding would be defeated. Nevertheless, Claimants' self-serving and incomplete factual narrative compels Colombia to present a brief summary of the key facts, as they actually unfolded, lest Claimants' tendentious narrative on the merits be taken at face value by the Tribunal. To that end, Colombia has compiled a timeline highlighting the key events, which is attached as Exhibit R-0001.[71]

27. Aside from setting straight some of the factual issues, however, Colombia will refrain herein from rebutting Claimants' arguments on the merits. If the case were to proceed to a merits stage, Colombia would prove that Claimants' claims are meritless. For example, Claimants' own insistence that their complaints center on

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[66] *See, e.g.*, Claimants' Memorial (PCA), ¶ 29 (alleging that the first instance judicial proceeding "lay fallow" for 5 years, even though the evidence shows that the case was active during that time, as the litigants gathered evidence, took oral testimony, and presented oral arguments), ¶ 434 ("The entire record of the present dispute is characterized by a marked connotation of discrimination against Claimants").

[67] *See, e.g.*, Claimants' Memorial (PCA), ¶ 4 (alleging that the Constitutional Court triggered an "institutional crisis," the "magnitude of [which] is witness to the Constitutional Court's extreme judicial activism, and abuse of authority").

[68] *See* Claimants' Memorial (PCA), §§ II, V.

[69] *See generally* Expert Report of Jack J. Coe; Expert Report of Dr. Martha Teresa de Briceño; Expert Report of Dr. Alfonso Vargas Rincón.

[70] *See generally* Expert Report of Antonia L. Argiz.

[71] **Ex. R-0001**, Timeline of Relevant Events, 21 October 2019.

the most recent judicial decision[72] would render all but their denial of justice claim untenable.[73] Colombia also would demonstrate that the regulatory measures at the heart of this dispute, viz., the 1998 Regulatory Measures, were prudential measures designed to bring Granahorrar into compliance with its legal obligations and protect the stability of the financial system, and thus cannot be the subject of liability under the terms of the TPA.[74]

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[72] *See, e.g.*, Claimants' Memorial (PCA), ¶ 1 ("The claims here presented arising from an extraordinary example of illicit judicial activism and abuse of authority matured on June 25, 2014. It was on this date (June 25, 2014) that the last element giving rise to damages stemming from Colombia's violation of the TPA's protection standards took place.").

[73] *See, e.g.*, **RLA-0080**, *B.E. Chattin (USA) v. United Mexican States*, Mexico/USA General Claims Commission (Vollenhoven, Nielsen, MacGregor), Decision, 23 July 1927, ¶ 10 ("Acts of the judiciary, either entailing direct responsibility or indirect liability (the latter called denial of justice, proper), are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man. Acts of the executive and legislative branches, on the contrary, share this lot only then, when they engender a so-called *indirect* liability in connection with acts of others"); **RLA-0081**, *Loewen Group and another v. United States of America*, ICSID Case No. ARB (AF)/98/3 (Mason, Fortier, Mikva), Opinion of Christopher Greenwood, QC, 26 March 2001, ¶ 10 ("I am, however, in complete agreement with Sir Robert Jennings that Loewen's claim in the present arbitral proceedings turns on whether or not there has been a denial of justice entailing a violation of international law by the United States of America. . . . While Article 1102 extends beyond denial of justice, in the circumstances of the present case, where Loewen's claims arise out of a decision of a Mississippi court, its claims under both Article 1102 and 1105 assert - and depend upon Loewen establishing - that there was a denial of justice. Although the Loewen claim also alleges an expropriation in violation of Article 1110, an award of damages, including an award of punitive damages, can amount to an expropriation only if the court proceedings are so flawed as to amount to a denial of justice.").

[74] *See* **RLA-0001**, TPA, Art. 12.10.1 ("Notwithstanding any other provision of this Chapter or Chapter Ten [] . . . with respect to the supply of financial services in the territory of a Party by a covered investment, a Party shall not be prevented from adopting or maintaining measures for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service supplier, or to ensure the integrity and stability of the financial system"), *id.* Art. 12.10.4 ("For greater certainty, nothing in this Chapter shall be construed to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with this Chapter, including those relating to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on financial services contracts, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions

II. SUMMARY OF KEY FACTS

28. In keeping with the nature of this Answer *on Jurisdiction*, Colombia does not provide herein an exhaustive account of the facts. Rather, it provides a high-level overview and a summary of the key facts, with the aim of providing the Tribunal with the proper context in which Colombia's jurisdictional objections should be considered. This is particularly necessary in this case, given that the factual narrative provided by Claimants in their pleadings is self-serving, largely unsubstantiated[75] and contradicted by the evidence.[76] Colombia reserves its right to expand upon the below description of the facts, in its Rejoinder and in any other written submission that may be authorized by the Tribunal in this proceeding.

29. A brief note concerning Claimants' translations is in order. The relatively few factual documents that Claimants rely upon in their Memorial on Jurisdiction are Spanish-language documents. In their Notice of and Request for Arbitration, Claimants produced English excerpts that contain mistranslations, which in some cases altered the meaning of the underlying documents. Claimants did not correct these errors in their Memorial. Moreover, Claimants submitted English translations of exhibits with their Memorial on Jurisdiction, but the block quotes from these documents which are included in their Memorial do not match Claimants' own English translations of such documents. Colombia has submitted as Exhibit R-0262 to this Answer on Jurisdiction a table comparing Claimants' quotations with the underlying documents, which shows Claimants' errors.[77]

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prevail, or a disguised restriction on investment in financial institutions or cross-border trade in financial services.").

[75] *See, e.g.*, Notice of and Request for Arbitration, ¶ 46 (claiming without providing any supporting documentation that the Colombian government withdrew all its deposits in Granahorrar as of the third quarter of 1997).

[76] Notice of and Request for Arbitration, ¶ 78 (claiming that Fogafín denied petitions for direct funding from July 6 to September 24, 1998); *but see* **Ex. R-0106**, Addendum No. 11 to the Agreement between Fogafín and Granahorrar, 24 September 1998 (authorizing COP 310 billion (c. USD 198 million) in direct funding).

[77] *See generally* **Ex. R-0262**, Examples of Instances in which Claimants Mistranslated or Misquoted Spanish Documents, 21 October 2019.

Whether these errors were deliberate or unintentional is not for Colombia to say, but their high incidence is worrisome. In any event, Colombia trusts that the Tribunal will read and examine with care the underlying documents, rather than simply rely on Claimants' characterizations thereof (or even on the (ostensibly verbatim) quotations of such documents in Claimants' pleadings).

30. In the following subsections, Colombia describes Claimants (**Section II.A**); discusses Claimants' ownership of shares in Granahorrar (**Section II.B**); summarizes the key events of the 1990s leading up to the 1998 Regulatory Measures that triggered this dispute (**Section II.C**); describes the subsequent judicial proceedings concerning the 1998 Regulatory Measures that Claimants are challenging, which resulted in a final judgment in 2011 (**Section II.E**); and briefly discusses Claimants' claims before the Inter-American Commission of Human Rights **(Section II.F**), which also concern the same facts. A timeline of the key events is also attached as Exhibit R-0001.[78]

A. Claimants are dual nationals who were born and live in Colombia

31. Claimants are three brothers named Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis, and Enrique Carrizosa Gelzis, who indirectly owned shares in a Colombian-incorporated company called Granahorrar.

32. It is undisputed between the Parties that all three of the brothers are dual Colombian-US nationals. However, their effective and dominant nationality is Colombian, as discussed in detail in **Section III.D** below. The oldest of the brothers, Alberto Carrizosa Gelzis, was born in Bucaramanga, Colombia on 9 March 1966[79] and lives in Bogotá, Colombia.[80] In 1998, as Colombia was attempting to rescue Granahorrar, he was the Chairman of the Board of Directors

[78] **Ex. R-0001**, Timeline of Relevant Events, 21 October 2019.

[79] **Ex. R-0010**, Colombian Identification Card of Alberto Carrizosa Gelzis, 30 May 1984.

[80] Alberto Carrizosa Gelzis Witness Statement, 24 May 2019, ¶¶ 3, 32.

of Granahorrar.[81] Currently, among other positions, he is the President of the Colombian company *I.C. Inversiones*.[82]

33. Felipe Carrizosa Gelzis was born in Bucaramanga, Colombia on 20 July 1968.[83] Since 1994, he has resided in Bogotá, Colombia.[84] Until 1998, he was President and CEO of the Colombian company *I.C. Constructora SAS*,[85] but it is unclear whether he is currently employed.

34. The youngest of the Carrizosa brothers, Enrique Carrizosa Gelzis was born in Bogotá, Colombia on 28 August 1974 and currently resides in Bogotá.[86] He is the Chairman of the Board of *I.C. Inversiones*[87] and the Chairman of the Board of the I.C. Group.[88]

35. Claimants' father Julio Carrizosa Mutis was a prominent, politically active Colombian businessman who took the lead in managing Granahorrar.[89] Mr. Carrizosa Mutis met Claimants' mother, Astrida Benita Carrizosa, in the early 1960s, and they married in 1964.[90] Mrs. Benita Carrizosa has initiated a parallel

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[81] Alberto Carrizosa Gelzis Witness Statement, ¶ 28.

[82] **Ex. R-0011**, LinkedIn Profile of Alberto Carrizosa, 5 May 2019.

[83] **Ex. R-0012**, Colombian Identification Card of Felipe Carrizosa Gelzis, 26 September 1986.

[84] Felipe Carrizosa Gelzis Witness Statement, 24 May 2019, ¶ 3.

[85] Felipe Carrizosa Gelzis Witness Statement, ¶ 21.

[86] Enrique Carrizosa Gelzis Witness Statement, ¶ 1-2.

[87] **Ex. R-0212**, LinkedIn Profile of Enrique Carrizosa, 5 May 2019.

[88] Enrique Carrizosa Gelzis Witness Statement, ¶ 17.

[89] **Ex. R-0121**, Second Revision Petition to the Inter-American Commission on Human Rights, 4 October 2017, p. 3 (English translation: explaining that Julio Carrizosa "ventured into savings and housing entities, where he managed to develop [Granahorrar,] which had been intervened by the government in 1982 and then privatized in 1986. With great effort from him and his family, they were able to acquire the majority and lead [Granahorrar] from being a medium-sized entity to being the 7th most important entity"); (Spanish original: explaining that Julio Carrizosa "*incursionó en las sociedades de ahorro y vivienda, donde logró desarrollar [Granahorrar,] que había sido intervenida por el gobierno en 1982 y luego privatizada en 1986. Con mucho esfuerzo de él y su familia pudieron adquirir la mayoría y llevar a [Granahorrar] de una entidad mediana a ser la 7ª más importante*").

[90] Felipe Carrizosa Gelzis Witness Statement, ¶ 6.

ICSID arbitration against Colombia, based on the same factual circumstances at issue in the present case.[91]

B. Claimants were majority shareholders in Granahorrar

36. Granahorrar was a financial institution incorporated in Colombia, founded in 1972 as a subsidiary of *Banco de Colombia* (a Colombian private bank), and subject to financial laws and regulatory oversight in Colombia.[92] Granahorrar was an institution known as a *Corporación de Ahorro y Vivienda* ("**CAV**"),[93] which is a type of financial entity that was created under Colombian law to obtain capital via deposits and then channel this capital to the construction industry.[94] CAVs were permitted to fund the construction industry by issuing long- or short-term loans[95] and could also issue mortgages.[96]

37. In 1986, Granahorrar "was sold to a group comprised of some of Colombia's leading building contractors."[97] That group included Claimants and their parents (collectively, "**Carrizosa Family**"). In 1988, the Carrizosa Family became the

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[91] *See* **Ex. R-0101**, Claimant's Memorial on Jurisdiction, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5 (Kaufman-Kohler, Fernández Arroyo, Söderlund) ("**Claimant's Memorial (ICSID)**").

[92] **Ex. C-0001**, Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 6.

[93] **Ex. C-0001**, Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 6.

[94] **Ex. R-0156**, Decree No. 678 of 1972, Republic of Colombia, 2 May 1972, Art. 2(a); *see also id*. at Art. 1 (English translation: "The incorporation of private savings and housing corporations is authorized. Their purpose will be to promote private saving, and channel it to the construction industry, within a constant value system.") (Spanish original text: "*Autorízase la constitución de corporaciones privadas de ahorro y vivienda, cuya finalidad será promover el ahorro privado y canalizarlo hacia la industria de la construcción, dentro del sistema de valor constante*").

[95] **Ex. R-0156**, Decree No. 678 of 1972, Republic of Colombia, 2 May 1972, Art. 2 (English translation: authorizing CAVs to " b) grant short and long term loans to carry out construction projects or acquire buildings. . . . c) grant short and long term loans to carry out urban renewal projects") (Spanish original text: "*… b) Otorgar préstamos a largo y corto plazo para ejecución de proyectos de construcción o adquisición de edificaciones . . . . c) Otorgar préstamos a corto y largo plazo, para la ejecución de proyectos de renovación urbana*").

[96] **Ex. R-0129**, Decree No. 633, President of Colombia, 2 April 1993 ("**Financial Act**"), Art. 4.

[97] **Ex. C-0001**, Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 25.

majority shareholder in Granahorrar.[98] By the following year, the three Claimant brothers controlled at least 30.6% of Granahorrar through their ownership of the Colombian companies—*Inversiones Carrizosa Gelzis y CIA S.C.S*—which in turn owned shares in Granahorrar.[99]

38. The Carrizosa Family subsequently restructured its holdings, such that the three Claimant brothers came to own shares in six different companies (collectively, "**Holding Companies**"),[100] which in turn owned shares in Granahorrar. Claimants state that they owned 40.24% of Granahorrar through their Holding Companies by October 1998.[101] At that time, the entire Carrizosa Family owned 58.76% of Granahorrar's shares.[102]

39. The shareholder registries of the Holding Companies show that Claimants held their shares in the Holding Companies as Colombian nationals, and registered their shares under their respective Colombian identification numbers.[103]

40. At that time, the Carrizosa Family controlled Granahorrar. All decisions requiring approval of the majority shareholder thus required that of the Carrizosa Family—and by extension that of Julio Carrizosa, the family's patriarch.[104] While both

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[98] **Ex. C-0001**, Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 25.

[99] **Ex. R-0110**, *Composición de Capital de personas jurídicas que posean más del 5% del capital de acciones de la entidad*, 31 December 1989.

[100] The six Holding Companies are (i) *Asesorías e Inversiones C.G. S.A.* ("**Asesorías e Inversiones**"); (ii) *Inversiones Lieja Ltda.* ("**Inversiones Lieja**"); (iii) *Interventorías y Construcciones Ltda.* ("**Interventorías y Construcciones**"); (iv) *Exultar S.A.* ("**Exultar**"); (v) *Compto S A.* ("**Compto**"); and (vi) *Fultiplex S.A.* ("**Fultiplex**"). *See* Notice of and Request for Arbitration, ¶¶ 16–40.

[101] Notice of and Request for Arbitration, ¶¶ 26, 33, 40.

[102] **Ex. C-0001**, Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 10.

[103] The Holding Companies' shareholding registries show that Claimants registered their shares under their Colombian identification numbers [redacted]. *See* **Ex. R-0154**, Shareholders Registries of Holding Companies 1987-2012, pp. 2–4, 8–10, 19–21, 29–32.

[104] Julio Carrizosa controlled the Carrizosa Family's businesses, including Granahorrar. This is evidence from the facts that he (i) made the decision to sell the Carrizosa Family's Granahorrar shares and (ii) was the only member of the Carrizosa Family who (based on currently available evidence) communicated with the Colombian regulatory authorities and the Carrizosa Family's

Alberto and Julio Carrizosa served as the Chair of Granahorrar's Board of Directors at different times in 1998,[105] it was Julio Carrizosa (i.e., the father) who was in charge of negotiating on behalf of the Carrizosa Family with the Colombian authorities and the family's creditors.[106]

41. Although Claimants allege that their shares in Granahorrar "meet the . . . definition of an investment" under the TPA,[107] they are not arguing that it was those shares that constituted their investment for purposes of establishing jurisdiction in this arbitration. Instead, Claimants identify the 2007 Council of State Judgment as their alleged investment.[108] (However, as Colombia will explain in **Section III.E**, the TPA states that such judgments do not qualify as protected investments.[109])

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creditors. *See, e.g.*, **Ex. R-0091**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 22 July 1998 (confirming to Fogafín that Julio Carrizosa Mutis had agreed to sell the shares that the Carrizosa Family held in Granahorrar); **Ex. R-0157**, Letter from Julio Carrizosa Mutis to Fogafín (F. Azuero), 29 July 1998; **Ex. R-0158**, Letter from Julio Carrizosa Mutis to Fogafín (F. Azuero), 30 July 1998; **Ex. R-0024**, Letter from Julio Carrizosa Mutis to Fogafín (F. Azuero), 23 September 1998; **Ex. R-0030**, Letter from Julio Carrizosa Mutis to Creditor Banks, 30 September 1998 ("**1998 Option Contract**").

[105] *See* Alberto Carrizosa Gelzis Witness Statement, ¶ 28; *see also* **Ex. R-0008**, Minutes of Granahorrar Board of Directors Meeting, 24 July 1998, p. 7 (identifying Julio Carrizosa Mutis as "*Presidente de la Junta*"); **Ex. R-0005**, Minutes of Granahorrar Board of Directors Meeting, 16 July 1998, p. 19 (Julio Carrizosa signing the minutes as "*Presidente*"); **Ex. R-0003**, Minutes of Granahorrar Board of Directors Meeting, 6 July 1998, p. 9 (Julio Carrizosa signing the minutes as "*Presidente*").

[106] *See, e.g.*, **Ex. R-0157**, Letter from Julio Carrizosa Mutis to Fogafín (F. Azuero), 29 July 1998; **Ex. R-0158**, Letter from Julio Carrizosa Mutis to Fogafín (F. Azuero), 30 July 1998; **Ex. R-0024**, Letter from Julio Carrizosa Mutis to Fogafín (F. Azuero), 23 September 1998; **Ex. R-0030**, 1998 Option Contract.

[107] Claimants' Memorial (PCA), ¶ 420.

[108] *See* Claimants' Memorial (PCA), p. 13 ("That judgment [of the Council of State] represented Claimants' investment in a monetary form. It is the *res* that constitutes the subject matter of this proceeding"); ¶ 420 ("[T]he Council of State's November 1, 2007 Judgment represents and constitutes Claimants' investment as alleged and demonstrated in this proceeding.").

[109] **RLA-0001**, TPA, Art. 10.28, note 15 ("The term 'investment' does not include an order or judgment entered in a judicial or administrative action.").

C. In 1998, Colombia adopted measures to rescue Granahorrar from a liquidity crisis

42. The heart of this dispute concerns certain regulatory measures taken with respect to Granahorrar in October 1998.[110] As discussed below, Granahorrar experienced a severe (and worsening) liquidity deficit in 1998. By mid-1998, this deficit had reached critical proportions, leading Granahorrar to seek assistance from the Colombian financial regulatory authorities. Three regulatory authorities, in particular, were involved in the efforts to rescue Granahorrar:

a. The Central Bank, which is the constitutionally established central bank of the Republic of Colombia. Among its various functions, it serves as the lender of last resort to Colombian financial entities;[111]

b. The Superintendency, which is a regulatory body tasked with supervising the Colombian financial system, ensuring that financial entities maintain appropriate liquidity levels, preventing the loss of confidence by the public in the financial system, and protecting the general welfare;[112] and

c. Fogafín, which is a regulatory authority tasked with protecting depositors, preventing unjustified enrichment by shareholders, and temporarily managing certain financial institutions to ensure their financial recovery.[113]

43. These three Colombian regulatory institutions promptly responded to Granahorrar's request for assistance, attempting to reestablish the market's confidence in Granahorrar by providing it with financial support. Despite the State's timely assistance, by October 1998 Granahorrar's liquidity crisis had devolved into an insolvency emergency. The Colombian authorities gave Granahorrar's shareholders an opportunity to capitalize the bank to increase its

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[110] *See* Claimants' Memorial (PCA), p. 12 ("In a nutshell, Colombia's financial regulatory authorities unlawfully expropriated Claimants' investment in that jurisdiction").

[111] **Ex. R-0124**, Political Constitution of the Republic of Colombia, 4 July 1991 ("**Colombian Constitution**"), Art. 371.

[112] *See generally* **Ex. R-0129**, Financial Act, Art. 325.

[113] *See generally* **Ex. R-0129**, Financial Act, Art. 316(2).

solvency. When Granahorrar's shareholders failed to do so, the Colombian authorities stepped in to capitalize Granahorrar and thus prevent its collapse. From June to October 1998, the three regulatory authorities worked together, in collaboration with Granahorrar, to avert its collapse (and also to prevent the collapse from having a ripple effect through the economy).

1. The Late 1990s: Colombia experiences a severe economic recession

44. Toward the end of the 1980s, there were many barriers to foreign direct investment in Colombia, including in the financial sector. In 1990, Colombia began the process of deregulating its financial sector by privatizing State-run banks, admitting foreign banks, and recapitalizing national banks.[114] As a result of this deregulation, between 1990 and 1995 Colombia experienced a significant influx of foreign capital, growth of its gross domestic product, and expansion of credit.[115]

45. However, 1996 marked the beginning of one of the worst economic recessions in Colombia's history.[116] The international liquidity shortage triggered by the Asian financial crisis in 1997 further battered the Colombian economy.[117] By 1999, Colombia's gross domestic product had fallen precipitously and unemployment had soared to 22%.[118] Colombians who had been granted loans or other financing were increasingly unable to repay their lenders, and the percentage of past due financing tripled from 1995 to 1999.[119]

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[114] **Ex. C-0002**, *La Crisis Colombiana de Finales del Siglo XX: ¿Un choque real o financiero?*, Alejandro Torres G, Perfil de Coyuntura Económica No. 18, 18 December 2011, p. 82.

[115] **Ex. C-0002**, *La Crisis Colombiana de Finales del Siglo XX: ¿Un choque real o financiero?*, Alejandro Torres G, Perfil de Coyuntura Económica No. 18, 18 December 2011, p. 82.

[116] **Ex. C-0002**, *La Crisis Colombiana de Finales del Siglo XX: ¿Un choque real o financiero?*, Alejandro Torres G, Perfil de Coyuntura Económica No. 18, 18 December 2011, p. 82.

[117] **Ex. C-0002**, *La Crisis Colombiana de Finales del Siglo XX: ¿Un choque real o financiero?*, Alejandro Torres G, Perfil de Coyuntura Económica No. 18, 18 December 2011, p. 83.

[118] **Ex. C-0002**, *La Crisis Colombiana de Finales del Siglo XX: ¿Un choque real o financiero?*, Alejandro Torres G, Perfil de Coyuntura Económica No. 18, 18 December 2011, p. 82.

[119] **Ex. C-0002**, *La Crisis Colombiana de Finales del Siglo XX: ¿Un choque real o financiero?*, Alejandro Torres G, Perfil de Coyuntura Económica No. 18, 18 December 2011, p. 83, Graph 3.

46. To assuage the financial strain suffered by numerous financial entities, the Colombian Government adopted various measures to protect depositors and the broader economy.[120] Some financial entities were placed under strict supervision.[121] Others were to undergo a process called *oficialización*, through which Colombia became the owner of an entity that it had capitalized.[122] The goal of *oficialización* was to prevent the collapse of the subject institution, nurse it back to health, and subsequently re-privatize it.[123] Unfortunately, certain financial entities were beyond salvaging, and were thus liquidated.[124]

2. Late 1997-mid-1998: Granahorrar suffers a liquidity crisis as result of shareholder in-fighting and the entity's lending policy

47. Like other financial institutions, Granahorrar was negatively affected by the economic recession. But the more immediate cause of Granahorrar's liquidity deficit was not the generalized economic situation. Claimants make the unsupported assertion that the immediate cause of Granahorrar's liquidity crisis was a supposed order by the Colombian government to withdraw from Granahorrar the funds that the government had deposited in that entity.[125] However, as affirmed by the President of Granahorrar in a July 1998 meeting of Granahorrar's Board of Directors, there were two comorbid causes of Granahorrar's liquidity crisis: an acrimonious, public shareholder dispute that lasted from late 1997 to mid-1998, and Granahorrar's own business strategy.[126]

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[120] **Ex. R-0064**, *Bancos: Sigue la Ola de Ventas y Fusiones*, EL TIEMPO, 12 September 1997, p. 2; **Ex. R-0162**, *El Gobierno Oficializó el Banco Uconal*, EL TIEMPO, 26 September 1998, p. 1.

[121] *See* **Ex. R-0064,** *Bancos: Sigue la Ola de Ventas y Fusiones*, EL TIEMPO, 12 September 1997, pp. 3-4

[122] **Ex. R-0159**, *La Superintendencia Bancaria en la Crisis de Los Noventa*, Sara Ordóñez Noriega, July 2003, p. 8.

[123] *See. e.g.*, **Ex. R-0163**, *La Oficialización de Granahorrar*, EL TIEMPO, 5 October 1998; **Ex. R-0162**, *El Gobierno Oficializó el Banco Uconal*, EL TIEMPO, p. 2; **Ex. R-0045**, *Gobierno vende Banco Granahorrar a grupo español BBVA*, DINERO, 31 October 2005.

[124] *See. e.g.*, **Ex. R-0163**, *La Oficialización de Granahorrar*, EL TIEMPO, 5 October 1998.

[125] *See* Claimants' Memorial (PCA), ¶¶ 46–47.

[126] **Ex. R-0003**, Minutes of Granahorrar Board of Directors Meeting, 6 July 1998, pp. 3–4.

48. The public shareholder dispute, which centered on alleged irregularities in the Carrizosa Family's business dealings, was a major cause of Granahorrar's liquidity crisis. The parties to the dispute were the three wealthy Colombian families that owned the majority of Granahorrar shares in 1997: the Carrizosa Family, the González family, and the Robayo family.[127] The dispute involved allegations that the Carrizosa Family (i) had prevented the González family from selling its shares to an outside buyer;[128] (ii) had prompted Granahorrar to purchase a pension fund at a premium from the Robayo family;[129] and (iii) had caused Granahorrar to purchase a financial institution from the Carrizosa Family, also at a premium, and using a valuation conducted by a third company that the Carrizosa Family also owned.[130]

49. The González family filed complaints with the Superintendency and the Attorney General's office, alleging that the Carrizosa Family had been executing transactions vitiated by conflicts of interest and self-dealing.[131]

50. The shareholder dispute was widely publicized in the media.[132] The dispute's impact on Granahorrar's image was such that, at a board of directors meeting on

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

[128] **Ex. R-0062**, *Pelotera en Granahorrar*, EL TIEMPO, 10 December 1997, p. 2 (English translation: "Before bringing the final transaction forward, they decided to retain the advice of UBS Securities and Finance and Projects SA. The latter was unable to carry out the deal because, as the international company revealed in a report addressed to González and Robayo, the majority of shareholders refrained from providing detailed information about Granahorrar's performance and financial strategy.") (Spanish original: "*Antes de adelantar la operación definitiva resolvieron contratar la asesoría de UBS Securities y Finanzas y Proyectos S.A., la cual no pudo concretar el negocio, porque, según reveló esta empresa internacional en informe dirigido a González y Robayo, los accionistas mayoritarios se abstuvieron de dar a conocer una información detallada sobre el desempeño y la estrategia financiera de Granahorrar*"); **Ex. R-0063**, *Pelea de Socios*, SEMANA, 12 January 1998, p. 2.

[129] **Ex. R-0063**, *Pelea de Socios*, SEMANA, 12 January 1998, pp. 2–3.

[130] **Ex. R-0062**, *Pelotera en Granahorrar*, EL TIEMPO, 10 December 1997, p. 3; **Ex. R-0063**, *Pelea de Socios*, SEMANA, 12 January 1998, pp. 2–3.

[131] **Ex. R-0062**, *Pelotera en Granahorrar*, EL TIEMPO, 10 December 1997, p. 2; **Ex. R-0063**, *Pelea de Socios*, SEMANA, 12 January 1998, pp. 3–5.

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

24 July 1998, the President of Granahorrar explained that it was a major cause of a decrease in deposits:

> [Granahorrar] ha[s] lost a significant participation in the collection of [certificates of deposit] in pesos and savings accounts resulting in large part from the noxious effects from publications made at the end of 1997 and the beginning of this year, regarding a dispute between shareholders.[133]

51. As a result, Granahorrar began hemorrhaging depositors in its savings accounts and certificates of deposit in Colombian pesos, which were its mainstay deposits. For example, Granahorrar had held COP 641 billion (c. USD 500 million) in savings accounts in October 1997, but by June 1998 this figure had dwindled to COP 497 billion (c. USD 364 million).[134] Additionally, while Granahorrar had held COP 876 billion (c. USD 677 million) in certificates of deposit in pesos in December 1997, this sum had shrunk to COP 695 billion (c. USD 509 million) by June 1998.[135]

52. The second cause of Granahorrar's crisis was its policy of lending money that it did not have. As stated above, *Corporacións de Ahorro y Vivienda* ("**CAVs**") were authorized to lend the capital that was generated from deposits. Prior to 1992, Granahorrar had obtained capital and had subsequently issued financing.[136] But in 1992, Granahorrar inverted the sequence: it first issued financing, and only after that sought to obtain capital.[137] As depositors increasingly withdrew their deposits

[133] **Ex. R-0008**, Minutes of Granahorrar Board of Directors Meeting, 24 July 1998, p. 1 (Spanish original: "[Granahorrar] había perdido de manera importante su participación en captación en [certificados de depósito] en pesos y en cuentas de ahorro como consecuencia en gran parte de los efectos nocivos que trajeron la publicaciones efectuadas a fines del año 1997 e inicios del presente año, respecto del enfrentamiento entre accionistas").

[134] **Ex. R-0008**, Minutes of Granahorrar Board of Directors Meeting, 24 July 1998, p. 2.

[135] **Ex. R-0008**, Minutes of Granahorrar Board of Directors Meeting, 24 July 1998, p. 2.

[136] **Ex. R-0003**, Minutes of Granahorrar Board of Directors Meeting, 6 July 1998, p. 3.

[137] **Ex. R-0003**, Minutes of Granahorrar Board of Directors Meeting, 6 July 1998, p. 3.

from Granahorrar in 1997 and 1998, Granahorrar's financial outflows were increasingly larger than its inflows.[138]

53. To compensate for the outflow of capital, Granahorrar obtained financing from other banks and issued certificates of savings deposit for term, financial instruments similar to certificates of deposit but with a much shorter term.[139] The shorter lifespan of the funds obtained through those savings deposits (e.g., of a mere seven days[140]) made Granahorrar's income highly volatile.[141] But for these funds, however, Granahorrar would have been officially illiquid as of February 1998.[142] Still, this short-term financing could not replace Granahorrar's shrinking deposit base indefinitely. Finally, in May 1998, Granahorrar's reserve funds fell below the legally mandated minimum, which is a situation called *desencaje*.[143]

3. June–October 1998: Colombia adopts measures to rescue Granahorrar

54. Faced with a liquidity crisis, Granahorrar sought assistance from the Colombian regulatory authorities. To prevent Granahorrar's collapse, between June and October 1998 Colombia provided Granahorrar with multiple types of financial support, which it subsequently increased and extended. Colombia also adopted measures intended to reestablish the market's confidence in Granahorrar—all in close coordination and consultation with Granahorrar.

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[138] *See e.g.*, **Ex. R-0008**, Minutes of Granahorrar Board of Directors Meeting, 24 July 1998, p. 2 (showing the subtotal of "*Captación*" increasingly being outweighed by the "*Cartera*" expense).

[139] **Ex. R-0008**, Minutes of Granahorrar Board of Directors Meeting, 24 July 1998, pp. 1–2.

[140] **Ex. R-0067**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 1 July 1998, p. 17.

[141] The short term of the financing required Granahorrar to constantly obtain new financing, and the interest it paid on certificates of deposit for a term fluctuated between 6–9%. *See* **Ex. R-0067**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 1 July 1998, p. 10.

[142] **Ex. R-0008**, Minutes of Granahorrar Board of Directors Meeting, 24 July 1998, p. 2 (showing that the subtotal of "*Captación*" in February 1998 is COP 1.903 billion (c. USD 1.416 million) while the "*Cartera*" expense is COP 1.932 billion (c. USD 1.437 million).

[143] **Ex. R-0008**, Minutes of Granahorrar Board of Directors Meeting, 24 July 1998, p. 2.

a. June 1998: the Central Bank provided liquidity infusions to Granahorrar

55. On 2 June 1998, Granahorrar requested that the Central Bank provide it with COP 180 billion (c. USD 129 million) in the form of *temporary liquidity infusions* ("**TLIs**"),[144] which consisted of direct deposits by the Central Bank into Granahorrar's Central Bank account.[145] This TLI scheme was regulated by External Resolution No. 25 of 1995 of the Central Bank ("**Resolution No. 25**"). Pursuant to this resolution, a financial entity could receive a TLI if it was suffering from a temporary liquidity loss *and* was not insolvent.[146] If the entity that received a TLI subsequently became insolvent, the Central Bank could demand immediate repayment.[147]

56. Contrary to Claimants' assertion that the Central Bank chose to demand collateral in exchange for the TLI,[148] the fact is that Resolution No. 25 *required* that a TLI be granted only in exchange for a temporary transfer of assets from the entity receiving the TLI.[149] In practice, the requesting entity (in this case, Granahorrar) would endorse A-rated assets[150] (in Granahorrar's case, promissory notes[151]) to the

[144] In Spanish, *apoyos transitorios de liquidez*.

[145] **Ex. R-0084**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 2 June 1998.

[146] **Ex. R-0142**, External Resolution No. 25, 31 October 1995, Art. 2.

[147] **Ex. R-0142**, External Resolution No. 25, 31 October 1995, Art. 29.

[148] Notice of and Request for Arbitration, ¶ 50 (Claimants asserting that "[t]he Central Bank demanded GRANAHORRAR to guarantee the three immediately referenced transactions . . . with an 'A' rated asset performing portfolio. Granahorrar met this demand").

[149] **Ex. R-0142**, External Resolution No. 25, 31 October 1995, Art. 3 (establishing that the Central Bank could only grant TLI via discount or rediscount transactions).

[150] **Ex. R-0142**, External Resolution No. 25, 31 October 1995, Arts. 3, 25(2) (English translation: "the Central Bank shall only accept Category 'A'-rated securities, in accordance with the relevant regulations by the Superintendency") (Spanish original: "[*E*]*l Banco de la República solo podrá aceptar títulos valores calificados en la categoría 'A' de acuerdo con las normas pertinentes de la Superintendencia Bancaria*").

[151] *See* **Ex. R-0067**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 1 July 1998 (confirming that the assets exchanged were promissory notes, "*pagarés*").

Central Bank in exchange for the TLI.[152] At the end of the term, the Central Bank would return the asset (in Granahorrar's case, the promissory note) in exchange for repayment.[153]

57. Granahorrar's request to the Central Bank was for a standard TLI ("**Standard TLI**"), which is a TLI with a 30-day repayment term.[154] In its request, Granahorrar (i) explained that it had been suffering from a decrease in deposits; (ii) identified institutional investors that had withdrawn large sums of money; and (iii) offered the Central Bank A-rated assets in exchange for the Standard TLI it was requesting.[155] On the very same day, the Central Bank granted Granahorrar's request, providing it with a Standard TLI for COP 144.7 billion (c. USD 103 million).[156]

58. On 16 June 1997, Granahorrar concluded that it would be unable to repay the Standard TLI within the 30-day term.[157] Hence, Granahorrar requested that the Central Bank authorize (i) the transfer of the Standard TLI to a special TLI scheme ("**Special TLI**"), which is permitted when the entity receiving a Standard TLI is unable to repay the TLI within 30 days, but can do so within 180 days.[158]

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[152] **Ex. R-0142**, External Resolution No. 25, 31 October 1995, Art. 3.

[153] **Ex. R-0142**, External Resolution No. 25, 31 October 1995, Art. 3.

[154] **Ex. R-0142**, External Resolution No. 25, 31 October 1995, Art. 6(5).

[155] **Ex. R-0084**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 2 June 1998, pp. 1–3.

[156] **Ex. R-0084**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 2 June 1998.

[157] *See generally* **Ex. R-0068**, Letter from Granahorrar (R. Navarro) to Central Bank (M. Urrutia), 17 June 1998.

[158] See **Ex. R-0142**, External Resolution No. 25, 31 October 1995, Art. 6 (English translation: "A credit institution may use the ordinary procedure to obtain resources from the Central Bank, if it meets the following conditions. . . . Be able to return the resources within a maximum period of thirty (30) calendar days from the date of the request "), Art. 14 (English translation: "If an event took place during the time when the resources are being used, causing the credit establishment an inability to return the resources within a maximum period of thirty (30) calendar days from the date of the request, the credit establishment shall only continue using the resources received if . . . [i]t is able to return them within a period of one hundred and eighty (180) calendar days from the disbursement of said resources by an ordinary proceeding") (Spanish original: "*Un establecimiento de crédito podrá utilizar el procedimiento ordinario para obtener recursos del Banco, si*

Granahorrar asserted in its request that (i) its decreasing deposits had further weakened its liquidity position; (ii) it was still under the legally mandated minimum reserve threshold; and (iii) it could repay the Special TLI within 180 days.[159] Granahorrar also requested an increase in the amount of the TLI to COP 270 billion (c. USD 194 million).[160]

59. On 1 July, the *Subgerencia Monetaria y de Reservas* of the Central Bank ("**Central Bank Technical Unit**") issued a report in response to Granahorrar's request. The report concluded that Granahorrar's liquidity status was highly fragile and that, as of 23 June 1998, Granahorrar had a negative cash flow of COP 154 billion (c. USD 110 million).[161] As a result, in its report the Central Bank Technical Unit recommended that the Central Bank approve the Special TLI request,[162] which the Central Bank did on the same day.[163] Accordingly, the Central Bank increased the total TLI amount granted to Granahorrar to COP 270 billion (c. USD 194 million),

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reúne las siguientes condiciones . . . . Estar en condiciones de devolver los recursos en un plazo máximo de treinta (30) días calendario contados a partir de la fecha de la solicitud."), Art. 14 (Spanish original: "*Si durante el tiempo en el que se estén usando los recursos, sobreviene un hecho que determina que el establecimiento de crédito no está en capacidad de devolver los mismos dentro de un plazo máximo de treinta (30) días calendario contados a partir de la fecha de la solicitud, solo , podrá continuar con el uso de los recursos recibidos, si . . . . [e]stá en capacidad de devolver los recursos dentro de un plazo de ciento ochenta (180) días calendario contados a partir del desembolso de los recursos por el procedimiento ordinario*").

[159] **Ex. R-0068**, Letter from Granahorrar (R. Navarro) to Central Bank (M. Urrutia), 17 June 1998, pp. 3-4.

[160] *See generally* **Ex. R-0068**, Letter from Granahorrar (R. Navarro) to Central Bank (M. Urrutia), 17 June 1998. While that request was pending, Granahorrar also requested an increase to its standard TLI, even though it had admitted it could not meet the 30-day repayment schedule. *See* **Ex. R-0082**, Letter from Granahorrar (R. Navarro) to Central Bank (M. Urrutia), 26 June 1998. Four days later, the Central Bank rejected Granahorrar's request. *See* **Ex. R-0065**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 30 June 1998.

[161] **Ex. R-0066**, *Análisis Solicitud de Traslado de Utilización de Recursos de Liquidez del Procedimiento Ordinario al Procedimiento Especial Granahorra*, Central Bank, 1 July 1998, pp. 11, 17.

[162] **Ex. R-0066**, *Análisis Solicitud de Traslado de Utilización de Recursos de Liquidez del Procedimiento Ordinario al Procedimiento Especial Granahorra*, Central Bank, 1 July 1998, p. 19.

[163] **Ex. R-0067**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 1 July 1998.

and as requested by Granahorrar, converted the Standard TLI to a Special TLI, meaning that the repayment term was extended to 180 days.[164]

b. July 1998: Fogafín redoubled Colombia's efforts to rescue Granahorrar

60. Despite the approval of the Special TLI, by the close of business on 1 July 1998, checks issued by Granahorrar totaling COP 90 billion (c. USD 65.7 million) had been returned uncashed due to insufficient funds.[165] This development further eroded market confidence in Granahorrar.[166] The latter informed the Central Bank of that situation, noting that "[Granahorrar's] solid image was seriously damaged when checks bounced on July 1st, and deposits significantly diminished as a result."[167]

61. Given its deepening financial crisis, on 2 July 1998—the same day on which the Central Bank disbursed the Special TLI[168]—Granahorrar requested a COP 48 billion (c. USD 35.3 million) increase of its Special TLI, to try to offset new withdrawals from its depositors.[169] That same day, 2 July 1998, the Central Bank approved Granahorrar's request for additional funds, and increased the Special TLI by COP 45.2 billion (c. USD 33.3 million).[170]

62. In addition to the Central Bank's assistance in the form of the Special TLI, Granahorrar simultaneously requested that Fogafín provide it with direct

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[164] **Ex. R-0067**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 1 July 1998.

[165] **Ex. R-0003**, Minutes of Granahorrar Board of Directors Meeting, 6 July 1998, p. 2.

[166] **Ex. R-0002**, Minutes of Fogafín Board of Directors Meeting, 2 July 1998, p. 9.

[167] **Ex. R-0072**, Letter from Granahorrar (R. Navarro) to Central Bank (M. Urrutia), 24 July 1998, p. 2 (Spanish original: "*[L]a imagen de solidez de [Granahorrar] sufrió un serio deterioro al producirse la devolución de cheques el día primero de Julio, lo cual ha repercutido en una mayor disminución de depósitos*").

[168] **Ex. R-0020**, *Informe Desarrollo Apoyo Especial de Liquidez C.A.V. Granahorrar*, 15 September 1998, p. 2.

[169] **Ex. R-0069**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 3 July 1998, pp. 2, 3.

[170] **Ex. R-0069**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 3 July 1998.

financing, in exchange for a temporary purchase of a portion of Granahorrar's A-rated credit portfolio.[171] In this request, Granahorrar explained its dire circumstances and the grievous impact that it could have on Colombia, unless the entity were to immediately obtain additional liquidity: "[I]f the liquidity required by [Granahorrar] is not generated immediately, the seventh largest entity in Colombia's financial system could collapse, with all the noxious effects that such circumstance may have on the country."[172]

63. On 2 July, Fogafín's Board of Directors ("**Fogafín Board**") met to assess the situation. The Governor of the Central Bank, a member of the Fogafín Board, explained that (i) both Granahorrar's shareholder dispute and the returned checks phenomenon had damaged the market's confidence in Granahorrar; and (ii) both the Standard TLI and Special TLI had been insufficient to stabilize Granahorrar's critical liquidity problem.[173]

64. Fogafín agreed to assist Granahorrar. Accordingly, on 6 July, Granahorrar and Fogafín executed the Fogafín Agreement, pursuant to which Fogafín would guarantee up to COP 300 billion (c. USD 222 million) of Granahorrar's interbank financing and overdraft obligations, until 6 August 1998.[174] In exchange, Granahorrar would endorse to Fogafín promissory notes valued at 134% of the guarantee amount actually relied upon by Granahorrar.[175] These promissory notes would be held in a trust during the contractual term.[176] At the end of the term of

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[171] **Ex. R-0089**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 2 July 1998, pp. 1–2.

[172] **Ex. R-0089**, Letter from Granahorrar (J. Amaya Pacheco) to Fogafín (F. Azuero), 2 July 1998, p. 2 (Spanish original: "*[D]e no generarse inmediatamente la liquidez requerida por la institución, podría colapsar la séptima entidad más grande del sistema financiero colombiano, con todos los efectos nocivos que tal circunstancia puede ocasionar para el país*").

[173] **Ex. R-0002**, Minutes of Fogafín Board of Directors Meeting, 2 July 1998, p. 9.

[174] **Ex. C-0005**, 1998 Fogafín Agreement, 6 July 1998, Arts. 1, 16.

[175] **Ex. C-0005**, 1998 Fogafín Agreement, 6 July 1998, Arts. 1, 2.

[176] **Ex. C-0005**, 1998 Fogafín Agreement, 6 July 1998, Consideration No. 7, Arts. 3, 5.

the obligation that Fogafín had guaranteed, the notes would be transferred back to Granahorrar.[177]

65. Two days later, on 8 July 1998, Granahorrar sought to modify the Fogafín Agreement: it requested that Fogafín guarantee transactions with entities that were not registered with Fogafín, and extend the contractual term of the Fogafín Agreement to 90 days (i.e., beyond 6 August 1998, the originally agreed date).[178]

66. On 16 July 1998, Granahorrar made yet another request from Fogafín: that it substitute 50% of the guarantee amount under the Fogafín Agreement with direct financing, via a temporary exchange of a portion of Granahorrar's credit portfolio.[179]

c. <u>July 1998: The Carrizosa and Robayo families took steps to sell their Granahorrar shares</u>

67. On 22 July 1998, Fogafín's management issued a report in connection with Granahorrar's requests of 8 and 16 July 1998. The report found that as of late July, Granahorrar had lost approximately COP 311 billion (c. USD 226 million) in savings accounts and certificates of deposit.[180] The report also noted that Fogafín

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[177] **Ex. C-0005**, 1998 Fogafín Agreement, 6 July 1998, Art. 10.

[178] **Ex. R-0004**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 8 July 1998. This request was resolved via the execution of the first addendum to the Fogafín Agreement. *See* **Ex. R-0007**, Minutes of Fogafín Board of Directors Meeting, 22 July 1998, pp. 5–6.

[179] **Ex. R-0006**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 16 July 1998. Simultaneously, Granahorrar also requested that the Central Bank temporarily purchase COP 150 billion of Granahorrar's A-rated credit portfolio. *See* **Ex. R-0070**, Letter from Granahorrar (J. Amaya) to Central Bank (M. Urrutia), 16 July 1998. On 21 July, the Central Bank informed Granahorrar that its request was not permitted by law. **Ex. R-0071**, Letter from Central Bank (P. Correa) to Granahorrar (J. Amaya), 21 July 1998.

[180] **Ex. R-0090**, *Documento a Consideración de la Junta Directiva*, Fogafín Managment, 22 July 1998, p. 2. (English translation: "[Granahorrar's] liquidity issues have resulted in decreases in the balance of CDTs issued, of almost 200,000 million pesos between late January and late July this year, as well as a decrease in savings accounts for the sum of $ 111,000 million pesos") (Spanish original: "*Las dificultades de liquidez .de la Corporación se han manifestado en disminuciones en el saldo de los CDT's emitidos, de casi $200.000 millones de pesos entre fines de enero y fines de julio del presente año así como disminución en las cuentas de ahorro por $111.000 millones de pesos*").

and Granahorrar had already begun discussing a possible change in Granahorrar's ownership, and concluded that reestablishing the market's confidence in Granahorrar was necessary to restore its financial stability.[181] In light of these considerations, the report concluded that "restoration of trust in the [Granahorrar] could be propelled by its sale."[182] The report thus recommended that any further financial support be conditioned on a change in Granahorrar's ownership.[183]

68. While the Fogafín Board was considering the report's findings, Granahorrar informed Fogafín that the Robayo family and Julio Carrizosa (on behalf of the Carrizosa Family) had agreed to sell their shares in Granahorrar.[184] Because the Carrizosa and Robayo families owned a majority of Granahorrar, the sale of their shares to third-parties would constitute a change in Granahorrar's ownership. However, in their Memorial, Claimants mischaracterize key aspects of the events concerning the proposed sale of shares.

69. For example, as shown in Exhibit R-0262[185]—and contrary to Claimants' allegations—Colombia never forced Claimants to sell their shares to "Granahorrar's creditors."[186] Instead, the Carrizosa and Robayo families agreed to

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[181] **Ex. R-0090**, Documento a Consideración de la Junta Directiva, Fogafín Managment, 22 July 1998,
pp. 2–3.

[182] **Ex. R-0090**, Documento a Consideración de la Junta Directiva, Fogafín Managment, 22 July 1998, p. 4 (Spanish original: "*[E]l restablecimiento de la confianza en [Granahorrar] podría ser impulsado si se produce una operación de venta de la misma*").

[183] **Ex. R-0090**, Documento a Consideración de la Junta Directiva, Fogafín Managment, 22 July 1998, p. 4.

[184] **Ex. R-0007**, Minutes of Fogafín Board of Directors Meeting, 22 July 1998, pp. 3–4.

[185] *See generally* **Ex. R-0262**, Examples of Instances in which Claimants Mistranslated or Misquoted Spanish Documents, 21 October 201.

[186] Notice of and Request for Arbitration, ¶¶ 110, 203 (alleging that Colombia "impos[ed] on Granahorrar the requirement of having Granahorrar substitute its majority shareholders pursuant to the sale of this shareholder block's interest in Granahorrar to **Granahorrar's creditors**") (emphasis added); *see also id.* at p. 46 note (improperly translating an exhibit to read "[t]hereafter the Superintendent of Banking had the floor and advised the Board with respect to the consensus that the Chairman of the financial entities serving as **Granahorrar's creditors** with respect to the latter's pledged assets in favor of Fogafín") (emphasis added). A creditor of the

sell their Granahorrar shares on the market. To do so, Granahorrar opened up data rooms in New York, Bogotá, and Madrid, in which prospective purchasers could inspect Granahorrar's financial information.[187] Hence, the intended purchasers of the Carrizosa and Robayo families shares were not "Granahorrar's creditors" but any third party buyer.

70. Similarly, Claimants' assertion that they were forced to transfer their shares in lieu of payment to "Granahorrar's creditors" in late September is also untrue.[188] A threshold obstacle to the sale of the families' Granahorrar shares was that many of them were encumbered. The Carrizosa Family, whose main business (construction) was affected by the recession, had resorted to financing to buttress its businesses.[189] In exchange for such financing, it had pledged to 11 different financial institutions ("**Creditor Banks**"), as collateral, COP 113 billion

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Carrizosa Family may well have been a creditor of Granahorrar. However, such creditors attended the relevant negotiations on the sale or transfer of the Carrizosa Family's shares in their capacity as creditors of the Carrizosa Family. The negotiations centered on the release of the Carrizosa and Robayo families' pledged shares, and subsequently the transfer of the Carrizosa Family's pledged shares in lieu of payment to its creditors.

[187] **Ex. R-0016**, Letter from Granahorrar (R. Navarro) to Fogafín (F. Azuero), 7 September 1998.

[188] *See e.g.*, Notice of and Request for Arbitration, ¶ 123 ("In furtherance of Fogafín's uncompromising directive, the U.S. shareholders agreed to transfer their interest in Granahorrar to the financial institution creditors who were collateralized by the guarantee-restructuring program").

[189] *See e.g.*, Astrida Carrizosa Witness Statement, ¶ 21; *see also* **Ex. R-0044**, *Pugna en Granahorrar*, EL TIEMPO, 10 December 1997, p. 1 (English translation: "The construction crisis hasn't just caused builders to go bankrupt. Shareholders of Granahorrar, the only corporation whose owners are dedicated to said economic activity, have started a dispute") (Spanish original: "*La crisis de la edificación no solo ha producido quiebras entre los constructores. La única corporación, cuyos propietarios están dedicados a esta actividad económica, Granahorrar, han entrado en una pelotera entre si*"); **Ex. C-0003**, Minutes of Fogafín Board of Directors Meeting, 3 October 1998, pp. 7–8; **Ex. R-0063**, *Pelea de Socios*, SEMANA, 12 January 1998, p. 5 (English translation: "To this we must add another universal rule: a corporation works better when business is good than when business is bad. The truth is that, in Granahorrar's case, the two shareholders private businesses have been deeply affected by the recessive construction cycle.") (Spanish original: "*A esto hay que añadir otra norma universal que dice que las sociedades funcionan mejor cuando los negocios van bien que cuando van mal, y la verdad es que, en el caso de Granahorrar, los negocios particulares de los dos socios se han visto profundamente afectados por el ciclo recesivo de la construcción*"); **Ex. R-0044**, *Pugna En Granahorrar*, EL TIEMPO,10 December 1997, p. 1.

(c. USD 71.5 million) of its shares in Granahorrar.[190] The Robayo family had similarly pledged to financial institutions COP 27 billion (c. USD 17.1 million) worth of its shares in Granahorrar.[191]

71. To facilitate the sale of the families' Granahorrar shares, Fogafín and the Superintendency initially met with both families' creditors to request the release of the shares.[192] Thereafter, the families agreed to negotiate with their creditors the release of their Granahorrar shares.[193] By September 1998, the families had failed to sell their Granahorrar shares, and Julio Carrizosa therefore negotiated with the Carrizosa Family's Creditor Banks a transfer of its pledged shares in lieu of payment.[194] In other words, the Carrizosa Family was attempting transfer of shares to its own creditors—not to "Granahorrar's creditors"—as Claimants misleading asserted in their Notice of and Request for Arbitration.[195] As further detailed below, these negotiations would also fail.

72. Also untrue is Claimants' insinuation that Fogafín required only "the U.S. shareholders (claimants in this cause), to divest themselves of their respective interests in Granahorrar."[196] Rather, both families (viz., the Carrizosa and Robayo families) agreed to sell their Granahorrar shares.[197] Moreover, both families were

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[190] The eleven Creditor Banks were Bancafe, Corfivalle, Banco Ganadero, Bancolombia, Banco Popular, Banco Superior, Interbanco, Banco Santander, Banco del Estado, Comercia, and Findesarrollo. **Ex. C-0003**, Minutes of Fogafín Board of Directors Meeting, 3 October 1998, pp. 7–8; **Ex. R-0031**, Letter from the Creditor Banks to Grupo I.C., 1 October 1998.

[191] **Ex. C-0003**, Minutes of Fogafín Board of Directors Meeting , 3 October 1998, p. 8.

[192] *See e.g.*, Notice of and Request for Arbitration, ¶ 123.

[193] **Ex. R-0061**, Irrevocable Trust Agreement, 5 August 1998, Art. 2.6.1.

[194] *See e.g.*, **Ex. R-0031**, Letter from the Creditor Banks to Grupo I.C., 1 October 1998 (the Creditor Banks rejecting the Carrizosa Family's option contract); *see generally* **Ex. R-0030**, Letter from Julio Carrizosa Mutis to Creditor Banks, 30 September 1998 ("1998 Option Contract").

[195] Notice of and Request for Arbitration, ¶¶ 11, 123.

[196] *See* Notice of and Request for Arbitration, pp. 8, 46, ¶¶ 93, 99, 101, 102, 103, 105–113; *see also* Claimants' Memorial (PCA), ¶ 16.

[197] *See* **Ex. R-0158**, Letter from Julio Carrizosa Mutis to Fogafín (F. Azuero), 30 July 1998 (English translation: Julio Carrizosa confirming "unequivocally . . an irrevocable desire to sell the stake held in [Granahorrar]") (Spanish original: Julio Carrizosa confirming "*en forma inequivoca . . . el*

considered Colombian at the time; a Lehman Brother's prospectus drafted in furtherance of the sale identified the Carrizosa, González, and Robayo families—owners of Granahorrar—as "preeminent members of the Colombian business and financial community."[198]

73. On 30 July 1998, after both Colombian families had reached an agreement to sell their Granahorrar shares in a single package, the Central Bank continued to provide assistance. Such assistance included a modification of the amortization schedule of Granahorrar's Special TLI,[199] which was effected at Granahorrar's request.[200]

d. August 1998: Fogafín provided direct financing to Granahorrar

74. In August 1998, Granahorrar's financial state continued to deteriorate.[201] As a result, Colombia was forced to grant further financial support.

75. In response to Granahorrar's 8 and 16 July requests, on 3 August 1998 Granahorrar and Fogafín executed the first of 13 addenda to the Fogafín Agreement.[202] Pursuant to this addendum, Granahorrar could use up to COP 70 billion (c. USD

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irrevocable deseo de vender la participación que se possee en [Granahorrar]"); **Ex. R-0091**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 22 July 1998 (Granahorrar confirming that Julio Carrizosa Mutis and Eduardo Robayo had agreed to sell their families' shares in Granahorrar).

198 **Ex. C-0001**, Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 10 (identifying the Carrizosa, González, and Robayo families "preeminent members of the Colombian business and financial community," who own Granahorrar).

