INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/19/34

AMEC FOSTER WHEELER USA CORPORATION, PROCESS CONSULTANTS, INC., AND JOINT VENTURE FOSTER WHEELER USA CORPORATION AND PROCESS CONSULTANTS, INC.

Claimants

v.

REPUBLIC OF COLOMBIA

Respondent

REPLY ON PRELIMINARY OBJECTIONS

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INTRODUCTION

1. The Republic of Colombia ("Colombia" or the "Respondent") submits this Reply on Preliminary Objections ("Reply") in response to the Counter-Memorial on Preliminary Objections filed by Amec Foster Wheeler USA Corporation ("Foster Wheeler"), Process Consultants, Inc. ("Process Consultants") and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. ("FPJVC") (together, the "Claimants") on October 14, 2021 ("Counter-Memorial"), in accordance with Procedural Order No. 1 of March 18, 2021 and the revised procedural calendar of April 1, 2021.[1]

2. In its Memorial on Preliminary Objections (the "Memorial"), Colombia raised a preliminary objection that, as a matter of law, Claimants have not presented a claim for which an award can be made in their favor. In addition, Colombia submitted five jurisdictional objections for this Tribunal to decide on as preliminary questions. Claimants' Counter-Memorial does not provide tenable, much less convincing, answers or explanations to refute these preliminary objections. In fact, it confirms that Claimants' claim should be dismissed in its entirety and that the Tribunal lacks jurisdiction to hear this case.

3. As is evident from a simple reading of the Counter-Memorial, Claimants' claim is clearly premature, and their creative and far-fetched arguments fail to mask this

[1] References in the form of "**Ex. R-**" and "**Ex. RL-**" are to the factual exhibits and legal authorities, respectively, submitted by Respondent in this Arbitration; while those in the form of "**Ex. C-**" y "**Ex. CL-**" are to the factual exhibits and legal authorities, respectively, submitted by Claimants in this Arbitration. References in the form of "**CWS-**" are to the witness statements submitted by Claimants in this Arbitration. This Reply uses the same terms that were defined in the Memorial, as well as the following notation: period (".") to separate thousands, comma (",") to separate decimals, "US$" to refer to U.S. dollars and "COP$" to refer to Colombian pesos.

reality. Setting aside the fact that the Tribunal must analyze the admissibility of the claim and its jurisdiction as of the time Claimants initiated this Arbitration (when there was not even a final administrative act),[2] even now that the Ruling with Fiscal Liability issued by the Office of the Comptroller General of the Republic ("CGR") is final at an administrative level (although it is still subject to several judicial remedies) there is still no *prima facie* violation of the obligations of the Investment Chapter (the "Treaty") of the Trade Promotion Agreement between the Republic of Colombia and the United States of America (the "Colombia-U.S. TPA") or of an "investment agreement", much less a pecuniary loss or damage incurred by Claimants that can be compensated by the Tribunal.

4. There is no doubt that Claimants initiated the present Arbitration while waiting for the CGR to issue a ruling in the Fiscal Liability Proceeding,[3] before there was any kind of final decision in that administrative procedure, and long before Colombian courts of the administrative adjudicatory jurisdiction had the opportunity to hear and rule on the matter. But an investment arbitration – and particularly a claim under Article 10.16.1 of the Treaty which stipulates very specific conditions for the submission of a valid claim to arbitration thereunder – cannot be initiated preemptively in the expectation that a future decision may be unfavorable, when there is still no measure capable of constituting a breach of the Treaty's substantive obligations, let alone a loss or damage by reason of, or arising out of, such an alleged breach.[4] If there was no valid claim under

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[2] *See* Memorial, n. 355; ¶¶ 85-88, *infra*.

[3] Claimants themselves acknowledged the preventive nature of this Arbitration while briefing their Application for Provisional Measures and Emergency Temporary Relief, September 2, 2021 ("Application for Provisional Measures"). *See* ¶¶ 200-202, *infra*.

[4] **Ex. RL-1**, United States – Colombia Trade Promotion Agreement, signed on November 22, 2006 and effective from May 15, 2012, Chapter 10 (the "Treaty"), Article 10.16.1; ¶¶ 92-109 190-215, *infra*.

Article 10.16.1 of the Treaty at the time Claimants initiated this arbitration proceeding, any subsequent decision or damage fails to cure that original deficiency such that Claimants' claim must be dismissed.

5. Claimants' untimely and unjustified Provisional Measures Application (which lacked any kind of necessity or urgency, and which significantly affected Respondent's time to prepare this Reply), as well as their requested forms of relief in this Arbitration (*i.e.*, an offsetting award equivalent to the amount of the Ruling with Fiscal Liability and a non-monetary order preventing any attempt by the CGR or any other Colombian body to seize any of Claimants' assets in Colombia or elsewhere) reveal that Claimants' true intention in prematurely initiating this Arbitration is to try to interrupt the conduct of the Fiscal Liability Proceeding and – now that a Ruling with Fiscal Liability has been issued – to stop its enforcement in order to avoid harm or damage, and not to seek compensation for harm or damage that has already materialized.

6. Claimants' arguments in this Arbitration present glaring contradictions that only reinforce the impropriety of their claim. For instance, Claimants argued in their Notice of Arbitration that they suffered damage, but then in their Provisional Measures Application they argued that they urgently required provisional measures to avoid such damage.[5] Moreover, in their Notice of Arbitration, Claimants requested an offsetting award equivalent to the amount of the Ruling with Fiscal Liability, while they now argue that the consequences of enforcing the Ruling with Fiscal Liability would be beyond the scope of the Tribunal's jurisdiction.[6] These shifting and contradictory positions, which are

[5] *Compare* Notice of Arbitration, December 6, 2019 ("Notice of Arbitration"), ¶ 206 *with* Application for Provisional Measures, ¶¶ 126, 131, 146, 149.

[6] *Compare* Notice of Arbitration, ¶ 216 *with* Hearing on Provisional Measures Transcript, November 4, 2021 ("Hearing on Provisional Measures Transcript"), p. 107; n. 403, *infra*

impossible to reconcile, truly reflect the way Claimants have litigated this case: constantly adjusting and recalculating their positions in an attempt to escape the reality that their claim is premature, improper, and that this Tribunal lacks jurisdiction to hear it.

7. The absence of actual harm or damage in this case is particularly alarming. Despite this being an indispensable requirement for submitting a valid claim to arbitration under Article 10.16.1 of the Treaty, Claimants have not been able to identify any actual monetary damage they have incurred to date. The Ruling with Fiscal Liability, which establishes the joint and several liability of fourteen Colombian and foreign individuals and legal entities, may still be judicially challenged. Claimants have not made any payments (whether forced or voluntary) within the framework of the Fiscal Liability Proceeding, and none of their assets have been seized, let alone auctioned. This alone should lead to the dismissal of their claim.

8. Knowing that they have not suffered harm, Claimants believe that they can salvage their case and satisfy the requirement provided in Article 10.16.1 of the Treaty by alleging that they have suffered reputational harm as a result of their involvement in the Fiscal Liability Proceeding. Despite the fact that they have offered no proof of any such alleged reputational harm, any reputational harm they have suffered is a result, not of Colombia's purported violations, but of Claimants' own acts.[7] [redacted].[8]

[7] *See* ¶¶ 204-207, *infra*.

[8] *See* ¶¶ 67-77, *infra*.

9. Seeking to distract the Tribunal's attention away from the absence of harm arising out of Colombia's alleged violations, Claimants repeatedly confuse the requirement that actual damage exist at the time the claim is submitted to arbitration (which is an essential requirement for rendering their claim admissible under Article 10.16.1 of the Treaty) with the possibility that damages suffered thereafter may be eventually considered in calculating the amount of compensation – which is a different and irrelevant issue to the question of admissibility of the claim.[9] Claimants also attempt to deride Colombia's objections by implying that its position is that Claimants can only initiate an arbitration in the event [redacted].[10] Setting aside that this is not Colombia's position, the Treaty is clear and direct in regard to the need to comply with this essential requirement when submitting a dispute to arbitration: the existence of harm or damage resulting from a breach of a substantive obligation of the Treaty or an investment agreement is required. In the absence of such actual harm or damage, a claim cannot be validly submitted to arbitration under the Treaty.

10. Unbelievably, Claimants are not content with seeking to prevent an alleged damage and go even further: they ask the Tribunal to issue an offsetting award equivalent to the amount of the Ruling with Fiscal Liability, *i.e.*, an award in their favor for almost US$ 900 million. Regardless of the fact that the Tribunal is not empowered to grant such a form of relief under the Treaty,[11] granting Claimants the relief they request would truly result in an unjust enrichment. Claimants have not paid any amount (voluntary or forcibly) of the Ruling with Fiscal Liability, and may never have to pay any amount – because the

[9] *See* ¶¶ 195-197, *infra*.

[10] Counter-Memorial, ¶ 132.

[11] *See* ¶¶ 228-232, *infra*.

Ruling with Fiscal Liability establishes joint and several liability, and Claimants do not have assets in Colombia that could be seized and enforced to satisfy that judgment. What Claimants abusively seek in this Arbitration is not the recovery of actual damage, but to obtain an extraordinary windfall.

11. It is telling that in their Counter-Memorial, Claimants have elected not to respond to the factual background relevant to the preliminary objections, which was set out in detail by Colombia in its Memorial. With respect to some of those factual issues, Claimants refer to their Provisional Measures Application (which is, in truth, a disguised memorial on the merits), yet with respect to other relevant factual issues they have surprisingly chosen to remain silent.[12] For example, Claimants do not analyze the terms of the Service Contract despite their unquestionable relevance in resolving the objection that the Tribunal lacks jurisdiction *ratione materiae*. Thus, the only possible conclusion is that these facts are undisputed.[13]

[12] Claimants argue that Colombia delved into a factual discussion that is inappropriate at this stage of the proceedings. Counter-Memorial, n. 13. Their argument is quite ironic because Claimants themselves had no problem in fully recounting their factual allegations on the merits of this case (even accompanying four witness statements) when they hastily filed their Request for Provisional Measures. In any event, in its Memorial, Colombia limited itself to addressing only the facts relevant to resolving the preliminary objections that the Tribunal will decide as a preliminary question. It is worth recalling that, although the factual allegations recounted by Claimants in their Notice of Arbitration must be assumed to be true with respect to the objection under Article 10.20.4 of the Treaty, nothing prevents these facts from being supplemented in order to have a complete picture of the factual scenario relevant to that objection. **Ex. RL-1**, Treaty, Article 10.20.4(c); n. 148, *infra*. With respect to the other jurisdictional objections, the Tribunal is not required to take Claimants' factual allegations as true. All relevant factual issues must be argued, with Claimants having the burden of proving all the facts on which this Tribunal's jurisdiction is based. *See* ¶ 238, *infra*.

[13] On repeated occasions in their Counter-Memorial, Claimants mix factual allegations with legal allegations (sometimes disguised as factual allegations), refer to conclusions that are not supported by factual allegations, and supplement the facts set forth in their Notice of Arbitration. It is worth recalling that, for purposes of analyzing a preliminary objection under Article 10.20.4 of the Treaty, a tribunal should only assume as true the factual allegations set forth in the Notice of Arbitration, and not legal allegations, unsupported conclusions, or factual allegations that were not raised in the Notice of Arbitration. *See* ¶ 79, *infra*. It is also worth reiterating that this presumption of truthfulness does not apply to the jurisdictional

12. Similarly, Claimants have selectively chosen to address only some of the numerous legal issues that are relevant for resolving the preliminary objections raised in this case (and have tried to distinguish only a handful of the legal authorities cited in support thereof), while ignoring the rest. It is especially striking that Claimants remain completely silent with respect to the objection that this Tribunal is not empowered under Article 10.26 of the Treaty to grant the non-monetary damages or injunctions they request, implicitly conceding the argument.[14] It is clear that Claimants would like to deal directly with the merits of the claim, but unfortunately for them, there are serious preliminary objections that must first be resolved and which constitute an insurmountable stumbling block to their case.

13. A detailed analysis of the Counter-Memorial also reveals that Claimants have had to resort to a series of far-fetched and indefensible arguments, distortions of legal authorities and international law, and baseless interpretations of the Treaty provisions – which are inconsistent with principles of interpretation – in an attempt to try to justify their unfounded positions.[15] The length of this Reply is, therefore, a consequence of the inconsistent manner in which Claimants chose to address the preliminary objections raised by Colombia.[16]

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objections raised as a preliminary question, since Claimants have the burden of proving all the facts on which the jurisdiction of this Tribunal is based. *See* ¶ 238, *infra*.

[14] *See* ¶¶ 225-227, *infra*.

[15] In Claimants' Counter-Memorial, it is common to see unsupported assertions, references to cases without providing the relevant citations, or citations to legal authorities that do not support the assertions. Moreover, Claimants repeatedly criticize Colombia's interpretations or positions even though they are the same positions that Claimants' law firm has taken while defending States in several investment arbitrations (and which match the positions adopted by the United States - the other Contracting Party to the Treaty - in its submissions as a non-disputing party). *See for example* ¶¶ 118, 134, 170, 276, *infra*. This double standard undermines the credibility of Claimants' counsel's positions in this Arbitration.

[16] Colombia regrets having to address certain discussions that would be more appropriate for a merits stage. However, Claimants have forced it to do so with their continued arguments on the merits that are

14. From the very first paragraph of their Counter-Memorial, Claimants express dissatisfaction with the numerous non-disputing party submissions filed by the United States in investment arbitrations that Colombia cited in its Memorial, wherein the United States analyzed the meaning of the provisions and obligations of this Treaty or of virtually identical investment treaties. Understandably, Claimants try to downplay the value and importance of those submissions, arguing that "party and non-party submissions are of questionable value because of the obvious incentive for States to attempt to limit the scope and reach of investment claims against them."[17]

15. While these submissions are not to Claimants' liking, the views of the Contracting Parties to the Treaty – the United States and Colombia – are fundamental for understanding what their intentions were in agreeing to certain obligations and thus determining how the provisions of the Treaty ought to be interpreted. Subsequent agreements and subsequent practice of the contracting parties to a treaty are recognized as objective evidence of the meaning of treaty provisions, and therefore, are considered to be authentic means of interpretation.[18] The United States' submissions are arguably

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plainly intended to lead this Tribunal to believe that there could be *prima facie* violations of Treaty's substantive obligations in this case.

[17] Counter-Memorial, ¶ 1. Claimants imply that Colombia's preliminary objections are supported, almost exclusively, by non-disputing party submissions of the U.S. in other investment arbitrations. *Id*. However, beyond the significant number of U.S. non-disputing party submissions confirming the Treaty interpretations advanced by Respondent, the fact remains that Colombia has submitted 205 other legal authorities with its Memorial in support of its preliminary objections (in addition to those submitted with this Reply). Thus, Colombia's preliminary objections, and its interpretations of the Treaty, are fully supported by arbitral doctrine and jurisprudence - and confirmed by the non-disputing party submissions of the United States - the other Contracting Party to the Treaty.

[18] *See* **Ex. RL-53**, Vienna Convention of the Law of Treaties, done at Vienna on May 23, 1969, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331 ("Vienna Convention of the Law of Treaties"), Article 31.3 ("There shall be taken into account, together with the context: a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."); **Ex. RL-267**, International Law Commission, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, 2(2) YEARBOOK OF

of greater probative value for determining the scope and meaning of the provisions and obligations arising under the Treaty than the decisions of arbitral tribunals interpreting other treaties – many of which contain wording that is very dissimilar to the Treaty.[19]

THE INTERNATIONAL LAW COMMISSION (2018), Conclusion No. 3 ("Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31."), Conclusion No. 3, ¶ 1 ("By characterizing subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention as 'authentic' means of interpretation, the Commission indicates why they have an important role in the interpretation of treaties. The Commission thereby follows its 1966 commentary on the draft articles on the law of treaties, which described subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), as 'authentic means of interpretation' and which underlined that: The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty."), Conclusion No. 4, ¶ 18 ("Subsequent practice under article 31, paragraph 3(b) [of the VCLT] must be conduct[ed] 'in the application of the treaty'. This includes not only official acts at the international or at the internal level that serve to apply the treaty, . . . but also, *inter alia*, . . . statements [of the States] in the course of a legal dispute, or judgments of domestic courts.") (emphasis added).

[19] Several international arbitral tribunals have emphasized the considerable weight that must be given to subsequent practice in the interpretation of a treaty, and in particular, to non-disputing party submissions of the contracting parties to the treaty in question. *See* **Ex. RL-268**, *Mobil Investments Canada Inc. v. Canada (II)*, ICSID Case No. ARB/15/6 (NAFTA), Decision on Jurisdiction and Admissibility, July 13, 2018, ¶ 158 ("In accordance with the principle enshrined in Article 31(3)(b) of the [VCLT], 1969, the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight."); **Ex. RL-176**, *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43 (DR-CAFTA), Decision on Respondent's Preliminary Objections, March 13, 2020 ("*Kappes*"), ¶ 156 ("VCLT Article 31(3) allows for consideration of 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its application,' and a demonstration that all the State Parties to a particular treaty had expressed a common understanding, albeit through separate submissions in separate cases, could be compelling evidence of subsequent practice."); **Ex. RL-269**, *Cases regarding the border closure due to BSE concerns (The Canadian Cattlemen for Fair Trade) v. United States of America*, UNCITRAL (NAFTA), Award on Jurisdiction, January 28, 2008, ¶¶ 182-183, 188-189 ("[T]he available evidence cited by the Respondent [which included submissions made by NAFTA States Parties in other arbitrations] demonstrates to us that there is . . 'subsequent practice that clearly establishes the understanding of all the parties regarding its interpretation.' . . . The Tribunal is of the view that this is 'subsequent practice' within the meaning of Article 31(3)(b) [of the VCLT] [sic]. And this 'subsequent practice' confirms the Tribunal's interpretation of the ordinary meaning of Article 1101(1)(a) of the NAFTA, as set out above."); **Ex. RL-270**, *William Ralph Clayton, et al. v. Government of Canada*, PCA Case No. 2009-04 (NAFTA), Award on Damages, January 10, 2019, ¶ 379 ("[T]he consistent practice of the NAFTA Parties in their submissions before Chapter Eleven tribunals in making a clear distinction between the application of Article 1116 and Article 1117 can be taken into account in interpreting the provisions of NAFTA. Thus, the NAFTA Parties' subsequent practice militates in favour of adopting the Respondent's position on this issue."); **Ex. RL-271**, Tarcisio Gazzini, INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES (Hart Publishing 2016), p. 194 ("NAFTA members have regularly and consistently claimed that their concordant positions on a given interpretation of the treaty, through non-disputing parties' submissions, constitute a subsequent agreement for the purpose of Article 31(3)(a)."). *See also* **Ex. RL-223**, *Commerce Group Corp and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17 (DR-CAFTA), Award, March 14,

Naturally, Claimants are unhappy with the United States' non-disputing party submissions, considering how they unanimously support all of the positions that Colombia has maintained in this Arbitration.[20]

16. As will be proven throughout this Reply, Claimants' claim must be dismissed because, as a matter of law, it is not a claim for which the Tribunal can make an award in their favor.[21] Claimants did not comply with the requirements set forth in Article 10.16.1 for the submission of a claim to Arbitration under the Treaty,[22] and the relief they seek is outside the powers of the Tribunal under Article 10.26 of the Treaty.[23]

17. Furthermore, the Tribunal (I) lacks jurisdiction *ratione materiae* because Claimants do not have a protected investment under either the Treaty or the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention"),[24] because the services contract they entered into did not entail

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2011 ("*Commerce Group*"), ¶¶ 81-82; **Ex. RL-272**, *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1 (NAFTA), Award, June 19, 2007, ¶ 107; **Ex. RL-39**, *United Parcel Service of America Inc v. Government of Canada*, ICSID Case No. UNCT/02/1 (NAFTA), Award on Jurisdiction, November 22, 2002 ("*UPS*"), ¶¶ 59, 69.

[20] That was not the position defended by Claimants' law firm when it represented a State in an investment arbitration. Indeed, in *Legacy v. Mexico*, Pillsbury Winthrop Shaw Pittman LLP emphasized that non-disputing party submissions evidenced the "subsequent practice" of State parties and should be taken into account for interpretative purposes. *See* **Ex. RL-273**, *Legacy Vulcan LLC v. United Mexican States*, ICSID Case No. ARB/19/1 (NAFTA), Respondent's Counter-Memorial, November 23, 2020 ("*Legacy Counter-Memorial*"), ¶ 425 ("While through pleadings and submissions under Article 1128, the NAFTA members have consistently resisted the use of the MFN clause to borrow treaty treatment standards from third parties. Such pleadings and consistent submissions demonstrate 'subsequent practice,' which must be taken into account under the ordinary rules of treaty interpretation.").

[21] *See* ¶¶ 78-82, *infra*.

[22] *See* ¶¶ 83-89, *infra*.

[23] *See* ¶ 216, *infra*.

[24] The Claimants shift their arguments on the Tribunal's jurisdiction, at times relying on the ICSID Convention and at other times on the Treaty, as they see fit. But the reality is that for a Tribunal constituted under the Treaty and the ICSID Convention to have jurisdiction over this case, the jurisdictional requirements of both the Treaty and the ICSID Convention must be met (the so-called "double keyhole approach"). *See* ¶¶ 249-250, n. 457, *infra*.

any investment risk;[25] (II) lacks jurisdiction *ratione personae* over FPJVC because it does not qualify as a juridical person under Article 25(2)(b) of the ICSID Convention;[26] (III) lacks jurisdiction *ratione voluntatis* with respect to Foster Wheeler and Process Consultants because they did not file a notice of intent in accordance with Article 10.16.2 of the Treaty;[27] (IV) lacks jurisdiction *ratione voluntatis* with respect to the claims for breach of the Treaty's fair and equitable treatment ("FET") obligation because Foster Wheeler and Process Consultants elected to raise allegations to the same effect before Colombian courts and, pursuant to Annex 10-G of the Treaty, such an election is definitive;[28] and (V) lacks jurisdiction *ratione voluntatis* because Claimants did not file a valid and effective waiver in accordance with Article 10.18.2(b) of the Treaty.[29]

18. Given the premature nature and obvious inappropriateness of this claim, coupled with the Tribunal's clear lack of jurisdiction to hear the case, Colombia requests that Claimants be ordered to pay the full costs and expenses of this Arbitration, including Respondent's attorneys' fees, together with interest thereon.

EXTENDED FACTUAL BACKGROUND

19. Claimants did not include a facts section in their Counter-Memorial, but referred instead to the facts section of the Provisional Measures Application.[30] In that factual narrative, Claimants continue to delve into facts that, besides being false, are

[25] *See* ¶¶ 239-254, *infra*.

[26] *See* ¶¶ 255-268, *infra*.

[27] *See* ¶¶ 269-277, *infra*.

[28] *See* ¶¶ 278-286, *infra*.

[29] *See* ¶¶ 287-299, *infra*.

[30] Counter-Memorial, ¶ 8.

absolutely irrelevant to decide on Colombia's preliminary objections. True to form, Claimants continue to defy the Tribunal's order to postpone any decision on the merits of the dispute in order to deal with Respondent's preliminary objections as a preliminary matter.

20. Just like in its Memorial, Colombia will now elaborate on the facts of the dispute that are relevant to contextualize its preliminary objections.[31]

A. Claimants Do Not Dispute that the Services Contract Is a Commercial Services Contract with a Remuneration Structure that [redacted]

21. Claimants assert on multiple occasions that Reficar modified the terms of the Services Contract to reduce FPJVC's responsibility for the Project.[32] According to Claimants, this reduced role deprived the CGR of jurisdiction to initiate the Fiscal Liability Proceeding against them.[33] However, that discussion is irrelevant at this point because none of Colombia's preliminary objections depend, to be upheld or rejected, on establishing the scope of Claimants' functions under the Services Contract.

22. What is relevant at this stage of the proceeding is that both Claimants and Respondent agree that the contract entered into between FPJVC and Reficar is a contract for the provision of consulting services, which provided for a remuneration structure that

[31] Memorial, ¶¶ 14-163.

[32] Application for Provisional Measures, ¶¶ 4, 13, 35-38, 47, 57, 59.

