INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of Arbitration	:	
Between:	:	
	:	
ASTRIDA BENITA CARRIZOSA	:	
	:	Case No.
Claimant,	:	ARB/18/5
	:	
v.	:	
	:	
THE REPUBLIC OF COLOMBIA,	:	
	:	
Respondent.	:	
	x	Volume 2

VIDEOCONFERENCE: HEARING ON JURISDICTION

Tuesday, November 10, 2020

The World Bank Group

The hearing in the above-entitled matter came on at 9:00 a.m. (EST) before:

PROF. GABRIELLE KAUFMANN-KOHLER, President

PROF. DIEGO P. FERNÁNDEZ ARROYO, Co-Arbitrator

MR. CHRISTER SÖDERLUND, Co-Arbitrator

Also Present:

MS. ALICIA MARTÍN
Secretary to the Tribunal

MR. DAVID KHACHVANI
Tribunal Assistant

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT KAUFMANN-KOHLER: Thank you very much. Good morning or good afternoon to everyone, depending on where you are. I'm pleased to open this hearing for--actually, it's a continuation of the hearing that we started late September. And as I was saying before we started, I'm very pleased that all our friends from Miami are safe and that we can start this hearing with one day of delay, but we have rescheduled until Friday. So, there is no difficulty in this respect.

We have the Tribunal online. Do I see--I see--I'm looking for Mr. Söderlund. Yes. Now I see you. And I'm also looking for Professor Diego Arroyo, who I see as well.

We have the court reporters. We have the interpreters. We have the Tribunal's assistant with me, Mr. Khachvani. We then have Mike Young for--who is operating this video hearing.

For the Claimants, I see Mr. Martínez-Fraga.

Is your entire team with you? Do you want me to run through the names or can you just tell me

that they're present?

MR. MARTÍNEZ-FRAGA: They're all present, Madam President.

PRESIDENT KAUFMANN-KOHLER: Thank you very much. I also see Mr. Carrizosa. I saw Mr. Carrizosa. Absolutely. Hello. Good morning to you.

And is--I know Mrs. Briceño is probably not with us yet.

Then let me turn to Respondent's counsel. I see Mr. Di Rosa. You're muted.

MR. DI ROSA: Yes. Sorry, Madam President. That's because Mr. Grané is going to lead our discussion today.

PRESIDENT KAUFMANN-KOHLER: Good. Excellent. Mr. Grané.

MR. GRANÉ LABAT: Good afternoon, Madam Chair.

PRESIDENT KAUFMANN-KOHLER: Is everyone from your team with us, or should I run through the different names?

MR. GRANÉ LABAT: It's not necessary, Madam Chair. Everyone is with us with the sole exception of

Mr. Camilo Gómez Alzate, the director of the Agencia Nacional de Defensa Juridica del Estado. He may join us later today or on subsequent days. But other than him, all of Respondent's representatives are here and ready to go.

PRESIDENT KAUFMANN-KOHLER: Excellent. Thank you.

And then we have from the U.S., as non-disputing party, I see one name, Ms. Blunt. Amanda Blunt, are you there?

MS. BLUNT: Yes. I'm Amanda Blunt from the Office of the U.S. Trade Representative, and some of my colleagues are on as well.

PRESIDENT KAUFMANN-KOHLER: Let me try and locate them. Absolutely. I see--I see John Blanck. I see--who else? Nicole Thornton.

And do I miss someone? Maybe I have to run through to the other page.

No, I think that this is all the participants I see from the U.S.

Ms. Blunt, did I miss someone?

MS. BLUNT: No. That's it. Thank you.

PRESIDENT KAUFMANN-KOHLER: Thank you. Good. Then we can proceed.

You know that the purpose today is to hear the Opening Statements, and tomorrow we will hear the legal expert of the Claimant. Wednesday--no, it's not Wednesday anymore. It's Thursday is the reserve day, and we have the closings and possibly Tribunal questions on Friday.

The rule says that in PO3 and 1, the time allocation initially was 6 hours 45 per party. Now, some time has been used at the September session, with the result that the Claimant has left for these sessions 4 hours and 55, and the Respondent 6 hours and 35. The secretary will keep the time and advise you by email at the end of the day.

That is--we have received the Claimant's Opening Presentation, the PowerPoint slides. We--I think we are ready to proceed on the Tribunal's side.

Is there anything the parties would like to raise before we give the floor to the Claimant for the Opening Argument? On the Claimant's side?

MR. MARTÍNEZ-FRAGA: Nothing.

PRESIDENT KAUFMANN-KOHLER: Nothing.

On the Respondent's side, Mr. Grané?

MR. GRANÉ LABAT: Nothing from Respondent's side. Thank you.

PRESIDENT KAUFMANN-KOHLER: Excellent.

So, Mr. Martínez-Fraga, you have the floor for the Opening Statement, please.

CLAIMANT'S OPENING PRESENTATION

MR. MARTÍNEZ-FRAGA: Thank you, Madam President, Members of the Tribunal, counsel, respected representatives of the Republic of Colombia and, of course, the representatives of the non-disputing party.

Respondent in this case--let's get to work right away--faces considerable liability arising from eminently quantifiable damages. Now, this is an extraordinary thing because these damages actually were quantified by The Republic of Colombia itself by the Council of State. So, it's extraordinary that--and understandable, of course, that The Republic of Colombia would seek to avoid a merits hearing at all costs.

But much more importantly, it is our--it is our position that the Respondent wants to avoid a merits hearing because it, of course, does not want to expose the fragility and lack of independence of its judiciary to the universe of investors, both prospective and existing investors, and to the community of nations.

For those reasons, although hardly a preferred practice, it is somewhat understandable, but we will address it. And we would like to say that this Opening Statement is going to be a little bit unorthodox in that it will be primarily based upon 15--at least the first part of the Opening Statement--15 fundamental principles that we believe have been either altogether ignored in this proceeding or absolutely turned on their head. They have not been guided by reason or the rule of law but, rather, by just pure expediency.

The first point that we would like to bring to the Tribunal's attention is, of course, our adherence to and emphasis on the principle of ordinary meaning. We feel that ordinary meaning in this case

has been completely sacrificed and abandoned. I want to give the Tribunal a very specific example that is eloquent and will run throughout the course of this entire presentation and, of course, this entire proceeding. It's a very simple one.

Respondent in this case argues somewhat feverishly, for example, that Footnote 2 to Article 10.4 of the Investment chapter, the MFN Clause of the Investment chapter, that Footnote 2 travels to 12.1.2(b) of the Financial Services chapter.

Now, here's where ordinary meaning is extremely important to us. We feel that--and this example--which, by the way, you can read it on Page 150 of the Counter-Memorial--of Respondent's Counter-Memorial on Footnote 706, also on Paragraph 268. We feel this is an eloquent example of how ordinary meaning has been completely, completely abandoned.

It's very clear that 12.1.2(b) brings and imports from Chapter 10, 10.7, Expropriation and Compensation; 10.8, Transfers; 10.12, Denial of Benefits; and 10.14, Special Formalities and

Information.

Of those four substantive provisions, of course, only 10.7 and 10.8 are treatment protection standards. The other two provisions, 10.12 and 10.14 just place obligations on the investor and transfers rights to the Host State. So, we have the four provisions that clearly come in under 12.1.2(b) from 10.

And then 12.1.2(b) does something else. It brings in Section 12. Now, here's what 12.1.2(b) does not do because it is not there. It does not and it cannot bring in 10.4, the MFN Clause from Chapter 10. And, certainly, it cannot bring in Footnote 2 of that clause from Chapter 10.

Footnote 2, of course, is the clause--is the qualification--the restriction on 10.4 in the Investment chapter that foundationally says that procedural rights to ISDS are not available. The reason 10.4 doesn't come in is, (a), it's not listed. It's not in 12.1.2(b).

What's there listed are the four substantive provisions that I just mentioned. And, of course,

Section B is in 12.1.2(b), but 10.4, which does not form part of Section B cannot be there.

Now, what does Respondent do? Respondent says, well, the limitation to the MFN practice in Chapter 10 has to attach to the Section B ISDS procedural rights because, otherwise, that little Footnote 2 will suffer from not having effet utile. It would not--we couldn't reconcile it. It would lay without a purpose, without practical application. And, certainly, we can't have that happen.

Well, here's what we say. We say that doesn't work. It simply doesn't work because it violates ordinary meaning because it's not something that's been transferred into 12 and because 12 already has an MFN Clause. And what you're trying to say is that that MFN Clause--again, contrary to ordinary meaning, that MFN Clause has no application when it has anything to do with ISDS. It's the Chapter 10, Article 10.4 MFN Clause.

So, ordinary meaning we stress, and we cannot stress enough. A second principle that we bring before the Tribunal--and this is something that

we've said time and again throughout our Reply Memorial--is we ask the Tribunal, quite respectfully, please, to read the cases that Respondent cites. Read the cases that Respondent cites. And here's why.

On no less than 37 occasions--can I have the slide, please--we have pointed out to the Tribunal that the cases on which Respondent relies--specific cases upon which Respondent lies, simply do not stand for the proposition for which they are cited.

And all of the ones that we're here naming and identifying--and we are giving the Tribunal and the other side, everybody, all concerned, in the name of academic integrity, the citation and the cases. The cases simply do not stand for the proposition stated, especially Spence v. Costa Rica. Respondent says that there's a test in there. We say there's absolutely no test as characterized by Respondent.

And, in fact, when you read Spence v. Costa Rica--we'll get into that a little bit later--you'll see that the very Tribunal in Spence says this is not a good case to cite for precedent because it is too restrictive--we'll see their actual

language--it is too restrictive to the particular facts of this case.

But even so, the two-prong test that Respondent identifies with respect to that case, one of them is that there has to be a fundamental change in the status quo. A fundamental change in the status quo, there is no such test. There's no such test in Spence, and there's no such test in the three cases that Respondent says follows Spence.

The second part of that test, which is a test that presumably says, well, the measure has to be a stand-alone measure that is actionable in and of itself. Well, yes. Yes, that's quite an unremarkable statement. That's just a reiteration of a very basic tenet that says that the measure at issue itself has to be a violation of the treaty protection standards at issue.

So, there has to be a measure identified, of course, and there has to be a violation or an alleged violation. Only such can it be actionable. We completely agree with that.

The Corona Materials v. Dominican Republic

test, we'll talk about them at greater length. But there again, that's supposed to be the Spence test applied. It's not there. When you read it, it's not there.

In fact, in that case, the whole point of the case is that there's no State action after the limitations period. Of course, the limitations period has two parts: the scope after entry into effect and the limitations period. How long from the act that allegedly breaches the treaty protection do you go back? Is it three years? Is it five years? Those are the two limitations issues.

You'll find that in Corona Materials v. Dominican Republic, what is at stake is--in the words of the very tribunal itself--the tribunal says: "Absence of a response to the motion for reconsideration cannot be considered a stand-alone measure or a separate breach of the treaty."

We agree with that. We agree with that proposition. But hardly does that restate or set out the purported Spence test. It's nowhere there. Eurogas v. Slovak, equally, equally unavailing. We

talk about that at great length.

And the last one that I'll just point out for the sake of completeness on this line of the trial development is ST-AD v. Bulgaria. In that case, the investment was ruled as not even existing three days before a new investor claimed that the investment was relevant, the State measure denying it had already issued, and a new investor came in.

Plus, that case was completely rife with fraud. They then tried to get a German strawman investor to serve as an investor. It just didn't at all work.

And can we have the next slide, please, on this issue of Respondent's--these are some more of the cases. I just wanted the second page of this, please. That's the second page? Okay. So, there are exactly 37 of these cases that we feel the Tribunal should read and re-read.

The third point that we want to stress is it's Claimant's prerogative to formulate--and we can take this down, please.

It's Claimant's prerogative to formulate its

claims, particularly at the jurisdictional stage, as it sees fit. This is incredibly important. This principle, however, is simple to overlook because in this case Respondent raises a series of ratione temporis arguments, all aimed at recharacterizing Claimant's claim. Let me respectfully explain.

It is Claimant's prerogative to select the act of sovereignty, the State measure that it chooses to challenge. Respondent lacks standing and basic legitimacy, of course, to set up a timeline containing State measures that arguably concern Claimant and pick and choose the particular measure that should be the appropriate subject matter of the claim and, therefore, to formulate legal consequences arising from its own selection of the true measure at issue.

Fortunately, however, hardly is this scenario at all new. The Tribunal in ECE Project Management offered a helpful and informed observation on the subject. It observed, and I quote: "It is for the investor to allege and formulate its claims of breach of relevant treaty standards as it sees fit. It is not the place of the Respondent State to recast

those claims in a different manner of its own choosing. And the Claimant's claims, accordingly, fall to be assessed on the basis on which they are pleaded." End of citation.

Respondent's attempt to recast Claimant's case is particularly inappropriate at this present stage, where the Tribunal is addressing jurisdictional issues. The Tribunal in Infinito Gold v. Costa Rica also was particularly eloquent on this point.

And it stated and it noted: "At the jurisdictional stage, a Tribunal must be guided by the case as put forward by the Claimant in order to avoid breaching the Claimant's due process rights. To proceed otherwise is to incur the risk of dismissing the case based on arguments not put forward by the Claimant at a great procedural cost for that party." End of citation.

Here Claimant's claims arise from the Order 18/44, the Constitutional Court's June 25, 2014, denial of the Motion for Annulment of its May 26, 2011, Judgment. That is the State measure that we have identified. That is the State measure on

which this case is based. That is the claim that has been pled.

There could be no doubt that the relevant State measure occurred while the TPA was in force. This cannot be denied. And within five years preceding commencement of the arbitration, a limitations period available to Claimant by dint of the MFN provision of TPA Article 12.3, this latter issue, of course, we will discuss in greater detail during the course of this statement.

The June 25, 2014, order denying the motion for annulment of the Constitutional Court's 2011 judgment represents the end of all judicial labor, as a matter of fact, logic equity, and even Colombian law. Even Respondent's own expert concedes this point, which is amply underscored and highlighted in Dr. Briceño's Expert Witness Reports and which shall be clearly articulated for the Panel and the Panel's benefit during the course of her testimony.

But Claimant respectfully invites the Tribunal to engage the imagination for the sake of argument and place the date of entry into force of the

TPA. Instead of a May 2012, let's just move it back one year and let's say that it came into force in May 2010. And let's keep all the other facts the same. Now--except for the June 25, 2014, order. Let's forget about that order. So, let's forget about the auto which, by the way--well, we'll talk about that later. Let's forget about the auto of June 25, 2014, just for a second. So, we place it one year ahead, May 2010.

If we had the identical case and the case were premised on the 2011 Judgment, Respondent would be in here before this Tribunal arguing it was not the end of judicial labor. This simply cannot take place. There is--there is a well-recognized procedure of Colombian law amply institutionalized in its judiciary, and it was not at all triggered. And, therefore, all available recourse demonstrably had not been pursued.

Notably, however, both Claimant and the Council of State institution itself pursued the annulment recourse, which is an important fact to keep in mind. It wasn't just the entities in which the

Claimant was a shareholder, but the actual Council of State pursued the annulment process.

And in that connection, another point that's extremely important to remember is that if you look at the timeline, in 2007 these entities had won. They received the Award from the Council of State. Tutelas were perfected by Fogafín and the Superintendency of Banking with the Council of State. And that's it. The case ends. But what happens next?

What happens next is critical because it really defines many of the defenses, and it speaks to many of the defenses that have been raised in this case by The Republic of Colombia. Colombia itself, Fogafín, and the Superintendency of Banking filed the proceedings perfect tutelas with the Constitutional Court.

They drag these shareholders into the 2011 Judgment. That other proceeding had ended. This is extremely important because this is an involuntary act. In other words, the second that the Republic, through its two banking agencies, decides to exhaust everything before the Council of State and then

perfect those tutelas with the Constitutional Court, they are now bringing in the shareholders involuntarily into this dynamic.

So, two things happen. At that point they're part of that proceeding involuntarily. And that proceeding, as a matter of law, simply has--can be extended and is not over and cannot be final if, in fact, within three days a Petition for Annulment is perfected, as was the case here.

So, this is a very important point that we want the Tribunal to focus on. Because it's very easy to just follow the timeline and lose this fact, lose this involuntary nature of what happens.

The next principle that we want to bring to the Tribunal's attention, which is Number 5--Number 4, which will be read together--it's part also of Number 5--is the background facts--background facts do not serve to accelerate the accrual of Claimant's claims for limitations purposes so long as the challenged measure does not predate the entry into force.

In other words, that there was a dispute by

one of the many operative definitions of "dispute" that preceded the entry into force of the TPA in 2012 does not proscribe having an actionable measure post-entry. It does not. And the authority and the doctrine and the writings on this point just simply could not be clearer.

And it's particularly so here. Why? Because when we look at 10.1.3 of the TPA in the investment chapter--the very investment chapter, this is exactly what it says. And this is another reason why we asked the Tribunal to read and re-read Lucchetti on which Respondent relies, to read and re-read Vieira on which Respondent relies, because that's a completely different treaty with a completely different standard.

10.1.3 says the following, and I quote: "For greater certainty, this chapter does not bind any party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this agreement." End of citation.

What's missing from that language is one

word that's operative, "dispute." Dispute is not part of it. This is not a treaty that has the dispute language in that qualification. And that matters.

And this takes us back to our first point, ordinary meaning. Let's just read the treaty with what it has to say.

The fifth principle is--also in connection with this is--in connection with any ratione temporis analysis, Claimant invites the Tribunal to accept the tenet that absent an express exception in the treaty such as those contained in the Chile-Spain and Chile-Peru BITs--that's Lucchetti and Vieira--which exception is nowhere found in the Colombia TPA, there simply is no general exclusion for pre-existing disputes from an Arbitral Tribunal's jurisdiction under an investment treaty. That does not exist anywhere.

The principle was aptly set forth by the Tribunal in Chevron Corp. v. Ecuador--the first iteration of that case, I want to be clear--in construing the Ecuador-U.S. BIT which, like the TPA, defined the Treaty's temporal scope and language, that

made no reference to the dispute.

The Tribunal explained the general rule as follows, and I quote: "The BIT--the present BIT applies so long as there are investments existing at the time of entry into force. The BIT's temporal restrictions refer to investments and not disputes. Thus, the BIT covers any dispute as long as it is a dispute arising out of or relating to investments at the time of entry into force. Again, this is not an issue of retroactivity"--the Tribunal goes on to say--"but of application of the specific rule to be found in Article 12 of the BIT.

"The Lucchetti and Vieira decisions were based on the wording in the respective BITs' temporal provisions, in contrast to the present BIT. Those BITs specifically concern themselves with temporal restrictions on citing disputes and not just investments." End of citation.

A similar example is provided by Mondev v. United States, where the parties were in agreement that "the dispute, as such, arose before NAFTA's entry into force."

But the Tribunal found jurisdiction ratione temporis over the claims concerning State conduct after that date. The Tribunal expressly noted the intertemporal principle as the basis for its focus on the timing of conduct as the governing standard.

Recognizing that Lucchetti's and Vieira's rejection of pre-treaty disputes on ratione temporis grounds was premised on express exclusion in the relevant treaty language rather than a generally applicable principle, respondent cites to MCI Power v. Ecuador and Generation Ukraine v. Ukraine for the proposition that "Such holding has applied even in instances in which the treaty did not expressly preclude claims relating to disputes that predate the treaty's entry into force." End of citation.

Neither case, however, supports Respondent's position. And, again, we encourage the Tribunal to read Respondent's own authority. It just simply does not stand for the proposition for which it is stated and cited. Jan de Nul v. Egypt presents still another example. Similar to Lucchetti and Vieira, Jan de Nul involved a BIT containing a provision that it shall

"not be applicable to disputes having arisen prior to its entry into force." End of citation.

In conducting--in concluding that the BIT provision excluding prior disputes did not deprive of it of jurisdiction ratione temporis, the Tribunal distinguished between the contract dispute involved in the litigation proceeding, which had arisen prior to the treaty, and the investor-State dispute that followed. Although, quote, "the domestic dispute antedated the international dispute and ultimately led towards it," end of citation, the disputes involved different parties and different types of claims. Moreover, the Tribunal concluded the two disputes would be distinct even under the Lucchetti standard.

An additional principle concerns the Parties' treaty practice post-Maffezini. This is principle number 6, the treaty practice post-Maffezini. And it's very, very clear, when we look at both Colombia's and the United States' treaty practice post-Maffezini, that whenever either nation seeks to limit a right, particularly an MFN right, it does so explicitly.

I repeat myself: Whenever either party/either signatory seeks to limit a right, it limits that right by explicitly stating as much, and I suggest to the Tribunal that that same practice was carried over into the TPA that here concerns us. We will look at that with painstaking--in painstaking detail.

Claimant--so this--this is point that we will return to. But an additional point, a seventh point, is our reading of the TPA. This is extremely important. We adhere to a holistic, comprehensive, structural, and systemic approach that is premised on the assumption that is unassailable that rights are to have remedies. Rights are to have remedies.