199 **Ex. R-0073**, Letter from Central Bank (P. Correa) to Granahorrar (R. Navarro), 31 July 1998.

200 **Ex. R-0074**, Letter from Granahorrar (R. Navarro) to Central Bank (M. Urrutia), 24 July 1998.

201 *See e.g.*, **Ex. R-0046**, Letter from Granahorrar (J. Amaya) to Fogafín (J. Azuero), 31 August 1998 (English translation: basing a request for an extensión of the Fogafín Agreement on a "decrease in deposits suffered by the Entity in the last few days that cannot be remedied by any other means") (Spanish original: basing a request for an extensión of the Fogafín Agreement on a "*baja en depósitos que ha presentado la Entidad en los últimos días y que no ha podido ser subsanada por ningún otro medio*").

202 **Ex. R-0092**, Addendum No. 1 to the Fogafín Agreement, 3 August 1998.

51 million) of the maximum COP 300 billion (c. USD 222 million[203]) in financial support as direct funding, instead of a guarantee.[204] The direct financing was effected via a temporary purchase by Fogafín of a portion of Granahorrar's credit portfolio.[205]

76. The second and third addendum extended the length of the direct financing until 21 September 1998.[206] This provision of direct financing was consistent with Granahorrar's requests for direct financing, both of which offered Fogafín a portion of Granahorrar's A-rated credit portfolio in exchange for the financing.[207] In other words, Claimants' contention that Fogafín "caus[ed] Granahorrar to pledge to Fogafín 'A' rated performing assets,"[208] is disingenuous. Also, the evidence belies Claimants' assertion that "Fogafín consistently denied direct

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[203] As of 6 July 1998, the date of the execution of the Fogafín Agreement. **Ex. C-0005**, Fogafín Agreement.

[204] **Ex. R-0092**, Addendum No. 1 to the Fogafín Agreement, 3 August 1998, Art. 1.

[205] **Ex. R-0092**, Addendum No. 1 to the Fogafín Agreement, 3 August 1998, Art. 1.

[206] *See* **Ex. R-0093**, Addendum No. 2 to the to the Fogafín Agreement, 6 August 1998, Art. 1 (extending the contractual term of the Fogafín Agreement to 21 August 1998); **Ex. R-0094**, Addendum No. 3 to the Fogafín Agreement, 21 August 1998, Art. 1 (extending the contractual term of the Fogafín Agreement to 21 September 1998); *see* **Ex. R-0013**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 20 August 1998 (requesting a 90-day extension of the contractual term).

[207] **Ex. R-0089**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 2 July 1998, p. 1 (English translation: "Based on the special provisions contained in the Financial Act, we find it necessary to request that [Fogafín] acquire Granahorrar's loan portfolio") (Spanish original: "*Con fundamento en las especiales disposiciones contenidas por el Estatuto Orgánico del Sistema Financiero, atentamente nos vemos precisados a solicitarle que el Fondo de Garantías de Instituciones Financieras – Fogafín – compre cartera de créditos de Granahorrar*"); **Ex. R-0006**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 16 July 1998, p. 1 (English translation: "Based on the special provisions contained in the Organic Statute of the Financial System, we hereby request that Fondo de Garantía de Instituciones Financieras - Fogafín - perform a discount operation on Granahorrar's loan portfolio") (Spanish original: "*Con fundamento en las especiales disposiciones contenidas en el Estatuto Orgánico del Sistema Financiero, atentamente solicitamos que el Fondo de Garantía de Instituciones Financieras -FOGAFIN-, realice una operación de descuento de cartera de créditos de Granahorrar*").

[208] Notice of and Request for Arbitration, p. 2; Claimants' Memorial (PCA), ¶¶ 9, 20.

funding" to Granahorrar.[209] As is evident from the facts discussed above, Fogafín did in fact provide direct funding to Granahorrar—and significant amounts of it.

77. As the month of August 1998 wore on, the Carrizosa and Robayo families advanced the sale of their Granahorrar shares by executing a trust agreement (i) that created a trust authorized to hold and offer their shares to the market,[210] and (ii) by virtue of which both families agreed to negotiate with their creditors the release of their pledged shares.[211] Julio Carrizosa signed the trust on behalf of the Carrizosa Family.[212]

78. August 1998 ended with an increase of Fogafín's direct financing to COP 90 billion (c. USD 62.5 million), via a fourth addendum to the Fogafín Agreement.[213]

e. <u>September–October 1998: Fogafín quadrupled its direct financing of Granahorrar</u>

79. Even though Granahorrar was still bleeding deposits, it believed that a sale of the Carrizosa and Robayo families' shares would restore the market's confidence in the institution. Indeed, in a request to the Central Bank a few days before the beginning of September, Granahorrar acknowledged "[a] change in attitude by the institutional market with regard to [Granahorrar] based on the majority shareholders' decision to sell."[214] In light of that request, on 1 September 1998 the Central Bank again modified the amortization schedule of Granahorrar's Special

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[209] Notice of and Request for Arbitration, ¶ 79.

[210] **Ex. R-0061**, Irrevocable Trust Agreement, 5 August 1998, Art. 2.1.

[211] **Ex. R-0061**, Irrevocable Trust Agreement, 5 August 1998, Art. 2.6.1.

[212] **Ex. R-0061**, Irrevocable Trust Agreement, 5 August 1998, p. 22.

[213] **Ex. R-0095**, Addendum No. 4 to the Fogafín Agreement, 31 August 1998, Art. 1 (granting Granahorrar's request for an increase in direct financing); *see* **Ex. R-0046**, Letter from Granahorrar (J. Amaya) to Fogafín (J. Azuero), 31 August 1998.

[214] **Ex. R-0074**, Letter from Granahorrar (R. Navarro) to Central Bank (M. Urrutia), 24 August 1998 , p. 4 (Spanish original: noting "*[e]l cambio de actitud del mercado institucional hacia [Granahorrar] con base en la decisión de venta por parte de los accionistas mayoritarios*"); *see also id*. at p. 2 (Granahorrar explaining that it was a requesting a second modification to the amortization schedule because it had lost a further COP 176 billion (c. USD 128 million) in deposits in July).

TLI.[215] Within 48 hours, however, Granahorrar would file the first of a series of urgent requests for additional financial assistance. Thus, in the short period between 2 September and 10 September alone, Granahorrar submitted 5 separate requests to Fogafín for increases of direct financing.[216] These requests produced 5 more addenda to the Fogafín Agreement (culminating with the ninth addendum), which increased Fogafín's direct financing of Granahorrar to COP 205 billion (c. USD 137 million).[217]

80. Then, on 15 September 1998, the Central Bank Technical Unit of the Central Bank issued a report indicating that (i) as of 8 September 1998, Granahorrar's liquidity deficit had swollen to COP 552 billion (c. USD 365 million); (ii) Granahorrar's evaporating deposit base would prevent it from ensuring repayment of its Special TLI; and (iii) Granahorrar had failed to execute certain measures that it had agreed to undertake to improve its liquidity.[218] On the basis of the foregoing, the report

[215] **Ex. R-0075**, Letter from Central Bank (A. Velandia) to Granahorrar (R. Navarro), 1 September 1998.

[216] **Ex. R-0104**, Addendum No. 5 to the Fogafín Agreement, 2 September 1998, Consideration No. 2 (identifying Granahorrar's request of 2 September 1998); **Ex. R-0096**, Addendum No. 6 to the Fogafín Agreement, 4 September 1998, Consideration No. 2 (identifying Granahorrar's request of 2 September 1998); **Ex. R-0016**, Letter from Granahorrar (R. Navarro) to Fogafín (F. Azuero), 7 September 1998 (Granahorrar requesting that Fogafín increase its direct financing by COP 33 billion (c. USD 21.4 million)); **Ex. R-0017**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 8 September 1998 (Granahorrar requesting that Fogafín increase its direct financing by COP 17 billion (c. USD 11.2 million)); **Ex. R-0098**, Addendum No. 9 to the Fogafín Agreement, 10 September 1998, Consideration No. 2 (identifying Granahorrar's request).

[217] **Ex. R-0104**, Addendum No. 5 to the Fogafín Agreement, 2 September 1998, Art. 1 (increasing direct financing to COP 105 billion (c. USD 72.8 million)); **Ex. R-0096**, Addendum No. 6 to the Fogafín Agreement, 4 September 1998, Art. 1 (increasing direct financing to COP 130 billion (c. USD 84.4 million)); **Ex. R-0105**, Addendum No. 7 to the Fogafín Agreement, 7 September 1998, Art. 1 (increasing direct financing to COP 163 billion (c. USD 21.4 million)); **Ex. R-0097**, Addendum No. 8 to the Fogafín Agreement, 8 September 1998, Art. 1 (increasing direct financing to COP 180 billion (c. USD 119 million)); **Ex. R-0098**, Addendum No. 9 to the Fogafín Agreement, 10 September 1998, Art. 1.

[218] **Ex. R-0020**, Informe Desarrollo Apoyo Especial de Liquidez C.A.V. Granahorrar, Central Bank, 15 September 1998, pp. 4–7.

concluded that the Central Bank would be justified in terminating the Special TLI, demanding immediate repayment, and sanctioning Granahorrar.[219]

81. On 19 September 1998, Granahorrar submitted a further request for an increase of Fogafín's maximum support.[220] This request resulted in a tenth addendum to the Fogafín Agreement, which increased Fogafin's direct financing.[221] On 22 September 1998, Granahorrar sought yet another increase in financial support from Fogafín, but this time topped with sobering news: the Carrizosa and Robayo families had failed to sell their Granahorrar shares.[222] Faced with that situation, the Carrizosa Family had decided to negotiate with the Creditor Banks the transfer of its pledged shares in Granahorrar, in lieu of payment of their financing.[223]

82. On the following day, Fogafín's management issued a report in connection with Granahorrar's request of 22 September 1998, which found that Granahorrar had lost 21% of its deposits during 1998, and that the entity's profits had decreased by 66% compared to the prior year.[224] While Claimants in their Memorial describe the report as "eloquent in documenting Granahorrar's financial liability at that time,"[225] they fail to note that the report recommended that Fogafín reject

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[219] **Ex. R-0020**, Informe Desarrollo Apoyo Especial de Liquidez C.A.V. Granahorrar, Central Bank, 15 September 1998, p. 9.

[220] **Ex. R-0023**, Informe de la Administración de Fogafín para la Consideracion de la Junta Directiva, Fogafín Management, 23 September 1998, p. 2 (discussing the 19 September 1998 request by Granahorrar).

[221] **Ex. R-0099**, Addendum No. 10 to the Fogafín Agreement, 21 September 1998, Consideration No. 2; *see also id*. at Arts. 1, 2 (increasing to COP 290 billion Fogafín's direct financing and extending the contractual term to 30 September 1998);

[222] **Ex. R-0022**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 22 September 1998, p. 1 (reasserting its request for a COP 60 billion increase in the ceiling of Fogafín's support); *see id.* at p. 6.

[223] **Ex. R-0022**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 22 September 1998, p. 7.

[224] **Ex. R-0023**, *Informe de la Administración de Fogafín para la Consideracion de la Junta Directiva*, Fogafín Management, 23 September 1998, p. 4.

[225] *See* Notice of and Request for Arbitration, ¶ 68. (referencing the minutes of the 23 September 1998 meeting of the Fogafín Board of Directors that transcráe the Fogafín report and quoting text from the report itself).

Granahorrar's request to increase the ceiling of Fogafín's financial support.[226] However, Fogafín chose to not follow the report's recommendation, and instead decided to continue to support Granahorrar, but with increased protection.

83. Thus, on 24 September 1998, it executed with Granahorrar what Claimants incorrectly label "Fogafín's second contract."[227] In fact, what was executed was yet another addendum to the Fogafín Agreement—the eleventh in the series. Such addendum increased to COP 320 billion (c. USD 204 million[228]) Fogafín's guarantee, and to COP 310 billion (c. USD 198 million) Fogafín's direct financing.[229] In light of Granahorrar's dismal financial state, however, the addendum also provided that in the event that Granahorrar were to default on its payment obligations, Fogafín would be entitled to freely dispose of Granahorrar's promissory notes.[230]

84. By late September 1998, Granahorrar would admit to the Central Bank that "rebuilding trust in the Corporation will **only** take place when [the] Corporation is sold by the current shareholders"[231] (emphasis added). However, such sale of ownership from Granahorrar's then-current shareholders never came to pass.

85. On 30 September 1998, Julio Carrizosa transmitted to the Creditor Banks a proposed option contract ("**Option Contract**") with terms for a transfer of the Carrizosa Family's pledged shares in Granahorrar in lieu of payment of the

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[226] **Ex. R-0023**, *Informe de la Administración de Fogafín para la Consideracion de la Junta Directiva*, Fogafín Management, 23 September 1998, pp. 3, 5. Simultaneously, Granahorrar submitted to Fogafín another request for an increase in direct financing due to its liquidity crisis. **Ex. R-0025**, Letter from Granahorrar (R. Navarro) to Fogafín (F. Azuero), 23 September 1998.

[227] Notice of and Request for Arbitration, ¶ 93.

[228] The decrease in dollar value relative to the original COP 300 billion in the Fogafín Agreement is the result of the exchange rate on 24 September 1998 of COP 1,561.28 to 1 USD.

[229] **Ex. R-0106**, Addendum No. 11 to the Fogafín Agreement, 24 September 1998, Art. 1.

[230] **Ex. R-0106**, Addendum No. 11 to the Fogafín Agreement, 24 September 1998, Art. 2.

[231] **Ex. R-0078**, Letter from Granahorrar (R. Navarro) to Central Bank (M. Urrutia), 29 September 1998, p. 1 (Spanish original: "*[L]a restitución de la confianza en la [Granahorrar]* ***solamente*** *se producirá en el momento en que se realice la venta de la Corporación por parte de sus accionistas actuales*") (emphasis added).

Family's debts.[232] Hoping for a successful transfer, Fogafín and Granahorrar then executed a twelfth addendum to the Fogafín Agreement, further increasing Fogafín's direct financing and guarantee.[233]

86. On the afternoon of 1 October 1998,[234] the Creditor Banks agreed to enter into the Option Contract, albeit subject to certain conditions.[235] Meanwhile, Fogafín increased the ceiling of both its direct financing and guarantee for Granahorrar to a maximum of COP 400 billion (c. USD 256 million), until 5 October 1998, via the thirteenth and final addendum.[236] Then, late in the evening of that same day, Julio Carrizosa abruptly rejected the Creditor Banks' conditions,[237] as a result of which the Option Contract was never executed.

4. October 1998: Colombia prevents the collapse of Granahorrar

87. The formidable injections of capital that the Central Bank, Fogafín, and private banks (in reliance on Fogafín's guarantee[238]) had pumped into Granahorrar, ultimately were unable to arrest the institution's hemorrhage or restore the beleaguered bank to financial health. October 1998 began with Granahorrar on the

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[232] **Ex. R-0030**, 1998 Option Contract.

[233] **Ex. R-0027**, Addendum No. 12 to the Fogafín Agreement, 30 September 1998, Consideration No. 4, Art. 1.

[234] On 1 October, the Central Bank Technical Unit also issued an internal report in response to a third request by Granahorrar to modify the amortization schedule of its Special TLI, concluding that Granahorrar's liquidity deficit had increased to (c. USD 409 million). **Ex. C-0007**, *Análisis Solicitud Nuevo Plan de Amortización Apoyo Especial de Liquidez C.A.V. Granahorrar*, Central Bank, 1 October 1998, p. 4. However, the report recommended that the Central Bank authorize the request in light of the potential change in ownership. **Ex. C-0007**, *Análisis Solicitud Nuevo Plan de Amortización Apoyo Especial de Liquidez C.A.V. Granahorrar*, Central Bank, 1 October 1998, pp. 5, 6. The Central Bank did so, with some changes to the proposed schedule. **Ex. R-0019**, Letter from Central Bank (A. Velandía) to Granahorrar (R. Navarro), 1 October 1998.

[235] **Ex. R-0031**, Letter from the Creditor Banks to Grupo I.C., 1 October 1998.

[236] **Ex. R-0028**, Addendum No. 13 to the Fogafín Agreement, 1 October 1998, Arts. 1, 2.

[237] *See* **Ex. R-0167**, Letter from Julio Carrizosa Mutis to Creditor Banks, 1 October 1998.

[238] *See* **Ex. R-0048**, Letter from Superintendency (S. Ordoñez) to Fogafín (Board of Directors), 3 October 1998, p. 7 (Confirming that *Banco Santander* and *Banco de Colombia* had issued Granahorrar financing and covered overdrafts in reliance on Fogafín's guarantee).

verge of collapse. From 2 through 5 October 1998, the regulatory authorities hastened to prevent Granahorrar's collapse and the systemic economic crisis that it would have triggered. Granahorrar's shareholders were provided with yet another opportunity to save the bank, but they failed to step up, and Colombia ultimately had to intervene to rescue Granahorrar.

f. 2 October 1998: Granahorrar became insolvent

88. Three events led to Granahorrar's near collapse on 2 October 1998. First, at the close of the business day, Granahorrar had recorded a negative balance of COP 31 billion (c. USD 19.7 million), which it estimated would increase by another COP 22.5 billion (c. USD 14.3 million) on 5 October 1998.[239] Second, multiple checks worth over COP 828 million (c. USD 526,309) issued by Granahorrar had been returned due to insufficient funds;[240] and third, Granahorrar defaulted on its Special TLI interest payments to the Central Bank.[241]

89. Having defaulted on its payment obligations,[242] Granahorrar had breached the Fogafín Agreement.[243] Thus, the temporary purchase through which Granahorrar had received Fogafín's direct financing became final, making Fogafín the owner of the transferred promissory notes, per the agreed and express terms of the Fogafín

[239] **Ex. R-0032**, Letter from Granahorrar (A. Arciniegas) to Superintendency (M. Arango), 2 October 1998.

[240] **Ex. R-0033**, Letter from Superintendency (S. Ordoñez) to Fogafín (F. Azuero), 2 October 1998; **Ex. R-0034**, Letter from Superintendency (S. Ordoñez) to Central Bank (M. Urrutia), 2 October 1998.

[241] **Ex. R-0036**, Letter from Granahorrar (J. Amaya) to Superintendency (S. Ordoñez), 2 October 1998.

[242] **Ex. R-0033**, Letter from Superintendency (S. Ordoñez) to Fogafín (F. Azuero), 2 October 1998, p. 2 (informing Fogafín that as a result of the returned checks and Granahorrar's negative balance, it had defaulted on its payments); **Ex. R-0034**, Letter from Superintendency (S. Ordoñez) to Central Bank (M. Urrutia), 2 October 1998, p. 2.

[243] **Ex. R-0035**, Letter from Fogafín (F. Azuero) to Superintendency (S. Ordoñez), 2 October 1998, p. 1.

Agreement.[244] This transfer resulted in a loss of COP 128.7 billion (c. USD 81.8 million) to Granahorrar, placing it below the legally mandated 9% solvency threshold.[245]

90. Granahorrar was now insolvent, in violation of Resolution No. 25,[246] and therefore its capacity to repay the Special TLI could not be ensured.[247] In subsequent judicial proceedings, which are discussed in greater detail below, the Administrative Judicial Tribunal determined that the contemporaneous evidence demonstrated that Granahorrar was indeed insolvent on 2 October 1998.[248] Consequently, the Central Bank terminated the Special TLI and took possession of Granahorrar's promissory notes, pursuant to Resolution No. 25.[249]

91. In addition to the Special TLI, the modifications of the amortization schedule, the Fogafín Agreement and its thirteen addenda providing increased financial support to Granahorrar, Colombia gave the bank yet another opportunity to save itself. In an order issued on 2 October 1998, the Superintendency directed Granahorrar to raise COP 157 billion (c. USD 99.8 million) in new capital to offset its insolvency ("**Capitalization Order**").[250]

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[244] **Ex. R-0035**, Letter from Fogafín (F. Azuero) to Superintendency (S. Ordoñez), 2 October 1998, p. 2.

[245] **Ex. C-0017**, Letter from Superintendency (S. Ordoñez) to Central Bank (M. Urrutia), 2 October 1998.

[246] **Ex. R-0142**, External Resolution No. 25, 31 October 1995, Art. 2.

[247] **Ex. C-0018**, Letter from Central Bank (J. Uribe) to Granahorrar (J. Amaya), 2 October 1998.

[248] *See* **Ex. R-0051**, 2005 Administrative Judicial Tribunal Judgment, pp. 32-33.

[249] **Ex. R-0142**, External Resolution No. 25, 31 October 1995, Art. 29(English translation: "Without prejudice to the effects foreseen by other rules in this resolution, a return of the resources shall be made immediately enforceable if, while Central Bank resources are being used, or when contracts expire, it becomes evident that the credit establishment is in a situation of insolvency") (Spanish original: "*Sin perjuicio de los efectos previstos en otras normas de esta resolución, si durante el uso de los recursos del Banco o al vencimiento de los contratos, resulta evidente que el establecimiento de crédito se encuentra en una situación de insolvencia, la devolución de aquellos se hará exigible de inmediato*"); *see also id.* at Art. 30 (permitting the Central Bank to dispose of the promissory notes it had received in exchange for the TLI, dispose of them, or obtain any payment that is due).

[250] **Ex. R-0038**, 1998 Capitalization Order.

92. The Superintendency explained to Granahorrar the reason for the issuance of the Capitalization Order as follows:

> Financial institutions must guarantee at all times that they are in a position to return the resources that have been deposited. Therefore, although it is not expressly contained in a legal provision, their shareholders must be able to provide sufficient resources to meet the aforementioned withdrawals and maintain the entity's solvency. In the present case it is clear that this has not happened because instead of the contribution of new resources by the owners, [Granahorrar] has resorted to State resources—from Fogafín and the Central Bank—and extensions of the term to meet its obligations to these Entities, and in no case have the shareholders created a climate of trust through the commitment to provide their own resources to capitalize [Granahorrar], nor has it [*sic*] led to the entry of capital contributed by non-shareholder third parties.[251]

93. The Superintendency gave Granahorrar until 3:00pm on 3 October 1998 to raise the additional capital, because it was justifiably concerned that Granahorrar's collapse would have a snowball effect that would "definitely" lead to a "systemic crisis" and "economic panic" in Colombia:

> [I]t is relevant to highlight that the urgent deadline is due to the precarious liquidity situation of [Granahorrar] and that in such circumstances the interest of savers and depositors prevails over the interests of shareholders. If [Granahorrar's] ability to return deposits has not been restored next Monday [on October 1998], mass withdrawals in the corporation will increase its insolvency

[251] **Ex. R-0038**, 1998 Capitalization Order, pp. 3–4 (Spanish original: "*Las instituciones financieras deben garantizar en todo momento que están en condición de devolver los recursos que le han sido depositados. Por ello, aunque no aparezca expresamente contenido en una norma, sus accionistas deben estar en capacidad de proporcionar los recursos suficientes que permitan atender los mencionados retiros y mantener la solvencia de la Entidad. En el presente caso es evidente que ello no ha ocurrido pues en vez del aporte de recursos frescos por parte de los dueños, la Entidad ha recurrido a recursos Estatales – del Fogafln y del Banco de la República – y a prórrogas para atender sus obligaciones para con dichas Entidades, y en ningún caso los accionistas han creado un clima de confianza mediante el compromiso de proveer recursos propios para capitalizar la Entidad, ni ha propiciado el ingreso de capital aportado por terceros no accionistas.*").

situation. This will inevitably lead to a collapse, definitely leading to a systemic crisis and eventual economic panic.[252]

The Superintendency therefore gave Granahorrar yet another opportunity, while attempting to avert a wider financial crisis in Colombia.

g. 3 October–5 October 1998: Granahorrar's shareholders, including the Carrizosa Family, proved unwilling or unable to save Granahorrar

94. On Saturday, 3 October 1998, Granahorrar notified its shareholders, including two of Claimants' Holding Companies (*Compto* and *Exultar*[253]), of the Capitalization Order, and requested that they capitalize Granahorrar. However, neither they nor any other shareholder stepped up to comply with the Capitalization Order.[254]

95. That evening, 3 October 1998, a report issued by the Superintendency detailed Granahorrar's desperate financial situation. Granahorrar was insolvent, illiquid, and had defaulted on its payments.[255] Granahorrar's automatic teller machines had begun to run out of money, and office services had been suspended.[256] From June to September 1998, Granahorrar's reserve funds had been invariably below the legally required minimum.[257] The Carrizosa and Robayo families had failed to

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[252] **Ex. R-0038**, 1998 Capitalization Order, p. 3 (Spanish original: "*[E]s pertinente resaltar que lo perentorio del plazo atiende a la situación precaria de liquidez de [Granahorrar] y que en tales circunstancias el interés de los ahorradores y depositantes prevalece sobre los intereses de los accionistas. Si la capacidad de [Granahorrar] para devolver los depósitos no se ha restablecido el próximo lunes, los retiros masivos en la corporación incrementarán su situación de insolvencia lo cual inevitablemente la conducirá al colapso, propiciando, sin lugar a dudas, una crisis sistémica y un eventual pánico económico*").

[253] **Ex. R-0040**, Letters from Granahorrar (J. Amaya) to Compto S.A. (G. Afandor) and Exultar S.A. (A. Carrizosa Gelzis), 3 October 1998; **Ex. R-0039**, Letter from Granahorrar (J. Amaya) to Superintendency (S. Ordoñez), 3 October 1998.

[254] **Ex. R-0041**, Letter from Granahorrar (J. Amaya) to Superintendency (S. Ordoñez), 3 October 1998.

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

[256] **Ex. R-0048**, Letter from Superintendency (S. Ordoñez) to Fogafín (Board of Directors), 3 October 1998, p. 6.

[257] **Ex. R-0048**, Letter from Superintendency (S. Ordoñez) to Fogafín (Board of Directors), 3 October 1998, p. 6.

sell or transfer their pledged shares to their creditors.[258] And Granahorrar's shareholders, including Claimants, were either unwilling or unable to capitalize Granahorrar.[259]

96. Faced with that dire situation, the Fogafín Board decided that Fogafín would proceed with the *oficialización* of Granahorrar, and would capitalize it "to ensure the public's confidence in the financial system, and a normal performance of the payment system."[260] Accordingly, on 3 October 1998 Fogafín ordered Granahorrar to reduce the nominal value of its shares to COP 0.01 ("**Value Reduction Order**").[261]

97. After Granahorrar certified that it had complied with the Value Reduction Order,[262] Fogafín did what Granahorrar's shareholders had failed to do: capitalize Granahorrar by COP 30 billion (c. USD 19 million), which it did on 3 October 1998, and by a further COP 127 billion (c. USD 80.4 million), which it did on 5 October 1998.[263] Accordingly, Fogafín infused Granahorrar with a total of COP 157 billion (c. USD 99.8 million).[264] Because this capitalization was effected via the acquisition of shares, Fogafín became Granahorrar's majority shareholder.[265]

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[258] **Ex. R-0048**, Letter from Superintendency (S. Ordoñez) to Fogafín (Board of Directors), 3 October 1998, pp. 7–8.

[259] **Ex. R-0048**, Letter from Superintendency (S. Ordoñez) to Fogafín (Board of Directors), 3 October 1998, p. 2.

[260] **Ex. C-0003**, Minutes of Fogafín Board of Directors Minutes, 3 October 1998, p. 9 (Spanish original: "*para asegurar la confianza del público en el sistema financiero y el normal-desarrollo de sistema de pagos*")

[261] **Ex. R-0042**, 1998 Value Reduction Order, Clause 13..

[262] **Ex. R-0168**, Letter from Granahorrar (J. Amaya) to Fogafín (F. Azuero), 3 October 1998.

[263] **Ex. R-0153**, Letter from Fogafín (I. Quintana) to Granahorrar (A. Arciniegas), 5 October 1998.

[264] As of 2 October 1998, the date of the Capitalization Order. **Ex. R-0038**, 1998 Capitalization Order.

[265] *See* **Ex. C-0003**, Minutes of Fogafín Board of Directors Meeting, 3 October 1998, p. 1.

h. 5 October 1998 and thereafter: Granahorrar began the road to recovery

98. The date of 5 October 1998, the first business day after the 1998 Regulatory Measures, would serve as a barometer for the effectiveness of Colombia's efforts to rescue Granahorrar and thus avert a financial crisis. By the end of that day, two things were clear: (ii) more work remained to be done, as some customers continued withdrawing their funds; [266] but (ii) Granahorrar's *oficialización* had averted an economic meltdown, as a wider run on Granahorrar and other banks had been staved off.[267]

99. That same day, the former President of Granahorrar wrote a formal letter to the President of Fogafín, expressing his gratitude for Fogafín's support:

> The transparent, balanced, and professional handling, and the experience that you showed in managing this complex situation is a guarantee to all Colombians that the difficult situation facing the entire banking industry is in good hands. I personally owe a great debt of gratitude to you, and all your officials, not only because of the way they treated the institution that I was representing, but also because of the way my requests were met and the kindness, respect and warmth that were always shown me." [268]

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[266] **Ex. R-0043**, *$157.000 Millones Para Granahorrar*, EL TIEMPO, 6 October 1998, p. 3 (English translation: identifying a customer who withdrew his money from Granahorrar because "I know that the Government is the new owner, but I am not willing to take risks. I have come to close my account") (Spanish original: identifying a customer who withdrew his money from Granahorrar because "[*y*]*o sé que el Gobierno es el nuevo dueño, pero no estoy dispuesto a correr riesgos y vengo a cerrar mi cuenta*").

[267] **Ex. R-0043**, *$157.000 Millones Para Granahorrar*, EL TIEMPO, 6 October 1998, p. 2 (English translation: identifying a customer who chose to maintain his Granahorrar account after arriving at his local office because "[t]he Government said that it would account for our money, and I wanted to know if everything was working") (Spanish original: identifying a customer who chose to maintain his Granahorrar account after arriving at his local office because "[*e*]*l Gobierno dijo que iba responder por nuestra plata y yo quería ver si todo estaba funcionando*").

[268] **Ex. R-0165**, Letter from Jorge Enrique Amaya Pachecho to Fogafín (F.Azuero), 5 October 1998 (Spanish original: "*El manejo transparente, equilibrado, profesional, y la experiencia que usted demostró en la administración de esta compleja situación nos garantiza a todos los colombianos que la situación difícil por la que pasa hoy toda la banca está en buenas manos. Yo personalmente quedo con una inmensa deuda de gratitud con Usted y con todos sus funcionarios, no solo por la forma deferente con que trataron a la*

100. In the days that followed, Claimants failed to participate in meetings to discuss Granahorrar's future. For instance, on 5 October 1998, Granahorrar's board of directors held an urgent meeting to discuss the prior weekend's events.[269] According to the meeting minutes, Alberto Carrizosa Gelzis—Chairman of the Board—had been aware of the meeting but failed to attend.[270] Similarly, on 16 October 1998, Granahorrar held a shareholders assembly, during which the shareholders unanimously approved new corporate statutes and voted in a new board of directors.[271] Although at least one of Claimants' Holding Companies had designated a representative specifically for the assembly, he failed to even show up.[272]

101. Thereafter, Granahorrar slowly recovered, but not without further financial support from Colombia.[273]

102. When the Colombian economy eventually recovered, Fogafín sold Granahorrar to *Banco Bilbao Vizcaya Argentaria*, a Spanish bank, on 31 October 2005.[274] Eventually, *Banco Bilbao Vizcaya Argentaria* merged with Granahorrar and stopped using the Granahorrar name.[275]

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institución que yo representaba, sino por la manera en que fueron atendidas mis solicitudes y por la amabilidad, respeto y calidez con que siempre fui recibido").

[269] *See generally* **Ex. R-0100**, Granahorrar Board Emergency Meeting, 5 October 1998.

[270] **Ex. R-0100**, Granahorrar Board Emergency Meeting, 5 October 1998, p. 1.

[271] **Ex. R-0047**, Minutes of Granahorrar Shareholders Assembly, 16 October 1998, pp. 17, 18.

[272] **Ex. R-0047**, Minutes of Granahorrar Shareholders Assembly, 16 October 1998, p. 2.

[273] For example, by 30 October, Granahorrar's solvency rating had increased from 0% to 6.92%, an improvement but still below the legally required minimum 9% threshold. Before the year's end, Fogafín would further capitalize Granahorrar by COP 150 billion (c. USD 98.4 million). **Ex. R-0103**, Minutes of Fogafín Board of Directors Meeting, 17 December 1998, p. 3.

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

[275] **Ex. R-0164**, *Lista fusión de BBVA y Granahorrar*, EL MUNDO, 29 April 2006.

D. Throughout the recession, Colombia adopted measures to combat the wider economic crisis

103. Aside from Granahorrar, Colombia assisted other financial institutions to rescue them from what appeared to be certain collapse. Like Granahorrar, two other financial institutions underwent *oficialización*.[276] *Banco Uconal* underwent *oficialización* on 26 September 1998, a week before Granahorrar.[277] As with Granahorrar, Fogafín had provided *Banco Uconal* with a guarantee and direct financing via a temporary purchase of assets.[278] Nevertheless, *Banco Uconal's* losses continued to increase.[279] After a failed attempt to sell the bank, *Banco Uconal* underwent *oficialización*.[280]

104. Even though Colombia averted a wider economic crisis by the timely, decisive measures that it adopted to rescue Granahorrar, it nevertheless faced one of the most severe recessions in its history. It therefore continued implementing measures to protect its economy. Notably, on 16 November 1998, Colombia declared a state of emergency, via Decree 2330 of 1998,[281] and subsequently promulgated other measures to combat the recession.[282] By the end of the

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[276] **Ex. R-0159**, Sara Ordóñez Noriega, *La Superintendencia Bancaria en la Crisis de Los Noventa*, July 2003, p. 8 (Identifying Granahorrar and FES has having undergone *oficialización*); *see also* **Ex. R-0162**, *El Gobierno Oficializó el Banco Uconal*, EL TIEMPO, 26 September 1998 (detailing the *oficialicazión* of Banco Uconal).

[277] *See generally* **Ex. R-0162**, *El Gobierno Oficializó el Banco Uconal*, EL TIEMPO, 26 September 1998.

[278] **Ex. R-0162**, *El Gobierno Oficializó el Banco Uconal*, EL TIEMPO, 26 September 1998, pp. 1–2.

[279] **Ex. R-0169**, *Uconal Va Camino a la Oficialización*, EL TIEMPO, 22 September 1998, p. 1.

[280] **Ex. R-0169**, *Uconal Va Camino a la Oficialización*, EL TIEMPO, 22 September 1998, p. 1; **Ex. R-0162**, *El Gobierno Oficializó el Banco Uconal*, EL TIEMPO, 26 September 1998.

[281] **Ex. R-0170**, Decree No. 2330 of 1998, Republic of Colombia, 16 November 1998.

[282] For example, via Decree No. 2331 of 1998, Colombia created a levy on financial transactions to financially support emergency measures that could be effected by Fogafín to preserve the stability and solvency of the financial system. *See generally* **Ex. R-0171**, Decree No. 2331 of 1998, Republic of Colombia, 16 November 1998; *see also* **Ex. R-0159**, Sara Ordóñez Noriega, *La Superintendencia Bancaria en la Crisis de Los Noventa*, July 2003, pp. 6–7 (identifying other measures implemented by Colombia to combat the economic recession).

economic recession, at least three financial entities had gone through an *oficialiciazión*, 10 others had been capitalized, and 14 had been liquidated.[283]

E. In 2000, Claimants initiated a local proceeding to overturn the 1998 Regulatory Measures

105. More than two years later, Claimants decided to mount a legal challenge to the 1998 Regulatory Measures that had rescued Granahorrar from collapse. Claimants, through the Holding Companies, filed a judicial action against the 1998 Regulatory Measures on 28 July 2000.[284] Indeed, Claimants concede in their Memorial on Jurisdiction that it was "Claimants, through the [Holding] Companies," who prosecuted the claims.[285]

106. In Colombia, disputes concerning administrative matters (such as the 1998 Regulatory Measures) are handled by a specialized branch of the judiciary known as the **Contentious Administrative Jurisdiction** (*Jurisdicción Contencioso Administrativa*).[286] Before 2006, the Contentious Administrative Jurisdiction consisted of (i) **Administrative Tribunals** (which acted as first instance courts); and (ii) the **Council of State**, which constitutes the highest judicial body that hears cases concerning administrative matters.[287] The **Constitutional Court**, the highest court in the land, is tasked with protecting the integrity of the Constitution by

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[283] **Ex. R-0159**, Sara Ordóñez Noriega, *La Superintendencia Bancaria en la Crisis de Los Noventa*, July 2003, p. 8; **Ex. R-0162**, *El Gobierno Oficializó el Banco Uconal*, EL TIEMPO, 26 September 1998.

[284] *See* **Ex. R-0154**, Shareholders Registries of Holding Companies 1987-2012, ¶ 28 ("[W]e invested all of our savings in Granahorrar. Those investments were made effective through several companies owned by our family. Those companies were *Compto S.A.*, *Fultiplex S.A.*, *Exultar S.A.*, *Asesorías e Inversiones C.G. S.A.*, *Inversiones Lieja LTDA*, and *Invertorías y Construcciones LTDA*."). For the avoidance of doubt, the Republic of Colombia flags for the Tribunal that — in its review of local proceeding documents — that Colombian courts often refer to the court as, the "Corporación."

[285] Claimants' Memorial (PCA), ¶ 28.

[286] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 45.

[287] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 37-40 (Mr. Ibáñez explains that the Council of State exercises control over "administrative activity," which includes administrative actions and decisions, disputes arising from state contracts, administrative operations, facts, abstentions, omissions and de facto channels attributable to administrative authorities.).

resolving questions of constitutionality and *tutela* petitions (which are petitions alleging violations of fundamental rights).[288] The Constitutional Court may review a decision of the Council of State if such decision is the subject of a *tutela* petition.[289]

1. Claimants requested information from the Superintendency and Fogafín

107. Colombian law imposes a statute of limitations on challenges to administrative measures. Pursuant to Article 136 of the Contentious Administrative Code of Colombia ("**Contentious Administrative Code**"), in force in 1998, Granahorrar and its shareholders had four months after the issuance of the Capitalization Order and the Value Reduction Order (i.e., until February 1999) to challenge those measures in court.[290] However, neither Granahorrar nor its shareholders presented a challenge during that time. Instead, Claimants waited almost *two years* after the 1998 Regulatory Measures had been issued and then sent two letters to the Superintendency seeking information about such measures.[291] In those letters (dated 9 and 30 May 2000, respectively), Claimants inquired about the process by which Fogafín and the Superintendency had served notice of the 1998 Regulatory Measures.[292]

108. The Superintendency responded to Claimants on 25 July 2000.[293] In its response, the Superintendency noted that the regulatory authorities had provided proper notice to Granahorrar, in accordance with Article 74 of the *Estatuto Orgánico del Sistema Financiero* ("**Financial Act**" or "**ESOF**") and the Code of Commerce. Under

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[288] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 77.

[289] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 74.

[290] *See* **Ex. R-0123**, Contentious Administrative Code, Art. 136.

[291] *See* **Ex. R-0060**, Letter from Superintendency (G. Aguilar) to Compto S.A.'s Counsel (C. Cardona), 25 July 2000, p. 1 (discussing to Claimants' two letters of 9 and 30 May 2000).

[292] *See* **Ex. R-0060**, Letter from Superintendency (G. Aguilar) to Compto S.A.'s Counsel (C. Cardona), 25 July 2000, p. 5; **Ex. C-0023**, Judgment No. SU-447/11 (Constitutional Court), 26 May 2011 ("**2011 Constitutional Court Judgment**"), ¶ 1.2.13.

[293] *See* **Ex. R-0060**, Letter from Superintendency (G. Aguilar) to Compto S.A.'s Counsel (C. Cardona), 25 July 2000; **Ex. C-0023**, 2011 Constitutional Court Judgment, ¶ 1.2.13.

the Financial Act, which governs the actions of the financial regulatory authorities in Colombia, when an agency issues a precautionary measure of immediate application, the agency does not need to notify the public.[294] Instead, the agency is required only to notify the entity that is the subject of the measure, through that entity's legal representative.[295] Given the nature and urgency of the measures, this makes perfect sense, as confirmed by Dr. Ibáñez, who explains that the collapse of the financial institution would have led to a systemic crisis and a possible economic panic.[296] When a measure is not urgent in nature, the Contentious Administrative Code governs the notification procedure. Under the Contentious Administrative Code, the agency must notify not only the entity itself, but also its shareholders and relevant third parties, of the non-urgent measure.[297]

109. The 1998 Regulatory Measures were precautionary measures of immediate application. As a result, and in accordance with the specialized notice provisions of the Financial Act, the legal representative of Granahorrar, Mr. Jorge Enrique Amaya Pacheco, was served by the Superintendency with notice of the Capitalization Order of 2 October 1998.[298] Neither the Superintendency nor Fogafín was required to provide further notice. The legal representative of Granahorrar then informed Granahorrar's shareholders of the issuance of the 1998

[294] *See* **Ex. R-0129**, Decree No. 663, President of Colombia, 2 April 1993 ("**Financial Act**"), Art. 74; **Ex. R-0125**, Decree No. 32, President of Colombia, 8 January 1986, Arts. 2, 3.

[295] *See* **Ex. R-0129**, Financial Act, Art. 74; **Ex. R-0125**, Decree No. 32, President of Colombia, 8 January 1986, Arts. 2, 3.

[296] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 23.

[297] *See* **Ex. R-0129**, Financial Act, Art. 74; **Ex. R-0125**, Decree No. 32, President of Colombia, 8 January 1986, Arts. 2, 3.

[298] **Ex. R-0038**, Capitalization Order.

Regulatory Measures.[299] In a letter sent to the Superintendency on 3 October 1998, the legal representative confirmed that the shareholders had been notified.[300]

110. In its response to Claimants' request for information, the Superintendency also responded to the other issues that had been raised by Claimants and ratified that the measures had been issued in accordance with the applicable laws.[301]

2. Claimants sought judicial nullification and reinstatement of the regulatory measures

111. On 28 July 2000, three days after the Superintendency had responded to their requests for information, Claimants filed a nullification and reinstatement action ("**Nullification and Reinstatement Action**") before the Administrative Judicial Tribunal.[302] Claimants requested that the Administrative Judicial Tribunal: (i) declare null the Capitalization Order and the Value Reduction Order; (ii) order the Superintendency and Fogafín to compensate Claimants' Holding Companies for the totality of the value of the shares that such companies had held in Granahorrar, plus interest; and (iii) order the Superintendency and Fogafín to pay all costs of the Nullification and Reinstatement Action.[303]

112. In that lawsuit, Claimants alleged that the 1998 Regulatory Measures had suffered from substantive and procedural defects.[304] For example, Claimants argued that: (i) they had not been properly notified either of the Capitalization Order or of the Value Reduction Order;[305] (ii) the 1998 Regulatory Measures had not been justified

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[299] *See* **Ex. R-0060**, Letter from Superintendency (G. Aguilar) to Compto S.A.'s Counsel (C. Cardona), 25 July 2000, p. 5.

[300] *See* **Ex. R-0060**, Letter from Superintendency (G. Aguilar) to Compto S.A.'s Counsel (C. Cardona), 25 July 2000, p. 5.

[301] *See* **Ex. R-0129**, Financial Act, Arts. 113(2), 325(1)(a), and 326(5)(c).

[302] *See* **Ex. R-0050**, Nullification and Reinstatement Action, *Compto S.A. in Liquidación, et al. v. Superintendency and Fogafín*, Case No. 2000-00521, Administrative Judicial Tribunal of Cundinamarca, 28 July 2000 ("**Nullification and Reinstatement Action**"), pp. 1, 87.

[303] *See* **Ex. R-0050**, Nullification and Reinstatement Action, pp. 2-3.

[304] *See* **Ex. R-0050**, Nullification and Reinstatement Action, § III, p. 49.

[305] *See* **Ex. R-0050**, Nullification and Reinstatement Action, p. 46.

because Granahorrar was not insolvent at the time that such measures were adopted; and (iii) the Superintendency and Fogafín had exceeded the scope of their powers by conditioning the temporary liquidity infusions on the sale of the shares of the majority shareholders of Granahorrar.[306]

113. At first, the Administrative Judicial Tribunal refused to register the Nullification and Reinstatement Action, because the Action did not comply with the applicable statute of limitations.[307] However, Claimants successfully appealed that decision,[308] and the Nullification and Reinstatement Action was registered on 9 March 2001.[309]

114. In their submissions to the Administrative Judicial Tribunal,[310] the Superintendency and Fogafín contended that the Nullification and Reinstatement Action was barred by the applicable statute of limitations.[311] They argued that Claimants had waited more than twenty months after the issuance of the 1998 Regulatory Measures to file their claim, a period that far exceeded the applicable four-month statutory limitations period.[312]

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[306] *See* **Ex. R-0050**, Nullification and Reinstatement Action, § III, pp. 50, 68.

[307] *See* **Ex. R-0143**, Rejection of Registration, Case No. 20000521, Administrative Judicial Tribunal, 25 August 2000.

[308] *See* **Ex. R-0144**, Admission of the Nullification and Reinstatement Action, Case No. 20000521, Administrative Judicial Tribunal, 9 March 2001.

[309] *See* **Ex. R-0144**, Admission of the Nullification and Reinstatement Action, Case No. 20000521, Administrative Judicial Tribunal, 9 March 2001.

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

[311] *See* **Ex. R-0127**, Answer of the Superintendency to the Nullification and Reinstatement Action, Case No. 20000521, 3 August 2001, pp. 29-30; **Ex. R-0128**, Answer of Fogafín to the Nullification and Reinstatement Action, Case No. 20000521, Administrative Judicial Tribunal, 23 November 2001, pp. 45-46.

[312] *See* **Ex. R-0127**, Answer of the Superintendency to the Nullification and Reinstatement Action, Case No. 20000521, 3 August 2001, p. 30; **Ex. R-0128**, Answer of Fogafín to the Nullification and Reinstatement Action, Case No. 20000521, Administrative Judicial Tribunal, 23 November 2001, pp. 45-46.

115. The Superintendency and Fogafín also responded to Claimants' arguments on the merits, and explained that the agencies' actions had a sound basis in both law and fact.[313] In particular, they observed that the evidence available at the time, including reports prepared by independent experts, had demonstrated that Granahorrar was in fact insolvent, such that the measures were justified and necessary to fulfill the agencies' regulatory obligations.[314]

116. The Superintendency, Fogafín, and Claimants each submitted evidence to the Administrative Judicial Tribunal.[315] During witness testimony, it was revealed that:

[313] *See, e.g.*, **Ex. R-0127**, Answer of the Superintendency to the Nullification and Reinstatement Action, Case No. 20000521, 3 August 2001, p. 28 (affirming that the Capitalization Order had been duly notified to Mr. Amaya Pacheco in his capacity as legal representative of Granahorrar, pursuant to Article 74 of the Financial Act); *id*. at p. 27 (noting that pursuant to the Financial Act regulations, the Superintendency is entitled to undertake the necessary preventive measures, including capitalizing entities, in order to protect public confidence in the financial system); **Ex. R-0128**, Answer of Fogafín to the Nullification and Reinstatement Action, Case No. 20000521, Administrative Judicial Tribunal, 23 November 2001, pp. 31-32 (noting that by 2 October 1998, Granahorrar had lost more than 100% of its net worth, and that the Capitalization Order was the result of the impossibility of Granahorrar to comply with the obligations under the agreement it had entered into with Fogafín).

[314] *See* **Ex. R-0127**, Answer of the Superintendency to the Nullification and Reinstatement Action, Case No. 20000521, 3 August 2001, pp. 11, 19-20, 22; **Ex. R-0128**, Answer of Fogafín to the Nullification and Reinstatement Action, Case No. 20000521, Administrative Judicial Tribunal, 23 November 2001, pp. 3-5, 32-33, 38-40.

[315] *See* **Ex. R-0130**, Record of Cross-Examination of Witnesses, Case No. 20000521, Administrative Judicial Tribunal, 2 February 2002.

a. the trustee of Granahorrar had admitted that the Capitalization Order and the Value Reduction Order had been widely broadcast by the media;[316] and

b. on 5 October 1998, the former President of Granahorrar, Mr. Jorge Enrique Amaya Pacheco, had unreservedly praised the manner in which Fogafín had handled the crisis that had unfolded on 2 and 3 October 1998.[317]

117. In their written closing statements to the Administrative Judicial Tribunal,[318] the Superintendency and Fogafín demonstrated that they had the requisite legal authority and factual justification to adopt and implement the 1998 Regulatory Measures.[319] Fogafín emphasized that during the course of the proceedings, Claimants had failed to demonstrate that Granahorrar's insolvency had been the result of collusion between Fogafín and the Superintendency, intended to harm Granahorrar.[320]

118. The first instance proceeding before the Administrative Judicial Tribunal lasted five years. Although at the time Claimants did not take issue with the length of the proceeding, they now complain that the matter "lay fallow" for five years.[321] That is not a fair characterization of the facts. As explained by Colombian law expert Dr. Ibáñez, it was not atypical for an administrative proceeding of this type to last

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316 *See* **Ex. R-0131**, Public Hearing for the Examination of Witnesses, Case No. 20000521, Administrative Judicial Tribunal, 11 June 2002, pp. 3-4 (question fifteen).

317 *See* **Ex. R-0131**, Public Hearing for the Examination of Witnesses, Case No. 20000521, Administrative Judicial Tribunal, 11 June 2002, p.5.

318 **Ex. R-0132**, Closing Statement of Fogafín, Case No. 20000521, Administrative Judicial Tribunal, 18 November 2004; **Ex. R-0133**, Closing Statement of the Superintendency, Case No. 20000521, Administrative Judicial Tribunal, 18 November 2004.

319 *See* **Ex. R-0132**, Closing Statement of Fogafín, Case No. 20000521, Administrative Judicial Tribunal, 18 November 2004, p. 33; **Ex. R-0133**, Closing Statement of the Superintendency, Case No. 20000521, Administrative Judicial Tribunal, 18 November 2004, p. 5.

320 *See* **Ex. R-0051**, 2005 Administrative Judicial Tribunal Judgment, pp. 18-19; **Ex. R-0132**, Closing Statement of Fogafín, Case No. 20000521, Administrative Judicial Tribunal, 18 November 2004, p. 8.

321 Claimants' Memorial (PCA), ¶ 29.

five years,[322] particularly given the investigative role of the tribunal, the various phases that a first instance proceeding entails,[323] and, in this case, the initial rejection by the Administrative Judicial Tribunal due to the statute of limitations, all of which contributed to the overall duration of the proceeding.[324]

3. The Administrative Judicial Tribunal rejected Claimants' request for nullification and reinstatement

119. On 27 July 2005, the First Section of the Administrative Judicial Tribunal issued its judgment, which rejected Claimants' claims on the merits. The Administrative Judicial Tribunal found that the evidence on the record demonstrated that Granahorrar had been both illiquid and insolvent at the relevant time,[325] which constituted a breach of the Fogafín Agreement. The Administrative Judicial Tribunal held:

> Undoubtedly, in financial terms **liquidity and insolvency are different phenomena**, as rightly stated by the lawsuit. However, **Granahorrar was not only in a situation of illiquidity**, as plaintiffs [i.e., Claimants] vehemently argue. . . To the contracting parties it was indisputable that if Granahorrar failed to comply with its obligations [under the Fogfín Agreement], the guarantor would be entitled to declare it a breach and, subsequently, make use of the powers contained in the [Fogafín] [A]greement for that purpose . . . What prevailed in the case of the order to capitalize Granahorrar was a need to maintain confidence and solidity in a financial sector that was being affected by negative events, such as the circumstances that the company went through . . . . Based on the foregoing, the [Administrative Judicial Tribunal] will dismiss the lawsuit because the plaintiffs did not overcome the presumption of legality accompanying the charges.[326] (Emphasis added)

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[322] *See* **RER-1**, Expert Report of Dr. Ibáñez, ¶ 50.

[323] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 50.

[324] *See* **Ex. R-0143**, Rejection of Registration, Case No. 20000521, Administrative Judicial Tribunal, 25 August 2000.

[325] *See* **Ex. R-0051**, 2005 Administrative Judicial Tribunal Judgment, pp. 32-33.

[326] *See* **Ex. R-0051**, 2005 Administrative Judicial Tribunal Judgment, pp. 32, 33, 43-44 (in Spanish: "*Es indudable que la liquidez y la insolvencia son fenómenos distintos en términos financieros como acertadamente se enuncia en la demanda. No obstante, la situación de Granahorrar no era solamente de*

120. In its final decision, the Administrative Judicial Tribunal upheld the 1998 Regulatory Measures.[327] In its Judgment, the Administrative Judicial Tribunal rejected the agencies' objection on the basis of the statute of limitations.[328] The Tribunal determined (incorrectly, as will be discussed below) that the Administrative Code (and not the Financial Act) governed the notifications procedure, and that the Superintendency and Fogafín had not complied with the notification procedure in the Administrative Code.[329] But the Tribunal held that the absence of proper notification did not invalidate the 1998 Regulatory Measures.[330]

4. The Council of State reversed the judgment of the Administrative Judicial Tribunal

121. Dissatisfied with the 2005 Administrative Judicial Tribunal Judgment, on 5 August 2005 Claimants filed a notice of appeal ("**Notice of Appeal**"),[331] which if admitted would be decided by the Council of State.[332] The Notice of Appeal outlined Claimants' four grounds for appeal, namely that the Administrative Judicial Tribunal had failed to: (i) decide on their claims; (ii) assess the evidence submitted by the parties; (iii) base its decision on the language of the 1998 Regulatory

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iliquidez como vehemente lo sostienen las actoras . . . Era indiscutible para las partes contratantes que si Granahorrar incumplía con sus obligaciones, el avalista estaba facultado para declararlo así y posteriormente, hacer uso de las facultades que para tal fin se habían establecido en el convenio . . . lo que primó en el caso de la orden de capitalización de Granahorrar fue el mantenimiento de la confianza y la solidez del sector financiero que estaba amenazado por acontecimientos negativos como el que atravesó la referida corporación . . . Basada en las anteriores consideraciones, la Corporación negará las pretensiones de la demanda al no haberse desvirtuado, por parte de las sociedades actoras, la presunción de legalidad que acompaña a los actos acusados.").

[327] *See* **Ex. R-0051**, 2005 Administrative Judicial Tribunal Judgment, pp. 33, 38-40, 44.

[328] *See* **Ex. R-0051**, 2005 Administrative Judicial Tribunal Judgment, pp. 25-26.

[329] *See* **Ex. R-0051**, 2005 Administrative Judicial Tribunal Judgment, p. 23.

[330] *See* **Ex. R-0051**, 2005 Administrative Judicial Tribunal Judgment, p. 44.

[331] *See* **Ex. R-0134**, Holding Companies' Notice of Appeal, Case No. 20000521, Administrative Judicial Tribunal, 5 August 2005, p. 1.

[332] *See* **RER-1**, Expert Report of Dr. Ibáñez, ¶ 51.

Measures; and (iv) recognize the regulatory authorities' abuse of power.[333] Claimants ultimately requested that the Council of State order the Superintendency and Fogafín to pay COP 8.80 for each share that they held (indirectly) in Granahorrar, plus interest, as compensation for the alleged damages suffered.[334] Claimants' Notice of Appeal was assigned to the Fourth Section of the Council of State.[335]

122. Claimants, the Superintendency, and Fogafín each submitted arguments to the Council of State in response to Claimants' grounds for appeal.[336] In addition, the Superintendency and Fogafín asked that the Council of State reconsider the Administrative Judicial Tribunal's finding that the applicable procedure for notification of the 1998 Regulatory Measures was that contained in the Contentious Administrative Code (rather than the one contained in the specialized Financial Act or ESOF).[337]

123. On 1 November 2007, the Council of State issued its judgment ("**2007 Council of State Judgment**"), in which it reversed the Administrative Judicial Tribunal Judgment.[338] In its Judgment, the Council of State upheld the Administrative

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[333] *See* **Ex. R-0134**, Holding Companies' Notice of Appeal, Case No. 20000521, Administrative Judicial Tribunal, 5 August 2005.