[33] *Id.*, ¶ 35.

guaranteed FPJVC full recovery of the resources it allocated to the provision of services, as well as a profit irrespective of the success or failure of the Project.[34]

23. Consequently, as Colombia noted in its Memorial,[35] the Services Contract does not constitute a protected "investment" under the Treaty or the ICSID Convention because it is a simple commercial contract that does not entail any kind of investment risk for Claimants.[36]

B. Claimants Have Filed Three *Acciones de Tutela* Alleging Due Process Violations in the Fiscal Liability Proceeding

24. Respondent informed the Tribunal that Foster Wheeler and Process Consultants have filed three *acciones de tutela* against CGR alleging violations of their fundamental rights to due process, defense and contradiction in the framework of the Fiscal Liability Proceeding.[37] As Colombia explained in its Memorial, the *acción de tutela* is a subsidiary and residual action that is only available when an authority has threatened or violated a fundamental right and the stakeholder has no other means of judicial defense.[38]

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[34] Claimants do not question the description of the Services Contract's remuneration structure presented by Respondent in its Memorial. Memorial, ¶¶ 33-53. In addition, Claimants admit that the purpose of the Services Contract is limited to the provision of consulting services. Application for Provisional Measures, ¶ 16 (accepting that the Services Contract was for "consulting services only, not for the actual engineering, procurement and construction of the Project."), ¶ 57 (noting that FPJVC acted "as a consultant that could only make certain suggestions and recommendations concerning the Project.") (emphasis added). *See* Memorial, ¶¶ 24-32. Contrary to Claimants' assertions (Counter-Memorial, ¶ 118), Colombia's description of the nature and remuneration structure of the Services Contract is relevant to support its objection that there is no protected investment, and not its objection under Article 10.20.4 that there is no damage – which objection is based on other facts.

[35] Memorial, ¶¶ 5, 22, 281-298.

[36] *See* ¶¶ 239-254, *infra*.

[37] Memorial, ¶¶ 136-138, nn. 327, 345.

[38] *Id.*, n. 283.

25. In the first *acción de tutela* ("*Acción de Tutela* 2018"), Claimants raised essentially the same arguments they raise in this Arbitration and even alleged a violation of due process as part of the FET obligation under the Treaty.[39] This *tutela* was denied in the first and second instance because Claimants did not prove the existence of an irreparable damage or that the remaining mechanisms within the Colombian legal system were inadequate to address their claims.[40]

26. In the second *acción de tutela* ("*Acción de Tutela* 2021-A"), Claimants objected to two technical reports related to the quantification of fiscal damage ordered by the CGR during the Fiscal Liability Proceeding.[41] This *acción de tutela* was denied at the first and second instance because, according to the *tutela* judges, the administrative adjudicatory jurisdiction allows Claimants to present their allegations and request the temporary suspension of the administrative acts allegedly violating their rights.[42]

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[39] *Id.*, ¶¶ 136, 324-327. *See* **Ex. R-69**, *Acción de Tutela* No. 2018-00182 filed by Foster Wheeler and Process Consultants against CGR, September 14, 2018 ("*Acción de Tutela* 2018"). Claimants argue that the parties to the *Acción de Tutela* 2018 were different from the parties to this Arbitration. Counter-Memorial, ¶ 192. That is false. The parties to the *Acción de Tutela* 2018 were Foster Wheeler and Process Consultants and "The Nation – Office of the Comptroller General of the Republic" (translation from Spanish; emphasis added). **Ex. R-69**, *Acción de Tutela* 2018, p. 1. It is also false, as they claim, that the subject of the *Acción de Tutela* 2018 is different from the subject of this Arbitration. Counter-Memorial, ¶ 191. In general terms, through the *Acción de Tutela* 2018 Claimants sought: (i) a declaratory judgment that their right to due process had been violated; and (ii) that the Fiscal Liability Proceeding be terminated or otherwise suspended for Foster Wheeler and Process Consultants, in order to avoid an alleged irreparable harm. **Ex. R-69**, *Acción de Tutela* 2018, pp. 39-48.

[40] Memorial, ¶¶ 137-138. *See* **Ex. R-70,** Criminal Court 26 of the Bogotá Circuit, *Acción de Tutela* No. 2018-00182 filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgment of First Instance, October 3, 2018; **Ex. R-68,** Superior Court of Bogotá – Criminal Chamber, *Acción de Tutela* No. 2018-00182 filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgment of Second Instance, November 21, 2018.

[41] Memorial, n. 327. *See* **Ex. R-84**, *Acción de Tutela* No. 2021-00138 filed by Foster Wheeler and Process Consultants against CGR, April 23, 2021 ("*Acción de Tutela* 2021-A").

[42] Memorial, n. 327. *See* **Ex. R-85**, Civil Court 14 of the Bogotá Circuit, *Acción de Tutela* No. 2021-00138 filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgment of First Instance, May 10, 2021; **Ex. R-100**, Superior Court of Bogota Judicial District of Bogota, Civil Chamber, *Acción de Tutela*

27. In the third *acción de tutela* ("*Acción de Tutela* 2021-B"), Claimants requested that the five-day term (provided by law) to appeal the Ruling with Fiscal Liability be waived, and that instead Claimants be granted a ninety (90) day term to file such an appeal.[43] The Administrative Adjudicatory Proceedings Court of Cundinamarca rejected the *Acción de Tutela* 2021-B at first instance because: (i) the five-day term for an appeal set forth by law does not constitute a violation of the Colombian Constitution; (ii) Foster Wheeler and Process Consultants were aware of the term for appeal since the start of the Fiscal Liability Proceeding; and, in any event, (iii) Claimants were able to present their allegations before the courts of the administrative adjudicatory jurisdiction.[44] As of the date of this Reply, the *Consejo de Estado* is performing the second instance review of the *Acción de Tutela* 2021-B.[45]

C. The Fiscal Liability and Administrative Sanctions Chamber of the CGR Confirmed the Ruling with Fiscal Liability

28. On May 7, 2021, Foster Wheeler and Process Consultants filed an appeal of the Ruling with Fiscal Liability (the "Appeal") before the fiscal liability and administrative sanctions chamber of the CGR (the "Fiscal Chamber").[46] While Claimants argued that

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No. 2021-00138, filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgment of Second Instance, July 1, 2021 ("*Tutela* Judgment of Second Instance 2021-A"), pp. 7-8.

[43] Memorial, ¶ 159, n. 345. *See* **Ex. R-87**, *Acción de Tutela* No. 2021-00385 filed by Foster Wheeler and Process Consultants against CGR, April 28, 2021 ("*Acción de Tutela* 2021-B").

[44] Memorial, n. 345. *See* **Ex. R-88**, Administrative Adjudicatory Proceedings Court of Cundinamarca – Fourth Section, Subsection B, *Acción de Tutela* No. 2021-00385 filed by Foster Wheeler and Process Consultants against CGR, *Tutela* Judgement of First Instance, May 14, 2021, pp. 28-31.

[45] Claimants assert that they filed this *acción de tutela* before the *Consejo de Estado* and that the *Consejo de Estado* denied it. *See* Application for Provisional Measures, n. 66. That assertion is false. *Acción de Tutela* 2021-B was decided in first instance by the Administrative Court of Cundinamarca. As of the date of this Reply, the *Consejo de Estado* has not decided on *Acción de Tutela* 2021-B.

[46] Memorial, ¶ 159; **Ex. R-89**, Appeal filed by Foster Wheeler and Process Consultants against the Ruling with Fiscal Liability, May 7, 2021 ("Appeal").

the five-day term for appeal set forth by law[47] was an "absurdity" and a violation of their right to due process[48] (and filed *Acción de Tutela* 2021-B seeking to extend it),[49] not only did Claimants file their appeal in a timely manner, but such appeal is substantial: it is 233 pages long, includes three expert opinions and develops all of Claimants' objections to the Fiscal Liability Proceeding in detail.[50] By filing the *Acción de Tutela* 2021-B and the Appeal, Claimants violated the waiver requirement under Article 10.18.2(b) of the Treaty, depriving the Tribunal of jurisdiction over this claim.[51]

29. On July 6, 2021, the Fiscal Chamber ruled on the Appeal filed by Foster Wheeler and Process Consultants, as well as on the appeals of the 16 other fiscally liable third parties, against the Ruling with Fiscal Liability issued by the Intersectoral Deputy Comptroller No. 15 ("Deputy Comptroller").[52] Claimants assert that the CGR rejected

[47] **Ex. RL-8**, Law 610 of 2000, which establishes the procedure for fiscal liability proceedings under the authority of the Comptroller's Office, prior to the amendments of Decree Law 403 of 2020 ("Prior Law 610 of 2000"), Article 56 (indicating that "[d]ecisions shall be binding and final: 1. When no recourse is available against them. 2. Five (5) business days following the last notification, when no recourses are filed or they are expressly waived. 3. When the recourses filed have been decided.") (translation from Spanish; emphasis added). Claimants falsely argue that the "CGR granted FPJVC a mere five days to file its appeal and rejected FPJVC's request for additional time." Application for Provisional Measures, ¶ 5. Such term was not set by the CGR, but by the law itself. The CGR has no power whatsoever to discretionarily modify a legal term.

[48] Application for Provisional Measures, ¶¶ 5, 72, 90, n. 3. *See* ¶ 15, *supra*.

[49] *See* ¶ 27, *supra*.

[50] **Ex. R-89**, Appeal. Foster Wheeler and Process Consultants were aware of the charges made against them in the Fiscal Liability Proceeding long before the issuance of the Ruling with Fiscal Liability. The CGR formally commenced the Fiscal Liability Proceeding on March 10, 2017, and filed charges on June 5, 2018, through the Indictment Order. *See* Memorial, ¶¶ 122-138.

[51] *See* ¶¶ 287-299, *infra.*

[52] *See* Memorial, ¶¶ 147-163.

their Appeal "summarily".[53] That is not true. The Fiscal Chamber ruled upon the appeals against the Ruling with Fiscal Liability within the 20-working-day term provided by law.[54]

30. Given its length,[55] we have divided the Fiscal Chamber's order (the "Ruling of Second Instance") into five parts, numbering each part as a separate exhibit as follows:

Ruling of Second Instance	**Ref.**
Part 1: General data, subject and background I	**R-101**
Part 2: Background II	**R-102**
Part 3: Considerations	**R-103**
Part 4: Considerations II	**R-104**
Part 5: Considerations III, conclusions and resolution	**R-105**

31. After a separate analysis of each of the appeals filed against the Ruling with Fiscal Liability, the Fiscal Chamber upheld fiscal liability, jointly and severally, for gross negligence on the part of 12 natural persons (Reficar's directors, both national and foreign, including the president of Ecopetrol at the time of the events), and on the part of four juridical entities (contractors, including Foster Wheeler and Process Consultants) for

[53] Application for Provisional Measures, ¶ 152.

[54] **Ex. RL-8**, Prior Law 610 of 2000, Article 57. It is worth clarifying that the term began to run on June 3, 2021, when the Deputy Comptroller resolved the requests for reconsideration filed by certain fiscally liable parties and decided to dismiss the charges against insurance company Chubb de Colombia S.A.. Foster Wheeler and Process Consultants did not file a request for reconsideration against the Ruling with Fiscal Liability. *See* **Ex. R-101**, Ruling of Second Instance – Part 1: General data, subject and background I, p. 7; **Ex. R-102**, Ruling of Second Instance – Part 2: Background II, pp. 125-137.

[55] Claimants complain about the length of the Ruling of Second Instance, which, as they point out, is slightly over 2.100 pages. Application for Provisional Measures, ¶ 5. The individual analysis of the 17 appeals explains the length. The specific response to the Appeal filed by Foster Wheeler and Process Consultants is 42 pages long. *See* **Ex. R-104**, Ruling of Second Instance – Part 4: Considerations II, pp. 1194-1236.

the economic damage deriving from Change Controls 2 and 3.[56] The Ruling of Second Instance also upheld the decision of the Deputy Comptroller not to declare any kind of fiscal liability with respect to Change Control 4, since it found no grossly negligent conduct on the part of the imputed parties, as well as a break in the causal link of the economic damage as determined by the Deputy Comptroller.[57] Moreover, the Ruling of Second Instance confirmed the insurance companies, Confianza S.A., Liberty Seguros S.A., AXA Colpatria Seguros S.A., as civilly liable third parties.[58]

32. The Fiscal Chamber responded to each and every argument raised by Foster Wheeler and Process Consultants against the Ruling with Fiscal Liability.[59]

33. With respect to the conduct under analysis, the Fiscal Chamber confirmed that FPJVC's conduct contributed to the economic damage incurred by the State.[60] The

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[56] **Ex. R-105**, Ruling of Second Instance – Part 5: Considerations III, conclusions and resolution, pp. 2159-2161. In its Memorial, Respondent stated that the economic damage determined by the Deputy Comptroller consisted of the loss of value of the investment of public resources in the Project derived from Change Controls 2 and 3. Memorial, ¶ 152.

[57] **Ex. R-103**, Ruling of Second Instance – Part 3: Considerations I, pp. 1067-1076. Colombia previously explained that according to the Ruling with Fiscal Liability, Change Control 4 was necessary to mitigate the impact of a workers' strike that took place in 2013. Memorial, n. 331.

[58] **Ex. R-105,** Ruling of Second Instance – Part 5: Considerations III, conclusions and resolution, p. 2160. The insurance company Chubb de Colombia S.A. filed a reconsideration before the Office of the Deputy Comptroller. This office reconsidered its position stated in the Ruling with Fiscal Liability and dismissed that insurance company from the Fiscal Liability Proceeding. **Ex. R-103**, Ruling of Second Instance – Part 3: Considerations I, pp. 1103-1106. *See* n. 54, *supra*.

[59] **Ex. R-104**, Ruling of Second Instance – Part 4: Considerations II, pp. 1194-1236.

[60] According to Claimants, the Ruling with Fiscal Liability contradicts the decision of the Office of the Inspector General of Colombia ("PGN", by its acronym in Spanish) of January 17, 2020, which allegedly concluded that FPJVC had no decision-making authority over public resources. **Ex. R-106**, Deputy Inspector for the Economy and Public Finance, Order No. DEHP 007, January 17, 2020 ("the PGN Decision") (Claimants submitted a copy of the PGN Decision as Ex. C-8, but Respondent resubmits it as **Ex. R-106** to provide an English translation of the portions on which it relies.). According to Claimants, it follows that the CGR could not then consider FPJVC to be a fiscal manager or that FPJVC could not be subject to fiscal liability. Application for Provisional Measures, ¶¶ 19, 43, 54-59, 64, 71, 122. The Claimants' argument goes to the merits of the dispute and, therefore, Respondent will not address it at this stage of the proceedings. However, as a preliminary matter, it is worth clarifying that the PGN did not analyze or rule on FPJVC's role in the Project, or on its fiscal liability. As Claimants themselves admit, the PGN has authority to investigate and impose disciplinary sanctions on those who perform public functions.

Fiscal Chamber recognized, however, that Claimants were not in charge of directly managing public resources and that they did not have decision-making power to approve Change Controls 2 and 3 – with such management and power laying instead with Reficar's board of directors.[61] However, the Fiscal Chamber reiterated that the actions and omissions of FPJVC, as the Project's project manager, necessarily influenced the decisions of Reficar's board of directors that gave rise to the economic damage, thus creating a close and necessary causal connection to the board's direct fiscal management.[62]

Application for Provisional Measures, ¶ 54; **Ex. RL-6**, Political Constitution of the Republic of Colombia, after Legislative Act No. 4 of September 18, 2019 ("Current Constitution"), Article 277(6). The PGN Decision concludes the disciplinary investigation conducted by the PGN against three members of the board of directors and three officials of Reficar. FPJVC was not subject to disciplinary investigation by the PGN. **Ex. R-106**, PGN Decision, p. 1. All references to FPJVC in the PGN Decision are tangential and were made in the context of analyzing the conduct of the six Reficar officials under disciplinary investigation. The PGN has no authority whatsoever to determine who is a fiscal manager or to investigate or declare the existence of fiscal liability, so its decision could hardly contradict the decisions of the CGR.

[61] *See for example*, **Ex. R-104**, Ruling of Second Instance – Part 4: Considerations II, p. 1206 (stating that "[Foster Wheeler and Process Consultants] did not have the power to decide in a decisive and effective manner on the approval of major investments assigned to Reficar's board of directors.") (translation from Spanish).

[62] *See for example*, *Id.*, p.1225 ("[FPJVC] . . . was responsible . . . for providing projections and project information, as well as for carrying out validations of estimates and schedules, which were taken into account in the decision making process for the approval of the change controls, as was clearly proven by the first instance.") (translation from Spanish). The notion of indirect fiscal management has been part of the Colombian legal system since 2000, when the law governing the fiscal liability proceeding came into force. **Ex. RL-8**, Prior Law 610 of 2000, Article 1 ("A fiscal liability proceeding is the set of administrative actions carried out by the comptrollers' offices in order to determine and establish the liability of public servants and private parties, when in the exercise of fiscal management, or in connection with fiscal management, they cause, by their willfully negligent or negligent actions or omissions, a damage to the State's assets."), Article 6 ("Such [property] damage may be caused by the action or omission of public servants or private parties who, willfully negligently or negligently, directly produce a damage to public assets or contribute to such damage.") (translation from Spanish; emphasis added). As explained by Respondent in its Memorial, in a 2001 judgment the Constitutional Court explained that not only those who directly manage public funds may be subject to fiscal liability under Law 610 of 2000, but also those who contribute to the economic damage through conduct that has a close and necessary connection to the exercise of fiscal management (*i.e.*, indirect fiscal management). Memorial, ¶ 79; **Ex. RL-16**, Constitutional Court of Colombia, Constitutional Judgment No. C-840, August 9, 2001, pp. 22-23. The constitutional precedent of the Constitutional Court is controlling for administrative authorities, such as the CGR. **Ex. RL-274**, Constitutional Court of Colombia, Constitutional Judgment No. C-539, July 6, 2011, p. 25 ("[A]ll public authorities . . . . are subject to the Constitution and the law, and as part of this subjection, the administrative authorities must comply with the judicial precedents issued by the High Courts of the ordinary,

34. Regarding the degree of FPJVC's fault and the causal link between its conduct and the economic damage, the Fiscal Chamber underscored that Foster Wheeler and Process Consultants were negligent by not preventing, as management consultants for the Project, the factors that led to the unjustified increase in the Project's costs as reflected in Change Controls 2 and 3 approved by the Reficar board of directors.[63]

35. In response to Claimants' argument, which they have raised in both the Appeal and this Arbitration, [redacted],[64] the Fiscal Chamber acknowledged that the Services Contract allows Foster Wheeler and Process Consultants to resolve their contractual disputes with Reficar [redacted], but found that that the Deputy Comptroller's analysis correctly focused on Claimants' fiscal, not contractual, liability.[65]

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administrative adjudicatory, and constitutional jurisdiction.") (translation from Spanish). As is usual in the development of legislation, Decree 403 of 2020 incorporates, among other things, this and other judicial interpretations that were already part of the legal system. Therefore, Claimants are wrong when they assert that the Deputy Comptroller and the Fiscal Chamber applied the law retroactively by charging them with fiscal liability as indirect fiscal managers for their contribution to the economic damage to the State. Application for Provisional Measures, ¶¶ 18, 19, 64-71, 74, 75; Counter-Memorial, ¶ 59, n. 118. The Deputy Comptroller and the Fiscal Chamber only applied a concept that had existed in the Colombian legal system for many years, way before Claimants made their purported investment in Colombia.

[63] *See for example*, **Ex. R-104**, Ruling of Second Instance – Part 4: Considerations II, p. 1232 (indicating that during the Fiscal Liability Proceeding the CGR found that the "FPJVC . . . was negligent in the approval of change controls 2 and 3, by not preventing, from its work as Project Manage[r] within the key areas of the project, the situations related to costs, risks and other factors, which generated the unjustified increase of investments in the execution of the [Project] through repeated delays and conduct[] that led to the payment of goods and services not foreseen for the Cartagena Refinery project.") (translation from Spanish). *See* Memorial, ¶¶ 153-155.

[64] **Ex. R-89**, Appeal, pp. 18-19; Application for Provisional Measures, ¶ 3, n. 20; Counter-Memorial, ¶¶ 61, 65, 114.

[65] *See for example*, **Ex. R-104**, Ruling of Second Instance – Part 4: Considerations II, p. 1203 ("[T]he debate in this procedure was not about the fulfillment or non-fulfillment of the Contract, . . . [but rather about] the conduct of the parties of the [FPJVC] - regardless of the fulfillment of the contract -, which generated the economic damage[.] The contractual clauses related to the resolution of disputes between the parties and derived from the contract itself, [do] not derogate the competence of the [CGR] to carry out fiscal liability proceedings[.] In fact[,] [the CGR] is not carrying out a judicial proceeding, but a special administrative

36. The Ruling of Second Instance brought the declaratory stage at the administrative level of the Fiscal Liability Proceeding to a close, and the Ruling with Fiscal Liability became "binding" or "final".[66] The enforceability or finality of the Ruling with Fiscal Liability has two relevant legal consequences: (i) it enables the exercise of judicial control over the Ruling with Fiscal Liability by the courts of the administrative adjudicatory jurisdiction; and (ii) it requires that the CGR initiate enforcement of the joint and several payment obligation of the fiscally liable parties set forth in the Ruling with Fiscal Liability, thus starting the execution stage at the administrative level of the Fiscal Liability Proceeding, which in turn consists of a voluntary collection stage followed by a forced collection stage.[67]

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proceeding [that is] compensatory in nature.") (translation from Spanish; emphasis added). Colombia has extensively explained the difference between fiscal and contractual liability. *See* Memorial, ¶¶ 81, 145, 158, 221, n. 342; n. 118, *infra*.

[66] **Ex. RL-8**, Prior Law 610 of 2000, Article 56(3); **Ex. R-105**, Ruling of Second Instance – Part 5: Considerations III, conclusions and resolution, p. 2161.

[67] **Ex. RL-5**, Political Constitution of the Republic of Colombia, prior to Legislative Act No. 4 of September 18, 2019 ("Prior Constitution"), Article 268(5); **Ex. RL-6**, Current Constitution, Article 268(5). Claimants assert that the Fiscal Chamber's confirmation of the Ruling with Fiscal Liability was "a forgone conclusion". Application for Provisional Measures, ¶ 89. This is mere speculation that ignores the fact that the Comptroller General of the Republic does not have the power to influence the decisions of the officials comprising the Fiscal Chamber. Under the constitutional principle of accountability of public servants, each official of the Fiscal Chamber must act in accordance with the law and be individually accountable for his or her actions. **Ex. RL-6**, Current Constitution, Article 6 (". . . Public servants are responsible for the same reason and for omission or for acting *ultra vires* in the exercise of their function."), Article 121 ("No authority of the State may exercise functions different from those assigned to it by the Constitution and law."), Article 123 ("Public servants are at the service of the State and of the community; they shall exercise their functions as provided by the Constitution, the law and the [relevant] regulation.") (translation from Spanish). Therefore, from the mere composition of the Fiscal Chamber it does not follow that such chamber issues decisions contrary to law just to obey the Comptroller General of the Republic. In its Memorial, Respondent also provided several examples of rulings with fiscal liability overturned by the Fiscal Chamber. Memorial, ¶ 209, n. 416.

D. Judicial Control of the Ruling with Fiscal Liability Is Pending

37. In strict compliance with the law currently in force, the CGR forwarded the administrative file of the Fiscal Liability Proceeding to the *Consejo de Estado* so that it could conduct the automatic and comprehensive legality control of the Ruling with Fiscal Liability.[68] The *Consejo de Estado* is the highest court of the administrative adjudicatory jurisdiction.[69]

38. On August 26, 2021, Special Decision Chamber No. 20 of the *Consejo de Estado* held that it would not conduct the automatic and comprehensive legality control on the Ruling with Fiscal Liability,[70] in furtherance of the guidelines previously set by the full chamber of the *Consejo de Estado*.[71]

39. In reaching its decision, the *Consejo de Estado* applied a concept known in Colombian constitutional law as an exception of unconstitutionality.[72] This concept is based on the principle of constitutional supremacy and allows any judicial authority to disapply a rule if it runs contrary to the Constitution.[73] The exception of unconstitutionality

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[68] **Ex. RL-12**, Law 2080 of 2021, which amends the Code of Administrative Procedure and Administrative Adjudicatory Proceedings – Law 1437 of 2011 – and establishes other provisions regarding decongestion in the proceedings that are carried out before the jurisdiction ("Law 2080 of 2021"), Articles 23, 45.

[69] **Ex. RL-24**, Law 1437 from 2011, which establishes the Code of Administrative Procedure and Administrative Adjudicatory Proceedings ("Administrative Code"), Article 107.

[70] **Ex. R-99**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, Special Decision Chamber No. 20, Decision on Admission, August 26, 2021 ("*Consejo de Estado* – Decision on Admission"), p. 13.

[71] In its Memorial, Respondent warned that on June 29, 2021, the plenary session of the *Consejo de Estado* issued a unification order indicating that it would abstain from performing the automatic and comprehensive legality control over rulings with fiscal liability because it considered that such control did not comply with certain constitutional provisions. *See* Memorial, n. 226.