And this connection--and in the context of Chapter 12 of the TPA, Claimant respectfully suggests that as to the rights of investors, remedies are only present where investors may perfect claims for treaty breaches that may give rise to compensatory damages.

A treatment protection standard cannot be said to be of practical remedial application if it does not provide for the right to pursue compensatory

damages arising from its breach. We will revisit this--this principle when we look at principle 15, which is just some very brief observations on State-to-State arbitration.

Claimant encourages the Tribunal to adopt an analytical approach--this is point number 8--an analytical approach that distinguishes between a TPA and a BIT. And this is extremely important in terms of context and purpose and, again, also ordinary meaning.

Respondent says there's no difference and this is not a distinction that merits any consequence at all. It's analytically irrelevant. We have a difference of opinion. In this connection, Claimant asserts that the structural differences between the two have substantive meaning and practical implications. The TPA before this Tribunal has no less than three MFN clauses, each in a separate and very particular chapter.

In contrast to Respondent, Claimant opines that this difference matters. The ordinary meaning, context, and purpose of all such MFN clauses must be

considered in trying to understand the scope, application, and workings of any single one of the three exemplars. It would not make sense to analyze the scope of any single one of these MFN clauses as part of an effort to discern its plain meaning, context, and purpose by turning a blind eye to a counterpart provision in the very same treaty.

How they appear, their respective qualifications and restrictions, and, of course, the purpose of the chapter that embodies them all constitute central considerations that simply find no residence or basic applicability when considering an MFN clause or any other treatment protection standard in the context of a BIT standing alone. There is no separate chapter. There is no competing clause.

No such analysis, however, is or can be relevant to the examination of an MFN clause in a BIT that is structurally and substantively distinct from a trade protection agreement. It makes no sense.

This difference matters. Put simply, the 12.3 Financial Services MFN clause must be understood in contrast to and comparison with its Chapter 10

Investment chapter, Article 10.4, Footnote 2 counterpart. And this matters.

Colombia's invitation to this Tribunal to read and to understand 12.3, the MFN in the Financial Services chapter, in a vacuum presents an insurmountable conceptual and doctrinal challenge.

It is an insurmountable conceptual and doctrinal challenge to say: "Let's look at it by itself. Forget about 10.4 as something that will help us understand 12.3. And, by the way, forget about also 10.2, the National Treatment Provision, and how that may help us understand 12.3. And also, by the way, try to forget 12.2, the National Treatment Protection Standard in Chapter 12, because that also," Colombia says, "has no bearing on understanding 12.3 in terms of its scope."

We have a difference of opinion. We think that it's important. In fact, we feel that it's critical. The Columbia-U.S. TPA itself represents a rich paradigm. It illustrates the signatory State's treaty practice of clearly and explicitly identifying in ordinary language any limits for qualification to

the scope of treatment protection standards generally and MFN clauses in particular, and certainly in this Treaty.

That practice, we respectfully suggest to this Tribunal, eminently was followed in the crafting of the three MFN clauses--Article 10.4, Article 11.3, and Article 12.3, that fourth part of the TPA--and related clauses, such as the National Treatment Standard in 10.3 and its counterpart in 12.2 in Chapter 12.

As to the differences between Article 10.4 MFN and 12.3--it's the Financial Services counterpart--Respondent Colombia invites the Tribunal to adopt one of two extremely untenable propositions. First, abandon any difference--any differences between Article 10.4, Footnote 2, and Article 12.3. Plain meaning/ordinary meaning no longer matters. So, while 10.4 has qualifying language--the qualifying language that we've all seen time and again in so many clauses, the establishment, operation, management, disposition, and sale, the 12.3 counterpart, the MFN in Chapter 12, simply does not have that language.

But, more importantly, the Footnote 2 qualifying the 10.4 MFN clause, not only is it not present in the 12.3 counterpart, but when we look at it, that footnote qualifies language that also is not present in the 12.3 counterpart.

The footnote--the Article 10.4, Footnote 2 qualifying language qualifies the "establishment, operation, management, disposition, and sales" language that finds no home, no presence whatsoever, in 12.3. So, this extremely important.

Now, they're saying--the Republic of Colombia, with all due respect, is saying, "Well, no, that doesn't matter. That doesn't teach us that the scope in 12.3 is different."

Well, we think that it does. We think that it does. And we think that if you add to that that 12.3 finds itself in a chapter that identifies a particular class of investors, a class of investors that's very, very vulnerable because it's subject to a very intense exercise of sovereignty in the form of administrative regulations, then having the broad scope and protection becomes all the more

foundational.

The second point that Respondent also asks this Tribunal to turn a blind eye to is the Parties' Treaty practice. They say, well, the fact that they can cite to ten treaties where, gee, the MFN clause in the investment chapter is limited and the MFN clause in the Financial Services chapter is not limited, has different language, and is in a different context--in fact, there may even be a third MFN Clause, as there is in this case in Chapter 11, which also is limited when you go to the scope provision of Chapter 11. They say that Treaty practice is of no consequence. It just simply doesn't teach us anything about the scope of 12.3.

We have a difference of opinion. We think that it does. We think that it's paramount.

Let me just share with the Tribunal that more research than I care to admit has not yielded a single treaty wherein the U.S. and Colombia has restricted an MFN clause contained in the Financial Services chapter. That set of universe of MFN clauses has no ordinary-language qualifications as to scope,

in stark relief with corresponding Investment chapter MFN counterparts.

We have not found--because there isn't any--there isn't any where they--they qualify and limit the scope of an MFN in a Financial Services chapter and where--and where you find, correspondingly that, in fact, the corresponding counterpart in the investment chapter is qualified. We can't find any. It's just not out there.

An additional principle, principle 9, that we would like to bring to the Tribunal's attention concerns distinguishing analytically, again, between a trade agreement and a BIT. Claimant also respectfully encourages the Tribunal to reject an aprioristic determination that an MFN treatment--in quotes the word "treatment"--treatment scope clause simply cannot be construed to reach procedural rights to arbitrate that are contained in another treaty.

So, we're asking the Tribunal to consider not having an aprioristic view of MFN practice as limited to only so-called substantive rights and not procedural rights. And, of course, we're going to

talk a lot about this, and we spent considerable--we--we spill considerable ink in our Memorial on this issue, and we know that the Tribunal is very, very well-versed in it, but we still have an obligation to bring it up as principle 9 because it needs to be emphasized. And we have some just basic thoughts to share, namely that underlying this conceptual proposition is a flawed assumption that somehow procedural rights do not protect investments.

And this is the ejusdem argument that we find one-third of all the cases applying. They say that the ejusdem generis applies and the cases we bring to the Tribunal's attention are the cases that say, "No, ejusdem generis doesn't apply."

Here's why. The generis component of ejusdem presupposes that procedural rights and substantive rights are different, that their purpose is different, that their purpose is not the primary overriding purpose of protecting investors and investments in these treaties.

If you assume that the purpose is the same, then the generis component, of course, has to be the

same. And the ejusdem argument flatly fails. Now, I understand that about one-third of the cases embrace the ejusdem argument. We feel that the ejusdem argument is not the preferred methodology. We feel what it does is creates an artificial distinction between procedural rights and substantive rights in terms of the foundational purpose of those rights embedded in these treaties, and particularly when the plain language is such that there's absolutely no reason to draw that distinction.

Again, we go back to ordinary meaning as pervading all of this. But we feel that the preferred policy is one that is not restrictive in this form, particularly when not--there's no ordinary language contributing to that restriction, which we say is the case here, together with context and purpose and the Parties' treaty practice.

Colombia, wholesale, has embraced this assumption without qualification. Therefore, Colombia asks the Tribunal to carve out of its MFN consideration the possibility of engaging even in a case-by-case adjudication based on the particulars of

the MFN treatment protection standard at issue.

A tenth principle that Claimant also respectfully encourages the Tribunal to adopt analytically in this proceeding concerns the application of the expressio unius est alterius axiom, which we mercifully have abbreviated to the expressio axiom.

The expressio axiom--first and foremost, we have to recognize that it forms no part of a VCLT analysis. It just simply does not, and there's no one on planet earth that says that it does. But if recourse to the axiom is had, then certainly it must be appropriately applied. The expressio axiom only can be applied to one set of listings at a time. Analytically, it cannot simultaneously be applied to two or more sets of elements within a particular category. Therefore, while, certainly, Respondent would be perfectly correct in concluding that only substantive provisions incorporated from Chapter 10 into 12 would--would command an application of the expressio axiom, we say, yes, that's correct.

Where it would be a mistake is to say

because we used the expressio axiom to say only 10.7, 10.8, 10.12, 10.14, and Section B are imported in, we also now apply--we say--okay. So we apply the expressio axiom. That's the five that are imported. Nothing else is imported from 10. That's right. Only Section B. That's correct. We agree with that.

Here's where we disagree. We disagree that the expressio axiom can also be said to apply to all of Chapter 12; because Chapter 12 is not listed as limiting or supplementing its own chapter, somehow the expressio axiom also limits and renders completely null and void all of the substantive provisions in Chapter 12. That makes no sense. If the expressio axiom were to be so applied, then it would negate everything. It can only negate those elements of Chapter 10 that are missing, that are not stated.

So, of course, if someone were to say, "Well, no, 10.4 surely must form part of Chapter 12 of 12.1.2(b), because that's the MFN clause and it has a procedural restriction, of course it's there," we would say, "No, the expressio axiom, properly applied, excludes 10.4." Expressio unius est exclusio

alterius, of course, very clearly.

But what we cannot say, because it's just simply a misapplication of the rule, is that it applies to anything else that I want it to apply to. Like now we'll make it apply to all of the substantive provisions in Chapter 12. There's no such application of the rule. It just doesn't exist, it's improper, and it defies basic logic.

It must also follow--this time, also out of logical necessity--that the application of the expressio axiom to 12.1.2(b) cannot amend or eviscerate any of the Chapter 12 treatment protection standards. That makes absolutely no sense.

Claimant also encourages the Tribunal to adopt the proposition that the substantive provisions contained in Chapter 12 are there present only for two reasons, in the following order of importance: First, they are intended to protect financial services investors and investments, plain and simple; second, such provisions are present in Chapter 12 so that State-to-State dispute mechanism framework may service and maintain the actual workings of that chapter,

should it become necessary to do so.

We acknowledge that that's important as well.

Principle number 11. Claimant invites the Tribunal to adopt the principle that every treaty provision must be interpreted as having a practical purpose or effect. Every treaty provision must be interpreted as having a practical purpose or effect.

Now, again--and I don't want to keep belaboring this point, but Respondent--but I will. Respondent makes a big issue out of Footnote 2 losing its purpose and practical application if not considered as somehow, through cut-and-paste law, making it to Chapter 12. Otherwise, they say, well, forget about the expressio axiom in this instance. It would render Footnote 2, the limiting qualification to MFN, not useful.

Well, we've explained why that just can't be the case in the ordinary meaning. But going beyond that, let's look at utility in terms of their theory of the case.

They--we--they basically say all of the

substantive provisions in 12 are not--are not there to protect the investor. The investor cannot avail him or herself of any of those provisions. The--the principle of utility has been--has been well, well observed. And here I'd like to bring the Tribunal's attention to Eureko v. Poland, a partial award.

There's an observation at Paragraph 248 that reads: "It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful, rather than meaningless. It is equally established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective." End of citation.

Notably, Respondent's Counter-Memorial omitted any mention, let alone an analysis, of Articles 12.4, market access for financial institutions; 12.5, cross-border trade; 12.6, new financial services; 12.10, which is a critical provision, the exceptions--these are the regulatory

prudential measures exception; 12.11, another critical provision, transparency and administration of certain measures; 12.16, Financial Services Committee--this is important because it tells us how it is that we can reconcile not having access to State-to-State arbitration with a theory that provides investors with rights that are enforceable; 12.17, consultations; and 12.19, investment disputes and financial services.

The Tribunal is invited to embrace an interpretive methodology that renders these substantive provisions, in addition to Articles 12.2 and 12.3 MFN, meaningful and effective.

12.4, market access for financial institutions is a very helpful example. A central objective of the TPA was to ensure, from both trade and investment perspectives, market access and financial institution establishment rights. Reciprocity of process and market conditions are a critical feature that the TPA sought to create, protect, and to enhance.

Reading Article 12.4 out of Article 12.1.2(b) would, in effect, divest financial

services investors from enforcing a pivotal right. A party's noncompliance with any of the obligations set forth in Article 12.4 would materially hamper, if not altogether eliminate, the viability of financial services offered by investors of another party.

Pursuant to application of the expressio axiom beyond Chapter 10, and to the entirety of a second set of rights contained in Chapter 12, financial services investors would be proscribed from seeking relief arising from wrongful infringement on the rights to be free from limitations imposed on a number of issues, such as the number of financial institutions, the total number of financial services in operation, the total number of natural persons that may be employed in a particular financial sector, on and on.

Article 12.5, cross-border trade, is equally illustrative. It accords national treatment protection to cross-border financial services suppliers of another party. Without a mechanism to enforce this right, financial services investors would be placed in considerable operational jeopardy.

Similarly helpful, and this, I think, is perhaps the most eloquent, is the Article 12.10, exceptions, and the workings with respect to both investors and host-State protections. This is critical because the temperance of both non-circumvention provisions together with the prudential measures is critical.

This article's objective, of course, is to protect regulators while simultaneously shielding investors from the overzealous exercise of regulatory sovereignty that would infringe upon the substantive rights that Chapter 12 provides to investors and their investments.

The fulsome depth and scope of a prudential measures exception, as set forth in 12.10, make greater sense in the context of an interpretive methodology that ingrafts practical applications to the two non-circumvention provisions contained in Article 10. Only with enforceable non-circumvention provisions can this article be tempered with the substantive rights that Chapter 12 provides to its investors.

Notably, 12.10.1 qualifies somewhat the

exception by noting that: "Where such measures do not conform with the provisions of this agreement referred to in this paragraph, they shall not be used as a means of avoiding a party's commitments or obligations under such provisions." End of citation.

Although somewhat general and scant, this provision attempts to reinforce all of an investor's substantive rights under Chapter 12. Similarly, Article 12.10.4 also sets forth a second circumvention provision. It is much more substantive and particular than that in its Section 1 counterpart, although it is contained in a subsection that further broadens the party's regulatory sovereignty, and it reads as follows: "For greater certainty, nothing in this chapter shall be construed to prevent the adoption or enforcement by a 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."

Now, here's where it is tempered, and here

is where rights are provided to investors: "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 prevailed or a disguised restriction on investment and financial institutions or cross-border trade in financial services." End of citation.

The second non-circumvention provision set forth in 12.10.4 explicitly references arbitrary and "unjustifiable discrimination" as rights limiting any expression of legislative or regulatory sovereignty with respect to the prudential measures exception of Chapter--of Article 12.10 in Chapter 12.

Again, this carve-out is much more meaningful, if not altogether only meaningful, in the context of an interpretation of Article 12.1.2(b) that renders Chapter 12's substantive protection standards enforceable. The explicit reference to "arbitrary or unjustifiable discrimination" would trigger enforcement of Article 12.2 national treatment on the part of an investor and is suggestive of an

international minimum standard of protection.

Respondent's interpretation provides for no such possibility. But irrespective of whether the incorporation of substantive provisions from 10, investment into 12, financial services, may modify or altogether nullify Chapter 12's substantive provisions, which Claimant flatly denies to be the case, the Tribunal should adopt the undisputed proposition that, at a very core minimum, the signatory States in this case have agreed and consented to ISDS with respect to Article 10.7, expropriation and compensation. This much is because it must be beyond quibble. There's no debating this point.

The only footnote on this point is the reach of MFN 12.3. Mr. Olin Wethington's testimony leads precisely to a reading of the TPA that ingrafts on its substantive provisions actual effect, utility, and purpose. Claimant invites the Tribunal to consider that the NAFTA's lead negotiator's testimony carries equal or more weight than could ever be reasonably ascribed to mere working papers.

For the sake of clarity, however, Claimant has here asserted that all contemporaneous evidence relative to the TPA, including the very NAFTA itself, supports an expansive construction of 12.2, national treatment, and 12.3, MFN.

The former Assistant Secretary of the Treasury for International Affairs was the lead negotiator for the NAFTA's Chapter 14, Financial Services. This proposition is unassailable.

It is equally not susceptible to reasonable challenge that Chapter 14 of the NAFTA served as the template provision for the TPA's Chapter 12 and really the entirety of the TPA.

And this is the 12th principle that we bring to the Tribunal's attention. The 12th principle is that the NAFTA was the template for the TPA. And this is really not a proposition that can be seriously debated.

Mr. Olin Wethington does not purport to speak for the U.S. government. That's not his role. Nor is he at all trying to say as much. But it cannot

be challenged that he was the highest-ranking U.S. official at the time, 1992 to 1993. The Tribunal will recall that the NAFTA came into force on January 1st, 1995. He was the highest-ranking U.S. official at the time, charged with serving as the lead negotiator for Chapter 14 of the NAFTA.

In this same vein, the U.S. position on Chapter 14 of the NAFTA with respect to ISDS is to be discerned as of January 1st, 1994. Not now. Not 26 years later. It's in 1994. What did you think back then? What was your position on these issues back then? That's what matters.

And we know what it is because of the contemporaneous evidence that has not been rebutted except for qualifications by argument of counsel. No evidence whatsoever.

That's the date at which the NAFTA came into force. Calendar year 2020 is not relevant for this purpose as a matter of law.

Even less relevant is an unprecedented federal executive policy that seeks to do away with ISDS altogether under the theory that U.S. investors

who invest beyond the national territory of the United States are contributing to the unfettered exportation of U.S. jobs and, therefore, are not worthy of ISDS protection.

This policy has the twin principle of holding that U.S. capital should be invested in the United States and not abroad. This principle has, as its corollary, that those who invest abroad be under U.S. national territory do not merit ISDS protection.

Mr. Wethington testifies with respect to, one, negotiations; two, the drafting; three, the implementation; and, four, the operation of Chapter 14 of the NAFTA as of the January--as of the 1993 through January 1, 1994, relevant, truthful, and operative time frame.

At that time, his testimony asserts, financial market liberalization demanded enforceable MFN and national treatment substantive treatment protection standards. That's his testimony in his Witness Statement at Paragraph 23.

The second operative date for understanding the United States' thinking on ISDS in the context of

NAFTA Chapter 14 template to Chapter 12 of the TPA is July 17, 2006. As of that date, the United States issued its non-disputing party submission into the Fireman's Fund Insurance case.

Now, what did they say in that case? Where presumably the direct actions on the part of an investor under Chapter 14, the parallel chapter to Chapter 12, may have been at issue, what did they say there? Quite notably, that submission is completely silent on the scope of ISDS procedural rights within the NAFTA Chapter 14 ruling.

At that time, on July 17th, 2006, the U.S. found no imperative to assert the novel proposition that it raises today, 14 years later, with respect to the alleged limited availability of ISDS relief to financial services investors.

Instead, the U.S. limited submission in Fireman's Fund to the very narrow issue of "whether a bank holding company under United States law should be considered a 'financial institution' within the meaning of Article 14.6 [definitions for purposes of Chapter 14 of the NAFTA]." That's Fireman's Fund at

Paragraph 36.

The third meaningful date for purposes of discerning the extent to which ISDS is available to Chapter 12 investors--the scope--because we know it's available. That not even Respondent contends. We know it's available because of the importation of 10.7 in Section B from Chapter 10. So that's the--so the only thing we're really talking about here is just the scope.

To any substantive treatment protection contained in chapter--in the chapter is, of course, May 15, 2012. What did the United States think on May 15, 2012? That's the date that the TPA enters into force.

So 2012, what did you think then? Fireman's Fund, 2006, what did you think then? January 1st, 1994, when the NAFTA is enacted--enters into force, what did you think then? Those are the three operative dates.

It's not 2020. What you think now about a treaty that came into force in 2012 and its predecessor that came into force on January 1,

1994--bless you--that's not--that's not the issue.

The current U.S. Administration's--the Trump Administration's unprecedented thinking on this subject, which is divorced from the NAFTA Chapter 14 template and arises eight years after the entry into force of the TPA, simply cannot be of any moment or consideration for this Tribunal.

Claimant respectfully requests the Tribunal to focus on the three timeframes, 1994, 2006, and 2012, as the relevant points in time that governed consideration of the scope of ISDS and the workings of Article 12.3, the MFN Clause in Chapter 12.

Claimant similarly respectfully asks the Tribunal to consider that Mr. Olin Wethington's testimony remains unrebutted. Respondent has not proffered, because it cannot do so, evidentiary testimony to the contrary. The resources of the Republic of Colombia and the current U.S. Executive Branch combined cannot yield one solitary person, one solitary person, with the requisite standing to challenge Mr. Olin Wethington's factual and expert witness testimony.

At the time of the entry into force of the NAFTA, the former Assistant Secretary of the Treasury for International Affairs was only accountable to two persons, Secretary Brady and the President of the United States. No one else.