[334] *See* **Ex. R-0135**, Holding Companies' Submission on the Merits of the Appeal, Case No. 20000521, Administrative Judicial Tribunal, 7 February 2006, pp. 81.

[335] *See* **Ex. R-0136**, Communications regarding the Notification of the Appeal, Case No. 20000521, Administrative Judicial Tribunal, 25 November 2005.

[336] *See generally* **Ex. R-0052**, Appeal Response by Fogafín, *Compto S.A. en Liquidación et al. v. Superintendency and Fogafín*, Case No. 2000-00521-02, Council of State, 19 December 2005; **Ex. R-0135**, Holding Companies' Submission on the Merits of the Appeal, Case No. 20000521, Administrative Judicial Tribunal, 7 February 2006; **Ex. R-0137**, Superintendency's Response to the Appeal, Case No. 20000521, Council of State, 16 February 2006.

[337] *See* **Ex. R-0137**, Superintendency's Response to the Appeal, Case No. 20000521, Council of State, 16 February 2006, pp. 4-9; **Ex. R-0052**, Appeal Response by Fogafín, *Compto S.A. en Liquidación et al. v. Superintendency and Fogafín*, Case No. 2000-00521-02, Council of State, 19 December 2005, pp. 42-43.

[338] *See* **Ex. R-0054**, Council of State Judgment and Dissent, *Compto S.A. en Liquidación et al. v. Superintendency and Fogafín*, Case No. 2000-00521-02(15728), 1 November 2007 ("**2007 Council of State Judgment**").

Judicial Tribunal's finding that Fogafín and the Superintendency were required to comply with the notification procedure contemplated in the Contentious Administrative Code (rather than that in the Financial Act).[339] The Council of State further determined that there was sufficient evidence to conclude that Granahorrar had been illiquid,[340] but insufficient evidence to conclude that Granahorrar had also been insolvent.[341] Because Fogafín and the Superintendency had issued the 1998 Regulatory Measures on the premise that Granahorrar was insolvent, the Council of State reversed the Administrative Judicial Tribunal's decision to uphold the Measures.[342] As a result, the Council of State ordered Fogafín and the Superintendency to pay Claimants more than COP 226 billion (approximately USD 114 million).[343]

124. In their Memorial, Claimants repeatedly mischaracterize the Council of State Judgment. For example, they allege—incorrectly—that "the Council of State concluded that the expropriation was in fact grossly illegal,"[344] and that the Council of State had been "scathing" in its review of the regulatory authorities.[345] These characterizations are at odds with the text of the Council of State Judgment, which consists of a straightforward determination that the evidence did not support a finding of insolvency.[346] Moreover, the Council of State rejected Claimants' request for an award of costs against the Superintendency and

[339] *See* **Ex. R-0054**, 2007 Council of State Judgment, pp. 32-33.

[340] *See* **Ex. R-0054**, 2007 Council of State Judgment, p. 43.

[341] *See* **Ex. R-0054**, 2007 Council of State Judgment, p. 43.

[342] *See* **Ex. R-0054**, 2007 Council of State Judgment, pp. 51-52; **Ex. R-0049,** 2014 Confirmatory Order, ¶¶ 1.3.3.1–1.3.3.2.

[343] *See* **Ex. R-0054**, 2007 Council of State Judgment, p. 61. The dollar amount has been calculated using the historic exchange rate established by the Central Bank of Colombia. The US dollar/Colombian peso exchange rate for 1 November 2007 was COP 1,987.69 per 1 USD.

[344] Claimants' Memorial (PCA), ¶ 32.

[345] Claimants' Memorial (PCA), ¶ 34.

[346] *See* **Ex. R-0054**, 2007 Council of State Judgment, pp.42-43.

Fogafín,[347] because the Council of State found that the agencies had not behaved recklessly.[348]

125. The Fourth Section of the Council of State that issued the judgment was comprised of four judges, three of which joined in the majority opinion.[349] Judge Ligia López Díaz issued a dissenting opinion,[350] in which she observed that Claimants' legal challenge had been filed in violation of the statute of limitations. She further opined on the basis of the evidence that the 1998 Regulatory Measures had complied with Colombian law.[351]

5. The Superintendency and Fogafín filed tutela *petitions against the Council of State Judgment*

126. On 5 March 2008, the Superintendency and Fogafín each filed a *tutela* petition against the 2007 Council of State Judgment ("***Tutela* Petitions**"). A *tutela* petition provides an expedited mechanism[352] for a party claiming that the acts or omissions of State authorities violated its fundamental rights.[353] A litigant can only challenge a judicial decision through a *tutela* petition in limited circumstances, namely when the judicial decision has infringed a fundamental right of a party, such as the right to due process.[354] A *tutela* petition can only proceed when the affected person has exhausted all other possible judicial recourses.[355]

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[347] *See* **Ex. R-0054**, 2007 Council of State Judgment, p. 60.

[348] *See* **Ex. R-0054**, 2007 Council of State Judgment, p. 60.

[349] *See* **Ex. R-0054**, 2007 Council of State Judgment, p. 61.

[350] *See* **Ex. R-0086**, Dissenting Opinion of Magistrate Ligia López Díaz on Council of State Judgment of 1 November 2007, *Compto S.A. en Liquidación et al. v. Superintendency and Fogafín*, Case No. 00521 02 (15728), 23 November 2007 ("**Dissenting Opinion of López Díaz**").

[351] *See generally* **Ex. R-0086**, Dissenting Opinion of López Díaz.

[352] *See* **Ex. R-0124**, Political Constitution of Colombia, 4 July 1991, ("**Colombian Constitution**"), Art. 86.

[353] *See* **Ex. R-0124**, Colombian Constitution, Art. 86.

[354] *See* **Ex. R-0139**, Judgment C-590/05, Constitutional Court, 8 June 2005, p. 38.

[355] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 79.

127. In the *Tutela* Petitions filed before the Fifth Section of the Council of State, the Superintendency and Fogafín alleged that the Council of State Judgment had violated their fundamental rights. Specifically, the Superintendency and Fogafín alleged that the Council of State had committed the following errors in the 2007 Council of State Judgment:[356]

a. Substantive error: the Council of State erred in holding that the Contentious Administrative Code (instead of the specialized Financial Act) governed the notification procedure, which constituted a substantive error of law.[357]

b. Procedural error: the Council of State should have dismissed Claimants' claims for failure to comply with the statute of limitations.[358] Because the Council of State had decided to apply the Administrative Code (rather than the Financial Act), it incorrectly concluded that the agencies had not properly notified Claimants, such that (according to the Council of State) the statutory limitations period had not begun to run until they were

[356] *See* **Ex. R-0140**, Fogafín's Tutela Petition, Council of State, 5 March 2008, p. 28; **Ex. R-0141**, Superintendency's Tutela Petition, Council of State, 5 March 2008, pp. 6-7.

[357] *See* **Ex. R-0140**, Fogafín's Tutela Petition, Council of State, 5 March 2008, p. 36; **Ex. R-0141**, Superintendency's Tutela Petition, Council of State , 5 March 2008, § VI.

[358] *See* **Ex. R-0140**, Fogafín's Tutela Petition, Council of State , 5 March 2008, pp. 66-69.

properly notified (which did not occur until 25 July 2000, when the Superintendency responded to Claimants' request for information).[359]

c. Factual error: contrary to the Council of State's finding, the evidence showed that Claimants had been on notice of the Capitalization Order and the Value Reduction Order.[360]

128. In their submission opposing the *Tutela* Petitions, Claimants reiterated the substantive arguments that they had presented in the first and second instances of the administrative proceeding, and requested that the Fifth Section of the Council of State dismiss the *Tutela* Petitions.[361]

129. The Ministry of Finance of Colombia filed a pleading in support of the *Tutela* Petitions filed by the Superintendency and Fogafín.[362]

130. On 10 April 2008, the Fifth Section of the Council of State rejected the *Tutela* Petitions on the merits.[363] The Superintendency and Fogafín appealed that decision to the First Section of the Council of State.[364] The First Section affirmed the Fifth Section's decision to reject the *Tutela* Petitions.[365] The Superintendency

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[359] *See* **Ex. R-0140**, Fogafín's Tutela Petition, Council of State, 5 March 2008, pp. 36-42; **Ex. R-0141**, Superintendency's Tutela Petition, Council of State, 5 March 2008, § IV; *See* **Ex. R-0054**, 2007 Council of State Judgment, p. 26; *See* **Ex. R-0060**, Letter from Superintendency (G. Aguilar) to Compto S.A.'s Counsel (C. Cardona), 25 July 2000.

[360] *See* **Ex. R-0140**, Fogafín's Tutela Petition, Council of State, 5 March 2008, pp. 14, 22, 31, 46; **Ex. R-0141**, Superintendency's Tutela Petition, Council of State , 5 March 2008, pp. 32-36; **Ex. R-0049**, 2014 Confirmatory Order, ¶ 1.4.1.4.

[361] *See* **Ex. R-0145**, Holding Companies' Answer to the Tutela Petitions, 25 March 2008, pp. 4-8.

[362] *See* **Ex. R-0146**, Pleading of *Tercero Coadyuvante* by the Ministry of Finance, Council of State, 31 March 2008.

[363] *See* **Ex. R-0056**, Rejection of Superintendency Tutela Petition, Case No. 11001-03-15-000-2008-00226-00, Fifth Section of the Council of State, 10 April 2008.

[364] **Ex. R-0187**, Rejection of Fogafín Tutela Petition, Case No. 11001-03-15-000-2008-00226-00, Fifth Section of the Council of State, 10 April 2008.

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

and Fogafín then submitted a request for review of the Council of State's decisions to the Constitutional Court[366]—a request that, as Dr. Ibáñez explained, is within the purview of the Constitutional Court.[367]

6. The Constitutional Court reversed the Council of State Judgment

131. The Constitutional Court selected the regulatory authorities' *Tutela* Petitions for review,[368] and issued a stay of the Council of State Judgment pending its review of the Petitions.[369]

132. In accordance with Article 241 of the Political Constitutional of Colombia,[370] the Constitutional Court has the authority to review and resolve *tutela* petitions as a court of last instance. In evaluating *tutela* petitions for adjudication, the Constitutional Court considers whether its review will (i) unify jurisprudence; (ii) clarify or further define jurisprudence; or (ii) set precedent.[371] In this case, the Constitutional Court determined that the issues presented in the *Tutela* Petitions merited setting precedent, so the petitions were selected for the full bench of the Constitutional Court to review.[372]

133. In their Memorial on Jurisdiction, Claimants allege that the Constitutional Court abused its authority in adjudicating the *Tutela* Petitions.[373] That argument is directly contradicted by the Council of State; in its decision of 10 April 2008 rejecting the Superintendency and Fogafín's *Tutela* Petitions, the First Section of

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

[367] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 111.

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

[369] *See* **Ex. R-0149**, Order Stall the Council of State Judgment, Constitutional Court, 25 March 2009.

[370] *See* **Ex. R-0124**, Colombian Constitution, Art. 241.

[371] **RER-1**, Expert Report of Dr. Ibáñez, 85.

[372] **RER-1**, Expert Report of Dr. Ibáñez, 114.

[373] *See* Claimants' Memorial (PCA), ¶ 46; *see also id.* ¶¶ 4, 42, 45, 76.

the Council of State expressly acknowledged that the Constitutional Court had the authority to review and accept the *Tutela* Petitions.[374]

134. On 26 May 2011, the Constitutional Court unanimously issued Judgment SU-447 ("**2011 Constitutional Court Judgment**"), which reversed the 2007 Council of State Judgment.[375] The Constitutional Court held that the Council of State had committed substantive, procedural and factual errors. In particular, the Constitutional Court determined that the Council of State had committed: (i) a substantive error of law by applying the general rules of the Administrative Code, rather than the specialized provisions of the Financial Act;[376] (ii) a procedural error of law by failing to dismiss Claimants' claims under the statute of limitations;[377] and (iii) a factual error of law by ignoring the evidence presented by the Superintendency and Fogafín that Claimants had been properly notified.[378] As a result, the legality of the 1998 Regulatory Measures stood and Claimants' request for compensation for alleged loss was reversed.

135. The 2011 Constitutional Court Judgment was read aloud on the same day that it was issued (viz., 26 May 2011). However, because one justice issued a separate opinion, the official notice of the Judgment was not rendered until 5 December 2011.[379]

136. Determined to secure the reversal of the 2011 Constitutional Court Judgment, Claimants, along with Magistrate Mauricio Fajardo, who was a member of the

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[374] *See* **Ex. R-0055**, Rejection of Fogafín Tutela Petition, Case No. 11001-03-15-000-2008-00225-00, First Section of the Council of State, 4 December 2008, p. 50.

[375] *See* **Ex. C-0023**, 2011 Constitutional Court Judgment.

[376] *See* **Ex. C-0023**, 2011 Constitutional Court Judgment, p. 139; **Ex. R-0049**, 2014 Confirmatory Order, ¶¶ 2.2.2-2.2.3.

[377] *See* **Ex. C-0023**, 2011 Constitutional Court Judgment, pp. 148, 154.

[378] *See* **Ex. C-0023**, 2011 Constitutional Court Judgment, p.159.

[379] *See* **Ex. R-0151**, Notice of the Constitutional Court Judgement to the Justices of the Council of State, 5 December 2011; **Ex. R-0152**, Notice of the Constitutional Court Judgement to the Holding Companies, 5 December 2011.

Council of State (collectively, the "**Petitioners**"), filed petitions to annul the Constitutional Court Judgment ("**Annulment Petition**").[380] According to the Petitioners, the Constitutional Court had violated the principle of due process by improperly assuming jurisdiction over a matter that fell within the exclusive jurisdiction of the Council of State.[381]

137. This type of annulment petition against a Constitutional Court decision is extraordinary in nature, as explained by Colombian law expert Dr. Ibáñez.[382] Specifically, an annulment petition of this kind does not serve as a recourse against Constitutional Court judgments,[383] as such judgments are final and unappealable.[384] In any event, an annulment petition of this kind involves a procedure that does *not* invite the reopening of legal debate resolved by the corresponding judgment.

138. The circumstances for presenting annulment petitions of this kind are limited, and in fact, from 1996 to 2019, the Constitutional Court considered only 49 annulment petitions, only four of which were successful.[385] Of those four annulment petitions, only one petition created a situation even remotely similar to the one filed by Claimants—namely, where the Constitutional Court has ruled for the purpose of setting precedent (*sentencias de unificación*).[386]

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[380] *See generally* **Ex. R-0059**, Annulment Petition by the Holding Companies, Constitutional Court, 9 December 2011**; Ex. R-0058**, Annulment Petition by Mauricio Fajardo Gomez, Constitutional Court, 11 December 2011.

[381] *See generally* **Ex. R-0059**, Annulment Petition by the Holding Companies, Constitutional Court, 9 December 2011**; Ex. R-0058**, Annulment Petition by Mauricio Fajardo Gomez, Constitutional Court, 11 December 2011.

[382] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 139.

[383] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 143.

[384] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 131.

[385] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 154.

[386] *See* **Ex. R-0186**, Order No. 320 of the Constitutional Court, 23 May 2018; **RER-1**, Expert Report of Dr. Ibáñez, ¶ 154.

139. On 25 July 2014, the Constitutional Court issued Order No. 188/14, in which it rejected the Annulment Petition, and confirmed the Constitutional Court Judgment ("**2014 Confirmatory Order**").[387] Claimants became aware of the 2014 Confirmatory Order on the same date, through an official press release issued by the Constitutional Court.[388]

140. Dr. Ibáñez explains that because the annulment petition is for a procedural issue and not an appeal, it is resolved by an "*auto*" and not a judgment (*sentencia*, in Spanish); the latter is reserved for cases where the decision puts a definitive end to the dispute.[389]

141. In the 2014 Confirmatory Order, the Constitutional Court held (i) that contrary to what Claimants alleged, it had not improperly assumed jurisdiction that belonged to the Council of State, because its ruling had not been based on an interpretation of the law applicable to administrative acts;[390] and (ii) that the Council of State had violated the Superintendency and Fogafín's fundamental due process rights by applying the Administrative Code instead of the specific provisions of the Financial Act.[391]

F. Claimants challenged the 1998 Regulatory Measures before the Inter-American Commission on Human Rights, once again seeking compensation for the alleged loss

142. Still determined to seek compensation for the 1998 Regulatory Measures, Claimants filed a petition with the Inter-American Commission on Human Rights ("**IACHR**") on 6 June 2012. In that petition, and in a supplementary petition filed

[387] *See* **Ex. R-0049**, 2014 Confirmatory Order.

[388] **Ex. C-0027**, Release No. 25 (and Dissent), Case No. D-9996, Constitutional Court, 25–26 June 2014.

[389] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 161.

[390] *See* **Ex. R-0049**, 2014 Confirmatory Order.

[391] *See* **Ex. R-0049**, 2014 Confirmatory Order, ¶¶ 4.4.2.1, 4.4.3.1–4.4.3.2.

on 20 July 2016,[392] Claimants regurgitated their arguments, which had been rejected by the Administrative Judicial Tribunal and the Constitutional Court. They asserted that they had not been notified of the 1998 Regulatory Measures,[393] and that the Measures had been unjustified because Granahorrar was solvent at the time.[394] Claimants also repeated the argument from their Annulment Petition before the Constitutional Court that the Constitutional Court had usurped the exclusive jurisdiction of the Council of State.[395]

143. The IACHR rejected Claimants' petition on admissibility grounds,[396] after which Claimants filed three revision petitions, expanding their claims to include the 2014 Confirmatory Order.[397] The IACHR has not yet rendered a decision with respect to Claimants' revision petitions.

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[392] **Ex. R-0119**, Supplementary Petition to the Inter-American Commission on Human Rights, 20 July 2016.

[393] **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012, pp. 8, 9, 40 (English translation: "[T]hey were never notified of a capitalization order that caused the *oficialización*, nor were they informed of the order that lowered the share's nominal value and proceeded to have Granahaorrar undergo *oficialización*") (Spanish original: "*[N]unca les fue notificada la orden de capitalización que causó la oficialización, como tampoco aquella mediante la cual se redujo el valor nominal de la acción y se procedió a oficializar la entidad*") (emphasis in original).

[394] **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012, p. 40 (English translation: "As stated by the very State agencies that intervened the entity, as well as decisions made by the judicial authorities, Granahorrar was above required solvency levels, and was going through liquidity issues.") (Spanish original: "*Tal como lo señalaron las propias entidades estatales que intervinieron la entidad, así como las decisiones adoptadas en el fuero interno, Granahorrar se encontraba por encima de los niveles de solvencia exigidos, y atravesaba por dificultades de liquidez*").

[395] **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012, p. 37, (English translation: "[T]he Constitutional Court acted through the *tutela* procedure as an administrative 'litigation judge,' usurping the jurisdiction of said branch of the judicial system.") (Spanish original: "[*L*]*a Corte Constitucional actuó mediante el procedimiento de tutela como 'juez de lo contencioso' administrativo, usurpando la jurisdicción y competencia de dicha rama de la administración de justicia*").

[396] **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 20 March 2017, p. 2.

[397] **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 20 March 2017, p. 77 (English translation: "[D]ecisions SU 447/11 of 26 May 2011 and 188/14 of 25 June 2014, which annulled the decision that remedied the violations committed in the administrative fora, thus causing the violations to reactivate, and giving rise to further violations of the victims' human rights.") (Spanish original: "[*L*]*as decisiones SU 447/11 del 26 de mayo de 2011 y 188/14 del 25 de junio*

III. JURISDICTIONAL OBJECTIONS

144. On 24 January 2018, Claimants initiated the present proceeding, alleging violations of the investment protections set forth in the TPA.[398] Claimants subsequently agreed to bifurcate the proceeding in order to first address the subject of this Tribunal's alleged jurisdiction.[399] In this Section, Colombia will demonstrate that contrary to Claimants' argument, Claimants bear the burden of establishing that this Tribunal has jurisdiction over their claims (**Section III.A**). Colombia will then demonstrate that the Tribunal lacks jurisdiction *ratione temporis* (**Section III.B**), *ratione voluntatis* (**Section III.C**), *ratione personae* (**Section III.D**), and *ratione materiae* (**Section III.E**). All of Claimants' claims should therefore be dismissed.

A. Claimants bear the burden of proof

145. Claimants devote a sizable section of their Memorial on Jurisdiction to the issue of the burden of proof with respect to jurisdiction.[400] In this Section, Colombia will demonstrate that Claimants have misstated the burden of proof that should apply to jurisdictional issues in this proceeding.

1. Claimants bear the burden of proving the facts required to establish jurisdiction

146. International tribunals have consistently applied the well-established principle of *actori inucumbit onus probandi*, the basic rule regarding the burden of proof according to which the party who makes an assertion must prove it.[401] The

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de 2014, que dejaron sin efecto la decisión que había subsanado las violaciones cometidas en sede administrativa, haciendo así que éstas renacieran y dando lugar a nuevas violaciones a los derechos humanos de las víctimas del presente caso"); **Ex. R-0121**, Second Revision Petition to the Inter-American Commission on Human Rights, 4 October 2017, p. 69; *see generally* **Ex. R-0122**, Third Revision Petition to the Inter-American Commission on Human Rights, 4 July 2018.

[398] *See generally* Notice of and Request for Arbitration.

[399] *See* Procedural Order No. 1, 29 January 2019, Annex 1.

[400] Claimants' Memorial (PCA), pp. 100–124.

[401] *See, e.g.*, **RLA-0061**, *Case Concerning Pulp Mills on the River Uruguay*, ICJ (Tomka, Korona, *et al.)* Judgment, 20 April 2010, ¶ 164 ("[T]he Court considers that, in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts

UNCITRAL Rules applicable to this proceeding codify this rule in Article 27.1.[402] In the context of assessing the tribunal's jurisdiction, this general principle means that, as the *Blue Bank v. Venezuela* tribunal explained,

> [a]ll facts that are dispositive for purposes of jurisdiction must be proven at the jurisdictional stage. In this regard, the Claimant bears the burden of proving the facts required to establish jurisdiction, insofar as they are contested by the Respondent.[403]

147. The burden of proof in the jurisdictional phase remains with Claimants at all times, although the burden of persuasion can shift from one party to the other over the course of the proceeding. As explained by the tribunal in *Spence v. Costa Rica*,

> [t]he burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction. If that can be done, the burden will shift to the Respondent to show why, despite

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certain facts to establish the existence of such facts. This principle . . . has been consistently upheld by the Court."); **RLA-0062**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 (Fortier, Schwebel, El Kholy), Award, 7 July 2004, ¶ 58 ("In accordance with accepted international (and general national) practice, a party bears the burden of proof in establishing the facts that he asserts."); **RLA-0063**, *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 (Runeland, Söderlund, Cremades), Final Award, 26 March 2008 ("***Atmo* (Final Award)**") ¶ 64 ("The burden of proof of an allegation in international arbitration rests on the party advancing the allegation, in accordance with the maxim *onus probandi actori incumbit*.").

[402] UNCITRAL Rules, 2013, Art. 27.1 ("Each party shall have the burden of proving the facts relied on to support its claim or defence.").

[403] **CLA-0014**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20 (Söderlund, Bermann, Malintoppi), Award, 26 April 2017 ("***Blue Bank***"), ¶ 66; *see also* **RLA-0065**, *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5 (Pierre, Abi-Saab, van den Berg), Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 678 ("[I]t is Claimants who bear the burden to prove that all conditions for the Tribunal's jurisdiction and for the granting of the substantive claims are met."); **RLA-0034**, *ICS* (Award on Jurisdiction), ¶ 280 ("Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined"); **RLA-0064**, *Cortec Mining Kenya Ltd., Cortec (Pty) Ltd. and Stirling Capital Ltd. v. Republic of Kenya*, ICSID Case No. ARB/15/29 (Binnie, Dharmananda, Stern), Award, 22 October 2018, ¶ 245; **RLA-0063**, *Atmo* (Final Award), ¶ 64.

> the facts as proved by the Claimants, the Tribunal lacks jurisdiction.[404]

148. Accordingly, Claimants bear the burden of proving the facts necessary to establish that the Tribunal has jurisdiction *ratione temporis*, *ratione voluntatis*, *ratione personae*, and *ratione materiae*. If Claimants are able to make a *prima facie* showing to establish those facts, the burden will shift to Colombia to rebut Claimants' *prima facie* case, and to demonstrate that the Tribunal lacks jurisdiction notwithstanding the evidence presented by Claimants. However, as explained below, Claimants have failed to satisfy even their initial *prima facie* burden of proving the facts necessary to establish jurisdiction. They cannot content themselves—as they appear to do—with simply *asserting* (rather than proving) the existence of elements tending to establish jurisdiction. By contrast, Colombia will demonstrate with concrete evidence that the Tribunal lacks jurisdiction *ratione temporis*, *ratione voluntatis*, *ratione personae*, and *ratione materiae*.

2. Claimants cannot seriously argue that jurisdiction must be presumed

149. Claimants argue in their Memorial on Jurisdiction that "the Tribunal is to accept Claimant's [sic] allegations *pro tem*."[405] That assertion is incorrect as a matter of law in relation to facts that go to the Tribunal's jurisdiction.

150. Claimants premise their argument concerning the burden of proof on the unsupported notion that they have an inherent right to have their case on the merits heard. They refer, for example, to an alleged "fundamental policy of providing parties with presumptions that would favor access to a merits hearing."[406] They also assert that "international law and the law of the overwhelming majority of national systems conceptually provides Claimants with

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[404] **CLA-0084**, *Spence*, ¶ 239; *see also* **RLA-0066**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12 (Veeder, Tawil, Stern), Decision on the Respondent's Jurisdictional Objections, 1 June 2012 ("***Pac Rim* (Decision on Jurisdiction)**"), ¶¶ 2.8–2.15.

[405] Claimants' Memorial (PCA), ¶ 178.

[406] Claimants' Memorial (PCA), ¶ 159.

an expansive rather than a restrictive presumption of truth with respect to jurisdictional allegations."[407] These statements are a build-up to Claimants' remarkable and unsubstantiated proposition that "[o]nly upon a showing that under no rational hypothesis of law or fact can a Claimant plead the requisite jurisdictional averments, should a jurisdictional challenge be sustained."[408] There is simply no support at all for Claimants' proposed standard for the burden of proof (viz., "no rational hypothesis"), nor is there an "expansive . . . presumption of truth with respect to jurisdictional allegations."[409]

151. Contrary to Claimants' proposition, the reality is that "a State's consent to arbitration shall not be presumed," as the tribunal in *ICS v. Argentina* succinctly observed.[410] Likewise, the tribunal in *SGS v. Paraguay* confirmed that a tribunal "must conclusively determine all issues that are necessary to establish its jurisdiction, including by making all necessary factual findings"—either at a preliminary jurisdictional stage (as in this case), or before proceeding to assess the merits in a consolidated proceeding.[411] Responding to an argument similar to that being made in this case by Claimants, the tribunal in *SGS* noted:

> Claimant suggested at the hearing that the Tribunal should accept as true all factual assertions of the Claimant, both those that go to threshold questions of jurisdiction and those needed to make out its claims on the merits. But that cannot be the case, because it would require the Tribunal to forgo the very inquiry it is required to undertake, i.e., determining whether or not the Tribunal has jurisdiction.[412]

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[407] Claimants' Memorial (PCA), ¶ 160.

[408] Claimants' Memorial (PCA), ¶ 161.

[409] Claimants' Memorial (PCA), ¶ 160.

[410] **RLA-0034**, *ICS* (Award on Jurisdiction), ¶ 280.

[411] **CLA-0080**, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29 (Alexandrov, Donovan, Mexía), Decision on Jurisdiction, 12 February 2010 ("***SGS-Paraguay***"), ¶ 58.

[412] **CLA-0080**, *SGS-Paraguay*, ¶ 58.

152. The same tribunal also cited to the following passage of dissenting opinion of Sir Franklin Berman in the annulment proceeding in *Luchetti v. Peru*:

> [I]f particular facts are a critical element in the establishment of jurisdiction itself, so that the decision to accept or to deny jurisdiction disposes of them once and for all for this purpose, how can it be seriously claimed that those facts should be assumed rather than proved?[413]

153. Claimants' arguments on the burden of proof also rely on case law that is inapposite. Specifically, Claimants place mistaken reliance on the separate opinion of Judge Rosalyn Higgins in the *Oil Platforms* case *(Islamic Republic of Iran v. United States of America)*.[414] In that decision, Judge Higgins had asserted the following:

> The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to interpret [the substantive protections invoked by Iran] for jurisdictional purposes — that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them.[415]

154. Judge Higgins' approach does not help Claimants here, because the relevant proposition and context in *Oil Platforms* were different. Judge Higgins' approach was designed for a specific type of preliminary objection that is not at issue in the instant case. In that case, Iran alleged that the United States had breached its obligations under the 1955 Treaty of Amity by destroying certain oil platforms.[416] The United States objected that such claim did not fall within the substantive scope of the Treaty of Amity. The Treaty allowed for the submission to arbitration of

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[413] **RLA-0067**, *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4 (Buergenthal, Cremades, Paulsson), Decision on Annulment and Separate Opinion of Berman, 5 September 2007, ¶ 17.

[414] *See* Claimants' Memorial (PCA), ¶ 164.

[415] **CLA-0016**, *Case Concerning Oil Platforms*, ICJ (Higgins), Separate Opinion, 12 December 1996 ("***Oil Platforms* Higgins Opinion**"), ¶ 32.

[416] *See* **RLA-0071**, *Case Concerning Oil Platforms*, ICJ (Bedjaoui, *et al.*), Judgment, 12 December 1996 **("*Oil Platforms* (Judgment)")**, ¶ 9.

disputes "'as to the interpretation or application of the Treaty,'"[417] and the United States alleged that the dispute did not qualify as such.[418] The Court was therefore called upon to "ascertain whether the violations of the [applicable treaty] pleaded by Iran d[id] or d[id] not fall within the provisions of the Treaty."[419] In her separate opinion, Judge Higgins confirmed that the task was to determine whether "the claims of Iran are sufficiently plausibly based upon the Treaty."[420] The only way to do so, according to Judge Higgins, was to accept Iran's factual allegations as true, and determine whether, as pleaded, the claims fell within the scope of the treaty.[421]

155. Judge Higgins' approach is therefore appropriate only when the question arises as to whether a claimant's claims are capable of falling within the substantive scope of a treaty, which is different from the question of whether certain jurisdictional requirements of the treaty have been met. The former and the latter are two separate inquiries, and the first is ultimately merits-related rather than jurisdictional. The *KT Asia v. Kazakhstan* tribunal articulated the distinction between those two lines of inquiries as follows:

> At the jurisdictional stage, the Claimant must establish (i) that the jurisdictional requirements of Article 25 of the ICSID Convention and of the Treaty are met, which includes proving the facts necessary to meet these requirements, and (ii) that it has a *prima facie* cause of action under the Treaty, that is that the facts which it alleges are susceptible of constituting a treaty breach if they are ultimately proved to be true.[422]

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[417] **RLA-0071**, *Oil Platforms* (Judgment), ¶ 15.

[418] *See* **RLA-0071**, *Oil Platforms* (Judgment), ¶ 16 ("[T]he Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute 'as to the interpretation or application of the Treaty of 1955'.").

[419] **RLA-0071**, *Oil Platforms* (Judgment), ¶ 16.

[420] **CLA-0016**, *Oil Platforms* Higgins Opinion, ¶ 32.

[421] *See* **CLA-0016**, *Oil Platforms* Higgins Opinion, ¶ 32.

[422] **RLA-0068**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8 (Kaufmann-Kohler, Glick, Thomas), Award, 17 October 2013, ¶ 91.

Because the types of preliminary objections are different, so too is the approach to the relevant factual allegations.

156. The *Phoenix Action* tribunal adopted a similar approach as that in *KT Asia*, holding that facts that go to jurisdiction must be proven, and that a tribunal is not required to accept blindly a claimant's characterization of such facts:

> If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level. On the contrary, **if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage**. For example, in the present case, all findings of the Tribunal to the effect that there exists a protected investment must be proven, unless the question could not be ascertained at that stage, in which case it should be joined to the merits.[423] (Emphasis added)

157. Numerous other tribunals have likewise confirmed that: (i) on the one hand, factual allegations can be accepted *pro tem* in order to determine whether those facts could amount to a substantive violation of the treaty, but (ii) on the other hand, a claimant bears the burden of proving facts required to establish jurisdiction.[424] Indeed, the *Blue Bank* tribunal expressly rejected a claimant's

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[423] **CLA-0061**, *Phoenix Action*, ¶ 61.

[424] *See, e.g.*, **RLA-0069**, *Philip Morris Brands Sàrl, et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (Bernardini, Born, Crawford), Decision on Jurisdiction, 2 July 2013, ¶ 29 ("Regarding burden of proof, it is commonly accepted that at the jurisdictional stage the facts as alleged by the claimant have to be accepted when, if proven, they would constitute a breach of the relevant treaty. However, if jurisdiction rests on the satisfaction of certain conditions, such as the existence of an 'investment' and of the parties' consent, the Tribunal must apply the standard rule of onus of proof *actori incumbit probatio*, except that any party asserting a fact shall have to prove it."); **RLA-0070**, *Anglo-Adriatic Group Ltd. v. Republic of Albania*, ICSID Case No. ARB/17/6 (Fernández-Armesto, Segesser, Stern), Award, 7 February 2019, ¶ 208; **RLA-0029**, *Apotex Inc. v. Government of the United States of America*, UNCITRAL (Landau, Smith, Davidson), Award on Jurisdiction and Admissibility, 14 June 2013 ("***Apotex* (Award)**"), ¶ 150; **RLA-0066**, *Pac Rim* (Decision on Jurisdiction), ¶ 2.9; **CLA-0080**, *SGS-Paraguay*, ¶ 57.

reliance on Judge Higgins' approach in *Oil Platforms*,[425] observing that "while it is true that matters that have a bearing on the merits of a dispute will not need to be conclusively established at the jurisdictional phase . . . the matter of establishing a jurisdictional threshold is fundamentally different."[426]

158. In the words of the tribunal in *SGS v. Paraguay*, "[a] determination that a given set of alleged facts, even if proven, would not constitute a violation of a legal right is, in effect, a holding on the merits."[427] The tribunal added that "[a] fundamentally different approach is required, however, for issues that are directly determinative of the Tribunal's jurisdiction."[428] The tribunal then explained:

> If the Tribunal is to make jurisdictional determinations on such issues [e.g., issues of consent, nationality, covered investment, territoriality, or the temporal scope of treaty protection] in a threshold jurisdictional stage (rather than joining them to the merits), the Tribunal must reach definitive findings of fact and conclusions of law. Without such determination, the Tribunal cannot satisfy itself that it has jurisdiction to hear the merits of the dispute.[429]

159. In the present case, the objections raised by Colombia are directly determinative of the Tribunal's jurisdiction, and thus require Claimants to prove (rather than merely assert) certain facts relating to jurisdiction. For example, in order to establish the jurisdiction *ratione temporis* of this Tribunal, Claimants must demonstrate that their claims fall within the temporal scope of the TPA. Tribunals

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[425] *See* **CLA-0014**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20 (Söderlund, Bermann, Malintoppi), Award, 26 April 2017 ("***Blue Bank***"), ¶ 68.

[426] **CLA-0014**, *Blue Bank*, ¶ 69.

[427] **CLA-0080**, *SGS-Paraguay*, ¶ 52.

[428] **CLA-0080**, *SGS-Paraguay*, ¶ 52.

[429] **CLA-0080**, *SGS-Paraguay*, ¶ 53.

in past cases have refused simply to accept at face value a claimant's assertion that they do.[430] The same applies to jurisdiction *ratione personae*.[431]

160. In conclusion, based on the rule of the burden of proof as correctly articulated and applied by the legal authorities cited herein, Claimants bear the burden of proving the facts necessary to establish this Tribunal's jurisdiction. Adopting Claimants' proposed approach and thereby merely accepting the facts as asserted by Claimants "would require the Tribunal to forgo the very inquiry it is required to undertake, i.e., determining whether or not the Tribunal has jurisdiction."[432] Indeed, under Claimants' approach, no jurisdictional objection would ever be upheld. Such a proposition is clearly untenable, and the Tribunal should therefore dismiss it summarily.

161. Colombia will now address the absence of jurisdiction *ratione temporis*, *ratione voluntatis*, *ratione personae*, and *ratione materiae*.

B. The Tribunal lacks jurisdiction *ratione temporis*

162. The plain text of the TPA, as well as rules of customary international law, place strict limits on this Tribunal's jurisdiction *ratione temporis*. Due to such limitations, this Tribunal lacks jurisdiction over:

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[430] *See* **CLA-0039**, *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 (Guillaume, Cremades, Landau), Decision on Jurisdiction, 22 April 2005 ("***Impregilo-Pakistan***"), ¶¶ 312–313.

[431] *See* **CLA-0061**, *Phoenix Action*, ¶ 63 (The tribunal "has to make a decision in order to verify whether or not it has jurisdiction *ratione personae* over the investor[s], based on [their] nationalit[ies].").

[432] **CLA-0080**, *SGS-Paraguay*, ¶ 58.

a. claims of TPA breaches based on alleged *State acts or omissions that pre-dated the TPA's entry into force* on 15 May 2012 (based on Article 10.1.3 of the TPA and the customary international law principle of non-retroactivity);

b. *disputes that arose* before the TPA's entry into force (based on the customary international law principle of non-retroactivity and the intertemporal rule of the law of State responsibility); and

c. claims submitted more than three years after Claimants knew or should have known of the alleged breach and injury (based on the limitations period established by Article 10.18.1 of the TPA).

163. Because each of Claimants' claims falls within one or more of these three categories, the Tribunal lacks jurisdiction *ratione temporis* over all such claims.

164. Despite bearing the burden of proof to establish the Tribunal's jurisdiction (discussed in **Section III.A** above), Claimants devote less than ten paragraphs of their Memorial on Jurisdiction to the subject of this Tribunal's jurisdiction *ratione temporis*.[433] Claimants begin that brief section with the self-serving and conclusory assertion that "*[r]atione [t]emporis* is not an issue in this case."[434] As demonstrated herein, that statement is manifestly incorrect. Because Claimants have simply failed to satisfy their burden of establishing jurisdiction *ratione temporis*, their claims must be dismissed in their entirety.

165. The sub-sections that follow are structured as follows. **Section III.B.1** explains that Claimants' claims should be dismissed because they are based on State acts or omissions that took place before the TPA's entry into force. **Section III.B.2** explains that dismissal of the claims is also warranted because the dispute is one that arose at the latest by 28 July 2000, well before the date of entry into force of the TPA. Finally, **Section III.B.3** explains why Claimants' claims fall outside of the three-year limitations period of the TPA, namely because Claimants knew or should

[433] *See* Claimants' Memorial (PCA), ¶¶ 397–406.

[434] Claimants' Memorial (PCA), ¶ 397.

have known of the alleged breaches and loss more than three years before they submitted their Request and Notice for Arbitration on 24 January 2018. For these reasons, Claimants' claims transcend the *ratione temporis* jurisdiction of the TPA.

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

a. The TPA does not apply retroactively to claims of breach based on State acts or omissions that pre-date the entry into force of the TPA

166. The Tribunal lacks jurisdiction over Claimants' claims that are based upon State acts or omissions that occurred before the entry into force of the TPA. In the present case, all but one of the measures challenged by Claimants pre-dates the TPA.[435]

167. One of the core principles of treaty law under customary international law is the principle of non-retroactivity. Such principle is codified in Article 28 of the VCLT ("Non-Retroactivity of Treaties"), which provides:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.[436]

168. This customary international law rule is consistent with the general rule of intertemporal law under customary international law. The latter rule is codified in Article 13 of the Articles on Responsibility of States for Internationally Wrongful Acts, according to which "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at

[435] The lone act that does not pre-date the TPA's entry into force is the 25 June 2014 Confirmatory Order of the Constitutional Court. However, that measure does not negate the Tribunal's lack of jurisdiction *ratione temporis*, as discussed in **Section III.B.2** below.

[436] **CLA-0124**, Vienna Convention on the Law of Treaties, United Nations, 23 May 1969 ("**VCLT**"), Art. 28.

the time the act occurs."[437] The commentary to Article 13 of the Articles on Responsibility of States for Internationally Wrongful Acts clarifies that

> Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ("does not constitute … unless …") is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.[438]

169. The investment arbitration jurisprudence has consistently recognized the intertemporal law rule.[439]

170. Article 10.1.3 of the TPA, for its part, reflects the above-referenced rules (of non-retroactivity and intertemporal law),[440] and thereby limits the scope *ratione temporis* of the Parties' consent to arbitration. Specifically, Article 10.1.3 provides, "[f]or greater certainty," that Chapter 10 of the TPA

> does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.[441]

171. In interpreting the non-retroactivity provision of the CAFTA-DR, which is identical to that in Article 10.1.3 of the TPA, the *Spence v. Costa Rica* tribunal noted that "[i]t is uncontroversial that Article 10.1.3 [of CAFTA-DR] restates the general

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[437] **RLA-0010**, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 ("**ILC Articles on State Responsibility**"), Art. 13.

[438] **RLA-0010**, ILC Articles on State Responsibility**,** Art. 13.

[439] *See* **RLA-0008**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6 (Vinuesa, Greenberg, Irarrázabal C.), Award, 31 July 2007 ("***MCI* (Award)**"), ¶ 94 ("The non-retroactivity of treaties as a general rule postulates that only from the entry into force of an international obligation does the latter give rise to rights and obligations for the parties."); **RLA-0009**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23 (Rigo Sureda, Eizenstat, Crawford), Second Decision on Objections to Jurisdiction, 18 May 2010, ¶ 116 ("The Treaty cannot be breached before it entered into force: 'An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.").

[440] *See* **RLA-0001**, TPA, Art. 10.1.3.

[441] *See* **RLA-0001**, TPA, Art. 10.1.3.

rule of customary international law reflected in Article 28 of the Vienna Convention on the Law of Treaties."[442]

172. Thus, this Tribunal lacks jurisdiction over the alleged acts or facts invoked by Claimants as alleged breaches of the TPA. This conclusion is based on (i) the principles of non-retroactivity and intertemporal law under customary international law, and (ii) the fact that the TPA does not expressly provide that rights and obligations set forth in Chapters 10 or 12 of the TPA apply retroactively—in fact, Article 10.1.3 explicitly provides the opposite, by reaffirming that the general non-retroactivity principle applies to the TPA.

b. Claimants' claims are based on State acts that predate the entry into force of the TPA

173. The specific State acts on which Claimants base their claims are the following:

[442] **CLA-0084**, *Spence*, ¶ 215.

a. **The Capitalization Order of 2 October 1998** (which the Superintendency issued to protect the assets of depositors in Granahorrar, after Granahorrar defaulted on its payment obligations);[443]

b. **The Value Reduction Order of 3 October 1998** (whereby, in response to Granhorrar's failure to comply with the Capitalization Order, Fogafín ordered that the nominal value of Granahorrar's shares be reduced);[444]

c. **The Final Constitutional Court Judgment dated 26 May 2011** (in which the Constitutional Court upheld the 1998 Regulatory Measures);[445] and

d. **The Confirmatory Order of the Constitutional Court dated 25 June 2014** (in which the Court affirmed the final 2011 Constitutional Court Judgment).[446]

174. Except for the last of the measures listed above, all of the acts of which Claimants complain predate the date of entry into force of the TPA, which was 15 May 2012.

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[443] *See* Notice of and Request for Arbitration, ¶ 135 ("The Superintendency of Banking's grant to Granahorrar of an obligatory opportunity to cure insolvency status was *legally* and *physically* impossible to perform. . . . This demand constitutes an abuse of power") (emphasis in original); Claimants' Memorial (PCA), ¶¶ 19–22 ("The 'Cure Notice,' presumably earmarked for Granahorrar's shareholders, was *never* communicated to the Granahorrar shareholders as required by law and in keeping with the provisions of the Administrative Code, Articles 46-48") (emphasis in original).

[444] *See* Notice of and Request for Arbitration, pp. 1–2 ("FOGAFIN discriminated against GRANAHORRAR and treated this formerly leading financial institution different from its peers by enacting the following five final acts comprising these measures: (i) artificially and deliberately reducing GRANAHORRAR's solvency status below the 9% legislative threshold, (ii) reducing the bank's share value to COP 0.01, (iii) denying GRANAHORRAR's shareholders due process statutory notice rights, (iv) unilaterally terminating GRANAHORRAR's CEO without notice to shareholders, and (v) replacing unilaterally Granahorrar's Board of Directors"); Claimants' Memorial (PCA), ¶¶ 22, 423, 437.

[445] *See* Claimants' Memorial (PCA), ¶ 45 ("The Constitutional Court's Opinion represents an emblematic denial of justice that even more importantly itself gave rise to a constitutional crisis because of the extent of its abuse of regulatory-judicial authority"); *see also id.* ¶¶ 42–77, 425–428, 437.

[446] *See* Claimants' Memorial (PCA), ¶ 425 ("The Constitutional Court in its 2011 and 2014 Opinions committed serious abuses of jurisdiction and authority, and radically renounced universal principles of justice and due process"); *see also id.* ¶¶ 404, 437.

The first three of the measures are manifestly outside the temporal scope of the TPA, and must therefore be dismissed for lack of jurisdiction *ratione temporis*.

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

176. The test adopted by the tribunal in *Spence v. Costa Rica*, for example, is apposite here. That test seeks to ascertain whether:

a. the act that post-dates the treaty fundamentally changed the status quo of the claimant's investment; and

b. such act is "independently actionable," such that the "alleged breach [can] be evaluated on the merits without requiring a finding going to the lawfulness of pre-[treaty] conduct[.]"[447]

177. Because the 2014 Confirmatory Order (i) did not fundamentally change the status quo of Claimants' investment, and (ii) is not independently actionable, it cannot be used as an expedient to overcome the lack of the Tribunal's jurisdiction *ratione temporis*. Each of these two points will be discussed in detail below.

i. The 2014 Confirmatory Order did not alter the status quo of Claimants' investment

178. In situations in which a claimant alleges treaty breaches based on a series of acts that straddle the relevant date—in this case, entry into force of the TPA—tribunals

[447] **CLA-0084**, *Spence*, ¶ 237(b).

have assessed the post-treaty acts to determine whether those acts produced a separate effect on the claimant's investment,[448] or whether the post-treaty act is instead "rooted" in the pre-treaty conduct, such that it did not materially change the circumstances that existed at the time of the treaty's entry into force.[449] If the post-treaty act has not changed the status quo, it cannot be used to as a Trojan horse to claim for grievances that were already fully configured before the treaty's entry into force. In other words, the post-treaty act cannot be used to manufacture jurisdiction *ratione temporis* where none would exist otherwise. This reasoning has been followed by numerous tribunals in investment arbitrations. For example, the tribunal in *Corona* noted:

> [W]here a "series of similar and related actions by a respondent State" is at issue, an investor cannot evade the limitations period by basing its claim on "the most recent transgression in that series". To allow an investor to do so would, as the tribunal in *Grand River* recognized, "render the limitations provisions ineffective"[450] (Internal citations omitted)

179. In *Corona*, the government of the respondent State had denied the claimant's application for a mining license prior to the relevant date. After the critical date under the applicable treaty, the claimant had requested reconsideration of such denial, but had received no response. The claimant then filed for arbitration, arguing that the tribunal had jurisdiction *ratione temporis* because the reconsideration request (and failure by the State to respond thereto) had post-

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[448] *See, e.g.*, **RLA-0012**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3 (Dupuy, Mantilla-Serrano, Thomas), Award on the Respondent's Expedited Preliminary Objections In Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 ("***Corona* (Award on Preliminary Objections)**"), ¶ 212 (analyzing whether the act after the relevant date "was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision").

[449] **CLA-0084**, *Spence*, ¶ 246; *see also* **CLA-0084**, *Spence*, ¶ 245 (observing that "[t]he appreciations that lie at the core of every allegation that the Claimants advance can be traced back to pre-10 June 2010 conduct, and indeed to pre-1 January 2009 conduct, by the Respondent.").

[450] **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 215.

dated the critical date. However, the tribunal rejected such argument, on the basis that the denial of the license after the relevant date had not changed the status quo:

> In this context, the Respondent's failure to reconsider the refusal to grant the license is nothing but an implicit confirmation of its previous decision. As will be seen when the Tribunal examines the issue of a denial of justice, the filing of a Motion for Reconsideration cannot be considered as a separate action.[451]

The tribunal thus concluded that the claimant had actual knowledge of the alleged breach before the critical date, and "as a consequence, its claims [were] time-barred by DR-CAFTA Article 10.18.1."[452]

180. Further, the fact that the claimant alleged that the later-in-time act amounted to a denial of justice did not alter the tribunal's analysis. Indeed, the tribunal found that "all of the alleged breaches relate to the same theory of liability,"[453] predicated on the invalidity of the denial of the license application. Such theory of liability included the denial of justice claim, which did "not produc[e] any separate effects on [the claimant's] investment other than those that were already produced by the initial decision."[454] As a result, the tribunal concluded that "there is no valid basis for treating the alleged denial of justice as distinct from the non-issuance of the environmental license."[455] For these reasons, the tribunal determined that it did not have jurisdiction *ratione temporis* over the claimant's claims.[456]

181. As in *Corona*, the tribunals in *Eurogas* and *ST-AD* likewise assessed pre- and post-date acts for purposes of deciding on compliance with temporal requirements imposed by the relevant investment treaty. In *EuroGas*, certain mining rights held by the claimant had been reassigned by the State prior to the treaty's entry into

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[451] **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 211.
[452] **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 238.
[453] **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 210.
[454] **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 212.
[455] **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 214.
[456] *See* **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 270.

force. In arguing that its treaty arbitration claims fell within the tribunal's jurisdiction, the claimant sought to rely on certain post-entry into force decisions by the Slovakian judiciary, refusing to restitute the relevant mining rights to the claimant. Referring to a chart establishing the timeline of events,[457] the tribunal concluded that

> the situation was exactly the same on 3 May 2005, before the BIT entered into force, and 1 August 2012, after the BIT entered into force: the mining rights that were lost by Rozmin were reassigned to another company. In other words, the mining rights were taken from Rozmin in 2005, allegedly in violation of Belmont's rights under the Canada-Slovakia BIT and international law, and several decisions of the mining authorities (not the judicial authorities) refused to restitute the rights to Rozmin. The [subsequent judicial decisions] did not change Belmont's legal and factual situation: since the reassignment of the Mining Area in 2005, it had lost its rights on the Mining Area and was not present on the site.[458]

182. Because the post-treaty government decisions had not altered (but rather had merely confirmed) the pre-treaty status quo, the *Eurogas* tribunal held that it did not have jurisdiction *ratione temporis* over those acts, even though they had post-dated the treaty's entry into force. According to the tribunal, to rule otherwise "would require the Tribunal to engineer a legalistic and artificial reasoning to bypass" the temporal limits on the application of the treaty.[459]

183. In *ST-AD*, the claimant described at length the alleged conduct of the State that had occurred before the claimant became a protected investor under the BIT, and such conduct included a judicial decision by a lower court concerning the investment, as well as a rejection by the Supreme Cassation Court of an application by the claimant for set-aside of the lower court decision.[460] Both of those decisions

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[457] **RLA-0013**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14 (Mayer, Gaillard, Stern), Award, 18 August 2017 ("***EuroGas* (Award)**"), ¶ 454.

[458] **RLA-0013**, *Eurogas* (Award), ¶ 455.

[459] **RLA-0013**, *Eurogas* (Award), ¶ 458.

[460] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶¶ 307–308, 311.

had predated the critical date under the treaty.[461] Subsequently, *after* the critical date, the claimant had filed a new set-aside application with the Supreme Cassation Court, and that application was also rejected.[462]

184. In arguing that the tribunal had jurisdiction *ratione temporis* over its claims, the claimant in ST-D had relied upon the single event that had occurred after the critical date, which was the rejection by the Supreme Cassation Court of the second set-aside application.[463] The tribunal observed that this judicial rejection was "the only possible relevant event that happened after the critical date."[464] It also characterized the post-critical date set-aside application as merely "a 'repackaging' of the first application to set aside that same Decision, rendered six years before the [critical date]."[465] Having confirmed that "nothing new happened after" the relevant date,[466] the tribunal upheld the respondent's objection to its jurisdiction *ratione temporis*:

> [I]f a claimant, before coming under the protection of a given BIT, had asked for and been refused a license, it could not simply purport to create an event posterior to it becoming a protected investor by presenting the very same request for a license that would, no doubt, be similarly refused. In the present case, the Claimant cannot establish jurisdiction for this Tribunal by presenting a request to set aside [the underlying judicial decision] after it became an investor on similar grounds than the request that was denied prior to its becoming a protected investor.[467]

On this basis, the tribunal concluded that the claimant had not satisfied the relevant temporal jurisdiction requirement, and dismissed the claim.[468]

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[461] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 300.
[462] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 311.
[463] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 314.
[464] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 316.
[465] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 331.
[466] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 318.
[467] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 332.
[468] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 333.

185. The arguments presented by Claimants in the instant case are similar to those unsuccessfully presented by the claimants in *Eurogas*, *ST-AD*, and *Corona*. As discussed above, Claimants here base all of their claims of breach on a series of acts, all but one of which pre-date the entry into force of the TPA. The only post-TPA act was one that merely confirmed the earlier ones (as had occurred in *Eurogas*, *ST-AD*, and *Corona*). The relevant acts and their timing are illustrated in the following table:

Date	Event
2 October 1998	Capitalization Order
3 October 1998	Value Reduction Order
28 July 2000	Claimants challenge the 1998 regulatory measures in Colombian court
26 May 2011	Final decision of the Constitutional Court
December 2011	Claimants file an extraordinary annulment request in an attempt to reopen the proceedings
15 May 2012	Entry into force of the TPA
25 June 2014	Confirmatory Order of the Constitutional Court

186. Accordingly, it is necessary to assess the impact of the 2014 Confirmatory Order, as the single post-treaty act upon which Claimants rely, to determine whether it altered the status quo at the time of the TPA's entry into force. In that context, it seems useful by way of preface to analyze the nature and significance of "confirmatory orders" in the Colombian legal system.

187. In his expert report, Dr. Ibáñez explains that a judgment of the Constitutional Court is final and puts an end to the proceeding.[469] An annulment petition against

[469] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 131.

a Constitutional Court judgment is not an ordinary recourse,[470] but is instead extraordinary in nature.[471] Claimants themselves recognized the extraordinary nature of the Annulment Petition against the Final Decision of the Constitutional Court of May 2011 in their petition before the IACHR.[472]

188. In that regard, Dr. Ibáñez underscores in his expert report that the Confirmatory Order of June 2014 cannot be considered as a separate action (in relation to the acts identified in the chart above).[473] The 2014 Confirmatory Order did not produce any separate effects other than those that had already been produced by the Final Decision of the Constitutional Court of May 2011; the latter had put an end to Claimants' legal challenge to and request for compensation for the 1998 Regulatory Measures.[474] The Confirmatory Order did not alter in any way the pre-treaty status quo with respect to Claimants' investment; as had been the case in *ST-AD* and *Corona*, the post-treaty act was no more than the rejection of a procedural attempt engineered by Claimants themselves to reopen a government decision that was already final prior to the TPA's entry into force. Importantly, and to recall the words of the *Eurogas* tribunal, "the situation was exactly the same"[475] before and after the entry into force of the TPA: by the time of the TPA's entry into force in 2012, Claimants' challenge of the 1998 Regulatory Measures had been finally rejected. As a result, this single post-treaty act (i.e., the 2014 Confirmatory Order) is insufficient to create jurisdiction *ratione temporis* for the Tribunal over Claimants' claims. Accordingly, such act along with the pre-treaty acts challenged by Claimants are outside the jurisdiction of this Tribunal.

ii. The 2014 Confirmatory Order is not independently actionable

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[470] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 143.

[471] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 139.

[472] *See* **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012, p. 27.

[473] **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 211.

[474] **RER-1**, Expert Report of Dr. Ibáñez, ¶¶ 160-161.

[475] **RLA-0013**, *Eurogas* (Award), ¶ 455.