[72] **Ex. R-99**, *Consejo de Estado* – Decision on Admission, pp. 7-12.

[73] The Constitution of Colombia provides that "[t]he Constitution is the supreme law. In the event of any conflict between the Constitution and the law, or any other regulation, the application of the Constitution shall prevail." **Ex. RL-5**, Prior Constitution, Article 4; **Ex. RL-6**, Current Constitution, Article 4.

has *inter partes* effects, and therefore, the rule that a judicial authority decides to disapply remains in force in the legal system until it is declared unconstitutional, with *erga omnes* effect, by the Constitutional Court.[74]

40. The *Consejo de Estado* disapplied the law that establishes the automatic and comprehensive legality control of the Ruling with Fiscal Liability[75] because it considered, *inter alia*, that the control: (i) disregards the right to due process of those fiscally liable insofar that it leaves the opportunity to present and contradict evidence at the judge's discretion; (ii) affects the right to the administration of justice of those fiscally liable by treating them as intervening parties and not as parties to the proceeding; (iii) does not allow those fiscally liable to request a suspension of the effects of rulings with fiscal liability; and (iv) violates the right to equal treatment of those fiscally liable *vis-à-vis* others, who may resort to an annulment and reinstatement of rights action in order to assert their individual interests and request compensation for damages.[76]

41. As a result of the automatic and comprehensive legality control not being conducted, the *Consejo de Estado* returned the file of the Ruling with Fiscal Liability to the Deputy Comptroller and declared that the parties found fiscally liable, including Foster Wheeler and Process Consultants, could file an annulment and reinstatement of rights action against the Ruling with Fiscal Liability.[77] According to the *Consejo de Estado*, the

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[74] The Constitutional Court, as the highest court in constitutional matters, is the only judicial authority authorized to withdraw from the legal system the law that created the automatic and comprehensive legality control of rulings with fiscal liability. **Ex. RL-5**, Prior Constitution, Article 241(4); **Ex. RL-6**, Current Constitution, Article 241(4).

[75] **Ex. RL-12**, Law 2080 of 2021, Articles 23, 45.

[76] **Ex. R-99**, *Consejo de Estado* – Decision on Admission, pp. 8-12.

[77] *Id.*, p. 13.

annulment and reinstatement of rights action is a mechanism for accessing the judicial level that guarantees the constitutional rights of those held fiscally liable.[78]

42. The annulment and reinstatement of rights action is a longstanding judicial remedy in the Colombian legal system that allows people to seek the annulment of specific administrative acts, such as the Ruling with Fiscal Liability, before the administrative adjudicatory jurisdiction.[79]

43. Pursuant to the Administrative Code, Foster Wheeler and Process Consultants may seek the annulment of the Ruling with Fiscal Liability before an administrative adjudicatory judge on any of the following grounds: (i) that the Ruling with Fiscal Liability violates the rules on which it should have been based; (ii) that the CGR lacked jurisdiction to issue the Ruling with Fiscal Liability; (iii) that the Ruling with Fiscal Liability was issued in an irregular manner; (iv) that the CGR disregarded the rights of Foster Wheeler and/or Process Consultants to a hearing and a defense; (v) that the facts underpinning the Ruling with Fiscal Liability are false; or (vi) that the CGR abused its power, *i.e.*, it exercised its power for purposes other than those stipulated by law. Virtually

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[78] Claimants assert that "it is very unlikely that any members of the judiciary will risk nullifying the [Ruling with Fiscal Liability]." **CWS-1**, Witness Statement of César Torrente, ¶ 16. *See also id.*, ¶ 14 ("any judicial challenge to the [Ruling with Fiscal Liability] . . . by Claimants in Colombia will also be rejected."). Contrary to this unfounded and irresponsible conjecture, the action of the *Consejo de Estado* is nothing more than a display of independence and impartiality of the administrative adjudicatory jurisdiction in favor of the protection of the constitutional rights of individuals, including Claimants.

[79] The emphasis on the administrative adjudicatory nature of judicial control is deliberate. In an unsuccessful attempt to convince the Tribunal that the Ruling with Fiscal Liability is the result of an administrative adjudicatory proceeding under Article 10.5.2(a) of the Treaty, Claimants argue that the Ruling with Fiscal Liability is the result of an "administrative adjudicatory proceeding." The Spanish version of the Treaty expressly refers to "*procedimientos contencioso administrativos*" ("administrative adjudicatory proceedings"). **Ex. RL-1**, Treaty, Article 10.5.2(a). Under Colombian law an administrative adjudicatory proceeding is necessarily brought before the administrative adjudicatory jurisdiction. No proceeding before an administrative authority (such as the CGR) is "administrative adjudicatory" in nature. **Ex. RL-24**, Administrative Code, Articles 104. Claimants' witness, César Torrente, confirms this by pointing out that judicial control occurs before the administrative adjudicatory jurisdiction. **CWS-1**, Witness Statement of César Torrente, ¶ 14. *See* ¶ 98, n. 172, *infra*.

all of the challenges that Claimants have raised against the Fiscal Liability Proceeding and in this Arbitration could be heard in an annulment and reinstatement of rights action.[80]

44. Through an annulment and reinstatement of rights action, Foster Wheeler and Process Consultants may also petition a judge to reinstate the rights allegedly violated by the CGR, as well as to award effective compensation for the alleged damage caused by the Ruling with Fiscal Liability.[81]

45. In the administrative adjudicatory proceeding, Claimants would have the constitutional guarantees of any judicial proceeding, including due process, the opportunity to present and contradict evidence, the right to challenge a potential judgment, and the opportunity to request precautionary measures, such as the provisional suspension of the enforcement of the Ruling with Fiscal Liability.[82]

46. Broadly speaking, due to the extensive protections afforded at the judicial level, the administrative adjudicatory proceeding is carried out in several stages.

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[80] The Superior Court of Bogota, which resolved one of the *Acciones de Tutela* filed by Claimants, indicated that the administrative adjudicatory jurisdiction is the "suitable and effective" jurisdiction to rule on Claimants' complaints regarding the Fiscal Liability Proceeding. **Ex. R-100**, *Tutela* Judgment of Second Instance 2021-A, p. 7 (pointing out that "the ordinary judicial proceeding [*i.e.*, administrative adjudicatory] is suitable and effective for obtaining the defense of the constitutional guarantees of the claimants vis-à-vis what happened in the fiscal liability proceeding against them, because it is the appropriate scenario to settle the legal and evidentiary disagreements with respect to what was decided therein.") (translation from Spanish; emphasis added).

[81] **Ex. RL-24**, Administrative Code, Article 138.

[82] **Ex. RL-6**, Current Constitution, Articles 29, 238; **Ex. RL-24**, Administrative Code, Articles 101(2), 103, 229, 230. As Respondent explained in its Answer to Provisional Measures Application, one of the precautionary measures that Foster Wheeler and Process Consultants could request is the provisional stay of enforcement of the Ruling with Fiscal Liability. Answer to Claimants' Application for Provisional Measures, October 28, 2021 ("Answer to Application for Provisional Measures"), ¶¶ 34, 37, n. 66. Claimants mistakenly assert that the provisional stay of the Ruling with Fiscal Liability "is not a legitimate option for Claimants" because it would require them to "post[] a bond in an amount that was sufficient to cover the payment of the integral value of the damage estimated in the [Ruling with Fiscal Liability], or 1.5 times the amount of the [Ruling with Fiscal Liability]." Application for Provisional Measures, n. 14. The law clearly states that "[n]o bond shall be required in the case of a provisional stay of the effects of administrative acts." **Ex. RL-24**, Administrative Code, Article 232.

Although it is not a formal part of the process, Claimants must make a request for extrajudicial conciliation as a procedural requirement before they can initiate an annulment and reinstatement of rights action.[83] Once the conciliation request has been made, and if the conciliation fails, Claimants may file their claim and initiate the administrative adjudicatory proceeding, which consists of three stages: first, from the filing of the claim to the initial hearing; second, from the conclusion of the initial hearing until the completion of the evidentiary hearing; and third, from the conclusion of the evidentiary hearing until the notification of the judgment. The third stage includes a hearing for the parties to present their oral arguments.[84]

47. If, as a result of an annulment and reinstatement of rights action, an administrative adjudicatory judge were to annul the Ruling with Fiscal Liability, it would be deprived of effects, losing its finality and enforceability.[85]

48. As of the filing date of this Reply, the judicial control process of the Ruling with Fiscal Liability before the courts of the administrative adjudicatory jurisdiction has not begun. Those fiscally liable, including Foster Wheeler and Process Consultants, have until January 2022 to file their respective annulment and reinstatement of rights actions. As already indicated by Colombia, the CGR will not be able to auction any of the assets of Claimants that it may eventually manage to seize until the administrative adjudicatory

[83] **Ex. RL-24**, Administrative Code, Article 161(1). *See* **Ex. RL-275** Law 270 of 1996, Statutory Law on the Administration of Justice, Article 42A.

[84] **Ex. RL-24**, Administrative Code, Article 179.

[85] **Ex. RL-24**, Administrative Code, Articles 137, 138.

jurisdiction has decided upon the potential annulment and reinstatement of rights actions filed by Foster Wheeler and Process Consultants.[86]

49. The mere fact that the courts of the administrative adjudicatory jurisdiction have not yet had the opportunity to decide upon the Ruling with Fiscal Liability defeats Claimants' FET claim. There is not even a *prima facie* claim of denial of justice.[87]

E. The Amount of the Ruling with Fiscal Liability Has Been Reduced by the Payments of other Fiscally Liable Parties

50. As Respondent explained in its Memorial, the obligation to pay the Ruling with Fiscal Liability is joint and several.[88] Accordingly, the amount of the Ruling with Fiscal Liability will be reduced as and when payments are made by others who are fiscally liable or by civilly liable third parties.

51. Approximately one month after the Ruling of Second Instance, the insurance companies that were declared civilly liable third parties paid a portion of the Ruling with Fiscal Liability equal to COP$ 4.459.460.250 (approximately US$ 1.150.000).[89] Like these insurance companies, other debtors of the Ruling with

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[86] **Ex. RL-33**, Decree Law 403 of 2020, which establishes rules for the proper implementation of Legislative Act 04 of 2019 and the strengthening of fiscal control ("Decree Law 403 of 2020"), Article 116. *See* Memorial, ¶ 120; Answer to Claimants' Application for Emergency Temporary Relief, September 30, 2021 ("Answer to Application for Emergency Temporary Relief"), ¶ 48; Rejoinder on Claimants' Application for Emergency Temporary Relief, October 18, 2021 ("Rejoinder on Application for Emergency Temporary Relief"), ¶ 41; Answer to Application for Provisional Measures, ¶¶ 34, 37, n. 93; **CWS-1**, Witness Statement of César Torrente, ¶ 32.

[87] *See* ¶¶ 141-150, *infra*.

[88] Memorial, ¶¶ 88, 108, 127, 150, n. 515.

[89] **Ex. R-107**, Office of Forced Collection No. 1 of the CGR, Forced Collection Proceeding DCC1-037, Order No. DCC1-277, November 18, 2021, pp. 4-10. The Director of Forced Collection decided to remove insurers Confianza S.A. and Liberty Seguros S.A. from the collection proceeding following the payment of the total amount of the policies they had issued. The Director of Forced Collection decided not to remove insurer AXA Colpatria Seguros S.A. from the collection proceeding, because that insurer made a mistake in calculating the exchange rate and thus it still owed a portion of its obligation. *Id.*, pp. 9-10.

Fiscal Liability may make payments of the economic damage determined therein, either voluntarily or by way of forced collection.[90]

52. Since others who are fiscally liable may make payments towards the joint and several payment obligation determined by the Ruling with Fiscal Liability, it is impossible to predict whether the CGR will enforce any amount of the Ruling with Fiscal Liability against the assets of Foster Wheeler and Process Consultants, which, in any event, have not been identified by the CGR.[91]

F. The CGR Commenced the Voluntary Collection Stage of the Ruling with Fiscal Responsibility

53. Respondent has explained that the CGR has a constitutional and legal duty to collect the amount of the economic damage established in the Ruling with Fiscal Liability through a collection procedure consisting of two stages: a voluntary collection stage and a forced collection stage.[92]

54. On October 6, 2021, the Director of Forced Collection No. 1 of the CGR (the "Collection Director") issued an order beginning the collection proceeding for the Ruling with Fiscal Liability.[93] In addition, on November 29, 2021, the Collection Director issued voluntary collection notices inviting Process Consultants and the other debtors to pay or negotiate settlements to satisfy the outstanding amount of the Ruling with Fiscal

[90] *See* ¶ 55, *infra*.

[91] *See* Answer to Application for Provisional Measures, ¶ 34; ¶¶ 63, 198, *infra*.

[92] In its pleadings, Respondent has explained in detail the forced collection proceeding of the Ruling with Fiscal Liability carried out by the CGR. *See* Memorial, ¶¶ 115-120; Answer to Application for Emergency Temporary Relief, ¶¶ 39-49; Answer to Application for Provisional Measures, ¶¶ 34, 37; Respondent's Presentation at the Provisional Measures Hearing, November 4, 2021, p. 34.

[93] **Ex. R-108**, Office of Forced Collection No. 1 of the CGR, Forced Collection Proceeding DCC1-037, Order No. DCC1-220, October 6, 2021.

Liability.[94] As of the date of this Reply, the collection procedure is in the voluntary collection stage.[95]

55. During the voluntary collection stage, the outstanding amount of the Ruling with Fiscal Liability may continue to be reduced as and when other debtors of the Ruling with Fiscal Liability make payments or as a result of the CGR and those debtors entering into payment settlement agreements.

56. If the voluntary collection stage concludes without the CGR obtaining payment or entering into the necessary agreements to recoup the outstanding amount of the Ruling with Fiscal Liability, the forced collection stage will proceed thereafter.

57. Colombia has already explained in detail the actions that take place during the forced collection stage.[96] Claimants will have several opportunities to oppose collection of the Ruling with Fiscal Liability, at both the administrative and judicial level:

Administrative level:

- Claimants may raise the objections stipulated by law against the payment order, including, *inter alia*, the existence of a payment agreement, lack of enforceability, or suspension of the enforceable instrument (*i.e.*, the Ruling with Fiscal Liability).[97]

[94] **Ex. R-109**, Office of Forced Collection No. 1 of the CGR, Persuasive Collection Notice No. 2021EE0205818 addressed to Process Consultants, November 29, 2021. Claimants provided this notice by email to the Tribunal dated December 6, 2021, without assigning it a factual exhibit number, so Respondent resubmits it as **Ex. R-109**.

[95] The persuasive collection stage may last up to three months. *See* Answer to Application for Emergency Temporary Relief, ¶ 41; Answer to Application for Provisional Measures, ¶ 37.

[96] Memorial, ¶¶ 115-120.

[97] *Id.*, ¶ 118. *See* **Ex. RL-34**, Decree Law 624 of 1989, which establishes the Tax Code for Taxes Administered by the National Tax and Customs Office, Article 831.

- During the proceeding to decide on the objections to the payment order, Claimants may request the taking of evidence.[98]

- If the CGR rejects all or part of the objections to the payment order and orders the execution and auction of any seized assets, Claimants may oppose the execution again by way of a request for reconsideration.[99]

- If the CGR definitively decides to reject the objections and order the execution and auction of any seized assets, Claimants may challenge such a decision before the administrative adjudicatory jurisdiction.[100]

Judicial level:

- Within the framework of an annulment and reinstatement of rights action before the administrative adjudicatory jurisdiction, Claimants may request a provisional suspension of the enforcement of the Ruling with Fiscal Liability and/or the administrative act ordering the execution and auction of any seized assets as a precautionary measure. Requesting such a precautionary measure does not require Claimants to post a bond.[101]

58. The effectiveness of the forced collection is contingent upon the CGR being able to (i) identify assets owned by the debtors of the Ruling with Fiscal Liability, whether in Colombia or abroad, (ii) seize such assets, and (iii) ultimately, auction such assets to satisfy the amount of the Ruling with Fiscal Liability.

59. In the context of Claimants' Provisional Measures Application, Colombia has already highlighted the enormous legal and practical difficulties faced by the CGR in identifying and seizing assets abroad.[102] In fact, as of the date of this Reply, the only

[98] **Ex. RL-33**, Decree Law 403 of 2020, Article 114(2).

[99] Memorial, ¶ 119. *See* **Ex. RL-33**, Decree Law 403 of 2020, Article 114.

[100] Memorial, ¶ 120. *See* **Ex. RL-33**, Decree Law 403 of 2020, Articles 116.

[101] **Ex. RL-24**, Administrative Code, Articles 229, 230(3), 232. *See* ¶ 45, *supra*. *See also* Answer to Application for Emergency Temporary Relief, n. 70; Rejoinder on Application for Emergency Temporary Relief, n. 66.

[102] *See* Answer to Application for Emergency Temporary Relief, ¶¶ 35, 36, 46; Rejoinder on Application for Emergency Temporary Relief, ¶ 41, n. 71; Answer to Application for Provisional Measures, ¶ 34, n. 78. Claimants themselves provided supporting documentation confirming the difficulties faced by the CGR

fiscally liable parties against whom the CGR has not issued precautionary measures are the foreign parties [redacted], including Foster Wheeler and Process Consultants.[103] Furthermore, Respondent has already explained that the CGR will only be able to auction any seized assets when a final pronouncement has been made by the administrative adjudicatory jurisdiction regarding the annulment and reinstatement of rights actions filed by Claimants against the Ruling with Fiscal Liability[104] and/or the administrative act ordering the execution and auction of any seized assets.[105] If the possibility of the CGR auctioning the local assets of Colombian debtors in the forced collection proceeding of the Ruling with Fiscal Liability is distant, the auctioning of Claimants' foreign assets is an altogether remote and hypothetical scenario.

60. In its Memorial, Colombia described the stages of a fiscal liability proceeding: (i) the preliminary investigation, (ii) the initiation stage, (iii) the indictment stage, (iv) the ruling and administrative remedies stage, (v) the judicial control stage, and (vi) the forced collection stage.[106] Currently, stages (v) and (vi) are pending. The following diagram shows the current status of the Fiscal Liability Proceeding (marked with a star), as well as the multiple pending administrative and judicial proceedings and

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when identifying assets abroad. **Ex. C-23**, Jaime Gnecco, *National and International Cooperation Unit for Asset Prevention, Investigation and Seizure, International Cooperation in Non-Criminal Matters-Administrative Procedures of the Comptroller General's Office of the Republic of Colombia*, November 3, 2015, pp. 12-13 (Claimants have not submitted a translation of this document into Spanish).

[103] **Ex. R-97**, Letter from the Deputy Comptroller No. 15 to the CGR's Forced Collection Office, July 18, 2021, pp. 7-8.

[104] *See* ¶ 48, n. 46, *supra*; **CWS-1**, Witness Statement of César Torrente, ¶ 32.

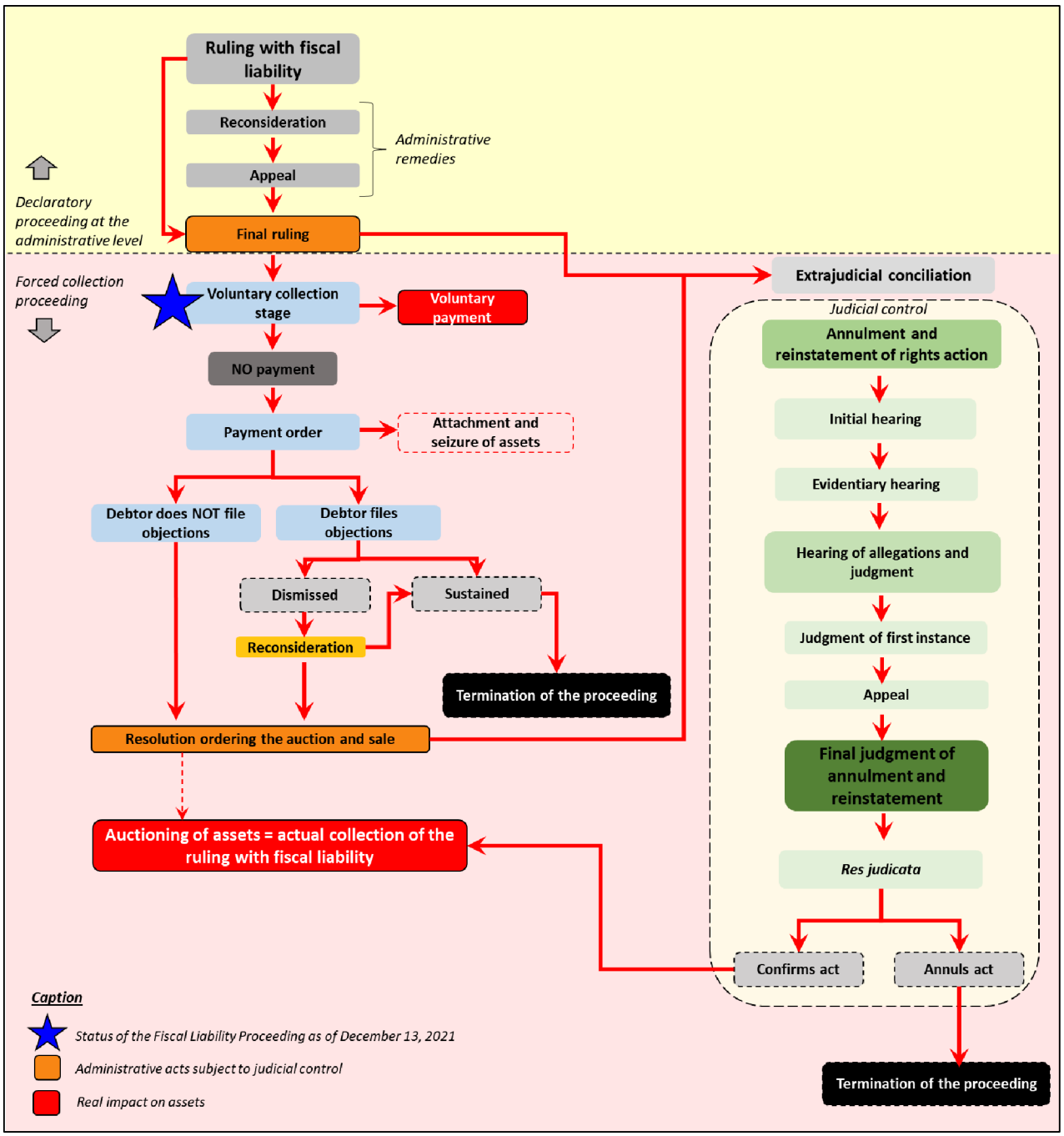
[105] Memorial, ¶ 120, Answer to Application for Emergency Temporary Relief, ¶ 48; Rejoinder on Application for Emergency Temporary Relief, ¶ 41; Answer to Application for Provisional Measures, ¶ 37, n. 93. *See* **Ex. RL-33**, Decree Law 403 of 2020, Article 116.

[106] Memorial, ¶¶ 89-121.

appeals (marked with a pink background) that would have to be resolved before there is a measure capable of causing monetary harm or damage to Claimants.[107]

[107] The figure only describes the main stages of the administrative adjudicatory proceeding under Article 179 of the Administrative Code. For a detailed description of the administrative adjudicatory proceeding, *see* **Ex. RL-24**, Administrative Code, Title V.

Figure 1 – Status of the Fiscal Liability Proceeding as of 13 December 2021



61. The absence of a measure capable of constituting a breach of the substantive obligations under the Treaty or an investment agreement at the time that

Claimants filed their Notice of Arbitration (and even now) constitutes a violation of the requirement in Article 10.16.1 of the Treaty for the submission of a claim to arbitration.[108]

62. Additionally, the absence of any damage by reason of, or arising out of, Colombia's alleged breach at the time that Claimants' filed their Notice of Arbitration (and even now) also constitutes a breach of the requirement in Article 10.16.1 of the Treaty for the submission of a claim to arbitration.[109] Claimants have not suffered any actual economic damage to date because neither Foster Wheeler nor Process Consultants have made any payments, voluntary or forced, towards the Ruling with Fiscal Liability. Nor are their assets subject to liens or other measures affecting their property rights.

63. There is also no certainty that Claimants will ever suffer any actual damage in the future because of the total uncertainty as to whether the Ruling with Fiscal Liability will eventually be enforced forcibly against the assets of Foster Wheeler and Process Consultants. As Colombia has already indicated, this uncertainty arises from: (i) the joint and several nature of the payment obligation set forth in the Ruling with Fiscal Liability and the possibility of its reduction due to payments made by other fiscally liable parties,[110] (ii) the challenges faced by the CGR in the identification and seizure of assets abroad,[111] (iii) the possibility of the courts of the administrative adjudicatory jurisdiction annulling the Ruling with Fiscal Liability,[112] and even if it is not annulled, (vi) the possibility that there are no seized assets of Foster Wheeler and Process Consultants that can be

[108] *See* ¶¶ 92-108, *infra*.