Claimant respectfully invites the Tribunal to reject the surface and simplistic proposition that a current change in policy alters what was meant and reduced to writing at the time of the entry into force of the NAFTA on January 1, 1994, and the entry into force of the TPA on May 15, 2020, 26 years and 8 years ago respectively.

The next--13th--penultimate mercifully--principle is the venerable chestnut of contemporaneity, which, in effect, is what I've been arguing for the last five minutes.

But contemporaneity is critical to the appropriate consideration of context and purpose of any VCLT analysis. And as the Tribunal is well aware of this principle, of course. It commands that any interpretation of Chapter 12 of the Colombia-U.S. TPA must be understood as of January 1, 1994, the date on

which the template predecessor entered into force and the time at which the U.S.-Colombia TPA was concluded. And remember, this TPA was actually signed on November 27, 2006, and it entered into force on May 15, 2012.

This principle has found residence in a number of awards. By way of example, in Daimler Financial Services v. Argentina, in exploring the scope of the word "treatment" in the MFN clause in Article 3 of the German-Argentine BIT, the Tribunal affirmed the principle of contemporaneity, and in so affirming, in Paragraph 2020 of the Award, observed as follows: "In order to shed light on whether the Contracting Parties intended for the term 'treatment' to encompass the BIT's international dispute settlement provisions, one must apply the classical rule of interpretation known as the principle of contemporaneity. This principle, particularly pertinent in the case of bilateral treaties, requires that the meaning and scope of the term 'treatment' be ascertained as of the time when Germany and Argentina negotiated the BIT. This BIT was adopted in 1991.

"Unfortunately neither disputing party has submitted any direct evidence--for example, from the Treaty's drafting history--revealing the particular understanding of 'treatment' maintained by Germany and Argentina as of that date. The Tribunal must, therefore, look for clues to the meaning generally ascribed by the terms by the broader international community of states at the time." End of citation.

Also discussing the scope to be ascribed to the word "treatment" in MFN clauses contained in Article 3.2 of the UK-Argentine BIT, the Tribunal affirmed the relevance in application of the principle of contemporaneity in Paragraph 298 of the Award on jurisdiction: "The Tribunal notes that neither party to the present case has submitted direct evidence revealing the particular understanding held by the Contracting Parties of the term 'treatment' at the time of the conclusion of the Treaty. As such, it is appropriate and helpful to resort to the principle of contemporaneity in treaty interpretation, particularly pertinent in the case of bilateral treaties. This principle requires that the meaning and scope of this

term be ascertained as of the time when the UK and Argentina--when the UK and Argentina negotiated their BIT."

Now, we have--Claimant has provided direct evidence. Mr. Olin Wethington's testimony explicitly references evidence contemporaneous with the entry into force of the NAFTA, and, therefore, the Chapter 14 template to Chapter 12 of the Colombia-U.S. TPA. He does that in Paragraph 23.

He references Congressional testimony, as well as a book that he authored at the time, which was then approved and cleared for publication by representatives of the three NAFTA signatory states, of course including the United States.

And that's his Supplemental Witness Statement at Paragraphs 10 and 43. 10 and 43.

Excuse me for one second. Thank you.

The contextual negotiating environment of the NAFTA, according to the unrebutted testimony before this Tribunal, requires the NAFTA parties to include broad MFN protection standards for cross-border investors in financial services because

of the economic crisis that Mexico at the time recently had endured. That's Olin Wethington at Paragraph 39.

Consequently, Olin Wethington testified that, "An interpretation of NAFTA Article 1401(2), scope and coverage, and the counterpart to 12.1.2(b) of our Treaty, that limits investor-State settlement procedures to the five referenced in Chapter 11, Investment Protections, would render the MFN protection toothless."" End of citation. That's Olin Wethington, First Witness Statement at Paragraph 39.

The anomaly of limiting the enforceability of Chapter 14 MFN and its national treatment substantive protection standards regarding financial services investors is very clear. The former Assistant Secretary testifies to it in the context of the United States' Treasury Department's policy at the time, which informed the NAFTA negotiator's policy objectives.

Mr. Wethington specifically testifies as follows: "Under this view, a reading of the NAFTA Chapter 14, as limited only to dispute resolution

procedural and substantive rights of Chapter 11, the Parties would have deliberately created a substantive obligation without a meaningful remedy. This interpretation will be incongruous with the Treaty--with the Treasury Department's imperative to provide strong investment protection to financial services investors." That's Olin Wethington's First Witness Statement at Paragraph 39.

Mr. Wethington testifies to this imperative both as a matter of fact based upon his personal knowledge and as an expert on the subject having expertise arising from his role as the lead negotiator for the United States with respect to the entirety of Chapter 14, Financial Services, of the NAFTA.

Again, Claimant respectfully reminds the Tribunal that these propositions notably have not been challenged from an evidentiary perspective. They have not--Respondent has not proffered any evidence other than argument of counsel, which is no evidence, in this regard. This testimony remains unchallenged.

Indeed, Colombia has elected to forego the presentation of any documentary evidence, expert

witness testimony, fact witness testimony concerning this point. Glaring because of its evidence--because of its absence is evidence of any of Colombia's negotiators of the TPA of any rank of government.

The absence of any opposing factual or expert witness testimony compels this Tribunal to consider, with substantial care, the evidence that has been proffered by the Claimant.

The historical context and purpose with respect to the NAFTA Chapter 14 MFN clause altogether have been wrested out of Respondent's analysis under the theory that such testimony is irrelevant and not instructive in construing the TPA generally or Article 12.3 MFN Clause because this testimony purportedly, "clearly is not the equivalent to travaux preparatoires for interpretive purposes." End of citation. That's the Counter-Memorial in Paragraph 351.

When stripped to its core meaning, Respondent asserts that because Mr. Wethington is a natural person and not an inanimate draft piece of paper, his testimony is of no moment. This

proposition speaks for itself and, quite frankly, defies any conceptual characterization.

Indeed, the historical negotiating context and purpose of the negotiating teams, as testified to by Mr. Wethington, have not been challenged or contested except obliquely through the arguments of counsel. Respondent does not challenge this testimony because it cannot do so.

Respondent does not challenge that Mr. Wethington's primary responsibility in his capacity "was to formulate and achieve U.S. negotiating objectives." To formulate and achieve U.S. negotiating objectives. End of quote. That's the First Witness Statement at Paragraph 22.

This proposition is important because Mr. Wethington further testifies that these responsibilities "extended to the provisions relating to investment and operation, the banking securities and insurance sectors, including provisions on national treatment and most favored nation protection and dispute resolution in financial services." End of citation. Olin Wethington at Paragraph 22.

Similarly, Respondent offers no evidentiary challenge to Mr. Wethington's testimony that the NAFTA Contracting Parties negotiated for and secured an MFN provision that would not be qualified in scope "unless otherwise expressly limited." Olin Wethington's First Witness Statement at Paragraph 27.

Mr. Wethington further offers the unchallenged testimony that, "The NAFTA significantly enlarged upon the application to financial services by including, in a stand-alone financial services chapter, a broad MFN protection in both prior treaties." A reference here is made to the U.S.-Canada FTA in 1998 and the U.S.-Israel FTA of 1995, two treaties that Respondent completely ignores.

He goes on to say, "The Parties' intention is reflected in the final ratified text of the NAFTA." End of citation. That's at Olin Wethington First Witness Statement, Paragraph 27.

He adds to 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."

First Statement at Paragraphs 28 and 29.

Mr. Wethington as well qualifies that. "Inclusion of express language specifically referencing procedural rights was not necessary because of the plenary language of the MFN provision, was, by plain meaning, adequate to incorporate procedural protections certainly in the absence of any language expressly limiting the scope of the MFN provision." End of citation. That's Wethington First Witness Statement, Paragraphs 28 and 29.

It is quite notable that Respondent's Counter-Memorial does not at all reference the exclusion of MFN clauses in Financial Services sections of pre-NAFTA agreements to which the U.S. is a signatory.

As the uncontroverted testimony before this Tribunal establishes, this prior practice demonstrates the NAFTA Parties' intent to expand financial services investor protection.

14th principle. The 15th is very brief. The State Parties' prior treaty practice matters. Quite significantly, 9 of the 11 U.S. FTAs--9 of the

11 U.S. FTAs that came into force between the entry--between the entry into force of the NAFTA and the entry into force of the Colombia-U.S. TPA, that is between January 1994 and May 15, 2012, January 1994/May 15, 2012. All these have investor-State dispute settlement language that tracks NAFTA Article 14.01(2). Only the FTAs concerning Jordan and Bahrain lack ISDS procedural rights.

Of course, Claimant is well aware that this Tribunal is not a policy Tribunal. We know that. However, it is important to observe that the current U.S. view on 12.1.2(b) of the Colombia-U.S. TPA is not a historically based view, and, moreover, it is a view that eviscerates altogether any meaningful protection for financial services investors concerning those ten states as well as carves out of ICSID a meaningful percentage of financial services jurisdiction on a prospective basis, particularly in light of the configuration of the new USMCA.

15, just a very brief word on State-to-State arbitration. It really is of no moment to say that the type of relief, in addition to two treatment

protection standards, 10.7 and 10.8, that we can all agree are made available to Chapter 12 investors through Section B, and that's brought into 12.1.2(b). We can agree on that.

It's of no moment really to say State-to-State arbitration provides a remedy. And here's why. First of all, State-to-State arbitration, by its own plain, ordinary language, is State to State. It does not purport to be a mechanism for derivative standing where an investor derivatively, through the State, can bring an action to redeem, to make whole a violation, a treaty violation.

State-to-State arbitration, based on the very plain meaning of the Treaty and the history of State-to-State arbitration--leaning to one side, of course, claims Tribunal, which is a different species.

In our field, State-to-State arbitration--first of all, there have only been five. Of those five, one did not even make it to Panel Report. State-to-State arbitration is not a derivative--a methodology for derivative actions by investors.

But second, and just as importantly, State-to-State arbitration cannot provide an investor with compensatory damages. State-to-State arbitration is limited to prospective workings of the Treaty so that the Treaty may function.

So, to say, well, those investors in Chapter 12, yes, they have these two rights, and, moreover, they have State-to-State arbitration, which is what's contemplated in Chapter 12, no. The thinking has to be changed. It has to be altered. State-to-State arbitration can never be characterized as anything but a maintenance for macroeconomics of the Treaty's workings.

It cannot provide damages. It never has. And it's in the ordinary language. And it's not a mechanism--because it's not in the ordinary language and there's no empirical basis for it. It's not a mechanism for an individual investor bringing a microeconomic concern arising from problems with the investment. So, we want the Tribunal to please keep in mind the workings of State-to-State arbitration.

Claimant has identified for the Tribunal

15 principles that Colombia altogether has ignored or otherwise branded with its very own novel exegesis that finds no supporting law or doctrine.

Claimant respectfully asks the Tribunal to reflect on the orthodox application of these principles as it analyzes both of the Parties' legal and factual proffers. All right.

Next. I'm not through yet. Next, please.

PRESIDENT KAUFMANN-KOHLER: Could I--I see that we have been going almost an hour 30. It's a long time for the court reporters. I did not want to interrupt your enumeration of principles. But I understand now we have gone through them. Would this be a good time to take just a five-minute break?

MR. MARTÍNEZ-FRAGA: Mercifully, yes.

PRESIDENT KAUFMANN-KOHLER: Yes. And then you have two hours; right? So, you have some time left.

MR. MARTÍNEZ-FRAGA: Yes. Let me--let me ask the Tribunal--I understand, Madam President. Let me ask the Tribunal, if I take--can I take more than just 30 minutes and not use that time for closing and

allocate it here?

PRESIDENT KAUFMANN-KOHLER: Yeah. I think the orders said that the maximum for the--for the openings would be two hours. So, I think we need to stick at approximately that. I will not cut you off if you need five minutes more or so.

MR. MARTÍNEZ-FRAGA: Okay.

PRESIDENT KAUFMANN-KOHLER: Now, we have--you have probably--oh, we have started at 05 approximately. So, you still have more than 30 minutes.

Maybe I look at the secretary. Alicia, can you tell us?

THE SECRETARY: Yes, they still have 39 minutes.

PRESIDENT KAUFMANN-KOHLER: Yes. So you have almost 40 minutes.

MR. MARTÍNEZ-FRAGA: Okay.

PRESIDENT KAUFMANN-KOHLER: And I hope you can do it in that time.

MR. MARTÍNEZ-FRAGA: I will try my best.

MR. GRANÉ LABAT: Madam President, if I may.

PRESIDENT KAUFMANN-KOHLER: Yes. Sure.

MR. GRANÉ LABAT: We wouldn't have any objection, Madam President, and we offer flexibility, if Claimant's counsel exceeds his time for the opening and then deducts it from closing--of course, within reason--we would not be raising any objection. We come to this with flexibility.

PRESIDENT KAUFMANN-KOHLER: Fine. That's appreciated. It's good when the Parties are less--less insisting on the rules than the Tribunal. So, we can be flexible on that, Mr. Martínez.

MR. MARTÍNEZ-FRAGA: Thank you.

PRESIDENT KAUFMANN-KOHLER: If you need a little bit more, then just take it.

MR. MARTÍNEZ-FRAGA: Okay. Thank you.

PRESIDENT KAUFMANN-KOHLER: Good. Could we take, then--well, maybe 10 minutes would be nice now and resume after 10 minutes.

And, Mike, you push us to the breakout rooms, please, and call us back automatically.

THE TECHNICIAN: I will. I will open the rooms now.

(Brief Recess.)

PRESIDENT KAUFMANN-KOHLER: I think we're ready to resume.

Mr. Martínez, you have the floor again.

MR. MARTÍNEZ-FRAGA: Thank you, Madam President.

May we have the next slide, please. Next, please.

As we started to emphasize during the first part of this presentation, at issue here, really, is an issue of scope. There's absolutely no--no debating that 12.1.2--that Chapter 12 does incorporate and does provide for ISDS rights to investors in that chapter. The real issue is scope, and there's no issue as to 10.7.

Where the concern arises and where this Tribunal, of course, will exercise its judgment, is in whether 12.3, the MFN clause, can reach into the Swiss-Colombia--the Colombia-Swiss BIT for five years, what that means if that can occur.

But assuming that can happen, which, of course, our position is that it should for the many

reasons set forth in our writing and here today--consent is eminently present, certainly with respect to 10.7.

Next, please. This is just the configuration. So, next, please. Next, please.

Again, the important thing that we urge this Tribunal is to look at the differences between 10.4 and 12.3, particularly in light of the treaty practice of setting forth explicitly any limits to the exercise of a substantive right.

We see a limit to 10.3, the national treatment counterpart in the Investment chapter. The limitation is present. We see the limitation to 10.4 by way of Footnote 2. We also see the language that Footnote 2 qualifies in 10.4, which is the establishment, operation and maintenance, disposition and sales, which is not present in 12.3.

Next, please.

Ordinary meaning of 12.3 treatment is completely broad and unqualified. And here, of course, there's no secret. There are three foundational lines of cases. I think that the

Impregilo Award talks about them with considerable clarity and expresses what the challenge is in our field of investor-State arbitration with how we look at MFN clauses and the uncertainty that now befalls the interpretation of MFN clauses.

But we do believe candidly and academically, and not just as advocates, that Professor Mistelis's point is the operative one that should be applied, namely: "Dispute settlement provisions, by their very nature, belong to the same category as substantive protections for foreign investors. In other words, the way a right is procedurally exercised is part and parcel of substantive protection." End of citation.

We have already looked at the ejusdem generis argument. I will not repeat it here.

Next, please.

The presence of Footnote 2 cannot be sufficiently emphasized. And, again, our position here is very clear. The Parties brought to the TPA that concerns this Tribunal the same party practice that it exercised and shows and demonstrates, from an evidentiary perspective empirically, in terms of

limiting expressly, with ordinary language, substantive rights. When they want to do so, they expressly state as much. It's never a situation where it's inferred.

Next, please.

Again, we see more evidence in the very same TPA. The MFN Clause in Chapter 11, Article 11.1--I think it's 11.3. I'm sorry. 11.1 is the scope provision. The scope provision has a footnote that says that ISDS would not be available to any of the provisions in that chapter. Again, the party expressly limits a known right.

Next, please.

The clear and unambiguous evidence that exists that has been proffered, what we see before this Tribunal, always of a single voice in two propositions--in asserting two propositions. First, that national treatment has to be robust and fulsome and, second, that the same holds true for MFN practice for purposes of the Chapter 12 investors.

These are probably the most vulnerable class of investors. And it's the one class of investors

that was segregated from all other classes of investors. It doesn't matter whether it's energy, technology, infrastructure, hospitality. Financial Services was treated differently, and that's clearly because of the regulatory exposure that these investors and their investments faced.

We feel that this is extremely important, and it was part and parcel of the NAFTA concern, as we shall see now.

Next, please.

The unrebutted testimony of Mr. Wethington on this point is extremely clear. He emphasizes MFN protection and national treatment protection as being extremely important and driving the entire process of the negotiations.

And, of course, this was not meant in the context of State-to-State arbitration, where such substantive rights would not be able to afford investors any protection in terms of being made whole or asserting microeconomic claims in the form of particular investments.

Next, please.

This is a very important point that we wanted to bring to the Tribunal's attention. We already did this when--in our submission. But it's very important to understand that the U.S. Government's position that Mr. Wethington's testimony, without permission because he's a prior employee, is in violation of U.S. law is not supported at all by U.S. law.

The U.S. Treasury Housekeeping Regulation relied upon, which is 31 C.F.R. 1.11, has no legal effect with respect to Mr. Wethington, a former Treasury official. The U.S. agency regulations lack legal effect unless authorized by federal statute. The regulation in question, which is called a "Touhy" regulation, setting forth procedures for securing testimony or documents from government employees, that regulation is empowered, comes into being because of a federal housekeeping statute.

The supposed authority for the regulation authorized promulgation of such regulations for government employees but not for former employees. Let me make that very clear.

The statute that provides the regulation with any authority does not provide that that regulation can apply to former employees. In that sense, the regulation is completely ultra vires, meaning the regulation itself is defective.

The parallel regulation for the United States Department of State, the State Department, which is the Department of the Government that actually filed the non-disputing party submission, their equivalent of a Touhy regulation, actually physically, in ordinary language, carves out testimony for international arbitration.

So, I want the Tribunal to be perfectly made aware that 31 C.F.R. 1.11 is not authorized by the enabling statute, if you will, to apply to former employees. And, by the way, numerous U.S. courts have rules that U.S. agencies may not be applied to former employees due to the lack of statutory authorization. And we cite a whole series of cases to that effect, namely saying that it cannot apply to former employees.

And no single U.S. court, not one, has

upheld the application of 31 C.F.R. Section 1.11 to a former employee. It's just not there. We cite considerable authority where parallel Touhy regulations have been held not to apply to former employees.

And there's no single court that has looked at any Touhy regulation and said it applies to a former employee. It can't say that because the enabling underlying statute does not provide that authority. So, the regulation itself has usurped its authority.

Next, please.

The stated purpose of the Housekeeping Regulation of 31 C.F.R. 1.11 does not implicate testimony by former employees. It says: "Intended only to provide guidance for the internal operations of the Treasury Department and to inform the public about department procedures concerning the service of process and responses to demands or requests." End of citation.

The real purpose is to be able to be responsive to subpoenas. There's no enforcement

mechanism with respect to former employees. They can't enforce the regulation. The reason they can't enforce it is because it has no legal basis. The regulation says that it applies to former employees, but the underlying statute does not so that the regulation has usurped the statute's authority. It is ultra vires.

There is no basis under U.S. domestic law for excluding even a current employee's testimony once given. And that's Moore v. Chertoff, which we cite at length. There's no reason to deprive the Tribunal of Mr. Wethington's testimony in these proceedings based upon, at best, a disputed question of U.S. internal administrative law. That's casting the issue in the light most favorable to the U.S. Government.

There's absolutely no authority. No Touhy regulation by any U.S. court has been held to be applicable to former employees. And we provided the Tribunal with significant authority. We've asked the government to give us their version to comment on the authority. They haven't done so. The stated purpose of the Housekeeping Regulation does not implicate

testimony.

Let's go next, please.

The U.S. has asserted that it is "not aware of any contemporaneous evidence that supports Mr. Wethington's view of the scope of investor-State dispute settlement in the Financial Services chapter of the NAFTA."

Well, you know, Mr. Wethington's views are based on his "personal recollection and experience"--end of citation--in his leadership role in negotiating the Financial Services and Chapter 14. The Assistant Secretary for International Affairs, U.S. Department of the Treasury, the lead negotiator of the Financial Services of the chapter of the NAFTA, he had primary responsibility.

And the person who was negotiating Chapter 11, the NAFTA equivalent of our TPA's Chapter 10, was Barry S. Newman, who was Mr. Wethington's deputy.

We discussed the book that he authored contemporaneously, but more importantly, he also discusses at length the September 23, I

think--September 28, 1993, Congressional testimony.

Next, please.