189. The 2014 Confirmatory Order is also not "independently actionable," because the alleged breach cannot be evaluated on the merits without a finding going to the lawfulness of pre-treaty conduct.

190. The general principle of non-retroactivity described above mandates that a treaty be in force in order for a State to be liable for violating that treaty. Accordingly, tribunals have consistently held that "[p]re-entry into force acts and facts cannot . . . constitute a cause of action."[476] As a result, "to move beyond a jurisdictional assessment, any such alleged breach must relate to independently actionable conduct within the permissible period."[477] In other words, "pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right."[478]

191. This is not to say that pre-treaty acts must be disregarded. Pre-treaty acts "can form part of the 'circumstantial evidence' or factual background,"[479] and thus "can indeed help the Tribunal to understand [subsequent] events."[480] But the extent to which such acts can be taken into account is necessarily "limited."[481] Pre-treaty

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[476] **CLA-0084**, *Spence*, ¶ 217.

[477] **CLA-0084**, *Spence*, ¶ 221.

[478] **CLA-0084**, *Spence*, ¶ 217.

[479] **CLA-0084**, *Spence*, ¶ 217 ("Pre-entry into force acts and facts cannot therefore, in the Tribunal's estimation, constitute a cause of action. Such conduct may constitute circumstantial evidence that confirms or vitiates an apparent post-entry into force breach, for example, going to the intention of the respondent (where this is relevant), or to establish estoppel or good faith or bad faith, or to enable recourse to be had to the legal or regulatory basis of conduct that took place subsequently, etc.").

[480] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 308; *see also* **CLA-0051**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (Stephen, Crawford, Schwebel), Award, 11 October 2002 ("***Mondev***"), ¶ 70 ("[E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation.").

[481] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 308.

acts "cannot, by any means, serve as an independent basis for a claim."[482] Instead, "it must still be possible to point to conduct of the State after that date which is itself a breach."[483]

192. In determining whether a post-treaty act can "serve as an independent basis for a claim,"[484] tribunals have considered whether "the claim that is alleged [based on the post-treaty act] can be sufficiently detached from pre-entry into force acts and facts so as to be independently justiciable."[485] The *Spence* tribunal reasoned that

> [a]n alleged breach will not come within the jurisdiction of the Tribunal if the Tribunal's adjudication would necessarily and unavoidably require a finding going to the lawfulness of conduct judged against treaty commitments that were not in force at the time.[486]

193. In *Spence v. Costa Rica*, the claimants alleged that Costa Rica's development of a national park for the protection of nesting leatherback turtles had unlawfully deprived them of real estate property. There, as here, the underlying regulatory actions occurred before the critical date. The claimants nevertheless insisted that the tribunal had jurisdiction *ratione temporis* on the basis that the assessment of the amount of compensation that was due to the claimants for the expropriation of their property had not been finalized until after the critical date.[487] Specifically, the claimants "assert[ed] that the fact that the underlying expropriations commenced before [the critical date] is not relevant to the question of whether the compensation eventually determined was consistent with the Respondent's

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[482] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 308; *see also* **CLA-0084**, *Spence*, ¶ 222 ("The Tribunal may have regard to pre-entry into force acts and facts for evidential and similar purposes, as discussed above. Such acts and facts cannot, however, form the foundation of a finding of liability even in respect of a post-entry into force, or a post-critical limitation date, actionable breach.).

[483] **CLA-0051**, *Mondev*, ¶ 70.

[484] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 308.

[485] **CLA-0084**, *Spence*, ¶ 222; **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 332.

[486] **CLA-0084**, *Spence*, ¶ 222.

[487] **CLA-0084**, *Spence*, ¶¶ 229–230.

CAFTA obligations."[488] The respondent State, Costa Rica, pointed out that the post-critical date acts identified by the claimants were merely "the lingering effects of pre-1 January 2009 acts or as dependent acts that did not in-and-of-themselves constitute independent breaches of the CAFTA."[489] The *Spence* tribunal agreed with Costa Rica:

> [T]he Claimants have failed to show, again *manifestly*, in the face of this pre-entry in force, pre-limitation period conduct, that the breaches that they allege are independently actionable breaches, separable from the pre-entry into force conduct in which they are deeply rooted. The Tribunal further considers that the Claimants have failed to show that, even were the Tribunal to accept the existence of an actionable breach post-10 June 2010, that that breach could properly be evaluated on the merits without requiring a finding going to the lawfulness of pre-1 January 2009 conduct.[490] (Emphasis in original)

194. On that basis, the *Spence* tribunal concluded that "it ha[d] no jurisdiction to entertain the Claimants claims."[491]

195. The foregoing reasoning applies with equal force to the case *sub judice*. The single post-treaty act of which Claimants complain—the 2014 Confirmatory Order—is not "independently actionable," because it cannot be evaluated without evaluating the legality of the earlier administrative and judicial decisions, all of which predated the TPA's entry into force; i.e. the lone post-TPA cannot be assessed "without requiring a finding going to the lawfulness of pre-[treaty] conduct."[492]

196. As Dr. Ibáñez explains in his expert report, the 2014 Confirmatory Order was the product of a request filed by Claimants' own Holding Companies on 11 December

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[488] **CLA-0084**, *Spence*, ¶ 231.
[489] **CLA-0084**, *Spence*, ¶ 231.
[490] **CLA-0084**, *Spence*, ¶ 246.
[491] **CLA-0084**, *Spence*, ¶ 247.
[492] **CLA-0084**, *Spence*, ¶ 246.

2011, to attempt to reopen a closed judicial proceeding.[493] That judicial proceeding had yielded a final decision by the Constitutional Court in 2011, prior to the TPA's entry into force.[494] Importantly, as discussed above and in Dr. Ibáñez's report, Claimants' request was extraordinary in nature, and not one that is made in the ordinary course of judicial proceedings in Colombia.[495] Through the 2014 Confirmatory Order, the Constitutional Court merely refused to annul the final judgment that it had rendered on 26 May 2011 (nearly one year before the entry into force of the TPA), which had dismissed Claimants' claims.[496] Moreover, those claims concerned the validity of underlying regulatory acts that took place in 1998, long before the TPA's entry into force in 2012.

197. As a result, this Tribunal would not be able to evaluate whether the 2014 Confirmatory Order constitutes a TPA violation without also evaluating the merits of the underlying (pre-TPA) regulatory acts and the (also pre-TPA) final judicial decision by the Constitutional Court. Indeed, the fact that the Tribunal would have to evaluate the merits of the pre-TPA regulatory and judicial decisions is evident from Claimants' own list complaints with the 2014 Confirmatory Order, summarized below:

    a. The Constitutional Court's decision overturning the Council of State's decision "that the expropriation of Granahorrar on the part of FOGAFIN" violated Claimants' due process rights;[497]

[493] **RER-1**, Expert Report of Dr. Ibáñez, ¶¶ 136-158.

[494] **RER-1**, Expert Report of Dr. Ibáñez, ¶¶ 133-158.

[495] **RER-1**, Expert Report of Dr. Ibáñez, ¶¶ 139-140.

[496] *See* **Ex. C-0026**, Order No. 188/14, Constitutional Court of Colombia, 25 June 2014, ¶¶ 4.4.2.1, 4.4.3.1–4.4.3.2; **RER-1**, Expert Report of Dr. Ibáñez, ¶¶ 160-161.

[497] Claimants' Memorial (PCA), ¶ 48.

b. The alleged "discriminatory treatment [by the Constitutional Court] directed at the Granahorrar shareholders as to FOGAFIN credit maturation dates;"[498]

c. The Constitutional Court's alleged "discriminatory treatment directed at the Granahorrar shareholders as to FOGAFIN credit interest rates;"[499]

d. The alleged failure of the Constitutional Court to penalize the alleged "discriminatory treatment that Fogafín directed at Granahorrar and the Granahorrar shareholders in the form of the Guaranty Restructuring Program;"[500] and

e. The alleged due process violation by the Constitutional Court as to "Granahorrar arising from the Superintendency's resolution."[501]

198. If it were to adjudicate claims based on the lone post-treaty act (viz., the 2014 Confirmatory Order), the Tribunal would thus be required to evaluate the validity of the pre-treaty acts (viz., the underlying regulatory measures and judicial proceeding before the Constitutional Court). For this reason, the post-treaty act is not independently actionable, and thus cannot, without more, give rise to jurisdiction *ratione temporis*.

199. In sum, of all of the State acts and omissions of which Claimants complain, only one post-dates the entry into force of the TPA. That act—the 2014 Confirmatory Order—is a rejection of an extraordinary attempt engineered by Claimants themselves to reopen a closed judicial proceeding in Colombia, for the purpose of challenging the Constitutional Court's final and binding decision of 26 May 2011 (i.e., before the TPA's entry into force on 15 May 2012). Put simply, the 2014 Confirmatory Order is not a separate, independently actionable act that can serve

[498] Claimants' Memorial (PCA), ¶ 50.
[499] Claimants' Memorial (PCA), ¶ 51.
[500] Claimants' Memorial (PCA), ¶ 53.
[501] Claimants' Memorial (PCA), ¶ 54.

as a free-standing source of liability by Colombia under the TPA. Claimants therefore cannot rely upon that act as a hook for the adjudication of claims that are based on pre-treaty acts, and all of their claims should accordingly be dismissed for lack of jurisdiction *ratione temporis*.

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

200. In order to demonstrate that the Tribunal has jurisdiction *ratione temporis* over their claims, Claimants would also need to demonstrate that the *dispute* before this Tribunal arose after the TPA entered into force on 15 May 2012. However, they have failed to do so, and the Tribunal therefore lacks jurisdiction *ratione temporis* over their claims.

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

201. As noted above, the principle of non-retroactivity is a rule of customary international law. Accordingly, a treaty will not apply retroactively unless the treaty expressly provides otherwise.[502] In the application of investment treaties, one of the temporal dimensions that is governed by the principle of non-retroactivity relates to the moment in which the *dispute* arose.[503]

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[502] *See* **RLA-0014**, *SGS Société Générale de Surveillance S A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (El-Kosheri, Crawford, Crivellaro), Decision on Jurisdiction, 29 January 2004 ("***SGS-Philippines***"), ¶ 166 ("The normal principle stated in Article 28 of the Vienna Convention on the Law of Treaties applies: the provisions of the BIT 'do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty.'"); **RLA-0015**, *Lao Holdings N.V. v. The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (Binnie, Hanotiau, Stern), 21 February 2014 ("***Lao Holdings* (Decision on Jurisdiction)**"), ¶ 114; **RLA-0016**, *Sergei Paushok, et al. v. The Government of Mongolia*, UNCITRAL (Lalonde, Grigera Naón, Stern), Award on Jurisdiction and Liability, 28 April 2011 ("***Paushok***"), ¶ 468 (observing that "it is a far stretch to conclude, unless there is a clear provision to that effect, that a tribunal would have been granted jurisdiction to rule on events" that took place before the treaty's entry into force); *see also* **RLA-0017**, Zackary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS, 2012, p. 145.

[503] *See* **RLA-0001**, TPA, Art. 10.1.3.

202. Numerous tribunals have held that they lack jurisdiction *ratione temporis* over disputes that arose before the entry into force of the treaty.[504] Such holding has applied even in instances in which the treaty did not expressly preclude claims relating to disputes that pre-date the treaty's entry into force. For example, the *MCI* tribunal held:

> The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force. Any dispute arising prior to that date will not be capable of being submitted to the dispute resolution system established by the BIT. **The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the non-retroactivity of treaties**.[505] (Emphasis added)

203. Because the TPA does not expressly provide for its retroactive application, the general principle of non-retroactivity applies, and therefore it does not apply to disputes that arose before its entry into force.

204. The jurisdictional analysis thus turns, first, on the definition of the term "dispute," and second, on a determination as to when the relevant dispute arose. As explained by the *Lucchetti* tribunal, the term "dispute" "has an accepted meaning" under international law.[506] The Permanent Court of International Justice defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of

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[504] *See, e.g.*, **RLA-0018**, *ATA Construction, Industrial and Trading Co. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2 (Fortier, El-Kosheri, Reisman), Award, 18 May 2010 ("***ATA* (Award)**"), ¶ 98.

[505] **RLA-0008**, *MCI* (Award), ¶ 61; *see also* **RLA-0019**, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9 (Paulsson, Salpius, Voss), Award, 16 September 2003 ("***Generation Ukraine* (Award)**"), ¶ 17.1 ("The Tribunal's jurisdiction extends to any dispute arising out of or relating to an 'alleged breach of any right conferred or created by [the] Treaty' . . . to the extent that the dispute arose on or after 16 November 1996 [i.e., the date of the treaty's entry into force].").

[506] **RLA-0020**, *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4 (Buergenthal, Cremades, Paulsson), Award, 7 February 2005 ("***Lucchetti* (Award)**"), ¶ 48; **RLA-0021**, *Gambrinus Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31 (Bernardini, Lalonde, Dupuy), Award, 15 June 2015 ("***Gambrinus* (Award)**"), ¶ 198.

interests between two persons."[507] The ICJ similarly defined a dispute as the "situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance" of a legal obligation.[508] The *Lucchetti* tribunal adopted these definitions.[509]

205. Numerous other tribunals have adopted and applied this definition of "dispute."[510] Pursuant to this accepted definition, a dispute arises when a disagreement or conflict of views emerges between the parties. However, a prospective claimant need not have articulated a specific legal basis for a claim in order for the dispute to have arisen.[511] Nor does the prospective respondent need to have explicitly opposed the position or complaint of the other party.[512] Further,

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[507] **RLA-0022**, *The Mavrommatis Palestine Concessions*, PCIJ (Loder, *et al.*), Judgment, 30 August 1924 ("***Mavrommatis* (Advisory Opinion)**"), p. 11.

[508] **RLA-0023**, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ (Basdevant, *et al.*), Advisory Opinion, 13 March 1950 ("***Interpretation of Peace Treaties* (Advisory Opinion)**"), ¶ 74.

[509] **RLA-0020**, *Lucchetti* (Award), ¶ 48; *see also* **RLA-0021**, *Gambrinus* (Award), ¶ 198 ("Under general international law, a dispute means 'a disagreement on a point of law or fact, a conflict of legal views or interests between parties'").

[510] *See, e.g.*, **CLA-0039**, *Impregilo- Pakistan*, ¶¶ 302–303; **RLA-0018**, *ATA* (Award), ¶ 99; *see also* **CLA-0081**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8 (Rigo Suerda, Brower, Bello Janeiro), Decision on Jurisdiction, 3 August 2004. ("***Siemens***"), ¶ 159; **RLA-0008**, *MCI* (Award), ¶ 63; **RLA-0021**, *Gambrinus* (Award), ¶ 198.

[511] *See* **RLA-0013**, *EuroGas* (Award), ¶ 437 ("As regards the occurrence of a dispute, the Tribunal agrees with the Respondent's submission that the relevant consideration is the articulation of opposing views and interests, as opposed to the articulation of a specific legal basis for the claim.").

[512] **RLA-0025**, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, ICJ (Ruda, et al.) Advisory Opinion, 26 April 1988, ¶ 38 ("In the view of the Court, where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty.").

the test for determining whether a dispute has arisen is an objective one; it does not depend on the subjective belief of the claimant (or of the respondent).[513]

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

206. The present dispute arose before the entry into force of the TPA on 15 May 2012. It began with, and centers on, regulatory measures that were adopted by the regulatory authority Fogafín in 1998, and specifically the Capitalization Order and the Value Reduction Order. In their Memorial on Jurisdiction, Claimants themselves describe as follows the dispute at issue in this arbitration: "In a nutshell, Colombia's *financial regulatory authorities* unlawfully expropriated Claimants' investment in that jurisdiction" (emphasis added).[514] The measures of the financial regulatory authorities (viz., the Superintendency of Banking and Fogafín) to which Claimants refer were adopted on 2 and 3 October 1998, respectively. The question therefore is when the dispute over these measures arose.

207. The evidence demonstrates that the dispute in this case arose by 28 July 2000 at the very latest. On that date, the Carrizosa family, through their Colombian-incorporated companies Exultar, Fultiplex, Inversiones Lieja, Compto, Asesorías e Inversiones e Interventorías y Construcciones, filed a legal challenge in Colombia against the 1998 Regulatory Measures.[515] Through their Nullification and Reinstatement Action, Claimants challenged the validity of the 1998 Regulatory Measures and sought compensation from the State.[516] In *Luchetti*, the tribunal held that by the time that the claimants had filed a legal challenge to regulatory action,

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[513] **RLA-0015**, *Lao Holdings* (Decision on Jurisdiction), ¶ 124 ("[T]he test for determining the critical date is objective . . . the relevant question is not whether the Lao Government subjectively believed the legal dispute to have arisen, or whether the Claimant subjectively believed it had not, the question is whether the facts, objectively analysed, establish the existence of a dispute and if so at what time did it arise").

[514] Claimants' Memorial (PCA), p. 12.

[515] Claimants' Memorial (PCA), ¶ 28; Notice of and Request for Arbitration, ¶ 131.

[516] *See* **Ex. R-0050**, Nullification and Reinstatement Action, 28 July 2000, pp. 2–3.

"the parties were locked in a dispute in which each side held conflicting views regarding their respective rights and obligations."[517] In the instant case, given the local litigation filed by Claimants through their local companies in Colombia, the parties were clearly "locked in a dispute" by 28 July 2000, at the latest.

208. In fact, Claimants themselves have recognized that a dispute existing at that time. For example, Alberto Carrizosa Gelzis recounts his discussions in 2000 with the Carrizosa Family's lawyer,[518] who explained that "[a] relevant issue . . . was that the shareholders were never notified of any such 'administrative acts[.]'"[519] Felipe Carrizosa Gelzis similarly articulated the crystallization of a dispute in 2000:

> Only in July 2000, our lawyer finally managed to get FOGAFIN and the Superintendency of Banking to hand over the documentation about our case. . . . We immediately activated ourselves to fight for our rights. Only few days after becoming aware of what had happened, we started proceedings before the administrative courts of Colombia.[520]

209. The dispute that arose at the latest on 28 July 2000 continued after the entry into force of the TPA, but the fact that the dispute may have continued even after the date of entry into force of the TPA does not negate the fact that the dispute arose before the treaty's entry into force, and is thus outside the temporal scope of the TPA. The tribunal in *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador* confirmed the foregoing, ruling that "[p]rior disputes that continue after the entry into force of the BIT are not covered by the BIT."[521] Because the dispute

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[517] **RLA-0020**, *Lucchetti* (Award), ¶ 49.

[518] *See* Alberto Carrizosa Gelzis Statement, ¶ 68.

[519] Alberto Carrizosa Gelzis Statement, ¶ 71; *see also id.* at ¶ 72 (explaining that they then "filed a claim before the Judicial Administrative Judicial Tribunal of Cundinamarca (JACT), against FOGAFIN and the Superintendency of Banking.").

[520] Felipe Carrizosa Gelzis Statement, ¶¶ 50–51.

[521] **RLA-0008**, *MCI* (Award), ¶ 66; *see also* **RLA-0075**, *Sociedad Anónima Eduardo Vieira v. República de Chile*, ICSID Case No. ARB/04/7 (von Wobeser, Czar de Zalduendo, Reisman), Award, 21 August 2007, ¶ 303.

in the present case arose long before the TPA entered into force on 15 May 2012, the Tribunal lacks jurisdiction *ratione temporis*.

210. In their Memorial on Jurisdiction, Claimants argue that "*[r]atione [t]emporis* is not an issue in this case" because "the dispute before this Tribunal became ripe and accrued" only with the Confirmatory Order in June 2014 (i.e., after the entry into force of the TPA).[522] However, "ripeness" is not an applicable or even relevant concept in the *ratione temporis* analysis, and Claimants do not cite any authority in support of their theory. To the contrary, however, the well-established legal standard for purposes of the non-retroactivity analysis concerns when the dispute "arose,"[523] not whether or when it "became ripe and accrued."[524]

211. To the extent that Claimants' argument is that the dispute did not arise until the 2014 Confirmatory Order, that assertion is patently incorrect. As discussed above, the dispute concerns the 1998 regulatory measures, and a conflict of legal views or interests with respect to such measures developed almost immediately after those measures were adopted,[525] and in any event no later than the date on which claims relating thereto were filed in Colombian courts by Colombian companies owned and controlled by Claimants.

212. At present, the dispute between the Parties involves claims relating to measures that include but are not limited to the 1998 regulatory measures, insofar as Claimants have also filed claims of alleged breaches based on acts that took place after 1998 (including during the judicial proceedings that Claimants commenced in 2000). However, the assertion of claims based on events that developed after the

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[522] Claimants' Memorial (PCA), ¶¶ 397, 400.

[523] *See, e.g.*, **RLA-0008**, *MCI* (Award), ¶ 61; *see also* **RLA-0019**, *Generation Ukraine* (Award), ¶ 17.1; **RLA-0018**, *ATA* (Award), ¶ 98.

[524] Claimants' Memorial (PCA), ¶ 400.

[525] *See* **RLA-0020**, *Lucchetti* (Award), ¶ 48 (citing **RLA-0022**, *Mavrommatis* (Advisory Opinion), p. 11 and **RLA-0023**, *Interpretation of Peace Treaties* (Advisory Opinion), ¶ 74); *see also* **RLA-0021**, *Gambrinus* (Award), ¶ 198.

dispute arose does not alter the determination as to the date on which the relevant *dispute* arose. Thus, the PCIJ for example drew a distinction between "facts constituting the real causes of the dispute" and "subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations."[526] Such is precisely the case here, as the later events all relate back to the 1998 Regulatory Measures. Since it is the date on which the *dispute* arose that matters when assessing jurisdiction *ratione temporis*, Claimants' claims must be dismissed on the basis of lack of jurisdiction *ratione temporis* notwithstanding that one of the State acts that Claimants invoke post-dated the TPA's entry into force.

213. Claimants cannot credibly argue that there are somehow two or more disputes at issue, and that at least one of those disputes arose after the entry into force of the TPA. In determining whether a new dispute had emerged after the date of entry into force of the treaty at issue in the case before it, the *Luchetti* tribunal explained that "the critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter."[527] The tribunal deemed that it needed "to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute."[528]

214. In *Lucchetti*, the claimants' investment, a pasta factory, had been subject to municipal environmental regulations. The claimants had challenged those measures in a judicial proceeding, and succeeded initially. Thereafter, however, the government adopted a new set of decrees that (i) authorized the municipal government to adopt measures necessary to achieve environmental objectives; and (ii) revoked the claimants' operating license. The claimants alleged that the

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[526] **RLA-0026**, *Phosphates in Morocco*, PCIJ (Guerrero, *et al.*), Judgment, 14 June 1938 ("**Phosphates**"), p. 18.

[527] **RLA-0020**, *Lucchetti* (Award), ¶ 50.

[528] **RLA-0020**, *Lucchetti* (Award), ¶ 50.

latter set of decrees gave rise to a new dispute, different from the one relating to the municipal environmental regulations. The tribunal disagreed, however:

> [T]he disputes have the same origin or source: the municipality's desire to ensure that its environmental policies are complied with and Claimants' efforts to block their application to the construction and production of the pasta factory.[529]

215. Similarly, the *Eurogas* tribunal rejected the claimant's attempt to frame events after the relevant date as the source of a new dispute. Specifically, the claimant sought to distinguish between a dispute about underlying regulatory measures and a dispute about subsequent judicial decisions that had merely affirmed the validity of those regulatory measures. The tribunal held that

> [c]ontrary to [claimant's] position, the decisions of 30 March 2012 and 1 August 2012 cannot be considered the source of a new dispute; rather, they were a refusal to resolve the ongoing dispute, which arose from the alleged breach in 2005. . . [530]
>
> All the decisions by Slovak authorities that have been mentioned in this arbitration are elements of the same dispute, the main feature of which is the taking of [claimant's] investment.[531]

216. The tribunal in *Eurogas* considered that to separate the dispute into different parts, as sought by the claimant, "would require the Tribunal to engineer a legalistic and artificial reasoning . . . and effectively extend the *ratione temporis* application of the Treaty to a long-standing dispute."[532] In concluding that the dispute before it fell outside its jurisdiction *ratione temporis*, the tribunal explained that under the claimant's theory, investors would always be able to circumvent *ratione temporis* limitations:

> Considering that the State's refusal to overturn an existing alleged breach gives rise to a new dispute would open the floodgates to a

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[529] **RLA-0020**, *Lucchetti* (Award), ¶ 53.

[530] **RLA-0013**, *EuroGas* (Award), ¶ 455.

[531] **RLA-0013**, *EuroGas* (Award), ¶¶ 455, 457.

[532] **RLA-0013**, *EuroGas* (Award), ¶ 458.

> possible complete disregard of the condition *ratione temporis* of the application of a BIT. The consequence would be that an investor could bypass the *ratione temporis* limitations of a treaty by commencing local court proceedings after the entry into force of the treaty, in respect of an old dispute. This cannot be a sensible legal result.[533]

217. The *ATA* tribunal reasoned along similar lines. Faced with a claimant that attempted to parse the dispute, the tribunal cautioned against such maneuvers, noting that "[a]s Zeno demonstrated in his famous paradox, the ability of logicians to analyze and break things into smaller components is infinite."[534] The tribunal, sensibly, noted that "juridical analysis must be conducted in ways consistent with the purposes of the rules in question."[535]

218. In *ATA*, the claimant had pursued legal action in the Jordanian courts for six years before the entry into force of the applicable treaty.[536] The claimant argued in the investment arbitration that it was only with the final Court of Cassation judgment (i.e. the appellate judgment) that a "denial of justice" had been configured, and that it was therefore only then that the dispute had "crystallised" for purposes of the relevant investment treaty.[537] The claimant further contended that an international claim "based on denial of justice does not arise as a substantive, rather than procedural, matter until the system of national appeals within the State in question has been exhausted."[538] However, the *ATA* tribunal rejected that argument, holding that

> [u]nless it falls prey to Zeno's paradox, the Tribunal must view the proceedings that followed as a continuation over this initial difference of legal opinion regarding the issue of annulment.[539]

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[533] **RLA-0013**, *EuroGas* (Award), ¶ 459.

[534] **RLA-0018**, *ATA* (Award), ¶ 104.

[535] **RLA-0018**, *ATA* (Award), ¶ 104.

[536] *See* **RLA-0018**, *ATA* (Award), ¶ 63.

[537] **RLA-0018**, *ATA* (Award), ¶ 67.

[538] **RLA-0018**, *ATA* (Award), ¶ 67.

[539] **RLA-0018**, *ATA* (Award), ¶ 104.

219. The tribunal also rejected the claimant's attempt to use a denial of justice claim as a basis for overcoming the treaty's temporal constraints on jurisdiction:

> In this case, the Claimant attempts to present a denial of justice as an independent violation of the BIT and to invite the Tribunal to treat it as if it were unconnected to the dispute in order to shift the moment of its occurrence forward and to locate it in time after the entry into force of a BIT. But the attempt must fail if, as in this case, the occurrence is part of a dispute which originated before the entry into force of the BIT. For this reason, the Tribunal has concluded that the claim of denial of justice is also inadmissible for lack of jurisdiction *ratione temporis*.[540]

220. The High Court of Singapore likewise confirmed that

> [t]o show that the two disputes were distinct, it clearly does not suffice to show that the acts sought to be challenged appear to breach treaty obligations. That does not answer the question whether the acts are part of a pre-existing dispute or not. Merely re-characterising a pre-existing claim as a "denial of justice" or a breach of treaty obligations cannot serve to shift the dispute later in time after the entry into force of the relevant treaty.[541]

221. The various foregoing jurisprudential findings are equally valid and applicable in the present case. Although Claimants have not articulated their arguments clearly, it appears that Claimants are attempting to break off the single post-treaty act (viz., the 2014 Confirmatory Order) from the pre-existing dispute in order to re-characterize it as a new dispute, consisting of a denial of justice.[542] However, doing so does not serve to save Claimants' case from the *ratione temporis* bar, because, as in the various cases discussed above, the post-TPA act is really part of the same dispute that had already arisen long before the TPA entered into force.

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[540] **RLA-0018**, *ATA* (Award), ¶ 108.

[541] **RLA-0027**, *Kingdom of Lesotho v. Swissbourgh Diamond Mines (Pty) Ltd. et al.*, 2017 SGHC 195 (Ramesh), Judgment, 14 August 2017, ¶ 176.

[542] *See* Claimants' Memorial (PCA), ¶ 24 ("It is the actions of the judiciary, primarily the Constitutional Court, that are most relevant to any determination concerning this bifurcated jurisdictional briefing").

222. A tribunal cannot accept blindly a claimant's characterization of its case, but rather must "discern the reality of the case."[543] And the reality of this case is that a dispute as to the validity 1998 regulatory measures arose shortly after those measures were adopted. Claimants' claims concerning the subsequent judicial proceeding, including the 2014 Confirmatory Order issued by the Constitutional Court, relate to the same subject matter as that pre-existing dispute: the reduction in the value of Claimants' shares in Granahorrar. To conclude otherwise would be to deprive the principle of non-retroactivity of any effect, as it would allow Claimants (i) on the one hand, to assert that only the 2014 Confirmatory Order of the Constitutional Court is relevant for purposes of *ratione temporis* jurisdiction, and yet (ii) on the other hand, to submit claims based on pre-entry into force events, including the Colombian courts' affirmation of the validity of regulatory measures dating back to 2 October 1998.

223. For the reasons stated above, and because the relevant dispute between Claimants and the Colombian State arose before the entry into force of the TPA, the Tribunal lacks jurisdiction *ratione temporis* over the totality of Claimants' claims.

3. Claimants did not comply with the three-year limitations period established in Article 10.18.1 of the TPA

224. Claimants' claims also fail to comply with the prescription (statute of limitations) provision of the TPA, which is set forth in Article 10.18.1. That provision (which is quoted verbatim in the first subsection below) prohibits the submission of claims more than three years after the claimant first acquired, or should have acquired, knowledge of the alleged breach and alleged loss.[544] However, as explained below, Claimants submitted their claims on 24 January 2018, *more* than three years after they first acquired knowledge of the alleged breach and alleged loss. This Tribunal thus lacks jurisdiction *ratione temporis* over Claimants' claims.

[543] **CLA-0084**, *Spence*, ¶ 226.

[544] **RLA-0001**, TPA, Art. 10.18.1.

a. Article 10.18.1 of the TPA precludes claims for alleged breaches and alleged loss that were known to have occurred before 24 January 2015

225. Article 10.18.1 of the TPA establishes a further limitation on the States Parties' consent to arbitration:

> No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.[545]

226. This provision is incorporated by reference into Chapter 12 of the TPA, by means of Article 12.1.2(b), which incorporates the dispute resolution clause of Chapter 10 into Chapter 12 (with certain limitations).[546] Accordingly, this Tribunal will lack jurisdiction *ratione temporis* if Claimants' claims do not comply with the temporal restriction set forth in Article 10.18.1—as in fact they have not.[547]

227. It is well established that temporal limitation provisions should be strictly construed and applied to bar untimely claims, and that a tribunal has no flexibility in this regard.[548] For example, when applying the temporal limitation provisions under Articles 1116(2) and 1117(2) of NAFTA, the *Grand River* tribunal noted that

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[545] **RLA-0001**, TPA, Art. 10.18.1. Article 10.16 is entitled "Submission of a Claim to Arbitration." *Id.*, Art. 10.16.

[546] Article 10.18.1 is a part of Section B of Chapter 10. Section B of Chapter 10 is expressly incorporated into Chapter 12 (with certain limitations). *See* **RLA-0001**, TPA, Art. 12.1.2(b).

[547] *See* **RLA-0027**, *Kingdom of Lesotho v. Swissbourgh Diamond Mines (Pty) Ltd. et al.*, 2017 SGHC 195 (Ramesh), Judgment, 14 August 2017, ¶ 104("[A] tribunal lacks jurisdiction *ratione temporis* if the dispute falls foul of temporal restrictions in the investment treaty.").

[548] *See* **RLA-0028**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (Kerameus, Covarrubias Bravo, Gantz), Interim Decision on Preliminary Jurisdictional, 6 December 2000 ("***Feldman***"), ¶¶ 62–63; **CLA-0051**, *Mondev*, ¶ 70.

these provisions "introduce[] a clear and rigid limitation defence – not subject to any suspension, prolongation or other qualification."[549]

228. Several tribunals have followed a clear methodology for applying limitation period clauses. For example, in applying a prescription clause almost identical to the one at issue here, the tribunal in *Infinito v. Costa Rica* endorsed the following approach:

> [T]o decide this objection the Tribunal must answer three questions: (i) first, it must identify the cut-off date for the three-year limitation period; (ii) second, it must determine whether the Claimant knew or should have known of the alleged breach or breaches before that cut-off date; and (iii) third, it must determine whether the Claimant knew or should have known that it had incurred loss or damage before that date.[550]

229. The first step of this analysis in the present case is straightforward: Claimants submitted their Notice of and Request for Arbitration on 24 January 2018. The cut-off date for the purpose of Article 10.18.1 is thus 24 January 2015, i.e., three years prior to the date of submission of the claims. The Tribunal must accordingly determine:

a. whether Claimants knew or should have known of the alleged breach or breaches before 24 January 2015; and

b. whether Claimants knew or should have known that they had incurred loss or damage before 24 January 2015.

230. If Claimants knew or should have known of either the alleged breaches or alleged loss before 24 January 2015—as in fact Claimants did—their claims do not comply with the temporal restriction of Article 10.18.1 and must be dismissed.

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[549] **CLA-0036**, *Grand River Enterprises Six Nations, Ltd. v. United States of America*, ICSID Case No. UNCT/14/2 (Nariman, Anaya, Crook), Decision on Objections to Jurisdiction, 20 July 2006 ("***Grand River***"), ¶ 29; **RLA-0029**, *Apotex* (Award), ¶¶ 304, 324–328.

[550] **RLA-0030**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5 (Kaufmann-Kohler, Hanotiau, Stern), Decision on Jurisdiction, 4 December 2017, ¶ 330.

b. Claimants first knew of the alleged breaches prior to 24 January 2015

231. The facts of this case demonstrate that Claimants knew or should have known of the alleged breaches well before 24 January 2015.

232. Article 10.18.1 inquires when the investor "**first** acquired, or should have **first** acquired, knowledge of the alleged breach"[551] (emphasis added). In the instant case, Claimants' claims all concern the impairment of their investment in Granahorrar.[552] The Tribunal therefore must identify the first moment at which Claimants knew or should have known that their alleged investment in Granahorrar had been impaired by acts or omissions attributable to the State. The triggering event is not *certainty* of such impairment.[553] Furthermore, it is not relevant that subsequent governmental action may have rendered the alleged impairment more acute.[554]

233. Claimants first acquired knowledge of the alleged breaches in 1998. Granahorrar was the subject of major regulatory measures in October 1998. As discussed above,

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[551] **RLA-0001**, TPA, Art. 10.18.1.

[552] Claimants' Memorial (PCA), pp. 10–14 ("Claimants invested in the Colombian financial services sector, and more precisely in the savings and loan institution Granahorrar"); Notice of and Request for Arbitration, ¶ 8 ("Claimants, Alberto Carrizosa Gelzis, Felipe Carrizosa Gelzis, and Enrique Carrizosa Gelzis, are U.S. citizens and investors who invested in Granahorrar.").

[553] **CLA-0051**, *Mondev*, ¶ 87 ("A **claimant may know that it has suffered loss** or damage **even if** the extent or quantification of the **loss** or damage **is still unclear**") (emphasis added).

[554] *See* **RLA-0013**, *EuroGas* (Award), ¶ 459 ("The State Parties to the Canada-Slovakia BIT **cannot have intended that Article 15(6) be read and applied in a way that exposes them to claims from investors that could date from more than three years before the entry into force of the treaty, just because a certain dispute** was not settled and/or **might give rise to a follow-up action**. Considering that the State's refusal to overturn an existing alleged breach gives rise to a new dispute would open the floodgates to a possible complete disregard of the condition *ratione temporis* of the application of a BIT. The consequence would be that an investor could bypass the *ratione temporis* limitations of a treaty by commencing local court proceedings after the entry into force of the treaty, in respect of an old dispute. This cannot be a sensible legal result.") (emphasis added); **RLA-0029**, *Apotex* (Award), ¶¶ 324–328 ("there is support in previous NAFTA decisions for the proposition that **the limitation period applicable to a discrete government or administrative measure** (such as the FDA decision of 11 April 2006) **is not tolled by litigation, or court decisions relating to the measure**") (emphasis added).

those regulatory measures form the essence of Claimants' dispute with Colombia. Claimants were immediately aware of these regulatory measures, as Fogafín had notified Claimants' legal representative of such measures in a letter dated 2 October 1998.[555]

234. Under similar circumstances, when assessing the moment at which the claimant first acquired knowledge of a regulatory measure alleged to constitute a treaty breach, the *Corona* tribunal held that the date of receipt of a letter notifying the measure "must be considered to be the date on which Claimant first gained actual knowledge of the [measure]."[556] In any event, Granahorrar's circumstances were the focus of headlines throughout Colombia[557] and was even covered by international press.[558] In light of this extensive media coverage, the Colombian Constitutional Court recognized that Granahorrar's troubled situation was notorious in October 1998.[559]

235. Alberto Carrizosa Gelzis was undoubtedly aware of the alleged breach in October 1998. Indeed, he discloses that on 1 July 1998, he was "promoted to Chairman of the Board of Directors of Granahorrar."[560] Alberto Carrizosa Gelzis's

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[555] **Ex. R-0038**, Letter from Superintendency (S. Ordoñez) to Granahorrar (J. Amaya), 2 October 1998 ("**Capitalization Order**"), p. 1 (the letter is from the Superintendency and is addressed to Jorge Enrique Amaya Pacheco, the President of Granahorrar at the time).

[556] **RLA-0012**, *Corona* (Award on Preliminary Objections), ¶ 221.

[557] **Ex. R-0107**, *Granahorrar, Recorrido de una Crisis*, EL TIEMPO, 5 October 1998 ("[C]orrían los plazos para que la corporación cumpliera sus compromisos con el Fondo de Garantías de Instituciones Financieras, Fogafín, que la había prestado hasta ese momento 320.000 millones de pesos contra cartera.").

[558] **Ex. R-0108**, Colombia Takes Over Granahorrar Bank, Planning $100 Million Injection to Save It, THE WALL STREET JOURNAL, 6 October 1998 ("The government's Financial Institutions Guarantee Fund, known as Fogafin, said it would take over the Granahorrar savings and loan immediately 'with the objective of protecting the public's savings and confidence in the Colombian system of savings and mortgage loans, and so that Granahorrar will continue lending its services to all clients.'").

[559] *See* **Ex. C-0023**, Judgment No. SU-447/11 (Constitutional Court) , 26 May 2011 ("**2011 Constitutional Court Judgment**"), p. 162.

[560] Alberto Carrizosa Gelzis Witness Statement, ¶ 28.

responsibilities "entailed relations with Fogafín, the Supreintendency of Banking, [and] the Central Bank[,]"[561] where he even supervised the CEO of Granahorrar.[562] Alberto Carrizosa Gelzis admits that he moved to Miami after the Colombian government actions in late 1998.[563]

236. The Superintendency issued the Capitalization Order on 2 October 1998. Such order was sent from Sara Ordonez Noriega directly to the President of Granahorrar, Jorge Enrique Amaya Pacheco.[564] The next day, Mr. Amaya Pacheco sent a letter to the Superintendency confirming that Granahorrar had informed its shareholders of the Capitalization Order.[565] After Fogafin's issuance of Resolution No. 2,[566] Granahorrar's shareholders gathered for a shareholders' meeting on 16 October 1998. At this point, the government measures that allegedly breached the TPA were fully known to Granahorrar. Yet Claimants did not file their Notice of and Request for Arbitration until 24 January 2018—almost twenty years after the relevant events of October 1998.

237. Even assuming arguendo that Claimants had not been immediately aware of the 1998 Regulatory Measures at the time of their issuance (quod non), Claimants necessarily knew of the alleged breaches by 28 July 2000. That was the date on which Claimants, through their Holding Companies, initiated legal action against the State before the Administrative Judicial Tribunal. In *Spence v. Costa Rica*, the tribunal took note of "the Claimants' objections to the [State's regulatory conduct]" on a certain date, and determined that "this conduct by each given Claimant in-and-of-itself indicates knowledge by that Claimant of a core breach that is now

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[561] Alberto Carrizosa Gelzis Witness Statement, ¶ 28.

[562] Alberto Carrizosa Gelzis Witness Statement, ¶ 28.

[563] *See* Alberto Carrizosa Gelzis Witness Statement, ¶ 29.

[564] *See* **Ex. C-0019**, Letter form Superintendency (S. Ordoñez) to Granahorrar (J. Amaya), 2 October 1998..

[565] *See* **Ex. R-0039**, Letter from Granahorrar (J. Amaya) to Superintendency (S. Ordoñez), 3 October 1998.

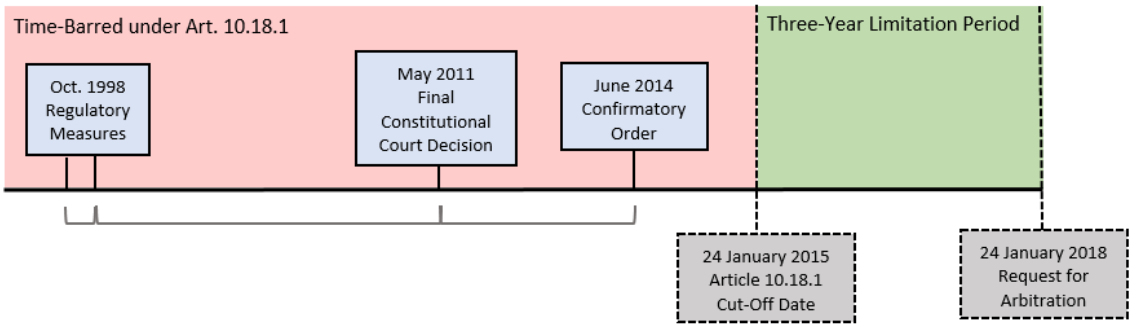
[566] *See* **Ex. R-0042**, Resolution No. 002 (Fogafín), 3 October 1998.

alleged, namely the alleged failure to pay adequate compensation."[567] Through the lawsuit (filed in the name of their Holding Companies) initiated on 28 July 2000, Claimants challenged the Capitalization Order and Value Reduction Order under Colombian law. Yet Claimants filed their Notice of Arbitration nearly 18 years after Claimants had filed their legal challenge before the Administrative Judicial Tribunal.

238. In their Memorial on Jurisdiction, as discussed above, Claimants purport to rely on the 2014 Confirmatory Order of the Constitutional Court in their attempt to overcome the *ratione temporis* restrictions of the treaty. Yet the Confirmatory Order was issued on 25 June 2014, and Claimants became aware—or should have become aware—of such order on that same date, through an official press release issued by the Constitutional Court.[568] However, the cut-off date for the purpose of Article 10.18.1 is 24 January 2015.

239. The relevant events and critical dates are illustrated in the following simple timeline:

Figure 1: Claimants' Claims Are Time-Barred under TPA Article 10.18.1



240. The foregoing means that, even on their own case, Claimants cannot overcome the *ratione temporis* bar, since they knew or should have known of the Confirmatory Order by 2014, which predates the cut-off date of 24 January 2015. Claimants'

[567] **CLA-0084**, *Spence*, ¶ 250.

[568] **Ex. C-0027**, Release No. 25 (and Dissent), Case No. D-9996 (Constitutional Court), 25–26 June 2014.

claims thus do not comply with the temporal restriction set forth in Article 10.18.1, and the Tribunal need not proceed to the second step of the analysis.

c. Claimants first knew of their alleged loss before 24 January 2015

241. Furthermore, Claimants also knew or should have known of their alleged loss or damage well before 24 January 2015. Again, the TPA dictates that the relevant inquiry is when Claimants **first** acquired knowledge of having incurred loss or damage.[569] The *Spence* tribunal approached this inquiry as follows:

> [T]he Tribunal agrees with the approach adopted in *Mondev*, *Grand River*, *Clayton* and *Corona Materials* that the limitation clause does not require full or precise knowledge of the loss or damage. Indeed, in the Tribunal's view, the Article 10.18.1 requirement, inter alia, to point to the date on which the claimant first acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result. It is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking.[570]

242. The *Grand River* and *Mondev* tribunals similarly observed that "damage or injury may be incurred even though the amount or extent may not become known until some future time."[571]

243. Claimants were aware of the alleged loss or damage *prior* to 24 January 2015. The alleged loss for which Claimants seek compensation in this arbitration is the alleged loss resulting from the 1998 Regulatory Measures. Claimants' damages expert concedes as much in his expert report:

> I, Antonio L. Argiz . . . was retained . . . to provide expert opinions on damages incurred by the Claimants as a result of the Colombian

[569] **RLA-0001**, TPA, Art. 10.18.1.

[570] **CLA-0084**, *Spence*, ¶ 213 (internal citations omitted).

[571] **CLA-0051**, *Mondev*, ¶ 87; **CLA-0036**, *Grand River*, ¶¶ 80–81.

> government's ('Respondent') **actions through its agencies (e.g. Central Bank, FOGAFIN and Superintendency of Banking) to expropriate** Corporacion Colombiana de Ahorro y Vivienda ('Granahorrar'), resulting in loss of value of Claimants' interest in Granahorrar.[572] (Emphasis added)

244. Claimants had actual or constructive knowledge *prior* to 24 January 2015 of the alleged loss caused by the 1998 Regulatory Measures. Indeed, on 28 July 2000, Claimants (through their Holding Companies) filed the Nullification and Reinstatement Action, in which Claimants *sought compensation for the allegedly expropriatory 1998 Regulatory Measures*.[573] As a result, Claimants were already aware by 28 July 2000 of alleged loss for which they seek compensation in this arbitration.[574]

245. Moreover, on 6 June 2012, Claimants brought claims against Colombia (including a claim for compensation) arising out of these same events before the IACHR.[575] Having twice sought compensation for the events arising out of the 1998 Regulatory Measures, it would be disingenuous for Claimants to allege that they had not acquired knowledge of their alleged loss prior to 24 January 2015.

246. As discussed above, Claimants attempt to shift the focal point to the 2014 Confirmatory Order. However, the 2014 Confirmatory Order was issued prior to the critical date of 24 January 2015. Claimants therefore first acquired knowledge of the alleged loss long before the critical date.

247. For all of the foregoing reasons, Claimants' claims do not comply with the three-year limitations period set forth in Article 10.18.1, and this Tribunal therefore lacks jurisdiction *ratione temporis*.

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[572] Expert Report of Antonio L. Argiz, 28 May 2019, ¶ 1.

[573] *See* **Ex. R-0050**, Nullification and Reinstatement Action, pp. 1-3.

[574] *See* Notice of and Request for Arbitration, p. 2 ("FOGAFIN discriminated against GRANAHORRAR....The bank was expropriated")

[575] *See generally* **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012.

d. Claimants cannot circumvent the express temporal restriction of the TPA using the MFN clause

248. In their Memorial on Jurisdiction, Claimants argue that the Tribunal should set aside the jurisdictional requirements of Article 10.18.1 of the TPA because "Claimants have exercised their right pursuant to Article. 12.3(1) of the TPA (MFN provision)."[576] In other words, Claimants seek to utilize Article 12.3.1 of the TPA ("**Chapter 12 MFN Clause**") in order to circumvent the express condition of consent codified by Colombia and the United States in Article 10.18.1 of the TPA. For the following reasons, Claimants' argument in this respect should be rejected.

i. The MFN Clause cannot be used to circumvent the TPA's consent to jurisdiction

249. Claimants invoke the Chapter 12 MFN Clause in an attempt to substitute Article 10.18.1 of the TPA with Article 11(5) of the Colombia-Switzerland BIT.[577] To recall, Article 10.18.1 of the TPA prohibits the submission of claims more than three years after a claimant first knew or should have known of the alleged breach and alleged loss.[578] Article 11(5) of the Colombia-Switzerland BIT, on the other hand, provides that

> [a]n investor may not submit a dispute for resolution according to this Article if more than five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.[579]

250. Claimants thus attempt to replace the three-year limitations period of the TPA with the five-year limitations period set forth in the Colombia-Switzerland BIT.

251. As a threshold matter, Claimants have failed to meet their burden of demonstrating that the Chapter 12 MFN Clause can be used to import the five-

[576] Claimants' Memorial (PCA), ¶ 405.

[577] Claimants' Memorial (PCA), ¶ 405.

[578] **RLA-0001**, TPA, Art. 10.18.1.

[579] Colombia-Switzerland BIT, Art. 11(5).

year limitations period of the Colombia-Switzerland BIT. Claimants devote a single sentence in their entire Memorial on Jurisdiction to Article 11(5) of the Colombia-Switzerland BIT[580] and the issue of importation of that provision through the Chapter 12 MFN Clause.[581] That sentence does not even begin to analyze, let alone apply, the applicable legal standard under the Chapter 12 MFN Clause.

252. Claimants' failure to meet their burden of proof justifies rejection of their attempt to incorporate by reference Article 11(5) of the Colombia-Switzerland BIT. Additional reasons (discussed in sub-sections (a) and (b) below) exist for rejecting Claimants' attempted reliance on the Chapter 12 MFN Clause.

(a) The Chapter 12 MFN Clause cannot be used to circumvent conditions of consent to arbitration

253. Under an appropriate interpretation and application of the Chapter 12 MFN Clause, as confirmed by the relevant case law, such clause cannot be used to circumvent conditions of consent in the TPA. Claimants therefore are not entitled to replace the three-year limitations period of the TPA with the five-year limitations period of the Colombia-Switzerland BIT.

254. The Chapter 12 MFN Clause, like any other treaty provision, must be interpreted in accordance with Article 31 of the VCLT, i.e., by focusing on the ordinary meaning of its terms, in its context and in light of the object and purpose of the TPA.[582] Claimants recognize that this is the approach taken by international

[580] Claimants' Memorial (PCA), ¶ 405.

[581] Claimants' Memorial (PCA), ¶ 405 ("Consonant with the analysis set forth in the *ratione voluntatis* section of this Memorial, Claimants have exercised their right pursuant to Art. 12.3(1) of the TPA to invoke the five-year limitations provision contained in the agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments in Art. 11 paragraph 5 of that treaty.").

[582] *See* **RLA-0034**, *ICS* (Award on Jurisdiction), ¶ 283 ("The Tribunal thus turns to the interpretation of the text of the provision. This exercise focuses, in accordance with Article 31(1) VCLT, on the identification of the ordinary meaning of the terms of the MFN clause in context

tribunals that have interpreted MFN clauses.[583] Claimants, however, fail to interpret the Chapter 12 MFN Clause in accordance with Article 31 of the VCLT. They also disregard the line of jurisprudence[584] (including the majority of recent decisions on the subject[585]) that holds that an MFN clause can only be used to import elements of a dispute resolution clause (i.e., conditions of consent) if the MFN clause "clearly and ambiguously" provides for such application.[586] For example, the *Plama v. Bulgaria* tribunal held that the

> [the] MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, **unless the MFN provision in the [treaty in question] leaves no doubt** that the Contracting Parties intended to incorporate them.[587] (Emphasis added)

255. The *Berschader* tribunal similarly stated that

> [t]he starting point in determining whether or not an MFN clause encompasses the dispute resolution provisions of other treaties must always be an assessment of the intention of the contracting parties upon the conclusion of the original treaty. The Tribunal has applied the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT **clearly and unambiguously** so provide or where it can otherwise be clearly inferred that this was the intention of the Contracting Parties.[588] (Emphasis added)

256. Along the same lines, the *Daimler v. Argentina* observed:

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and in light of the object and purpose of the BIT."); **RLA-0033**, *Daimler* (Award), ¶¶ 169–170; **CLA-0093**, *Berschader*, ¶ 175; **CLA-0007**, *Austrian Airlines*, ¶ 121.

[583] See Claimants' Memorial (PCA), ¶ 339.

[584] *See generally* **CLA-0062**, *Plama* Decision on Jurisdiction; **CLA-0088**, *Telenor*; **CLA-0093**, *Berschader*; **CLA-0007**, *Austrian Airlines*; **RLA-0034**, *ICS* (Award on Jurisdiction); **RLA-0033**, *Daimler*, (Award); **RLA-0035**, *Euram* (Award on Jurisdiction); **CLA-0043**, *Kılıç*.

[585] *See generally* **CLA-0007**, *Austrian Airlines*; **RLA-0034**, *ICS* (Award on Jurisdiction); **RLA-0033**, *Daimler* (Award); **RLA-0035**, *Euram* (Award on Jurisdiction).

[586] **CLA-0093**, *Berschader*, ¶ 206.

[587] **CLA-0062**, *Plama*, ¶ 223.

[588] **CLA-0093**, *Berschader*, ¶ 206.

> [S]tates may elect whatever means of settlement of disputes relating to international investment they so choose. They may also perfectly well decide in the framework of a BIT to extend the bearing of a most-favored nation (MFN) clause to the international settlement of their disputes relating to investments. But this choice cannot be presumed or artificially constructed by the arbitrator; it can only result from the demonstrated expression of the states' will.[589]

257. The requirement of clear and unambiguous evidence derives from the fundamental "rule according to which state consent is the incontrovertible requisite for any kind of international settlement procedure."[590] The *Daimler* tribunal noted that "consent must be established," and that "it is not permissible to presume a state's consent by reason of the state's failure to proactively disavow the tribunal's jurisdiction."[591] Accordingly, tribunals are not "authorize[d] . . . to interpret such clauses in a manner which exceeds the consent of the contracting parties as expressed in the text."[592] As succinctly stated by the tribunal in *ICS v. Argentina*, "the duty of the Tribunal is to discover and not to create [the] meaning" of an MFN clause.[593]

258. Tribunals have referred to examples of MFN clauses that provide the requisite "clear and unambiguous" evidence of States' consent to extend the scope of such clauses to include dispute resolution provisions. For instance, in the United Kingdom Model BIT, the MFN clause provides:

> (1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

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[589] **RLA-0033**, *Daimler* (Award), ¶ 176 (internal citations omitted).

[590] **RLA-0033**, *Daimler* (Award), ¶ 175.

[591] **RLA-0033**, *Daimler* (Award), ¶ 175.

[592] **RLA-0033**, *Daimler* (Award), ¶ 172.

[593] **RLA-0034**, *ICS* (Award on Jurisdiction), ¶ 277; *see also* **RLA-0033**, *Daimler* (Award), ¶ 166.

. . .

> (3) For the avoidance of doubt it is confirmed that **the MFN treatment** provided for in paragraphs (1) and (2) above **shall apply to the provisions of Articles 1 to 11** [which include the dispute resolution provisions)] **of this Agreement**.[594] (Emphasis added)

259. The above-quoted MFN clause clearly and unambiguously extended the scope of the Parties' consent to the dispute resolution mechanism. By contrast, the Chapter 12 MFN Clause invoked by Claimants in the present case contains no such indication. To recall, Article 12.3.1 of the TPA contains an unadorned MFN clause, which states simply that

> [e]ach Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of any other Party or of a non-Party, in like circumstances.[595]

260. The Chapter 12 MFN Clause above can be contrasted to others, such as the one at issue in *Maffezini v. Spain*, that by its terms applied to "all matters" covered by the relevant treaty (as a result of which the tribunal concluded that the clause applied also to the treaty's dispute resolution provisions). However, tribunals have interpreted narrower MFN clauses (such as the one in the TPA—i.e., clauses that do not expressly refer to "all matters"), as not altering the scope or conditions of the Parties' consent applying to the dispute resolution clauses, and therefore as not extending to the treaty's dispute resolution provisions.[596]

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[594] **RLA-0006**, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkmenistan for the Promotion and Protection of Investments, 9 February 1995 ("**UK-Turkmenistan BIT**"), Art. 3.

[595] **RLA-0001**, TPA, Art. 12.3.1.

[596] *See e.g.*, **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶¶ 396–397 ("Through its interpretation of the ordinary meaning of the text of Article 4(5) of the BIT, the Tribunal thus concludes that the MFN clause does not apply *prima facie* to the dispute settlement mechanism"); **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 380 (where the MFN clause of the Germany-Bulgaria BIT read as

261. In sum, because the TPA does not provide "clear and unambiguous" evidence that the Chapter 12 MFN Clause applies to the treaty's dispute resolution clause, or can otherwise be used to alter the TPA's conditions to consent, Claimants cannot import the five-year limitations period from the Colombia-Switzerland BIT.