[109] *See* ¶¶ 190-215, *infra*.

[110] *See* ¶¶ 31, 50-52, *supra*.

[111] *See* ¶¶ 58-59, *supra*.

[112] *See* ¶¶ 42-45, *supra*.

auctioned.[113] The uncertainty as to the very existence of a damage (let alone its amount) shows that the damages claimed by Claimants are entirely hypothetical. The tribunal has no power under the Treaty to award compensation for hypothetical damages.[114]

64. For these reasons, the Tribunal cannot, as a matter of law, make an award in Claimants' favor under Article 10.26 of the Treaty.[115]

G. [redacted]

65. [redacted].[116] [redacted].[117]

[113] *See* ¶ 59, *supra*.

[114] *See* ¶¶ 228-236, *infra*.

[115] *See* ¶ 78, *infra*.

[116] [redacted]. *See* Memorial, ¶¶ 57- 59.

[117] **Ex. C-7**, *Refinería de Cartagena, S.A.S. v. Joint Venture Foster Wheeler USA Corporation and Process Consultants Inc. et al.*, Request for Arbitration, June 23, 2021, pp. 5-6. Claimants are wrong to suggest

66. The mere fact that [redacted] demonstrates that Claimants' claim for "expropriation of [redacted]" has no merit. The CGR has in no way deprived Claimants of the right to pursue their contractual disputes against Reficar [redacted]. Contractual liability [redacted] is independent and autonomous from the fiscal liability arising from the Ruling with Fiscal Liability.[118]

H. [redacted]

67. [redacted][119] [redacted]

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that the [redacted] would lead to a double recovery of the economic damage identified by the CGR. *See* Application for Provisional Measures, n. 109. In its Memorial, Colombia has already explained that the nature of fiscal liability is purely compensatory. As a result, if part of the economic damage to the State is recovered in another forum [redacted], it must necessarily be taken into account in the Fiscal Liability Proceeding. Memorial, ¶ 81, n. 342.

[118] As indicated by Respondent in its Memorial, while fiscal liability seeks compensation for the economic damage to the State caused by inadequate fiscal management, contractual liability seeks compensation for damages caused by the breach of obligations under a contract. Memorial, ¶ 81, n. 177. *See also id.*, ¶¶ 220-222. Respondent also described the CGR's analysis regarding the clear distinction between the Claimant's contractual and fiscal liability. *Id.*, ¶¶ 157-158, n. 343. Although contractual liability and fiscal liability are autonomous and independent, the CGR refers to the obligations of Foster Wheeler and Process Consultants under the Services Contract because it is that contractual relationship that creates a connection between Claimants and the fiscal management of public assets by Reficar. However, the CGR clearly states that the purpose of the Fiscal Liability Proceeding is not to determine the performance or non-performance of the Services Contract. *Id.*, ¶¶ 153-154, nn. 336, 338.

[119] Counter-Memorial, ¶ 121.

[redacted]

[redacted].[120]

68. [redacted]

[redacted][121] – [redacted]

[redacted]

[redacted].[122]

69. [redacted]

[redacted]

[redacted][123] [redacted]

[redacted].[124]

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[120] **Ex. R-110**, John Wood Group PLC, UNLOCKING SOLUTIONS TO THE WORLD'S MOST CRITICAL CHALLENGES, Annual Report and Accounts 2020, March 2021, pp. 203-204 (listing both Process Consultants, Inc. and Amec Foster Wheeler USA Corporation as 100% owned U.S.-based subsidiaries).

[121] [redacted]. *See generally,* **Ex. R-110**, John Wood Group PLC, UNLOCKING SOLUTIONS TO THE WORLD'S MOST CRITICAL CHALLENGES, Annual Report and Accounts 2020, March 2021.

[122] [redacted]. *See id.*, p. 1 [redacted]

[123] **Ex. R-111**, [redacted] 7.

[124] **Ex. R-112**, [redacted]; **Ex. R-113**, [redacted] **Ex. R-114**, [redacted]; **Ex. R-115**, [redacted].

[redacted][125]

[redacted]

70. [redacted]

[redacted][127]

71. [redacted]

[redacted]

[125] **Ex. R-112**, [redacted].

[126] **Ex. R-116**, [redacted] (emphasis added).

[127] **Ex. R-116**, [redacted]

[redacted].”[128] [redacted]

[redacted].”[129] [redacted]

[redacted]

[redacted]

[redacted]”[130] [redacted]

[redacted]:

[redacted]

[131]

72. [redacted]

[redacted][132]

[128] **Ex. R-117**, [redacted]

[129] **Ex. R-116**, [redacted] (emphasis added).

[130] *Id.*

[131] *Id.*

[132] **Ex. R-117**, [redacted]

[redacted][133]

[redacted]

73. [redacted]

[redacted]t.[134] [redacted]

[redacted]

[redacted]

[redacted].[135]

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[133] **Ex. R-115**, [redacted].

[134] **Ex. *R-118***, [redacted].

[135] **Ex. R-119,** [redacted] **Ex. R-120,** *See* **Ex. R-121**, ; **Ex. R-122**, . **Ex. R-120**,

74. [redacted]

[redacted][136]

[redacted][137]

[redacted]

[redacted]

[136] **Ex. R-123**, [redacted]; **Ex. R-119**, [redacted]

[137] **Ex. R-119**, [redacted]

[redacted][138]

75. [redacted]

[redacted]"[139] [redacted]

[redacted]

[redacted]

[redacted][140] [redacted]

[138] **Ex. R-123**, [redacted]

[139] **Ex. R-119**, [redacted]

[140] *Id*.

[redacted]”[141] [redacted]

[redacted][142]

76. [redacted]

[redacted]”[143]

77. [redacted]

[redacted].[144]

PRELIMINARY OBJECTION UNDER ARTICLE 10.20.4 OF THE TREATY

78. Colombia has filed a preliminary objection under Article 10.20.4 of the Treaty requesting that this Tribunal dismiss Claimants' claim on the grounds that, as a matter of law, it is not a claim for which an award can be made in their favor.[145] Firstly, Claimants have not submitted a claim to arbitration that meets the requirements of Article

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[141] *Id*.

[142] **Ex. R-124**, [redacted].

[143] **Ex. R-125**, [redacted].

[144] *See* ¶¶ 217-224, *infra*.

[145] In their Counter-Memorial, Claimants do not contest the general scope of this preliminary objection or the requirements for it to be upheld. *See* Memorial, ¶¶ 164-166, nn. 350, 351. Claimants only cite to a number of legal authorities on the interpretation of ICSID Arbitration Rule 41(5), which are irrelevant to the interpretation of Article 10.20.4 of the Treaty, given that the two provisions are not analogous and contain different standards. *See* n. 149, *infra*.

10.16.1 of the Treaty,[146] and secondly, their claims exceed the forms of relief that the Tribunal is empowered to grant under Article 10.26 of the Treaty.[147]

79. While the Tribunal "shall assume to be true claimant's factual allegations in support of any claim" when ruling on Colombia's preliminary objection under Article 10.20.4, that presumption of truthfulness is limited to the factual allegations raised by Claimants in their Notice of Arbitration and does not extend to subsequent factual allegations, conclusions unsupported by factual allegations, or legal allegations.[148]

80. Seeking to abuse the narrow presumption of truthfulness set forth in Article 10.20.4 of the Treaty, in their Counter-Memorial Claimants would like this Tribunal to presume the truthfulness of factual allegations that were not included in their Notice of Arbitration (including allegations concerning the Ruling with Fiscal Liability and subsequent facts, all of which took place after the Notice of Arbitration), as well as allegations that are not factual but legal (in certain instances, substantially altering the legal allegations raised in their Notice of Arbitration).[149]

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[146] *See* ¶¶ 83-215, *infra*.

[147] *See* ¶¶ 216-236, *infra*.

[148] Memorial, n. 350; **Ex. RL-1**, Treaty, Article 10.20.4; **Ex. RL-36**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12 (DR-CAFTA), Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5, August 2, 2010 ("*Pac Rim*"), ¶¶ 90-91 ("[O]nly the notice (or amended notice) of arbitration which benefits from a presumption of truthfulness: there is to be no assumption of truth as regards factual allegations made elsewhere, for example in other written or oral submissions made by a claimant to the tribunal under the procedure for addressing the respondent's preliminary objection. . . . It is also only 'factual allegations' that are assumed to be true under this procedure. The phrase does not include any legal allegations. It could not therefore include a legal allegation clothed as a factual allegation. Nor could it include a mere conclusion unsupported by any relevant factual allegation without depriving the procedure of any practical application. In short, the Tribunal concludes, again, that substance must clearly prevail over form under this procedure.") (emphasis added). The Tribunal is not barred from considering other relevant facts which are not in dispute.

[149] In addition, in an attempt to alter the standard that the Tribunal must apply in analyzing Colombia's preliminary objection under Article 10.20.4 of the Treaty, Claimants rely on the decision in *RSM v. Grenada* which provides that the Notice of Arbitration should be construed liberally and that any doubt or uncertainty as to the scope of a claimant's allegation should be resolved in favor of the claimant. Counter-Memorial, ¶

81. However, if the Tribunal assumes the truthfulness of the factual allegations raised in the Notice of Arbitration – and those allegations alone -, it must necessarily conclude that, as a matter of law, it cannot make an award in Claimants' favor.

82. Colombia will now proceed to respond to the arguments raised by Claimants in their Counter-Memorial regarding its objection under Article 10.20.4 of the Treaty, which only serve to underscore the prematurity and impropriety of their claim.

I.

An Award Cannot Be Made in Claimants' Favor Because the Requirements of Article 10.16.1 of the Treaty Are Not Met

83. Colombia explained in its Memorial that, under Article 10.16.1 of the Treaty, in order for an investor – either on its own behalf or on behalf of an enterprise it owns or controls, directly or indirectly – to submit a claim to arbitration under the Treaty, two requirements must be met: (A) that there is a breach of a substantive obligation under the Treaty or of an investment authorization or investment agreement, and (B) that the claimant or enterprise has incurred loss or damage by reason of, or arising out of, such breach.[150] In their Counter-Memorial, Claimants failed to prove that they satisfy these essential requirements because such requirements are indeed not satisfied.

32; **Ex. CL-63**, *RSM Production Corporation v. Grenada,* ICSID Case No. ARB/10/6, Award, December 10, 2010 ("*RSM*"), ¶ 6.1.3. Like other legal authorities cited by Claimants, the *RSM* decision is irrelevant in this case because the tribunal in that case was interpreting ICSID Arbitration Rule 41(5), which contains different language from that in the Treaty, as well as a different object and purpose. *See* **Ex. RL-36**, *Pac Rim*, ¶ 118 ("The Tribunal was also not materially assisted by comparisons with NAFTA or the New ICSID Arbitration Rule 41.5, which have different wording and do not share exactly the same object and purpose.").

[150] Memorial, ¶¶ 168-261.

84. Failing to fulfill these requirements not only affects the admissibility of the claim Claimants submitted to arbitration, but also prevents the Tribunal from exercising *ratione voluntatis* jurisdiction over the case, since the Contracting Parties only consented to arbitrate claims if the conditions of Article 10.16.1 of the Treaty were met.[151]

85. Contrary to what Claimants suggest, whether the requirements of Article 10.16.1 of the Treaty for submitting a valid claim are met – and, by extension, whether a claim is ripe – must be assessed at the time the claim is submitted to arbitration. As correctly stated by the tribunal in *Glamis v. United States*:

> The issue of ripeness therefore turns on the determination of whether the challenged California measures had effected harm upon Claimant's property interests by the time Claimant submitted its claim to arbitration.[152]

86. This is also the position held by the United States, the other Contracting Party to the Treaty. In its submission as a non-disputing party in *Mesa Power v. Canada*, the United States stated:

> NAFTA Article 1116(1) further provides that an investor may submit a claim to arbitration that a Party "has breached" certain obligations, and that the investor "has incurred loss or damage by reason of, or arising out of, that breach." Thus, there can be no claim under Article 1116(1) until an investor has suffered harm from an alleged breach. Consistent with Articles 1116(1) and 1120(1), therefore, a disputing investor may submit a claim to arbitration under Chapter Eleven only for a breach that already has occurred and for which damage

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[151] *Id.*, n. 354; **Ex. RL-1**, Treaty, Article 10.17.1 (consenting to submit a claim to arbitration "under this Section [B] in accordance with this Agreement"); **Ex. RL-39**, *UPS*, ¶ 60 ("Jurisdiction is conferred by Article 1116(1)(b) [of NAFTA, which is similar to Article 10.16.1 of the Treaty] and is subject to its terms. Article 1116 concerning Investor-State disputes, like the similar Article 1117, states the extent of what the Parties have agreed to in respect of claims being submitted to arbitration against each of them by an investor of another Party.").

[152] **Ex. RL-40**, *Glamis Gold, Ltd. v. United States of America,* UNCITRAL (NAFTA), Award, June 8, 2009 ("*Glamis*"), ¶ 335 (emphasis added). *See also* ¶ 104, *infra*.

> or loss has already been incurred. . . . No claim based solely on speculation as to future breaches or future loss may be submitted.[153]

87. In their Counter-Memorial, Claimants intentionally seek to create confusion between two clearly distinguishable concepts. The first is whether, at the time of initiating this Arbitration, Claimants satisfied the requirements of Article 10.16.1 of the Treaty in order to validly submit the present claim to arbitration before this Tribunal. A second very different matter is whether the Tribunal may consider events that took place after the initiation of this Arbitration when analyzing the alleged breaches of the Treaty' substantive obligations, or take into account damages that were incurred after the initiation of this Arbitration for purposes of calculating an eventual award of compensation payable to Claimants.[154] The two issues are independent and unrelated.

88. Events or damages that occurred after the initiation of the Arbitration are not relevant to determine whether the requirements of Article 10.16.1 of the Treaty for the submission of a valid claim to arbitration were met at the time this Arbitration was commenced, or to determine the ripeness of the claim at that time. In other words, for a claim to be admissible (and to perfect the Tribunal's jurisdiction *ratione voluntatis* over the dispute) there must exist a breach of a substantive obligation under the Treaty or of an investment agreement, as well as loss or damage arising from such breach, at the time the Arbitration is initiated.

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[153] **Ex. RL-48**, *Mesa Power Group LLC v. Government of Canada,* PCA Case No. 2012-17 (NAFTA), Submission of the United States of America, July 25, 2014 ("*Submission of the U.S. in Mesa Power*"), ¶ 4 (emphasis added).

[154] Counter-Memorial, ¶¶ 19-25. None of the cases mentioned by Claimants supports the position that a claim may become ripe as a result of events occurring after the commencement of an arbitration. *See* ¶¶ 102-106, *infra*.

89. As explained in more detail in the following sections, on the date this Arbitration commenced, the essential prerequisites under Article 10.16.1 for submitting a valid claim to arbitration under the Treaty were not met (and continue not to be met). On the contrary, the claim submitted by Claimants is based "solely on speculation as to future breaches or future loss" and is therefore inadmissible, such that the Tribunal cannot, as a matter of law, make an award in their favor.

A. No Breach Exists that May Give Rise to a Claim Under Article 10.16.1 of the Treaty

90. In its Memorial, Colombia noted that in order for an investor to submit a valid claim to arbitration, Article 10.16.1 of the Treaty first requires that there be a breach of a substantive obligation of the Treaty, an investment authorization, or an investment agreement at the time of submission of the claim.[155]

91. Even assuming as true Claimants' factual allegations in their Notice of Arbitration,[156] on the date of that notice (1) there could not have been a breach of a substantive obligation under the Treaty or (2) a breach of an investment agreement.

(1) There Could Not Have Been A Breach of a Substantive Obligation Under the Treaty in This Case

92. The factual allegations raised by Claimants in their Notice of Arbitration are not capable of constituting, as a matter of law, a breach of the substantive obligations under the Treaty. This is primarily because (a) a measure capable of constituting a substantive breach of the Treaty had not occurred at the time this Arbitration commenced,

[155] Memorial, ¶¶ 168-250.

[156] *See* ¶ 79, *supra*.

and (b) Claimants have failed to establish that their claim constitutes a *prima facie* violation of the Treaty's substantive obligations.

a. Claimants' Claim Is Premature Because There Is No Measure Capable of Constituting a Violation of a Substantive Obligation Under the Treaty

93. At the time Claimants filed their Notice of Arbitration, the Fiscal Liability Proceeding had begun, and Foster Wheeler and Process Consultants had already been charged, but a final administrative decision had still not been issued in that proceeding. At that time, only the Indictment Order had been issued, which is a procedural administrative act that did not define any legal situation, such that it could constitute a violation of the Treaty's substantive obligations.[157]

94. In an attempt to hide that reality, in their Provisional Measures Application and their Counter-Memorial, Claimants point to the Ruling with Fiscal Liability, which was issued after the initiation of this Arbitration, as a measure capable of violating the Treaty's substantive obligations.[158] However, this does not solve Claimants' problem.

95. Even if the Tribunal were to assess the ripeness of the claim based on what has occurred to date (which, as Respondent indicates, would be incorrect),[159] at the time of this Reply there is still no measure capable of constituting a breach of a substantive obligation under the Treaty. Despite the fact that the CGR has now issued the Ruling

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[157] Memorial, ¶¶ 7-8, 135, 173.

[158] *See* Hearing on Provisional Measures Transcript, p. 95 ("ARBITRATOR BEECHEY: Mr. Sills, so there is absolutely no doubt, would you be kind enough to look at Article 10.20.8 of the [Treaty]? And so there is absolutely no doubt about this whatever, looking at the sentence which is at the heart of the debate we've had today, 'A tribunal may not order attachment or enjoin the application,' and then comes 'of a measure alleged to constitute a breach referred to in Article 10.16'. To be absolutely clear, what do you say is the Measure alleged to constitute a breach referred to in Article 10.16? MR. SILLS: [The Ruling with Fiscal Liability] of the CGR.").

[159] *See* ¶¶ 85-88, *supra*.

with Fiscal Liability, Claimants' claim remains premature. An administrative act that is subject to subsequent judicial control cannot – by itself – constitute a denial of justice or breach any of the other substantive obligations under the Treaty alleged by Claimants.

96. As Colombia indicated in its Memorial, in a similar case, *Corona v. Dominican Republic*, which was dismissed pursuant to an objection under Article 10.20.5 of DR-CAFTA (which is identical to Article 10.20.5 of the Treaty), the tribunal held that "an administrative act, in and of itself, particularly as the level of a first instance decision-maker" cannot "constitute a denial of justice under customary international law, when further remedies or avenues of appeal are potentially available under municipal law."[160] The *Corona* tribunal also emphasized that "there can be no denial of justice without a final decision of a State's highest judicial authority."[161]

97. Claimants contend that the present case is not analogous to *Corona* because that case dealt with a failure to reconsider the denial of an environmental permit and no administrative adjudicatory proceeding had been initiated.[162] But that is exactly like the present case. Here, there is only a mere administrative act, and to date no judicial proceeding has been initiated before the administrative adjudicatory jurisdiction to challenge the Ruling with Fiscal Liability issued by the CGR after the initiation of this Arbitration.

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[160] **Ex. RL-41**, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3 (DR-CAFTA), Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, May 31, 2016 ("*Corona Award*"), ¶ 248.

[161] *Id.*, ¶ 264.

[162] Counter-Memorial, ¶ 16.

98. Inconceivably, Claimants argue that the Ruling with Fiscal Liability "is the result of an administrative adjudicatory proceeding falling squarely within the ambit of Article 10.5.2(a) [of the Treaty]."[163] That argument is vastly mistaken. The administrative adjudicatory proceeding referred to in Article 10.5.2(a) (or "*procedimiento contencioso administrativo*", in Spanish) is a judicial proceeding before the administrative adjudicatory jurisdiction, and must be distinguished from an administrative proceeding – *e.g.*, the Fiscal Liability Proceeding – before administrative authorities – *e.g.*, the CGR.[164] As Colombia highlighted in its Memorial, Article 10.5.2(a) of the Treaty expressly establishes "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings, in accordance with the principle of due process embodied in the principal legal systems of the world."[165] Thus, it is clear from the wording of the provision itself that the obligation not to deny justice established in the Treaty is limited to proceedings of a judicial nature before courts with administrative adjudicatory jurisdiction and does not cover purely administrative proceedings.[166]

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[163] *Id.*, ¶ 17. Claimants incorrectly use the term "*procedimiento adjudicatorio administrativo*" in their Spanish language version of the Counter-Memorial, instead of the term contained in the Spanish language version of the Treaty which is "*procedimiento contencioso administrativo*" ["administrative adjudicatory proceeding"]. **Ex. RL-1**, Treaty, Article 10.5.2(a).

[164] Memorial, ¶ 201, nn. 179, 398. The characterization of the Fiscal Liability Proceeding as an administrative proceeding was even confirmed by the witness Claimants presented. **CWS-1**, Witness Statement of César Torrente, ¶¶ 13-14.

[165] **Ex. RL-1**, Treaty, Article 10.5.2(a) (emphasis added); Memorial, ¶ 201.

[166] Should there be any doubt, the Treaty uses the terms "administrative proceeding" or "administrative process" elsewhere when referring to administrative proceedings or processes – as opposed to judicial proceedings or processes –, and does not use the terms administrative adjudicatory proceeding or process (which are only used when referring to judicial proceedings) for these purposes. *See* **Ex. RL-1**, Treaty, Articles 10.8.4 and 10.9.3 (b)(ii).

99. Claimants also state that the *Corona* tribunal held that "a denial of justice can originate in a State's administrative act."[167] However, they conveniently omit what the tribunal subsequently stated (cited by Respondent in its Memorial),[168] which makes it clear that there can be no denial of justice before judicial remedies under domestic law are pursued:

> [T]he Tribunal does not believe that an administrative act, in and of itself, particularly as the level of a first instance decision-maker, can constitute a denial of justice under customary international law, when further remedies or avenues of appeal are potentially available under municipal law.[169]

100. As already indicated, at the time the Arbitration commenced in the present case, only an Indictment Order had been issued in the Fiscal Liability Proceeding (a ruling had not yet been issued). Although the Ruling with Fiscal Liability has now been issued, it has not yet been subject to judicial control by the courts of the administrative adjudicatory jurisdiction (and to date it has not even been judicially challenged) such that there is still no measure capable of constituting a breach of a substantive obligation under the Treaty.

101. In their attempt to argue that a mere administrative act, such as the Ruling with Fiscal Liability, can constitute a breach by Colombia, Claimants cite to the *Glencore v. Colombia* case. According to Claimants, that case supports their position because the tribunal found that the claim was ripe notwithstanding that a judicial decision had not been issued. The *Glencore* case, however, does not actually help Claimants. First, Claimants

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[167] **Ex. RL-41**, *Corona Award*, ¶ 248; Counter-Memorial, ¶ 18.

[168] Memorial, ¶ 177. *See also* ¶ 96, *supra*.

[169] **Ex. RL-41**, *Corona Award*, ¶ 248 (emphasis added).

erroneously argue that the claimants in *Glencore* were in a similar situation insofar as they had exhausted their administrative remedies.[170] While it is true that Claimants have now exhausted domestic administrative remedies against the Ruling with Fiscal Liability, that was not the case at the time the Arbitration commenced, when, in fact, a ruling in the Fiscal Liability Proceeding did not even exist. Therefore, the fact that administrative remedies have now been exhausted is irrelevant for determining the admissibility of Claimants' claim under the Treaty. Second, Claimants contend that Article 11(3) of the Protocol to the Colombia-Switzerland BIT merely constitutes a requirement to exhaust local administrative remedies, which requirement is not contained in the Treaty.[171] While it is true that the Treaty does not contain an express requirement to exhaust administrative remedies, in order to claim a denial of justice in an administrative adjudicatory proceeding, the administrative phase must be exhausted before the judicial phase in the administrative adjudicatory jurisdiction can begin. Therefore, absent an administrative adjudicatory proceeding, it is logically impossible for the substantive obligations of the Treaty to have been breached, much less so for a denial of justice to exist.[172]

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[170] Counter-Memorial, ¶ 26.

[171] *Id.*, ¶¶ 26-28. It should be added that the Colombia-Switzerland BIT discussed in *Glencore* does not contain the requirement set forth in Article 10.16.1 of the Treaty and, in any case, the claimant in *Glencore* had already paid the ruling with fiscal liability. *See* ¶ 199, *infra*.