What's in blue in this PowerPoint, with the exception of the title, of course, the light blue, is actual citation. So, it's actual language. And here's contemporaneous evidence:

“Under the terms of the most-favored-nation obligation, investors or financial entities of a NAFTA Party may not be disadvantaged vis-à-vis another NAFTA Party or side agreements. In addition, the benefits of any agreement between a NAFTA Member State and a non-NAFTA Member Country will be extended to the other two NAFTA Member Countries."

Next, please.

There's ample--ample testimony concerning the liberalization of financial markets in the hemisphere.

Next, please.

This is important, particularly important. This is not Mr. Wethington's testimony. It's a September 28, 1993, hearing before the Committee on Banking, Finance, and Urban Affairs. The--this is

Henry B. Gonzalez, the Chairman.

Again, he says: "The financial services provisions in NAFTA are the driving force and the locomotive behind this agreement." That's a citation.

This is very important because this hearing on this date was dedicated only to financial--only to the Financial Services chapter and to flesh out how that chapter worked by having a different agency representatives testifying. They did. They were of a single voice.

I will say this in advance of stating two foundational propositions: First, MFN had to be broad, fulsome and robust; second, national treatment has to be fulsome and robust.

And the thinking that the testimony reflects--also, it's very clear. The U.S., based on this testimony, thought that, "Look, we already apply MFN, and we already apply national treatment here domestically. So, we're not losing anything by exporting these rights and having these rights available to investors who invest in the NAFTA Parties. Plus, we want investors to be able to be

secure."

And this was particularly the case and the concern, whether rightfully or not, with Mexico, as we'll see from the testimony.

Next, please.

This is John P. Laware of the Federal Reserve System. He says, "The Financial Services chapter of NAFTA incorporates the principles of MFN and national treatment that have long been applied in the United States with respect to foreign investment."

And, again, you'll notice that there's a lot of emphasis on creating opportunities for United States banks, other financial firms in the Mexican market. There was a--the concern, of course, was, from the U.S. perspective, with U.S. investors being protected abroad, which is commonsensical.

Next, please.

This is the SEC representative. What I want the Tribunal to be sensitive to is how she speaks in terms of financial firms. And she speaks in terms of investors in financial services from other NAFTA countries. The entire focus was on investor

protection and not on State-to-State arbitration.

Next, please.

This is Barry Newman's testimony. Mr. Newman was the Assistant Secretary for International Monetary Affairs, Department of the Treasury. He worked and reported to--worked for and reported to Mr. Wethington directly.

And he states: "The national treatment and MFN provisions ensure that Mexico and the United States firms will be treated favorably--treated as favorably as Canada and Mexico treat their domestic firms or the firms of any country."

And you see the emphasis on a non-discriminatory basis in terms of treatment that's contemplated for specific investors, particular investors.

Next, please.

This is a very important language. The Tribunal can read the language. Colombia says that--that somehow the reference here is to transfer--the ability to bring claims for violation of the transfer protections, the equivalent in our Treaty

of 10.8. We believe not when you read the whole thing.

It says: "Aside from the basic financial services rules, the NAFTA also contains a number"--a number--"of very important investment protections for U.S. financial firms. For example, NAFTA investments in financial institutions cannot be subject to unreasonable expropriation by another NAFTA country. In addition, a NAFTA country is not permitted to restrict the transfer of profits out of its territory except for prudential reasons. Any violation"--any violation, not a transfer violation.

"Any violation of an investment protection will permit an investor to bring a direct action against the offending NAFTA country for the financial harm caused by the violation."

Now, let's be clear here. He's talking very clear about, again, ordinary language. "Any violation." He's not saying "transfer violations." He's not saying "any violation of a transfer right" or "an expropriation right."

He's saying any violation of an investment

protection will permit the investor--not derivatively, through State-to-State--to bring a direct action--the word "direct"--against an offending NAFTA country for financial harm caused by a violation.

Again, we know that State-to-State does not provide for compensatory damages. It is only prospective advice.

Next, please.

Here's Mr. Newman's exchange with the late Henry B. Gonzalez, which, again, it's just very clear that--it emphasizes dispute settlement as front and center, always in the context of individuals, always in the context of investors, and always in the context of a robust national treatment and MFN practice, MFN treatment protections.

Now, this is the testimony before this Tribunal. This is--this is the testimony that really has not been rebutted at all or modified except through the arguments of counsel.

Next, please.

Now, this is very important. Whether true or not, Ira Shapiro, the General Counsel of the Office

of the United States Trade Representative's Office, he says--and this is, again in blue, it's a quote--"We haven't put our faith in the Mexican court system. There are a number of provisions in NAFTA by which arbitral panels that are not the court system adjudicate disputes."

Now, I suggest--we suggest to the Tribunal, that's not reference to State-to-State disputes. The only type of dispute that an investor would bring before a Mexican court is a microeconomic dispute arising from harm to the particular investment of the investor. So, you know, if you were to draft somehow a State-to-State methodology--dispute resolution methodology to this, it really would not make any sense. It would really fly in the face of the general principle here, which, again, is the very commonsensical principle of protecting U.S. investors abroad so that they can have claims and so they can be protected against, perhaps, the bias of domestic courts.

Next, please.

There is absolutely no doubt that the

contemporaneous evidence--and this fact report just could not be clearer--speaks to the NAFTA as serving as a template for hemispheric trade protection agreements, free trade agreements. It just couldn't be any clearer.

It's right here: "SPAC sees the NAFTA provisions as the starting point and model for all future trade negotiations. The successful negotiation of NAFTA will set useful precedent for other negotiations, such as those contemplated under the Enterprise for the Americas Initiative," et cetera, et cetera.

Next, please.

The SPAC Report mirrors, the Congressional testimony mirrors, Mr. Wethington's testimony mirrors the treaty practice. It says: "These barriers will be largely removed for most U.S. services by NAFTA. National treatment is provided for all U.S. services providers in Mexico except for those services specifically exempted."

And it goes--again, the guiding principle is national treatment, which is the principle that

foreign--and then it goes on to define it.

Next, please.

This is extremely important. It goes directly to our point in ISDS. It goes directly to Barry Newman's testimony. The SPAC Report--again, this is contemporaneous evidence. This is not what the government says today in 2020. This is what it said then during the NAFTA.

It says: "NAFTA, in a major breakthrough, protects investors' rights through a dispute settlement mechanism that permits investors to go directly to international arbitration for disputes with the host Government. NAFTA also strengthens the protections for obtaining binding awards of money damages and enforcement of those decisions."

I suggest to the Tribunal that in the context of the testimony on MFN, the testimony on national treatment, the testimony on the liberalization of markets, and the testimony on protecting investors, this is not a reference to State-to-State arbitration.

Next, please.

The academic writings about the time also are very clear pro-investment, control of--protection for U.S. investors abroad, the proliferation of national treatment and MFN beyond U.S. borders.

Next, please.

We are not going to belabor this. The Tribunal is more than erudite and versed on the different lines of MFN awards out there. We do believe Siemens, AWG, Suez, National Grid, which I don't even see here, and the analysis in Impregilo are all the better, more favorable. But the reality is there are three lines of cases. One which is aprioristic and simply says MFN practice cannot and will not and under no analysis will reach out to procedural rights; another that says it depends on treaty language, context, and purpose; and a third that says, of course, the ejusdem generis finds no space in an MFN scope analysis unless specifically qualified. Why? Because procedural rights are part and parcel of substantive rights. They have to be; otherwise, they could not--a substantive right could not be deployed.

Next, please.

The treaty practice. We mentioned this, but here you have it in writing. Post-Maffezini treaty practice by both the U.S. and Colombia. What does it do? It strictly favors a reading--it shows empirical data and strictly favors a reading that says when the Parties wanted to limit a substantive right, they stated as much. They said as much. They wrote the limit there.

And we see that. Again, that's the practice that came to our TPA. 10.4, the investment chapter counterpart, is limited. It's expressly limited. 11.3 is limited. It's expressly limited. 12.3, not limited. 12.2, not limited. It's just very clear. And we see that with all the treaties.

Now, this Tribunal has been asked to turn a blind eye to treaty practice, blind eye to ordinary meaning, blind eye to Wethington's testimony, blind eye to the contemporaneous evidence, a tortured reading of the Congressional evidence, but it's all there. It's, again, principle number 1, ordinary meaning.

Next, please.

We just go through this for you so you can just see, you know, the actual restrictions on one set of MFNs versus the Financial Services MFN. As I said, embarrassing the amount of time we poured into trying to find contrary evidence. There is none. There just simply is none.

Next, please. Next, please.

Again, Colombia always, always, always limits--limits rights very, very clearly. This is a perfect example, the Colombia-Chile. But there are many, many, many examples.

Next, please.

Yeah. Next, please.

Again, when we look at the actual 12.1.2(b), 12.1.2(b) does not have any language limiting its application with respect to the substantive provisions in Chapter 12. There just simply is none. The only thing that can be parsed out is to try somehow to take the expressio axiom and, instead of applying it asymmetrically, which is the only logical way that it can function, to applying it symmetrically both to 10

and to 12. We say that simply makes no sense and defies all of the evidence and all of the arguments that thus far have been tendered.

Next, please.

What we're trying to say is that when you look at 12.1.2(b) under an ordinary language approach, we see that what the provision is doing is incorporating into Chapter 12 substantive provisions that are not contained in 12. There's no expropriation protection in 12. It's brought in 10.7. There's no transfer right protection in 12. There isn't. It's brought in 10.8.

And, again, those are balanced with obligations on investors. There's no denial of benefits obligation of investors and rights to the Host State in 12. It's brought in from 10. Special formalities and information, again, that is a Host State right. And investor obligation was not there in Chapter 12 before. It's brought in. It makes perfect sense. Chapter 12 is being supplemented by Chapter 10, but what it's not is being limited in terms of all of its substantive provisions that are

aimed at protecting the most vulnerable class of investors and investments.

Next, please.

This is just the emphasis on the argument on the word "solely," which is at least susceptible to the two readings that have been offered in this proceeding. We don't disagree that it can be read that there's an inherent ambiguity. But we believe that the better reading is one that provides effect, as we have discussed, to all of the provisions in 12 and that really provide a comprehensive reading of 12 that makes sense, that is holistic and systemic in nature.

Next, please.

This is the first case, by the way, notwithstanding the U.S. position on it--Colombia is silent on this particular point, but this is the first case where the scope of the enforcement of national treatment and MFN protection standards in the Financial Services chapter of a TPA or FTA is being challenged or is being explored. Fireman's Fund simply cannot serve as precedent because there, they

stipulated away the Chapter 14 claims. They said, "We're not going to litigate this. We're not going to arbitrate them."

So, the panel there--notwithstanding a very, very fine precedent, the panel there did not have the benefit of any briefing. The panel there took absolutely no evidence. The panel did not at all, really, brief that issue. It was not before it. It just simply--it wasn't. The Tribunal's pronouncements on the scope of NAFTA Parties' consent to investor-State arbitration of claims under 14 protection are just dicta without providing analysis or premised on consideration of submissions from the Parties.

We've already talked about the U.S. submission. What did the U.S. think about the protections that U.S. investors or NAFTA financial services investors had at the time, January 1, 1994? They saw the issues that were raised. What did they submit?

Whether a holding company can be an investor under the NAFTA definition provision, that's what they

saw. That's what they considered important in 2006. Not the threat that somehow investors now who invest beyond U.S. territory are somehow weakening the country because they're contributing to flight capital and to the wholesale exportation of jobs, and therefore, we have to cut down ISDS.

That was never raised. It was never part of the policy. To the contrary. In fact, Mr. Wethington testifies that had that been raised, he doubts that Congressional approval for the NAFTA would have ensued.

Next, please.

We've talked about the structural differences. This is a huge, huge difference between the Respondent's position and the Claimant's position. We feel the structural differences matter. We feel that you cannot just reduce the analysis of 12.3, the Chapter 12 MFN, without taking into account what it is, that it's in a particular chapter, that there are related provisions, how those related provisions are limited, how they are not, differences and similarities in scope. It just makes absolutely no

sense to reduce it to the analytical framework of a BIT when it just is not, nor does it purport to be.

Next, please.

And these are just the points that we've referenced concerning having a holistic, comprehensive, organic view. We, Claimant--only the Claimant--is presenting the Tribunal with a view that is systemic and holistic and that makes sense and reconciles--reconciles the--the unavailability of State-to-State arbitration to particular investors. That unavailability is reconciled by having a reading of the Chapter 12 substantive provisions as enforceable so that they can form part of Section (b), imported into 12.1.2(b).

Next, please.

We've already discussed this, the expressio axiom. It only--it's not a mandatory interpretive canon, of course. But if you are going to use it, use it correctly.

Next, please.

So, this is important. When we stop and pull back and we try to think, "Well, what is--what is

Respondent really saying in terms of the workings of 12.1.2(b)?" Here's a simplistic, but, I think, extremely helpful analytical device.

Here's what they're saying. They're saying, "Look, financial services investors, you can take them all, move them into Chapter 10, forget about all the provisions in 12, and only give them two treatment protection standards, expropriation compensation and transfers." That's it.

So, 12 really doesn't matter. The entire chapter does not matter. You can take all of them and move them into 10, give them 10.7. Give them 10.8. Nothing else. A limited 10.4 MFN, nothing else, and that's it. There's really no difference between the two, except that they have less rights, and they can't reconcile any of the other provisions. And, of course, this creates a friction, a tremendous anomaly with the actual testimony, with the actual evidence before the Tribunal.

Next, please.

And I don't know what--these are additional grounds of coffee. I don't know. Grounds to look at.

It's--a number of technical defenses were raised that we believe are completely misplaced.

Next, please.

Okay. The first is the waiver, the waiver defense. This is a very interesting one, basically saying, "Well, gee, you really can't bring this claim because you brought a claim before the Inter-American Commission on Human Rights, and under our reading of that claim you're seeking money damages and it's identical to this claim."

Well, first of all, it's not identical to this claim. Second of all, it's before an international tribunal. The limitation of waiver is to domestic tribunals. Thirdly, the International Commission on Human Rights, which is where it's pending, does not have any authority to award--to award compensatory damages, so that the main thrust of the waiver defense, which is double recovery, is not at all present.

And fourth and finally, if you look at the entire body of cases--of awards, which we have, with very, very rare exception, and factually very, very

different, they all say that the waiver defense can be cured at any point before a merits hearing so that, if it came to that, we're perfectly content with waiving it. And we've stated as much in our Memorial nearly a year ago.

So, that's just not a conceptually viable basis for not going forward. And there's a lot of authority that says that it's--that it's not a jurisdictional predicate and that it's only aimed at precluding double recovery and not creating obstacles to the exercise of jurisdiction.

So, if the Tribunal, at the end of the day, has an issue with the waiver defense--which we feel does not apply, because the International Commission on Human Rights is not an adjudicatory body that awards money, compensatory damages, because the claims there are claims for violation of human rights, because the configuration is completely different, because it's an international venue--but if the Tribunal wants us to waive it, we would certainly waive it. And that comports with the authority on waiver.

Let's go to the next one, please.

Consultation and defense is not applicable. First of all, we're drawing on Article 11 of the Colombia-Swiss BIT, and consultation and negotiation is not there present. So, that should be the end of the story altogether. It's just not--it's just not a requirement.

Secondly, in terms of our case, it's permissive. It's a permissive directory, procedural imperative. It's not a predicate to jurisdiction, and it's permissive. The language is permissive in the Treaty.

There is absolutely no authority anywhere holding that permissive language is to be read as mandatory for purposes of consultation and negotiation. All the authority says that it's directory and procedural--and procedural in nature and not jurisdictional.

But here is something that's very important. We also--first of all, it applies to both parties. Both parties are supposed to try to undertake this effort, of course. And the awards all say--they're

all a single voice. They're all in unison in saying that this is meant to highlight and emphasize the likelihood of settlement rather than to create, again, jurisdictional predicates that are barriers to the exercise of jurisdiction of any tribunal over a genuine, bona fide claimant. So, that's the real lay of the land when you look at the actual authorities and when you look at the relevant statutory language.

But here's the factual lay of the land. We have--we have invited the Republic of Colombia to negotiate. We provided them with a letter in January 2018 saying, "If you're interested in discussing settlement, please pick up the phone or write." And, you know, we've never heard from them. We just haven't.

And about a year ago, when we submitted our Reply Memorial, therein, we also invited them to negotiate, and we still haven't heard from them. And I don't think we will. So, they clearly are not interested.

This is not a situation where this is a new situation unknown to them. 2017 is an important--2014

is an important date. 2011 is an important date. 2007 are important related dates.

Next, please. And I know that I'm over time at this point. I'll just take five minutes. I promise.

Can you change this thing, please.

Okay. Go to the Notice of Intent, yeah. The Notice of Intent, clearly also not in the Colombia-Swiss BIT. We again respectfully--and I am sorry for repeating myself. We're going under--under that BIT. It's nowhere to be found there.

But even if Article 10.16.2 of the TPA were applicable, again, this is not a situation where the State--the host State passed legislation erga omnes and somehow a claim that it could not be made aware of surfaced and now it has no opportunity to negotiate. Nothing could be farther from the truth.

And the authority on this point is very clear. It is not a jurisdictional requirement. We cite to Bayindir v. Pakistan and a number of other cases where basically it says enforcement of Notice of Intent clause will not serve to protect any legitimate

interests.

In the present case, it is amply established that parties have been aware of the dispute. No evidence of bilateral intention to settle. No prejudice to Respondent. All of those elements are here and present.

And I think the best statement of the policy and the workings is in B-Mex v. Mexico. The Tribunal there said, first, Article 1119 is stated in mandatory terms "shall." However, it is entirely silent on the consequences of a failure to include all the required information in the Notice of Intent.

Article 1119 does not in terms--in terms refer to Article 1122(1); does not provide that satisfaction of the requirement of Article 1119 is a condition precedent to the NAFTA party's consent; and does not state that failure to satisfy those requirements will vitiate a NAFTA party's consent.

The text of Article 1119 therefore "does not compel the conclusion that a failure to include all the required information in the notice of intent vitiates a NAFTA party's consent." End of citation.

Next, please.

And there's ample, ample authority. But most importantly, again, Respondent's legal authority simply does not support the proposition for which it is cited.

Western Enterprise v. Ukraine. The Tribunal ruled that lack of notice did not affect its jurisdiction. It actually helps us.

Burlington v. Ecuador. That's an indigenous group issue. In Burlington, it was a failure to comply with the 6-month cooling off period, not the failure to submit a Notice of Intent. Again, read the case. In Burlington, the Claimant did not apprise the Respondent of the prospective claims at all before its submission to arbitration. Moreover, Ecuador was aware of the underlying disturbances giving rise to the claim.

Again, Ecuador had no reason to understand that in a remote part of the country, there was an indigenous revolt to--that was affecting and causing prejudice--material prejudice to the investment.

In the present case, the Respondent has been

very well aware of the dispute and imminent claim. It had actively implemented strategies aimed at exploring the Claimant's investment.

Next, please.

They pull in the fork-in-the-road provision from--from the Swiss-Colombia BIT. All is fair in love and war. And that doesn't--that doesn't work, and it cannot work.

At the time that the--this claim was filed, there was no alternative judicial avenue, point number 1. So, there was no fork in the road. We're talking about the 2014 June 25 date. There's no fork in the road.

But before that, if somehow they're looking at fork in the road in the year 2000 or in the year 2007 or in the year 2011, the Treaty didn't come into play until May 15, 2012. So, again, the fork-in-the-road analysis is--it's just not--not even remotely close.

And, finally, there's no identity of party cause of action and relief sought. And I guess even meta finally, please do remember, it was--it was

Respondent, in 2007, who perfected the tutelas with the Constitutional Court and drove the investors into this quagmire. They brought them in involuntarily.

Next, please.

We cite authority on fork in the road. It's classical analysis.

Next, please.

Ratione temporis. I don't know how this got in here. Yes, it's 5:00 o'clock somewhere. And we'll end very soon.

Next, please.

Clearly, it's very, very, very simple. We certainly did file after the Treaty was in force and concerning a measure that took place after the Treaty was in force, and it's a self-standing measure that is actionable in itself. The testimony of Ms. Briceño--of Dr. Briceño will speak to that.

And even if you look at the testimony of Dr. Ibáñez in his reports--clearly if you look at--I think it's Paragraph 164 of his Second Report, you'll see there that he does speak to the hypothetical. And he says, "Well, in hypothetical language, hypothetical

scenario, yes, the June 25, 2014, Act would have changed--would have modified materially and substantively the 2011 judgment." It's clear in his report and we cite to it.

Next, please.

The claim was brought within the five-year limitations period. Again, this is the real issue. This is the real core issue before this Tribunal. Will 12.3 MFN extend to bring in 24 more months, in effect?

Is this the enhancement of an already existing right three years to five years? Particularly so when the limitations period under Colombian law is not procedural.

And we cite a case to--a Constitutional Court case--Colombian Constitutional Court case to that effect. They say it's neither procedural nor substantive. So, that may help even with the radical MFN--or the extreme MFN reading on exercising MFN and limiting it only to substantive or to non-procedural rights.