(b) Claimants misinterpret the TPA and mischaracterize the case law

262. In their attempt to circumvent the three-year limitations period of the TPA, Claimants misinterpret the text of the TPA and mischaracterize the case law.

263. Claimants misconstrue the TPA in two principal ways. First, they argue that the term "treatment" in the Chapter 12 MFN Clause (Article 12.3) should be interpreted broadly to encompass dispute resolution provisions.[597] In support of their position, they invoke *Siemens*, *AWG*, *Suez*, and *Impregilo.* They characterize those cases as supporting their contention that the term "treatment" in and of itself (i.e., irrespective of whether it contains other language such as "all matters") signals an expansive scope in the MFN clause which enables importation of dispute resolution provisions from other treaties.[598] However, multiple tribunals have refused to interpret the simple word "treatment" as permitting the importation of dispute resolution clauses from other treaties.[599]

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follows: "In matters governed by this article, the investments and investors of either Contracting Party shall enjoy treatment in the territory of the other Contracting Party that is no less favourable than that enjoyed by investments and investors of those third States that receive most favourable treatment in this respect"); **CLA-0007**, *Austrian Airlines*, ¶ 112 (where the MFN clause of the Germany-Bulgaria BIT read as follows: "Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment that is no less favorable than that which it accords to its own investors or to investors of any third states and their investments[.]").

[597] *See* Claimants' Memorial (PCA), ¶¶ 352–373 (referencing Article 12.3 of the TPA).

[598] *See* Claimants' Memorial (PCA), ¶ 359.

[599] *See* **CLA-0062**, *Plama* Decision on Jurisdiction; **CLA-0088**, *Telenor*; **CLA-0093**, *Berschader*; **CLA-0007**, *Austrian Airlines*; **RLA-0034**, *ICS* (Award on Jurisdiction); **RLA-0033**, *Daimler* (Award); **RLA-0035**, *Euram* (Award on Jurisdiction); **CLA-0095**, *Wintershall*; **CLA-0043**, *Kılıç*.

264. Furthermore, the MFN provisions in the four cases that Claimants cite all include broader language than Article 12.3 of the TPA.[600] For example, the *Suez* and *AWG* tribunals expressly relied upon the fact that the MFN clause in the relevant treaty applied by its terms to "all matters" governed by the treaty.[601] The *Salini* tribunal, for its part, relied on the *absence* of the phrase "all matters" from the relevant MFN clause in finding that such clause could not be used to alter the conditions of consent under the treaty.[602]

265. Second, Claimants argue that the juxtaposition of the MFN clauses in Chapters 10 ("Investment") and 12 ("Financial Services") suggests that the Chapter 12 MFN Clause was meant to apply to dispute resolution provisions.[603] Specifically, Claimants argue that, for "interpretative purposes,"[604] the Tribunal should compare the Chapter 12 MFN Clause with the analogous clause of Chapter 10 ("**Chapter 10 MFN Clause**"), which reads as follows:

> 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,

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[600] *See* **CLA-0081**, *Siemens*, ¶ 103 (in which the Tribunal considered the MFN clause to apply to dispute resolution provisions, in part, because the word "treatment" was accompanied by the phrase "activities related to the investments"); **CLA-0008**, *AWG* Decision on Jurisdiction, ¶ 61 (in which the Tribunal considered the MFN clause to apply to dispute resolution provisions, in part, because it contained the phrase "all matters"); **CLA-0038**, *Impregilo-Argentina*, ¶ 99 (in which the tribunal relied in part upon the fact that the MFN clause expressly applied "all . . . matters regulated by this Agreement"); **CLA-008**, *AWG*, Decision on Jurisdiction, ¶ 55 (relying on the fact that "[t]he text [of the MFN clause] quoted above clearly states that 'in all matters' (*en todas las materias*) a Contracting party is to give a treatment no less favorable than that which it grants to investments made in its territory by investors from any third country.").

[601] *See* **CLA-0008**, *AWG* Decision on Jurisdiction, ¶ 55; **CLA-0086**, *Suez* Decision on Jurisdiction, ¶ 61.

[602] **CLA-0075**, *Salini Costruttori S.p.A. and Italstrade S.p A. v. The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13 (Guillaume, Cremades, Sinclair), Decision on Jurisdiction, 9 November 2004 ("***Salini-Jordan***"), ¶ 118.

[603] Claimants' Memorial (PCA), ¶¶ 340–342, 345.

[604] *See* Claimants' Memorial (PCA), ¶ 334.

> management, conduct, operation, and sale or other disposition of investments.[605]

266. Claimants then highlight that the Chapter 10 MFN Clause contains a footnote ("**Chapter 10 MFN Footnote**") that features a "restrictive qualification,"[606] the relevant part of which reads as follows:

> For greater certainty, treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" referred to in paragraphs 1 and 2 of Article 10.4 **does not encompass dispute resolution mechanisms**, such as those in Section B, that are provided for in international investment treaties or trade agreements.[607] (Emphasis added)

267. In light of this footnote, Claimants concede that the Chapter 10 MFN Clause "only contemplates the importation of *substantive* and not *procedural* rights"[608] (emphasis in original). The Parties thus agree that the Chapter 10 MFN Footnote quoted above unequivocally expresses the State Parties' intent to limit the scope of the Chapter 10 MFN Clause, so that it cannot be used to alter the conditions of consent to arbitration contained in the dispute settlement mechanism of Chapter 10 (i.e., Section B of Chapter 10). However, Claimants allege that the absence of such a footnote in Chapter 12 means that the Chapter 12 MFN Clause *does* apply to dispute resolution provisions.[609]

268. Claimants' argument is untenable. The common intent of the State Parties (as reflected in the Chapter 10 MFN Footnote) must be respected and given full effect, including in the context of claims under Chapter 12. As discussed above, Chapter 12 does not contain an endogenous investor-State dispute settlement mechanism. Instead, Chapter 12 imports the dispute settlement mechanism of Chapter 10, and

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[605] **RLA-0001**, TPA, Article 10.4.2.

[606] *See* Claimants' Memorial (PCA), ¶ 335.

[607] **RLA-0001**, TPA, Article 10.4(2), fn. 2.

[608] Claimants' Memorial (PCA), ¶ 336.

[609] Claimants' Memorial (PCA), ¶ 338.

only with respect to certain specified types of claims.[610] The dispute settlement mechanism of Chapter 12 is therefore a limited, narrower version of Section B of Chapter 10. Moreover, the Chapter 10 MFN Footnote forms part of the context of Chapter 12, and therefore must be taken into account.[611] Pursuant to the Chapter 10 MFN Footnote, the conditions of consent contained in Section B of Chapter 10 cannot be altered or expanded by importing dispute resolution provisions or conditions from other treaties. In other words, the Chapter 10 MFN Footnote shields the existing dispute resolution mechanism of Chapter 10 from expansion or alteration. The express will of the State Parties to not permit the expansion or alteration of the investor-State mechanism of Chapter 10 must be preserved when such mechanism is incorporated (in an expressly limited way) into Chapter 12. Claimants therefore cannot rely on the Chapter 12 MFN Clause to alter the conditions of consent to arbitration under the TPA.

269. An additional consideration illustrates the illogicality of Claimants' interpretation. If the Chapter 10 MFN Footnote were simply ignored in the context of Chapter 12 claims, as Claimants propose, the effect would be that: (i) a claimant bringing claims under Chapter 10 of the TPA would be unable to import more favorable conditions of consent than those set forth in Section B of Chapter 10, whereas (ii) a claimant bringing claims under Chapter 12, which simply imports Section B of Chapter 10 (with additional limitations), would be able to modify the conditions of consent contained in Section B of Chapter 12. Such a result would defy logic, and would do violence to the text of the TPA and the will of the State Parties.

270. Claimants also mischaracterize the case law concerning MFN clauses. In their single sentence concerning Article 11(5) of the Colombia-Switzerland BIT,

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

[611] *See* **CLA-0124**, VCLT, Art. 31.1.

Claimants refer generally to "the *ratione voluntatis* section of [their] Memorial".[612] In that section of their Memorial on Jurisdiction, Claimants allege that "general and conventional post *Maffezini* practice accords similar expansive treatment to MFN clauses absent clear and express provisions to the contrary."[613] That sweeping statement by Claimants seems to be based on their survey of a specific line of decisions, almost all of which were issued before 2007,[614] and all of which (including *Maffezini*) relate to provisions in Argentina's BITs that require 18-months of local court litigation before arbitration can be pursued.[615] Those provisions created a very specific situation: the claimants were always going to be able to submit their claim to arbitration; the question was simply whether they were required to initiate local litigation and wait 18 months before doing so, or whether that requirement could be waived. Here, by contrast, the condition to consent at issue affirmatively bars a claimant from submitting its claim after a specified cut-off date (viz., three years from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged). Claimants have failed to identify any case in which a condition to consent such as the latter has been circumvented using a general MFN clause.

271. Further, Claimants fail to recognize that (i) several tribunals have expressed serious doubts about the reasoning of the *Maffezini* tribunal to begin with,[616] and

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[612] Claimants' Memorial (PCA), ¶ 405.

[613] Claimants' Memorial (PCA), ¶ 346.

[614] The only recent decision that Claimants rely on is *Impregilo v. Argentina*, which related to the 18-month local court litigation requirement in many Argentina BITs. The *Impregilo* tribunal based its decision "on the basis" of the MFN clause containing the broad "'all matters' or 'any matter'" language. **CLA-0038**, *Impregilo-Argentina*, ¶ 108.

[615] *See* Claimants' Memorial (PCA), ¶¶ 339–373.

[616] *See, e.g.*, **CLA-0075**, *Salini-Jordan*, ¶ 115 ("The current Tribunal shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case. **Its fear is that the precautions taken by the authors of the award may in practice prove difficult to apply**, thereby adding more uncertainties to the risk of "treaty shopping") (emphasis added); **CLA-0093**, *Berschader*, ¶ 169.

(ii) many tribunals,[617] including the majority of the ones that have addressed the subject recently,[618] have refused to adopt the *Maffezini* approach in contexts beyond that of the 18-month clause. For example, the *Plama v. Bulgaria* tribunal reviewed "the expansive interpretation [of the MFN clause] in the *Maffezini* case" and determined that such "interpretation went beyond what States Parties to BITs generally intended to achieve by an MFN provision."[619]

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272. In sum, the Chapter 12 MFN Clause does not enable the importation of more favorable conditions of consent contained in dispute resolution provisions of other treaties. Such clause therefore cannot be used to circumvent the express limitations to consent in the TPA (including those enshrined in the Chapter 10 MFN Footnote), and thus cannot be used to replace the TPA's three-year limitations period with the five-year limitation period from the Colombia-Switzerland BIT.

ii. In any event, the Tribunal lacks jurisdiction even under the terms of the provision that Claimants seek to incorporate by reference from the Colombia-Switzerland BIT

273. Even if the Colombia-Switzerland BIT were to apply (which it does not), the Tribunal still would lack jurisdiction to hear Claimants' claims, because they do not comply with the temporal restriction set forth in that treaty.

274. Article 11 of the Colombia-Switzerland BIT sets forth the following limitations clause:

> An investor may not submit a dispute for resolution according to this Article if more than five years have elapsed from the date the

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[617] *See generally* **CLA-0062**, *Plama* Decision on Jurisdiction; **CLA-0088**, *Telenor*; **CLA-0093**, *Berschader*; **CLA-0007**, *Austrian Airlines*; **RLA-0034**, *ICS* (Award on Jurisdiction); **RLA-0033**, *Daimler* (Award); **RLA-0035**, *Euram* (Award on Jurisdiction); **CLA-0095**, *Wintershall*; **CLA-0043**, *Kılıç*.

[618] *See generally* **CLA-0007**, *Austrian Airlines*; **RLA-0034**, *ICS* (Award on Jurisdiction); **RLA-0033**, *Daimler* (Award); **RLA-0035**, *Euram* (Award on Jurisdiction); **CLA-0043**, *Kılıç*.

[619] **CLA-0062**, *Plama* Decision on Jurisdiction, ¶ 203.

> investor **first acquired or should have acquired knowledge** of the events giving rise to the dispute.[620]

275. As noted above, Claimants submitted their Notice of and Request for Arbitration on 24 January 2018. Pursuant to Article 11 of the Swiss BIT, Claimants cannot submit a dispute if they "first acquired or should have acquired knowledge of the events giving rise to the dispute" before 24 January 2013 (which is five years before they submitted the dispute to arbitration).

276. Claimants' claims do not comply with this temporal restriction. As explained above, and as conceded by Claimants,[621] this dispute concerns the 1998 Regulatory Measures. Indeed, through this arbitration, Claimants are seeking compensation for the 1998 Regulatory Measures.[622] Claimants first had knowledge of the events giving rise to the dispute almost immediately after the implementation of the 1998 Regulatory Measures. In any event, they incontrovertibly had such knowledge — at the very latest — by 28 July 2000 (i.e., the date on which Claimants initiated proceedings in Colombian courts with respect to the regulatory measures at issue in the present arbitration). Claimants thus had knowledge of the events giving rise to this dispute long before the critical date under the Colombia-Switzerland BIT (i.e., 24 January 2013).

277. Claimants' attempt to shift the focus to the 2014 Confirmatory Order is unavailing. The reality is that the 2014 Confirmatory Order did not alter the alleged

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[620] **RLA-0004**, Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, 17 May 2006 ("**Colombia-Switzerland BIT**"), Art. 11.

[621] *See* Claimants' Memorial (PCA), p. 12 ("In a nutshell, Colombia's financial regulatory authorities unlawfully expropriated Claimants' investment"); Notice of and Request for Arbitration, p. 1 ("This case is about the inordinate abuse of regulatory sovereignty.").

[622] Expert Report of Antonio L. Argiz, 28 May 2019, ¶ 1 ("I, Antonio L. Argiz . . . was retained . . . to provide expert opinions on damages incurred by the Claimants as a result of the Colombian government's ('Respondent') **actions through its agencies (e.g. Central Bank, FOGAFIN and Superintendency of Banking) to expropriate** Corporacion Colombiana de Ahorro y Vivienda ('Granahorrar'), resulting in loss of value of Claimants' interest in Granahorrar" (emphasis added)).

impairment to their investment. To recall, through their 29 July 2000 Nullification and Reinstatement Action, Claimants challenged the 1998 Regulatory Measures and sought compensation for the damage allegedly inflicted by those measures.[623] However, 2011 Constitutional Court Judgment dismissed Claimants' claims. As explained by Dr. Ibáñez, and as discussed above, the 2011 Constitutional Court Judgment constituted the final and definitive resolution of Claimants' claims.[624] The 2011 Constitutional Court thus did not alter the status quo or trigger a new dispute.

278. Because Claimants had knowledge of the events giving rise to this dispute before 24 January 2013, Claimants' claims fail to satisfy the limitations period set forth in the Colombia-Switzerland BIT. Accordingly, even the third-party treaty clause that Claimants seek to incorporate via the MFN clause of TPA does not assist their case.

C. The Tribunal lacks jurisdiction *ratione voluntatis*

279. This Tribunal lacks jurisdiction *ratione voluntatits* over all of Claimants' claims, for various reasons. All of Claimants' claims must be rejected because Claimants have failed to satisfy various conditions for consent under the TPA (**Section III.C.1**). In addition, several of Claimants' claims fall outside of the scope of consent set forth in Chapter 12 of the TPA (**Section III.C.2**).

280. Claimants cannot rely on the Chapter 12 MFN Clause to overcome the jurisdictional limitations *ratione voluntatis* specified in the TPA. Such reliance amounts to an improper attempt to arbitrate certain types of claims that Colombia and the United States excluded from arbitration (**Section III.C.3(a)**). Likewise, Claimants cannot use the Chapter 12 MFN Clause as a means to incorporate by reference the fair and equitable treatment provision of the Colombia-Switzerland BIT ("**Colombia-Switzerland BIT**") (**Section III.C.3(b)**).

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[623] *See* **Ex. R-0050**, Nullification and Reinstatement Action, 28 July 2000, pp. 80-81.

[624] **RER-1**, Expert Report of Dr. Ibáñez, ¶ 133.

1. *The Tribunal lacks jurisdiction* ratione voluntatis *because Claimants have not satisfied several conditions for consent under Chapter 10 of the TPA, incorporated by reference (with certain limitations) into Chapter 12*

281. All of Claimants' claims must be dismissed for lack of jurisdiction *ratione voluntatis* because Claimants fail to satisfy the conditions for consent to arbitration set forth in the TPA. Chapter 10 of the TPA is the investment chapter of the treaty. Section B of that chapter establishes an investor-State dispute settlement mechanism that includes arbitration, and sets forth conditions to the States Parties' consent to arbitration.[625] For its part, Chapter 12 of the TPA (which is the chapter that governs financial services), incorporates by reference (but with certain important limitations) the investor-State dispute settlement mechanism of Chapter 10, including its conditions for consent. Specifically, Article 12.1.2(b) provides that "Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter."[626] However, as discussed in greater detail below, that provision also makes it clear that such dispute settlement provisions are available only for a limited category of claims.[627]

282. As discussed in the following subsections, Claimants have not complied with the following conditions to consent in Chapter 10 Section B: (a) the requirement of consultation and negotiation; (b) the requirement of notice of intent; and (c) the requirement of waiver.

a. <u>Claimants have not met the consultation and negotiation requirement</u>

283. Claimants have failed to satisfy the requirement of consultation and negotiation set forth in Section B of Chapter 10. Specifically, Article 10.15 of the TPA provides that,

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[625] *See generally* **RLA-0001**, TPA, Ch. 10, § B.

[626] **RLA-0001**, TPA, Art. 12.1.2(b).

[627] **RLA-0001**, TPA, Art. 12.1.2(b).

> [i]n the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.[628]

284. Tribunals have treated similar requirements of amicable settlement in other treaties as jurisdictional requirements.[629] For example, in *Murphy v. Ecuador*, the relevant treaty stated that,"[i]n the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation."[630] The tribunal held that "the six-month period established in Article VI(3) of the BIT is a mandatory requirement,"[631] and that "it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration."[632]

285. Claimants here have not complied with this condition for jurisdiction: they never sought to resolve the dispute amicably with Colombia, as required by Chapter 10. Thus, for example, they did not seek to consult with Colombia about their claims, nor did they attempt at any time to negotiate a settlement of these claims. Because Claimants failed to satisfy the condition of consent in Article 10.15, incorporated by reference into Chapter 12,[633] the Tribunal lacks jurisdiction *ratione voluntatis*.

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[628] **RLA-0001**, TPA, Art. 10.15.

[629] *See e.g.*, **RLA-0048**, *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4 (Blanco, Grigera Naón, Vinuesa), Award on Jurisdiction, 15 December 2010 ("***Murphy* (Award on Jurisdiction)**"), ¶ 149; **CLA-0075**, *Salini Costruttori S.p A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13 (Guillaume, Cremades, Sinclair), Decision on Jurisdiction, 9 November 2004 ("***Salini-Jordan***"), ¶ 16; **RLA-0047**, *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Orrego Vicuña, Espiell, Tschanz), Decision on Jurisdiction, 14 January 2004 ("***Enron* (Decision on Jurisdiction)**"), ¶ 88.

[630] **RLA-0048**, *Murphy* (Award on Jurisdiction), ¶ 95.

[631] **RLA-0048**, *Murphy* (Award on Jurisdiction), ¶ 132.

[632] **RLA-0048**, *Murphy* (Award on Jurisdiction), ¶ 149.

[633] *See* **RLA-0001**, TPA, Art. 12.1.2(a).

b. Claimants have not met the notice of intent requirement

286. Claimants have also failed to comply with the notice of intent requirement set forth in Section B of Chapter 10. Specifically, Article 10.13.2 of the TPA requires that

> [a]t 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").[634]

287. Tribunals have treated similar requirements in other treaties as affirmative conditions of consent.[635] For example, the *Western Enterprise* tribunal held:

> Proper notice is an important element of the State's consent to arbitration, as it allows the State, acting through its competent organs, to examine and possibly resolve the dispute by negotiations.[636]

288. Similarly, the *Burlington Resources v. Ecuador* tribunal considered that such requirements are jurisdictional in nature. In *Burlington*, the relevant treaty stated that "in the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably [within a six-month period], the national or the company concerned may choose to submit the dispute [to arbitration]."[637] Notwithstanding that this treaty provision did not expressly require any obligation to notify the respondent six months before submitting the dispute to arbitration, the tribunal determined that "the Notice of and Request for Arbitration

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[634] **RLA-0001**, TPA, Art. 10.16.2.

[635] *See e.g.* **RLA-0049**, *Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2 (Blanco, Paulsson, Pryles), Order, 16 March 2006 ("***Western NIS* (Order)**"), ¶ 5; **RLA-0050**, *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017 ("***Supervision* (Award)**"), ¶ 346.

[636] **RLA-0049**, *Western NIS* (Order), ¶ 5.

[637] **RLA-0051**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (Kaufmann-Kohler, Stern, Orrego Vicuña), Decision on Jurisdiction, 2 June 2010 ("***Burlington* (Decision on Jurisdiction)**"), ¶ 103.

is too late a time to appraise Respondent of a dispute."[638] The tribunal explained that the waiting period

> is designed precisely to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration. Claimant has only informed Respondent of this dispute with the submission of the dispute to ICSID arbitration, thereby depriving Respondent of the opportunity accorded by the Treaty, to redress the dispute before it is referred to arbitration.[639]

289. Subsequent tribunals have adopted similar reasoning.[640]

290. Here, Claimants failed to deliver any written notice of intent, despite the explicit requirement to do so under Article 10.16.2 of the TPA.[641] The Tribunal therefore lacks jurisdiction *ratione voluntatis* over their claims.

c. Claimants have not met the waiver requirement

291. Claimants have also failed to meet the requirement of waiver set forth in the TPA. Pursuant to Article 10.18.2(b) of the TPA,

> [n]o claim may be submitted to arbitration under this Section unless . . . the notice of arbitration is accompanied,
>
> (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and

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[638] **RLA-0051**, *Burlington* (Decision on Jurisdiction), ¶ 312.

[639] **RLA-0051**, *Burlington* (Decision on Jurisdiction), ¶ 312.

[640] *See* **RLA-0048**, *Murphy* (Award on Jurisdiction), ¶ 144 ("It is not possible to ignore the existence of the norms contained in Article VI of the BIT, regarding the obligation of the parties to attempt negotiations in order to resolve their disputes and the impossibility to resort to ICSID before the six-month term has elapsed"); **RLA-0047**, *Enron* (Decision on Jurisdiction), ¶ 88 (holding that the requirement of a six-month negotiation period "very much a jurisdictional one"); **RLA-0050**, *Supervision* (Award), ¶ 346 ("The new claims not notified to Respondent nor directly related to those included in the Notice of Intent are inadmissible in these arbitration proceedings").

[641] *See* **R-0166**, Letter from the Ministry of Commerce to the Agency for the Legal Defense of the State, 7 February 2019 (confirming that the Ministry of Commerce (in Spanish, *Dirección de Inversión Extranjera y Servicios del Ministerio de Comercio, Industria y Turismo*) has not received a notice of intent from the Carrizosa Family).

> (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers
>
> of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.[642]

292. Tribunals applying similar treaty provisions have determined that the filing of a waiver is a condition precedent of consent to arbitration.[643] For example, the *Renco Group* tribunal held that "to understand the concept of waiver in any other way would render it devoid of meaning."[644] Other tribunals have explained that such a requirement serves "to avoid conflicting decisions and eliminate the possibility

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[642] **RLA-0001**, TPA, Art. 10.18.2(b).

[643] *See, e.g.*, **RLA-0082**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2 (Cremades, Highet, Siqueiros), Award, 2 June 2000 ("***Waste Management I* (Award)**"), ¶¶ 13–14, 17 (considering the almost identical waiver requirement in Article 1121 of NAFTA, and stating that: "NAFTA Chapter XI, Section B, Article 1121 lays down a series of conditions precedent to submission of a claim to arbitration proceedings . . . . Under NAFTA Article 1121[,] a disputing investor may submit to arbitration proceedings, to quote literally '***Only if***' certain prerequisites are met, comprising, in general terms, consent to and waiver of determined rights. In light of this Article, it is fulfilment of NAFTA Article 1121 conditions precedent by an aggrieved investor that entitles this Tribunal to take cognisance of any claim forming the subject of arbitration . . . any analysis of the fulfilment of the prerequisites established as conditions precedent to submission of a claim to arbitration under NAFTA Article 1121 calls for the utmost attention, since fulfillment thereof opens the way, *ipso facto*, to an arbitration procedure in accordance with the commitment acquired by the parties as signatories to [NAFTA]"); *see also* **RLA-0052**, *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL (van den Berg, Wälde, Ariosa), Arbitral Award, 26 January 2006, ¶ 115 ("Article 1121 of the NAFTA is concerned with conditions precedent to the submission of a claim to arbitration. One cannot therefore treat lightly the failure by a party to comply with those conditions").

[644] **RLA-0053**, *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1 (Moser, Fortier, Landau), Partial Award on Jurisdiction, 15 July 2016, ¶¶ 186–189 ("[T]he Tribunal has concluded that, in raising its waiver objection, Peru has sought to vindicate its right to receive a waiver which complies with the formal requirement of Article 10.18(2)(b) and a waiver which does not undermine the object and purpose of that Article. In so finding, the Tribunal does not accept the contention that Peru's waiver objection is tainted by an ulterior motive to evade its duty to arbitrate Renco's claims. Indeed, Peru has no duty to arbitrate Renco's claims under the Treaty unless Renco submits a waiver which complies with Article 10.18(2)(b). . . It follows from the Tribunal's findings in this section of the Partial Award that Renco has failed to establish the requirements for Peru's consent to arbitrate under the Treaty. Renco's claims must therefore be dismissed for lack of jurisdiction.").

of obtaining double recovery for the same acts,"[645] and that it is up to a claimant to make an effective waiver.[646]

293. Tribunals have further determined that waiver provisions of this nature impose two separate requirements. Thus, for example, the *Commerce Group* tribunal articulated the relevant conditions as follows: "(i) a 'form' requirement, whereby Claimants must in fact submit a waiver, and (ii) a 'material' requirement, whereby Claimants must abide by such waiver by discontinuing domestic court proceedings before initiating this CAFTA arbitration."[647]

294. Claimants here have satisfied neither of these requirements. Claimants have not satisfied the 'form' requirement, because they did not submit a waiver. And they have also failed to comply with the 'material' requirement. The terms of Article 10.18.2(b) indicate that the waiver requirement applies to a broad category of other proceedings. Specifically, the requirement applies to "**any** [local proceeding], **or other dispute settlement procedures** . . . with respect to **any** measure alleged to constitute a breach"[648] (emphasis added). In interpreting the similar waiver requirement contained in NAFTA Article 1121, the *Waste Management* tribunal confirmed that the waiver was not limited to claims equivalent to, or based upon, breaches of NAFTA, because "one and the same measure may give rise to different types of claims in different courts or tribunals."[649]

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[645] **RLA-0050**, *Supervision* (Award), ¶ 297 ("Once an international arbitration is initiated, the investor is thereby required to waive or withdraw from the actions it has initiated or could initiate before national courts or an arbitral tribunal, in order to avoid conflicting decisions and eliminate the possibility of obtaining double recovery for the same acts").

[646] *See* **RLA-0054**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17 (van den Berg, Grigera Naón, Thomas), Award, 14 March 2011 ("***Commerce Group* (Award)**"), ¶ 86.

[647] **RLA-0054**, *Commerce Group* (Award), ¶ 71 (quoting the respondent's argument); *see also id.*, ¶ 80 ("The Tribunal agrees with Respondent. In the Tribunal's view, to understand the concept of waiver in any other way would render it devoid of meaning."); **RLA-0094**, *Waste Management,* p. 223 ("Any waiver . . . implies a formal and material act on the part of the person tendering same.").

[648] **RLA-0001**, TPA, Art. 10.18.2(b).

[649] **RLA-0082**, *Waste Management I* (Award), ¶ 27(a).

295. Thus, Article 10.18(2)(b) makes it a condition precedent to the submission of claims under Chapters 10 and 12 of the TPA that Claimants expressly and effectively waive their right to initiate or continue *any* proceeding, under *any* dispute settlement procedure, arising out of *any* measure at issue in this case. However, they have failed to do so. Contrary to the "intended effect" of the waiver requirement under the TPA,[650] Claimants commenced and are still pursuing another dispute settlement proceeding concerning the same measures that are the subject of the instant case. Specifically, Claimants submitted a petition to the Inter-American Commission of Human Rights ("**IACHR**") in 2012,[651] which commenced the case captioned *Julio Carrizosa Mutis y Otros v. Republic of Colombia P-1096-12*.

296. Claimants' claims before the IACHR fall within the scope of the waiver requirement, because such claims are based on the same measures that Claimants allege constitute breaches under the TPA. Indeed, like in this proceeding, before the IACHR Claimants are complaining of the measures taken by Colombia with respect to Granahorrar,[652] the Constitutional Court's judgment of 26 May 2011, and the Constitutional Court's 2014 Confirmatory Order.[653] And like in this

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[650] See **RLA-0054**, *Commerce Group* **(Award)**, ¶ 80 ("In the Tribunal's view, to understand the concept of waiver in any other way would render it devoid of meaning. Indeed, a waiver must be more than just words; it must accomplish its intended effect.").

[651] *See* **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012.

[652] *Compare* **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012, p. 8 (English translation: "In practical terms, the 1998 Regulatory Measures were an expropriation of shareholder property, and a reduction in proportion to the Carrizosa family members' assets.") (Spanish original: "*Las [1998 Regulatory Measures] constituyeron, en términos prácticos, una expropiación de la propiedad de los accionistas, y un desmedro proporcional al patrimonio de los miembros de la familia Carrizosa*") *with* Claimants' Memorial (PCA), p. 12 ("In a nutshell, Colombia's financial regulatory authorities unlawfully expropriated Claimants' investment in that jurisdiction").

[653] *Compare* **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012, p. 2 ("English translation: "In particular, the present petition denounces a violation of the natural judge principle . . . by the Constitutional Court through Decision SU 447 of 2011. In the Decision, the Constitutional Court not only exceeded its powers contrary to the aforementioned principle. It also revived violations of due process and private property rights committed by the State in the administrative penalizing process of Granahorrar's *oficialización*.") (Spanish original: "*En especial*

proceeding, in the IACHR case Claimants are seeking compensatory damages.[654] The following table illustrates the direct overlap between the measures complained of before this Tribunal and the IACHR:

Measures before this Tribunal	Measures before the IACHR
The 1998 Capitalization Order[655]	The 1998 Capitalization Order[656]
The 1998 Value Reduction Order[657]	The 1998 Value Reduction Order[658]
The 2011 Constitutional Court Judgment[659]	The 2011 Constitutional Court Judgment[660]
The 2014 Confirmatory Order[661]	The 2014 Confirmatory Order[662]

la presente petición denuncia la violación del principio del juez natural . . . por parte de la Corte Constitucional, mediante el fallo SU 447 de 2011, mediante el cual no sólo extralimitó sus competencias en contravía del mencionado principio, sino que reavivó las violaciones al debido proceso y a la propiedad privada cometidas por el Estado en el proceso administrativo sancionatorio de oficialización de Granahorrar") *with* Claimants' Memorial (PCA), ¶ *3* ("Colombia's Constitutional Court, a Tribunal of hierarchy equal to the Council of State and subject to an equally narrow and specialized jurisdictional purview as that which is incident to the Council of State, engaged in an unprecedented usurpation of the Council of State's jurisdiction"*)*.

[654] *Compare* **Ex. R-0121**, Second Revision Petition to the Inter-American Commission on Human Rights, 4 October 2017, p. 44 (English translation: "Through Official Document 188/14, the Constitutional Court decided to deny the requests for annulment of SU.447/11 dated 26 May 2011, ratifying this harmful decision and the violations of the applicant's human rights") (Spanish original: "[*M*]*ediante el Auto 188/14, la Corte Constitucional decidió denegar las solicitudes de nulidad frente a la sentencia SU.447/11 del 26 de mayo de 2011, ratificando esta lesiva decisión y las violaciones a los derechos humanos de los peticionarios*") *with* Claimants' Memorial (PCA), ¶ 425 ("The Constitutional Court in its 2011 and 2014 Opinions committed serious abuses of jurisdiction and authority, and radically renounced universal principles of justice and due process").

[655] *See* Claimants' Memorial (PCA), pp. 12–13, ¶¶ 5–7, 129.

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

[657] *See* Claimants' Memorial (PCA), pp. 12–13, ¶¶ 5–7, 129.

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

[659] *See* Claimants' Memorial (PCA), p. 13, ¶¶ 2, 42–77.

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

[661] *See* Claimants' Memorial (PCA), ¶¶ 1–5, 86–101.

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

297. Not only have Claimants not waived their right to pursue claims based on these measures before the IACHR, but to this day they are pursing them in parallel with the arbitral proceeding before this Tribunal.[663] Given Claimants' failure to meet the condition precedent in Article 10.18(2)(b), Colombia respectfully submits that this Tribunal lacks jurisdiction *ratione voluntatis* over Claimants' claims.

298. For the reasons discussed above, the Tribunal lacks jurisdiction *ratione voluntatis* over all of Claimants' claims.

2. The Tribunal lacks jurisdiction ratione voluntatis *over certain of Claimants' claims because those claims fall outside the scope of Colombia's consent under Chapter 12 of the TPA*

299. Chapter 12 of the TPA applies to "measures adopted or maintained by a Party relating to" investors and investments of another Party in financial institutions.[664] Claimants invested in shares in Granahorrar, a financial institution in Colombia.[665] Claimants' claims are therefore governed by Chapter 12, a fact that is explicitly acknowledged by Claimants.[666] Claimants assert that Colombia has breached the national treatment obligation set forth in Article 12.2 of the TPA,[667] the fair and equitable treatment obligation under Article 10.5 of the TPA,[668] and the expropriation protection under Article 10.7 of the TPA.[669]

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[663] *See* **Ex. R-0122**, Third Revision Petition to the Inter-American Commission on Human Rights, 4 July 2018 (Claimants filing a third revision petition after the initiation of the present arbitration).

[664] **RLA-0001**, TPA, Art. 12.1(b).

[665] *See* Notice of and Request for Arbitration, ¶¶ 16-20; *See* Letter of Pedro J. Martinez Fraga addressed to Catherine Kettlewell, Legal Counsel of ICSID of February 9, 2018, p. 3; *see* Claimants' Memorial (PCA), pp. 10–11.

[666] *See* **Ex. R-0101**, Claimant's Memorial (ICSID), ¶ 207 ("Claimant has filed this proceeding under Chapter 12.").

[667] *See* Claimants' Memorial (PCA), ¶¶ 433–437.

[668] *See* Claimants' Memorial (PCA), ¶ 424. Claimants invoke the "Minimum Standard of Treatment" provision of Chapter 10 of the TPA (*viz.*, Article 10.5), which includes the fair and equitable treatment obligation. Claimants allege a breach of the fair and equitable treatment standard.

[669] *See* Claimants' Memorial (PCA), ¶¶ 429–432.

300. Herein, Colombia will demonstrate that it did not consent to the submission of claims under the fair and equitable treatment (Article 10.5) or national treatment (Article 12.2) provisions of the TPA.[670]

a. Colombia did not consent to arbitrate claims under Chapter 12 in relation to either the national treatment or fair and equitable treatment obligations

301. Claimants' claims that Colombia violated the national treatment obligation and the fair and equitable treatment obligation under the TPA[671] are barred for the simple reason that Chapter 12 does *not* provide for the arbitration of such claims.

302. Chapter 12 of the TPA does not contain a dispute resolution mechanism of its own. Instead, Chapter 12 incorporates by reference the investor-State dispute settlement mechanism contained in Chapter 10, but it does so in an expressly limited way. The limits on the application of the dispute settlement mechanism of Chapter 10 are expressly set forth in Article 12.1, which is entitled "Scope and Coverage." Article 12.1.2 provides:

> Chapters Ten (Investment) and Eleven (Cross-Border Trade in Services) apply to measures described in paragraph 1 **only to the extent** that such Chapters or Articles of such Chapters are incorporated into this Chapter.[672] (Emphasis added)

303. The provisions of Chapter 10 thus apply "only to the extent" that they are expressly incorporated into Chapter 12. This means that the dispute settlement mechanism of Chapter 10 applies only to certain, expressly defined claims, which are identified as follows in Article 12.1.2(b):

> Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter **solely for claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial**

[670] Colombia acknowledges that Claimants can submit a claim to arbitration of an alleged breach of the expropriation provision (Article 10.7) of the TPA. *See* **RLA-0001**, TPA, Art. 12.1.2(a)–(b).

[671] *See* Claimant's Memorial (PCA), ¶¶ 433, 427.

[672] **RLA-0001**, TPA, Art. 12.1.2.

> **of Benefits), or 10.14 (Special Formalities and Information Requirements)**, as incorporated into this Chapter.[673] (Emphasis added)

304. Article 12.1.2(b) must be interpreted in accordance with the rule of treaty interpretation under customary international law which is codified in Article 31.1 of the Vienna Convention on the Law of Treaties. Pursuant to such rule, a treaty must be interpreted "in good faith and in accordance with the ordinary meaning to be given to [its] terms."[674] Because Article 12.1.2(b) includes a closed set of claims that may be submitted to arbitration under Chapter 12 (as denoted by the term "solely"), it follows that claims that are *not* included in this list may not be submitted to arbitration. This is consistent with the related and well-established principle of *expressio unius est exclusio alterius* (i.e., the expression of one thing implies the exclusion of another).[675]

305. Article 12.2 of the TPA articulates the national treatment obligation with respect to measures adopted by a State Party relating to investors and investments of the other Party in financial institutions.[676] The fair and equitable treatment obligation is delineated in Article 10.5 of Chapter 10.[677]

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[673] **RLA-0001**, TPA, Art. 12.1.2(b).

[674] **CLA-0124**, VCLT, Art. 31.1.

[675] **RLA-0055**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 (Weil, Bernardini, Price), Decision on Jurisdiction, 29 April 2004 ("***Tokios* (Decision on Jurisdiction)**"), ¶ 30.

[676] *See* **RLA-0001**, TPA, Art. 12.2 ("Each Party shall accord to financial institutions of another Party and to investments of investors of another Party in financial institutions treatment no less favorable than that it accords to its own financial institutions, and to investments of its own investors in financial institutions, in like circumstances, with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of financial institutions and investments.").

[677] *See* **RLA-0001**, TPA, Art. 10.5. The fair and equitable treatment obligation does not apply at all in respect of measures governed by Chapter 12. Chapter 12 does not include a fair and equitable treatment obligation. Chapter 10 does include a fair and equitable treatment obligation in the form of Article 10.5. However, Article 10.5 is not included in the limited set of protections incorporated by reference into Chapter 12. *See* **RLA-0001**, TPA, Art. 12.1.2(a) ("Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.11 (Investment and Environment), 10.12 (Denial of Benefits), 10.14 (Special Formalities and Information Requirements), and 11.11 (Denial of Benefits) are hereby incorporated into and made a part of this Chapter").

306. Importantly for present purposes, the exhaustive list of arbitrable claims contained in Article 12.1.2(b) does not include claims under either Article 12.2 (national treatment) or Article 10.5 (fair and equitable treatment). Accordingly, by the treaty's express terms, claims under those two provisions are not arbitrable.

307. Had Colombia and the United States wished to allow the submission of those types of claims in respect of measures falling within the scope of Chapter 12, they would have included such categories of claims in Article 12.1.2(b). However, they did not, which means that Colombia has not consented to the submission of claims for breaches of the national treatment obligation or the minimum standard of treatment under Chapter 12. Claimants' national treatment and fair and equitable treatment claims must therefore be dismissed for lack of jurisdiction *ratione voluntatis*.

b. Moreover, the fair and equitable treatment provision of Chapter 10 does not apply to measures governed by Chapter 12

308. Moreover, Claimants cannot claim a violation of the fair and equitable treatment obligation under the TPA, because such obligation does not apply to measures governed by Chapter 12. Chapter 12 of the TPA does not include a fair and equitable treatment obligation; the obligation is set forth in Article 10.5 of Chapter 10.[678] As discussed above, the provisions of Chapter 10 apply "only to the extent that" they are expressly incorporated in Chapter 12.[679] Chapter 12.1.2(a) lists the substantive protections of Chapter 10 that apply to Chapter 12, as follows:

> Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.11 (Investment and Environment), 10.12 (Denial of Benefits), 10.14 (Special Formalities and Information Requirements), and

[678] *See* Claimant's Memorial (PCA), ¶ 424 (referencing Article 10.5 of the TPA).

[679] **RLA-0001**, TPA, Art. 12.1.2.

11.11 (Denial of Benefits) are hereby incorporated into and made a part of this Chapter.[680]

309. Consistent with the ordinary meaning of the terms of the TPA and the principle of *expressio unius est exclusio alterius*,[681] this list of substantive protections in Article 12.1.2(a) is exhaustive. The fair and equitable treatment obligation of Article 10.5 is not included in this list.

310. The fair and equitable treatment obligation does not apply to measures governed by Chapter 12, including the measures at issue here. Having acknowledged that Chapter 12 governs their claims, Claimants therefore cannot allege a violation of the fair and equitable treatment obligation.

c. Claimants' arguments contradict the plain text of the TPA

311. In their Memorial on Jurisdiction, Claimants argue that they are entitled to submit national treatment and fair and equitable treatment claims under Chapter 12 of the TPA.[682] As far as Colombia can discern, such argument appears to be based on (i) the proposition that the TPA should be interpreted expansively,[683] and (ii) the opinion of Claimants' expert, Mr. Olin Wethington, that the States Parties to NAFTA (and by analogy, the TPA) intended for these claims to be arbitrable, despite the fact that treaty text conveys the opposite intention. Those arguments by Claimants directly contradict the plain language of the TPA and must therefore be summarily rejected.

312. In their Memorial on Jurisdiction, Claimants implicitly acknowledge that not all of the substantive protections or avenues for dispute settlement which are contemplated under Chapter 10 are incorporated into Chapter 12, noting that

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[680] **RLA-0001**, TPA, Art. 12.1.2(a).

[681] **RLA-0055**, *Tokios* (Decision on Jurisdiction), ¶ 30.

[682] *See* Claimants' Memorial (PCA), ¶ 331.

[683] See Claimants' Memorial (PCA), ¶ 326 ("Hence, the Parties to the TPA sought to provide expansive protections to Chapter 12 investments and investors beyond those detailed in that chapter.").

"Article 12.1(2) expands the protection available under Chapter 12 by incorporating **certain** provisions under Chapter 10 into Chapter 12"[684] (emphasis added). Claimants' arguments on the national treatment and fair and equitable treatment obligations are at variance however with that acknowledgement, as well as with the clear and unambiguous text of the TPA.

313. Claimants strain to find support in the treaty text where there is none. For instance, they assert—disingenuously—that "[t]he incorporation by reference of Chapter 10 is significant"[685] Such assertion suggests that the entirety of Chapter 10 was incorporated by reference into Chapter 12. Yet, as already explained, Article 12.1.2 of the TPA renders it unequivocally clear that Chapter 10 is *not* incorporated wholesale into Chapter 12, and that the provisions of Chapter 10 apply "only to the extent" that they are expressly incorporated.[686]

314. Claimants also recite parts of Article 12.1.2, but—once again, disingenuously—they fail to allude to Article 12.1.2(a),[687] which explicitly identifies the provisions of other chapters that *are* incorporated by reference into Chapter 12:

> Article 12.1.2(a) Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.11 (Investment and Environment), 10.12 (Denial of Benefits), 10.14 (Special Formalities and Information Requirements), and 11.11 (Denial of Benefits) **are hereby incorporated into and made a part of this Chapter**.[688] (Emphasis added)

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[684] Claimants' Memorial (PCA), ¶ 326; *see also* Claimants' Memorial (PCA), ¶ 329(i) (asserting that the TPA establishes that the States Parties "consented to provide foreign investors and investments in the financial services sector with certain fundamental standards of protection made available to foreign investors under Chapter Ten that are additional to those provided for in Chapter 12").

[685] Claimants' Memorial (PCA), ¶ 329.

[686] *See* **RLA-0001**, TPA, Art. 12.1.2 ("Chapters Ten (Investment) and Eleven (Cross-Border Trade in Services) apply to measures described in paragraph 1 only to the extent that such Chapters or Articles of such Chapters are incorporated into this Chapter.").

[687] *See* Claimants' Memorial (PCA), ¶ 326.

[688] **RLA-0001**, TPA, Art. 12.1.2(a).

315. As is plain from its terms, Article 12.1.2(a) does *not* include Article 10.5 (the fair and equitable treatment obligation),[689] which means that the fair and equitable treatment obligation is *not* incorporated into Chapter 12. Accordingly, Claimants' brazen assertion that "Articles 10.5 to Articles 10.7 are incorporated into Chapter 12"[690] is manifestly incorrect. Given Claimants' failure to quote the most relevant treaty provision and their tendentious argumentation, it must be concluded that their intention was to mislead.

316. Further on the same issue, Claimants also cite to Article 10.2.1,[691] which provides: "In the event of any inconsistency between this Chapter [10] and another Chapter, the other Chapter shall prevail to the extent of the inconsistency."[692] Immediately after citing that provision, Claimants characterize Article 10.2.1 as an "incorporation by reference of Chapter 10 [into Chapter 12]."[693] Such statement is a complete *non sequitur*. Claimants do not even attempt to identify an "inconsistency" between Chapters 10 and 12 that would justify the application of Article 10.2.1 in the first place. Nor do Claimants attempt to explain how the application of Article 10.2.1 would justify the wholesale incorporation of all the substantive protections under Chapter 10 into Chapter 12, in direct contradiction with Article 12.1.2.

317. Moreover, Claimants assert, inexplicably, that "[t]his framework [(i.e., the alleged incorporation of all of Chapter 10 into Chapter 12)] makes perfect rational sense clearly seeks to vest investors in the financial services sector with an equal panoply of protections as those accorded to other investors."[694] There is no support in the text of the TPA for the proposition that the States Parties intended to put financial services investors in the same position as other investors; to the contrary, the States

[689] *See* **RLA-0001**, TPA, Art. 12.1.2(a).
[690] Claimants' Memorial (PCA), ¶ 327.
[691] *See* Claimants' Memorial (PCA), ¶ 328.
[692] **RLA-0001**, TPA, Art. 10.2.1.
[693] Claimants' Memorial (PCA), ¶ 329.
[694] Claimants' Memorial (PCA), ¶ 330.

Parties created an entirely different legal regime in the form of Chapter 12 for such financial services investors.

318. Claimants also include a passing reference to customary international law, in yet another failed attempt to support the proposition that investors and investments in the financial services sector (i.e., under Chapter 12) are protected by the fair and equitable treatment standard, among others.[695] Claimants do not specify precisely what alleged norm of customary international law they claim supports their (manifestly anti-textual) interpretation of the TPA. Nor do they attempt to prove widespread State practice and *opinio juris* demonstrating the existence of such a norm.[696] This vague and unmoored reliance on "customary international law" therefore does nothing to substantiate Claimants' contention.

319. Claimants' argument that national treatment obligation claims under Article 12.2 can be submitted to investor-State dispute settlement[697] is also belied by Claimants' expert Mr. Olin Wethington. Implicit in Mr. Wethington's analysis is the admission that the national treatment obligation set forth in Article 12.2 is *not* subject to the investor-State dispute settlement mechanism set forth in Section B of Chapter 10.[698] He analogizes the TPA and NAFTA to draw certain conclusions concerning the scope of the TPA. He explicitly acknowledges that NAFTA does not include the national treatment obligation in the list of claims that can be

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[695] Claimants' Memorial (PCA), ¶ 331.

[696] **RLA-0001**, TPA, Annex 10-A ("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.").

[697] *See* Claimants' Memorial (PCA), ¶ 329(i) (asserting that the States Parties to the TPA "**have consented expressly and unequivocally** to arbitrate investor-State disputes under Chapter 12 of the TPA") (emphasis in original).

[698] *See* Olin L. Wethington Expert Report, ¶ 37 (acknowledging that in the NAFTA, "investor-state dispute settlement is not in Article 1402(2) specifically made applicable to breaches of Article 1405 (National Treatment) and Article 1406 (Most Favored Nation)"), ¶ 44 (observing that "the counterpart provisions in Chapter 12 of the TPA . . . are materially identical to those of NAFTA").

submitted to arbitration under the financial services chapter of that treaty.[699] Despite that, however, Mr. Wethington theorizes that "[i]f the intention of the Parties was to leave the [national treatment] obligation without the investor-state remedy, the text would have explicitly done so."[700] That reasoning and conclusion defies both logic and the well-established rules of treaty interpretation, which place primacy on the text of the treaty[701] and seek to ensure that no terms are deprived of their meaning (in accordance with the *effete utile* canon of interpretation).[702] Indeed, under Mr. Wethington's logic, Article 12.1.2(b), which lists the claims that *can* be submitted to dispute settlement, would be deprived of meaning.

320. If Mr. Wethington's reasoning were accepted, the only way that States Parties would be able to effectively limit their consent to arbitration would be by means of negative lists, i.e., by affirmatively and explicitly listing every type of claim that is *not* arbitrable. Such an approach would be illogical and impracticable.

321. Moreover, such approach is inconsistent with the reasoning of previous tribunals.[703] For example, the *A11Y Ltd. v. Czech Republic* tribunal interpreted and

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[699] *See* Olin L. Wethington Expert Report, ¶ 37 ("Though investor-state dispute settlement is not in Article 1401(2) specifically made applicable to breaches of Article 1405 (National Treatment) and Article 1406 (Most Favored Nation), NAFTA nonetheless does not leave financial services investors without an avenue for monetary compensation under investor-states dispute settlement to remedy breach of those provisions.").

[700] Olin L. Wethington Expert Report, ¶ 40.

[701] *See* **CLA-0124**, VCLT, Art. 31.1.

[702] *See* **CLA-0095**, *Wintershall*, ¶ 165 ("Nothing is better settled as a common canon of interpretation in all systems of law than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. This is simply an application of the wider legal principle of effectiveness which requires favouring an interpretation that gives to every treaty provision an '*effet utile*.'") (internal citations omitted).

[703] *See, e.g.*, **RLA-0032**, *Sanum* (Award on Jurisdiction), ¶ 358 ("to read into that clause a dispute settlement provision to cover all protections under the Treaty when the Treaty itself provides for very limited access to international arbitration would result in a substantial re-write of the Treaty and an extension of the States Parties' consent to arbitration beyond what may be assumed to have been their intention, given the limited reach of the Treaty protection and dispute settlement clauses."); **CLA-0088**, *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No.

applied a dispute resolution provision that provided consent to arbitrate claims under certain substantive provisions of the treaty.[704] The provision read: "Disputes between an investor of one Contracting Party and the other Contracting Party concerning an obligation of the latter under Articles 2(3), 4, 5 and 6 of this Agreement . . . ."[705] The tribunal considered that this provision created a "specific and limited consent to arbitration."[706] The tribunal therefore concluded that "it ha[d] jurisdiction over alleged violations of Articles 2(3), 4, 5 and 6 of the Treaty but not over violations of other Articles of the Treaty."[707]

322. For the reasons identified above, Claimants' arguments fail. Contrary to Claimants' assertions, the TPA expressly limits the obligations that are subject to arbitration under Chapter 12, and the national treatment or fair and equitable treatment claims are excluded. Consequently, Claimants' national treatment and fair and equitable treatment claims must be rejected.

3. The Chapter 12 MFN Clause does not expand the scope of consent of the State Parties, and cannot be used to amend or subvert the plain text of the TPA

323. Claimants invoke the Chapter 12 MFN Clause (i.e., Article 12.3) in an attempt to overcome the jurisdictional limitations that exclude from arbitration their national treatment and fair and equitable treatment claims under the TPA. That clause requires that each State Party accord to investors of another Party and their investments in financial institutions treatment no less favorable than that it accords to the investors and investments of investors in financial institutions of

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ARB/04/15 (Goodem, Allard, Marriott), Award, 13 September 2006 ("***Telenor***"), ¶ 97; **RLA-0072**, *A11Y Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1 (Fortier, Alexandrov, Joubin-Bret), Decision on Jurisdiction, 9 February 2017 ("***A11Y* (Decision on Jurisdiction)**"), ¶ 90.

[704] **RLA-0072**, *A11Y* (Decision on Jurisdiction), ¶ 65.

[705] **RLA-0072**, *A11Y* (Decision on Jurisdiction), ¶ 65.

[706] **RLA-0072**, *A11Y* (Decision on Jurisdiction), ¶ 84.

[707] **RLA-0072**, *A11Y* (Decision on Jurisdiction), ¶ 90.

any other Party or of a non-Party.[708] Claimants' attempted reliance upon the Chapter 12 MFN Clause in this case is misplaced.

324. Claimants devote the majority of the *ratione voluntatis* section of their Memorial on Jurisdiction to a discussion of the Chapter 12 MFN Clause, but fail to articulate how exactly the Chapter 12 MFN Clause supposedly applies in this case. For example, they do not identify the provisions from other treaties that they seek to import into the TPA via the Chapter 12 MFN Clause. Instead, Claimants simply make scattered references to a few provisions of the Colombia-Switzerland BIT.[709] That is not sufficient to satisfy Claimants' burden[710] of establishing that the Chapter 12 MFN Clause can be used to import such provisions into the TPA.

325. Claimants' failure to articulate their MFN argument limits Colombia's ability to respond fully to it. Nevertheless, and fully reserving its rights to supplement its response at a later time, Colombia addresses below Claimants' MFN argument.

326. Specifically, in the sections that follow, Colombia demonstrates that: (a) Claimants' cannot use the Chapter 12 MFN Clause to create otherwise non-existent consent to arbitrate claims based on the national treatment and fair and equitable treatment provisions of the TPA (**Section III.A.3(a)**); and (b) Claimants cannot rely on the Chapter 12 MFN Clause to submit claims based on the fair and equitable treatment and expropriation provisions of the Colombia-Switzerland BIT (**Section III.A.3(b)**).

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

[709] *See, e.g.*, Claimants' Memorial (PCA), ¶¶ 395–396, 424.

[710] *See supra* **Section III.A**.

a. The Chapter 12 MFN Clause does not create consent to arbitrate fair and equitable treatment or national treatment claims under the TPA

327. Under the terms of the TPA, and consistent with the prevailing case law, Claimants cannot rely upon the Chapter 12 MFN Clause to import the dispute resolution mechanism of the Colombia-Switzerland BIT, and on that basis submit certain categories of claims under the TPA that Colombia and the United States excluded from arbitration (viz., the national treatment and fair and equitable treatment obligations).

i. The text of the TPA and relevant case law make clear that the Chapter 12 MFN Clause cannot be used to create consent to arbitration

328. Claimants seek to overcome the absence of consent by Colombia to arbitration of national treatment and fair and equitable treatment claims by attempting to import, via the Chapter 12 MFN Clause, the dispute resolution mechanism of the Colombia-Switzerland BIT.[711]

329. The relevant part of the Chapter 12 MFN Clause provides as follows:

> Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of any other Party or of a non-Party, in like circumstances.[712]

330. As explained below, both the text of the TPA and the consistent case law on the subject demonstrate that the Chapter 12 MFN Clause cannot validly be relied upon to expand the State Parties' consent.

331. The incorporation of a dispute resolution mechanism through the Chapter 12 MFN Clause would be contrary to the express terms of the TPA. As noted earlier, Article

[711] Notice of and Request for Arbitration, ¶ 234.

[712] **RLA-0001**, TPA, Art. 12.3.1.