[172] Claimants refer to Article 10.5.2(a) of the Treaty and incorrectly translate "administrative adjudicatory proceeding" as "*procedimiento adjudicatorio administrativo*" (Counter-Memorial, ¶ 28), whereas in fact the official Spanish language text reads "*procedimiento contencioso administrativo*" (which presupposes a judicial proceeding before the administrative adjudicatory jurisdiction). *See* ¶ 98, n. 79, *supra*. The Claimants have not even instituted a judicial proceeding (administrative adjudicatory or of any other nature) challenging or contesting the Ruling with Fiscal Liability issued by the CGR in the Fiscal Liability Proceeding, as is required by the Treaty to allege a breach of FET. *See* ¶¶ 141-150, *infra*. Nonetheless, Claimants allege that "[o]ther tribunals . . . interpret[ed] identical language [to Article 10.5.2(a) of the Treaty]" and held "claims based solely on administrative acts to be ripe." Counter-Memorial, ¶ 28 (emphasis added). However, Claimants only refer to one case (*TECO v. Guatemala*) which involves an entirely different factual scenario from the one at hand and does not support their position. *See* Counter-Memorial, n. 52. In fact, the *TECO* case was initiated after the Constitutional Court of Guatemala rendered a final decision regarding the judicial challenges filed by Empresa Eléctrica de Guatemala S.A., in which the claimant had an indirect

102. Claimants further argue that notwithstanding the prematurity of their claim at the time it was initiated, subsequent events can ripen the claim. They cite to a number of arbitral decisions that purportedly support that contention.[173] However, an analysis of Claimants' legal authorities makes it clear that none of them truly support their position.

103. In *Chevron v. Ecuador*, the "ripeness" of the claim was not at issue, since the tribunal had already assumed jurisdiction over the claims as initially presented.[174] The only related point of discussion was "whether these new claims [could] be maintained by the [c]laimants as an amendment to their pleadings."[175] These "new claims" were condensed in the so-called "Lago Agrio [Judicial] Judgement," confirmed by the Constitutional Court of Ecuador.[176] The *Chevron* tribunal only noted that provided those new claims "me[t] the requirements of Article 20 [of the UNCITRAL Arbitration Rules] (including jurisdiction and admissibility)," no provision of the treaty precluded them from being dealt with since they were intimately related to the original claims.[177] This case is substantially different. First, the Ecuador-U.S. BIT applicable in the *Chevron* case does not contain a provision analogous to Article 10.16.1 of the Treaty. Second, Claimants had not complied with Article 10.16.1 at the time they initiated this Arbitration, such that the "ripeness" of their original claims is indeed in dispute. Third, in any event, to date

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investment. *See* **Ex. RL-276**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17 (DR-CAFTA), Award, December 19, 2013, ¶¶ 3, 15, 79, 233, 235, 244-246 (Claimants only submitted the English language version of **Ex. CL-61**, therefore, the English and Spanish versions are now submitted herein). In the case at hand, no final judicial decision exists, as Claimants have not even initiated a judicial proceeding.

[173] Counter-Memorial, ¶¶ 18-24.

[174] **Ex. RL-78**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, August 30, 2018 ("*Chevron II*"), ¶¶ 4.461, 7.2-7.3.

[175] *Id.*, ¶ 7.158 (emphasis added).

[176] *Id.*, ¶¶ 1.71, 5.180.

[177] *Id.*, ¶ 7.173 (emphasis added).

there has been no "ripening" of their claims since no final judicial ruling has been rendered, as was the case in *Chevron*.

104. Notably, the *EnCana v. Ecuador* case – which Claimants cited to after their discussion of *Chevron*[178] – undoubtedly supports Colombia's position. Indeed, the *EnCana* tribunal held that

> [I]nvestor-State arbitration under a provision such Article XIII of the [Canada-Ecuador BIT (1996), similar to Article 10.16.1 of the Treaty] must relate to a measure in breach of the [Canada-Ecuador BIT] which has caused loss to the Claimant by the time of the commencement of the arbitration. In terms of Article XIII(I) of the [Canada-Ecuador BIT], the investor must state a ["]claim . . . that a measure taken or not taken by the former Contracting Party *is* in breach of this [BIT], and that the investor *has* incurred loss or damage by reason of, or arising out of, the breach ["].[179]

105. Similarly, in *Eco Oro v. Colombia*, a valid claim already existed when the claim was submitted to arbitration. In that case, the issue before the tribunal was whether the claims raised in the notice of intent could be supplemented by other claims related to the original claim, but not mentioned in the notice of intent. The *Eco Oro* tribunal first noted that the notice of intent in that case specified "the harm suffered by Eco Oro."[180] Then, the tribunal observed that in order to submit a valid claim to arbitration, the tribunal

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[178] Counter-Memorial, n. 41.

[179] **Ex. RL-277**, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481 (UNCITRAL), Award, February 3, 2006, ¶ 163 (emphasis added) (although Claimants assigned the legal appendix number **Ex. CL-210**, they did not provide a copy of the decision, and therefore Respondent is now submitting it). Accordingly, the tribunal noted that "the events between December 2004-April 2005 in Ecuador, were relied upon by EnCana not for the purpose of introducing a new claim or cause of action, but in order to inform the Tribunal of matters which might be of relevance in relation to the claims which had already been identified when the arbitration proceedings were commenced." *Id.*, ¶ 165 (emphasis added). Ultimately, the *EnCana* tribunal rejected all of the claimant's claims. *See id.*, ¶¶ 168, 199.

[180] **Ex. CL-50**, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021 ("*Eco Oro*"), ¶ 326.

had to determine "the point in time at which [claimant's] claim had crystallized[,] but once this point had been reached, [the claimant] couldn't wait for an indeterminate period of time to see if . . . any further measures [affected him]."[181] In other words, in *Eco Oro*, there was no dispute as to whether or not a valid claim existed at the time of the submission to arbitration.

106. In any case, whether new facts linked to the existing claims raised in the notice of arbitration may have arisen, or whether there are additional claims that may be addressed within the same arbitration proceeding, are independent issues that are irrelevant to the preliminary objection raised herein. What is relevant is that there must first exist a valid claim when the arbitration is commenced, for then to later evaluate if subsequent new facts or new claims can be addressed within the same arbitration. However, if there is no valid claim at the time of submission to arbitration, the claim is inadmissible, and such inadmissibility cannot be cured by relying on subsequent new facts. None of the cases cited by Claimants support this proposition.[182]

107. Finally, Claimants attempt – unsuccessfully – to distinguish the cases cited by Colombia in support of its argument that Claimants' allegations of Treaty breach are premature.[183] However, none of the distinctions they try to draw are relevant or successful in undermining the conclusions reached in those cases:

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[181] *Id.*, ¶ 327.

[182] Claimants also assert that tribunals of the International Centre for Settlement of Investment Disputes ("ICSID") have accepted new related facts, not raised in the request for arbitration, when determining treaty violations. Counter-Memorial, ¶ 23. Leaving aside that two out of the four cases cited by Claimants (*Enkev v. Poland* and *Ethyl v. Canada*) were not decided by "ICSID tribunals," this point is not at issue here. As explained above, whether new facts can be taken into account in determining liability is irrelevant for the question of ripeness of the claim that is before this Tribunal.

[183] Counter-Memorial, ¶¶ 29.

- In *Achmea v. Slovakia II*, the tribunal held that "the process is still [found] in its infancy stages, since no draft bill has as of yet been submitted to the Slovak legislature." Consequently, the tribunal warned that it was "entirely speculative if, when, and under which conditions the purported expropriation of Achema's investment is to take place" and concluded that "the Claimant has failed to state a prima facie case for its Article 5 claim." In that respect, the tribunal observed that it was being invited to "engage in a speculative exercise, looking into the future to examine a State conduct that has not yet materialized and whose features may not be determined with certainty at this stage" and that it was "impermissible under the BIT and thus falls outside the ambit of the Tribunal's jurisdiction."[184] Instead of distinguishing that case, Claimants only corroborate its conclusions.[185]

- Similarly, in *Enkev v. Poland*, the tribunal observed that, apart from the "road-map" provided by the respondent with "the different and successive administrative, legal and judicial steps which could lead to the eventual expropriation of Enkev Polska's real property," it was possible to note that "[t]he second step [of the seven individualized steps there] has not yet been reached, still less any further administrative, legal or judicial step culminating in the actual expropriation of Enkev Polska's real property under the Road Legislation." The tribunal held that the claimant had failed to demonstrate "any want of due process under Polish or international law" as the process still had a long way to run in Poland, "including the possibility for several judicial interventions by the Polish courts." Therefore, the tribunal concluded the claimant's claim was "premature."[186] Again, Claimants do not seek to distinguish this case but merely repeat the tribunal's findings: "that the expropriation had not yet occurred, and that the diminution in value to claimant's shares was not yet so severe as to render them useless."[187]

- The *Glamis v. United States* case does not support Claimants' position either. The tribunal in that case held that "[w]ithout a governmental act that moves beyond a mere threat of expropriation to an actual

[184] **Ex. RL-47**, *Achmea B.V. v. Slovak Republic II*, PCA Case No. 2013-12, Award on Jurisdiction and Admissibility, May 20, 2014, ¶¶ 238, 251 (emphasis added).

[185] *See* Counter-Memorial, ¶ 29.

[186] **Ex. RL-45** *Enkev Beheer B.V. v. Republic of Poland,* PCA Case No. 2013-01, First Partial Award, April 29, 2014, ¶¶ 350-351 (emphasis added).

[187] Counter-Memorial, ¶ 29; n. 185, *supra*.

> interference with a property interest, it is impossible to assess the economic impact of the interference."[188]

108. In sum, at the time of the initiation of this Arbitration, Claimants' claim was manifestly premature because there was no measure on the part of Colombia that could have constituted a violation of the Treaty's substantive obligations. There was only an administrative procedural act (the Indictment Order) that did not define the legal situation of Foster Wheeler and Process Consultants in the Fiscal Liability Proceeding.

109. Notwithstanding that the CGR has now issued its Ruling with Fiscal Liability, Claimants' claim remains premature because the courts of the administrative adjudicatory jurisdiction have not had the opportunity to decide upon the matter (a judicial proceeding challenging the Ruling with Fiscal Liability has not even been initiated before the administrative adjudicatory courts), such that there can be no denial of justice, expropriation or any other of the substantive Treaty breaches that Claimants allege.[189]

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[188] **Ex. RL-40**, *Glamis*, ¶¶ 328, 331 (emphasis added). *See also* **Ex. RL-44**, *The American Independent Oil Company v. Government of the State of Kuwait*, Final Award, March 24, 1982, ¶ 112 ("[T]he possibility (prior to the issuing of Decree-Law No. 124) of seizing an arbitral tribunal with the particular question over which the Parties had failed to come to an understanding . . . . did not exist, because unless and until the Government took some concrete step – such as nationalization – in consequence of that failure, there would have been no definite complaint with which to seize any arbitral tribunal.") (emphasis added). Claimants also failed to distinguish this case. Counter-Memorial, n. 59.

[189] Claimants argue that it is absurd to suggest that they would have to initiate a second arbitration once the harm is fully realized. Counter-Memorial, ¶ 31. However, at the Hearing on Provisional Measures, Claimants themselves suggested that if the enforcement of the Ruling with Fiscal Liability were to cause them any harm, they would have "a separate claim for that." Hearing on Provisional Measures Transcript, p. 107. Regardless, Claimants once again ignore that for a claim to be validly submitted to arbitration under the Treaty, Article 10.16.1 expressly requires that the respondent "has breached" a substantive obligation under the Treaty or an investment agreement and that the claimant "has incurred loss or damage by reason of, or arising out of, that breach." **Ex. RL-1**, Treaty, Article 10.16.1. Accordingly, if the requirements set forth in Article 10.16.1 of the Treaty are not met at the time of the submission of the claim to arbitration, the Tribunal must dismiss the case because the claim would not be admissible. *See* ¶¶ 83-84, *supra*. This view is upheld by the only legal authority cited by Claimants on this point. *See* Counter-Memorial, n. 60 (referring to *Pan-American v. Argentina*). Although the *Pan-American* case was initiated under the Argentina-US BIT (1991), which does not contain a provision similar to Article 10.16.1 of the Treaty, the tribunal noted - in the two paragraphs preceding the paragraph cited by Claimants - that it was required that "some of the damage [was] concrete and specific in that it [had] occurred already, while some, which may occur later, is not yet specified but is more or less foreseeable under the circumstances." Based on this

b. Claimants Have Not Established a *Prima Facie* Breach of Any of the Substantive Obligations of the Treaty

110. In their Notice of Arbitration, Claimants did not establish a *prima facie* breach of any of the substantive obligations of the Treaty.

111. While Claimants have tried to supplement their original facts in an attempt to salvage their case, as Colombia has already indicated, only the factual allegations raised by Claimants in their Notice of Arbitration should be taken into account for purposes of deciding upon the preliminary objection under Article 10.20.4 of the Treaty.[190] In addition, it is worth recalling that the Tribunal "is not barred from considering other relevant facts which are not in dispute" and that it should not presume the truthfulness of any of Claimants' legal allegations (including any legal allegations disguised as factual allegations).[191]

(i) Claimants Have Not Established a *Prima Facie* Breach of FET

112. As Colombia explained in its Memorial, Claimants' Notice of Arbitration did not establish a *prima facie* breach of the FET obligation for several reasons. First, because the FET standard protects only investments and not investors, yet all of Claimants' claims pertain to alleged actions by Colombia that affected investors. Second, because Claimants base their case on an incorrect FET standard, given that the Treaty expressly limits the FET obligation to the minimum standard of treatment under customary

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understanding, the tribunal acknowledged that in that case "Claimants, *prima facie*, have demonstrated their assertion that some damage has occurred" and that, "[t]he final amount of damages will of course have to be determined during the proceedings on the merits if the Respondent is held liable." **Ex. RL-174**, *Pan American Energy LLC, and BP Argentina Exploration Company v. Argentine Republic,* ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, ¶¶ 177-178 (emphasis added).

[190] *See* ¶ 79, *supra*.

[191] *Id.*

international law. Third, because there cannot have been a denial of justice in this case since the judiciary has not yet intervened in the Fiscal Liability Proceeding. Claimants' Counter-Memorial fails to refute any of these arguments.

(a) The FET Standard Does Not Protect Investors

113. The text of Article 10.5.1 of the Treaty is clear in indicating that the minimum standard of treatment (which includes the FET obligation) only protects investments, and not investors.[192]

114. Notably, Claimants do not challenge the fact that in this case all of their allegations of FET breaches relate to Respondent's alleged actions or conduct that – if true – would have affected them as alleged investors, and not their alleged covered investment (*i.e.*, the Services Contract).[193]

115. However, relying primarily on decisions of tribunals that have interpreted FET provisions in other treaties with language different from the Treaty,[194] Claimants

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[192] Memorial, ¶¶ 187-192.

[193] *Id.*, ¶¶ 190-191.

[194] Counter-Memorial, ¶¶ 37-41. Claimants' reference to the ILC Report on MFN Clauses is completely irrelevant. *See id.*, ¶ 37 ("[I]n the words of Colombia's own cited authority in this context, the International Law Commission's 2015 Report on MFN Clauses, 'the definition of investment is a matter relevant to the investment agreement as a whole and does not raise any systemic issues about MFN [or other substantive provisions, by Colombia's logic] or about their interpretation. Accordingly, the Study Group did not see any need to consider this matter further."). The argument advanced by Colombia is very simple and does not require resorting to "systemic issues." To the contrary, a mere logical syllogism is enough. On the one hand, Article 10.5.1 of the Treaty (which includes the FET standard) only protects investments. On the other hand, all of Claimants' allegations refer to purported actions or conducts affecting the investors. Therefore, Claimants' complaints are not protected by the Treaty and should be rejected. In a similar manner, Claimants' reference to *Bahgat v. Egypt* is irrelevant to this case, because in that case the tribunal expressly recognized that "[t]he Freezing Order covering the bank accounts of Claimant as well as the bank accounts of the Companies, the raid of the offices of Claimant, and the prohibition of the staff to enter the site of the Project were investment related and, *de facto,* ended the Project. Therefore, in the view of the Tribunal, the measures taken by Respondent were predominantly directed against the investment." **Ex. CL-52**, *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award, December 23, 2019, ¶ 187 (emphasis added); Counter-Memorial, ¶ 37. In the case at hand, the measures

argue that the FET obligation in the Treaty protects both investors and investments, although they do not analyze the actual text of the relevant provision.

116. It is not surprising that Claimants make no attempt to interpret the textual language of the provision (indeed, they do not even cite to it), since the plain meaning of the text necessarily supports the conclusion that the minimum standard of treatment obligation under the Treaty only protects investments.

117. As much as Claimants would like to ignore the text of Article 10.5.1 of the Treaty, that text unequivocally states:

> Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.[195]

118. An interpretation of this provision in accordance with Article 31 of the Vienna Convention (*i.e.*, from the ordinary meaning of the terms of the article in their context) does not allow for any other interpretation.[196] The protection is only granted to "covered

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allegedly in breach of the FET standard are, in any case, directed against Claimants and are not "predominantly directed against" their purported investment.

[195] **Ex. RL-1**, Treaty, Article 10.5.1 (emphasis added).

[196] **Ex. RL-53**, Vienna Convention of the Law of Treaties, Articles 31.1. *See* **Ex. RL-278**, Robert Jennings and Arthur Watts, 1 OPPENHEIM´S INTERNATIONAL LAW: VOL. I (9th ed., Oxford University Press 2008), p. 1271 ("The general rule of interpretation laid down in Article 31 of the Vienna Convention adopts the textual approach."); **Ex. RL-279**, *Competence of the General Assembly for the Admission of a State to the United Nations*, International Court of Justice, Advisory Opinion of March 3, 1950, I.C.J. REPORTS 4 (1950), p. 8 ("If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter."); **Ex. RL-280**, *Wintershall Aktiengesellschaft v. Republic of Argentina*, ICSID Case No. ARB/04/14, Award, December 8, 2008 ("*Wintershall*"), ¶ 79 ("[W]here the ordinary meaning of words (the text) is clear and they make sense in the context, here is no occasion at all to have recourse to other means of interpretation."); **Ex. RL-281**, Jean-Marc Sorel and Valérie Boré Eveno, *Observance, Application and Interpretation of Treaties*, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 804 (Olivier Corten and Pierre Klein (eds.), Oxford University Press 2011), ¶ 31 ("The primacy of textual interpretation if the treaty is clear is moreover a leitmotiv that the Court has not hesitated to repeat each time the opportunity has arisen, that is to say, frequently. . . . [T]he lesson is simple: it serves little purpose to examine other aspects of interpretation if the treaty text is clear.").

investments," investors are not even mentioned in the provision. This was the same position advocated by Claimants' law firm when representing Mexico in an investment arbitration under NAFTA.[197] To read into the provision terms that it does not contain would be to no longer interpret it, but instead to rewrite it, which an arbitral tribunal cannot and should not do.[198]

119. The tribunal in *Grand River v. United States*, interpreting a virtually identical FET provision to that provided for in the Treaty, found that the FET obligation only protects investments and not investors, stating:

> The required treatment must be accorded to 'investments of investors of another party.' Article 1105 [of NAFTA] provides no scope for individual investors' claims that they have received treatment contrary to international law, except as that treatment affects a covered investment.[199]

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[197] **Ex. RL-282**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2 (NAFTA), Award, September 20, 2021 ("*Lion Mexico Award*"), ¶¶ 10, 356 ("Mexico's first argument is based on a literal reading of Art. 1105 of NAFTA, which provides that Mexico 'shall accord to investments of investors' of the other treaty Parties treatment in accordance with international law, including FET and FPS. Respondent says that Art. 1105 only extends protection to investments, but not to investors.") (Claimants only submitted the English language version of **Ex. CL-68**; Respondent hereby provides both the English and Spanish versions).

[198] *See* **Ex. RL-280**, *Wintershall*, ¶ 82 ("[I]t is not the function of interpretation to revise treaties or to read into them what they do not contain expressly or by implication; that the terms (the text) of a treaty must always be adhered to, for the reason that a treaty expresses the mutual will of the Contracting States."); **Ex. RL-283**, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia*), International Court of Justice, Separate Opinion of Judge Mohammed Bedjaoui, I.C.J. REPORTS 120 (1997), p. 123. ("[T]he '*interpretation*' is not the same as the '*substitution,*' for a negotiated and approved text, of a completely different text, which has neither been negotiated nor agreed."); **Ex. RL-278**, R. Jennings and A. Watts, OPPENHEIM'S INTERNATIONAL LAW: VOL. I, pp. 1271-1272 ("That such a textual approach – on which the International Law Commission was unanimous – is an accepted part of customary international law is suggested by many pronouncements of the International Court of Justice, which has also emphasized that interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain, or of applying a rule of interpretation so as to produce a result contrary to the letter or spirit of the treaty's text."). *See also* **Ex. RL-284**, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase*), International Court of Justice, Advisory Opinion of July 18, 1950, I.C.J. Reports 221 (1950), p. 229 ("[I]t is the duty of the Court to interpret the Treaties, not to revise them."); **Ex. RL-280**, *Wintershall*, ¶ 84 ("If this be the duty of an international court, the duty of an ICSID Tribunal is no different.").

[199] **Ex. RL-101**, *Grand River Enterprises Six Nations, LTD., et al. v. United States of America,* UNCITRAL (NAFTA), Award, January 12, 2011 ("*Grand River*"), ¶ 177 (emphasis added).

120. This interpretation of the scope of the FET obligation is consistent with the understanding of the Contracting Parties to the Treaty. In repeated submissions as a non-disputing party, the United States has stated its position with respect to this limitation of the scope of the FET obligation under the Treaty:

> Some obligations in the U.S.-Colombia TPA require a Party to accord treatment to both investors and covered investments, whereas other obligations in the Agreement only require a Party to accord treatment to a covered investment. For example, the Article 10.5 requires the Parties to accord "fair and equitable treatment" and "full protection and security" only to covered investments, not to investors. In contrast, Article 10.3 requires the Parties to accord "national treatment" to both investors and covered investments. In accordance with this distinction, for the Agreements' obligations which only extend to covered investments, a claimant (*i.e.*, an investor) must establish that a Party's treatment was accorded to the covered *investment* and violated the relevant obligation.[200]

121. In this regard, it is worth noting that when the Contracting Parties to the Treaty intended a standard of protection to cover both investments and investors, they expressly stated so, as they did in the national treatment and most-favored nation ("MFN") provisions of the Treaty.[201] To fail to distinguish standards that protect only investments

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[200] **Ex. RL-54**, *Angel Manuel Seda and others v. Republic of Colombia,* ICSID Case No. ARB/19/16 (Colombia-U.S. TPA), Submission of the United States of America, February 26, 2021 ("*Submission of the U.S. in Angel Seda*"), ¶ 5 (emphasis added). *See also* **Ex. RL-55**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2 (NAFTA), Submission of the United States of America, June 21, 2019 ("*Submission of the U.S. in Lion Mexico*"), ¶ 10 ("Article 1105(1) [of NAFTA] differs from other substantive obligations, such as those in Articles 1102, 1103 and the second paragraph of Article 1105, in that it obligates a Party to accord treatment only to an '*investment*.' In the context of a claim for denial of justice under Article 1105(1), a claimant (*i.e.*, an investor) must therefore establish that the treatment accorded to its investment rose to the level of a denial of justice under customary international law."); **Ex. RL-56**, *Omega Engineering LLC and Mr. Oscar Rivera v. Republic of Panama*, ICSID Case No ARB/16/42 (Panama-U.S. TPA), Submission of the United States of America, February 3, 2020 ("*Submission of the U.S. in Omega*"), ¶ 46.

[201] *See* **Ex. RL-1**, Treaty, Article 10.3 ("1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to

from other standards that protect both investments and investors would be to render the different terms of these provisions as effectively useless.[202]

122. Faced with the clear text of Article 10.5.1 of the Treaty interpreted in its context, Claimants resort to Article 10.5.2 to support their position, arguing that this provision refers to the "minimum standard of treatment of aliens" and contending, based on the *Lion v. Mexico* decision, that the reference to "aliens" implies that it also includes investors.[203] This reasoning is clearly flawed, primarily for two reasons. First, because the fact that the standard is equivalent to the "customary international law minimum

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the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."), Article 10.4 ("1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.") (emphasis added). *See also* **Ex. RL-285**, Patrick Dumberry, THE FAIR AND EQUITABLE TREATMENT STANDARD: A GUIDE TO NAFTA CASE LAW ON ARTICLE 1105 (Kluwer Law International 2013), pp. 56-57 ("The first notable feature of Article 1105 is that it offers protection to 'investments of investors,' and not to investors themselves. This nuance was implicitly recognized by the Grand River tribunal. The language of Article 1105 contrasts with the one adopted elsewhere in Chapter 11 (for instance, Articles 1105(2), 1102 and 1103) where protection is accorded to both investments and investors.") (emphasis omitted).