Next, please. Next, please.

Yes. Just very, very, very simply. The dispute--the definition of "dispute" that we focus on is the way "dispute" is defined in the Colombia-Swiss BIT. That definition of dispute defines "dispute" as an existing measure that is set to violate a treaty obligation. Now, of course, it has to postdate the treaty. And that's the self-standing actionable dispute.

The other definition of "dispute," which is nowhere to be found in the TPA, is the dispute that says it's--it's a difference of opinion that gives rise to basically litigation.

And we do believe that Professor Gaillard's dissent in Eurogas, I believe it is, on disputes is the most comprehensive and thoughtful analysis of what "dispute" really is, and particularly in terms of our TPA.

Next, please.

Yes. Here again, as we started--I think it was the third principle. They cannot--Respondent cannot just take a timeline and pick and choose which is the measure and why it's that measure that should

have been the measure from which the jurisdictional limitations period would run. Cannot do that.

No matter how much you try to minimize the auto--which, by the way, missing from Dr. Ibáñez's testimony was the fact there are two types of auto: one, a trámite auto, which is just perfunctory, the other one, auto interlocutorio, which is what this is, which has the same substantive holding and meaning as the 2011 Judgment. Dr. Briceño will testify to that effect.

Next, please.

MR. GRANÉ LABAT: Madam President, if I may. I'm sorry to interrupt, Mr. Martínez-Fraga.

We're now, I think--believe 10 minutes over the limit. May I get some guidance from Madam President as to how much longer he will be allowed to continue. We're offering flexibility.

PRESIDENT KAUFMANN-KOHLER: I was thinking it would be generous because you seemed very flexible. So, let me just ask the Secretary.

Alicia, how much time has the Claimant now used?

THE SECRETARY: Let me check.

They have used 2 hours and 11 minutes so far.

PRESIDENT KAUFMANN-KOHLER: Yes. Mr. Martínez, how much more do you think you need?

MR. MARTÍNEZ-FRAGA: Can I have four minutes?

PRESIDENT KAUFMANN-KOHLER: I was about to give you five. Yes.

MR. MARTÍNEZ-FRAGA: See, that's what happens when you bid against yourself.

PRESIDENT KAUFMANN-KOHLER: Yes. But it's good if we get to a close because we still have--

MR. MARTÍNEZ-FRAGA: I'm doing it right now. I'm doing it right now.

Next, please. I'm going to skip a lot of the material that we covered in the first part on Spence v. Costa Rica and Corona v. DR. Eurogas and ST-AD v. Bulgaria. And we've already covered those. We feel that the investment qualifies under 12.20. It cannot be any clearer.

Alleged noncompliance with Colombia's local

administrative requirements does not preclude the Tribunal's jurisdiction. This is nowhere in the Treaty. The authority looking at this issue has been, again, in unison and of a single voice in holding as much. These qualifications have to be embedded in the Treaty. Otherwise, they just can't be ingrafted in the Treaty based on local legislation.

Next, please.

We feel that Mondev is very, very instructive--by the way, so too is Saipem--on the issue that somehow the investment here magically disappears. An investment is protected for its lifetime until final disposal so long as it remains beneficially held by the investor regardless of form.

And this--again, Mondev and in Saipem, but also just the common sense of following the track of the investment is extremely, extremely clear in this regard, and we feel very confident about it, and the cases support it.

Next, please.

The timeline supports very, very clearly that the 2007 Award in itself is not the investment

but it embodies the elements of the investment. And at all times material, the shareholder Claimant held--were the beneficiaries of that investment. And this, again, is amply demonstrated as certainly factually in terms of the procedural history, but also as a matter of law.

Just to close. Just to close. Again, we want to thank the Tribunal for its generosity in sitting through this, which I understand to be a painful exercise, for all concerned, let me admit.

But we do ask that the Tribunal first, please, reflect, read and re-read on the cases that Respondent has cited and relies on, and please take into consideration the 15 points that we feel have been completely either disavowed or turned on its head.

Thank you very much to the Tribunal. And with that, I have nothing further to add.

PRESIDENT KAUFMANN-KOHLER: Thank you very much.

That was very helpful. We may have questions, but I'm not sure we want to ask them now.

Maybe we will wait to hear the Respondents, or maybe we even wait for tomorrow at the end of the session and then ask questions that you can consider for purposes of the closing arguments.

But having said that, if my co-arbitrators have any questions they would like to ask the Claimant's counsel right now, of course, you're free to do so.

ARBITRATOR FERNÁNDEZ ARROYO: Not on my side.

PRESIDENT KAUFMANN-KOHLER: Thank you.

ARBITRATOR SÖDERLAND: I think it's better to wait until we have heard both presentations.

PRESIDENT KAUFMANN-KOHLER: Yeah. Fine.

So, should we take now maybe a little longer break. Is 20 minutes fine?

MR. MARTÍNEZ-FRAGA: Fine by Claimants.

PRESIDENT KAUFMANN-KOHLER: Is it fine with the Respondent as well, Mr. Grané?

MR. GRANÉ LABAT: Yes. Thank you very much.

PRESIDENT KAUFMANN-KOHLER: Good. Then, Mike, we'll take a 20-minute break and go to the

breakout rooms, and you can bring us automatically back after 20 minutes.

THE TECHNICIAN: Okay. I'll open the rooms now.

PRESIDENT KAUFMANN-KOHLER: Thank you.

(Brief Recess.)

PRESIDENT KAUFMANN-KOHLER: Are we ready to resume? Mr. Grané, are you ready?

MR. GRANÉ LABAT: Yes, ma'am.

PRESIDENT KAUFMANN-KOHLER: Good. Then you have the floor, please.

MR. GRANÉ LABAT: Thank you very much, Madam President. I will first invite, with the Tribunal's indulgence, Ms. Ana María Ordóñez, the Director of the Agencia Nacional, to start our Opening Presentation.

PRESIDENT KAUFMANN-KOHLER: Thank you.

RESPONDENT'S OPENING PRESENTATION

DRA. ORDÓÑEZ PUENTES: I will make my intervention in Spanish, in case any one of you would like to switch channels.

Good morning in Bogotá, Washington, and Miami. Good afternoon in Stockholm and Paris and

Geneva. Madam Chair/President, Members of the Tribunal, as Director of National Defense--or, rather, International Arbitration at the National Agency of Legal Defense of the State, we see to human rights in investor-State arbitration and international criminal court matters.

I come before this Tribunal with my team at the agency, as well as Mr. Gerardo Hernández, co-director of the Central Bank, and Dina Maria Olmos, who is the subdirector of the Fund of Guarantees for Financial Institutions, and Alvaro Torres of the Financial Superintendency. Together with the law firm Arnold & Porter, we make up the team defending The Republic of Colombia in international investment disputes--in the international investment disputes brought by the Carrizosa family.

I appear today before this Tribunal in representation of Colombia, with the huge responsibility that it means to represent a State that is respectful of the law and international treaties. For me, it is an honor to introduce the Opening Arguments on behalf of the Republic of Colombia.

Colombia is a Democratic state with clear separation of powers that guarantees a legislative branch with a high level of representation, a judiciary that is completely independent, with a clear institutional architecture and an executive branch that must always operate in keeping with the law.

Colombia is a State under the rule of law, guided by the principle of legality, respectful of the rights of private persons, and governed by a constitution that protects free enterprise and private property.

Colombia is an economically and democratically stable country that has overcome any number of complex situations, thanks to its solid institutions. Our responsible management of the economy has enabled us to take on the debacles that have been suffered in the region at different times and to keep a clear message of openness to foreign capital that contributes to the country's development.

In addition, the solidity of our legal system provides investors equal conditions and respect for their rights. Colombia has its doors open to

investments. Since 1991 we have taken in thousands of investors in our territory in more than ten economically and socially significant sectors.

We have entered into 17 international investment agreements for the purpose of providing security and assurances to these investors. Last year we received more than $14 billion in investment flows. This openness to foreign investment makes us proud, and so we take its protection very seriously.

But we want to highlight that the protection entailed in the international investment regime has certain strict requirements for access. The main requirement that is recognized across the board is consent.

Colombia has given its consent to opening up its doors to international investment in order to protect and cover investments and foreign investors, but it has done so in the understanding that the key to these doors is in the hands only of foreign investors who meet each and every requirement established in the treaties, the ICSID Convention, and international law.

That is not the case of the Claimant in this Arbitration, who has not met these requirements. The arbitral tribunals have already said that their jurisdiction depends on a two-fold situation by the investor. That is to say that a Claimant must show that they satisfy the requirements of the ICSID Convention and the treaty invoked.

Throughout this stage, Colombia has shown that Ms. Carrizosa does not have those keys to unlock these doors. Colombia defends and respects investment arbitration as a way of solving disputes. Colombia has always abided by its international commitments taken on in the treaties, and we have always given foreign investors the same conditions as national investors.

In particular, we have always thought that the basis of democracy is complying with the law. For this very reason, Colombia is concerned on seeing that the scenario investment arbitration loses legitimacy when one turns to tribunals such as this in an effort to try to revive with juggling and arguments that are untenable, a supposed controversy that doesn't meet

the requirement of the U.S.-Colombia Treaty.

The domestic courts took stock of and already decided on the claims of Ms. Carrizosa, her husband, and her children much before the entry into force of the treaty invoked in this treaty. They invoke the institutional architecture of the highest courts in Colombia. And our court of last resort, the Constitutional Court, came up with a final solution to these differences in 2011.

Since that difficult economic crisis that we faced in the late 1990s, many years elapsed until the Trade Promotion Agreement between the United States and Colombia came into force on 15 May 2012.

This--we are now meeting 22 years later to debate the desperate efforts of the Claimant to subject the Colombian State to international arbitration in order to call into question judicial measures that are not covered by the Treaty.

We had to hear the most elaborate and unlikely theories put forth by the Claimant in order to fabricate, fruitlessly, the consent of the Colombian State for this dispute. Indeed, the Parties

to the treaties, United States and Colombia--we had to hear the Claimant distort and contradict the common understanding as to the provisions of the Treaty that is held and always has been held by the parties who signed it.

In summary, we are here to witness a clear example of what investment arbitration should not be. Investment arbitration is not designed for supposed foreign investors to leash out--or lash out against the Colombian State with reckless demands or action--legal actions in different legal--international legal forums.

Colombia has had to spend much taxpayer money on several fronts in order to address what is, at the very least, an approachable attitude on the part of the Claimant and her family. Colombia is now facing claims for the same facts and the same measures before the Inter-American Human Rights system and another tribunal as well.

Investment arbitration is not supposed to be a capricious, wide-open door so that certain persons who don't meet the requirements can gain access to

international arbitration. The Claimant deliberately went around the rules for activating the mechanism. One of the many defects of the Claimant's claim is that they did not present any Notice of Intent such that the State would be able to understand the Claimant's claims.

Another effect of the Claimant's claim is that it is contrary to fundamental principles of public international law, having to do with the Law of Treaties. One of those principles is the non-retroactivity of international obligations and the consequent lack of jurisdiction of an international tribunal over disputes that do not respect the time limitations agreed upon by the Parties to the Treaty.

The Judgment of the Constitutional Court of 2011, which according to the Claimant, deprives her of her investment was proffered one year before the coming into force of the Treaty.

And at any rate, more than three years elapsed before Act 168 of 2014 was known of, which the Claimant ties to today to try to overcome the time limitations imposed by the Treaty and by international

law. The Claimant also invokes, as her supposed investment and judicial decision of 2007, even though the Treaty expressly excludes such measures.

The literal meaning of the Treaty is clear and undeniable. The term "investment" does not encompass a judicial--a judicial administrative resolution or judgment. So, even though the Claimant states that the Judgment of the Council of State of 2007 represents an investment, it is not an investment in the terms of the Treaty.

The legal arguments that have been presented by Colombia are in line with the specific terms of the Treaty. In asking that the Tribunal find that it lacks jurisdiction, we're asking the Tribunal to safeguard the locks to open the door of the US-Colombia treaty dispute settlement.

The Claimant is trying to open a door for which they don't have the appropriate keys. And you, Members of the Tribunal, are the ones that are called on to ensure that the Treaty is respected, including its jurisdictional requirements and the express limit of consent of the States that signed it.

Next, and with the Tribunal's indulgence, I would like to now yield to Attorney Paola Di Rosa to continue with the opening arguments.

PRESIDENT KAUFMANN-KOHLER: Thank you, ma'am, for your Statement. And I now give the floor to Mr. Di Rosa, please.

MR. DI ROSA: Thank you Ms. Ordóñez. Good afternoon, Madam President and Members of the Tribunal. We are here today exclusively to address Colombia's jurisdictional objections in this Arbitration.

This is obvious, of course, given that this is a jurisdictional hearing, and yet it bears stressing simply because even after the proceeding was bifurcated in its jurisdictional pleadings, the Claimant focused very heavily on the merits issues.

And, in fact, it is precisely that focus on the merits that likely accounts for the unusual order of presentations during this jurisdictional phase, with the Claimants going first and Colombia second. That order was suggested by the Claimant at the outset of the bifurcated phase and, as best we can discern,

it appears to be a strategy by Claimant to treat the jurisdictional phase as a preliminary opportunity to hammer home her merits arguments.

And that seems to be confirmed also by the fact that the testimony of the Claimant's fact witnesses and of her experts during this jurisdictional phase also focused heavily on the merits, including even on quantum issues. And they made reference to both liability and quantum issues at the outset of their presentation today.

Of course, all of those issues are completely irrelevant in the present phase, so we will not be addressing them today or this week. But the fact that we will not do so should not be construed as acceptance of Claimant's merits claims.

And just to be clear, Colombia categorically rejects all of those claims and reserves the right to respond to them should they survive the jurisdictional phase, which they shouldn't, for all the reasons we identified in our pleadings and will discuss again this week.

What we propose to do today is to start with

a brief description of the facts that are relevant to Colombia's jurisdictional objections. And after that we will turn sequentially to a discussion of each of the three specific jurisdictional objections. The first one, on ratione temporis, will be presented by my colleague, Mr. Patricio Grané Labat. I will then come back to discuss the second one on ratione materiae. And the third and final one, on ratione voluntatis, will be presented by my colleague, Ms. Katelyn Horne.

So, we start with a brief discussion of the facts. Astrida Benita Carrizosa, who is the Claimant in this ICSID Arbitration, was born in Latvia and later married a Colombian businessman, Julio Carrizosa Mutis. They had three sons who, incidentally, are the three claimants in the parallel UNCITRAL Rules Arbitration at the PCA, one of whom is attending this hearing on behalf of the Claimant.

In the 1980s, Claimant and her sons used Colombian Holding Companies to acquire shares in Granahorrar, a Colombian financial institution. In 1998 Colombia experienced a nationwide financial

crisis and, in that context, Granahorrar suffered a serious liquidity crisis and ended up asking for assistance from the Colombian regulatory authorities to be able to stay afloat.

Granahorrar received that assistance, including several hundred millions of U.S. dollars in liquidity infusions from Colombia Central Bank, which is the Banco de la República, and from the Fondo de Garantia de Instituciones Financieras, or Fogafín, which is the State's guarantee fund for financial institutions.

Colombia ultimately provided more than USD 487 million in liquidity assistance to Granahorrar, so almost half a billion dollars. Despite those cash infusions from the State, Granahorrar continued to struggle, and on October 2nd of 1998, it defaulted on its payment obligations and it became insolvent.

The Financial Superintendency then gave Granahorrar one more chance by issuing a capitalization order. That order directed Granahorrar to make efforts to immediately raise capital from its

shareholders or from third parties to address its insolvency.

However, Granahorrar failed to inject the requisite capital, and Fogafín was therefore forced, the next day, on October 3rd, 1998, to issue a Value Reduction Order. That order directed Granahorrar to reduce the nominal value of its shares to one Colombian cent. And after that, Fogafín capitalized the entity and was able to save it.

Fast-forward six years later. In 2005 BBVA purchased Granahorrar from Fogafín. And shortly after that, in 2006, Granahorrar was dissolved and merged into BBVA. As a result, at that time, Granahorrar ceased to exist as a separate legal entity, and Granahorrar's shares also, therefore, ceased to exist.

In the aftermath of the 1998 regulatory measures, which are the ones we just described, and as Colombia explained in its Counter-Memorial, Granahorrar's leadership and Mr. Julio Carrizosa, who was the former Chairman of the Board and a major shareholder of Granahorrar, they publicly expressed their gratitude for the swift action that was taken by

the Colombian regulatory authorities to save the company.

And yet only about two years later, the Claimant and her sons, through their Colombian Holding Companies, filed a lawsuit in a Colombian court against the same Colombian regulatory agencies seeking monetary compensation for the very same regulatory measures that had saved Granahorrar to begin with.

The first instance court in that lawsuit issued a judgment in 2005, and that's the one we have been referring to in our pleadings as the Administrative Tribunal Judgment. That ruling rejected the Claimant's claims and upheld the 1998 regulatory measures on the merits.

The Claimant then appealed that ruling to the Council of State, which is the highest judicial body on administrative matters in Colombia. That appeal yielded the 2007 Council of State Decision which reversed the 2005 Judgment.

In response to the 2007 Judgment, the Colombian regulatory authorities filed tutela petitions. Under Colombian law, a tutela enables a

petitioner to seek judicial recourse for violations of fundamental rights. It was in that context that the Constitutional Court, which is Colombia's highest court, reviewed the 2007 Council of State Judgment and, through a decision that was issued in 2011, the Constitutional Court reversed the 2007 Council of State Judgment.

Now, Claimant has invoked the TPA as the basis for this Tribunal's jurisdiction, but the TPA entered into force after the 2011 Constitutional Court Judgment was issued.

What that means, as Claimant herself has admitted in her pleadings, is that she cannot claim that the 2011 Constitutional Court Judgment itself or any of Colombia's actions that were prior to that Judgment are breaches of the TPA.

And that result is compelled by a straightforward application of the non-retroactivity principle, which my colleague, Mr. Patrico Grané, will discuss.

The 2011 Constitutional Court Judgment was final because Colombian law does not contemplate or

allow any appeals or other recourses against judgments of the Constitutional Court. Nevertheless, Claimants submitted to the Constitutional Court an extraordinary nullification request. But through the 2014 Confirmatory Order, the Constitutional Court rejected that petition.

You will note from the timeline on the screen that this 2014 Confirmatory Order by the Constitutional Court is the only measure that Claimant can point to that occurred after the TPA entered into force. But that 2014 Order did not alter or affect the preexisting and final 2011 Judgment in any way. It simply left it untouched.

We will address today the consequences of this for the Tribunal's jurisdiction ratione temporis.

So, having failed to obtain damages for the 1998 regulatory measures in the Colombian judicial system, Claimant and her sons decided to try their luck on the international front.

And so, in 2012, Claimant and all three of her sons filed a petition before the Inter-American Commission on Human Rights, challenging the 1998

regulatory measures and the 2011 Constitutional Court Judgment. And they later updated that petition to include claims concerning the 2014 Confirmatory Order as well.

A few years later, Claimant then opened a third front by filing a Request for Arbitration at ICSID, asserting claims under the U.S.-Colombia TPA. That same day her three sons commenced yet another proceeding, the fourth one, by filing at the PCA a parallel Request for Arbitration under the UNCITRAL Rules. In that request the sons, likewise, asserted claims under the U.S.-Colombia TPA.

Now, despite what they said today, there is an almost complete overlap between these various proceedings. And that's because the claims in the Inter-American proceeding are based on the very same facts and measures that are at issue in this Arbitration. The relief they seek might be different, but the facts and measures that are at issue there are the same as in this Arbitration.

And those are the very same facts and measures that are at issue in the parallel PCA

Arbitration, and those, in turn, with the sole exception of the 2014 Confirmatory Order, are the very same facts and measures that were at issue in the Colombian litigation.

So, this means that even after their claims were heard exhaustively up and down the Colombian judicial system, Claimants and her sons are now improperly attempting multiple additional bites at the apple at the international level.

That's all we wish to say by way of introduction and background facts, Madam President and Members of the Tribunal. Unless you have questions at this time, I will yield the floor to Mr. Grané Labat to address the lack of jurisdiction ratione temporis.

Thank you very much.

PRESIDENT KAUFMANN-KOHLER: Thank you.

MR. GRANÉ LABAT: Madam President, Members of the Tribunal, I will address Colombia's ratione temporis objection. Under this objection, every single one of Claimant's claims should be dismissed for three reasons.

First, Claimant's claims are based on

alleged acts that took place before the TPA entered into force. Second, the present dispute arose before the entry into force of that TPA. And, third, Claimant failed to comply with the three-year limitation period under the TPA.

The first two objections are based on Article 10.1.3 of the TPA, which provides for great certainty that--you have it on your screen--Chapter 10 "does not bind any party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement."

That Article embodies the well-known principle of non-retroactivity under customary international law, which is codified in Article 28 of the Vienna Convention and Article 13 of the Articles on State Responsibility. The Claimant recognizes that the TPA does not apply to acts that occurred prior to 15 May 2012, which is when the TPA entered into force.