12.1.2(b) of the TPA expressly and exhaustively lists the "sole[]" set of claims that can be submitted to investor-State dispute settlement under the TPA in relation to measures under the scope of Chapter 12 of the TPA, namely: "Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), and 10.14 (Special Formalities and Information Requirements)."[713]

332. The Chapter 12 MFN Clause cannot be relied upon to negate the facial language of Article 12.1.2(b) or to subvert the common intention and express will of Colombia and the United States to limit the category of claims that may be submitted to arbitration. Allowing Claimants to rely upon the Chapter 12 MFN Clause to bring claims for alleged breaches of protections that are not listed in 12.1.2(b) would—contrary to well-established principles of treaty interpretation[714]—deprive that provision of *effet utile*.[715]

333. International investment tribunals faced with similar situations have consistently held that MFN clauses do not create consent. For example, the *A11Y Ltd. v. Czech Republic* tribunal considered and rejected arguments similar to those advanced by Claimants in the instant case. In that case, as discussed above, claimant was

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[713] **RLA-0001**, TPA, Article 12.1.2(b).

[714] *See* **CLA-0015**, *Canfor Corp. v. United States of America* and *Terminal Forest Products Ltd. v. The United States of America*, UNCITRAL Consolidated Case (de Mestral, Robinson, van den Beg), Decision on Preliminary Questions, 6 June 2006 ("***Canfor***"), ¶ 324 ("every provision of an international agreement must have meaning, because it is presumed that the State Parties that negotiated and concluded that agreement intended each of its provisions to have an effect."); **CLA-0095**, *Wintershall*, ¶ 165 ("Nothing is better settled as a common cannon of interpretation in all systems of law than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. This is simply an application of the wider legal principle of effectiveness which requires favouring an interpretation that gives to every treaty provision an '*effet utile*.'") (internal citations omitted).

[715] Claimants' interpretation likewise ignores the context of the treaty, including the Chapter 10 MFN Footnote. As discussed in **Section III.C** above, the Chapter 10 MFN Footnote prevents the Chapter 10 MFN Clause from being used to import dispute resolution provisions from other treaties. **RLA-0001**, TPA, Art. 10.4, fn. 2. As a result, Section B of Chapter 10 (the dispute resolution section) cannot be altered by reference to other treaties. In invoking Chapter 12 of the TPA, Claimants are relying on Section B of Chapter 10 (which is incorporated, with limits, into Chapter 12). To endorse Claimants attempt to create consent using the Chapter 12 MFN Clause would thus also be to deprive the Chapter 10 MFN Footnote of *effet utile*.

predicating its claims on the U.K.-Czech BIT, which contained a dispute resolution clause that applied only to a limited set of claims.[716] Like Claimants in this case, the *A11Y Ltd.* claimant invoked the Chapter 12 MFN Clause to import a broader dispute resolution provision from another treaty, and on that basis purported to bring claims that were not included on the primary treaty's list of authorized claims.[717]

334. In evaluating and ultimately rejecting the claimant's argument, the *A11Y Ltd.* tribunal recalled the extensive case law on the subject of MFN clauses, noting that

> [a]rbitral rulings draw a distinction between the application of an MFN clause to a more favorable dispute resolution provision where the investor has the right to arbitrate under the basic treaty, albeit under less favorable conditions, and the substitution of non-existent consent to arbitration by virtue of an MFN clause. While case law confirms that the former is possible, it has almost consistently found that the latter is not.[718]

335. The *A11Y Ltd.* tribunal concluded that the claimant's request fell within the latter category of requests. In other words, the claimant's attempt to replace a dispute resolution clause limited to certain types of claims with a broad resolution clause that was not so limited, constituted an attempt to "substitut[e] . . . non-existent consent to arbitration by virtue of an MFN clause."[719] In the present case, the TPA does not grant investors "the right to arbitrate under the basic treaty" claims of national treatment and fair and equitable treatment.

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[716] **RLA-0072**, *A11Y* (Decision on Jurisdiction), ¶ 38.

[717] **RLA-0072**, *A11Y* (Decision on Jurisdiction), ¶ 94.

[718] **RLA-0072**, *A11Y* (Decision on Jurisdiction), ¶ 98.

[719] **RLA-0072**, *A11Y* (Decision on Jurisdiction), ¶ 98; *see also id.*, ¶ 103 ("In the present case, it is clear that the Contracting Parties' consent to arbitrate expressed in Article 8 of the Treaty is limited. The Contracting Parties explicitly agreed in this provision that they would consent to arbitrate disputes arising out of a certain and limited number of articles of the Treaty. The Tribunal is therefore of the view that, under the Treaty, the Contracting Parties have not provided their consent to arbitrate disputes arising out of any provisions of the Treaty not explicitly mentioned in Article 8.").

336. As noted by the *A11Y Ltd.* tribunal, other tribunals have reached the same conclusion.[720] For example, the *Sanum Investments Limited v. Lao People's Democratic Republic* tribunal explained that allowing claims to be brought for alleged breaches of all protections under the treaty, where the treaty itself provides for limited access to international arbitration, would amount to a "substantial re-write of the Treaty and an extension of the States Parties' consent to arbitration beyond what may be assumed to have been their intention."[721] The same is true in the instant case: Claimants are attempting to re-write the TPA and extend the States Parties' consent to arbitration via the Chapter 12 MFN Clause in order to bring claims for alleged breaches of protections that are not included within the limited scope of arbitration defined in Article 12.1.2(b).

337. The *Telenor v. Hungary* tribunal similarly reasoned that

> in Article XI of their BIT Hungary and Norway made a deliberate choice to limit arbitration to the categories specified in that Article and have eschewed the wide form of dispute resolution clause adopted in many of their other BITs. . . .
>
> The Tribunal therefore concludes that in the present case the MFN clause cannot be used to extend the Tribunal's jurisdiction to

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[720] *See generally* **CLA-0062**, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No.ARB/03/24 (Salans, van den Berg, Veeder), Decision on Jurisdiction, 8 February 2005 ("***Plama* Decision**"); **CLA-0088**, *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15 (Goodem, Allard, Marriott), Award, 13 September 2006 ("***Telenor***"); **CLA-0093**, *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 080-2004 (Sjövall, Lebedev, Weier), Award, 21 April 2006 ("***Berschader***"); **CLA-0095**, *Wintershall;* **CLA-0007**, *Austrian Airlines v. Slovak Republic*, UNCITRAL (Kaufmann-Kohler, Brower, Trapl), Final Award, 9 October 2009 ("***Austrian Airlines***"); **RLA-0034**, *ICS;* **RLA-0033**, *Daimler* (Award); **RLA-0035**, *Euram* (Award on Jurisdiction); **CLA-0043**, *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1 (Rowley, Park, Sands), Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, 7 May 2012 ("***Kılıç***"); **RLA-0011**, *ST-AD* (Award on Jurisdiction); **RLA-0032**, *Sanum* (Award on Jurisdiction).

[721] **RLA-0032**, *Sanum* (Award on Jurisdiction), ¶ 358 ("to read into that clause a dispute settlement provision to cover all protections under the Treaty when the Treaty itself provides for very limited access to international arbitration would result in a substantial re-write of the Treaty and an extension of the States Parties' consent to arbitration beyond what may be assumed to have been their intention, given the limited reach of the Treaty protection and dispute settlement clauses.").

> categories of claim other than expropriation, for this would subvert the common intention of Hungary and Norway in entering into the BIT in question.[722]

338. Here, Colombia and the United States (like Hungary and Norway in the BIT at issue in *Telenor*) made a deliberate choice to limit arbitration to the categories specified in Article 12.1.2(b). And like in *Telenor v. Hungary*, here Chapter 12 MFN Clause at issue here cannot be used to extend the Tribunal's jurisdiction to categories of claims not included in Article 12.1.2(b). Doing so would subvert the common intention of Colombia and the United States in entering into the TPA.

339. In *Euram v. Slovak Republic*, the tribunal noted that the "substantive scope" of the investor-State arbitration clause of the underlying BIT was "strictly limited" in that it only allowed for the submission to arbitration of alleged breaches of certain obligations.[723] Respecting such limitation, the tribunal found that claims under the other provisions of the BIT were not within the scope of the State Parties' consent to arbitrate.[724] The tribunal observed that "[a]s regards those categories of disputes, there is no offer of arbitration at all. Acceptance of Claimant's argument would therefore mean that the MFN clause completely transformed the scope of the arbitration provision."[725] The Tribunal therefore concluded that the MFN clause could not be used to "affect the scope of its jurisdiction . . . and reject[ed] Claimant's argument to the contrary."[726]

340. In sum, the prevailing view is that a MFN clause does not allow an investor to create a right to arbitrate a claim when the underlying treaty does not provide such

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[722] **CLA-0088**, *Telenor*, ¶¶ 97, 100.

[723] **RLA-0035**, *Euram* (Award on Jurisdiction), ¶ 448.

[724] *See* **RLA-0035**, *Euram* (Award on Jurisdiction), ¶ 448 ("While the present BIT does, of course, contain a provision for investor-State arbitration, the substantive scope of that provision is strictly limited. It encompasses disputes regarding Article 5 of the BIT and certain aspects of Article 4 but, as the Tribunal has found in Chapter V(A) of the Award, it excludes disputes regarding other aspects of Article 4 and alleged violations of the other provisions of the BIT.").

[725] **RLA-0035**, *Euram* (Award on Jurisdiction), ¶ 448.

[726] **RLA-0035**, *Euram* (Award on Jurisdiction), ¶ 455.

a right.[727] As the tribunal in *STAD GmbH v. Republic of Bulgaria* succinctly put it, "the conditions for access to jurisdiction *ratione voluntatis* under the BIT cannot be modified by the MFN clause."[728]

341. The reasoning of these tribunals is grounded in the foundational principle of consent. In that regard, the *Plama v. Bulgaria* tribunal observed:

> Nowadays, arbitration is the generally accepted avenue for resolving dispute between investors and states. Yet, **that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate**. It is a well-established principle, both in domestic and international law, that such agreement should be clear and ambiguous. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires.[729] (Emphasis added)

342. Claimants in this case attempt to achieve exactly that which all of the above-cited tribunals refused to allow: to replace a dispute resolution provision establishing limited consent with a broader provision, thereby attempting to re-write the treaty to create consent where none exists.

343. Based on the terms of the TPA, and consistent with the line of jurisprudence discussed above, the Tribunal should reject Claimants' attempt to circumvent the plain text of the relevant provisions of the TPA, and to thwart the common intention of the State Parties' to the TPA, by expanding the latter's consent to arbitration beyond what Article 12.1.2(b) provides.

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[727] **RLA-0056**, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31 (Lowe, Brower, Thomas), Decision on Jurisdiction, 24 October 2011 ("***Hochtief* (Decision on Jurisdiction)**"), ¶ 81 ("The MFN clause is not a *renvoi* to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found").

[728] **RLA-0011**, *ST-AD* (Award on Jurisdiction), ¶ 397 ("[B]efore a tribunal can apply the MFN clause . . . above all, the tribunal must have jurisdiction ratione voluntatis (and the conditions for access to jurisdiction ratione voluntatis under the BIT cannot be modified by the MFN clause) . . . jurisdiction ratione voluntatis, cannot be altered or removed by virtue of the MFN provision").

[729] **CLA-0062**, *Plama* Decision, ¶ 198.

ii. Claimants base their arguments on cases that are inapposite and that do not support their contention

344. Claimants argue that case law supports their attempt to create consent using the Chapter 12 MFN Clause. They rely heavily on a certain line of decisions, in which tribunals allowed claimants to import more favorable conditions of consent in order to avoid a requirement to resort to domestic court before initiating an arbitration. However, those cases are inapposite, because here Claimants do not seek to import more favorable *conditions* of consent; instead, Claimants seek to *create* consent. As discussed above, the decisions that *are* apposite have confirmed that MFN clauses cannot and should be used in the manner suggested by Claimants.

345. In their Memorial on Jurisdiction, Claimants rely on six cases[730] concerning use of the Chapter 12 MFN Clause. All of those cases involved claimants' attempts to import more favorable dispute resolution clauses from other treaties. In all six cases, the dispute resolution clause in the underlying treaty already provided consent to arbitration for the *types of claims* being submitted, and the claimants merely sought to override less favorable *conditions* to arbitration in the underlying treaty; namely, the requirement that the claimant first submit its claims to local courts, before pursuing international arbitration. Thus, in none of the six cases cited by Claimants were the claimants seeking to import *consent* to arbitration.

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[730] *See* Claimants' Memorial (PCA), ¶¶ 339–373 (citing **CLA-0031**, *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Orrego Vicuña, Buergenthal, Wolf), Decision on Jurisdiction, 25 January 2000 ("***Maffezini***"); **CLA-0081**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8 (Rigo Suerda, Brower, Bello Janeiro), Decision on Jurisdiction, 3 August 2004 ("***Siemens***"); **CLA-0056**, *National Grid, PLC v. Argentine Republic*, UNCITRAL (Rigo Sureda, Debevoise Garro), Decision on Jurisdiction, 20 June 2006 ("***National Grid* Decision**"); **CLA-0086**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Inter Aguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17 (Salacuse, Kaufmann-Kohler, Nikken), Decision on Jurisdiction, 16 May 2006 ("***Suez* Decision on Jurisdiction**"); **CLA-0008**, *Suez, Sociedad General de Aguas de Barcelona S A. and Vivendi Universal S.A., v. Argentine Republic*, ICSID Case No. ARB/03/19 (Salacuse, Kaufmann-Kohler, Nikken) and *AWG Group Ltd. v. Argentine Republic*, UNCITRAL (Salacuse, Kaufmann-Kohler, Nikken), Decision on Jurisdiction, 3 August 2006 ("***AWG* Decision on Jurisdiction**"); **CLA-008**, *Impregilo S.p.A. v. Argentine Republic,* ICSID Case No. ARB/07/17 (Danelius, Brower, Stern), Award, 21 June 2011 ("***Impregilo-Argentina***").

Here, by contrast, the State Parties to the TPA did not consent to arbitrate the fair and equitable treatment and national treatment claims that Claimants have submitted.

346. Tribunals have recognized this distinction. For example, the tribunal in *National Grid v. Argentina*, one of the cases cited by Claimants, rejected the contention that the MFN clause could be used to create consent:

> The Tribunal concurs with *Maffezini's* . . . concern that MFN clauses not be extended inappropriately. It is evident that some claimants may have tried to extend an MFN clause beyond appropriate limits. For example, the situation in *Plama* involving an attempt to create consent to ICSID arbitration when none existed was foreseen in the possible exceptions to the operation of the MFN clause in *Maffezini*.[731]

347. Similarly, the tribunal in *Hochtief v. Argentina* "consider[ed] that the question in this case is not whether the Chapter 12 MFN Clause can alter the jurisdiction of tribunals established under the BIT but whether it can affect the prescribed procedures for accessing that jurisdiction."[732] The tribunal concluded that the latter constitutes an acceptable use of the Chapter 12 MFN Clause, but the former does not:

> The MFN clause is not a *renvoi* to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found.[733]

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[731] **CLA-0056**, *National Grid*, ¶ 92; *see also* **CLA-0056**, *National Grid*, ¶ 93 ("To conclude, the Tribunal considers that, in the context in which the Respondent has consented to arbitration for the resolution of the type of disputes raised by the Claimant, 'treatment' under the MFN clause of the Treaty makes it possible for UK investors in Argentina to resort to arbitration without first resorting to Argentine courts, as is permitted under the US-Argentina Treaty. Therefore, the Tribunal rejects this objection to its jurisdiction.").

[732] **RLA-0056**, *Hochtief* (Decision on Jurisdiction), ¶ 91; *see also id.*, ¶ 90 (drawing a distinction "between what is a new, independent, right to arbitrate and what is simply a manner in which an existing right to arbitrate must be exercised . . . ").

[733] **RLA-0056**, *Hochtief* (Decision on Jurisdiction), ¶ 81.

348. Summarizing the prevailing jurisprudence, the International Law Commission stressed in its Final Report on the Study Group on the Most-Favoured-Nation Clause (2015) that "[a]ttempts to use MFN to add other kinds of dispute settlement provisions, going beyond an 18-month litigation delay, have generally been unsuccessful."[734]

349. In any event, even the cases cited by Claimants (which as explained above are distinguishable from the present case) do not establish a consistent line of jurisprudence that would support Claimants' case. Indeed, one tribunal surveyed the line of cases addressing the 18-month litigation requirement, and found that not all tribunals in those cases agreed that the claimant was entitled to circumvent the 18-month litigation requirement.[735] Of those that did allow for the MFN clauses to be used in this way, a number of tribunals commented on the particularly expansive language of the MFN clauses in the applicable treaty. Indeed, some of these clauses clarified that the MFN protection applies to "all matters" governed by the treaty, which the tribunals interpreted to mean that the dispute resolution provisions of other treaties *could* be imported.[736] By contrast, the Chapter 12 MFN Clause does not use the phrase "all matters" or similarly expansive language.

350. Thus, neither the prevailing jurisprudence—nor even the entirety of the cases relied upon by Claimants themselves—support their case, because here Claimants are attempting to use the Chapter 12 MFN Clause to create consent to arbitration

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[734] **CLA-0140**, International Law Commission, Study Group on the Most-Favoured Nation Clause, 29 May 2015 ("**ILC Study**"), ¶ 127.

[735] *See* **RLA-0035**, *Euram* (Award on Jurisdiction), ¶ 454 (summarizing this line of cases as follows: "[A]ll of those cases concerned, not limits on the substantive scope of the provision for arbitration, but requirements to submit a dispute to national courts for a period of time before that dispute could be brought to an investor-State arbitration tribunal. In those cases, the dispute was one which fell within the substantive scope of the offer to arbitrate. Even so, the issue was a highly controversial one, as demonstrated by the fact that the MFN argument was accepted by some arbitration tribunals and rejected by others").

[736] See **CLA-0031**, *Maffezini*, ¶ 38; **CLA-0086**, *Suez* Decision on Jurisdiction, ¶ 55; **CLA-0008**, *AWG* Decision on Jurisdiction, ¶ 65.

rather than merely to overcome procedural conditions in the TPA that may be less favorable than those in the Colombia-Switzerland BIT.

351. In addition to the inapposite case law, Claimants rely on the expert opinion of Mr. Wethington, who asserts that the intent of the MFN clause of NAFTA (based on his recollection, rather than any documents) was to allow for claimants to replace the dispute resolution provision therein with another dispute resolution provision providing advance consent to the submission of all claims.[737] Mr. Wethington's personal recollections about the negotiation of NAFTA are neither authoritative, persuasive, or even instructive in interpreting the TPA, and are clearly not equivalent to *travaux préparatoires* for interpretative purposes. The TPA, like any other treaty, must be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties. As explained above, interpretation of the TPA in accordance with those rules of customary international law confirms that Colombia did not consent to claims of national treatment or fair and equitable treatment.

352. In conclusion, Claimants have failed to demonstrate that the Chapter 12 MFN Clause can be used to create consent to arbitrate claims of national treatment and fair and equitable treatment. Given that Colombia and the United States expressly limited the categories of claims that can be submitted to arbitration under Chapter 12 of the TPA, and such categories do not include claims of national treatment and fair and equitable treatment, the Tribunal lacks jurisdiction *ratione voluntatis* to hear those claims.

[737] *See* Olin L. Wethington Expert Report, ¶ 29 (asserting—without citation—that "the NAFTA Parties intended that this broad MFN treatment cover any dispute resolution related to investment protection enjoyed by third-country investors in the host NAFTA Party"). Indeed, Mr. Wethington does not cite any sources in his report, other than the texts of NAFTA and the TPA. *See generally* Olin L. Wethington Expert Report.

iii. In any event, Claimants fail to satisfy the jurisdictional requirements of the dispute resolution clause of the Colombia-Switzerland BIT

353. Even assuming *arguendo* that Claimants could rely upon the Chapter 12 MFN Clause to create consent for the submission of their national treatment and fair and equitable treatment claims (quod non), this Tribunal would still lack jurisdiction *ratione voluntatis* to hear those claims. Claimants seek to bring their national treatment and fair and equitable treatment claims under the TPA by importing the dispute resolution clause in Article 11 of the Colombia-Switzerland BIT into the TPA. But Claimants have not met certain conditions to consent under Article 11 of the Colombia-Switzerland BIT. Specifically, Claimants failed to observe two conditions under that clause: (1) a fork-in-the-road provision, and (2) a waiting period of 6 months. Each will be discussed in turn.

354. Claimants also fail to observe the fork-in-the-road provision in Article 11 of the Colombia-Switzerland BIT. To recall, Article 11(2) of the Colombia-Switzerland BIT provides that a dispute (which the parties have not been able to resolve amicably) may be "referred to the courts or administrative tribunals of the Party concerned **or** to international arbitration"[738] (emphasis added). Article 11(4) further clarifies that

> [o]nce the investor has referred the dispute to either national tribunal or any of the international arbitration mechanisms provided for in paragraph 2 above, **the choice of the procedure shall be final**. [739] (Emphasis added)

355. The plain language of Article 11 of the Colombia-Switzerland BIT thus provides that a claimant must choose between domestic courts or arbitration, and that such

[738] **RLA-0004**, Colombia-Switzerland BIT, Art. 11(2).

[739] **RLA-0004**, Colombia-Switzerland BIT, Art. 11(4).

choice shall be final— an interpretation of Article 11 that was confirmed by the tribunal in *Glencore v. Colombia*.[740] The Glencore tribunal observed:

> Arts. 11(2) and (4) contain a so-called "fork in the road" provision, which allows the investor to opt between different judicial or arbitral fora for the submission of an investment dispute, but prescribes that once that election has been made, it becomes **final and irrevocable** – *electa una via non datur recursus ad alteram*.[741] (Emphasis added)

356. Tribunals have consistently ruled that such fork-in-the-road provisions preclude the exercise of jurisdiction when the same claims have already been litigated in domestic courts.[742]

357. Tribunals applying fork-in-the-road provisions (such as Article 11(4) of the Colombia-Switzerland BIT) have assessed whether the *fundamental basis of a claim* in the international arbitration, on the one hand, and in the domestic proceedings, on the other hand, were the same.[743] Professor Paulsson (as sole arbitrator) endorsed the "fundamental basis of a claim" test in the *Pantechniki v. Albania* award:

> It is common ground that the relevant test is the one expressed by the America-Venezuela Mixed Commission in the *Woodruff* case (1903): whether or not 'the fundamental basis of a claim' sought to be brought before the international forum, is autonomous of claims to be heard elsewhere. This test was revitalized by the ICSID *Vivendi* annulment decision in 2002. It has been confirmed and applied in many subsequent cases. The key is to assess whether the

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[740] *See* **RLA-0057**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6 (Fernández-Armesto, Garibaldi, Thomas), Award, 27 August 2019, ¶ 900 ("***Glencore* (Award)**").

[741] **RLA-0057**, *Glencore* (Award), ¶ 900.

[742] *See* **RLA-0050**, *Supervisión* (Award), ¶¶ 308, 310; **CLA-0031**, *Maffezini*, ¶ 63; **RLA-0073**, *Pantechniki S A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21 (Paulsson), Award, 30 July 2009 ("***Pantechniki* (Award)**"), ¶ 61; **RLA-0074**, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB 09/15 (Cremades, Heiskanen, Gharavi), Award, 6 May 2014 ("***H&H* (Award)**"), ¶ 378.

[743] *See* **RLA-0073**, *Pantechniki* (Award), ¶ 61; **RLA-0050**, *Supervisión* (Award), ¶¶ 308, 310; **RLA-0074**, *H&H* (Award), ¶¶ 368-376.

> same dispute has been submitted to both national and international fora.[744]

358. The *Supervision y Control v. Costa Rica* tribunal likewise held that

> [i]n order to determine whether the proceedings before the local tribunals relate to the same dispute submitted to arbitration, the Tribunal will apply the fundamental basis of a claim test. . . . One can only consider that the dispute submitted before the national tribunals is the same as the one submitted to arbitration if both of them share the fundamental cause of the claim and seek for the same effects.[745]

359. To assess whether the fundamental bases of the claims are the same, tribunals have considered whether the action brought in domestic courts pursues the same general purpose as the arbitration claims.[746] In this respect, the fact that the local proceeding concerns alleged breaches of domestic law, whereas the international proceeding concerns breaches of treaty law, does not necessarily mean that the fundamental bases of the claims are different. To the contrary, the purposes of the claim may be the same, even if they are filed under different legal frameworks. Furthermore, neither the remedies sought in, nor the factual predicates of, the two sets of claims need to be identical.[747]

360. Because this is inherently a fact-specific exercise, it is helpful to consider factual analysis of previous tribunals. Faced with claims very similar to those at issue in the instant case (viz., complaints about regulatory actions), the *Supervision y*

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[744] **RLA-0073**, *Pantechniki* (Award), ¶ 61.

[745] *See* **RLA-0050**, *Supervisión* (Award), ¶¶ 308, 310.

[746] *See* **RLA-0050**, *Supervisión* (Award), ¶¶ 315–317 ("The Tribunal considers that the actions filed in the local proceeding and in the arbitration share a fundamental normative source and pursue ultimately the same purposes. The fundamental normative source is the same because compensation was claimed for lost profits derived from the failure of Costa Rica to adjust the VTI service rates according to what Claimant alleges was established in the Contract, notwithstanding that the specific administrative acts alleged in each proceeding may not be exactly the same"); **RLA-0074,** *H&H* (Award), ¶¶ 371–382.

[747] *See* **RLA-0050**, *Supervisión* (Award), ¶¶ 315, 317.

Control tribunal compared the domestic and international proceedings. With respect to the domestic proceeding, the tribunal observed:

> [I]n the proceeding before the Administrative Contentious Court the nullity of various administrative acts was requested, the payment of damages and lost profits and a judicial declaration on the manner in which the rates for the VTI [(Vehicle Technical Inspection)] services should be set were also requested. It is also alleged that such damages and lost profits arise essentially from the presumed breach by Costa Rica of its legal and contractual obligations, among others, to adjust the rates.[748]

361. As to the arbitration, the tribunal noted that "Claimant requested compensation for lost profits arising from various acts and omissions by Costa Rica, the majority related to the adjustment of the rates for the VTI service."[749] In view of these similarities, the tribunal determined that "the actions filed in the local proceeding and in the arbitration share a fundamental normative source and pursue ultimately the same purposes."[750] It further explained:

> **The fundamental normative source is the same** because compensation was claimed for lost profits derived from the failure of Costa Rica to adjust the VTI service rates according to what Claimant alleges was established in the Contract, **notwithstanding that the specific administrative acts alleged in each proceeding may not be exactly the same.**[751] (Emphasis added)

362. The *Supervision y Control* tribunal concluded that the basis of the claims was the same:

> [T]he Tribunal considers that the claims of Claimant coincide. They consist of the compensation for lost profits derived from the conduct or omissions of Costa Rica, which are alleged in the local proceeding as violating national law, while in the arbitration proceedings, the conduct of Costa Rica is alleged as contrary to the provisions of Treaty. In both cases Respondent's acts are essentially

[748] **RLA-0050**, *Supervisión* (Award), ¶ 313.

[749] **RLA-0050**, *Supervisión* (Award), ¶ 314.

[750] **RLA-0050**, *Supervisión* (Award), ¶ 315.

[751] **RLA-0050**, *Supervisión* (Award), ¶ 315.

> qualified as illegal because Claimant considers that the adjustment of rates was not done as agreed to in the Contract.[752]

363. If the fundamental bases of the claims are the same, tribunals also consider the entity that submitted the claim to local courts.[753] Notably, the claimant himself need not have submitted the claim before local courts; rather, it suffices for a "corporate vehicle that acts according to the interests and instructions of Claimant" to have pursued the local court claim.[754] In this respect, "there is a general presumption that a majority shareholder also controls the company, and that presumption can only be rebutted if there are elements that create doubts about the majority shareholder's control."[755]

364. In the present case, Claimants' claims would be precluded under the fork-in-the-road provision of the Colombia-Switzerland BIT, because Claimants previously referred the present dispute to Colombian domestic courts. The two sets of claims—those before the domestic courts and those before this Tribunal—share the same fundamental basis. Claimants filed suit before the Administrative Judicial Tribunal on 28 July 2000 against the Superintendency and Fogafín, alleging that Colombia's actions with respect to Granahorrar violated domestic law.[756] Their case reached the highest levels of the Colombian judiciary. Claimants sought compensation for these alleged violations of Colombian law. In the present proceeding, Claimants likewise complain that Colombia's actions—beginning with the 1998 regulatory measures—breached its obligations, and Claimants seek

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[752] **RLA-0050**, *Supervisión* (Award), ¶ 318.

[753] *See* **RLA-0050**, *Supervisión* (Award), ¶¶ 321–323.

[754] **RLA-0050**, *Supervisión* (Award), ¶¶ 324–325; *see also* **RLA-0074**, *H&H* (Award), ¶ 384 (where the tribunal held that the respondent State itself also did not have to be a party to the local proceedings).

[755] *See* **RLA-0050**, *Supervisión* (Award), ¶ 328.

[756] *See* **Ex. C-0023**, Judgment No. SU-447/11 (Constitutional Court), 26 May 2011 ("**2011 Constitutional Court Judgment**"), ¶ 1.2.14.

compensation. The domestic and international claims thus share a fundamental normative source and ultimately pursue the same purposes.[757]

365. Furthermore, the domestic claims filed by the Holding Companies functionally amount to claims filed by Claimants, because Claimants controlled the Holding Companies. In the words of the *EuroGas v. Slovak Republic* tribunal, "it would be artificial to distinguish the dispute between [a company] and the State authorities concerning [the company]'s own mining rights, from the dispute between [the company]'s shareholders and the State in respect of [the company]'s mining rights."[758] Moreover, Claimants here have explicitly taken responsibility for the filing the domestic claims; thus, in their Memorial on Jurisdiction, they title the section on the start of local proceedings as follows: "**Claimants Commence Judicial Proceedings** Against FOGAFIN and the Superintendency of Banking"[759] (emphasis added). Claimants also repeatedly concede that they prosecuted their claims in Colombian courts "through the Companies."[760]

366. Claimants' claims are thus precluded by operation of the fork-in-the-road provision of the Colombia-Switzerland BIT.

367. Claimants claims are also precluded by Article 11 of the Colombia-Switzerland BIT, which requires that a potential claimant attempt to resolve a dispute

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[757] *See* **RLA-0050**, *Supervisión* (Award), ¶ 315 ("The Tribunal considers that the actions filed in the local proceeding and in the arbitration share a fundamental normative source and pursue ultimately the same purposes. The fundamental normative source is the same because compensation was claimed for lost profits derived from the failure of Costa Rica to adjust the VTI service rates according to what Claimant alleges was established in the Contract, notwithstanding that the specific administrative acts alleged in each proceeding may not be exactly the same"); **RLA-0073**, *Pantechniki* (Award), ¶¶ 64–68 ("To the extent that this prayer was accepted it would grant the Claimant exactly what it is seeking before ICSID - and on the same 'fundamental basis'. The Claimant's grievances thus arises out of the same purported entitlement that it invoked in the contractual debate it began with the General Roads Directorate. The Claimant chose to take this matter to the Albanian courts. It cannot now adopt the same fundamental basis as the foundation of a Treaty claim.").

[758] **RLA-0013**, *EuroGas* (Award), ¶ 446.

[759] Claimants' Memorial (PCA), p. 27.

[760] *See, e.g.*, Claimants' Memorial (PCA), ¶¶ 28, 31.

amicably, and imposes a waiting period of 6 months before a claim can be submitted to arbitration. Specifically, Article 11 states in relevant part:

> (1) If an investor of a Party considers that a measure applied by the other Party is inconsistent with an obligation of this Agreement, thus causing loss or damage to him or his investment, he may request consultations with a view to resolving the matter amicably.
>
> (2) Any such matter which has not been settled within a period of six months from the date of written request for consultations [with a view to resolving the matter amicably] may be referred to the courts or administrative tribunals of the Party concerned or to international arbitration. [761]

368. This requirement that a claimant first attempt to resolve a dispute amicably is mandatory. Thus, a party can refer a dispute to international arbitration under Article 11(2) only after it attempts to amicably settle the dispute pursuant to Article 11(1). Article 11(3) confirms that "[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 this Agreement."[762]

369. The *Glencore v. Colombia* tribunal specifically interpreted and applied Article 11 of the Colombia-Switzerland BIT, and held that "consultations with [Colombia] under Art. 11(1) of the Treaty" was "a measure **necessary** to start a claim for breach of the BIT"[763] (emphasis added). The *Glencore v. Colombia* tribunal further held that the six-month consultation period under Art. 11(2) of the Colombia-Switzerland BIT is "mandatory[.]"[764]

370. In the instant case, Claimants have furnished no evidence that they tried to resolve the dispute amicably, for the simple reason that they did not do so. They also have not established that they waited the required 6 months before they submitted their

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[761] **RLA-0004**, Colombia-Switzerland BIT, Art. 11.

[762] *See* **RLA-0004**, Colombia-Switzerland BIT, Arts. 11(2), 11(3).

[763] **RLA-0057**, *Glencore* (Award), ¶ 907.

[764] **RLA-0057**, *Glencore* (Award), ¶ 909.

claims to arbitration. Consequently, Claimants have not complied with the terms of the very dispute settlement provision that they attempt to import via the Chapter 12 MFN Clause.

371. For these reasons, even if Claimants could create consent to the submission of their claims using the Chapter 12 MFN Clause (which they cannot), this Tribunal would not have jurisdiction over Claimants' claims because in any event Claimants have failed to meet the conditions for consent under the Colombia-Switzerland BIT.

b. Claimants are also barred from submitting a fair and equitable treatment claim under the Colombia-Switzerland BIT

372. In addition to submitting impermissible claims under the TPA, Claimants also allege violations of the substantive protections of the Colombia-Switzerland BIT. Specifically, Claimants allege that Colombia breached the fair and equitable treatment provision of the Colombia-Switzerland BIT (embodied therein in Articles 4 and 6, respectively, and as assertedly incorporated by reference through the Chapter 12 MFN Clause).[765] However, for the reasons discussed below, Colombia did not consent to the adjudication of the fair and equitable treatment provision of the Colombia-Switzerland BIT. Claimants therefore cannot rely upon the Chapter 12 MFN Clause to submit to arbitration under the TPA claims based on the fair and equitable treatment provision of the Colombia-Switzerland BIT. Consequently, these claims fall outside of the jurisdiction *ratione voluntatis* of this Tribunal.

373. The Chapter 12 MFN Clause requires treatment no less favorable to foreign investors and investments than that accorded to local or third-party investors and investments in financial institutions, so long as they are "in like circumstances."[766]

[765] Claimants' Memorial (PCA), ¶ 424.

[766] *See* **RLA-0001**, TPA, Article 12.3.1 ("Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords

Tribunals agree that similarly-worded MFN clauses require that a claimant invoking such clause establish that: (i) it was accorded *treatment* by the State, (ii) which was *less favorable* than (iii) the treatment accorded to investors *in like circumstances*.[767] Claimants here have not met their burden of proof of establishing those three elements.

374. In their Memorial on Jurisdiction, Claimants do not even attempt to explain how the Chapter 12 MFN Clause enables invocation of the fair and equitable treatment provision of the Colombia-Switzerland BIT. Claimants' argument is limited to the following, conclusory assertions: "As a result of the expansive scope of the MFN provision in Article 12.3 of the TPA, Claimants also are entitled to rely on the Fair and Equitable Treatment contained in Article 4(2) of the Colombia-Switzerland BIT."[768] This is manifestly insufficient to establish that, in the specific circumstances of this case, the Chapter 12 MFN Clause justifies reliance on this provision of the Colombia-Switzerland BIT.

375. The paucity of arguments on the part of Claimants is explained by the fact that Claimants simply cannot properly submit a fair and equitable treatment claim under the Colombia-Switzerland BIT. They are barred from submitting such claim because, as explained in **Section III.C.2** above, Colombia and the United States excluded that protection from the scope of Chapter 12.[769] Moreover, there is

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to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of any other Party or of a non-Party, in like circumstances.").

[767] *See, e.g.*, **RLA-0058**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1 (Veeder, Rowley, Crook), Award, 25 August 2014 ("***Apotex Holdings* (Award)**"), ¶ 8.4 ("Although the Parties approached the matter slightly differently, it was common ground that establishing a violation of NAFTA Article 1102 involves an inherently fact-specific analysis of whether the Claimants, or their alleged investments: (i) were accorded *treatment* by the Respondent with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments; (ii) were *in like circumstances* with the identified *domestic* investors or investments; and (iii) received treatment *less favourable* than that accorded to the identified domestic investors or investments").

[768] Claimants' Memorial (PCA), ¶ 424.

[769] The fair and equitable treatment obligation does not apply at all in respect of measures governed by Chapter 12. Chapter 12 does not include a fair and equitable treatment obligation.

jurisprudential support for the notion that a claimant cannot import into a treaty a protection that does not exist in that treaty. For example, the tribunal in *Sirketi v. Turkmenistan* held that the claimant was only entitled via the MFN clause to invoke investment protection standards from other treaties that were specifically included in the primary treaty. In that case, the claimant argued that the MFN clause could be used to import a substantive protection standard that was not specifically included in the primary treaty. The tribunal interpreted the MFN clause of the relevant treaty—which is similar to that of Chapter 12—in light of the general rule of treaty interpretation in Article 31 of the Vienna Convention, and concluded:

> The Claimant's argument that it is entitled to import substantive standards of protection not included in the Treaty from other investment treaties concluded by Turkmenistan, and to rely on such standards of protection in the present arbitration, must be rejected. When including the terms "similar situations" in Article II(2) of the BIT, the State parties must be considered to have agreed to restrict the scope of the MFN clause so as to cover discriminatory treatment between investments of investors of one of the State parties and those of investors of third States, insofar as such investments may be said to be in a factually similar situation. Nor do Article II(4) or Article VI of the BIT create any such entitlement. The Claimant is therefore only entitled to invoke those investment protection standards specifically included in the BIT. These standards include the entitlement to MFN treatment "in similar situations.[770]

Chapter 10 does include a fair and equitable treatment obligation in the form of Article 10.5. However, Article 10.5 is not included in the limited set of protections incorporated into Chapter 12. *See* **RLA-0001**, TPA, Art. 12.1.2(a) ("Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.11 (Investment and Environment), 10.12 (Denial of Benefits), 10.14 (Special Formalities and Information Requirements), and 11.11 (Denial of Benefits) are hereby incorporated into and made a part of this Chapter").

[770] **RLA-0058**, *Apotex Holdings* (Award), ¶ 332.

376. This is consistent with the reasoning of other tribunals as well.[771] For example, the *Hochtief AG v. Argentina* tribunal held that "the MFN clause stipulates how investors must be treated when they are exercising the rights given to them under the BIT but does not purport to give them any further rights in addition to those given to them under the BIT."[772] A MFN clause thus cannot be used to create a new legal right by importing a substantive protection into Chapter 12 of the TPA that does not already exist in the latter.

377. In essence, Claimants are attempting by means of the Chapter 12 MFN Clause to manufacture rights to which they are not entitled under Chapter 12. While Chapter 10 of the TPA does include a fair and equitable treatment provision (embodied in Article 10.5), such right was *not* incorporated into Chapter 12 (which is the chapter under which Claimant has commenced this arbitration).[773] That is manifest from Article 12.1.2(a) of the TPA, which lists the "only" provisions of Chapter 10 that are incorporated into Chapter 12;[774] Article 10.5 is not included in that list.[775]

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[771] *See,* e.g., **RLA-0060**, *Teinver S A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S A. v. Argentine Republic*, ICSID Case No. ARB/09/01 (Buergenthal, Alvarez, Hossain), Award, 21 July 2017, ¶¶ 884–885.

[772] **RLA-0056**, *Hochtief* (Decision on Jurisdiction), ¶ 79; *see also id*., ¶ 77 ("It is well understood that MFN clauses are subject to implicit limitations. An example was given by the International Law Commission in its Commentary on its draft Articles on Most-Favoured-Nation clauses. It said that an MFN clause in a commercial treaty between State A and State B would not entitle State A to claim the extradition of a criminal from State B on the ground that State B has agreed to extradite such criminals to State C or voluntarily does so. The reason, it said, 'is that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty.'").

[773] **Ex. R-0101**, Claimant's Memorial (ICSID), ¶ 207 ("Claimant has filed this proceeding under Chapter 12.").

[774] **RLA-0001**, TPA, Art. 12.1.2 ("Chapters Ten (Investment) and Eleven (Cross-Border Trade in Services) apply to measures described in paragraph 1 only to the extent that such Chapters or Articles of such Chapters are incorporated into this Chapter").

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

Consequently, in line with the case law cited above, Claimants cannot assert a fair and equitable treatment claim under the Colombia-Switzerland BIT.

378. In conclusion, Claimants have failed to satisfy their burden of establishing the Tribunal's jurisdiction *ratione voluntatis* over their claim under the fair and equitable treatment provision of the Colombia-Switzerland BIT. Claimants' claim alleging a breach of that provision should therefore be dismissed because they fall outside the scope of this Tribunal's jurisdiction *ratione voluntatis*.

D. The Tribunal lacks jurisdiction *ratione personae*

379. It is undisputed in the present case that all three of Claimants are dual nationals of Colombia and the United States.[776] The TPA provides that investors who are dual nationals must be deemed exclusively citizens of the State of their dominant and effective nationality: "[A] natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality."[777]

380. Given that under the terms of the TPA Colombia has consented to arbitrate claims filed only by US investors, Claimants must prove that their US nationality is their dominant and effective one. However, as will be demonstrated below, at all relevant times Claimants' dominant and effective nationality has been their Colombian rather than US nationality. Therefore, the Tribunal lacks jurisdiction *ratione personae* to hear Claimants' claims under the TPA.

1. *Claimants bear the burden of demonstrating that their dominant and effective nationality is that of the United States*

381. While Claimants appear to concede (as they must) that the TPA requires the Tribunal to apply the "dominant and effective nationality" test,[778] the discussion on this subject in Claimants' Memorial on Jurisdiction is both confusing and

[776] *See* Claimants' Memorial (PCA), p. 11.

[777] **RLA-0001**, TPA, Arts. 10.28, 12.20.

[778] *See* Claimants' Memorial (PCA), ¶ 186.

misleading. In the following sections, Colombia will (i) clarify the scope and purpose of the dominant and effective nationality test (**Section III.D.1(a)**), (ii) detail the legal standard applicable to the determination of Claimants' dominant and effective nationality (**Section III.D.1(b)**), and (iii) apply that standard to the facts of this case (**Section III.D.2**).

a. For the Tribunal to possess jurisdiction ratione personae, Claimants' dominant and effective nationality must be that of the United States

382. Consent is the cornerstone of the jurisdiction of international courts and tribunals. Claimants have invoked the TPA as the alleged basis of consent. Consistent with many investment treaties, and in order to ensure that the protections under the TPA apply only to investors of the *other* State party, the TPA requires (i) that investors be nationals of the other State party; and (ii) that, for purposes of the treaty, tribunals deem dual nationals to be "exclusively" nationals of the State of their dominant and effective nationality.

383. Chapter 12 of the TPA is the chapter that addresses financial services. Article 12.1.1(b) of the TPA (under the heading "Scope and Coverage")[779] establishes that Chapter 12 "applies to measures adopted or maintained by a Party relating to . . . investors of another Party, and investments of such investors, in financial institutions in the Party's territory."[780] Article 12.20 of the TPA, for its part, defines the term "investor of a Party" as "a person of a Party, that attempts to make, is making, or has made an investment in the territory of *another* Party"[781] (emphasis added).

[779] *See generally* **RLA-0001,** TPA, Art. 12.1.

[780] **RLA-0001**, TPA, Art. 12.1.1(b).

[781] **RLA-0001**, TPA, Art. 12.20. Chapter 10 of the TPA contains a virtually identical definition. *See* **RLA-0001**, TPA, Art. 10.28 ("[I]nvestor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural

384. Importantly, Article 12.20 further provides that "a natural person who is a dual citizen shall be deemed to be *exclusively* a citizen of the State of his or her dominant and effective nationality"[782] (emphasis added). Additionally, pursuant to Article 10.16.1(a)(i)(A) (incorporated by reference into Chapter 12),[783] the TPA only authorizes the "submi[ssion] to arbitration under this Section [of] a claim . . . that the respondent has breached . . . an obligation under [the TPA provisions that articulate substantive protections]."[784]

385. Where Colombia is the host State of an investment, the provisions quoted above apply in the following manner. Colombia is bound by its obligations under Chapter 12 only in relation to US investors. Dual nationals qualify as US investors only if their dominant and effective nationality is that of the United States. Thus, to submit an investment arbitration claim against Colombia under the TPA, any would-be claimant who is a dual national must establish that his or her US nationality is the dominant and effective one.

386. In the present case, the Parties agree that Claimants are dual Colombian-US nationals. Consequently, for the Tribunal to possess jurisdiction *ratione personae*, the TPA requires that Claimants' dominant and effective nationality be their US nationality. However, Claimants misconstrue the relevant treaty language. Thus, they assert—incorrectly—that Colombia has "consented that it would accord investment treaty protection to dual citizens."[785] That is patently incorrect, as illustrated by the treaty language and discussion above; Colombia has agreed to

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person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality").

[782] **RLA-0001**, TPA, Art. 12.20. Chapter 10 of the TPA contains a virtually identical dominant and effective nationality provision. *See* **RLA-0001**, TPA, Art. 10.28.

[783] *See* **RLA-0001**, TPA, Art. 12.1.2(b) ("Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter solely for [certain] claims").

[784] **RLA-0001**, TPA, Art. 10.16.1(a)(i)(A). As discussed in this Answer on Jurisdiction, the TPA only incorporates certain obligations from Chapter 10 into Chapter 12.

[785] Claimants' Memorial (PCA), ¶ 214.

grant treaty protection *exclusively* to dual nationals *whose dominant and effective nationality is that of the US*. By virtue of Articles 10.28 and 12.20 of the TPA, any dual national whose Colombian nationality is dominant and effective shall be deemed "exclusively" a Colombian citizen. Such persons are thus excluded from the ambit of the TPA's protection vis-à-vis Colombia. Hence, the TPA does not provide protections to all dual nationals, as incorrectly asserted by Claimants.

387. Part of Claimants' confusion stems from their misunderstanding of the purpose of this type of "dominant and effective nationality" restriction. According to Claimants, the "single purpose"[786] of the dominant and effective nationality test is to prevent investors from acquiring the nationality of the other State in order to secure the protections of the TPA. Claimants argue that because they are dual nationals by birth, they did not *acquire* any nationality to obtain the protection of the TPA,[787] and that therefore their dual nationality is "the type of dual citizenship that the TPA seeks to protect."[788] Claimants' syllogism is fatally flawed because its underlying premises are false.

388. In reality, the purpose of the dominant and effective nationality test is not as narrow as Claimants argue; instead, its purpose is to broadly ensure that only *foreign* investors benefit from the TPA's protections. Dual national investors whose dominant nationality is that of the host State of the investment—irrespective of how or why they obtained their two nationalities—are barred from claiming under the TPA. This interpretation is consistent with the general purpose of investment treaties, which is to "stimulate flows of private capital into the economies of contracting states."[789] In furtherance of this end, "[i]nvestment treaties confer rights to foreign investors, which are unavailable to

[786] Claimants' Memorial (PCA), ¶ 211.

[787] Claimants' Memorial (PCA), ¶ 211.

[788] Claimants' Memorial (PCA), ¶ 211.

[789] **RLA-0084**, *Vito G. Gallo v. The Government of Canada*, PCA Case No. 55798 (Fernández-Armesto, Castel, Lévy), Award, 15 September 2011 ("***Gallo* (Award)**"), ¶ 336.

nationals of the host country. . . . because [f]oreigners are more exposed than domestic investors to the sovereign risk attached to the investment."[790]

389. The object[791] of Chapters 10 and 12 of the TPA is to promote foreign investment between the US and Colombia.[792] To do so, the TPA grants rights to foreign investors that are unavailable to domestic investors, such as (i) certain codified substantive obligations to foreign investors (e.g., the obligation to permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory [793]), and (ii) the ability to resort to arbitration to assert claims for violations of the TPA.[794]

390. The dominant and effective nationality test ensures that domestic investors do not arrogate to themselves rights that were intended only for investors *of the other State party*. In analyzing a provision in the DR-CAFTA that is virtually identical to that in the TPA,[795] the *Aven v. Costa Rica* reached that very conclusion:

> Through reference to the dominant and effective party language, [the treaty] seeks to provide protections for *foreign investors* who are characterized by their lack of proximity and experience with the host country . . . The dominant and effective test would [ ] determine whether *the investor is truly a foreigner* or the investor

[790] **RLA-0084**, *Gallo* (Award), ¶¶ 331, 335.

[791] **CLA-0124**, VCLT, Art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose").

[792] *See* **RLA-0001**, TPA, Preamble ("The Government of the United States of America and the Government of the Republic of Colombia, resolved to: . . . ENSURE a predictable legal and commercial framework for business and investment").

[793] *See* **RLA-0001**, TPA, Arts. 10.8, 12.1.2.

[794] *See* **RLA-0001**, TPA, Art. 12.1.2(b) (incorporating the dispute resolution provisions of Chapter 10).

[795] **RLA-0007**, Dominican Republic Central America Free Trade Agreement, 1 March 2006, Art. 10.28 ("[I]nvestor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality").

enjoys the same degree of personal connection to the host State that any other of its nationals enjoys.[796] (Emphasis added)

391. In sum, the TPA admits no alternative interpretation: Claimants are subject to the dominant and effective nationality test on the same terms as every other dual national, and the purpose and manner in which they obtained their Colombian nationality is wholly irrelevant. Thus, for the Tribunal to have jurisdiction *ratione personae*, Claimants' dominant and effective nationality must be their US nationality. The evidence demonstrates, however, that their dominant nationality is—and was at all relevant times—their Colombian nationality.

b. <u>The Tribunal should apply the following legal standard to determine Claimants' dominant and effective nationality</u>

392. Having clarified the scope and purpose of the dominant and effective nationality test, the next query is the legal standard that the Tribunal should apply to determine Claimants' dominant and effective nationality. In this regard, three components require delineation: (i) *what* the Tribunal should determine; (ii) *how* it should be determined; and (iii) by reference to *when* it should be determined.

i. The Tribunal only needs to determine Claimants' dominant nationality, not their effective one

393. As explained above, "the claimant in any investment arbitration must prove that he or she is a protected foreign investor."[797] By its terms, the TPA classifies a dual national's nationality on the basis of both dominance *and* effectiveness. [798] The plain language of the treaty thus supports the existence of two *distinct*

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[796] **RLA-0085**, *David Aven et. al. v. the Republic of Costa Rica*, Case No. UNCT/15/3 (Siquieros, Baker, Nikken), Final Award, 18 September 2018, ¶ 215.

[797] **RLA-0084**, *Gallo* (Award), ¶¶ 336, 331; *see also* **CLA-0084**, *Spence*, ¶ 239 ("The burden is . . . on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction").

[798] **RLA-0001**, TPA, Art. 12.20 ("[A] natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant **and** effective nationality" (emphasis added)).

requirements.[799] That is confirmed by the ordinary meaning of the terms. The Oxford English Dictionary defines "effective" as "[a]ctual, de facto; existing in fact."[800] By contrast, "dominant" is defined as "[e]xercising chief authority or rule: ruling, governing, commanding; most influential."[801] Various international tribunals have espoused the same interpretation. In *Mergé*, for example, the Italy-United States Conciliation Commission stated that the test "does not mean only the existence of a real bond [i.e., effectiveness], but means also the prevalence of that nationality over the other [i.e., dominance]."[802]

394. The tribunal in the recently decided *Ballantine v. Dominican Republic* case interpreted a virtually identical nationality clause in the DR-CAFTA.[803] By majority, the tribunal there noted that "nationality [must comply] with two specific qualities."[804] It also observed that the "dominance" requirement focuses on "the degree or magnitude in which [connections to a particular State] are stronger than the connections that could have also been built by the individual in relation to another State that has also bestowed its nationality."[805] In contrast, the "effectiveness" requirement demands that the bond of an individual nationality "go beyond a formality with no apparent further effect," such that the nationality is "of substance rather than merely declaratory."[806] The purpose of the

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[799] **CLA-0124**, VCLT, Article 31(1).

[800] **Ex. R-0086**, Effective, OXFORD ENGLISH DICTIONARY.

[801] **Ex. R-0087**, Dominant, OXFORD ENGLISH DICTIONARY.

[802] **CLA-0047**, *Mergé Case – Decision No. 55*, UN Italian-United States Conciliation Commission, Decision, 10 June 1955 ("***Mergé***"), p. 247.

[803] *See* Claimants' Memorial (PCA), ¶ 295 ("Article 10.28 of the CAFTA-DR is identical in every respect, expect for the use of the word 'national' in lieu of 'citizen,' to the definition of 'investor of a Party' in Art. 12.20 of the TPA.").

[804] **RLA-0088**, *Michael Ballantine and Lisa Ballantine v. the Dominican Republic*, PCA Case No. 2016-17 (Ramírez Hernández, Cheek, Vinuesa), Final Award, 3 September 2019 ("***Ballantine* (Final Award)**"), ¶ 539.

[805] **RLA-0088**, *Ballantine* (Final Award), ¶ 538.

[806] **RLA-0088**, *Ballantine* (Final Award), ¶ 539.

effectiveness requirement is thus to prevent claimants from acquiring a nationality of convenience solely for the purposes of filing an international claim.

395. Because the dominant and effective nationality test is composed of two distinct requirements, Claimants must prove both the effectiveness and dominance of their US nationality. In the present case, however, the Tribunal need not concern itself with the "effectiveness" prong of the test. This is so because (a) Claimants concede that their Colombian nationality is indeed an effective nationality (along with that of the US);[807] and (b) Colombia does not dispute the effectiveness of Claimants' US nationality.

396. Because there is no dispute between the Parties that both of Claimants' nationalities are effective, the Tribunal is called upon only to determine which of Claimants' two nationalities is the dominant one.

ii. The Tribunal should determine Claimants' dominant nationality by applying a set of well-established factors

397. The TPA does not provide specific guidance on how a tribunal should determine a person's "dominant and effective nationality."[808] However, Article 10.22 of the TPA (which is incorporated into Chapter 12 by reference[809]) does provide that "the tribunal shall decide the issues in dispute in accordance with this Agreement **and applicable rules of international law**"[810] (emphasis added). Consistent with that provision, the Tribunal may thus find guidance in the factors previously applied by international courts and tribunals, both in the

[807] Claimants' Memorial (PCA), ¶ 289 ("The case before this Tribunal . . . exemplifies dual nationalities both of which are effective"); *see also* Claimants' Memorial (PCA), ¶ 219 (affirming that the "genuineness of Claimants dual citizenship status during any relevant timeframe is beyond cavil").

[808] **RLA-0001**, TPA, Art. 12.20.

[809] *See* **RLA-0001**, TPA, Art. 12.1.2(b).

[810] **RLA-0001**, TPA, Art. 10.22.

context of customary international law[811] and of the investment jurisprudence. Even Claimants themselves concede—as they should—that the judgments of the International Court of Justice ("**ICJ**") and other tribunals applying a customary international law dominant and effective nationality test (in the context of diplomatic protection) are "instructive."[812]

398. Based on the relevant international jurisprudence and doctrine (discussed below), Colombia respectfully submits that the Tribunal should apply the following factors to the present case in determining which of Claimants' two nationalities is the dominant one: **(i)** the location of Claimants' permanent and habitual residence; **(ii)** the center of Claimants' economic lives; **(iii)** the center of Claimants' family, social and political lives; and **(iv)** how Claimants have identified themselves.

399. These factors have been applied by other international tribunals, starting with the ICJ in 1955 in the case concerning *Nottebohm (Liechtenstein v. Germany)*. In that case, a State (Lichtenstein) had asserted diplomatic protection over a national (Mr. Nottebohm).[813] Because Mr. Nottebohm was solely a national of Lichtenstein, the ICJ only had to determine the effectiveness of his one nationality.[814] To do so, however, ICJ compiled and relied on a set of factors that "[i]nternational arbitrators [had previously applied in] numerous cases of dual nationality."[815] Those factors included the habitual residence of the individual,

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[811] *See* **RLA-0088**, *Ballantine* (Final Award), ¶ 529 ("Although there is no express reference made to customary international law in [the nationality] provision [of the treaty], the inclusion of the phrase '*dominant and effective nationality*' clearly suggests the application of a concept that has been used in the context of customary international law.") (emphasis in original).