[202] *See also*, **Ex. RL-280**, *Wintershall*, ¶ 165 ("Nothing is better settled as a common canon of interpretation in all systems of law than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. This is simply an application of the wider legal principle of effectiveness which requires favouring an interpretation that gives to every treaty provision an '*effet utile*'."); **Ex. RL-271**, T. Gazzini, INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES, p. 170 ("[C]ontracting parties shared the view expressed by the ILC that [the principle of effectiveness] is implicit through the principles of good faith and the 'object and purpose' criteria. . . . Thus, the interpreter must presume that all words or expressions used in a treaty contribute to the definition of the rights and obligations of the parties. In other words, the interpretation that gives some significance to these terms or expressions must prevail to any other interpretation that would make them redundant.").

[203] Counter-Memorial, ¶¶ 38-39; **Ex. RL-1**, Treaty, Article 10.5.2 ("For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.") (emphasis added). It is worth noting that the law firm representing Claimants used to represent Mexico in that case and defended the position that is now being presented by Colombia. *See* **Ex. RL-282**, *Lion Mexico Award*, ¶ 356 ("Mexico's first argument is based on a literal reading of Art. 1105 of NAFTA, which provides that Mexico 'shall accord to investments of investors' of the other treaty Parties treatment in accordance with international law, including FET and FPS. Respondent says that Art. 1105 only extends protection to investments, but not to investors.").

standard of treatment of aliens" says nothing about the application of that standard to investors (in other words, it only establishes a parameter, but does not say to whom that protection is granted). Second, because this interpretation ignores what is expressly stated later in the text of that provision, which clarifies that the minimum standard of treatment shall be "afforded to covered investments," *i.e.* not including investors.

123. Claimants also attempt – unsuccessfully – to distinguish the cases cited by Colombia in support of this argument. In *Nelson v. Mexico*, the tribunal noted that, pursuant to the first paragraph of NAFTA Article 1105 (virtually identical to Article 10.5.1 of the Treaty), it was clear that the obligation to accord FET was limited to the treatment of investments and that it was therefore necessary to specify which investments were subject to violations.[204] As Claimants rightly point out, the tribunal recognized that "the investment that was not granted fair and equitable treatment is Tele Fácil" and that "[t]he [p]arties do not dispute that Tele Fácil is an investment protected by NAFTA Chapter Eleven."[205] However, in this case, all of Claimants' claims relate to alleged actions by Colombia that would have affected them as alleged investors (not their investments) and, thus, are outside the scope of the Treaty.

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[204] **Ex. RL-57**, *Mr. Joshua Dean Nelson v. United Mexican States*, ICSID Case No. UNCT/17/1 (NAFTA), Final Award, June 5, 2020, ¶ 312 ("From the text of the treaty, it is clear that the obligation of fair and equitable treatment is limited to the treatment of 'investments of investors'. Therefore, before reviewing Claimant's allegations of unfair and inequitable treatment, the Tribunal must first clarify what is the investment that, according to Claimant, suffered from unfair and inequitable treatment.") (emphasis added). Accordingly, the tribunal indicated that "[t]he Parties do not dispute, and for the Tribunal is clear, that for purposes of NAFTA Article 1139, [that provides, among others, that 'investment' means 'an enterprise'], there is an enterprise (Tele Fácil) that constitutes an investment, there are shares held." *Id.*, ¶ 223. *See also id.,* ¶ 314 ("[A]ccording to Claimant, the investment that was not granted fair and equitable treatment is Tele Fácil" and "[t]he Parties do not dispute that Tele Fácil is an investment protected by NAFTA Chapter Eleven.").

[205] *Id.*, ¶ 314; Counter-Memorial, ¶ 40.

124. Similarly, in *Belokon v. Kyrgyzstan*, the tribunal noted that Article 2.2 of the Kyrgyzstan-Latvia BIT (virtually identical to Article 10.5.1 of the Treaty) only required FET for investments and that, therefore, any allegations that did not relate to the investment could not be considered under this standard.[206] Contrary to Claimants' suggestion, the tribunal's reading of Article 2.2 of the Kyrgyzstan-Latvia BIT led it to reject the claims for alleged breaches of the FET standard supposedly suffered by "former directors and former management."[207] Claimants also failed in their attempt to distinguish the other legal authorities cited by Colombia.[208]

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[206] **Ex. RL-58**, *Valeri Belokon v. Kyrgyz Republic,* UNCITRAL, Award, October 24, 2014 ("*Belokon*"), ¶¶ 245, 251 ("The BIT [Bilateral Investment Treaty] however only requires FET in accordance with 'investments of investors of either contracting party'. Investments is a defined term of the BIT and does not encompass the *former* directors and management of Manas Bank. The Tribunal therefore does not consider it has authority to consider the criminal proceedings, however abusive they may be, in its analysis under the FET standard of this particular BIT, except insofar as they form a pattern which may be relevant in assessing the context as a whole. . . . The latter of these two allegations, while understandably grave, cannot be considered under this BIT as a breach of the FET standard as they do not relate to the investment in Manas Bank.") (emphasis added).

[207] *Id.*, ¶¶ 245, 251; Counter-Memorial, ¶ 40. The tribunal only considered such allegations under Article 2.3 of the Kyrgyzstan-Latvia BIT (*i.e.*, "non-impairment clause" or "*cláusula de no deterioro*"), which - as Claimants duly recognize - is not analogous to any provision in the Treaty. Counter-Memorial, ¶¶ 40-41, n. 75. In its analysis, the tribunal consistently referred to the investor's investment, and not to the "former directors and management" or to the investor itself. *See* **Ex. RL-58**, *Belokon*, ¶¶ 264, 267-268, 272.

[208] The other authorities cited by Colombia are clearly relevant to the discussion. *See* **Ex. RL-59**, Jeswald Salacuse, THE LAW OF INVESTMENT TREATIES (2d. ed., Oxford 2015), p. 281 ("Like provisions on national treatment, MFN clauses are formulated in different ways in different treaties. As a result, the scope of protection that the clause provides and the stipulated exceptions to it vary from treaty to treaty. For example, some treaties grant MFN treatment only to *investments* of a treaty counterpart, while others grant it to *investors*. . . . As a result of the wide variety of MFN treatment formulations found in investment treaties, persons interpreting them need to focus carefully on the particular language of the treaty in question and should not assume that the nature and scope of protection is uniform among treaties.") (emphasis added); **Ex. RL-60**, International Law Commission, *Final Report of the Study Group on the Most-Favoured-Nation Clause*, 2(2) Yearbook of the International Law Commission (2015), ¶ 69 ("In investment agreements, the obligation is generally specified as providing MFN treatment to the 'investor' or its 'investment'. Some agreements limit the benefit of an MFN provision to the investment.") (emphasis added). It is puzzling that Claimants criticize the fact that Colombia has cited doctrine that refers to the same distinction in the context of MFN and not FET clauses (Counter-Memorial, ¶ 41), but then go on to quote the ILC Report on MFN Clauses in support of their position (Counter-Memorial, ¶ 37). This is just one example of the many contradictory arguments advanced by Claimants. In any case, pointing to the fact that certain investment treaty provisions only protect investments and not investors is just as valid in both the FET and MFN contexts.

125. In sum, Claimants' claim is not capable of constituting a breach of the FET obligation under the Treaty because the Treaty only protects investments, and not investors. None of Claimants' allegations relate to actions by Colombia that have affected their alleged covered investment, and so they have failed to establish a *prima facie* case of breach of the FET standard.

(b) The FET Standard in the Treaty Is Limited to the Minimum Standard of Treatment Under Customary International Law

126. Colombia also stated in its Memorial that Article 10.5 of the Treaty explicitly limits the FET obligation to the minimum standard of treatment under customary international law.[209] That provision expressly states that FET "do[es] not require treatment in addition to or beyond that which is required by that [minimum] standard [of treatment under customary international law], and do[es] not create additional substantive rights."[210]

127. Given the express wording, it seems odd that Claimants refused to acknowledge that they were wrong to assert – in their Notice of Arbitration – that the Treaty "does not define the term 'fair and equitable' [treatment]."[211] Instead of recognizing their mistake, in their Counter-Memorial Claimants choose to argue that there is no difference between the autonomous FET standard and the minimum standard of treatment under customary international law (another unusual argument, by the way), and

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[209] Memorial, ¶¶ 193-200.

[210] **Ex. RL-1**, Treaty, Article 10.5.

[211] Notice of Arbitration, ¶¶ 101-102. Contradictorily, Foster Wheeler and Process Consultants recognized that the FET obligation under the Treaty is "in accordance with customary international law" in the *acción de tutela* submitted in 2018, **Ex. R-69**, *Acción de Tutela* 2018, pp. 7-8 (translation from Spanish); Memorial, n. 382.

further argue that, in any event, customary international law has evolved since *Neer v. Mexico* so any distinction is now irrelevant.[212] None of these arguments have any merit.

128. Claimants' first argument does not require much analysis. It is obvious that the autonomous FET standard is not equivalent to the minimum standard of treatment under customary international law. It would make no sense for States to put so much effort into defining the content of the FET obligation in their investment treaties, restricting it to the customary international law minimum standard of treatment, if there were no differences. Moreover, such an interpretation would be contrary to the very text and meaning of Article 10.5.2 of the Treaty, which states that the concept of FET does not require "treatment in addition to or beyond that which is required by that [minimum] standard [of treatment]," which would be an unnecessary clarification if the two standards were equivalent.[213] The distinction between the two standards was recognized by the tribunal in *Eco Oro v. Colombia*, one of the decisions Claimants cited to the most:

> The Tribunal also accepts that Colombia is under no obligation to exceed this standard and, as it is not considering an autonomous treaty standard of FET but a "minimum"

[212] Counter-Memorial, ¶¶ 44-50. To this end, Claimants go so far as to misrepresent a Colombian filing in the *Eco Oro* case – which is not public –, alleging that "Colombia itself recently agreed in another ICSID arbitration that *Neer's* relevance was questionable." *Id.*, ¶ 2. *See also id.*, ¶ 49, n. 5. However, Colombia's only remarks in the *Eco Oro* case, arising from the tribunal's decision, were that, whether or not *Neer* has evolved, it is still relevant to the interpretation of the FET under the minimum standard of treatment, and that the threshold for its violation is high, as has been recognized by multiple arbitral tribunals. *See* **Ex. CL-50**, *Eco Oro*, ¶ 734 ("Colombia does not say that [the *Neer* case] still defines the standard for Eco Oro to meet but [the *Neer* case] does remain relevant to the interpretation of the MST FET standard and numerous tribunals subsequently have confirmed that the bar is high."). *See also id.*, ¶ 705 (noting that Colombia argued that the minimum standard of treatment under customary international law was "still rooted in *Neer*.").

[213] Such an interpretation would be contrary to the principle of the *effet utile* interpretation. *See* n. 202, *supra*.

> standard, the Tribunal further accepts the obligation should not be interpreted expansively.[214]

129. Colombia's position in this case coincides with the position of the United States – the other Contracting Party to the Treaty –, which, in its submissions as a non-disputing party, has confirmed that:

> This text [that is, the one from Article 10.5] demonstrates the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 10.5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. The standard establishes a minimum "floor below which treatment of foreign investors must not fall."[215]

130. Claimants' second argument is also baseless. It is not true that the customary international law minimum standard of treatment has evolved to the point of matching the autonomous FET standard, as Claimants erroneously contend. That assertion reveals a profound ignorance of how customary international law evolves.

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[214] **Ex. CL-50**, *Eco Oro*, ¶ 745.

[215] **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 32 (emphasis added). *See also* **Ex. RL-62**, *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17 (DR-CAFTA), Submission of the United States of America, July 6, 2018 ("*Submission of the U.S. in Ballantine*"), ¶ 17; **Ex. RL-63**, *Bay View Group and The Spalena Company v. Republic of Rwanda,* ICSID Case No. ARB/18/21 (Rwanda-U.S. BIT), Submission of the United States of America, February 19, 2021 ("*Submission of the U.S. in Bay View*"), ¶ 37; **Ex. RL-65**, *Elliott Associates, L.P. v. Republic of Korea,* PCA Case No. 2018-51 (KORUS FTA), Submission of the United States of America February 7, 2020 ("*Submission of the U.S. in Elliott Associates*"), ¶ 13; **Ex. RL-66**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. Republic of Peru,* ICSID Case No. UNCT/18/2 (Peru-U.S. TPA), Submission of the United States of America, June 21, 2019 ("*Submission of the U.S. in Gramercy*"), ¶ 31; **Ex. RL-67**, *Italba Corporation v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Submission of the United States of America, September 11, 2017 ("*Submission of the U.S. in Italba*"), ¶ 18; **Ex. RL-68**, *Mason Capital, L.P and Mason Management LLC v. Government of the Republic of Korea*, PCA Case No. 2018-55 (KORUS FTA), Submission of the United States of America, February 1, 2020 ("*Submission of the U.S. in Mason*"), ¶ 10; **Ex. RL-56**, *Submission of the U.S. in Omega*, ¶ 14; **Ex. RL-286**, *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1 (NAFTA), Submission of the United States of America, June 7, 2021 ("*Submission of the U.S.in Legacy Vulcan*"), ¶ 4; **Ex. RL-287**, *Alicia Grace and others v. United Mexican States,* ICSID Case No. UNCT/18/4 (NAFTA), Submission of the United States of America, August 24, 2021 ("*Submission of the U.S.in Alicia Grace*"), ¶ 68.

131. In the *North Sea Continental Shelf* case, the International Court of Justice articulated the principles governing the evolution of customary international law in the following manner:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved. . . .
>
> [E]ven if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; – for, in order to achieve this result two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, *i.e.*, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, *e.g.*, in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience, or tradition, and not by any sense of legal duty.[216]

[216] **Ex. CL-85**, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* International Court of Justice, Judgement of February 20, 1969, I.C.J. REPORTS 3 (1969), ¶¶ 74, 77 (emphasis added).

132. The decision of the International Court of Justice has been repeatedly reaffirmed by international jurisprudence and doctrine.[217] Accordingly, Annex 10-A of the Treaty expressly defines the concept of "customary international law" as "a general and consistent practice of States that they follow from a sense of legal obligation."[218]

133. Applying those principles to this particular case, there is no doubt that Claimants' position with respect to the evolution of the content of the FET standard does not have the necessary consensus to constitute a rule of customary international law.[219]

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[217] **Ex. CL-84**, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* International Court of Justice, Judgement of February 3, 2012, I.C.J. REPORTS 99 (2012), ¶ 55 ("In particular . . . the existence of a rule of customary international law requires that there be a 'settled practice' together with *opinio juris*."), **Ex. CL-86**, *Continental Shelf (Libyan Arab Jamahiriya/Malta),* International Court of Justice, Judgement of June 3, 1985, I.C.J. REPORTS 13 (1985), ¶ 27 ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States."); **Ex. RL-288**, International Law Commission, *Draft conclusions on identification of customary international law, with commentaries*, 2(2) YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (2018), Conclusion No. 2, p. 124 ("To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).").

[218] **Ex. RL-1**, Treaty, n. 3 and Annex 10-A; Memorial, n. 384. *See also* **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 33 ("Annex 10-A to the U.S.-Colombia TPA addresses the methodology for determining whether a customary international law rule covered by Article 10.5 has crystallized. The Annex expresses the Parties' 'shared understanding that "customary international law" generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation.' Thus, in Annex 10-A the Parties confirmed their understanding and application of this two-element approach —State practice and *opinio juris*— which is the standard practice of States and international courts, including the International Court of Justice."); **Ex. RL-287**, *Submission of the U.S.in Alicia Grace*, ¶ 69; **Ex. RL-286**, *Submission of the U.S.in Legacy Vulcan*, ¶ 5. Claimants refer to Annex 10-A and argue that the definition therein supports the generally accepted definition of customary international law (Counter-Memorial, ¶ 47). It is not clear how this definition may support their position, given that it precisely demonstrates that the evolution of customary international law requires an established practice and *opinio juris*. Claimants have not presented any evidence, not even *prima facie*, of an established practice, much less of *opinio juris*, to argue that the minimum standard of treatment has evolved.

[219] *See also*, **Ex. RL-171**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada (I),* ICSID Case No. ARB(AF)/07/4 (NAFTA), Decision on Liability and on Principles of Quantum, May 22, 2012 ("*Mobil*"), ¶¶ 123, 152, 153 ("The Respondent refutes that . . . '[t]he Claimants [have submitted] no evidence of state practice or opinion to support their assertion that the minimum standard of treatment afforded to foreign investors by customary international law includes protection of legitimate expectations or the obligations [in the Respondent's mind] to provide a stable regulatory environment for foreign investments' . . . [T]he Tribunal summarizes the applicable standard in relation to Article 1105 [of NAFTA] as follows: (1) the minimum standard of treatment guaranteed by Article 1105 [of NAFTA] is that which is reflected in customary international law on the treatment of aliens; (2) the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant[,] that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant

This has been confirmed both by States[220] and their model treaties,[221] as well as by courts[222] and doctrine.[223]

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to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.' . . . This applicable standard does not require a State to maintain a stable legal and business environment for investments, if this is intended to suggest that the rules governing an investment are not permitted to change, whether to a significant or modest extent. . . . What the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment. Those standards are set, as we have noted above, at a level which protects against egregious behavior. It is not the function of an arbitral tribunal established under NAFTA to legislate a new standard which is not reflected in the existing rules of customary international law. The Tribunal has not been provided with any material to support the conclusion that the rules of customary international law require a legal and business environment [applicable to the investment] to be maintained or set in concrete.") (emphasis added).

[220] *See for example*, **Ex. RL-289**, NAFTA, *NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions*, July 31, 2001. Such interpretative Notes were necessary precisely because certain tribunals expanded the standard of fair and equitable treatment well beyond what States had agreed to. Had the content of the standard under customary international law been coextensive with the autonomous standard, the interpretative Notes would not have been necessary. *See in this regard* **Ex. RL-290**, Marcos Orellana, *International Law on Investment: The Minimum Standard of Treatment (MST)*, 1(3) TRANSNATIONAL DISPUTE MANAGEMENT (2004), p. 5 ("This was clearly an attempt by the Free Trade Commission [of NAFTA] to curtail extensively broad interpretations."); **Ex. RL-101**, *Grand River*, ¶¶ 174, 176, 181. *See also* **Ex. RL-291**, Free Trade Agreement between the Dominican Republic, Central America and the United States of America, signed on August 5, 2004 and effective from January 1, 2009, Chapter 10, Articles10.5.1-10.5.2; **Ex. RL-292**, Comprehensive Economic and Trade Agreement (CETA), signed on October 30, 2016 and effective from September 21, 2017, Section D (Protection of Investments), Article 8.10; **Ex. RL-208**, Agreement between United States-Mexico-Canada, signed on December 10, 2019 and effective from July 1, 2020 ("USMCA"), Chapter 14 (Investment), Article 14.6.

[221] *See for example*, **Ex. RL-293**, 2012 United States Bilateral Investment Treaty Model, Article 5(2); **Ex. RL-294**, Netherlands Bilateral Agreement for the Promotion and Protection of Investments Model of 2019, Article 9(2); **Ex. RL-295**, Canada Bilateral Agreement for the Promotion and Protection of Foreign Investments Model of 2021, Article 8. *See also* **Ex. RL-296**, Andrew Newcombe and Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Kluwer International Law 2009), p. 268 ("There is some state practice amongst major capital exporting states suggesting that fair and equitable treatment was viewed as reflecting, and as synonymous with, the minimum standard of treatment. For example, some elements of US, UK, Swiss, and Canadian treaty practice suggest that these states considered that fair and equitable treatment reflected the minimum standard of treatment.").

[222] *See for example*, **Ex. CL-196**, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia,* ICSID Case No. ARB/99/2, Award, June 25, 2001 ("*Genin*"), ¶ 367; **Ex. RL-225**, *International Thunderbird Gaming Corporation v. United Mexican States,* UNCITRAL (NAFTA), Arbitral Award, January 26, 2006, ¶ 194; **Ex. RL-40**, *Glamis,* ¶¶ 602-604, 824; **Ex. RL-70**, *Cargill, Incorporated v. United Mexican States,* ICSID Case No. ARB(AF)/05/2 (NAFTA), Award, September 18, 2009 ("*Cargill*"), ¶¶ 274, 277, 284, 286.

[223] *See for example*, **Ex. RL-297**, J. Roman Picherack, *The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?,* 9(4) THE JOURNAL OF WORLD INVESTMENT & TRADE 255 (2008), p. 272; **Ex. RL-290**, M. Orellana, *International Law on Investment: The Minimum Standard of Treatment (MST)*, p. 7; **Ex. RL-298**, Gus Van Harten, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (Oxford University Press 2007), p. 89; **Ex. RL-299**, Graham Mayeda, *Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties*, 41(2) JOURNAL OF WORLD TRADE 273

134. Ultimately, in order for there to be a breach of the minimum standard of treatment under customary international law, there must be proof of an egregious conduct on the part of the State that is shocking, manifestly arbitrary, a denial of justice, evidently discriminatory and without any reason whatsoever. That standard was expressed in *Neer v. Mexico*,[224] and has been affirmed by several investment tribunals that have had to interpret articles similar to Article 10.5.1 of the Treaty.[225] Claimants here take issue with

(2007), pp. 274-275; **Ex. RL-300**, Patrick G. Foy and Robert J.C. Deane, *Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement*, 16(2) ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 299 (2001), pp. 313-314.

[224] **Ex. RL-69**, *L.F.H Neer and Pauline Neer v. United Mexican States,* Mexico-U.S. General Claims Commission, Docket No. 136, Opinion, October 15, 1926, in 21 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 555 (1927) ("*Neer*"), p. 556 (providing that, for a breach of the minimum standard of treatment to exist, the treatment accorded to a foreign national "should amount to an outrage, to bad faith, to willful neglect of duty, or to insufficiency of Governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.").

[225] *See for example*, **Ex. RL-40**, *Glamis,* ¶ 824 ("[C]laimant has not established that the individual measures taken by the federal and California state Governments fall below the customary international law minimum standard of treatment and constitute a breach of Article 1105 [of NAFTA] in that they are not egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."); **Ex. RL-70**, *Cargill*, ¶¶ 284, 286 ("Key to this adaptation is that, even as more situations are addressed, the required severity of the conduct as held in *Neer* is maintained. . . . If the conduct of the Government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, bad faith or the willful neglect of duty, whatever the particular context the actions taken in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment."); **Ex. RL-300**, P. Foy and R. Deane, *Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement*, p. 313 ("A State's conduct has been held to fall below this standard where its treatment of non-nationals is egregious and amounts to an outrage, willful neglect of duty or to an insufficiency of Governmental action that every reasonable and impartial person would recognize as insufficient. A State's conduct will also fall below the minimum standard when it is determined that there has been a denial, unwarranted delay or obstruction of access to courts; gross deficiency in the administration of judicial or remedial process; or a failure to provide guarantees which are generally considered indispensable to the proper administration of justice."), p. 314 (for determining a breach of the minimum standard of treatment under customary international law "the threshold is extremely high" and "outrageous or egregious conduct is required before a violation is established."); **Ex. CL-196**, *Genin*, ¶ 367 ("Under international law, this requirement [of fair and equitable treatment] is generally understood to 'provide a basic and general standard which is detached from the host State's domestic law'. While the exact content of this standard is not clear, the Tribunal understands it to require an 'international minimum standard' that is separate from domestic law, but that is, indeed, a minimum standard. Acts that would violate this minimum standard would include acts showing a willful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.") (emphasis omitted).

Respondent's reliance on *Neer*.[226] But that was not the view of the law firm that represents them when it acted on behalf of Mexico in *Abengoa v. Mexico*, and vigorously advocated for the validity of the *Neer* standard.[227] Beyond citing a few isolated decisions of other investment tribunals – which do not constitute State practice and cannot create or constitute proof of customary international law[228] – Claimants have not cited any legal source, or presented any evidence, to support their assertion that the minimum standard of treatment has evolved since *Neer*.[229]

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[226] Claimants contend that the correct minimum standard of treatment is that established by the tribunal in *Waste Management v. México II*. Counter-Memorial, ¶ 50. Even if that were the correct standard, Claimants have also failed to present a *prima facie* case of such breach.

[227] **Ex. RL-301**, *Abengoa S.A. and Cofides S.A. v. United Mexican States,* ICSID Case No. ARB(AF)/09/2, Award, April 18, 2013, ¶¶ 11, 416 ("Respondent argues that the applicable minimum standard of treatment under customary international law is that which was established by the tribunal in *Glamis Gold*, . . . And adds that the *Glamis Gold* decision recognized the current validity of the standard applied in *Neer*.").