It was only after that date that Colombia became legally bound by the obligations in that treaty. For a measure to be capable of breaching a

TPA, it must have occurred after that date.

Claimant's claims, however, are based on measures that pre-dated the entry into force of the TPA. Claimant initially based her claims on the 1998 regulatory measures which consist of, first, the Capitalization Order of 2 October 1998 by the Financial Superintendency, and second, the Value Reduction Order of 3 October 1998 by Fogafín, both of which have been mentioned by Mr. Di Rosa.

Claimant also based her claims on the Constitutional Court Judgment of 26 May 2011. As the Tribunal may recall in its Judgment of 2011, the Constitutional Court reversed the 2007 Council of State Judgment and held that the Council of State had committed substantive procedural and factual errors in its ruling concerning the 1998 regulatory measures.

After Colombia pointed out that the principle of non-retroactivity made Claimant's claims against the those measures hopeless, Claimant quickly changed tack. In her reply, she based her claims, instead, on Order 188/14 of the Constitutional Court, dated 25 June 2014--that is R-49--which we have

referred to as the "2014 Confirmatory Order" or simply the "2014 Order."

Through that Order, the Constitutional Court rejected Claimant's nullification request of the 2011 Judgment. Claimant thus shifted, or at least pretended to shift, from alleging breaches based on the 1998 regulatory measures and the 2011 Judgment to insisting that all of her claims are based solely on the 2014 Order.

Claimant's Counsel in its opening confirmed that Claimant is now focusing on the 2014 Order. But despite that apparent shift, Claimant's claims remain outside of this Tribunal's jurisdiction ratione temporis. Colombia has demonstrated that Claimant's expediency of pointing to the 2014 Order as the sole post-treaty measure does not bring the present dispute within the jurisdiction of this Tribunal.

The fact remains that Claimant continues to complain about the pre-treaty conduct. And merely pointing to the 2014 Order does not bring this dispute within the Tribunal's jurisdiction. Even the handful of cases cited by Claimant in her Reply confirm that

it is not sufficient for Claimant to point to an act that post-dates the entry into force of the TPA.

Pursuant to the principle of non-retroactivity in Article 10.1.3 of the TPA, claims based on acts or facts that are rooted in pre-treaty conduct fall outside of a tribunal's jurisdiction. And the 2014 Order is deeply rooted in pre-treaty conduct.

In its Non-disputing Party Submission, the United States, the only other party to the TPA, confirmed that there is no liability under the TPA for claims based on alleged breaches that are rooted in pre-treaty conduct.

In its written submissions, Colombia cited cases in which tribunals, presented with State conduct that straddles the entry into force of the applicable treaty, analyzed the particular claims to determine whether they are sufficiently detached or separable from pre-treaty conduct. Those cases include Corona v. Dominican Republic, Spence v. Costa Rica, and Eurogas v. Slovak Republic.

In its Opening Statement, Claimant's Counsel

referred to those cases rather superficially. There is one thing counsel said that we agree with, and it is that those cases should be read. We have read them, and we trust that the Tribunal has also read them.

And the Tribunal will have seen that, in determining whether an act is sufficiently detached from pre-treaty conduct, those and other tribunals have looked at the status quo that existed before the Treaty came into force and asked whether that status quo changed as a result of the post-treaty conduct. Tribunals have also analyzed whether a post-treaty act is independently actionable.

Colombia has demonstrated in its written submissions that the 2014 Order did not alter the status quo that existed prior to the entry into force of the TPA and is not independently actionable. Let's start with the status quo test.

It may be helpful to recall the analysis and findings of the Tribunal in Corona to which Claimant's counsel alluded to. In that case, the State had denied the Claimant's application for a mining

license. Now, that denial had taken place before the critical date under the Treaty.

After such critical date, the Claimant had requested reconsideration of the licensed denial, but had received no response from the authorities. The Claimant then filed for arbitration, arguing that the Tribunal had jurisdiction ratione temporis because the reconsideration request post-dated the critical date.

The Tribunal in Corona rejected Claimant's argument. It found that Claimant's status after the critical date had remained exactly the same as before the critical date. In other words, the status quo was not altered. And the same is true in this case with respect to the 2014 confirmatory order and the entry into force of the TPA.

The Tribunal in Corona observed that the reconsideration request filed by the Claimant after the critical date was, and I quote, "only aimed at having the same administration review its own decision."

Accordingly, in the view of the Tribunal, the Respondent's post-critical date conduct was, and I

quote again, "nothing but an implicit confirmation of its previous decision."

Again, the same is true of the 2014 Order. To recall, the 2014 Order consisted of a rejection by the Constitutional Court of the Claimant's attempt to nullify that Court's decision contained in the 2011 Constitutional Court judgment, but that 2011 judgment was final. It was not subject to appeal or other recourse. The 2014 Order did not change that fact or in any way alter the 2011 judgment.

Now, Claimant's suggestion that the 2011 Judgment was not final and that proceedings before that Court remained open until the nullification petition was rejected is wrong as a matter of Colombian law.

Pursuant to Article 241 of the Colombian Constitution, and I quote, "the judgments by the Constitutional Court are final."

Article 49 of Decree Number 2067 of 1991 also provides that, and I quote: "There are no appeals for Constitutional Court judgments." This is Exhibit R-250.

Colombian law allows a litigant to request the nullification of a final judgment of the Constitutional Court. However, the Constitutional Court has explicitly and consistently noted that the potential for such exceptional nullification--and here I quote one of the many positions of the Constitutional Court--"does not mean that there is an appeal against the Constitutional Court's decisions, nor does it become a new opportunity to reopen the debate or examine disputes that have already been concluded." End of quote. This is Exhibit R-254.

The fact that the Constitutional Court's decisions are final, not subject to appeal or other recourse, and that the nullification request does not reopen the matters already decided by the Court was confirmed by Dr. Ibáñez, now a sitting judge of the Constitutional Court, in his two Expert Reports and during the cross-examination before this Tribunal in this Arbitration.

Claimant, however, would have you ignore the fact that the 2011 Constitutional Court judgment was final. Claimant also attempts to portray the 2014

Order as an ordinary and commonplace continuation of the judicial proceeding before the Constitutional Court, but it is not. Claimant's goal is obvious. It is attempting to fabricate the jurisdiction ratione temporis where none exists. But even assuming for the sake of argument that the 2011 Judgment was not final, I emphasize once again the fact that the 2014 Order rejected the nullification petition. Consequently, it did not change the status quo that existed at the time that the TPA entered into force.

In addition to not altering the pre-treaty status quo, the 2014 Order is not independently actionable. The Tribunal in Spence v. Costa Rica considered whether, and I quote, "the post-treaty breaches are independently actionable breaches separable from the pre-treaty"--sorry--"separable from the pre-entry into force conduct in which they are deeply rooted." This is Spence Interim Award, Paragraph 246.

In the words of that Tribunal, the post-treaty conduct must, and I quote, "constitute an actionable breach in its own right such that the

alleged breach can be evaluated on the merits without requiring a finding going to the lawfulness of pre-treaty conduct." This is in Spence, again, Interim Award, Paragraph 237.

That Tribunal cautioned that merely identifying a post-treaty act and characterizing that act as the source of liability, as Claimant does in this case, is not sufficient. Instead, and here I again quote the Tribunal in that case, and you have this on your screen: "It will be necessary to assess whether the claim that is alleged can be sufficiently detached from pre-treaty--pre-entry into force acts and facts."

The ST-AD and other Tribunals cited by Colombia have conducted a similar analysis, and in its mission, the United States agreed with the legal test and analysis that I have summarized. Colombia has demonstrated that Claimant's claims about the 2014 Order are not independently actionable and cannot be sufficiently detached from pre-entry into force conduct. Adjudication of such claims would require an evaluation and finding on the lawfulness of pre-treaty

conduct, starting with the 2011 Constitutional Court Judgment.

Claimant also cannot hide the fact that its challenge continues to center on the lawfulness of the 1998 regulatory measures. The lawfulness of those measures was ruled upon by the First Instance Court in 2005, by the Council of State in 2007, and subsequently by the Constitutional Court in its 2011 final judgment, all of those pre-dating the TPA.

In fact, the Claimant seems to recognize that adjudication of her claims in this Arbitration centers on pre-treaty conduct. Her written submissions are replete with such recognition. For example, you have on your screen Paragraph 97 from Claimant's Memorial. I will not read it out loud, because it's a rather verbose sentence, but I will pause for a few seconds so that you can read it.

Also in her Memorial, Paragraph 98, the Claimant cited that the text of the 2011 Constitutional Court judgment has, and I quote, "best evidence," according to Claimant, of the asserted TPA breaches.

Claimant also submitted with its Memorial on Jurisdiction an Expert Report by Ms. Briceño that spills significantly more ink criticizing the Constitutional Court judgment than it does discussing the 2014 Confirmatory Order. Tellingly, Claimant has provided no argumentation as to why or how the 2014 Order violated the TPA, but, by contrast, asserts 16 different reasons why, according to Claimant, the 2011 Constitutional Court allegedly violated the TPA. And you see this in Claimant's Memorial, Paragraph 47.

Claimant's specified claim against the 2014 Order is that the Constitutional Court was wrong in not nullifying its 2011 Judgment. Evidently, the lawfulness of the 2014 Order cannot be established without evaluating the lawfulness of the 2011 judgment, which in turn requires evaluating the lawfulness of the 2007 Judgment by the Council of State, which in turn requires evaluating the lawfulness of the 1998 regulatory measures.

The fact that Claimant's claims are based on pre-treaty conduct is further confirmed by her damages claim. According to Claimant, she is entitled to

compensation based--and here I quote from the very first paragraph of Claimant's Quantum Expert Report--based on, and I quote, "damages incurred by the Claimant as a result of the Colombian government's actions through its agency (Central Bank, Fogafín, and the Superintendency of Banking) to expropriate Granahorrar resulting in loss of value of Claimant's interest in Granahorrar."

So, Claimant's damages theory is based on the actions adopted by those regulatory agencies more than a decade before the entry into force of the TPA.

In conclusion, Claimant's claims, based on the 2014 Order, are outside the Tribunal's jurisdiction because they are rooted in pre-treaty conduct. But there is a second basis for the lack of jurisdiction ratione temporis, and it is that the present dispute arose prior to the entry into force of the TPA.

Consistent with the customary international law principle of non-retroactivity that I alluded to earlier, the TPA does not apply to disputes that arose before the treaty's entry into force. A treaty will

not apply retroactively unless the treaty expressly provides otherwise, and the TPA in this case does not expressly provide for its retroactive application; quite the opposite, as shown by Article 10.1.3 that I put up on the slide at the beginning of my presentation.

But, in any event, the jurisprudence cited by Colombia confirms the Tribunal's lack of jurisdiction ratione temporis over disputes that arose before the entry into force of the treaty, even in the absence of a provision that expressly excludes pre-treaty disputes.

Now, based on Claimant's opening statement today, it's clear that they continue to ignore that. Instead, counsel says that those cases do not stand for the proposition for which Colombia has put them forward. And Claimant's counsel referred to MCI. He insisted that the cases should be read when one reads Paragraph 61 of the Award in that case, one finds that the Tribunal held, and I quote: "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 effect of the principle of non-retroactivity of treaties."

This is, again, MCI Award, Paragraph 61, Legal Authority RL-0008.

Claimant, by contrast, relies on inapposite case law. And, for instance, today we heard Claimant's counsel cite the Chevron Interim Award. But what Claimant's counsel did not mention is that the treaty at issue in Chevron contained a unique clause that, as pointed out by the Tribunal in that case, and I quote, "makes an exception to the principle of non-retroactivity in accordance to Article 28 of the Vienna Convention." "Makes an exception to the principle." This is Chevron Interim Award, Paragraph 265.

And I had to look this up after Claimant's counsel made that statement. I'm sure it's on the record. I can provide a legal authority number for Chevron.

Although it may seem trite, it is worth recalling the definition of "dispute" for the purpose of this discussion. In the Mavrommatis Advisory

Opinion, the Permanent Court of International Justice articulated what has since become widely recognized as the definitive definition of a dispute. And according to that definition, a dispute is "a disagreement on a point of law or fact; a conflict of legal views or of interests between two persons."

Claimant acknowledges this to be the classic definition of a dispute. The Lucchetti Tribunal noted that "acts or facts that take place after a dispute has arisen may confirm or prolong the same dispute, but such acts or facts do not trigger a new dispute."

And if it were otherwise, any Claimant would fabricate jurisdiction by eliciting a new state measure, pointing to that measure, declaring that a new dispute had arisen, and thus circumvent whatever temporal limitations were included in the BIT.

And, before I go on, my colleagues have helpfully provided the reference to Chevron, and it is CL-157.

Now, Colombia has demonstrated that the present dispute arose before the TPA entered into force on 15 May 2012 and that the 2014 Order did not

give rise to a new dispute. Let us recall very briefly the facts which my colleague Mr. Di Rosa mentioned in his introduction.

On 28 July 2000, Claimant, through her Holding Companies, filed suit in Colombia challenging the lawfulness of the 1998 regulatory measures. What has followed since then are a series of judicial decisions related to the same dispute that gave rise to that lawsuit. And, indeed, Claimant does not and cannot deny that the 2014 Order is fundamentally tied to her legal challenge of the 1998 regulatory measures and her disagreement with the 2011 Judgment concerning the lawfulness of those measures.

And to claim, as she does, that the 2014 Order triggered an entirely new dispute is simply untrue, and it's contradicted by Claimant's own written submissions, as well as the Expert Reports that she has submitted, which are replete with attacks of the 1998 regulatory measures and the 2011 Constitutional Court's Judgment. In sum, the dispute arose before the entry into force of the TPA and is therefore outside the Tribunal's jurisdiction.

To complete my presentation, I will now turn to the third and final reason why this Tribunal lacks jurisdiction ratione temporis, and that reason is that Claimant did not comply with the three-year limitation period under Article 10.18.1 of the TPA, which Colombia has referred to as the "TPA Limitations Period." And I will put that provision up on the screen for you to have, although I am sure that you already have read it.

Pursuant to that TPA Limitations Period, no claim may be submitted to arbitration 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 and knowledge that the Claimant has incurred loss or damage.

There are three parts to this objection. First, the TPA limitations period applies to and bars Claimant's claims. Second, Claimant cannot circumvent that limitations period on Colombia's condition of consent by invoking Chapter 12 MFN Clause. Third, even assuming that Claimant could circumvent the conditions of consent under the TPA by relying on

Chapter 12 MFN Clause, Claimant did not comply with the five-year limitations period that she tries to import into the TPA via the MFN Clause.

The first issue is straightforward. Claimant has submitted her claims under Chapter 12 of the TPA. And as my colleague Ms. Horne will discuss in greater detail, Chapter 12 expressly incorporates the investor-State arbitration mechanism under Chapter 10, Section B.

Chapter 10 sets forth a number of conditions of consent for investor-State arbitration which apply to Claimant's claims by virtue of Article 12.1.2(b), which, again, my colleague Ms. Horne will discuss in greater detail, and one such condition of consent is the TPA Limitations Period.

Claimant submitted her claims on 24 January 2018. Now, that means that if Claimant knew or should have known of the alleged breach and laws before 24 January 2015--that is, three years counting backwards from the date on which Claimant submitted her claims--her claims would be barred under the TPA. In other words, 24 January 2015 is the cut-off date.

Claimant argues that her claims arose from the 2014 Order which was issued on 25 June 2014, which, of course, predates the cut-off date of 24 January 2015 by seven months. Having failed to comply with the TPA Limitations Period, Claimant's claims must be dismissed.

But, recognizing that she has not satisfied this condition of consent under the TPA, Claimant attempts to import a longer five-year limitation period from another treaty via the MFN clause in Chapter 12 of the TPA. But Claimant cannot rely on the Chapter 12 MFN clause in this way, for reasons explained by Colombia in its written submissions.

As a preliminary matter, the Chapter 12 MFN clause is excluded from the application of the investor-State arbitration mechanism under the TPA, as confirmed by the United States in its Non-Disputing Party Submission. And, again, this will be further explained by my colleague Ms. Horne.

The result, as noted by the United States, is that an investor-State Tribunal, and I quote from the U.S. submission, "has no jurisdiction to consider

any procedural or substantive treatment extended by a TPA party to a third-state investor or investment through another treaty."

The Fireman's Fund Award, which interpreted the NAFTA equivalent of Article 12.1.2(b) of the TPA, confirms this interpretation. Claimant's counsel in his oral argument said that the NAFTA was the model for the TPA, and he finally referred to the Fireman's Fund, because Claimant had not referred to that before Colombia raised it. And the finding of that Tribunal in that case supports and confirms the interpretation of Article 12.1.2(b) advanced by both Parties to the TPA in this proceeding.

I will not spend too much time on this because it will be dealt with in the following segment of our presentation. But given what I have heard from Claimant's counsel, I do wish to recall briefly that the Tribunal in Fireman's Fund considered the scope of Chapter 14, which is the equivalent of Chapter 12 in the TPA and is the basis of Claimant's claims in the present case, and that Tribunal, Fireman's Fund, explained that the scope for investor-State

arbitration under that Financial chapter, Chapter 14, is more limited than the scope for investor-State arbitration under the Investment chapter.

And, as noted by both Colombia and the United States in their respective submissions in the present case, the Fireman's Fund Tribunal, and I quote--I'm sorry--I quote from the U.S. submission, Paragraph 11, correctly noted that: "The NAFTA Parties did not consent to arbitrate national treatment claims for minimum standard of treatment claims for financial services matters."

We respectfully refer the Tribunal to both Colombia and the United States' submissions where that case is discussed in more detail.

And another remark that I wish to say in response to what I heard from Claimant's counsel. To say that Mr. Wethington's testimony remains unrebutted or is unchallenged, as stated by Claimant's counsel, is simply untrue. Colombia has addressed his testimony and demonstrated that Mr. Wethington, with respect, is wrong, plain and simple.

Now, the United States in its submission

noted that, and I quote: "The United States is not aware of any contemporaneous evidence that supports Mr. Wethington's view of the scope of investor-State dispute settlement in the Financial Services chapter of NAFTA."

Mr. Wethington is not a legal authority, and his testimony, to the extent that it has any weight whatsoever, cannot override the treaty text as interpreted in accordance with the Vienna Convention. And we will come back to this point in this Hearing.

In any event, the proper interpretation of the Chapter 12 MFN clause, in accordance with the Vienna Convention and as confirmed by the leading case law, is that Chapter 12 MFN clause cannot be used to circumvent conditions of consent to arbitration under the TPA.

In its submission, the United States has confirmed that Chapter 12 MFN clause cannot be used in this manner or in the manner attempted by Claimant, and I respectfully refer the Tribunal to Paragraphs 15 through 17 of the U.S. submission in which the U.S. explains that the MFN clause is not subject to

investor-State arbitration and that the States parties have excluded from MFN protection treaties that entered into force prior to the TPA.

Now, the Parties are in agreement that Chapter 12 MFN clause, which you have on your screen, does not explicitly authorize a Claimant to import dispute resolution provisions from another treaty. In its written submissions, Colombia cited multiple tribunals that have explicitly refused to interpret the word "treatment" in an MFN clause as permitting the importation of dispute resolution clauses from other treaties absent express language to that effect. And, indeed, there is a long line of jurisprudence, including the majority of recent decisions on the subject, that has held that an MFN clause cannot be used to import conditions of consent unless--unless the text of the clause clearly and unambiguously provides for such application.

The ordinary meaning of the Chapter 12 MFN clause does not provide, let alone in a clearly and unambiguous manner, for the application of that clause to import more favorable conditions of consent to

arbitration.

Now, Claimant argues that the use of the word "treatment" means the Chapter 12 MFN Clause can be used to import conditions of consent, and she relies on the Maffezini line of cases. The Claimant has failed to respond to Colombia's discussion of those cases, which Claimant's counsel incorrectly and dismissively referred to as aprioristic.

Now, Colombia pointed out that most of those cases allowed for the importation of more favorable conditions of consent based on treaty language that is broader than that in Chapter 12 in this case.

Colombia also pointed out that all of the post-Maffezini line of cases cited by Claimant involved a claimant's attempt to circumvent an 18-month litigation cause in the applicable treaty, which is different in nature and must be distinguished from the statute of limitations period that Claimant is attempting to circumvent via the MFN clause in this case, and Colombia also recalled that a number of tribunals have criticized the reasoning and effects of the Maffezini decisions and its progeny.

Contrary to what Claimant says and consistent with the relevant jurisprudence, the plain language of Chapter 12 MFN clause does not enable the importation of more favorable conditions of consent to arbitration as Claimant is attempting to do here. An analysis of the context of the Chapter 12 MFN clause likewise leads to the conclusion that such clause cannot be used to circumvent Colombia's and the United States' conditions of consent.

Now, counsel for Claimant, in his Opening, referred to Footnote 2 of Article 10.4 of the TPA. And I wish to spend just a brief one or two minutes on that issue.