[812] Claimants' Memorial (PCA), ¶ 203; *see also* Claimants' Memorial (PCA), ¶¶ 191–203.

[813] *See* **CLA-0057**, *Nottebohm Case*, ICJ, Second Phase (Hackworth, *et al.*), Judgment, 6 April 1955 ("***Nottebohm***"), p. 22.

[814] *See* **RLA-0088**, *Ballantine* (Final Award), ¶ 545 ("The main question to be decided in *Nottebohm* was whether the nationality granted to an individual by one State was binding or enforceable *vis a vis* a third State, in the context of diplomatic protection. *Nottebohm* does not deal with the concept of 'dominant nationality.'").

[815] **CLA-0057**, *Nottebohm*, p. 22.

the center of his interests, his family ties, his participation in public life, and the attachment shown for a country and inculcated in his children.[816]

400. Subsequent tribunals, including the Italy-United States Conciliation Commission in *Mergé*[817] and the Iran-United States Claims Tribunal[818] have relied and expanded on the *Nottebohm* factors when determining the dominant and effective nationality of dual nationals. Most recently, the *Ballantine* tribunal applied the dominant and effective nationality test by analyzing, *inter alia*, the claimants' choice of habitual residence; the claimants' personal attachment for the States of their dual-nationality; the center of the claimants' economic, social, and family lives; and the manner in which the claimants had identified themselves.[819]

401. On the basis of the above factors and the evidence on the record, the Tribunal should compare the relative strength of Claimants' ties to Colombia and the United States.

iii. Claimants' dominant nationality must be assessed as of four critical dates

402. Colombia has consented to the submission of certain claims to arbitration only in accordance with the terms of the TPA, including its limitation on dual nationality.[820] That limitation defines four critical dates on which Claimants'

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[816] **CLA-0057**, *Nottebohm*, p. 22.

[817] **CLA-0047**, *Mergé*, p. 247 (To determine the dominant and effective nationality of a Italian-U.S. dual national, the Italy-United States Conciliation Commission considered the individual's "habitual residence . . . [t]he conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States").

[818] **RLA-0089**, *Case No. A/18*, IUSCTR (Lagergren, *et al.*), Decision, 6 April 1984, p. 12; *see also* **RLA-0090**, *Benny Diba and Wilfred J. Gaulin v. Islamic Republic of Iran*, *et al.*, IUSCTR (Briner, Aldrich, Khalilian), Award, 31 October 1989, ¶ 11 (holding that the Iran-United States Claims Tribunal was required to scrutinize "the entire life of the Claimants . . . including Claimants' habitual residence, center of interests, family ties, participation in public life, and other evidence of attachment").

[819] *See* **RLA-0088**, *Ballantine* (Final Award), § X.C.

[820] *See* **RLA-0001**, TPA, Art. 10.17. Article 10.17 is incorporated into Chapter 12 of the TPA. *See id.*, Art. 12.1.2(b).

dominant nationality must have been that of the United States for them to be able to assert claims against Colombia under the TPA: (i) the date of the alleged treaty breaches, *and* (ii) the date on which Claimants submitted their claims to arbitration.[821]

403. First, Claimants' dominant nationality must have been that of the US on the dates of the alleged breaches of the TPA.[822] As discussed above, the provisions of Chapter 12 of the TPA "appl[y] to measures adopted or maintained by a Party relating to . . . [US investors]."[823] As the *Mesa Power* tribunal explained when interpreting a similar provision under NAFTA,[824] "there is no jurisdiction if disputed measures are not 'relating to Investors.'"[825] Accordingly, a dual US-Colombian national would have standing under the TPA only if its dominant and effective nationality is that of the US on the date on which the disputed measures (i.e., the alleged treaty breaches) occurred. Such a reading is consistent with the views of all of the arbitrators in *Ballantine*,[826] the rulings of other

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[821] **RLA-0088**, *Ballantine* (Final Award), ¶ 527; *see also* **RLA-0091**, *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17 (Ramírez Hernández, Cheek, Vinuesa), Partial Dissent of Marney L. Cheek on Jurisdiction, 3 September 2019 ("***Ballantine* (Cheek Dissent)**"), ¶ 2 (noting that the claimants could "only assert a claim against the Dominican Republic if their dominant and effective nationality is, in this case, that of the United States at the time of the alleged breach and at the time of submission of the claim").

[822] *See* Claimants' Memorial (PCA), ¶ 1 ("It was the last element from Colombia's standards took on this date (June 25, 2014) that giving rise to damages stemming violation of the TPA's protection place").

[823] **RLA-0001**, TPA, Art 12.1(1).

[824] **CLA-0113**, North American Free Trade Agreement, 1 January 1994 ("**NAFTA**"), Art. 1101 ("Scope and Coverage . . . 1. This Chapter applies to measures adopted or maintained by a Party relating to . . . investors of another Party").

[825] **RLA-0093**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17 (Kaufmann-Kohler, Brower, Landau), Award, 24 March 2016 ("***Mesa Power* (Award)**"), ¶ 325.

[826] **RLA-0088**, *Ballantine* (Final Award), ¶ 527; *see also* **RLA-0091**, *Ballantine* (Cheek Dissent), ¶ 2 (noting that the claimants could "only assert a claim against the Dominican Republic if their dominant and effective nationality is, in this case, that of the United States at the time of the alleged breach and at the time of submission of the claim").

international tribunals,[827] and the general principle of international law—embodied in Article 13 of the International Law Commission's Articles of State Responsibility—that "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[828]

404. Second, and in addition, Claimants' dominant nationality must *also* have been that of the US on the date of the submission of their claims to arbitration. An "investor of a Party" can be a "claimant" only to the extent that it "is a party to an investment dispute with ***another*** Party"[829] (emphasis added). Thus, a "claimant" seeking to file a claim against Colombia must be a US investor in an investment dispute with Colombia. And because Article 10.16 of the TPA[830] confirms that only a "claimant" can "submit [a claim] to arbitration,"[831] a "claimant" must exist at the time of the submission of the claim. In line with that reasoning, the majority and dissent in *Ballantine* held that "compliance with [the dominant and effective nationality] requirement is fundamental at the moment the claim [is] submitted."[832] The relevance of the date of submission is confirmed

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[827] *See*, *e.g.*, **CLA-0047**, *Mergé*, p. 247 (confirming that "[t]he question of dual nationality obviously arises only in cases where the claimant was in possession of both nationalities at the time the damage occurred").

[828] **RLA-0010**, ILC Articles on State Responsibility, Art. 13; *see also* **RLA-0092**, *Cementownia "Nowa Huta" S A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, ¶ 112 (Tercier Lalonde, Thomas) ("It is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, i.e., at the moment when the events on which its claim is based occurred."); **RLA-0093**; *Mesa Power* (Award), ¶ 325 ("State conduct cannot be governed by rules that are not applicable when the conduct occurs.").

[829] **RLA-0001**, TPA, Art. 12.20.

[830] *See* **RLA-0001**, TPA, Art. 10.16. Article 10.16 is incorporated into Chapter 12 of the TPA. *See id*., Art. 12.1.2(b).

[831] **RLA-0001**, TPA, Art. 10.16.

[832] **RLA-0088**, *Ballantine* (Final Award), ¶ 527; *see also* **RLA-0091**, *Ballantine* (Cheek Dissent), ¶ 2 (noting that the claimants could "only assert a claim against the Dominican Republic if their dominant and effective nationality is, in this case, that of the United States at the time of the alleged breach and at the time of submission of the claim").

by the general principles of international law, which affirm that jurisdiction must exist on the date of the submission of claims, as repeatedly noted by distinguished arbitrators and scholars.[833]

405. Article 25(2)(a) of the ICSID Convention is consistent with the above. Although not applicable in this case, that provision states that when determining the standing of any natural person to bring claims against a State, the nationality of such person must be ascertained by reference to when the parties to the dispute consented to submit the dispute to arbitration, and when the request for arbitration was registered.[834] Unlike the TPA, the ICSID Convention altogether precludes claims by any person who on either date also had the nationality of the Contracting State party to the dispute—regardless of whether that nationality was dominant.

[833] *See*, *e.g.*, **RLA-0094**, *Achmea B.V. v. the Slovak Republic*, PCA Case No. 2013-12 (Lévy, Beechy, Dupuy), Award on Jurisdiction and Admissibility, 20 May 2014, ¶ 267 ("It is an accepted principle of international law that jurisdiction must exist on the day of the institution of proceedings."); **RLA-0095**, *Compañía de Aguas del Aconquija S A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3 (Kaufmann-Kohler, Bernal Verea, Rowely), Decision on Jurisdiction, 14 November 2005, ¶ 61 ("[I]t is an accepted principle of international adjudication that jurisdiction will be determined in the light of the situation as it existed on the date the proceedings were instituted."); **RLA-0096**, Christoph H. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY (2D. ED. 2009), Art. 25, ¶ 36 ("It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. This means that on that date all jurisdictional requirement must be met.").

[834] **RLA-0098**, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, April 2006, Art. 25(a).

406. Claimants allege that Colombia breached its obligations under the TPA between June and October 1998,[835] on 26 May 2011,[836] and on 24 June 2014.[837] Thus, Claimants must prove that their US nationality was dominant on these dates ("**First Set of Critical Dates**"). Additionally, Claimants must prove that their US nationality was dominant on 24 January 2018, which was the date of submission of their Notice of and Request for Arbitration ("**Second Critical Date**").[838]

407. Put differently, the Tribunal would enjoy jurisdiction *ratione personae* only if it were to conclude that Claimants' US nationality was their dominant nationality on *all* of the critical dates—i.e., *each* of the First Critical Dates, *and* the Second Critical Date. In the present case, however, Claimants' dominant nationality was not that of the US on any of the First Set of Critical Dates or on the Second Critical Date. Consequently, pursuant to the TPA, the Tribunal lacks jurisdiction *ratione personae*.

408. Claimants make no attempt to prove that their dominant nationality was that of the US on *any* of the relevant dates. Their only cursory reference to any timeframe is the irrelevant assertion that the "*genuineness* of [their] dual citizenship status during *any relevant* timeframe is beyond cavil"[839] (emphasis added).

409. Since Claimants' dominant nationality was not that of the US on *either* the First Set of Critical Dates *or* on the Second Critical Date, it suffices for Colombia to

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[835] *See*, *e.g.*, Notice of and Request for Arbitration, ¶ 199 (asserting that Fogafín's financial support of Granahorrar violated Article 12.2 (the national treatment obligation) of the TPA); *see also id.*, ¶ 232 ("The underlying expropriation artificially compromising Granahorrar's solvency, reducing its share value to COP 0.01 . . . deprived the U.S. shareholders in absolute terms of the value of their investments.").

[836] *See e.g.*, Notice of and Request for Arbitration, ¶ 233 (claiming that the "Constitutional Court's issuance of its May 26, 2011 ruling and June 24, 2014 order also illicitly and permanently deprived the U.S. shareholders of their property").

[837] *See e.g.*, Notice of and Request for Arbitration, ¶ 219 (stating that the Constitutional Court's 25 June 2014 order was "the final element of a treaty violation based upon denial of justice").

[838] *See generally* Notice of and Request for Arbitration.

[839] Claimants' Memorial (PCA), ¶ 219.

demonstrate that Claimants' dominant nationality on the Second Critical Date was that of Colombia. Hence, for the sake of simplicity and judicial economy, Colombia will focus on Claimants' dominant nationality on the Second Critical Date. Nevertheless—for the avoidance of doubt—Colombia expressly notes that the evidence also demonstrates that Claimants' dominant nationality on the First Set of Critical Dates was also that of Colombia.

2. The Tribunal lacks jurisdiction ratione personae because Claimants' dominant nationality was that of Colombia at all relevant times

410. In the following sections, Colombia will address the factors identified above, and demonstrate on the basis of the cumulative evidence that Claimants' dominant and effective nationality was that of Colombia on the Second Critical Date (i.e., 24 January 2018).

a. Claimants selected Colombia as their permanent and habitual place of residence

411. A person's permanent residence reflects his or her "decision to settle in a specific place, as a long-standing decision."[840] As shown below, Colombia has been Claimants' permanent and habitual residence at all relevant times.

412. Alberto Carrizosa has permanently and habitually resided in Colombia uninterruptedly since 2007—which is eleven years prior to the Second Critical Date—until the present.[841] In 2018, the year of the Second Critical Date, Alberto Carrizosa spent 300 days in Colombia, and only 65 abroad (including but not limited to the US).[842] From 2007 to 2018, Alberto Carrizosa spent 3,406 days in

[840] **RLA-0088**, *Ballantine* (Final Award), ¶ 563.

[841] Alberto Carrizosa Gelzis Witness Statement, ¶ 32.

[842] **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 1; *see generally* **Ex. R-0201**; Migratory Records for Alberto Carrizosa Gelzis, 2001–2019. or the Tribunal's benefit, Colombia has calculated the number of days that Alberto Carrizosa has spent in and outside of Colombia from the year in which he established his permanent residency in Colombia until the year of the Second Critical Date. Colombia has relied on the Alberto

Colombia, far longer than the 948 days he spent abroad (including but not limited to the US).[843] In total, Alberto Carrizosa has resided in Colombia for 37 years, in the United States for 15 years, and in Europe for approximately one year.[844]

413. Colombia has similarly been Enrique Carrizosa's permanent and habitual residence uninterruptedly since 2004—which is fourteen years before the Second Critical Date—until the present date.[845] He spent 237 days in Colombia in 2018, versus 127 abroad (including but not limited to the US).[846] In total, from 2004 to 2018, Enrique Carrizosa spent 4,220 days in Colombia, versus 1,206 abroad (including but not limited to the US).[847] Over the course of his life, Enrique Carrizosa has resided in Colombia for 31 years and in the United States for only 14 years.[848] And though Enrique Carrizosa states that he "spend[s] at least 70 days per year in the United States,"[849] documentary evidence disproves that assertion.[850]

Carrizosa's migratory records from the Cancillería de Colombia, which it received on 2 April 2019.

[843] **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 1; *see generally* **Ex. R-0201**; Migratory Records for Alberto Carrizosa Gelzis, 2001–2019.

[844] *See* Alberto Carrizosa Gelzis Witness Statement, ¶¶ 1, 3, 12–17.

[845] Enrique Carrizosa Gelzis Witness Statement, ¶ 17.

[846] **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 2; *see generally* **Ex. R-0202**; Migratory Records for Enrique Carrizosa Gelzis, 2002–2019. For the Tribunal's benefit, Colombia has calculated the number of days that Enrique Carrizosa has spent in and outside of Colombia from the year in which he established his permanent residency in Colombia until the year of the Second Critical Date. Colombia has relied on the Enrique Carrizosa's migratory records from the Cancillería de Colombia, which it received on 2 April 2019.

[847] **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 2; *see generally* **Ex. R-0202**; Migratory Records for Enrique Carrizosa Gelzis, 2002–2019.

[848] Enrique Carrizosa Gelzis Witness Statement, ¶¶ 1, 7–17.

[849] Enrique Carrizosa Gelzis Witness Statement, ¶ 29.

[850] **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 2, note x (Assuming that Enrique Carrizosa spent every day during the periods in which he exited to and entered from the US in the US (i.e., that he never travelled to and from the US other than to Colombia), Enrique Carrizosa spent; 172 days in the US in 2004; 35 days in 2005; 37 days in

414. Felipe Carrizosa, for his part, has made Colombia his permanent and habitual residence uninterruptedly since 1994—which is 24 years prior to the Second Critical Date—until the present. [851] Felipe Carrizosa spent 302 days in Colombia in 2018, and only 62 abroad (including but not limited to the US).[852] In total, from 2001 to 2018, he spent 5,270 days in Colombia, dwarfing the 643 days he spent abroad (again, including but not limited to the US).[853] Felipe Carrizosa has resided in Colombia for 40 years, in the United States for seven years, and in Germany for three years.[854]

415. Claimants raise two arguments in an attempt to minimize the significance of their choice to make Colombia their permanent and habitual residence. First, they contend that they live in Colombia because that is where their businesses are located.[855] But for these businesses, Claimants allege, they would live

2006; 86 days in 2007; 58 days in 2008; 17 days in 2009; 52 days in 2010; 68 days in 2011; 61 days in 2012; 46 days in 2013; 38 days in 2014; 10 days in 2015; 58 days in 2016; 43 days in 2017; and 111 days in 2018); *see generally* **Ex. R-0202**; Migratory Records for Enrique Carrizosa Gelzis, 2002–2019.

[851] Felipe Carrizosa Gelzis Witness Statement, ¶ 17.

[852] **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 3; *see generally* **Ex. R-0203**; Migratory Records for Felipe Carrizosa Gelzis, 2001–2019. For the Tribunal's benefit, Colombia has calculated the number of days that Felipe Carrizosa has spent in and outside of Colombia from 2001 (the earliest available year) in Colombia until the year of the Second Critical Date. Colombia has relied on the Felipe Carrizosa's migratory records from the Cancillería de Colombia, which it received on 2 April 2019.

[853] **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 3; *see generally* **Ex. R-0203**; Migratory Records for Felipe Carrizosa Gelzis, 2001–2019.

[854] Felipe Carrizosa Gelzis Witness Statement, ¶¶ 1, 10–21.

[855] *See* Claimants' Memorial (PCA), ¶ 236; *see also* Alberto Carrizosa Gelzis Witness Statement, ¶ 45 ("My business ventures in Colombia require my physical presence and daily care"); Enrique Carrizosa Gelzis Witness Statement, ¶ 33.

elsewhere.[856] Second, they assert that they jointly own a condominium in Miami-Dade County, Florida.[857]

416. Both arguments are unavailing, and fail to disprove that their dominant nationality is that of Colombia. Claimants' first attempted rebuttal—viz., that they only live in Colombia due to their businesses—fails for three reasons.

417. First, Claimants freely chose to situate their business ventures and permanent residences in Colombia, having had the option to do so elsewhere. Claimants first moved to the United States as minors,[858] and therefore did not move there by choice. By contrast, Claimants freely chose as adults to leave the United States, and to live and work in Colombia. The foregoing is significant also because Alberto and Enrique Carrizosa had enjoyed successful professional lives in the United States prior to moving to Colombia.[859] Nevertheless, Alberto Carrizosa chose to return to Colombia.[860] Enrique Carrizosa similarly elected—voluntarily, and as an adult—to leave the United States in 2004 for the purposes of working and residing in Colombia.[861]

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[856] Alberto Carrizosa Gelzis Witness Statement, ¶ 8 ("I live in Colombia to follow my business activities more closely in person. Indeed, if my business activities required living in another country I would live in that country"); *see also* Enrique Carrizosa Gelzis Witness Statement, ¶ 33 ("For the time being I still need to look after my business ventures in Colombia personally . . . It is business requiring constant presence and availability while my investments in the US do not require any such personal presence"); Felipe Carrizosa Witness Statement, ¶ 32 ("The necessity to live in Colombia, rather than in the US, is the result of the different nature of my investments in the two countries").

[857] Alberto Carrizosa Gelzis Witness Statement, ¶ 44; Enrique Carrizosa Gelzis Witness Statement, ¶ 37; Felipe Carrizosa Gelzis Witness Statement, ¶ 34.

[858] Alberto Carrizosa Gelzis Witness Statement, ¶ 12; Enrique Carrizosa Gelzis Witness Statement, ¶ 6; Felipe Carrizosa Gelzis Witness Statement, ¶ 11.

[859] *See* Alberto Carrizosa Gelzis Witness Statement, ¶¶ 20–21, 29–31; Enrique Carrizosa Gelzis Witness Statement, ¶¶ 10–16.

[860] Alberto Carrizosa Gelzis Witness Statement, ¶¶ 23, 32 (stating that he chose to return to Colombia from the United States in 1990 and 2007).

[861] Enrique Carrizosa Gelzis Witness Statement, ¶¶ 17–18.

418. For his part, Felipe Carrizosa could have established his professional life in the United States, but like his brothers chose to return to Colombia.[862] He concedes that his most recent job in Colombia ended in 2018.[863] Since it is unquestionable that he has resided in Colombia from 2018 until the present,[864] he is either residing in Colombia without any active business ventures, or he has not fully disclosed his professional activities in Colombia.

419. Second, Claimants maintained their involvement in their Colombian investments even while abroad. Indeed, Claimants' mother concedes that "Alberto, who was attending University [in the United States] participated *very actively* in Granahorrar. The same thing was true with Felipe"[865] (emphasis added).

420. In his witness statement, Alberto Carrizosa fails to mention his "active[]"[866] involvement in his Colombian businesses during the periods in which he lived in the United States and Europe (from 1998 to 2007). For example, the evidence shows that he was the Director of the *I.C. Group* during the relevant period.[867] The Carrizosa Family controlled *I.C. Inversiones* in the late 1990s.[868] Alberto Carrizosa remained involved in *I.C. Inversiones* thereafter, and he is currently its President.[869] *Balcones de Iguazu* was also controlled by the Carrizosa Family in the late 1990s.[870] And as evidenced by Bulletin 2846 of the Chamber of Commerce of

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[862] Felipe Carrizosa Gelzis Witness Statement, ¶ 17.

[863] Felipe Carrizosa Gelzis Witness Statement, ¶ 21.

[864] *See* Felipe Carrizosa Gelzis Witness Statement, ¶ 3.

[865] Witness Statement of Astrida Benita Carrizosa, ¶ 27.

[866] Witness Statement of Astrida Benita Carrizosa, ¶ 27.

[867] Alberto Carrizosa states that he became Director of the *I.C. Group* in 1992. Alberto Carrizosa Gelzis Witness Statement, ¶ 25. There is documentary evidence that he was still a Director of the *I.C. Group* as of 2016. **Ex. R-0206**, Effective Philanthropy in a Colombia in Transition, 30 November 2016, p. 9.

[868] **Ex. R-0250**, Registry of Corporations Controlled by the Carrizosa Family, 27 September 1999, pp. 8–9.

[869] **Ex. R-0011**, LinkedIn Profile of Alberto Carrizosa

[870] **Ex. R-0250**, Registry of Corporations Controlled by the Carrizosa Family, 27 September 1999, pp. 10–11.

Bogotá, Alberto Carrizosa legally controlled *Balcones de Iguazu* until 2007,[871] and he directly owned at least 7.4% of *Balcones de Iguazu* until 2010.[872] Finally, the Carrizosa Family controlled *Covitotal* in the late 1990s,[873] and by 2008 Alberto Carrizosa had risen to a member of the company's board of directors.[874]

421. Further, beginning in 1992, Alberto Carrizosa supervised various Granahorrar subsidiaries, including *Vanguardia Inversiones*.[875] He served as a representative of *Vanguardia Inversiones* to the Colombo-American Chamber of Commerce in 2007, and therefore remained involved in the company at least until that date.[876]

422. As for Enrique Carrizosa, he similarly remained involved in his family's corporations while working in the US (from 1995 until 2004). Indeed, between 1997 and 1999, the Carrizosa Family was in control of 29 Colombian corporations.[877] Enrique Carrizosa was registered as one of those companies' "*controlantes*" (controllers).[878] Enrique Carrizosa was a "*controlante*" of *Inversiones Burgos Monserrat* in 1997,[879] and he and his brothers were the company's sole shareholders by 2015.[880]

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[871] **Ex. R-0204**, Bulletin 2846, Chamber of Commerce of Colombia, 21 November 2007, p. 284.

[872] **Ex. R-0257**, Minutes of Balcones de Iguazu Shareholders Assembly, 9 September 2010, p. 1.

[873] **Ex. R-0250**, Registry of Corporations Controlled by the Carrizosa Family, 27 September 1999, p. 3.

[874] *See generally* **Ex. R-0256,** Minutes of Covitotal Board of Directors Meeting, 11 September 2008.

[875] Alberto Carrizosa Gelzis Witness Statement, ¶ 27.

[876] *See* **Ex. R-0207**, Directory of Affiliates of the Colombo American Chamber of Commerce, 2007, p. 99.

[877] *See generally* **Ex. R-0250**, Registry of Corporations Controlled by the Carrizosa Family, 27 September 1999.

[878] **Ex. R-0250**, Registry of Corporations Controlled by the Carrizosa Family, 27 September 1999, p. 2.

[879] **Ex. R-0250**, Registry of Corporations Controlled by the Carrizosa Family, 27 September 1999, pp. 13–14.

[880] **Ex. R-0259**, Inversiones Burgos Monserrat Shareholders Assembly, 15 April 2015, p. 1.

423. Felipe Carrizosa returned to Colombia in 1994. According to his own witness statement, however, before that time he actively acquired tens of thousands of shares in the Holding Companies.[881]

424. In sum, Claimants demonstrably remained involved in their Colombian businesses while abroad.

425. *Third*, Claimants rely on the *Micula v. Romania* Decision on Jurisdiction and Admissibility, which is inapposite jurisprudence. In *Micula*, the tribunal discussed the effectiveness—but not the dominance—of the claimants' nationality, and moreover it did so only in *dicta*.[882] As part of its assessment of the effectiveness of the claimants' Swedish nationality, the tribunal considered *inter alia* the fact that they had been residing in Romania only to run their businesses.[883] According to Claimants, the *Micula* tribunal's analysis applies in the present case because *inter alia* "all three Claimants have testified that they only live in Colombia because it is where their business is located."[884]

426. However, *Micula* is inapplicable here for the simple reason that the *Micula* tribunal did not conduct any comparative analysis regarding the *dominance* of one or the other of two nationalities.[885] Instead, it only considered whether the claimants' links to Sweden were so tenuous as to render their only nationality ineffective. Because the present case presents only the question of which nationality is dominant (as opposed to effective), the *Micula dicta* cited by Claimants is wholly inapposite.

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[881] Felipe Carrizosa Gelzis Witness Statement, ¶ 38.

[882] **CLA-0040**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20 (Lévy, Alexandrov, Ehlermann), Decision on Jurisdiction and Admissibility, 24 September 2008 ("***Ioan Micula***"), ¶¶ 100–104.

[883] **CLA-0040**, *Ioan Micula*, ¶ 104.

[884] Claimants' Memorial (PCA), fn. 284.

[885] **CLA-0040**, *Ioan Micula*, ¶ 103.

427. Instead, the more relevant decision is that in *Ballantine*, in which the tribunal did undertake an analysis of the dominance requirement. That award confirms that even if Claimants' Colombian businesses required their physical presence in Colombia, that fact would not without more determine—or even alter—the outcome of the dominance analysis. In *Ballantine*, the claimants alleged that they initially had intended to manage their investment from the United States.[886] According the claimants, the purpose of their move to the Dominican Republic was to oversee their investment when "it became apparent that they needed to be present."[887] The majority of the *Ballantine* tribunal was not persuaded by that argument; instead, in concluding that the claimants' dominant nationality on the critical dates had been that of the Dominican Republic, the majority relied in significant part on the claimants' choice to establish their permanent residence in the Dominican Republic.[888]

428. Claimants' second attempted rebuttal—viz., that they jointly own a condominium in Florida—is equally unavailing.[889] The Miami-Dade County Property Appraiser's records confirm that the subject property was purchased in 2015 by a British Virgin Islands company called Archinal Group Limited.[890] There is no record that Claimants have ever owned the subject property. But even assuming that Claimants did purchase and own that property indirectly, all

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[886] **RLA-0088**, *Ballantine* (Final Award), ¶ 557.

[887] **RLA-0088**, *Ballantine* (Final Award), ¶ 206.

[888] **RLA-0088**, *Ballantine* (Final Award), ¶ 566 ("[A]t at least from 2008 until the moment they became Dominican nationals in 2010 was as *permanent residents* of the Dominican Republic and being nationals from 2010 to 2014, most of their time was spent in that country. We view this evidence as confirming the legal status the Claimants voluntarily chose to acquire. Consequently, although the Claimants maintained ties with the United States, their permanent residence at the relevant time was centered in the Dominican Republic.").

[889] *See* Alberto Carrizosa Gelzis Witness Statement, ¶ 44; Enrique Carrizosa Gelzis Witness Statement, ¶ 37; Felipe Carrizosa Gelzis Witness Statement, ¶ 34.

[890] **Ex. R-0208**, Special Warranty Deed for 17475 Collins Avenue, Unit 1102, 25 August 2015, **Ex. R-0209**, Miami-Dade Property Appraiser Records for 17475 Collins Avenue, Unit 1102, 2 September 2019.

it suggests is that Claimants decided to buy a holiday home outside of their main country of residence (and specifically, in the Miami area, as many affluent Latin Americans have done over the years).

429. For the foregoing reasons, Colombia was Claimants' permanent residence on the Second Critical Date, and remains so as of today.

b. Claimants elected to make Colombia the center of their economic lives

430. The center of a person's economic life is the geographic location that serves as the focal point for their professional and financial life.[891] In the present case, the evidence confirms that Claimants also elected to make Colombia the center of their economic lives at all relevant times.

431. Colombia is the center of Alberto Carrizosa's economic life, as evinced by the facts identified below. Since at least 1990, Mr. Carrizosa has held the following positions in Colombia:

- Administrative Director and Chief Financial Officer of *Industrial de Construcciones Limitada*;[892]
- Director of *I.C. Group*;[893]
- Director of *Termodorada*;[894]

[891] *See*, *e.g.*, **RLA-0088**, *Ballantine* (Final Award), ¶¶ 576–577 (finding that "that during the relevant time [the] center [of the claimants' economic life] was in the Dominican Republic," *inter alia* because they had "relocated their economic center . . . to the country where they resided permanently," and established "their 'main' business in the Dominican Republic"); **CLA-0047**, *Mergé*, p. 13 (identifying as a guiding principle *inter alia* whether "the interests and the permanent professional life of the head or the family *were established in* the United States" (emphasis added)).

[892] Alberto Carrizosa Gelzis Witness Statement, ¶ 24.

[893] Alberto Carrizosa Gelzis Witness Statement, ¶ 25.

[894] Alberto Carrizosa Gelzis Witness Statement, ¶ 26.

- Director and Chairman of the Board of Granahorrar (overseeing five subsidiaries);[895]
- Member of the Board of Directors of *Covitotal*;[896]
- Liquidator of *Vanguardia Asesorías SAS*;[897]
- Member of the Board of Directors of *Gas Gombel SA*;[898]
- Employee at *I.C. Investments Group*;[899] and
- President of *I.C. Inversiones*;[900]
- President of *I.C. Fundación*.[901]

By contrast, Alberto Carrizosa has worked for only three companies in the United States, in each instance *prior to* the Second Critical Date.[902]

432. Colombia has likewise been the center of Enrique Carrizosa's economic life since at least 2004—which is fourteen years prior to the Second Critical Date.[903] Enrique Carrizosa began working at the IC Group in April 2004 and is currently the Chairman of the Board.[904] In total, Enrique Carrizosa has spent over 15 years at the IC Group.[905] Additionally, he is Chairman of the Board at the *I.C. Inversiones*.[906] Enrique Carrizosa has also the represented *Vanguardia Inversiones,*

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[895] Alberto Carrizosa Gelzis Witness Statement, ¶¶ 27–28.

[896] *See generally* **Ex. R-0256,** Minutes of Covitotal Board of Directors Meeting, 11 September 2008.

[897] **Ex. R-0210**, Certificate of Liquidation of Vanguardia Asesorías SAS, 9 October 2017, p. 5 (certifying Alberto Carrizosa Gelzis as Liquidator of Vanguardia Asesorías SAS).

[898] **Ex. R-0211**, Certificate of Existence of Gas Gombel SA, 9 June 2019, p. 6 (certifying that Alberto Carrizosa Gelzis is a member of the Board of Directors).

[899] Alberto Carrizosa Gelzis Witness Statement, ¶ 32.

[900] **Ex. R-0011**, LinkedIn Profile of Alberto Carrizosa

[901] *See* **Ex. R-0206**, Effective Philanthropy in a Colombia in Transition, 30 November 2016, p. 9.

[902] *See* Alberto Carrizosa Gelzis Witness Statement, ¶¶ 19–23, 29–32.

[903] Enrique Carrizosa Gelzis Witness Statement, ¶ 17.

[904] Enrique Carrizosa Gelzis Witness Statement, ¶ 17.

[905] *See* Enrique Carrizosa Gelzis Witness Statement, ¶ 17.

[906] **Ex. R-0212**, LinkedIn Profile of Enrique Carrizosa

Compto, Exultar, and Fultiplex at *Banco Davivienda* (Colombia's third largest bank) shareholder assemblies.[907] In 2013, *Banco Davivienda*'s shareholders unanimously nominated him to certify the minutes of at least one shareholder meeting.[908] In 2010, he was the legal representative of *Manufacturas de Oriente*.[909] Finally, in 2017 Enrique Carrizosa oversaw the liquidation of *Vanguardia Asesorías SAS*.[910] By contrast, he spent at most four years of his professional life in the United States,[911] in each instance *prior to* the Second Critical Date. [912]

433. The center of Felipe Carrizosa's economic life has always been in Colombia. In fact, he has never held a job in the United States at all.[913] In contrast, since 1994, he has held a number of positions in Colombia, including the following:

- Plant Director at *Industrias y Construcciones S.A.*;[914]
- Member of the Board at *Leasing Patrimonio*;[915]
- Head of the Purchasing Department at *Industrias y Construcciones S.A.*;[916]
- General Manager for *Industrias y Construcciones S.A*;[917]

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[907] *See* **Ex. R-0213**, Minutes No. 7356 of Shareholder Assembly of Banco Davivienda, 21 June 2013, p. 3.

[908] *See* **Ex. R-0213**, Minutes No. 7356 of Shareholder Assembly of Banco Davivienda, 21 June 2013, pp. 6, 7.

[909] **Ex. R-0258**, Minutes of Industrias y Construcciones Shareholders Assembly, 13 September 2010, p. 1.

[910] **Ex. R-0210**, Certificate of Liquidation of Vanguardia Asesorías SAS, 9 October 2017, p. 5 (certifying Enrique Carrizosa Gelzis as Liquidator of Vanguardia Asesorías SAS).

[911] Enrique Carrizosa Gelzis Witness Statement, ¶¶ 13–16 (identifying the two jobs Enrique Carrizosa held in the United States after graduating from university, from 1998 to 2001 and from 2003 to 2004").

[912] Felipe Carrizosa Gelzis Witness Statement, ¶ 17.

[913] *See generally* Felipe Carrizosa Gelzis Witness Statement.

[914] Felipe Carrizosa Gelzis Witness Statement, ¶ 17.

[915] Felipe Carrizosa Gelzis Witness Statement, ¶ 18.

[916] Felipe Carrizosa Gelzis Witness Statement, ¶ 19.

[917] Felipe Carrizosa Gelzis Witness Statement, ¶ 20.

- President and CEO of *I.C. Constructora SAS*;[918] and
- President of *I.C. Inmobilaria*.[919]

434. Notably, in his role as President and CEO of *I.C. Constructora SAS* and *I.C. Inmobilaria*, Felipe Carrizosa has developed large-scale real estate projects in Colombia. In 2009, for instance, *I.C. Inmobilaria* developed a multi-use project in Cúcuta, Colombia.[920] *I.C. Inmobilaria* also developed a luxury office complex in Bogotá called Capital Park 93.[921] Due to his long-standing career as a Colombian real estate developer, Felipe Carrizosa has been interviewed for his knowledge of urban development issues in Colombia both by international publications,[922] and for local Colombian university projects.[923]

435. Claimants seek to divert attention from their choice to build and center their economic lives in Colombia with three arguments, all of which fail.

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[918] Felipe Carrizosa Gelzis Witness Statement, ¶ 21.

[919] **Ex. R-0214**, **"***En Cúcuta se construye Altovento; en el proyecto se invertirán más de $25.000 millones*," PORTAFOLIO, 19 June 2009, p. 2 (Identifying Felipe Carrizosa Gelzis as President of *I.C. Inmobilaria*).

[920] **Ex. R-0214**, **"***En Cúcuta se construye Altovento; en el proyecto se invertirán más de $25.000 millones*," PORTAFOLIO, 19 June 2009.

[921] **Ex. R-0215**, "*Vendido 80% de Capital Park 93 en Bogotá*," EL TIEMPO, 28 August 2009.

[922] **Ex. R-0216**, **"***Homebuilding and ambitious infrastructure plans drive expansion*," OXFORD BUSINESS GROUP, 25 September 2014, p. 2 ("'The development of VIS projects in Bogotá has become extremely difficult in recent times,' Felipe Carrizosa, president of IC Constructora, told OBG. 'The present administration wants to expand the city in an area that they called the Expanded Centre Initiative, which restricts VIS projects in two ways: firstly it prevents projects from being developed in the periphery or the south, where the soil is cheaper. Furthermore, utility services are being given only to the defined area'").

[923] **Ex. R-0217**, Jairo Iván Oviedo Pesellini, *Renovar ¡Reedificando! Un proceso reglado no planificado, Bogotá: 2000-2017*, UNIVERSIDAD NACIONAL DE COLOMBIA, (2018), pp. 244–247.

436. *First*, Claimants assert that all their passive assets,[924] which they say comprises the majority of their assets,[925] are in the United States. However, they provide no documentary evidence whatsoever to support this claim, and such documentary evidence as does exist on that point shows the contrary: that Claimants maintained passive assets of sizable value in Colombia after they moved there from the US. For instance, as of 31 March 2010, the Carrizosa Family owned 4.45% of the shares in Banco Davivienda (amounting to approximately 2,125,192 shares).[926] The nominal value of each share was COP 1,000 (c. USD .52) at the time,[927] resulting in a total value of COP 2.125 billion (c. USD 1.1 million). Additionally, as it had done with Granahorrar, the Carrizosa Family held its shares in Davivienda indirectly, through the Holding Companies.[928] As a result, Claimants' shares in the Holding Companies constituted additional passive assets that they held in Colombia.

437. In fact, the Carrizosa Family owns a veritable business empire in Colombia. From 1997 to 1999, the Carrizosa Family—including Claimants—was the majority shareholder of at least 29 corporations in Colombia.[929] Available documentary evidence confirms that many, if not all, of those corporations have remained in

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[924] *See* Alberto Carrizosa Gelzis Witness Statement, ¶ 45 ("My assets in the US are passive assets. i.e. non-business income producing assets"); Enrique Carrizosa Gelzis Witness Statement, ¶ 33; Felipe Carrizosa Gelzis Witness Statement, ¶ 32.

[925] *See* Alberto Carrizosa Gelzis Witness Statement, ¶ 39 ("Most of my assets, overwhelmingly so, are in the US"); Enrique Carrizosa Gelzis Witness Statement, ¶ 34 ("Most of my income-generating assets are located in the US. Those assets amount to about 90% of my total liquid assets"); Felipe Carrizosa Gelzis Witness Statement, ¶ 33 ("My personal liquid assets in the US by far exceed my liquid assets in Colombia").

[926] **Ex. R-0218**, Prospectus for Issuance of Preferred Shares, Banco Davivienda, August 2010, pp. 50–51 (as of 31 March 2010, Davivienda had 47,757,122 shares in circulation).

[927] **Ex. R-0218**, Prospectus for Issuance of Preferred Shares, Banco Davivienda, August 2010, p. 84.

[928] **Ex. R-0218**, Prospectus for Issuance of Preferred Shares, Banco Davivienda, August 2010, p. 51.

[929] *See* **Ex. R-0250**, Registry of Corporations Controlled by the Carrizosa Family, 27 September 1999.

operation.[930] Additionally, Claimants' companies have purchased at least 10 plots of land in Colombia, which they still own, either as separate plots or after fusing together multiple plots.[931] There is no evidence that Claimants have divested themselves of any of these assets or that their investments in the US are anywhere near as extensive. Still, Claimants have created a corporate structure so

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[930] *See generally* **Ex. R-0250**, Registry of Corporations Controlled by the Carrizosa Family, 27 September 1999; *see also* **Ex. R-0251**, Balcones de Iguazu Financial Report, August 2010, p. 21 (showing that *Balcones de Iguazu* owned shares in *Covitotal, Industrial de Construcciones, Industrias y Construcciones IC Inmobiliaria,* and *Prodesic*, all Carrizosa Family companies); **Ex. R-0254,** Industrial de Construcciones Financial Report, December 2011, p. 37 (showing that the shareholders of *Industrial de Construcciones* included *Balcones de Iguazu, IC Constructora, Industrias y Construcciones*, and *IC Inmobiliaria*, all Carrizosa Family companies); **Ex. R-0255,** Industrias y Construcciones Financial Report, August 2010, p. 17 (showing that among the debtors of *Industrias y Construcciones* were *Asesorías e Inversiones, Balcones de Iguazu, Covitotal,* and *Prodesic*, all Carrizosa Family companies); *see also id.* at 23 (showing that among the creditors of *Industrias y Construcciones* were *Asesoría e Inversiones*, *Balcones de Iguazu*, *Covitotal, Exultar, Fultiplex, IC Inmobiliaria, IC Inversiones, Industrial de Construcciones, Inversiones Burgos Monserrat,* and *Inversiones Lieja*, all Carrizosa Family companies).

[931] *See* **R-0252**, Certificate of Real Property No. 50S-40293773, 18 October 2019, p. 1 (showing that *Asesorias e Inversiones* purchased the subject property from *Industrias y Construcciones* on 20 April 1999 and subsequently fused it with another property); **R-0252**, Certificate of Real Property No. 50S-40293774, 18 October 2019, p. 1 (showing that *Asesorias e Inversiones* purchased the subject property from *Industrias y Construcciones* on 20 April 1999 and subsequently fused it with another property); **R-0252**, Certificate of Real Property No. 50S-40293775, 18 October 2019, p. 1 (showing that *Asesorias e Inversiones* purchased the subject property from *Industrias y Construcciones* on 20 April 1999 and subsequently fused it with another property); **R-0252**, Certificate of Real Property No. 50S-40293776, 18 October 2019, p. 1 (showing that *Asesorias e Inversiones* purchased the subject property from *Industrias y Construcciones* on 20 April 1999 and subsequently fused it with another property); **R-0252**, Certificate of Real Property No. 50S-40293777, 18 October 2019, p. 1 (showing that *Asesorias e Inversiones* purchased the subject property from *Industrias y Construcciones* on 20 April 1999 and subsequently fused it with another property); **R-0252**, Certificate of Real Property No. 50S-40293778, 18 October 2019, p. 1 (showing that *Asesorias e Inversiones* purchased the subject property from *Industrias y Construcciones* on 20 April 1999 and subsequently fused it with another property); **R-0252**, Certificate of Real Property No. 50S-40293779, 18 October 2019, p. 1 (showing that *Asesorias e Inversiones* purchased the subject property from *Industrias y Construcciones* on 20 April 1999 and subsequently fused it with another property); **R-0252**, Certificate of Real Property No. 50S-40379155, 18 October 2019, pp. 1–2 (identifying one property that was split on 21 September 2001 and became property of *Asesorías e Inversiones* and *Industrias y Construcciones*); **R-0253**, Certificate of Real Property No. 450-2355, 18 October 2019, p. 3 (showing that *Lieja* purchased the subject property on 21 November 2001); **Ex. R-0253**, Certificate of Real Property No. 450-17006, 18 October 2019, p. 3 (showing that *Lieja* purchased the subject property on 21 November 2001).

convoluted that the full extent of their asset ownership in Colombia is currently unknown.[932] Indeed, it is likely that only Claimants possess the information necessary to fully untangle their corporate web. As Claimants bear the burden of proof on the issue of their nationality, they should fully disclose the extent to which they and their companies own assets in Colombia.

438. Further, even if Claimants have invested in the United States money that they have earned in Colombia, that fact would not demonstrate that the center of their economic life is in the United States. Indeed, it is common for Latin Americans with financial means to use the United States as a safe haven for their investments. For example, Forbes Magazine, among many publications,[933] highlights that "the US continues to provide a safe haven for Latin American money. Even those who keep money in Latin America want to hedge with American investments, especially real estate."[934] In light of the volatility and inflation of developing countries' economies relative to the United States, it is not surprising that Claimants would keep assets in the United States.

439. In any event, it is significant that Claimants have chosen to establish in Colombia *the totality* of their active assets (i.e., their business ventures). In the *Ballantine* case, the majority considered that the claimants' economic lives were centered in the Dominican Republic despite the fact that the claimants maintained checking

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[932] *See e.g.*, **Ex. R-0251**, Balcones de Iguazu Financial Report, August 2010, p. 21 (showing that *Balcones de Iguazu* owned shares in *Covitotal, Industrial de Construcciones, Industrias y Construcciones IC Inmobiliaria,* and *Prodesic*, all Carrizosa Family companies); **Ex. R-0254,** Industrial de Construcciones Financial Report, December 2011, p. 37 (showing that the shareholders of *Industrial de Construcciones* included *Balcones de Iguazu, IC Constructora, Industrias y Construcciones*, and *IC Inmobiliaria*, all Carrizosa Family companies); **Ex. R-0255,** Industrias y Construcciones Financial Report, August 2010, p. 17 (showing that *Industrias y Construcciones* owned shares in *Covitotal, Industrial de Construcciones*, and *Prodesic*, all Carrizosa Family companies); *see also id.* at 25 (showing that the shareholders of *Industrias y Construcciones* included *Balcones de Iguazu*).

[933] *See generally* **Ex. R-0219**, *Cash-rich Latin Americans help resuscitate Miami real estate*, Reuters, 23 February 2012; **Ex. R-0220**, *How wealthy Latinos are transforming Miami housing*, CNBC, 7 February 2014; **Ex. R-0221**, *Latin American Investors Look North to US Markets*, Morgan Stanley, March 2016.

[934] **Ex. R-0222**, *Miami – The Operational Financial Center For A Growing Latin American Market*," FORBES MAGAZINE, 13 March 2015, p. 2.

accounts and a retirement account in the United States.[935] The majority noted, *inter alia*, that the claimants had established their main business in the Dominican Republic, and had reorganized their life around their investment.[936] Notably, in parallel with their investments in the Dominican Republic, the *Ballantine* claimants maintained two active business ventures in the United States[937]—something which Claimants here do not even claim.

440. *Second*, Claimants contend that they file income tax returns in the United States.[938] This proves nothing at all, for the simple reason that all United States citizens are equally required by law to file tax returns in the United States (irrespective of their country of residence, of where their income originated, or of which of their nationalities—if they have more than one—is dominant).[939] Mere compliance with a particular nation's laws does not in itself constitute evidence of the dominance of that country's nationality. Claimants recognize this when they allege—incorrectly and misleadingly—that they only identify as Colombian when required to do so by law.[940]

441. Remarkably, Claimants make no mention of whether they have filed tax returns in Colombia. Colombia has not used its sovereign authority to obtain information about Claimants' tax filings. However, as Claimants bear the burden on the issue of nationality and have invoked the issue of tax returns, they should produce their Colombian tax returns.

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[935] **RLA-0088**, *Ballantine* (Final Award), ¶ 575.

[936] **RLA-0088**, *Ballantine* (Final Award), ¶ 576.

[937] **RLA-0088**, *Ballantine* (Final Award), ¶ 575.

[938] *See* Alberto Carrizosa Gelzis Witness Statement, ¶ 47; Enrique Carrizosa Gelzis Witness Statement, ¶ 41; Felipe Carrizosa Gelzis Witness Statement, ¶ 24(b).

[939] **Ex. R-0223**, Publication No. 54, United States Department of the Treasury–Internal Revenue Service, 25 January 2019, p. 3 ("If you are a U.S. citizen or resident alien, the rules for filing income, estate, and gift tax returns and for paying estimated tax are generally the same whether you are in the United States

or abroad").

[940] *See* Alberto Carrizosa Gelzis Witness Statement, ¶ 50;

442. *Third*, Claimants state that they "*always* expected to receive protection as US investors in Colombia from the investment protection treaty entered into by the US and Colombia"[941] (emphasis added). This claim is incredible—literally. Claimants assert that "the Council of State's November 1, 2007 Judgment . . . constitutes [their] investment."[942] But that judgment was issued 5 years before the TPA came into force, and the TPA explicitly precludes judicial decisions from being considered investments.[943] And if Claimants were to assert in their reply that their shares in Granahorrar constituted their investment, that claim would be similarly unavailing. Claimants obtained their interests in Granahorrar in the late 1980s[944]—which is over *twenty years before the TPA entered into force*. Accordingly, it is patently untrue that Claimants always expected the TPA's protections. Further, Claimants have submitted no contemporaneous evidence suggesting—let alone proving—that they expected the TPA to protect their investment in Granahorrar even *after* the TPA entered into force. Indeed, as Colombia will detail below, before submitting their claims to this Tribunal Claimants first filed a claim at Inter-American Commission on Human Rights as *Colombian nationals*.[945]

443. For the reasons stated above, and as supported by the evidence cited herein, Colombia was the center of all three of Claimants' economic lives on the Second Critical Date. It remains so as of today.

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[941] Alberto Carrizosa Gelzis Witness Statement, ¶ 92; *see also* Enrique Carrizosa Gelzis Witness Statement, ¶ 70 ("I ***always*** relied on the Treaty between the US and Colombia (the TPA) to receive protection as a US investor in Colombia"); Felipe Carrizosa Gelzis Witness Statement, ¶ 61 ("I ***always*** had an expectation to receive protection from the TPA, the investment protection treaty entered by the US with Colombia" (emphasis added)).

[942] Claimants' Memorial (PCA), ¶ 420.

[943] **RLA-0001**, TPA, Art. 10.28, note 15.

[944] **Ex. R-0110**, *Composición de Capital de personas jurídicas que posean más del 5% del capital de acciones de la entidad*, 31 December 1989.

[945] *See, e.g.*, **Ex. R-0119**, Supplementary Pleading to the Inter-American Commission on Human Rights, 20 July 2016, pp. 1–2.

c. Claimants elected to make Colombia the center of their family, social, and political lives

444. The analysis regarding the center of a person's family, social, and political life is an objective one. The Tribunal here is tasked with determining where—in a physical/geographic sense—the majority of Claimants' social and family life occurs.[946] Claimants and their families have chosen to reside in Colombia, to join Colombian society, to establish friendships in Colombia, and to engage with Colombian politics. Accordingly, the center of Claimants' family, social, and political lives has also been Colombia at all relevant times.

445. The center of Alberto Carrizosa Gelzis's family, civil, and political life is in Colombia. His immediate family has lived in Colombia since before the Second Critical Date.[947] Further, Alberto Carrizosa Gelzis has been active in the democratic process in Colombia. In 2018 he donated to the presidential campaign of Iván Duque Márquez, the current President of Colombia.[948]

446. Alberto Carrizosa Gelzis spends important holidays in Colombia; for instance, he has spent 9 out of the past 12 Christmases there.[949] Additionally, at least as far back as 2014 Alberto Carrizosa Gelzis has been the President of *I.C. Fundación*, a non-profit corporation that provides lines of credit to Colombian companies.[950]

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[946] *See*, *e.g.*, **RLA-0088**, *Ballantine* (Final Award), ¶¶ 576–577 (stating that "that during the relevant time [the] center [of the claimants' family, and social life] was in the Dominican Republic," because they had relocated "their family center to the country where they resided permanently, independently of the fact that they often visited the United States, that their children continued their education in the U.S or that they kept social relations in the U.S."); **CLA-0047**, *Mergé*, p. 13 (identifying as a guiding principle *inter alia* whether "the interests and the permanent professional life of the head or the family *were established in* the United States" (emphasis added)).

[947] *See e.g.*, Enrique Carrizosa Gelzis Witness Statement, ¶ 2; Felipe Carrizosa Gelzis Witness Statement, ¶ 3; Witness Statement of Astrida Benita Carrizosa, 27 May 2019, ¶ 3.

[948] **Ex. R-0224**, Report on Donations to Ivan Duque Marquez, Electoral Council of Colombia, p. 11.

[949] **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 1; *see generally* **Ex. R-0201**; Migratory Records for Alberto Carrizosa Gelzis, 2001–2019.

[950] **Ex. R-0225**, Transforming Philanthropy 2014 Annual Report, 2014, p. 20.

Alberto Carrizosa Gelzis claims that through these lines of credit, *I.C. Fundación* supports "more than 300 families in areas in Colombia where a lot needs to be done, such as Bajo Cauca, Caquetá, Cauca, among others."[951] The whole Carrizosa family, according to Alberto Carrizosa Gelzis, has "a common motivation to do things properly for **the Country**"[952] (emphasis added).

447. Alberto Carrizosa Gelzis's family, social, and political ties to the United States are comparatively weaker than those to Colombia. He does not have immediate family in the United States. Even though his alleged second residence is in Florida, he is not registered to vote there.[953] Furthermore, Alberto Carrizosa Gelzis's claim that he "enrolled selective service (US military service)"[954] at 18 years old is disingenuous. Registration for the selective service is legally required at age 18 for all male United States citizens (whether they are dual nationals or not).[955] Again, mere compliance with the law is not evidence of the dominance of any particular nationality. Second, the selective service is not military service.[956] Rather, enrollment in the selective service merely serves to facilitate for the US Government the task of identifying relevant personnel in the event that the United

[951] **Ex. R-0225**, Transforming Philanthropy 2014 Annual Report, 2014, p. 20 (Spanish original: "*más de 300 familias en regiones donde hay mucho por hacer en Colombia, como Bajo Cauca, Caquetá, Cauca, entre otros*").

[952] **Ex. R-0225**, Transforming Philanthropy 2014 Annual Report, 2014, p. 20 (Spanish original: "*una motivación común de hacer las cosas bien para el País*").

[953] **Ex. R-0239**, Search Results for Voter Registration of Alberto Carrizosa in the State of Florida, 26 August 2019; **Ex. R-0240**, Search Results for Voter Registration of Alberto Carrizosa in Miami-Dade County, 8 September 2019.

[954] *See* Alberto Carrizosa Gelzis Witness Statement, ¶ 48.

[955] **Ex. R-0226**, Code of the United States of America, Title 50, Section 3802(a).

[956] **Ex. R-0227**, Why Register, Selective Service System, p. 1 ("It's important to know that even though a man is registered, he will not automatically be inducted into the military. Registering with Selective Service **does not** mean you are joining the military" (emphasis in original)).

States were to authorize a compulsory military draft—the last of which took place in 1974, during the Vietnam War.[957]

448. Like his brother Alberto, the center of Enrique Carrizosa Gelzis's family, social, and civil life is also Colombia. Enrique Carrizosa Gelzis's immediate family (except his in-laws) lives in Colombia.[958] His wife, [redacted], has lived in Colombia with him since 2004. He has two daughters, both of whom were born in Colombia, have been raised in Colombia, and have Colombian citizenship.[959] Like his brother, Enrique Carrizosa Gelzis spends important holidays in Colombia. For instance, though Enrique Carrizosa Gelzis states in his witness statement that Thanksgiving is a "big deal" to his family,[960] and that his family "is dedicated to Halloween too,"[961] in the last 15 years he has spent 12 Thanksgivings and every Halloween in Colombia.[962]

449. Enrique Carrizosa Gelzis invokes his wife's US nationality in an attempt to buttress his claim that his own dominant nationality is that of the US.[963] However, [redacted] has fully integrated into Colombian society, as evidenced by her many Colombian friends who endearingly comment (in Spanish) on the pictures she posts on Facebook.[964] [redacted] also

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[957] **Ex. R-0228**, *America may never have a draft again. But we're still punishing low-income men for not registering*, THE WASHINGTON POST, 16 October 2014.

[958] *See e.g.*, Alberto Carrizosa Gelzis Witness Statement, ¶ 3; Felipe Carrizosa Witness Statement, ¶ 3; Witness Statement of Astrida Benita Carrizosa, 27 May 2019, ¶ 3.

[959] **Ex. R-0229**, [redacted] **Ex. R-0230**, [redacted]

[960] Enrique Carrizosa Gelzis Witness Statement, ¶ 30.

[961] Enrique Carrizosa Gelzis Witness Statement, ¶ 30.

[962] **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 2; *see generally* **Ex. R-0202**; Migratory Records for Enrique Carrizosa Gelzis, 2002–2019.

[963] *See* Enrique Carrizosa Gelzis Witness Statement, ¶ 19.