[228] **Ex. RL-40**, *Glamis*, ¶ 605 ("Arbitral awards ... do not constitute State practice and thus cannot create or prove customary international law."). *See also* **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 37 ("[A]rbitral decisions interpreting 'autonomous' fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 10.5 [of the Treaty]. Likewise, decisions of international courts and arbitral tribunals interpreting 'fair and equitable treatment' as a concept of customary international law are not themselves instances of 'State practice' for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice. A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 10.5 [of the Treaty]."); **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶¶ 44-45; **Ex. RL-286**, *Submission of the U.S.in Legacy Vulcan*, ¶ 10; **Ex. RL-287**, *Submission of the U.S.in Alicia Grace*, ¶¶ 72-73; **Ex. RL-302**, *PACC Offshore Services Holdings Ltd v. United Mexican States,* ICSID Case No. UNCT/18/5, Counter-Memorial, August 21, 2019, ¶ 634 ("Particularly, citing arbitral awards . . . is not a substitute for establishing that a principle of customary international law exists.") (Mexico was represented by Pillsbury Winthrop Shaw Pittman LLP in this case).

[229] *See* **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 35 ("The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*."); **Ex. RL-286**, *Submission of the U.S.in Legacy Vulcan*, ¶ 8; **Ex. RL-61**, *Submission of the U.S. in Hamadi Al Tamimi*, ¶ 5. Even if it were true that the minimum standard of treatment has evolved since *Neer*, it is not possible to maintain that it has evolved to the point of including the protection of legitimate expectations. Claimants' law firm defended the position held here by Colombia in several investment cases in which they represented Mexico. *See for example*, **Ex. RL-303**, *Alicia Grace and others v. United Mexican States,* ICSID Case No. UNCT/18/4 (NAFTA), Rejoinder, July 12, 2021, ¶ 591 ("Although the standard may evolve, 'there is no confirmation that States when referencing FET in treaties meant anything other than the minimum standard of treatment, as classically understood.'") (partial translation from Spanish); **Ex. RL-273**, *Legacy Vulcan LLC v. United Mexican States*, ¶ 299 ("In conclusion, the minimum standard of customary international law prohibits an action from being 'arbitrary,

135. Claimants also argue that a breach of FET largely hinges on the violation of the legitimate expectations of investors.[230] However, the minimum standard of treatment under customary international law does not include the protection of legitimate expectations, as has been repeatedly stated by the United States – the other Contracting Party to the Treaty – in its submissions as a non-disputing party,[231] and reaffirmed by none other than the International Court of Justice in *Bolivia v. Chile*:

> The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.

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notoriously unjust, unlawful or idiosyncratic, and discriminatory if the claimant is subjected to racial or regional prejudices or if it involves an absence of due process that leads to an outcome that offends judicial discretion.' The allegations of violation of domestic law, general claims of injustice, and self-defined 'expectations' are not sufficient to allege a violation of the fair and equitable treatment standard.").

[230] Counter-Memorial, ¶ 56. Claimants allege that Colombia wrongly asserted that Claimants were making an independent claim of breach of legitimate expectations, separately from their FET claim. *Id.*, ¶ 3. This is not true. Colombia's position is that the protection of legitimate expectations is not part of the customary international law minimum standard of treatment and, correspondingly, that Claimants' assertions about the frustration of their alleged legitimate expectations are not capable of constituting a breach of the FET standard under the Treaty (which is limited to the customary international law minimum standard of treatment). Memorial, ¶ 199.

[231] Memorial, ¶ 199; **Ex. RL-72**, *Lone Pine Resources Inc. v. Government of Canada,* ICSID Case No. UNCT/15/2 (NAFTA), Submission of the United States of America, August 16, 2007, ¶¶ 26-27 ("The concept of 'legitimate expectations' is not a component element of 'fair and equitable treatment' under customary international law that gives rise to an independent host State obligation. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required than the interference with those expectations. In fact, tribunals discussing State practice confirm that expectations about a particular legal regime do not preclude a State from taking future regulatory action. States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's 'expectations' about the state of regulation in a particular sector.") (emphasis added). *See also* **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 40; **Ex. RL-62**, *Submission of the U.S. in Ballantine*, ¶ 23; **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶ 50; **Ex. RL-66**, *Submission of the U.S. in Gramercy*, ¶ 38; **Ex. RL-67**, *Submission of the U.S. in Italba*, ¶ 25; **Ex. RL-68**, *Submission of the U.S. in Mason*, ¶ 18; **Ex. RL-56**, *Submission of the U.S. in Omega*, ¶ 24; **Ex. RL-287**, *Submission of the U.S.in Alicia Grace*, ¶ 81.

> Bolivia's argument based on legitimate expectations thus cannot be sustained.[232]

136. True to form, Claimants simply ignore this landmark decision as well as the abundant doctrine and case law cited by Colombia, and support their argument by citing to a series of sources that discuss the content of the FET obligation as a stand-alone standard, and not as a standard limited to the minimum standard of treatment – as is the standard contained in the Treaty.[233] Thus, all of the legal authorities cited by Claimants are irrelevant to the interpretation of Article 10.5.1 of the Treaty.

137. In any event, even if the protection of legitimate expectations were considered part of the minimum standard of treatment under customary international law (*quod non*), none of the necessary elements for Claimants to have any legitimate expectations protected by the Treaty are present in this case. For legitimate expectations to exist, they (i) must be objectively analyzed, (ii) at the time of making the investment, (iii) must be reasonable, and (iv) must be based on specific promises to the investor.[234]

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[232] **Ex. RL-71**, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* International Court of Justice, Judgment of October 1, 2018, 507 I.C.J. REPORTS 2018, ¶ 162 (emphasis added).

[233] Counter-Memorial, ¶¶ 56-58.

[234] *See* **Ex. RL-80**, *Phillip Morris Brands SARL, et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016 ("*Phillip Morris*"), ¶ 426 ("It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment.") (emphasis omitted); **Ex. RL-296**, A. Newcombe and L. Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, pp. 281-282 ("IIA [International Investment Agreements] jurisprudence highlights that, to create legitimate expectations, state conduct needs to be specific and unambiguous. Encouraging remarks from government officials do not of themselves give rise to legitimate expectations. There must be an 'unambiguous affirmation' or a 'definitive, unambiguous and repeated' assurance. The conduct must be targeted at a specific person or identifiable group."); **Ex. RL-304**, Rudolf Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (Oxford University Press 2012), p. 148 ("Legitimate expectations are not subjective hopes and perceptions; rather, they must be based on objectively verifiable facts."); **Ex. RL-305**, *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, September 11, 2007, ¶ 344 ("It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood

138. Claimants simply allege that Colombia "frustrated" their legitimate expectations because it allegedly applied its own laws in an incorrect and discriminatory way, failed to protect Claimants' due process rights, disproportionately assessed damages, changed its damage theories during the Fiscal Liability Proceeding, retroactively applied a law to broaden the CGR's jurisdiction, and failed to respect and protect Claimants' contractual rights.[235]

139. Leaving aside the fact that these assertions are false, none of them is *prima facie* capable of constituting a breach of Claimants' "legitimate expectations", which require that specific promises be made to investors at the time of their investment.

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in international law."); **Ex. RL-306**, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon,* ICSID Case No. ARB/07/12, Award, June 7, 2012, ¶ 166 ("The fair and equitable treatment standard of international law does not depend on the frustrated investor."); **Ex. RL-100**, *Electrabel S.A v. Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012 ("*Electrabel*"), ¶ 7.76 ("[E]xpectations must be based on more than subjective beliefs."); **Ex. RL-80**, *Phillip Morris*, ¶ 426 ("Provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.") (emphasis omitted); **Ex. RL-307**, *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010, ¶ 117 ("The expectation of the investor is undoubtedly 'legitimate', and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilization clauses on which the investor is therefore entitled to rely as a matter of law."); **Ex. CL-93**, *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, October 8, 2009, ¶ 217 ("Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy, against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable."); **Ex. RL-308**, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain,* CCE Case No. 062/2012, Final Award, January 21, 2016, ¶ 495 ("A finding that there has been a violation of investor's expectations must be based on an objective standard or analysis, as the mere subjective belief that could have had the investor at the moment of making of the investment is not sufficient. Moreover, the application of the principle accordingly depends on whether the expectation has been reasonable in the particular case with relevance to representations possibly made by the host State to induce the investment."); **Ex. RL-42**, Campbell McLachlan, Laurence Shore and Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed., Oxford International Arbitration Series 2017), ¶ 7.187 ("[T]he absence of specific representations is a material factor in leading to a finding that the standard has not been breached.").

[235] Counter-Memorial, ¶ 59. Claimants also argue that FPJVC expected Colombia to respect its rights under the Services Contract executed with Reficar. *Id.*, ¶ 61. Besides the fact that Colombia has always respected the contractual rights under the Services Contract, and that it is not a party to that Contract, none of the allegations made by Claimants have the slightest support, given that fiscal liability is separate and independent from contractual liability. *See* Memorial, ¶ 81, nn. 177, 444; n. 118, *supra*.

Claimants do not refer to any specific promises made to them at the time of their alleged investment – much less promises that were reasonable and objectively discernible – that could give rise to their alleged legitimate expectations.[236] It is obvious that Claimants' long list of alleged actions by Colombia has nothing to do with the frustration of legitimate expectations.[237]

140. In sum, since Claimants base their claim on an incorrect standard for FET – one that is not the standard contained in the Treaty, which limits that obligation to the minimum standard of treatment under customary international law – and none of their

[236] The Claimants also rely on *Glencore v. Colombia* in support of their assertion that "legitimate expectations may also consist of specific commitments, such as contractual terms between the State and an investor, made by the State." Counter-Memorial, ¶ 60. However, Claimants ignore the fact that *Glencore* was initiated under a treaty (the Colombia-Switzerland BIT) containing a definition of FET that, unlike the Treaty in this case, is not limited to the minimum standard of treatment under customary international law. *See* **Ex. RL-20**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia,* ICSID Case No. ARB/16/6, Award, August 27, 2019 ("*Glencore*"), ¶1304 ("Art. 4(2) imposes a second obligation. Colombia must accord fair and equitable treatment [already defined as 'FET'] within its territory to the investments of Swiss investors: 'Each Party shall ensure fair and equitable treatment within its territory of the investments of investors of the other Party.") Notwithstanding the foregoing, it is worth noting that the *Glencore* tribunal rejected all legitimate expectations claims, which the claimant alleged arose from contractual terms. *See id.*, ¶ 1550 ("In the Tribunal's opinion, the conduct of the SGC/ANM does not breach Claimants' legitimate expectations: Colombia never made any representation or gave any assurance to Claimants that its Mining Agency would abstain from enforcing such rights as it might have under the Contract or under Colombian law."), ¶ 1552 ("[T]he execution of a contract, even if such contract includes a representation that it is valid and binding, does not create a legitimate expectation that, if subsequently one of the parties discovers that an alleged cause for annulment pre-existed or has arisen, such party will abstain from raising a dispute in the proper forum. To understand the contrary would lead to the untenable general conclusion that actions requesting annulment of a contract are barred because such actions will breach the counter-party's legitimate expectations."). *See also id.*, ¶¶ 1410, 1416, 1425, 1427, 1429.

[237] Claimants' reference to *Marfin v. Cyprus* is misleading. Counter-Memorial, ¶ 62. That case does not support Claimants' assertion, on the contrary, it establishes that there are other types of violations of an autonomous FET obligation, separate from the frustration of legitimate expectations. *See* **Ex. CL-100**, *Marfin Investment Group Holdings S.A. and others v. Republic of Cyprus,* ICSID Case No. ARB/13/27, Award, July 26, 2018, ¶¶ 1210-1217. However, such an argument is irrelevant to this case because the FET obligation is not a stand-alone standard, but a standard tied to the minimum standard of treatment under customary international law. The relevance of *Marfin* – a case where there was no violation of an autonomous FET standard – to Claimants' position is unclear, given that in this case Claimants' arguments are based on the alleged frustration of legitimate expectations.

allegations are capable of constituting a breach of the minimum standard of treatment, they have failed to make out a *prima facie* case of breach of the FET standard.

(c) There Could Not Have Been a Denial of Justice As No Judicial Proceedings Have Been Initiated

141. Claimants' denial of justice claim is also not capable of constituting a *prima facie* breach of the Treaty's standards.[238] While Colombia does not deny that denial of justice is part of the minimum standard of treatment under customary international law, in this case there could not have been a denial of justice simply because no judicial proceedings have yet been initiated to challenge or contest the Ruling with Fiscal Liability issued by the CGR in the Fiscal Liability Proceeding.[239]

142. As indicated above, according to the express language of the Treaty, the FET obligation includes the obligation not to deny justice in proceedings of a judicial nature.[240] Thus, in order for there to be denial of justice under the Treaty, there must be a judicial proceeding (in this case, an administrative adjudicatory proceeding).[241]

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[238] In their Counter-Memorial, Claimants – having presumably noticed the weakness of their denial of justice allegation, which is both factually and legally impossible – have ostensibly modified their FET argument and now focus primarily on the alleged frustration of their legitimate expectations. *See* Counter-Memorial, ¶¶ 51-63. In any case, as explained above, legitimate expectations are not an element of the minimum standard of treatment under customary international law, making Claimants' arguments about the alleged frustration of their legitimate expectations irrelevant to the determination of whether there has been a breach of the FET obligation under the Treaty.

[239] Memorial, ¶¶ 201-214; ¶¶ 48, 109, *supra*. It is necessary to reiterate that, at the time this Arbitration commenced (which is the relevant moment for analyzing the admissibility of the claim), there had been no final administrative decision in the Fiscal Liability Proceeding, making the denial of justice allegation even more ludicrous. *See* ¶ 93, *supra*.

[240] *See* ¶ 98, *supra*; Memorial, nn. 179, 398; **Ex. RL-1**, Treaty, Article 10.5.2(a).

[241] Notably, one of the legal authorities cited by Claimants supports this proposition. *See* **Ex. CL-183**, Christoph Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 1 (2005), p. 14 ("The idea that a violation of substantive international standards has occurred only after redress has been sought exhaustively through the local courts, is hardly surprising in the context of an alleged denial of justice. Denial of justice is

143. At the time Claimants filed their Notice of Arbitration, a final administrative act that could be subject to judicial review had not yet been issued in the Fiscal Liability Proceeding.[242] Now, even though the Ruling with Fiscal Liability (an administrative decision) has been issued in the Fiscal Liability Proceeding (an administrative proceeding), a judicial proceeding has not yet been initiated before the Colombian courts of the administrative adjudicatory jurisdiction.[243] Without a judicial proceeding having been initiated, it is not even possible to allege the existence of a denial of justice.

144. A denial of justice requires, by definition, a final decision of the judicial branch of the State[244] and the standard required is extremely high.[245] The fact that there

committed typically by the judiciary and is completed only if the incriminated decision has been appealed unsuccessfully.").

[242] **Ex. RL-24**, Administrative Code, Articles 43, 75.

[243] Though Claimants attempt to misrepresent the nature of the Fiscal Liability Proceeding, it is undisputed that it is an administrative proceeding and not an administrative adjudicatory proceeding. *See* ¶ 98, *supra*.

[244] Memorial, ¶¶ 202-206; **Ex. RL-41**, *Corona Award*, ¶ 248 ("[T]he Tribunal does not believe that an administrative act, *in and of itself*, particularly as the level of a first instance decision maker, can constitute a denial of justice under customary international law, when further remedies or avenues of appeal are potentially available under municipal law.") (emphasis added); **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 47 ("For the foregoing reasons, judicial measures may form the basis of a claim under the customary international law minimum standard of treatment under Article 10.5.1 only if they are final and if it is proved that a denial of justice has occurred. Were it otherwise, it would be impossible to prevent Chapter Ten tribunals from becoming supranational appellate courts on matters of the application of substantive domestic law, which customary international law does not permit.") (emphasis added).

[245] *See* **Ex. RL-80**, *Phillip Morris*, ¶ 499 ("An elevated standard of proof is required for finding a denial of justice due to the gravity of a charge which condemns the State's judicial system as such. A denial of justice claim may be asserted only after all available means offered by the State's judiciary to redress the denial of justice have been exhausted.") (emphasis added); **Ex. RL-66**, *Submission of the U.S. in Gramercy*, ¶ 46 ("The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems.") (emphasis added); Memorial, n. 400. In addition, this was also the position Claimants' law firm advocated for when representing Mexico in the *Lion v. Mexico* case, which is one of the decisions to which Claimants refer. **Ex. RL-282**, *Lion Mexico Award*, ¶¶ 10, 281 ("Mexico emphasizes that the standard for denial of justice is very high, summarizing its scope in the following words: 'The threshold to establish denial of justice is very high - *e.g.* requiring a "notoriously unjust" or "egregious" administration of justice "which offends a sense of judicial propriety." It does not suffice to establish that domestic adjudicators have erred, or misapplied or misinterpreted domestic law'.").

are still multiple judicial remedies available to challenge the Ruling with Fiscal Liability is by itself sufficient to show that Claimants have not made a *prima facie* case of denial of justice.[246]

145. Claimants argue that this high standard should not be applied here on the grounds that challenging the Ruling with Fiscal Liability before the Colombian courts would be futile or manifestly ineffective.[247] However, this allegation is not supported by even the slightest evidence. On the contrary, as Colombia pointed out in its Memorial, there are numerous cases of rulings with fiscal liability issued by the CGR that have been rendered ineffective or reversed, in whole or in part, after the available judicial remedies have been exercised.[248]

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[246] Memorial, ¶ 206; **Ex. RL-82**, *Alps Finance v. Slovak Republic*, UNCITRAL, Award, March 5, 2011, ¶¶ 251-252 ("[R]espondent has convincingly objected that other remedies were still available to the Claimant in internal law in order to try to obtain revision of the judgment that it considered prejudicial to its interest. The non-exhaustion of local remedies is *per se* sufficient to exclude the States' responsibility in international law for actions or omissions of its judiciary. In conclusion, the *prima facie* test of a plausible treaty-claim is far from being met."); **Ex. RL-83**, *Flughafen Zurich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, November 18, 2014, ¶ 392 ("There could be no international responsibility of a State for denial of justice if there is still an effective local remedy against the local decision that is challenged.") (translation from Spanish); **Ex. RL-84**, *Apotex Inc. v. Government of the United States of America*, ICSID Case No. UNCT/10/2 (NAFTA), Award on Jurisdiction and Admissibility, June 14, 2013, ¶ 276 ("The Tribunal has sympathy for Apotex's position, and can readily appreciate that a judgment call was taken at the time that petitioning the U.S. Supreme Court was unlikely to secure the desired relief. However, as the Respondent has observed, under established principles, the question whether the failure to obtain judicial finality may be excused for 'obvious *futility*' turns on the unavailability of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief. In this case, and on balance, the Tribunal is not satisfied that finality was achieved, such as to allow for a claim under NAFTA in respect of the particular judicial decisions in question."); **Ex. RL-55**, *Submission of the U.S. in Lion Mexico*, ¶¶ 12-13 ("[D]ecisions of lower courts that may be corrected on appeal, for example, have not produced a denial of justice and cannot be the basis of a NAFTA Chapter Eleven claim. As such, non-final judicial acts cannot be the basis for claims under Chapter Eleven of the NAFTA, unless recourse to further domestic remedies is obviously futile or manifestly ineffective. Rather, an act of a domestic court that remains subject to appeal has not ripened into the type of final act that is sufficiently definite to implicate state responsibility, unless such recourse is obviously futile or manifestly ineffective.").

[247] Counter-Memorial, ¶¶ 17-18.

[248] Memorial, ¶ 209, n. 417. The fact that Colombia is attempting to enforce the Ruling with Fiscal Liability has no relation to the supposed futility and ineffectiveness of the available judicial remedies to challenge such administrative act. The CGR has a legal mandate to enforce the Ruling with Fiscal Liability once it is

146. Leaving aside the text and scope of the denial of justice obligation under Article 10.5.2(a) of the Treaty, and in the absence of any decisions supporting the possibility of a denial of justice in an administrative proceeding, Claimants rely on a series of arbitral decisions in which a denial of justice was found in judicial proceedings. All these decisions are inapplicable to the present case, and in fact support Colombia's position that a denial of justice can only occur in the context of a judicial proceeding which, as was already indicated, has not been initiated in this case.

147. It is particularly strange that Claimants cite to *Loewen v. United States*,[249] where the tribunal did not find a denial of justice because the claimant had not exhausted all local judicial remedies.[250] That is precisely what Colombia argues in this case. Moreover, the tribunal in *Loewen* reaffirmed that "[i]n the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort."[251] To date, in this case, Claimants have not even brought an annulment action against the CGR's Ruling with Fiscal Liability, which makes their attempt at a comparison with the *Loewen* case even more absurd.[252]

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final at the administrative level, but Claimants equally have the right to request the annulment of the Ruling before the courts of the administrative adjudicatory jurisdiction, and may even request the suspension of the Ruling's enforcement within the context of that judicial challenge. Also, Claimants are entitled to freely exercise their right of defense in the forced collection proceeding initiated against them in order to enforce the Ruling with Fiscal Liability. The auction of any assets that may eventually be attached will not be conducted until all judicial actions filed by Claimants challenging the Ruling have been resolved. *See* Memorial, ¶¶ 115-120; Answer to Application for Provisional Measures, ¶¶ 34, 37; ¶ 57, *supra*.

[249] Counter-Memorial, ¶ 52; **Ex. CL-91**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America,* ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003.

[250] *Id.*, ¶¶ 151-157, 217.

[251] *Id.*, ¶ 242 (emphasis added).

[252] *See* ¶ 48, *supra*.

148. The *Chevron v. Ecuador* decision cited by Claimants does not support their position either.[253] First, in *Chevron* there was already a final judicial decision, confirmed by the Constitutional Court of Ecuador.[254] Second, the tribunal in that case had verified that there was "overwhelming" "circumstantial and other evidence . . . establishing 'ghostwriting';" noting that it "must be the most thorough documentary, video, and testimonial proof of fraud ever put before an arbitral tribunal."[255] In this regard, the tribunal added that "[t]he evidence pointing to the corrupt conduct of Judge Zambrano in regard to the 'ghostwriting' of the Lago Agrio Judgment in collusion with certain of the Lago Agrio Plaintiffs' representatives justifies the very gravest concerns as to judicial propriety in regard to the Lago Agrio Judgment, with the judgments of the Lago Agrio Appellate Court, Cassation and Constitutional Courts leaving the Lago Agrio Judgment materially unremedied."[256] Third, without prejudice to the foregoing, the tribunal warned that "for denial of justice on the merits, the Tribunal does not consider it appropriate to base its decision on the Lago Agrio Judgment's treatment of environmental standards, including its assessment of causation and damages."[257] In this case, as already noted, Claimants have not even brought an annulment action against the Ruling with Fiscal Liability. Moreover, Claimants do not allege the existence of "fraud," "corruption" or "ghostwriting" attributable to Colombia; essentially, Claimants only challenge certain interpretations and/or conclusions made by the CGR, based on Colombian law, to determine, *inter alia*,

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[253] Counter-Memorial, ¶ 53; **Ex. RL-78**, *Chevron II*, ¶ 8.26.

[254] **Ex. RL-78**, *Chevron II*, ¶ 5.180.

[255] *Id.*, ¶ 8.54.

[256] *Id.*, ¶ 8.59.

[257] *Id.*, ¶ 8.73. The tribunal warned that, to establish a denial of justice, it was required that "claimant . . . prove objectively that the impugned judgment was 'clearly improper and discreditable', and a failure by the 'national system as a whole to satisfy minimum standards'." *Id.*, ¶ 8.40.

the "assessment of causation and damages." This falls far short of satisfying the standard for denial of justice under the Treaty.

149. Furthermore, Claimants argue that the investor can also invoke the FET standard "as a mode to redress against administrative wrongs," and independently of having initiated actions before the local courts.[258] But in such cases it would not be possible to invoke a denial of justice,[259] but rather another type of breach of the FET obligation, which the Treaty limits to the minimum standard of treatment under customary international law. Therefore, only if some administrative action attributable to Colombia amounts to "an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency" could there be a breach of the minimum standard of treatment,[260] and none of Claimants' allegations are likely to violate

[258] Counter-Memorial, ¶ 54. Claimants rely on certain paragraphs from McLachlan, Shore, and Weiniger's book in support of this assertion, but none of the cited paragraphs support the notion that there can be a denial of justice without first having a judicial proceeding. The paragraphs Claimants cite state that there can be other types of violations of the FET standard resulting from administrative decisions. *See* **Ex. RL-42**, C. McLachlan and others, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, ¶¶ 7.104, 7.174. In any case, following what these same legal authorities clarify, "[t]he processes of administrative decision-making cannot be judged by the standards expected of judicial proceedings," and "[t]he administrative due process requirement is lower than that of a judicial process." *Id.*, ¶ 7.193.