That footnote to Article 10.4 clarifies what the Parties meant by "treatment" in the context of that MFN clause. And that footnote explicitly states that treatment, and I quote, "does not encompass dispute resolution mechanisms such as those in Section B of Chapter 10."

Confronted with that explicit treaty text, the Claimant argues that because the Chapter 12 MFN clause does not contain a similar exclusion, it must

mean that no such exclusion can apply in the context of a dispute brought under Chapter 12. Claimant is, yet again, wrong in its treaty interpretation.

As Ms. Horne will recall in more detail, Chapter 12 does not provide for its own investor-State dispute settlement mechanism to challenge financial measures. Instead, Chapter 12 imports the investor-State dispute mechanism of Section B, Chapter 10, including the conditions of consent established therein.

A Claimant filing claims under Chapter 12 cannot rely on the State's consent under Chapter 10 but at the same time ignore the conditions of such consent included in Chapter 10. And also, it makes no sense to argue that the term "treatment" has one meaning in Chapter 10, but a different meaning in Chapter 12.

And even if Claimant could circumvent the conditions of consent under the TPA, you've seen the Chapter 12 MFN Clause, which she cannot--Claimant did not comply with the five-year limitation period of the Colombia-Switzerland BIT which she invokes.

Article 11.5 of the Colombia-Switzerland BIT precludes the submission of a dispute to arbitration if Claimant obtained knowledge or should have obtained knowledge of the events giving rise to the dispute more than five years before she submitted her claims to arbitration.

Now, Claimant alleges that she complained--I'm sorry--alleges that she complied with this limitation period because her dispute allegedly arose after 2013. However, her argument is premised upon a unique, self-serving definition of "dispute" which deviates from the classic definition of "dispute" articulated in the Mavrommatis Advisory Opinion which I alluded to earlier, as well as other tribunals.

And as discussed earlier, applying the established definition of a dispute, the present dispute arose in July of 2000 at the latest. It was then that Claimant filed suit challenging the 1998 regulatory measures that are at the source and core of the present dispute. That is some 13 years before the cut-off date under the five-year limitations period

under the Colombia-Switzerland BIT that Claimant is trying to import.

For the reasons that I have summarized and which Colombia expounded in its written submissions, Claimant's case in its entirety should be dismissed for lack of jurisdiction ratione temporis.

And, with the Tribunal's indulgence, I will now cede the floor to Mr. Di Rosa to address Colombia's second jurisdictional objection.

PRESIDENT KAUFMANN-KOHLER: Thank you.

Mr. Di Rosa, please.

MR. DI ROSA: Yes, thank you, Madam President and Patrico.

I will now address Colombia's second objection, which is the ratione materiae objection. The Tribunal's jurisdiction ratione materiae depends upon the existence of a covered investment. That's the term used in the TPA 12.1 and Article 10.1.1(b) of the TPA.

In other words, Claimant needs to be able to point to an investment that actually qualifies as such under the TPA and that is otherwise subject to the

TPA's protections. However, to this day and deep into the case as we are, Claimant still has not identified with clarity the specific investment that she alleges was harmed and that, according to her, is protected by the TPA.

Her position and her theories on this have changed several times, including today, and she has contradicted herself along the way. We will go into a little more detail on each of those, but we'll start by briefly identifying the four ratione materiae theories that they have advanced so far.

Initially in her Request for Arbitration and also in her own Witness Statement, the Claimant had asserted that the investment on which she was basing her TPA claims was her interest in the Granahorrar shares. But then in her Memorial, she changed her theory, asserting instead that the relevant investment for ratione materiae purposes was the 2007 Council of State judgment, which, for convenience, I'm just going to refer to as "the 2007 Judgment."

Then in her Reply, Claimant advanced yet another theory, a third theory, which is that "The

investment was transformed into different modes at different times." And respectfully, we just don't know what that means.

How can a Claimant file an investment arbitration and halfway through the case not even be able to identify with clarity the investment that was allegedly harmed. An investment is a clearly-defined asset, not some sort of nebulous, shape-shifting abstract concept.

Now, today they came up with a fourth theory, which appears to be a variation on the third one. And if I recall correctly, Claimant's counsel said something like the 2007 Judgment is not an investment, but it embodies the elements of an investment. I think that's roughly what he said. And once again, respectfully, don't know what that means.

In any event, none of these theories succeeds in establishing a covered investment under the TPA for the reasons that we'll discuss, and we will discuss each of these theories now in a little more detail, taking them in reverse chronological order so that we can focus on the more recent

theories. Although today you saw that they resuscitated, apparently, the theory--the first theory, which is that the Granahorrar shares are the relevant investment.

We'll get to all of them one way or another. Our presentation was structured based on what they said in their most recent submission, which was their Reply. So, it is sort of noteworthy that in each of their submissions, they have had a different theory. On their request for arbitration, one theory; Memorial, another theory; Reply, another theory; and then today, yet another theory. We'll start with the most recent one that they articulated in their pleadings, which is the one that they advance in her Reply.

Now, as far as we can tell, this theory appears to be an amalgam of the first two. She appears to be saying that the Granahorrar shares somehow morphed into the 2007 Judgment. There's a little bit of that in their theory from today as well, and that, therefore, the investment is some sort of hybrid or combination of the two.

But this theory is clearly insufficient for ratione materiae purposes because if the Claimant is unable to identify a specific investment that is actually covered by the TPA, she cannot advance claims under that treaty. And for the reasons that we will discuss and that we've articulated in our pleadings, neither the 2007 Judgment nor the Granahorrar shares qualify individually as a covered investment under the TPA, and such being the case, the no combination or amalgam or transformation or metamorphosis of the two could ever amount to a covered investment. In this context, the whole cannot be greater than the sum of the parts.

So, let's turn to Claimant's second theory, which appeared to be the principal one until this morning. That's the theory that she advanced in her Memorial, which is that the relevant covered investment is the 2007 Judgment. And specifically in her Memorial, she said, "For purposes of pleading and/or proof of ratione materiae, the Council of State's November 1, 2007, Judgment represents and constitutes Claimant's investment."

This statement couldn't be any clearer. They're saying the relevant investment for ratione materiae purposes is the 2007 Judgment. And it's because of this direct and unambiguous statement that we were inclined to believe that Claimant was abandoning the position that they had taken earlier, that the covered investment for ratione materiae purposes was the Granahorrar shares.

In any event, the second theory concerning the 2007 Judgment also fails for three separate reasons. The first and principal reason is that there is a TPA provision that directly excludes court judgments from the treaty's definition of "investment." This is the provision that, in our pleadings, we have called the "Judgment Exclusion Provision."

That clause is contained in Footnote 15 of Article 10.28 of the TPA, which we have on the screen. And it states: "The term 'investment' does not include an order or judgment entered in a judicial or administrative action."

And we'll come back to this. But just for

the avoidance of any doubt, we wish to confirm a couple of issues concerning that clause. First of all, Article 12.20 of the TPA explicitly incorporates into Chapter 12 the definition of "investment" contained in Article 10.28. And specifically, Article 12.20 states: "Investment means investment as defined in Article 10.28."

Since this exclusion provision--the Judgment Exclusion Provision is located in a footnote within Article 10.28, then there's no question that the footnote applies to Chapter 12 arbitrations as well.

And furthermore, Article 23.1, which also appears on the screen, explicitly confirms that any footnotes in the treaty text constitute an integral part of the treaty, and it says: "Footnotes to this Agreement constitute an integral part of this Agreement."

Clear as water; right? That means that the Judgment Exclusion Provision has to be treated as functionally equivalent to a provision in the main text of the TPA.

Both of the TPA contracting--go to the next

slide.

Both of the TPA contracting States, Colombia and the United States, agree that the Judgment Exclusion Provision does apply to investor-State arbitrations conducted under Chapter 12 such as the present proceeding. In its Non-Disputing Party Submission, the United States explicitly alluded to this emphasizing Article 12.20 in that regard.

So, let's explore now briefly the nature of the 2007 Judgment. The 2007 Judgment was a ruling that was issued by the Council of State of Colombia, which is the highest judicial branch tribunal that adjudicates administrative matters in the Colombian court system.

The judgment was issued in response to an appeal by Claimant, through her Holding Companies, of an unfavorable ruling by a First Instance Court in a lawsuit that she had started in Colombia challenging the 1998 regulatory measures. This 2007 Judgment was subsequently overturned by yet another judicial body, the Constitutional Court, as I just mentioned earlier, pursuant to the 2011 Constitutional Court Judgment.

So, there can't be any question whatsoever that the 2007 Judgment is a "judgment entered in a judicial action," which is the--paraphrasing the language from Footnote 15, but that's, in essence, what it refers to, judgments entered in a judicial action.

For that reason, the 2007 Judgment falls squarely within the scope of the Judgment Exclusion Provision and, therefore, outside the definition of "investment" under the TPA.

That's fatal to Claimant's case, at least if you take what they said in their Memorial on face value, that the 2007 Judgment is the investment for ratione materiae purposes.

Now, what do Claimants have to say about this? They say in her Reply--and to get around this problem, they advance three arguments basically, none of which has any merit whatsoever. First, she says that certain jurisprudence permits her to rely on the 2007 Judgment as a covered investment.

And this argument fails for the very simple reason that no amount of jurisprudence could ever

override the plain text of a treaty; therefore, the Mondev and Saipem decisions that they cited and other legal authorities that they invoked are simply irrelevant here.

And in any event, the decisions that she cited, such as these two, Saipem and Mondev, did not include a Judgment Exclusion Provision. The treaties in those cases didn't include a Judgment Exclusion Provision like the one we have in the TPA, so they're not really apposite at all.

Claimant's second argument is that the Judgment Exclusion Provision only applies to certain types of judgments or orders which, according to her, do not include the 2007 Judgment, and specifically she says that the Judgment Exclusion Provision only covers the subset of court decisions that count as investments in their own right, is how they put it. And she cites as an example of this a judgment that was rendered in favor of a different party that is then acquired at a discount by the investor, so essentially purchasing an award to collect on it.

The problem with this argument is that it is

manifestly inconsistent with the plain text of the Judgment Exclusion Provision, which doesn't contain any limitation, exception, or qualification whatsoever. It applies to all court judgments.

So, there's simply no way to reconcile Claimant's interpretation with the plain language of the treaty provision. And Claimant, incidentally, has not even attempted to offer a citation in support of this interpretation. That's because there is none.

Claimant's third argument on the Judgment Exclusion Provision is that since it was the 1998 regulatory measures that led to the issuance of the 2007 Judgment in the first place, it was, therefore, they say, Colombia's own alleged misconduct that resulted in the judgment to begin with and that Colombia is, therefore, estopped from invoking the Judgment Exclusion Provision as a defense.

And this argument also fails for at least three reasons. First, because it would require that the Tribunal make a ruling on the merits at the jurisdictional stage. In essence, Claimant is asking the Tribunal to assume liability for purposes of

finding jurisdiction, but that would be putting the cart before the horse.

Under the Judgment Exclusion Provision, the issue of whether the 2007 Judgment is covered by the TPA is an issue of consent. It's an issue of jurisdiction, not an issue of liability. You can't find liability in order to get to jurisdiction. It doesn't work that way.

Second, the Tribunal, in any event, cannot pronounce itself on the lawfulness of the 1998 regulatory measures because the Tribunal lacks jurisdiction ratione temporis to do so, as Mr. Grané Labat just explained.

And, third, by its terms, the Judgment Exclusion Provision applies directly to the 2007 Judgment irrespective of the 1998 regulatory measures. The only determination that the Tribunal needs to make is whether the 2007 Judgment constitutes "a judgment entered in a judicial or administrative action." That's it.

The background of the 2007 Judgment, including the 1998 regulatory measures, is completely

irrelevant. So, all three of Claimant's arguments on the Judgment Exclusion Provision therefore fail. The bottom line is that the Claimant can't get around the insurmountable bar to her claims that this clause poses for her case.

And because all of her claims relate to the same alleged investment, that means--again, taking the 2007 Judgment as the relevant investment--that means that all of her claims must be dismissed for lack of jurisdiction ratione materiae.

And to close the segment on the Judgment Exclusion Provision, I just want to go back to the two quotes we just saw a few slides back.

The first one is the quote from the Claimant's Memorial where they said that the 2007 Judgment was the relevant investment for ratione materiae purposes, and the second quote is the TPA Judgment Exclusion Provision. This is the cleanest and most straightforward jurisdictional basis on which the Tribunal could dismiss the entirety of Claimant's case in this case, taking Claimant's own representations here.

You could take the one sentence from the Claimant's Memorial, the one sentence from the TPA, and draft a one-sentence award. It would be the shortest award in the history of investment arbitration. It really is that simple.

Now, given what we've just discussed, the analysis could stop here with respect to the 2007 Judgment. But for the sake of completeness, we will describe two other reasons why the 2007 Judgment cannot constitute the covered investment, and we then will come back to the shares as the investment since they kind of resuscitated that argument today.

So, the first two--the first of the two additional reasons that the 2007 Judgment cannot be an investment is that that judgment was overturned on 26 May 2011 by the 2011 Constitutional Court judgment. What that means is that the judgment no longer existed by the time of the two critical jurisdictional dates in this case.

Pursuant to Articles 12.1 and 10.1 of the TPA, Article 28 of the VCLT and Article 13 of the ILC Draft Articles, a Claimant must be able to demonstrate

that its investment existed on two critical dates; first, the date on which the treaty entered into force and, second, the date of the challenged measure.

In this case, the two critical jurisdictional dates are 15 May 2012, which appears on the left there on the slide. That's the date of the TPA's entry into force. And then 25 June 2014, which is the date of what we understand to be the only measure that Claimants are challenging in this case, which is the 2014 Confirmatory Order.

Since the 2007 Judgment was overturned in May of 2011, it no longer existed when the TPA entered into force in May 2012, and, similarly, it no longer existed by the time of the 2014 Confirmatory Order.

By definition, Colombia could not have breached the TPA with respect to an investment that had already ceased to exist by the time that Colombia first became bound by the TPA's obligations. It's an empirical impossibility for a measure to harm a non-existent investment.

In sum, for this reason, too, the 2007 Judgment cannot constitute a covered investment

under the TPA.

Just quickly, the third reason that the 2007 Judgment cannot qualify as an investment is for the simple reason that it does not meet objective elements of the definition of "investment" obtained in Article 10.28 of the TPA. Now, we just mentioned a couple minutes ago that Article 12.20 of the TPA incorporates by reference the definition of "investment" in Article 10.28.

And importantly, the definition here is different from the definition contained in other treaties. As this Tribunal knows, most investment treaties define the term "investment" broadly with language such as "every kind of asset."

But as you can see on the screen, the definition in Article 10.28 of the TPA is narrower because it encompasses only assets that have the characteristics of an investment, and then it goes on to specify what kind of characteristics, "including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."

And the 2007 Judgment simply doesn't meet this definition. The main formal requirement here is that the relevant asset has to have the characteristics of an investment. And as a general common-sense matter, court rulings do not have--do not have the characteristics of an investment, period.

But even if conceptually you were prepared to accept the notion that a court ruling could, in some scenario, constitute an investment, the 2007 Judgment, in any event, doesn't meet the specific characteristics that are specifically identified in Article 10.28.

For example, the judgment itself did not involve any commitment of capital by the Claimant, nor did she assume any risk with it. And although she may have had an expectation of gain from it at some point while the judgment was still valid, that was no longer the case once the 2011 Judgment was reversed in 2011.

In sum, for the three reasons that we just articulated, the 2007 Judgment cannot possibly be considered, in and of itself, an investment for which Claimant can seek redress under the TPA. There is,

therefore, no ratione materiae jurisdiction, and all of the Claimant's claims must be dismissed.

Now, for the sake of completeness in the analysis and given the fact that the Granahorrar shares now appear to be relevant again in some derivative quasi crypto way, you know, to Claimant's new amalgam theory, we will describe briefly the two reasons why, in any event, the Granahorrar shares also could not be a covered investment under the TPA.

And those reasons are summarized in the bullets on the screen. First, because Claimant no longer had an interest in those shares. Actually, the shares didn't even exist on the critical jurisdictional dates. And, second, because Claimant acquired her interest in Granahorrar in violation of Colombian law.

As we mentioned earlier, the two critical jurisdictional dates in this case are 15 May 2012 and 25 June 2014. The Claimant no longer had any Granahorrar shares on either of those dates, and that's because Claimant's Granahorrar shares ceased to exist in 2006. In that year, Granahorrar was

dissolved. As I mentioned during the factual presentation, its assets were absorbed by another financial institution, which was BBVA, and it ceased to exist as a legal entity.

Since Granahorrar became defunct in 2006, that means its shares ceased to exist at that time as well. And that was a full six years before the entry into force of the TPA and eight years before the 2014 Confirmatory Order, which, as we said, appears to be the only measure that they are formally challenge--formally challenging in this arbitration. Because the Granahorrar shares no longer existed by the time of the two critical dates, they cannot constitute a covered investment.

The second reason why the shareholding interest is not a covered investment is because the Claimant acquired that interest in violation of Colombian law. And Claimant's counsel today spent a fair amount of time on the jurisprudence. This Tribunal is vastly experienced, so we're not going to really dwell on this issue of--you know, this conformity requirement too much.

Several investment arbitral tribunals have been confirming, for quite some time now, that the conformity requirement applies even if there's no explicit language to that effect in the treaty. And there have been a number of cases that we cited in our pleadings, but we have one example--one representative example on the screen which is the Phoenix v. Czech Republic case where the Tribunal stated, "This condition"--the conformity of the establishment of the investment with the national laws--"is implicit even when not expressly stated in the BIT."

This means that the conformity requirement applies in the present case even though the TPA does not contain an explicit clause to that effect. And although some might--some might argue that a trivial or de minimis violation of domestic law will not bar jurisdiction, there is broad support in the jurisprudence for the proposition that to be covered by an investment treaty, an investor does need to comply or have complied with domestic rules governing foreign investments.

And I could cite the decisions in Saba

Fakes, Phoenix Action, Quiborax, Metal-Tech, and Achmea. All of those reported that proposition.

As the quotes on the slide that appears here now show, Claimant's own assertions in her pleadings suggest that she obtained her interest in Granahorrar in 1986 using foreign capital. And if that's the case, the purchase of the share interest would have constituted a foreign capital investment under Colombian law.

During the relevant time period, Colombia had in force a foreign capital investment framework that consisted of a number of laws, and those laws imposed two approval and registration requirements that are relevant to the Claimant's investment. And those two requirements appear on the screen. I'm not going to read them. But essentially, they required approval by certain authorities and registration with other authorities.

The first of these requirements was--well, both of them applied at the time the Claimant first obtained her interest in Granahorrar, which was in 1986. The second of the requirements--the first one

was eliminated in 1991, but it had applied in 1986, and the second one did continue throughout. And that's relevant because Claimant says that she acquired further indirect interest in Granahorrar shares between 1991 and 1997. So, certainly, the second requirement on the screen applied to her, and she should have registered this investment with the Central Bank.

But the Central Bank of Colombia has confirmed, in a letter dated 17 October 2019, that it had no record of any approval or registration of a foreign capital investment relating to Granahorrar or to the Claimant's holding companies.

And importantly, in her Reply, Claimant failed to challenge any of these propositions. She did not deny that she had made an investment in Granahorrar using foreign capital. She did not deny that at that time, Colombian law required the approval and registration of foreign investments, and she did not deny that she failed to comply with those requirements.

The inference that must be drawn from that

silence and also from the Claimant's failure to even attempt to adduce any evidence on these issues is that Claimant made a foreign investment in Colombia without complying with the relevant approval and registration requirements, which means that her investment was not made in conformity with Colombian law.

In sum, there's no way that the Granahorrar shares either could qualify as a covered investment under the TPA. With this, we reach the conclusion of our discussion of the ratione materiae objections.

So, unless you have any questions for me, Madam President and Members of the Tribunal, I will now yield the floor to my colleague, Ms. Katelyn Horne, who will address the third and final jurisdictional objection, which is the ratione voluntatis objection.

And for this purpose, and with our apologies to the Tribunal, we will need a pause of a minute or two to switch places and computers since Ms. Horne and I are in the same conference room.

PRESIDENT KAUFMANN-KOHLER: No. We had in mind to have a short break in any event now, because

we have been going for an hour and 30, and that's a long stretch for the court reporters and the interpreters.

So, should we take five minutes? Is five minutes enough, or would you like more?

MR. DI ROSA: Five is perfect.

PRESIDENT KAUFMANN-KOHLER: Let's take five minutes then and resume for the last objection.

MR. DI ROSA: Thank you.

PRESIDENT KAUFMANN-KOHLER: Thank you.

(Brief recess.)

PRESIDENT KAUFMANN-KOHLER: We hear you well now, so you can proceed.

MS. HORNE: Thank you very much, Madam President.

Good afternoon and evening. And as I was already introduced, my name is Katelyn Horne. I will address the third and final jurisdictional objection which concerns this Tribunal's jurisdiction ratione voluntatis.