[964] *See e.g.*, **Ex. R-0231**, Post on the Facebook Page of [redacted], 5 May 2018 (English translation: comments include the following: "How cute," "What a beautiful couple! Hugs, Merika," and "Cute inside and out!") (Spanish original: comments include the following: "*Que lindos*," "*Qué belleza de pareja! Abrazos* [redacted]," and "*Lindos por dentro y por fuera!*"); *see also* **Ex. R-0232**, Post on the Facebook Page of [redacted], 25 July 2018 (English translation:

speaks fluent Spanish, as illustrated by her Facebook entries.[965] [redacted] is also involved in the preservation of historic properties in Colombia, and has even challenged a decision by the *Consejo Asesor de Patrimonio* to rescind the protected status of a historic residence.[966] In an interview with a local newspaper on the matter, [redacted] argued that the *Consejo Asesor de Patrimonio* had not taken the community's views into account: "The Advisory Council met and Planning made the decision without the neighbors knowing. They said the neighbors were not interested but that was not the case."[967]

450. Enrique Carrizosa Gelzis also claims that he is registered to vote in the United States.[968] However, the State of Florida has no record of any such registration.[969]

451. Like his two brothers, Felipe Carrizosa Gelzis centers his family, social, and political life in Colombia. His immediate family resides in Colombia.[970] His wife, [redacted], is Colombian.[971] He has two daughters, both of whom were born in Colombia, have been raised in Colombia, and are Colombian citizens.[972] Felipe Carrizosa Gelzis has spent every single Christmas since 2001 in

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comments include the following: "Beautiful picture," "Regal and divine!!," and "Nice couple!!!!") (Spanish original: comments include the following: "*Linda foto*," "*Regios y divinos!!*," *and* "*Bella pareja!!!!*").

[965] **Ex. R-0233**, Post on the Facebook Page of [redacted], 10 June 2019.

[966] **Ex. R-0235**, *Impiden obras en una casa de Chapinero*, EL TIEMPO, 30 October 2008.

[967] **Ex. R-0235**, *Impiden obras en una casa de Chapinero*, EL TIEMPO, 30 October 2008 (Spanish original: "*El Consejo Asesor se reunió y Planeación tomó la decisión sin que los vecinos nos enteráramos. Dijeron que los vecinos no estaban interesados y eso no fue así*").

[968] Enrique Carrizosa Gelzis Witness Statement, ¶ 40.

[969] **Ex. R-0241**, Search Results for Voter Registration of Enrique Carrizosa in the State of Florida, 26 August 2019; **Ex. R-0242**, Search Results for Voter Registration of Enrique Carrizosa in Miami-Dade County, 8 September 2019.

[970] *See e.g.*, Alberto Carrizosa Gelzis Witness Statement, ¶ 3; Enrique Carrizosa Gelzis Witness Statement, ¶ 2; Witness Statement of Astrida Benita Carrizosa, ¶ 3.

[971] **Ex. R-0236**, Marriage Certificate of Felipe Carrizosa Gelzis and [redacted], 21 July 2002.

[972] **Ex. R-0237**, [redacted] **Ex. R-0238**, [redacted].

Colombia.[973] And as evidenced by his donation in 2011 to Domingo Perez Abrajin, a candidate to the city council of Bogotá,[974] Felipe Carrizosa Gelzis is active in Colombian politics—much like his older brother Alberto. Conversely, Felipe Carrizosa Gelzis is not registered to vote in the State of Florida.[975]

452. Felipe Carrizosa Gelzis is active in influential and affluent circles in Colombia. For instance, he has been a member of the Colombian Golf Federation since 2013, and of the *La Pradera de Potosí* Residential Club.[976] Due to the exclusivity and prestige of this club, membership therein is hard to obtain. A candidate for membership must submit an application containing personal and family information, and three letters of recommendation from existing members.[977] Thus, to obtain membership at the *La Pradera de Potosí* Residential Club, Felipe Carrizosa Gelzis relied on his influential friends in Colombian society. After his admission, Felipe Carrizosa Gelzis has consistently played golf at the club.[978] His most recent outing took place on 9 January 2019.[979]

453. Claimants try to deny or minimize the undeniable fact that Colombia is the center of the social, family, and political lives by asserting that they subjectively,

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[973] **Ex. R-0261**, Summary of Information from Official Immigration Records, 21 October 2019, p. 3; *see generally* **Ex. R-0203**; Migratory Records for Felipe Carrizosa Gelzis, 2001–2019.

[974] **Ex. R-0249**, Record of Donations to Domingo Perez Abrajin, p. 3.

[975] **Ex. R-0243**, Search Results for Voter Registration of Felipe Carrizosa in the State of Florida, 8 September 2019; **Ex. R-0244**, Search Results for Voter Registration of Felipe Carrizosa in Miami-Dade County, 8 September 2019.

[976] **Ex. R-0245**, History for Felipe Carrizosa Gelzis at the Colombian Golf Federation, 8 September 2019.

[977] *See* **Ex. R-0246**, Statutes of the La Pradera de Potosí Residential Club, 10 September 2019, Art. 6(b).

[978] **Ex. R-0245**, History for Felipe Carrizosa Gelzis at the Colombian Golf Federation, 8 September 2019.

[979] **Ex. R-0245**, History for Felipe Carrizosa Gelzis at the Colombian Golf Federation, 8 September 2019.

culturally identify only with the United States.[980] According to Claimants, most of their "cultural, social, and educational effective links with Colombia have been minimized to bare essentials, mitigated, or altogether eviscerated."[981] But documentary evidence disproves that claim.

454. For instance, Claimants' surname on their US passports is "Carrizosa."[982] Yet Claimants filed this arbitration using their Colombian surname, "Carrizosa Gelzis,"[983] which is a dual last name based on the Colombian tradition of adopting both one's paternal and maternal surnames.[984] That fact, while subtle, belies Claimants' assertion and shows instead that for all their declarations to the contrary, they are first and foremost culturally Colombian.

455. Further, Enrique Carrizosa alleges that he and his wife are raising their two daughters based on US culture, and that his family only subscribes to US entertainment.[985] However, on 5 May 2018—three months and twelve days *after* the Second Critical Date—[redacted] posted a picture on Facebook of the family attending the *Festival de la Leyenda Vallenata*, a quintessentially Colombian music festival.[986] That festival celebrates *vallenato* music (which is a genre of folk music indigenous to Colombia) and the legend of a failed rebellion by an Amerindian tribe against Spanish colonizers.[987] In the photos in the Facebook post, [redacted] and her daughters appear wearing

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[980] Alberto Carrizosa Gelzis Witness Statement, ¶ 7; *see also* Enrique Carrizosa Gelzis Witness Statement, ¶ 30; Felipe Carrizosa Witness Statement, ¶¶ 22–23; Claimants' Memorial (PCA), ¶¶ 231, 242, and 262.

[981] Claimants' Memorial (PCA), ¶ 290.

[982] **CWS-1-1**, Certificate of Birth and U.S. Passport, 9 March 1966, p. 1; **CWS-2-1**, U.S Passport and Birth Certificate, 20 July 1968, p. 1; **CWS-3-1**, US Passport, US Certificate of Birth, and Report of Birth Abroad, 28 August 1974, p. 1.

[983] *See* Notice of and Request for Arbitration, Cover Page; Claimants' Memorial (PCA), Cover Page.

[984] **Ex. R-0247**, A Guide to Names and Naming Practices, p. 25.

[985] Enrique Carrizosa Gelzis Witness Statement, ¶ 31.

[986] **Ex. R-0231**, Post on the Facebook Page of [redacted], 5 May 2018.

[987] **Ex. R-0234**, *Leyenda Del Milagro*, El Tiempo, 13 April 1999.

traditional Colombian attire, while Enrique Carrizosa is holding a traditional Colombian hat and wearing a shirt that reads, "*El rock de mi Pueblo*" (My People's rock):[988]

Figure 2: Enrique Carrizosa Gelzis's Family at the *Festival de la Leyenda Vallenata*

In response, one of the family's friends posted the following comment: "*Colombia tierra Querida!!*" (Colombia, beloved land.)[989]

456. In light of the above, the center of Claimants' family, social, and political lives was Colombia on the Second Critical Date.

d. Claimants consistently have self-identified as Colombian

457. As the Tribunal is likely aware, it is very difficult to disprove assertions about a person's thoughts or feelings regarding their identity—whether that identity

[988] **Ex. R-0231**, Post on the Facebook Page of [redacted], 5 May 2018.
[989] **Ex. R-0231**, Post on the Facebook Page of [redacted], 5 May 2018.

involves culture, nationality, gender, etc. As demonstrated in the preceding section, however, documentary evidence exists that rebuts Claimants' claims that they identify only with the United States. In addition, documentary evidence that Claimants have consistently and freely relied on and invoked their Colombian nationality, both inside and outside Colombia, further disproves Claimants' assertion. Specifically, Claimants have self-identified as Colombian even in formal contexts, such as the following: (i) in proceedings before the Inter-American Commission on Human Rights ("**IACHR**"); and (ii) when registering their shares in the Holding Companies.

458. In the IACHR context, on 6 June 2012—five and a half years before the Second Critical Date—Claimants filed a petition against Colombia concerning the very facts at issue in the present arbitration.[990] In that petition, Claimants identified themselves exclusively by their Colombian identity numbers.[991] Subsequently, on 20 July 2016—a year and a half before the Second Critical Date—Claimants filed a supplementary pleading with the IACHR, in which each Claimant identified himself—again exclusively—as "*colombiano*," confirmed his Colombian identification number, and attached his Colombian identification card.[992]

459. Claimants thereafter filed three revision petitions in the IACHR proceeding. The third revision petition was filed on 4 July 2018—after the Second Critical Date and on US Independence Day.[993] In that petition, as in the previous revision petitions, each Claimant identified himself—yet again, solely—as "*colombiano*,"

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[990] *See generally* **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012.

[991] **Ex. R-0118**, Petition to the Inter-American Commission on Human Rights, 6 June 2012, p. 43.

[992] **Ex. R-0119**, Supplementary Pleading to the Inter-American Commission on Human Rights, 20 July 2016, pp. 1–2; **Ex. R-0010**, Colombian Identification Card of Alberto Carrizosa Gelzis, 30 May 1984; **Ex. R-0189**, Colombian Identification Card of Enrique Carrizosa Gelzis, 27 October 1992; **Ex. R-0012**, Colombian Identification Card of Felipe Carrizosa Gelzis, 26 September 1986.

[993] **Ex. R-0122**, Third Revision Petition to the Inter-American Commission on Human Rights, 4 July 2018.

included his Colombian identification number, and attached his Colombian identification card.[994]

460. Their self-identification as "*colombiano[s]*" in the proceedings before the IACHR—and their failure in that context to even mention their US nationality—is all the more significant if one considers that nothing compelled Claimants to file their IACHR claims as Colombians. Indeed, pursuant to Article 44 of the American Convention on Human Rights, "Any person or group of persons . . . may lodge petitions with the [IACHR] containing denunciations or complaints of violation of this Convention by a State Party."[995] In other words, Claimants could have identified themselves as either US nationals or Colombians.[996] It must be concluded, therefore, that if they self-identified as Colombians in that context it is because they genuinely consider themselves Colombians.

461. Moreover, Claimants made assertions in their submissions to the IACHR that contradict their contention in the present proceeding that their dominant nationality is that of the US. In their second revision petition, for instance, Claimants argued that Colombia's conduct amounted to a retaliation for their family's deep involvement in the Colombian opposition political party. Specifically, they alleged:

> Julio Carrizosa, an engineer from the Colombian provinces, and a member of the Liberal Party and activist in social causes created a socially responsible business activity. . . He even became the Liberal Party's Treasurer. . . With great effort, he and his family were able

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[994] **Ex. R-0122**, Third Revision Petition to the Inter-American Commission on Human Rights, 4 July 2018, pp. 1, 7; **Ex. R-0121**, Second Revision Petition to the Inter-American Commission on Human Rights, 4 October 2017, pp. 4, 5, 7, 17; **Ex. R-0121**, Revision Petition to the Inter-American Commission on Human Rights, 20 March 2017, pp. 3–4.

[995] **Ex. R-0248**, American Convention on Human Rights, 18 July 1978, Art. 44.

[996] *See, e.g.*, **Ex. RLA-0097**, *Castillo Petruzzi et al. v. Peru*, IACHR (Salgado-Pesantes *et al.*), Preliminary Objections Judgment, 4 September 1998 ("[I]t it is clear that Article 44 of the Convention permits any group of persons to lodge petitions or complaints of the violation of the rights set forth in the Convention. This broad authority to make a complaint is a characteristic feature of the system for the international protection of human rights.").

> to acquire a majority [in Granahorrar] and take it from being a medium-size entity into the 7th most important entity. The growth and importance achieved by the Carrizosa family did not come without jealousy and rejection by the opposing political party. During conservative President Pastrana's presidency, the bank was expropriated. Later, after the Colombian Council of State declared that the expropriation was illegal and ordered that compensation be paid, President Alvaro Uribe sought to apply any available irregular mechanism, disguised with a mantle of legality, to avoid paying the legally ordered fair compensation.[997] (Emphasis added)

462. Claimants alleged further that their IACHR petition was based on "the violation of human rights by the Colombian State against its own citizens"[998] (emphasis in original). Subsequently, in their third revision petition, Claimants reiterated that Colombia's actions constituted "**a structural violation of the human rights of Colombian citizens**"[999] (emphasis in original). Inconsistently with the foregoing, however, in the present arbitration, Claimants allege that they were discriminated against by Colombia due to their US nationality.[1000]

463. In the present arbitration, Claimants are contending that in the past they have only identified as Colombians due to Article 22 of Law 43 of 1993 of Colombia

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[997] **Ex. R-0121**, Second Revision Petition to the Inter-American Commission on Human Rights, 4 October 2017, pp. 3, 6 (Spanish original: "*Julio Carrizosa un ingeniero proveniente de la provincia Colombiana y un militante del Partido Liberal y de las causas sociales creó una actividad empresarial responsable socialmente . . . Inclusive llego a ser el tesorero del Partido Liberal . . . Con mucho esfuerzo de él y su familia pudieron adquirir la mayoría y llevar a [Granahorrar] de una entidad mediana a ser la 7ª más importante. Este crecimiento e importancia lograda por la familia Carrizosa, no llegó sin sus celos y rechazos por el partido político contrario. Durante la presidencia del Presidente conservador Andrés Pastrana, se expropió el banco y luego después que el Consejo de Estado Colombiano declaró que la expropiación había sido ilegal y declaró una indemnización, el Presidente Álvaro Uribe buscó todos los mecanismos irregulares disfrazados de un manto de legalidad, para evadir el pago justo ordenado legalmente*").

[998] **Ex. R-0121**, Second Revision Petition to the Inter-American Commission on Human Rights, 4 October 2017, p. 6 (Spanish original: "*la violación por parte del Estado Colombiano de los derechos humanos en contra de sus propios ciudadanos*").

[999] **Ex. R-0122**, Third Revision Petition to the Inter-American Commission on Human Rights, 4 July 2018, p. 5 (Spanish original: "***una violación estructural de derechos humanos de los ciudadanos colombianos***").

[1000] *See e.g.*, Felipe Carrizosa Gelzis Witness Statement, ¶ 43; Enrique Carrizosa Gelzis Witness Statement, ¶ 50.

(which requires that dual nationals enter and exit Colombia and perform domestic civil and political acts in their capacity as Colombian nationals).[1001] That argument is disproven, however, by their submissions to the IACHR (to which Law 43 of 1993 does not apply in any way), and their willingness to identify as Colombian even prior to the promulgation of Law 43 of 1993. For example, the shareholder registries for the Holding Companies confirm that Claimants' shares, including those obtained before the promulgation of Law 43, are registered under Claimants' Colombian identification numbers: [redacted].[1002] In other words, Claimants have not self-identified as Colombian as a result of any legal imperative, but rather by choice and consistent with the strength of their ties with Colombia.

464. In sum, Claimants' consistent, voluntary reliance on their Colombian nationality in various contexts evinces not only that they freely identify as Colombian, but also the dominance of their Colombian nationality.

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465. For the foregoing reasons, Claimants' dominant nationality was that of Colombia at all relevant times—including but not limited to the Second Critical Date—and remains so up to the present. As a result, and pursuant to the terms of the TPA, the Tribunal lacks jurisdiction *ratione personae* over all of Claimants' claims in this arbitration.

[1001] *See e.g.*, Felipe Carrizosa Gelzis Witness Statement, ¶ 37; Alberto Carrizosa Gelzis Witness Statement, ¶ 50.

[1002] *See* **R-0154**, Shareholders Registry of: (i) Asesorías e Inversiones C.G. S.A.; (ii) Exultar S.A.; (iii) Compto S.A.; (iv) Inversiones Lieja Ltda; (v) Fultiplex S.A.; and (vi) I.C Interventorias y Construcciones Ltda., pp. 2–4, 8–10, 19–21, 29–32; **Ex. R-0010**, Colombian Identification Card of Alberto Carrizosa Gelzis, 30 May 1984; **Ex. R-0012**, Colombian Identification Card of Felipe Carrizosa Gelzis, 26 September 1986; **Ex. R-0189**, Colombian Identification Card of Enrique Carrizosa Gelzis, 27 October 1992.

E. The Tribunal lacks jurisdiction *ratione materiae*

1. *The Tribunal lacks jurisdiction* ratione materiae *because Claimants' alleged investment is not a qualifying investment under the TPA*

466. In order to fall within the scope of this Tribunal's jurisdiction *ratione materiae*, Claimants must be able to identify a qualifying investment that they have made in Colombia. Specifically, Article 10.16 of the TPA, which is expressly incorporated (with limitations) into Chapter 12, provides that "[a] claimant, on its own behalf, may submit [a claim] to arbitration."[1003] Article 10.28 defines a "claimant" as "an investor of a Party that is a party to an investment dispute with another Party."[1004] An "investor of a Party" is in turn defined as an investor of "a Party . . . that attempts through concrete action to make, is making, or has made and investment in the territory of another Party."[1005] Article 10.28 also provides a detailed definition of what qualifies as an "investment,"[1006] and importantly for purposes of this case, expressly clarifies that "[t]he term 'investment' does not include an order or judgment entered in a judicial or administrative action."[1007]

467. Notwithstanding the above-quoted limitation, Claimants argue that their qualifying investment is the 2007 Judgment of the Council of State.[1008] In their Memorial on Jurisdiction, they explicitly assert that "for purposes of pleading and/or proof of *ratione materiae*, the Council of State's November 1, 2007 Judgment represents and **constitutes Claimants' investment** as alleged and demonstrated in this proceeding"[1009] (emphasis added).

[1003] **RLA-0001**, TPA, Art. 10.16.1.

[1004] **RLA-0001**, TPA, Art. 10.28.

[1005] **RLA-0001**, TPA, Art. 10.28.

[1006] **RLA-0001**, TPA, Art. 10.28.

[1007] **RLA-0001**, TPA, Art. 10.28, fn. 15.

[1008] *See, e.g.*, Claimants' Memorial (PCA), ¶ 1 ("Colombia's Constitutional Court denied the Council of State's Motion to Vacate the Constitutional Court's Opinion depriving Claimants of their monetized investment in the form of a Council of State Judgment").

[1009] Claimants' Memorial (PCA), ¶ 420.

468. The foregoing means that Claimants' alleged investment is not a qualifying investment under the TPA, and is thus excluded from the treaty's protection. As a result, Claimants do not satisfy the fundamental requirement of a qualifying investment, and their claims fall outside of the jurisdiction *ratione materiae* of this Tribunal.

2. *The Tribunal lacks jurisdiction* ratione materiae *because Claimants' investments were not made in conformity with Colombian law*

469. Although Claimants do not assert that their shares in Granahorrar constitute an investment for the purpose of the TPA's jurisdictional requirements, they nevertheless mention in passing that their shares in Granahorrar "meet the [TPA] Art. 10.28(b) definition of an investment."[1010] For the sake of completeness, Colombia will demonstrate in this Section that even if Claimants had in fact asserted that their shares in Granahorrar constitute their respective investments under the TPA, the Tribunal would still lack jurisdiction *ratione materiae*.

470. For investments to be protected under the TPA, they must have been made in conformity with Colombian law. At the time that Claimants invested in Granahorrar, foreign investments in Colombia had to comply with specific legal requirements. Claimants, however, failed to comply with such requirements. Because Claimants' investments[1011] were not made in conformity with Colombian law, neither they nor their investments are entitled to protection under the TPA. Consequently, the Tribunal lacks jurisdiction *ratione materiae*.

[1010] Claimants' Memorial (PCA), ¶ 420.

[1011] For the sake of simplicity, in this Section Colombia will refer to Claimants' ownership of shares in Granahorrar as "investments." In doing so, Colombia does not acknowledge or concede that Claimants' indirect ownership of shares constitutes a qualifying investment under the TPA. Instead, Colombia uses this term for the purpose of explaining that even if Claimants *had* alleged that these shares constituted their investments (*quod non*), such shares would not satisfy the definition of an investment under the TPA.

a. International law requires that Claimants' investments comply with the host State's law

471. It is well established in investment law that where a treaty requires investments to be in accordance with a host State's laws, investments that are not in conformity with such laws are not protected by the treaty.[1012] Many tribunals have also recognized that this requirement of conformity with domestic law applies regardless of whether or not it is expressly stated in the treaty.[1013] For example, in *Phoenix v. Czech Republic,* the tribunal explained that a requirement of conformity with the host State's law is implicit, even in the absence of an express provision to that effect in the relevant treaty:

> In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws . . . . [I]t is the Tribunal's view that this condition—the conformity of the establishment of the investment with the national laws—is implicit even when not expressly stated in the relevant BIT.[1014]

472. The *Phoenix* tribunal concluded that "[t]he core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law."[1015]

[1012] *See*, for example, **RLA-0040**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25 (Fortier, Cremades, Reisman), Award, 16 August 2007 ("***Fraport* (Award)**") ¶ 339; **RLA-0076**, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (Oreamuno Blanco, Landy, von Wobeser), Award, 2 August 2006, ¶ 207; **RLA-0083**, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 (Briner, Cremades, Fadlallah), Decision on Jurisdiction, 31 July 2001, ¶ 46.

[1013] *See, e.g.*, **RLA-0036**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24 (Stern, Cremades, Landau), Award, 18 June 2010 ("***Hamester* (Award)**"), ¶¶ 123–24; *See also SAUR International S A. v. Republic of Argentina*, ICSID Case No. ARB/04/4 (Fernández-Armesto, Hanotiau, Tomuschat), Decision on Jurisdiction and Liability, 6 June 2012, ¶ 308; **RLA-0037**, *Plama* (Award), ¶¶ 138-139; **CLA-0061**, *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5 (Stern, Bucher, Fernandez-Armesto), Award, 15 April 2009 ("***Phoenix Action***"), ¶ 101.

[1014] **CLA-0061**, *Phoenix Action*, ¶ 101.

[1015] **RLA-0037**, *Plama* (Award), ¶ 102; *see also* **RLA-0038**, *SAUR International S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4 (Fernández-Armesto, Hanotiau, Tomuschat), Decision on Jurisdiction and Liability, 6 June 2012, ¶ 308.

473. Likewise, the tribunal in *Hamester v. Ghana* confirmed:

> An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. **It will also not be protected if it is made in violation of the host State's law . . . . These are general principles that exist independently of specific language to this effect in the Treaty.**[1016] (Emphasis added)

474. The *Plama v. Bulgaria* similarly held that a requirement of compliance with local law applied even though the treaty was silent on the issue:

> Unlike a number of Bilateral Investment Treaties, the ETC [Energy Charter Treaty] does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law . . . . The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.[1017]

475. International law thus requires that a claimant's investment have been made in conformity with the law of the host State in order to qualify as a proper investment. Accordingly, in order to be subject to the protection of the TPA, Claimants' investments must have been made in accordance with Colombia law.[1018]

476. Tribunals applying the requirement of compliance with the host State's laws have articulated the applicable legal standard. Pursuant to such standard, a tribunal will lack jurisdiction if: (i) in establishing the investment, the claimant violated the host

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[1016] **RLA-0036**, *Hamester* (Award), ¶¶ 123–24.

[1017] *See* **RLA-0037**, *Plama* (Award), ¶¶ 138-139.

[1018] The Colombia-Switzerland BIT, which Claimants attempt to import via the Chapter 12 MFN clause, contains a provision explicitly requiring conformity of a protected investment with the host State's laws. *See* **RLA-0004**, Colombia-Switzerland BIT, Art. 2 ("This Agreement shall apply to investments of investors of one Party, made in the territory of the other Party *in accordance with its laws and regulations*, whether prior or after the entry into force of the Agreement. It shall, however not be applicable to claims or disputes arising out of events which occurred prior to its entry into force." (Emphasis added)).

State's laws in force at the time that it made its investment;[1019] (ii) the nature of the violation justifies the exclusion of the investment from the protection under the investment treaty;[1020] and (iii) the respondent State is not estopped from asserting this objection.[1021] If these three conditions are satisfied, the Tribunal will not have jurisdiction *ratione materiae* over Claimants' claims.

b. Claimants' investments were not made in conformity with Colombian law

477. Each of the three conditions described above is met in the instant case, as discussed in turn below: (i) in establishing their investments, Claimants did not comply with Colombian law; (ii) the nature of Claimants' Colombian law violations means that Claimants' investments are not subject to the protections of the TPA, and (iii) Colombia is not estopped from asserting this defense.

i. Claimants' investments did not comply with Colombian law

478. In order for the Tribunal to be able to exercise jurisdiction over Claimants' claims, their investments must have been established in violation with the law of the host State in force at the time. This is a straightforward question of domestic law.

479. At the time that Claimants invested in Granahorrar (by 1988, according to Claimants[1022]), foreign capital investments in Colombia were subject to specific laws and regulations. Claimants, however, did not fulfill their obligations under Colombian law as foreign investors. Specifically, they did not comply with the

[1019] **RLA-0077**, *L.E.S.I. S.p.A. and ASTALDI S.p A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3 (Tercier, Faurès, Gaillard), Decision, 12 July 2006, ¶ 83; **CLA-0072**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Hanotiau, Boyd, Lalonde), Award, 29 July 2008 ("***Rumeli***"), ¶ 168; **RLA-0043**, *Alasdair Ross Anderson, et al. v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3 (Morelli Rico, Salacuse, Vinuesa), Award, 19 May 2010 ("***Anderson* (Award)**"), ¶ 57.

[1020] **RLA-0039**, *Vladislav Kim, et al. v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6 (Caron, Fortier, Landau), Decision on Jurisdiction, 8 March 2017, ¶¶ 405–407.

[1021] **RLA-0040**, *Fraport* (Award), ¶¶ 346–347, 387.

[1022] **Ex. C-0001**, Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 25.

procedures for the authorization and registration of foreign capital investments in Colombia.

480. At the time, Decree 444, which was promulgated in 1967, regulated international exchange and foreign trade. Its Article 1 stated that its purpose was to "promote foreign capital investments, in harmony with the general interests of the national economy."[1023] Chapter VIII thereof described the legal framework applicable to foreign capital investment in Colombia, and provided that all foreign capital investors in Colombia had to obtain previous authorization from the government.[1024] This obligation was set forth in Article 107 of Decree 444, which provided:

> **Foreign capital investments that are planned to be made in the country shall require the approval of the *Departamento Administrativo de Planeación***. Any replacement of an original investment must also be submitted to the approval of said Department. The *Departamento Administrativo de Planeación* shall examine any projected investment, or substitution, as the case may be, within the deadlines set by the *Consejo Nacional de Política Económica*, in accordance with criteria stated in this Decree and criteria established by the aforementioned Council in resolutions of a general nature. Any application that is not resolved within the deadline set by Council regulations shall be deemed approved.[1025] (Emphasis added)

[1023] **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967, Art. 1.d. (Spanish original: "*d) Estímulo a la inversión de capitales extranjeros, en armonía con los intereses generales de la economía nacional.*").

[1024] **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967, Art. 105 (English translation: "The rules in this chapter shall apply to foreign capital investments in Colombia, to foreign currency credits granted in favor of a natural person or legal person resident in the country, and to investments or loans that the latter may grant to a natural person or legal person abroad.") (Spanish original: "*Las normas de este capítulo se aplicarán a las inversiones de capital extranjero en Colombia, a los créditos en moneda extranjera otorgados en favor de personas naturales o jurídicas residentes en el país y a las inversiones o préstamos que estas últimas hagan o concedan en favor de personas naturales o jurídicas del Exterior.*").

[1025] **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967, Art. 107 (Spanish original: "***Las inversiones de capital extranjero que se proyecte hacer en el país requerirán la aprobación del Departamento Administrativo de Planeación.*** *También deberá someterse a la aprobación de dicho Departamento toda sustitución de la inversión original. El Departamento Administrativo de Planeación*

481. As the text quoted above shows, pursuant to Decree No. 444, if a foreign investor intended to make an investment in Colombia using foreign capital, it had to request an authorization from the *Departamento Administrativo de Planeación* ("**Planning Department**") of Colombia. The investor had to submit to the Planning Department the information described in Article 109 of Decree No. 444, which included, inter alia, the intended use of the investment, the amount of foreign capital, the value of the project (if applicable), and when the investor expected to start transferring the profits abroad.[1026]

482. If the Planning Department approved the investment, the investment then had to be registered before the *Oficina de Cambios* ("**Exchange Office**") of the Central Bank. Specifically, Article 113 of Decree 444 required:

> **Any foreign capital investment, once approved by the *Departamento Administrativo de Planeación*, must be registered with the *Oficina de Cambios***. Any investment transaction, including additional foreign investments, profit reinvestment with a right to transfer abroad, profit remittances and reimbursement of capital shall also be registered with said office. The *Oficina de Cambios* shall regulate the manner and terms of the registration herein ordered, and shall provide, if necessary, the procedure to assess investments that are not made in currencies, such as investments in machinery and equipment.[1027] (Emphasis added)

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estudiará, dentro de los plazos que fije el Consejo Nacional de Política Económica, las inversiones proyectadas o las sustituciones de las mismas según el caso, conforme a los criterios que se indican en este Decreto y a los señalados por el mencionado Consejo en resoluciones de carácter general. Las solicitudes que no fueren resueltas dentro de los plazos establecidos por la reglamentación del Consejo se entenderán aprobadas.") (emphasis added).

[1026] **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967, Art. 109.

[1027] **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967, Art. 113 (Spanish original: "***Las inversiones de capital extranjero deberán registrarse en la Oficina de Cambios, una vez aprobadas por el Departamento Administrativo de Planeación***. *También se registrará en dicha oficina el movimiento de las inversiones, inclusive inversiones extranjeras adicionales, reinversiones de utilidades con derecho a giro al exterior, remesas de utilidades y reembolso de capitales. La Oficina de Cambios reglamentará la forma y términos para hacer el registro ordenado en este artículo y dispondrá, si fuere necesario, el procedimiento para avaluar las inversiones que no se hagan en divisas, tales como las representadas en maquinarias y equipos*." (emphasis added)).

483. In accordance with the referenced Article 113, the investor was required to register the investments as well as any changes to such investments, including "any additional foreign investment, reinvestment of profit with a right to transfer abroad, profit remittance, and capital reimbursement."[1028] Further, pursuant to Article 120 of Decree No. 444, the registration obligation applied to investments made after 17 June 1957.[1029] Registration of the investments in the Exchange Office granted specific rights to the investor, including the right to transfer profits abroad.

484. The requirements of Decree No. 444 were concordant with Decision 24 of the Andean Community, adopted in 1970, concerning foreign investment.[1030] Colombia's Decree No. 1900 of 1973—by which the Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses and Royalties (approved by Decisions Nos. 24, 37 and 27-A of the Cartagena Agreement Commission) entered into force—also required prior approval from the competent national authority.[1031] Article 4 of Decree No. 1900 provided that foreign investors'

[1028] **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967, Art. 113 (Spanish original: "*inversiones extranjeras adicionales, reinversiones de utilidades con derecho a giro al exterior, remesas de utilidades y reembolso de capitales*.").

[1029] **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967, Art. 120 (English translation: "Article 120. Any foreign capital invested in the country after 17 June 1957 shall be registered with the *Oficina de Cambios*. Registration is an essential requirement to continue transferring profits abroad and to reimburse capital.") (Spanish original: "*Artículo 120. Los capitales extranjeros invertidos en el país, con posterioridad al 17 de junio de 1957, deberán registrarse en la Oficina de Cambios. El registro constituye requisito indispensable para continuar girando al Exterior utilidades y para reembolsar los capitales.")*.

[1030] **Ex. R-0109**, Decision No. 24, Special Commission, 14–31 December 1970, Art. 37.

[1031] **Ex. R-0116**, Decree No. 1900, President of Colombia, 15 September 1973, Art. 2 (English translation: "Article 2. Any foreign investor wishing to invest in any of the Member countries shall file an application with the relevant national body. After evaluation, said national body shall authorize if the request meets the host country's development priorities. The request must comply with the guidelines provided in Annex 1 of the regime. Upon proposal by the Board, the Commission may approve common criteria for the evaluation of a direct foreign investment in a Member Country.") (Spanish original: "*Artículo 2. Todo inversionista extranjero que desee invertir en alguno de los países Miembros deberá presentar su solicitud ante el organismo nacional competente el cual, previa evaluación, la autorizará cuando corresponda a las prioridades del desarrollo del país receptor. La solicitud deberá atenerse a la pauta que le señala en el Anexo número 1 del régimen. La comisión, a*

participation in Colombian national or mixed companies could be authorized, provided that such participation increased the capital of the company, and that such participation did not modify the classification of the company as national or mixed.[1032] Article 5 of Decree No. 1900 therefore required all foreign direct investments in Colombia to be registered before the national competent authority, i.e., Exchange Office of the Central Bank.[1033]

485. In sum, pursuant to Decree No. 444 and Decree No. 1900, foreign capital investments in Colombia required: (i) previous approval from the Planning Department, and subsequently (ii) registration of the investment with the Exchange Office of the Central Bank.

486. These requirements were also incorporated into Decree 1265 of 1987, which approved the regulations of Decision No. 220 of the Andean Community. Decree 1265 required approval of foreign direct investment from the Planning Department. Article 1 thereof stated that "[a]ny direct foreign investment in Colombia shall be previously authorized by the *Departamento Nacional de Planificación*. An interested party shall file the relevant application with said agency."[1034] Article 5 of Decree No. 1265 established that authorized foreign direct investments had to be registered before the Exchange Office of the Central Bank.[1035] Additionally, Article 5 required that the investor obtain from the correspondent super-intendency exercising control an operating permit, so that such super-intendency could supervise the company whenever the foreign direct

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propuesta de la Junta podrá aprobar criterios comunes para la evaluación de la inversión extranjera directa en los Países Miembros.").

[1032] **Ex. R-0116**, Decree No. 1900, President of Colombia, 15 September 1973, Art. 4.

[1033] **Ex. R-0116**, Decree No. 1900, President of Colombia, 15 September 1973, Art. 5.

[1034] **Ex. R-0115**, Decree No. 1265, President of Colombia, 10 July 1987, Art. 1. (Spanish original: "*Toda inversión extranjera directa en Colombia deberá ser previamente autorizada por el Departamento Nacional de Planeación, para lo cual el interesado presentará ante dicho organismo la correspondiente solicitud.*").

[1035] **Ex. R-0115**, Decree No. 1265, President of Colombia, 10 July 1987, Art. 5.

investment was aimed at creating a new corporation or establishing a new branchof a company.[1036]

487. The requirements provided in the above-described Decree No. 444 were in force in Colombia until the issuance of Law No. 9 of 1991, which opened Colombian market to foreign investment. As a result, before 1991, all foreign capital investments required previous approval from the Planning Department, and had to be registered in the Exchange Office of the Central Bank.

488. Claimants have not been precise about the dates on which they made their investments in Granahorrar, but the documents show that they had invested in Granahorrar well before 1991. One example of this is information that was provided in a 1998 information memorandum prepared by Lehman Brothers, Inc. (on the basis of information supplied by Granahorrar). Such memorandum stated that, "[p]ursuant to the nationalization of Banco de Colombia in 1986, Granahorrar was sold to a group comprised of some of Colombia's leading building contractors," and "**[i]n 1988 . . . the Carrizosas assumed the leadership**"[1037] (emphasis added). Also, the information filed by Granahorrar before the Superintendency shows that in 1989, Inversiones Carrizosa Gelzis y CIA S.C.S. owned 30.5944% of the shares of Granahorrar, and that Claimants were in turn the shareholders of that company (33.33% for each of the three Carrizosa brothers).[1038] Consequently, the approval and registration requirements under Colombian law discussed above were in force and applied at the time that Claimants invested in Granahorrar.

[1036] **Ex. R-0115**, Decree No. 1265, President of Colombia, 10 July 1987, Art. 5.

[1037] **Ex. C-0001**, Granahorrar Information Memorandum (Lehman Brothers), August 1998, p. 25.

[1038] **Ex. R-0110**, *Composición de Capital de personas jurídicas que posean más del 5% del capital de acciones de la entidad*, 31 December 1989.

489. In any event, after the issuance of Law No. 9 of 1991, a new registration requirement entered into force. Article 15 of Law No. 9 of 1991 established the framework applicable to foreign capital investments:

> The National Government shall establish the general framework for foreign capital investment in the country and for Colombian investments abroad. In doing so, the modality, destination, form of approval and general conditions for an investment shall be indicated.[1039]

490. In implementation of the foregoing law, the National Government, through the *Consejo Nacional de Política Económica y Social* ("**CONPES**"), issued Resolution No. 49 of 1991. Article 19 thereof established an obligation to register foreign capital investments:

> All foreign capital investments shall be registered with the *Oficina de Cambios* of the Central Bank, or relevant agency.
>
> An investor, or its representative, shall request the registration of an investment within three (3) months following the date when the investment was authorized or made, as the case may be.[1040]

491. Article 21 of Resolution No. 49 states that the registration of foreign capital investments gives the investor the right "to transfer abroad any profit from the investment and reimburse the invested capital and capital gains."[1041]

[1039] **Ex. R-0111,** Law No. 9 (Congress of Colombia), 17 January 1991, Art. 15. (Spanish original: "*El régimen general de la inversión de capitales del exterior en el país y de las inversiones colombianas en el exterior será fijado por el Gobierno Nacional. En desarrollo de esta función se señalarán las modalidades, la destinación, forma de aprobación y las condiciones generales de esas inversiones.*").

[1040] **Ex. R-0112**, Resolution No. 49, 28 January 1991, Art. 19. (Spanish original: "*Todas las inversiones de capital del exterior deberán registrarse en la Oficina de Cambios del Banco de la República, o la dependencia que haga sus veces. El registro de las inversiones deberá ser solicitado por el inversionista o quien represente sus intereses, dentro de los tres (3) meses siguientes a la fecha en que se haya autorizado o realizado la inversión, según sea el caso.*").

[1041] **Ex. R-0112**, Resolution No. 49, 28 January 1991, Art. 21 (Spanish original: "*para remitir al exterior las utilidades provenientes de la inversión y para reembolsar el capital invertido y las ganancias de capital.*").

492. Pursuant to the provisions of Law No. 9 of 1991, the Monetary Board of the Central Bank issued Resolution No. 57 of 1991 (confirmed by Law 31 of 1992), which regulates exchange transactions, including foreign capital investments in Colombia.[1042] Article 1.6.1.01 provides that "[a]ny foreign capital investments in Colombia shall be registered with the Central Bank, subject to any requirement and condition established by regulations governing such operations."[1043] The Central Bank's regulations likewise include an obligation to register foreign capital investments before the Central Bank.[1044] Consequently, after 1991, the law continued to require that all foreign capital investments be registered with the Central Bank.

493. Claimants claim to be foreign investors in Colombia. For instance, in their witness statements, Claimants state that they expected that the TPA would protect their investments in Colombia.[1045] Yet Claimants did not follow the procedures for the

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[1042] **Ex. R-0113**, Resolution No. 57, 26 June 1991, Art. 0.0.0.01.

[1043] **Ex. R-0113**, Resolution No. 57, 26 June 1991, Art. 1.6.1.01 (Spanish original: "*Las inversiones de capital del exterior en Colombia deben ser registradas ante el Banco de la República, con sujeción a todos los requisitos y condiciones exigidos por las normas que regulan dichas operaciones*.").

[1044] **Ex. R-0117**, External Resolution No. 21 (Central Bank), 21 September 1993, Art. 37. (English translation: "CHANNELING AND REGISTRATION. Any currency destined to foreign capital investment in Colombia shall be channeled through the foreign exchange market; and said currency shall be registered with the Central Bank in accordance with the general regulations issued by said Bank, by submitting documents to prove the investment was made. With regard to investments requiring authorization by the *Departamento Nacional de Planeación*, the Banking Superintendency, the Ministry of Mines and Energy, or the Superintendency of Securities, the Exchange Statement shall contain the authorization's number, date and conditions.") (Spanish original: "*CANALIZACION Y REGISTRO. Las divisas destinadas a efectuar inversiones de capital del exterior en Colombia deberán canalizarse a través del mercado cambiario y su registro en el Banco de la República deberá efectuarse de conformidad con la reglamentación de carácter general que expida esta entidad, presentando los documentos que prueben la realización de la inversión. Tratándose de inversiones que requieran de la autorización o del concepto previo del Departamento Nacional de Planeación, de la Superintendencia Bancaria, del Ministerio de Minas y Energía o de la Superintendencia de Valores, en la Declaración de Cambio respectiva deberá indicarse el número, fecha y condiciones de la autorización o concepto*.").

[1045] Witness Statement of Alberto Carrizosa , ¶ 92 ("My brothers, my mother and I always expected to receive protection as US investors in Colombia from the investment protection treaty entered into by the US and Colombia."); Witness Statement of Felipe Carrizosa, ¶ 61 ("My brothers, my mother and I always had an expectation to receive protection from the TPA, the

authorization and registration of foreign capital investments in Colombia pursuant to Decrees Nos. 444, 1900, and 1265. They also failed to register, pursuant to Resolution No. 49 and Resolution No. 57 of 1991, any additional foreign capital investments they made after the issuance of Law No. 9 of 1991.

494. Colombia has taken steps to verify whether Claimants complied with these legal requirements. Specifically, it requested that the Central Bank confirm if it had in its records any information about the approval or registration of foreign capital investments relating to Granahorrar or the Holding Companies.[1046]

495. The Central Bank responded in a letter dated 17 October 2019, in which it indicated the following:

> 1. In the Central Bank's database no records were found of foreign investment in . . . [the Holding Companies and Granahorrar] before 2006.
>
> 2. The Annexes to this communication contain details of foreign investment made in . . . [the Holding Companies and Granahorrar], that were registered with the Bank in accordance with applicable regulations.

investment protection treaty entered by the US with Colombia."); Witness Statement of Enrique Carrizosa , ¶ 70 ("Together with my brothers and my mother, I always relied on the Treaty between the US and Colombia (the TPA) to receive protection as a US investor in Colombia."); *see also* Claimants' Memorial (PCA), ¶¶ 239, 253, 265.

[1046] **Ex. R-0167**, Letter from Central Bank (A. Boada) from Central Bank to *Agencía Nacional de Defensa Jurídica del Estado* (A. Ordoñez), 17 October 2019, p. 1. (English Translation: "'information on whether the foreign investment registration applications approved by the Planning Department and foreign investment records are recorded in the Central Bank file' and 'information on approval requests or approvals for the reimbursement of foreign investments and / or the sending of remittances abroad for profits generated by foreign investment, in the following companies in accordance with Decree Law 444 of 1967 and even Law 9 of 1991.'") (Spanish original: "'*información sobre si consta en el archivo del Banco de la República solicitudes de registro de inversión extranjera aprobadas por el Departamento Administrativo de Planeación y registros de inversión extranjera' e 'información sobre solicitudes de aprobación o aprobaciones para el reintegro de las inversiones extranjeras y/o el envío de remesas al exterior por concepto de las utilidades generadas por inversión extranjera, en las siguientes sociedades de conformidad con el Decreto Ley 444 de 1967 e incluso la Ley 9 de 1991.*'").

> 3. There are no records of any foreign investment in *Corporación de Ahorro y Vivienda - Granahorrar*.[1047]

496. Based on the information provided by the Central Bank, there is *no* evidence of registration of foreign capital investments in Granahorrar—at any time—or in the Holding Companies before 2006 (including during the time that Claimants (indirectly) owned shares in Granahorrar).

497. Since Claimants failed to comply with the applicable laws governing the making of foreign investments in Colombia, their investments were not made in accordance with Colombian law, and therefore do not fall within the scope of the TPA's protections.

ii. The nature of Claimants' violation of Colombian law deprives them of the TPA's protection

498. In assessing whether Claimants' investments qualify for protection under the TPA, the *nature* of the violation of domestic law is also relevant. In this respect, tribunals have considered the "subject matter" of the law at issue.[1048] For example, the *Quiborax v. Bolivia* tribunal held that three types of violations can deprive an investment of treaty protection:

> The subject-matter scope of the legality requirement is limited to (i) non-trivial violations of the host State's legal order[], (ii) violations of the host State's foreign investment regime[], and (iii) fraud – for

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[1047] **Ex. R-0167**, Letter from Central Bank (A. Boada) from Central Bank to *Agencía Nacional de Defensa Jurídica del Estado* (A. Ordoñez), 17 October 2019, p. 2. (Spanish original: "*1. En la base de datos del Banco de la República no se encontraron registros de inversión extranjera en las sociedades consultadas antes de 2006. 2. En los Anexos a esta comunicación se encuentra el detalle de la inversión extranjera en las sociedades consultadas que fue registrada ante el Banco conforme la regulación aplicable. 3. No hay registros de inversión extranjera en la sociedad Corporación de Ahorro y Vivienda–Granahorrar*.").

[1048] **RLA-0041**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 (Kaufmann-Kohler, Lalonde, Stern), Decision on Jurisdiction, 27 September 2012 ("***Quiborax* (Decision on Jurisdiction)**"), ¶ 266; *see also* **RLA-0042**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (Kaufmann-Kohler, Townsend, von Wobeser), Award, 4 October 2013 ("***Metal-Tech* (Award)**"), ¶ 193.

> instance, to secure the investment[] or profits.[1049] (Internal citations omitted)

499. The *Saba Fakes*[1050] and *Phoenix*[1051] tribunals likewise affirmed that investments made in violation of a host State's law governing the establishment of foreign investments will not be subject to treaty protection. The *Phoenix* tribunal provided the following example:

> If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process.[1052]

500. For its part, the *Anderson v. Costa Rica* tribunal assessed whether the ownership of the claimant's property is in accordance with the law, which required it to examine whether the process by which that possession or ownership was acquired complied with all of the prevailing laws. The tribunal determined the following:

> In the present case, it is clear that the transaction by which the Claimants obtained ownership of their assets (i.e. their claim to be paid interest and principal by Enrique Villalobos) did not comply with the requirements of the Organic Law of the Central Bank of Costa Rica and that therefore the Claimants did not own their investment in accordance with the laws of Costa Rica. That being the case, the obligations of the Villalobos brother held by the Claimants do not constitute "investments" under the Canada-Costa Rica BIT and therefore this Tribunal lacks jurisdiction to hear the Claimants' claims against Costa Rica under the BIT.[1053]

[1049] **RLA-0041**, *Quiborax* (Decision on Jurisdiction), ¶ 266; *see also* **RLA-0042**, *Metal-Tech Ltd.* (Award), ¶ 193.

[1050] **RLA-0078**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20 (van Houtte, Lévy, Gaillard), Award, 14 July 2010, ¶ 119 ("[I]t is the Tribunal's view that the legality requirement contained therein concerns the question of the compliance with the host State's domestic laws governing the admission of investments in the host State.").

[1051] **CLA-0061**, *Phoenix Action*, ¶ 101.

[1052] **CLA-0061**, *Phoenix Action*, ¶ 101.

[1053] **RLA-0043**, *Anderson* (Award), ¶ 57.

501. The nature of the violation discussed in the preceding section is such that Claimants are precluded from invoking the protection of the TPA in relation to their indirect shareholding in Granahorrar. The case law confirms that violations of local law governing the establishment of foreign investments (such as those discussed above)[1054] will disqualify an investment from protection under the relevant treaty.[1055]

502. The rules governing foreign investment in Colombia are strictly applied by the Colombian authorities. For example, the Council of State, in deciding a case concerning limitations to the right to transfer abroad the profits resulting from plane tickets sales, stated the following:

> Within the framework established by Decree Law 444 of 1967, as amended, it is illegal for any national or foreign individual, natural person or legal person, to buy, sell, or otherwise negotiate in foreign currency; to hold foreign currency within the country or abroad, except in expressly authorized exceptions; or to carry out international exchange transactions, **without a prior license issued by a relevant official, to carry out activities or businesses where foreign currency obtained by the country may be invested or spent**.[1056] (Emphasis added)

503. The Council of State also rejected a claim requesting annulment of a decision from the Corporations Superintendency, which had approved a sale of shares of a company but had stated that foreign investors could not buy such shares without previous authorization from the Planning Department. In its decision, the Council

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[1054] *See e.g.,* **Ex. R-0114**, Decree No. 444, President of Colombia, 22 March 1967.

[1055] **RLA-0041**, *Quiborax* (Decision on Jurisdiction), ¶ 266.

[1056] **Ex. R-0015**, Decision of the Council of State, Case No. 2640, 16 July 1974, p. 4. (Spanish original: "*Dentro del régimen establecido por el Decreto Ley 444 de 1967 y las disposiciones que lo adicionan o reforman, no es lícito para los particulares, ya sean nacionales o extranjeros, personas físicas o jurídicas, adquirir, vender o negociar de cualquier otro modo en monedas extranjeras, poseerlas en el país o fuera de él, salvo en los casos de excepción expresamente autorizados, o realizar operaciones de cambio internacional* ***sin la previa licencia expedida por los funcionarios competentes y para el desarrollo de actividades o negocios en que sea permitido invertir o gastar las monedas extranjeras que obtenga el país***." (emphasis added)).

of State invoked Decision No. 24 of the Andean Community[1057] and Decree No. 1900 of 1973[1058] (discussed above), and confirmed that "[a]ll foreign investors must obtain authorization in Colombia from the Planning Department and, after the investment is made, it shall be registered."[1059] The Council of State held:

> Kores Holding Zug A.G., a foreign investor in the Werner E. Marchand & Cía. S.A. company intends to subscribe and pay shares with the proceeds of profits or dividends. However, this can only be done by complying with the requirement of obtaining prior authorization by the *Departamento Nacional de Planeación*, and then meeting the other noted requirements for foreign direct investments. Consequently, Kores Holding Zug A.G has not been deprived of any right contained in the rules that the lawsuit claims were infringed by the challenged administrative act.[1060]

504. Consequently, Claimants' breach of the legal requirements applicable to foreign capital investments in Colombia means that they have forfeited any and all rights under the TPA, and should not be allowed to resort to investment treaty arbitration against Colombia.

iii. Colombia is not estopped from objecting to Claimants' non-compliance with Colombian law

505. Finally, Colombia is not estopped from objecting that Claimants' investment was made in violation of its laws. An estoppel argument of this nature must be raised

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[1057] **Ex. R-0109**, Decision No. 24, Special Commission, 14–31 December 1970.

[1058] **Ex. R-0116**, Decree No. 1900, President of Colombia, 15 September 1973.

[1059] **Ex. R-0169**, Decision of the Council of State, Case No. 3182, 18 May 1981, p. 6 (Spanish original: "*1. Todo inversionista extranjero debe obtener autorización en Colombia del Departamento Nacional de Planeación y luego de hecha tal inversión debe registrarla*.").

[1060] **Ex. R-0169**, Decision of the Council of State, Case No. 3182, 18 May 1981, p. 7 (Spanish original: "*La sociedad Kores Holding Zug A.G., inversionista extranjero en la sociedad Werner E. Marchand & Cía. S.A., pretende suscribir y pagar acciones con el producto de las utilidades percibidas o dividendos. Pero esto sólo puede hacerlo cumpliendo con el requisito de la previa autorización del Departamento Nacional de Planeación y llenado luego los demás requisitos que para las inversiones extranjeras directas se han señalado. Por consiguiente, no se les ha privado de ningún derecho consagrado en las normas que en la demanda se han indicado como infringidas por le acto administrativo impugnado*.").

affirmatively by a claimant;[1061] a State will only be estopped from asserting an "in accordance with law" objection if the claimant can prove that the State somehow endorsed or accepted the illegality of the claimant's investment.[1062] This determination requires a fact-specific analysis.

506. Previous tribunals have found that a respondent State is estopped from claiming non-compliance with local law in situations in which (i) high-ranking State officials made express representations to the investor at the time of the investment about the validity of the investment under local law;[1063] and (ii) the State and the claimant both relied upon the investment agreement for years, after which the State courts made a finding that retroactively made the investment agreement illegal.[1064]

507. In the present case, Colombia at no point endorsed, accepted or acquiesced to the illegality of Claimants' investments. Colombia therefore is not estopped from

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[1061] *See* **RLA-0044**, *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18 (Fortier, Orrego Vicuña, Watts), Decision on Jurisdiction, 6 July 2007 ("***Kardassopoulos* (Decision on Jurisdiction)**"), ¶ 185 ().

[1062] *See* **RLA-0040**, *Fraport* (Award), ¶ 401 (observing that "[n]or can [the claimant] claim that high officials of the Respondent subsequently waived the legal requirements and validated Fraport's investment, for the Respondent's officials could not have known of the violation.").

[1063] *See* **RLA-0044**, *Kardassopoulos* (Decision on Jurisdiction), ¶ 191 ("Respondent cannot simply avoid the legal effect of the representations and warranties set forth in the JVA and the Concession by arguing that they are contained in agreements which are void ab initio under Georgian law. The assurances given to Claimant regarding the validity of the JVA and the Concession were endorsed by the Government itself, and some of the most senior Government officials of Georgia (including, inter alia, President Gamsakhurdia, President Shevardnadze, Prime Minister Sigua and Prime Minister Gugushvili) were closely involved in the negotiation of the JVA and the Concession.").

[1064] *See* **RLA-0045**, *Frank Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23 (Cremades, Hanotiau, Knieper), Award, 8 April 2013, ¶ 374 ("Respondent's argument based on the invalidity of the Lease Agreement and the July 1, 2008 Agreement is formalistic in that it relies on a judicially declared invalidity that applies retrospectively to the date of the investment. The reality was that at the time the investment was made, and for many months thereafter, both Parties believed and were allowed to trust that the July 1, 2008 Agreement and the Lease Agreement were valid, and that the investment had been made in accordance with the legislation of Moldova. Both Parties acted in good faith on this basis.").

arguing that Claimants' investments did not comply with Colombian law and are therefore outside the scope of protection of the TPA.

508. In conclusion, because Claimants' investments were not made in accordance with the Colombian laws and regulations governing the establishment of foreign investments in Colombia, this Tribunal lacks jurisdiction *ratione materiae* over all of Claimants' claims.

* * *

509. As a final note, it bears emphasizing that Claimants have not been forthcoming about the nature or timing of the establishment of their investments in Granahorrar. This absence of evidence by Claimants renders it impossible to confirm their compliance with Colombian law, which presents a fatal dilemma for Claimants: either (i) they invested foreign capital in Colombia without complying with the laws and regulations mentioned above, or (ii) the capital invested by Claimants was of *Colombian* origin (rather than foreign)—in which case approval and registration of their investment were not required. If the former is true, that would mean *a fortiori* that Claimants' investments were not made in conformity with Colombian law, and that the Tribunal therefore lacks jurisdiction *ratione materiae*. If the latter is true (i.e., the capital that Claimants invested was not foreign), it would constitute additional evidence that Claimants' dominant and effective nationality is Colombian, such that their claims are not within the jurisdiction *ratione personae* of this Tribunal (see **Section III.D**). Either way, this Tribunal lacks jurisdiction to hear Claimants' claims.

IV. CONCLUSION AND REQUEST FOR RELIEF

510. For the foregoing reasons, Colombia respectfully requests that the Tribunal:

a. render an award dismissing Claimants' claims in their entirety, for lack of jurisdiction; and

b. order Claimants to pay all of Colombia's costs, including the totality of the arbitral costs that Colombia incurred in connection with this proceeding, as well as the totality of its legal fees and expenses.

Respectfully submitted,

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