Now, this objection revolves around the fundamental principle of consent. As affirmed by the

ICJ, a State's consent to an international court or tribunal must be "an unequivocal indication of the desire of that State to accept jurisdiction in a voluntary and indisputable manner."

In this case Claimant has been unable to demonstrate such unequivocal consent. In fact, all of Claimant's claims fall outside of the jurisdiction ratione voluntatis of this Tribunal. This is so for four reasons, each of which I will address. I'll begin with the first.

The Tribunal does not have jurisdiction over Claimant's fair and equitable treatment claim, or FET Claim, because Chapter 12 of the TPA does not include or incorporate an FET obligation.

Now, before I proceed, I'll make a very brief aside. While our arguments about the application of the TPA in this respect are quite straightforward, the TPA is drafted in such a way as to have many cross-references and to denote articles with numbers like 12.1.2(b). I therefore ask the Tribunal's indulgence as I go through these recitations, particularly at this hour of the day.

So, we begin with Claimant's FET Claim. Claimant has repeatedly stated that she is a financial services investor submitting her claims under Chapter 12 and that her claims include an FET claim, yet there can be no dispute that Chapter 12 itself does not include an FET obligation. Faced with this, Claimant turns, instead, to the FET obligation of Chapter 10. That's Article 10.5.

It's Chapter 12, though, that governs Claimant's claims. Chapter 12 does incorporate certain substantive provisions from Chapter 10; specifically, Article 12.1.2(a), which is shown on your screen, sets forth a list of provisions that are incorporated from other chapters. But Article 10.50, the FET obligation, is not among them.

In sum, Chapter 12 does not include or incorporate an FET obligation. Colombia, therefore, cannot be held liable for such a breach under Chapter 12, and Claimant's FET claim falls outside of the jurisdiction of this Tribunal.

The second part of Colombia's objection concerns both Claimant's FET and national treatment

claims. As it relates to the FET Claim, this is an argument in the alternative, as I've just described, that there's no FET obligation for Claimant to invoke.

Claimant is submitting her FET and national treatment claims under Chapter 12. However, as we all agree, Chapter 12 does not have any investor-State dispute mechanism of its own. Instead, Article 12.1.2(b) incorporates the investor-State dispute mechanism from Chapter 10 into Chapter 12, as shown on your screen.

Now, Claimant believes that Article 12.1.2(b) gives her license to submit to arbitration any and every kind of claim that she can contrive under Chapter 12. However, an interpretation of Article 12.1.2(b), in accordance with customary principles of treaty interpretation, demonstrates that this provision limits the set of claims that a financial services investor can submit to arbitration.

This morning, Claimant said that the first step of the VCLT analysis, the ordinary meaning of the terms, is "extremely important." Colombia fully agrees.

The text of Article 12.1.2(b) is shown on your screen and states that the investor-State arbitration provisions of Chapter 10 are "hereby incorporated into and made a part of this chapter solely for claims that a party has breached" the four listed obligations.

The word "solely" circumscribes the types of claims that can be submitted to arbitration. The meaning of this provision is unequivocal. A financial services investor can submit only the types of claims identified in the exhaustive list contained in Article 12.1.2(b).

A Claimant cannot submit to arbitration under Chapter 12 claims under any other obligations, whether those obligations are contained in Chapter 10 or in Chapter 12. Claimant here has purported to submit a variety of claims, including FET and national treatment claims. But those provisions are not included in the list in Article 12.1.2(b). That means there is no consent to arbitrate those claims.

Ultimately, what this means is that only one of Claimant's claims can Claimant submit to

arbitration under Chapter 12. That's her expropriation claim, which is Article 10.7 and shown on the left side of the screen.

The Parties are in agreement on this point. But even if this claim were to reach the merits, the facts show that there has been no expropriation, as that term is narrowly defined in Annex 10(b) of the TPA.

The United States fully agrees with Colombia's interpretation of Article 12.1.2(b). In its Non-Disputing Party Submission, the U.S. confirmed that "by using the word 'solely,' the Parties expressly identified the only obligations found in Chapter 10 that they were willing to arbitrate under Chapter 12."

The U.S. continued: "Nor did the Parties consent to arbitrate investors' claims based on any of the substantive obligations contained in Chapter 12."

For her part, rather than focusing on an interpretation of the relevant provision of the TPA, Claimant has insisted on interpreting an analogous provision in NAFTA. However, Claimant's

interpretation of even that provision is incorrect.

Like the TPA, NAFTA has one chapter, Chapter 11, that governs investments and an entirely separate chapter, Chapter 14, that governs financial services.

NAFTA Article 1401 regulates the scope and coverage of the Financial Services chapter, just as for the TPA, Article 12.1 governs the scope and coverage of that financial services chapter.

And just like TPA Article 12.1.2(b), NAFTA Article 1401(2) serves to incorporate the investor-State arbitration mechanism from NAFTA's investment chapter. This provision shown on your screen incorporates that mechanism "solely for breaches by a Party of Articles 1109 through 1111, 1113, and 1114, as incorporated into this Chapter."

Just as with the TPA, all of the State's parties to NAFTA agree that Article 1401(2) sets forth the exhaustive list of claims that a financial services investor can submit to arbitration.

Mexico and Canada, for their part, had an opportunity to address this issue of interpretation in

the Fireman's Fund v. Mexico arbitration. You heard earlier today from Claimant that Claimant believes this case is inapposite, but that's merely wishful thinking.

In that case Mexico, as Respondent, objected that the Claimant could not submit minimum standard of treatment or national treatment claims under the Financial Services chapter of NAFTA. That sounds an awful lot like Colombia's objection in this case.

In their Written Submissions in Fireman's Fund, both Mexico and Canada agreed that the list in Article 1401(2) of claims that could be submitted to arbitration under the Financial Services chapter was an exhaustive list. The minimum standard of treatment and national treatment claims were not on that list.

For its part and in the present proceeding, the United States has expressed complete agreement with that interpretation, which means that all three NAFTA Parties are in agreement about the proper interpretation of NAFTA Article 1401(2).

Ultimately, the Fireman's Fund Tribunal itself agreed with this ordinary meaning

interpretation of Article 1401(2), and it dismissed, for lack of jurisdiction, the Claimant's minimum standard of treatment and national treatment claims. The ordinary meaning of TPA Article 12.1.2(b) demands the same result in this case.

With the plain meaning of Article 12.1.2(b) clear and confirmed by the NAFTA jurisprudence, I'll turn to the next step of the VCLT analysis, the context.

The context, as we all know, is comprised of the surrounding provisions of the Treaty. The chapeau of Article 12.1.2 is relevant in this regard. Shown on your screen, the chapeau clarifies that the provisions of Chapters 10 and 11 apply "only to the extent that such chapters or articles of such chapters are incorporated into this chapter. That includes the investor-State arbitration mechanism.

The context of Article 12.1.2(b) also includes TPA Article 12.18, which you heard about this morning and which provides a dispute settlement mechanism for disputes arising under the Financial Services chapter. This is the State-to-State dispute

settlement mechanism. This part of the context directly refutes one of Claimant's key arguments.

Claimant says that the ordinary meaning of Article 12.1.2(b) would render unenforceable the substantive protections of Chapter 12. But Article 12.18 does provide a means of enforcing such obligations. Confronted with this reality, Claimant now falls back on the argument that the State-to-State dispute settlement mechanism is not sufficient because she wants to sue the State herself.

This argument is based on two false premises; first, that Claimant has an inherent right to sue the State as an investor and, second, that she has the right to dictate the terms under which she can sue the State.

She has no such rights. Under general international law, a State must consent to investor-State arbitration, and States are free to limit the scope of their consent.

Moving now to the next step of the VCLT analysis, Articles 31(3)(a) and (b) of the VCLT dictate that any subsequent agreement or practice

between the treaty parties must be taken into account by an interpreter. Here, the United States and Colombia are in complete agreement that Article 12.1.2(b) lists the only claims that can be submitted to arbitration under Chapter 12. This agreed interpretation of the two parties is authoritative.

In sum, an interpretation under Article 31 of the VCLT yields a clear and straightforward result. Article 12.1.2(b) identifies an exhaustive set of claims that the States have consented to arbitrate. That set of claims does not include FET or national treatment claims, and the Tribunal accordingly does not have jurisdiction over this Claimant's FET and national treatment claims.

Now, Claimant has insisted and, indeed, spent a great deal of the opening presentation on supplementary means of interpretation under Article 32 of the VCLT, including the negotiating history. Here such supplementary means are not necessary because the primary means of interpretation do not yield a result that is either ambiguous or absurd. In any event,

Claimant has not submitted a single qualifying element of the travaux of the TPA.

As stated in Colombia's written submissions, the travaux of a treaty must reflect the joint understanding of the parties during the negotiations. This stands to basic reason. A party cannot submit as definitive evidence of interpretation its own internal documents and sources, otherwise a party could always unilaterally propose a self-serving interpretation.

Claimant relies on the personal recollections of Mr. Olin Wethington and testimony of U.S. officials before U.S. Congress. Simply put, these are not travaux, and therefore do not have any interpretive weight under the VCLT. However, even if Mr. Wethington's testimony had interpretive weight, the fact remains that it would do little to support Claimant's case.

Claimant devoted much time today to defending Mr. Wethington's testimony. The fact remains that although Mr. Wethington purports to declare the official drafting intentions and interpretation of the United States, the United States

has made clear that, first, Mr. Wethington does not speak for the United States; and, second, there is, in fact, no contemporaneous evidence to support Mr. Wethington's assertions.

Mr. Wethington's Report thus does not reflect the drafting intentions or understanding of the United States, let alone the drafting intent of both Parties.

In sum and for these reasons, Claimant's FET and national treatment claims are clearly not part of the exhaustive list in Article 12.1.2(b), and they therefore fall outside of the jurisdiction ratione voluntatis of this Tribunal.

I will now briefly address Claimant's attempt to circumvent the limitations of consent that I just discussed by invoking the Chapter 12 MFN Clause. In this context, Claimant attempts to use the Chapter 12 MFN Clause in two ways. First, Claimant tries to incorporate into Chapter 12 a substantive FET obligation; and, second, Claimant attempts to use the MFN clause to create consent to arbitrate her FET and national treatment claims.

I'll begin with the first. As I explained earlier, there is no FET obligation in Chapter 12. Claimant therefore seeks to import the FET obligation from the Colombia-Switzerland BIT using the MFN clause. However, an MFN clause cannot be used to import an obligation that itself does not exist in the underlying treaty. This is well-established in arbitral case law.

Claimant also seeks to use the Chapter 12 MFN clause to create consent to arbitrate her FET and national treatment claims. Unlike the applicable treaty here, the TPA, the Colombia-Switzerland BIT does not limit consent to arbitration to a certain set of claims. So, Claimant naturally argues that, if the TPA doesn't include consent to arbitrate her claims, she can still import the consent from the Colombia-Switzerland BIT.

But there is an insurmountable obstacle to this argument. An MFN Clause cannot be used to create consent to arbitration where no such consent exists in the underlying treaty. This is consistent with the findings of multiple investment tribunals.

For example, the A11Y Limited v. Czech Republic Tribunal applied a dispute resolution provision that limited consent to arbitration only to expropriation claims. In that case, just as here, the Claimant attempted to import via an MFN clause a dispute resolution provision that did not limit consent only to expropriation claims. But the Tribunal held that the MFN clause could not be used to expand the State's consent beyond expropriation claims.

Under nearly identical circumstances, the Telenor v. Hungary Tribunal held the same and explains its reasoning as follows: "In the present case, the MFN Clause cannot be used to extend the Tribunal's jurisdiction to categories of claim other than expropriation, for this would subvert the common intention of Hungary and Norway in entering into the BIT in question."

In exactly the same way, allowing the Claimant here to use the MFN clause to create consent to arbitrate her FET and national treatment claim would subvert the clear intention of the TPA States'

parties to limit the scope of consent to arbitration under the Financial Services chapter.

Claimant's attempt to manufacture consent to arbitrate her FET and national treatment claims using the Chapter 12 MFN clause thus fails.

The fourth and final aspect of Colombia's objection affects all of Claimant's claims. Having failed to satisfy certain conditions of consent under the TPA, her claims must be dismissed for lack of jurisdiction. I will address these issues very briefly now, but I rely on our written submissions for our complete arguments.

As already discussed, Article 12.1.2(b) incorporates into Chapter 12 the investor-State dispute resolution provisions of Chapter 10. Those provisions include conditions of consent to arbitration. As a result, the conditions of consent in Chapter 10 apply to Claimant's claims under Chapter 12. The United States and Colombia are in complete agreement on this point, as discussed in the United States' Non-Disputing Party Submission.

If the conditions of consent set forth in

the TPA are not satisfied, a Tribunal will not have jurisdiction. Here, three conditions of consent have not been satisfied.

First, Claimant has not met the Notice of Intent requirement set forth in Article 10.16.2. Claimant asserts that this is not a mandatory jurisdictional requirement. But Claimant is wrong, as shown by the plain language of Article 10.16.2. It's on your screen, and it provides that: "At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration."

Here again, the two treaty parties are in complete agreement. As the United States observed, quote--I apologize. As the United States observed, an investor who does not deliver a Notice of Intent within the 90 days "fails to satisfy the procedural requirement under Article 10.16.2, and so fails to engage the respondent's consent to arbitrate."

Here, there's no dispute as to the facts. Claimant does not deny that she never submitted a

Notice of Intent. She thus failed to comply with this jurisdictional requirement, and her claims must be dismissed for lack of jurisdiction.

The second condition of consent that Claimant failed to satisfy is the consultation and negotiation requirement of Article 10.15. That article is shown on your screen.

While Claimant alleges that this requirement is not mandatory, various tribunals have interpreted similar requirements for amicable dispute resolution as mandatory jurisdictional requirements, including in Murphy v. Ecuador and Enron v. Argentina. Moreover, the Spanish version of the TPA, which the TPA defines as equally authentic with the English version, uses the word "deben," which means "must." Claimant never attempted to consult or negotiate with Colombia. She therefore did not satisfy Article 10.15's condition of consent.

The third and final condition of consent that Claimant failed to satisfy is the waiver requirement. Article 10.18.2(b), which is shown on your screen, requires that an investor waive any right

to initiate or continue proceedings with respect to any measure alleged to constitute a breach of the TPA.

As observed by the United States, an effective waiver is "a precondition to the parties' consent to arbitrate claims and, accordingly, a Tribunal's jurisdiction under Chapters 10 and 12 of the U.S.-Colombia TPA." Colombia agrees.

The United States and Colombia likewise agree as to the nature of the waiver requirement. In particular, there are two requisite elements, a form requirement and a material requirement. The form requirement mandates the submission of a clear, explicit, and written waiver. The material requirement mandates that a Claimant act consistently with that written waiver; namely, that the Claimant refrain from initiating or pursuing proceedings in another forum with respect to the measures alleged to constitute breaches of the TPA.

There is no dispute here that Claimant never submitted a written waiver. She, therefore, has failed to satisfy the form requirement, so the analysis could end here.

But Claimant has also failed to satisfy the material requirement because she is pursuing a proceeding that falls within the scope of the waiver requirement. That proceeding is the one before the Inter-American Commission on Human Rights.

It's covered by the waiver requirement because, first, it's an ongoing proceeding that Claimant continues to pursue, in fact, as evidenced by her latest submission to the Commission in May of 2020. Second, the proceeding is before a dispute settlement procedure. And, third, it concerns the same measures challenged by Claimant in the present arbitration; namely, the '98 regulatory measures, the 2011 Constitutional Court judgment, and the 2014 Confirmatory Order. All of those measures are specifically addressed by Claimant in her submissions to the Inter-American Commission.

The fact that Claimant is pursuing separate relief in that proceeding is irrelevant under the TPA. What the TPA asks is whether a Claimant is initiating or pursuing a proceeding with respect to the same measures alleged to constitute a breach of the TPA.

Here that is satisfied, and Claimant has, therefore, failed to comply with the waiver. For that reason, Claimant's claims fall outside of this Tribunal's jurisdiction.

For each of the four reasons I have discussed, the Tribunal lacks jurisdiction ratione voluntatis over all of Claimant's claims.

Madam President and Members of the Tribunal, we wish to conclude Colombia's opening presentation today by highlighting the simple fact that even though Claimant has inundated this Tribunal with many hundreds of pages of pleadings, expert reports, witness statements, and exhibits, she has not carried her burden of proof on the critical threshold matter, which is whether this Tribunal has jurisdiction to hear her claims.

This is an issue on which international law is clear. The Claimant bears the burden of proof. For all of the reasons that we have described today, as well as those articulated in our written submissions, she has not carried that burden.

That means that there is no jurisdictional

basis in this case for Ms. Carrizosa's TPA claims. The Republic of Colombia, therefore, respectfully requests that this Tribunal dismiss all of her claims for lack of jurisdiction.

Madam President, we have now completed Colombia's opening presentation. Thank you very much. And we would be happy to answer any questions that you may have.

PRESIDENT KAUFMANN-KOHLER: Thank you. That leads us to the end of the opening statements.

Do my colleagues have questions for now, or do we save the questions for tomorrow after having heard Dr. Briceño? You're free to proceed with questions. That could be to either one.

ARBITRATOR FERNÁNDEZ ARROYO: I think tomorrow would be better. More efficient, I think.

PRESIDENT KAUFMANN-KOHLER: Yeah.

Christer?

ARBITRATOR SÖDERLAND: Yeah, I have a question, but it could wait until tomorrow.

PRESIDENT KAUFMANN-KOHLER: You can ask it if you want. If you want to ask it now, if you

prefer, you're free, of course. I'll have some questions tomorrow, but I have to think about how to frame them best.

ARBITRATOR SÖDERLAND: I'd like to put the question, but I will not get an answer to it tonight.

We have been discussing the scope of the most favored nation clause and, in particular, the fact that this clause appears in Chapter 10 and Chapter 12. And in the first mentioned chapter, there is also attached a Footnote 2 to this MFN clause.

And my question is only: Do the Parties think that the formulation, the language of this footnote, informs us as to how the drafters of the TPA envisioned the scope of the MFN clause as regards whether it includes dispute resolution or not?

And the language of the footnote that I'm particularly sort of concerned about is the introductory words "For greater certainty."

So, that's my question. And, of course, no one has any obligation to reply to that question, but there is a freedom to put questions, so that is what I did.

PRESIDENT KAUFMANN-KOHLER: Do the Parties want to give an answer now, or do you want to save it for Friday?

Mr. Martínez, what's your choice?

MR. MARTÍNEZ-FRAGA: Well, whatever works best for the Tribunal. We're in the Tribunal's hands.

PRESIDENT KAUFMANN-KOHLER: Mr. Grané?

MR. GRANÉ LABAT: Thank you, Madam President.

We would--following your guidance, Madam President, we could take that question and address it either tomorrow or on Friday as part of our closing.

It is very clear, and we thank Professor Söderlund for the question, and we would be happy to address that tomorrow or on Friday.

PRESIDENT KAUFMANN-KOHLER: So, I think the best way to organize this is to keep it for Friday. And there may be other questions that will come up tomorrow that we can also keep for Friday, and then you can organize your closing taking into account our questions.

Because we have very lengthy, very detailed, and thorough written submissions. We have heard you now for quite some time this afternoon so--or morning--and so we will probably be more interested on Friday to look into specific areas or specific questions rather than repeating what has already been said.

So, I think it will make a better use of the time on Friday if we proceed that way, if that's fine with everyone.

I see nodding, so I assume it's fine. Good.

Is there anything we should address before we close? Tomorrow we'll hear Dr. Briceño. We'll start at the same time, like today. You know how we will proceed for the examination as we have done it already at the last session.

Are there any questions/comments that the Parties would like to raise before we adjourn for today?

Mr. Martínez-Fraga?

MR. MARTÍNEZ-FRAGA: (Shook head.)

PRESIDENT KAUFMANN-KOHLER: No?

MR. MARTÍNEZ-FRAGA: No. Thank you.

PRESIDENT KAUFMANN-KOHLER: You're muted. But I understood you meant no; right?

MR. MARTÍNEZ-FRAGA: I know. I know. I just wanted to use sign language. But you're absolutely correct. No.

PRESIDENT KAUFMANN-KOHLER: Fine.

Mr. Grané?

MR. GRANÉ LABAT: Nothing from Respondent. Thank you.

PRESIDENT KAUFMANN-KOHLER: Good.

Is there anything from the Secretary in terms of logistics?

THE SECRETARY: Nothing from me. Thank you.

PRESIDENT KAUFMANN-KOHLER: Excellent. Then I wish you all a good end of the day, whatever that means, depending on where you are, and we'll meet tomorrow again at the same time.

Goodbye to everyone.

(Whereupon, at 2:07 p.m., the Hearing was adjourned until 9:00 a.m. (EST) on November 11, 2020.)

CERTIFICATE OF REPORTER

I, Margie R. Dauster, RMR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

MARGIE R. DAUSTER