[259] *See* ¶¶ 142-143, *supra*. *See also* **Ex. RL-42**, C. McLachlan and others, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, ¶ 7.68 ("Any failures in administrative decision-making would not give rise themselves to an international claim, since they would first have had to be tested by the investor in the local courts.") (emphasis added). Although Claimants argue that the "process" penetrates the substance of the judgment (Counter-Memorial, ¶ 54), the truth is that the denial of justice is a standard of protection that relates to the process and not to the substance of a judicial decision. *See* **Ex. RL-309**, C. McLachlan and others, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, ¶ 7.356 ("When applied to the *judicial* function of the host State, the standard [of FET] provides a protection against denials of justice, being a failure to accord due process to the investor. This protection is concerned with the procedures applied by the host State court, and not with the substantive outcome under host State law.").

[260] *See* **Ex. RL-69**, *Neer*, p. 556; ¶ 134, n. 224, *supra*.

that extremely high standard, even less so when there are still numerous judicial remedies available to challenge that administrative decision.[261]

150. In sum, Claimants have not made out a *prima facie* case of denial of justice or any other type of violation of the minimum standard of treatment under customary international law.

(ii) Claimants Have Failed to Establish a *Prima Facie* Expropriation Claim

151. Claimants have also failed to establish a *prima facie* claim of expropriation under the Treaty. Claimants argue that two of the contractual rights provided in the Services Contract [redacted] were indirectly expropriated by Colombia when it initiated the Fiscal Liability Proceeding against Foster Wheeler and Process Consultants.

152. However, as Colombia explained in its Memorial, these two contractual rights are not capable of being economically exploited independently and separately from the Services Contract, so that – even if the facts that Claimants outline were true (*quod non*) – these concrete and specific rights cannot be "expropriated" under the Treaty

[261] Claimants also argue that a lack of impartiality would be in breach of the FET obligation, relying on *Glencore v. Colombia* in support of their position. *See* Counter-Memorial, ¶ 55; **Ex. RL-20**, *Glencore*, ¶ 1348. Despite the fact that the FET standard in the Colombia-Switzerland BIT - which was applied in *Glencore* - is not limited to the minimum standard of treatment under customary international law as it is under the Treaty, the tribunal in *Glencore* did not find a breach of the FET obligation on account of a lack of impartiality on the part of the CGR, and even highlighted the difference between a judicial proceeding and an administrative proceeding (in which the decision-maker is both the one investigating and accusing, and therefore the only requirement of due process is for the final administrative decision to be subject to full judicial review). *See* **Ex. RL-20**, *Glencore*, ¶¶ 1319, 1359-1360.

separately and independently from the rest of the alleged "investment" (*i.e.*, the Services Contract), which Claimants do not even allege has been expropriated.[262]

153. Having no argument to refute the clear and unanimous jurisprudence rejecting the possibility of a "partial" expropriation[263] and supporting the basic principle that an investment must be viewed as a whole for purposes of determining whether there is an indirect expropriation,[264] Claimants try to obfuscate the discussion by arguing that

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[262] Memorial, ¶¶ 215-224.

[263] *See in this regard,* **Ex. RL-99**, *Louis Dreyfus Armateurs SAS v. Republic of India,* PCA Case No. 2014-26, Award, September 11, 2018, ¶¶ 417-419 ("This dilemma leads LDA [Louis Dreyfus Armateurs SAS, the Claimant] to attempt to demonstrate expropriation instead by isolating a particular *revenue stream* contributing to ALBA's [ALBA Asia Private Limited] overall value, namely that attributable to HBT's [Haldia Bulk Terminals Private Limited] operations. But however creative this theory may be, it runs counter to the text of Article 6(1). Article 6(1) does not prohibit 'measures having the effect of dispossession . . . of [*a part of an*] investment,' or 'the effect of dispossession . . . of [*a distinct revenue strand of an*] investment.' It requires a showing that the *investment itself* suffered an impact equivalent in effect to complete dispossession. The prohibition on uncompensated dispossession thus serves to bar dispossession by the host State of an investment writ large, not just interference with isolated rights or benefits relating to such investment. . . . Even putting aside the implications of Article 2(1) – that LDA has no protected investment in HBT, much less a protected right stemming from HBT's Contract – the false assumption underlying LDA's argument is that every interest, asset, or right of an investor may be expropriated separately from the investment enterprise as a whole, even when the enterprise has not itself been expropriated. But the logical consequence of LDA's theory would be that almost any impact of State conduct on an investment could be deemed to be an expropriation, provided the investor simply identified as the relevant 'investment' only the category of interests, assets or rights impacted by the Government act. . . . Thus, even if proven, interference with a single component of LDA's investment in ALBA, such as the value derived from an alleged indirect right to benefit from HBT's Contract, could not constitute expropriation."); **Ex. RL-100**, *Electrabel,* ¶ 6.57 ("If it were possible so easily to parse an investment into several constituent parts each forming a separate investment … it would render meaningless … [the] approach to indirect expropriation based on 'radical deprivation' and 'deprivation of any real substance' as being similar in effect to a direct expropriation or nationalization. It would also mean, absurdly, that an investor could always meet the [magnitude of deprivation] test for indirect expropriation by slicing its investment as finely as the particular circumstances required, without that investment as a whole ever meeting that same test."); Memorial, ¶ 217, n. 438.

[264] *See* Memorial, ¶ 219; **Ex. RL-105**, *Merrill & Ring Forestry L.P. v. Government of Canada,* ICSID Case No. UNCT/07/1 (NAFTA), Award, March 31, 2010, ¶ 144 ("In this regard, as was also concluded in *Pope & Talbot*, the business of the investor has to be considered as a whole and not necessarily with respect to an individual or separate aspect."); **Ex. RL-51**, *Telenor Mobile Communications A.S. v. Republic of Hungary,* ICSID Case No. ARB/04/15, Award, September 13, 2006, ¶ 67 ("In the present case at least, the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value."); **Ex. RL-106**, A. Newcombe y L. Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, p. 350 ("The tendency has been for tribunals to consider that the investment must be viewed as a whole.").

contractual rights are susceptible of being expropriated.[265] But that is not the relevant issue here. The issue in this Arbitration is not whether contractual rights, as a general matter, can constitute an investment and be subject to expropriation. The relevant question in this case is whether Claimants can claim expropriation of two specific and concrete contractual rights in the Services Contract if there was no expropriation of the Services Contract (*i.e.* the alleged investment) itself (which Claimants have not alleged). And the answer is clearly no.

154. The text of Article 10.7 of the Treaty – which Claimants cite in their Counter-Memorial – does not support their position.[266] In fact, this Article expressly provides that "[n]o Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization."[267] Interpreting this provision in accordance with the ordinary meaning of its terms leaves no room for ambiguity: the Treaty protects a "covered investment" – which Claimants themselves define as the Services Contract – against expropriation, not "specific rights" or portions of that "covered investment."

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[265] Counter-Memorial, ¶ 69.

[266] *Id.*, ¶¶ 64, 66.

[267] **Ex. RL-1**, Treaty, Article 10.7; Memorial, ¶ 218. Claimants refer to Annex 10-B of the Treaty, which sets forth the elements to consider when determining the existence of an indirect expropriation. *See* Counter-Memorial, ¶ 66; **Ex. RL-1**, Treaty, Annex 10-B. While Respondent does not contest these elements, or the concept of indirect expropriation, these elements are all irrelevant to the analysis of Claimants' claim. This is because for an indirect expropriation to exist, there must be an act or series of governmental acts depriving the investor of all or substantially all its investment, and not just parts of that investment. Annex 10-B even clarifies that "the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred." **Ex. RL-1**, Treaty, Annex 10-B, Article 3(a)(i). Claimants themselves seem to acknowledge that a total or significant deprivation of their "investment" is required for an indirect expropriation to exist. *See* Counter-Memorial, n. 123 ("For a finding of indirect expropriation, the inquiry is whether a government's interference deprived the investor, in whole or in significant part, of the use or reasonably-to-be-expected benefit of its investment.") (emphasis added).

155. As noted by the tribunal in *Grand River v. United States* when interpreting a similar NAFTA provision, "[a]n act of expropriation must involve 'the investment of an investor, not part of an investment'."[268] This is even confirmed by one of the cases cited by Claimants, *Koch v. Venezuela*, where the tribunal held that the investment "cannot be sliced off and isolated, like a piece of sausage."[269]

156. Finally, Claimants outline a number of irrelevant arguments that have nothing to do with the *prima facie* existence of an expropriation in this case, such as, for example, that ICSID tribunals have found that contractual rights may be expropriated when a contract is terminated by decree or by a series of sovereign acts terminating a concession.[270] The Services Contract was not terminated by any action of Colombia. Claimants do not allege that the Services Contract was terminated or expropriated. [redacted]. All they allege is that the Fiscal Liability Proceeding indirectly "expropriated" two of their contractual rights.

157. [redacted]

[268] **Ex. RL-101**, *Grand River*, ¶ 155 (emphasis added).

[269] **Ex. RL-310**, *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/19, Award, October 30, 2017 ("*Koch*"), ¶ 7.48 (emphasis added) (Claimants only submitted the English version of **Ex. CL-110**, therefore, the English and Spanish versions are herein submitted).

[270] Counter-Memorial, ¶ 70. An analysis of the very cases cited by Claimants shows that none of them involve allegations of partial expropriation. *See* **Ex. CL-107**, *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, January 17, 2007, ¶ 267 ("The Contract falls under the definition of 'investments' under the Treaty and Article 4(2) . . . Therefore, the State parties recognized that [the Contract] may be expropriated."). One of the cases referred to by Claimants actually supports Colombia's position. *See* **Ex. RL-310**, *Koch*, ¶ 7.48 (where, in evaluating an expropriation claim, the majority of the tribunal held that "both KOMSA's original investment and the *Offtake Agreement* [*i.e.*, the contract that was alleged to have been expropriated] [should be considered] as a unitary package.") (emphasis added).

[redacted]. [271]

158. For all the foregoing reasons, the allegations of supposed expropriation of Claimants' rights [redacted] [272] are not capable of constituting a *prima facie* case of expropriation under the Treaty.

(iii) Claimants Have Failed to Establish a *Prima Facie* Breach of National Treatment

159. Colombia pointed out that there is no *prima facie* case of breach of the national treatment obligation under Article 10.3 of the Treaty since the Fiscal Liability Proceeding involves both nationals and foreigners, and therefore in this case there is no measure that *prima facie* favors nationals over non-nationals.[273]

160. In their Counter-Memorial, Claimants insist that they have made out a claim of a *prima facie* breach of the national treatment standard solely based, once again, on the fact that the CGR did not charge the members of Ecopetrol's board of directors with

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[271] *See* ¶ 66, *supra*. [redacted].

[272] As pointed out by Colombia, beyond the fact that it is impossible, as a matter of law, that there could be an indirect expropriation of two specific contractual rights separately from the rest of the contractual rights that would constitute Claimants' "covered investment", a *prima facie* analysis of their factual allegations shows that expropriation could not have taken place in this case. First, the Fiscal Liability Proceeding refers to Claimants' fiscal liability, not to their contractual liability, and the personal and material scope [redacted]. *See* Memorial, ¶¶ 220-223.

[273] Memorial, ¶¶ 225-230.

fiscal liability while it did charge Foster Wheeler and Process Consultants.[274] Despite their insistence, Claimants cannot ignore the unequivocal facts of this case: the Indictment Order and the subsequent Ruling with Fiscal Liability involve both nationals and foreigners, and therefore cannot have the "practical effect" of "creat[ing] a disproportionate benefit for nationals over non-nationals," nor constituting a "measure" that "on its face appears to favor its nationals over non-nationals."[275]

161. Claimants are aware of these facts, but argue that, for purposes of deciding an objection under Article 10.20.4 of the Treaty, the Tribunal must assume as true the facts as recounted by Claimants,[276] pointing to the alleged differential standard applied with respect to the members of Ecopetrol's board of directors. However, as Colombia has already indicated, contrary to Claimants' argument, the presumption of truthfulness under Article 10.20.4 of the Treaty is narrow,[277] being limited only to the factual allegations in the Notice of Arbitration. Most of the allegations made by Claimants with respect to the alleged *prima facie* breach of the national treatment standard are legal allegations or conclusions that are not supported by factual allegations, and not actual factual allegations that the Tribunal may assume as true.[278]

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[274] Counter-Memorial, ¶¶ 94-101.

[275] **Ex. RL-112**, *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL (NAFTA), Partial Award, November 13, 2000 ("*SD Myers*"), ¶ 252.

[276] Counter-Memorial, ¶ 96.

[277] *See* ¶ 79, *supra*.

[278] *See for example*, Counter-Memorial, ¶ 95 (stating that FPJVC should not be considered as a fiscal manager under Law 610 of 2000), ¶ 98 (claiming that the members of the board of directors of Ecopetrol were exonerated due to the absence of fiscal management, a conclusion that is erroneous and is not supported by the contents of the Indictment Order).

162. Ultimately, the only relevant fact to determine whether or not there is a p*rima facie* breach of the national treatment obligation, and which is not in dispute, is that both natural persons (including the members of the board of directors and certain administrators of Reficar) and juridical persons (including CB&I), of Colombian and foreign nationality, were charged and later found liable in the Fiscal Liability Proceeding. Additionally, it is worth reiterating that Foster Wheeler and Process Consultants and the members of the board of directors of Reficar were not situated in similar circumstances that could give rise to a claim for a breach of the national treatment obligation.[279]

163. Moreover, the only fiscally liable parties against whom the CGR has not issued precautionary measures in the Fiscal Liability Proceeding have been foreign individuals without assets in Colombia, including Foster Wheeler and Process

[279] Memorial, ¶ 226, nn. 270, 451. In their Counter-Memorial Claimants allege that the CGR expressly stated that fiscal management was the primary consideration in dropping the charges against the members of the board of directors of Ecopetrol. Counter-Memorial, ¶ 98. This is not true. Claimants draw their erroneous conclusion from an editorial publication of the CGR stating that "the fiscal responsibility over the control and execution of the investments was a task for the board of Reficar." **Ex. C-12**, Office of the Comptroller General of the Republic of Colombia, GRANDES HALLAZGOS: ASÍ DESTAPÓ LA CONTRALORÍA GENERAL DE LA REPÚBLICA LOS CASOS MÁS SONOROS DE CORRUPCIÓN EN COLOMBIA. DEL CARTEL DE LA HEMOFILIA A LOS ESTRAFALARIOS SOBRECOSTOS DE REFICAR PASANDO POR EL SAQUEO AL PLAN DE ALIMENTACIÓN ESCOLAR (Imprenta Nacional 2018), p. 64 (Respondent submitted this factual exhibit with its Memorial as **Ex. R-49**). Claimants confuse the terms fiscal liability and fiscal management. According to the Indictment Order, there is no doubt that the CGR investigated the members of the board of directors of Ecopetrol, precisely because they performed a "fiscal management of the economic interest of the State." **Ex. R-54**, Indictment Order – Part 3: Considerations of the office and results of the investigation, p. 808 (translation from Spanish; emphasis added). However, the CGR decided not to charge fiscal liability against the members of the board of directors of Ecopetrol since (i) Change Control 2 was approved by the board of directors of Reficar absent any knowledge of the board of directors of Ecopetrol; and (ii) the conduct of the members of the board of directors of Ecopetrol concerning Change Controls 3 and 4 was in accordance with their functional, legal, statutory, and regulatory duties, thus there was neither a willfully nor grossly negligent conduct on their part. Memorial, n. 270. *See* **Ex. R-63**, Indictment Order – Part 12: Closure of proceedings I, pp. 4422, 4427. In none of the sections of the Indictment Order cited by Claimants does the CGR state that the members of the board of directors of Ecopetrol are not fiscal managers. Counter-Memorial, n. 180.

Consultants,[280] meaning that foreigners in the Fiscal Liability Proceeding have received even more favorable treatment than nationals.

164. Claimants appear not to challenge the text and requirements of Article 10.3 of the Treaty,[281] nor the interpretations of this obligation advanced by the United States in its non-disputing party submissions.[282] However, Claimants specifically question the decision in *SD Myers v. Canada* cited by Colombia in its Memorial, where the tribunal noted that, "in assessing whether a measure is contrary to a national treatment norm," two factors must be taken into account: "whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals" and "whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty."[283]

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[280] *See* ¶ 59, *supra*.

[281] **Ex. RL-1**, Treaty, Article 10.3 ("1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."). It is important to note that none of Claimants' allegations concerning a purported breach of the national treatment obligation relate to the "acquisition, expansion, management, conduct, operation, and sale or other disposition" of the Services Contract, such Contract being the "investment" claimed by Claimants. Memorial, n. 454. Claimants say nothing about this in their Counter-Memorial.

[282] Counter-Memorial, ¶¶ 99-100. *See* Memorial, ¶¶ 227-228. *See also* **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶¶ 49-50 ("To establish a breach of national treatment under Article 10.3, a claimant has the burden of proving that it or its investments: (1) were accorded 'treatment'; (2) were in 'like circumstances' with domestic investors or investments; and (3) received treatment 'less favorable' than that accorded to domestic investors or investments. Article 10.3 is intended to prevent discrimination on the basis of nationality between domestic investors (or investments) and investors (or investments) of the other Party, that are in 'like circumstances.' [Article 10.3] is not intended to prohibit all differential treatment among investors or investments. Rather, [Article 10.3] is designed only to ensure that the Parties do not treat entities that are 'in like circumstances' differently based on nationality. Nationality-based discrimination under Article 10.3 may be *de jure* or *de facto*. *De jure* discrimination occurs when a measure on its face discriminates between investors or investments in like circumstances based on nationality. *De facto* discrimination occurs when a facially neutral measure with respect to nationality is applied in a discriminatory fashion based on nationality.").

[283] **Ex. RL-112**, *SD Myers*, ¶ 252

165. Claimants allege that the decision in *SD Myers* "ignores over twenty years of jurisprudence, treaty practice, and scholarship on the subject of national treatment."[284] This assertion – which Claimants did not back with any legal sources – is wrong. *S.D. Myers v. Canada*, along with the other "early NAFTA cases played a very important role in developing a methodology for applying the national treatment standard,"[285] laying the groundwork for the interpretation of that standard.[286]

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[284] Counter-Memorial, ¶ 100.

[285] **Ex. CL-130**, Borzu Sabahi, Noah Rubins, and Don Wallace, Jr., INVESTOR-STATE ARBITRATION (2d ed., Oxford University Press 2019), Chapter XVII, n. 19.

[286] *See also*, **Ex. RL-296**, A. Newcombe and L. Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, Chapter 4, n. 18 (noting that multiple investment tribunals, including *SD Myers*, have confirmed that the national treatment standard seeks to protect against discrimination based on nationality). Claimants also criticize Respondent's reference in its Memorial to the national treatment standard as articulated by the tribunal in *Feldman v. Mexico* on the grounds that Mexico was found liable for a breach of that standard in that case. Counter-Memorial, ¶ 100. However, as Colombia pointed out, what is important about the *Feldman* case is not the result but how the tribunal interpreted the national treatment standard. The tribunal in *Feldman* stated that "the concept of national treatment as embodied in NAFTA and similar agreements are designed to prevent discrimination on the basis of nationality, or by reason of nationality." **Ex. RL-102**, *Marvin Feldman v. Mexico,* ICSID Case No. ARB(AF)/99/1 (NAFTA), Award, December 16, 2002, ¶ 181. The tribunal in *Feldman* found a breach of the national treatment standard because "there [was] evidence of a nexus between the discrimination and the Claimant's status as a foreign investor" and "the treatment between the foreign investor and domestic investors in like circumstances [was] different on a *de facto* basis." *Id.*, ¶¶ 181-182, 184. If the *Feldman* standard was applied to the facts of this case, Claimants would fail to present a *prima facie* case of national treatment. Unlike in *Feldman*, in this case, there is no evidence of discrimination based on nationality, nor is there a difference in factual treatment, since both nationals and foreigners were charged in the Indictment Order and found liable in the Ruling with Fiscal Liability. The same is true with respect to *Casinos v. Argentina*, which Claimants also take issue with. According to Claimants, the decision in *Casinos* is irrelevant to this case because the facts of that case and the facts of this dispute are different. Counter-Memorial, ¶ 100. The alleged factual difference alleged by Claimants is irrelevant. What is relevant here is that if the national treatment standard articulated by *Casinos* was applied to the facts of this case, Claimants would also fail to make out a *prima facie* case of a breach of the national treatment standard. As Colombia has already explained, the tribunal in *Casinos* determined that the national treatment standard "prohibits nationality-based discriminations between foreign investors and their investments, on the one hand, and national investors and their investments, on the other. Such discrimination, however, presupposes that foreign and national investors and their investments are affected differently*, de jure* or *de facto*, either by the same government measure or by measures that are sufficiently closely connected so as to result in a discriminatory treatment." **Ex. RL-111**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, June 29, 2018, ¶ 249. As already demonstrated, in this case, there is no evidence of any differential treatment based on nationality, nor is there any distinction in treatment either *de jure* or *de facto*. Both nationals and foreigners were involved in the Fiscal Liability Proceeding and were subject to fiscal liability.

166. In short, the requirements for a *prima facie* breach of the national treatment obligation under the Treaty are not met in this case because the Indictment Order and the Ruling with Fiscal Liability (which was issued after the commencement of this Arbitration) implicate both nationals and non-nationals, and therefore cannot have the "practical effect" of "creat[ing] a disproportionate benefit for nationals over non-nationals," coupled with the fact that "the measure, on its face," does not "appear to favour its nationals over non-nationals."

(iv) Claimants Have Failed to Establish a *Prima Facie* Breach of the Most-Favored-Nation Treatment

167. Claimants have also failed to establish a *prima facie* breach of the MFN obligation under Article 10.4 of the Treaty. In their Notice of Arbitration, Claimants invoked the MFN clause in an attempt to import an umbrella clause from the Colombia-Switzerland BIT.[287] As Colombia explained in its Memorial, none of the allegations raised by Claimants is capable of establishing a *prima facie* breach of the MFN obligation because (i) Claimants do not argue that there is a factual situation in which more favorable treatment has been granted to an investor from a third country; (ii) even if the MFN clause could be used as an importation mechanism, it would not be possible to import from another investment treaty a new right that is not found in the base treaty (such as an umbrella clause); (iii) even assuming that it were possible to import new rights, it would also not be possible to import an umbrella clause from another investment treaty because this would contravene the public policy considerations that the Contracting Parties took into account when they specifically excluded an umbrella clause from the Treaty; (iv) even if the importation of new rights through the MFN clause were allowed, importing the right

[287] Notice of Arbitration, ¶¶ 188-192.

to submit a claim to arbitration for breach of the umbrella clause of the Colombia-Switzerland BIT would not be possible because such a right does not exist in that treaty; and (v) in any event, the requirements for the application of the umbrella clause of the Colombia-Switzerland BIT are not met (among others, because Reficar is not an "agency" of the Colombian central government).[288]

168. Claimants state in their Counter-Memorial that Colombia reads "exceedingly restrictive conditions" into the MFN clause that have no basis in the language of the Treaty or elsewhere, and essentially argue that the MFN clause permits the importation of other standards of protection – in particular an umbrella clause from another investment treaty – and that Colombia's other treaties include umbrella clauses.[289] Claimants' arguments are incorrect and inconsistent with the language and operation of the Treaty's MFN clause, and with the umbrella clause they seek to import.[290]

169. Claimants' first argument is that Article 10.4 of the Treaty permits the importation of standards of protection from other investment treaties concluded by Colombia.[291] Although Claimants claim to rely on the language of the MFN clause, an

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[288] Memorial, ¶¶ 231-239.

[289] Counter-Memorial, ¶¶ 71-93.

[290] When the law firm representing Claimants represented Mexico, it endorsed the interpretation proposed by Colombia in this case. *See* n. 295, *infra*.

[291] Counter-Memorial, ¶¶ 72-81. Claimants cite the maxim *expressio unius est exclusio alterius* as support to justify the importation of substantive standards from other treaties through the MFN clause, because the clause expressly excludes dispute resolution mechanisms. *See* Counter-Memorial, ¶¶ 77-78. Beyond the fact that such maxim is only a supplemental means of interpretation, several investment tribunals have warned about the dangers of its mechanical application to the interpretation of the MFN clause. *See* **Ex. RL-271**, T. Gazzini, INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES, pp. 128-129 ("In *Plama v. Bulgaria*, the Tribunal warned against a mechanical application of the principle *expressio unius est exclusio alterius* with regard to the question of the inclusion or exclusion of the provisions on the settlement of disputes from the scope of application of the MFN clause. . . . As further elaborated in *ICS v. Argentina*, which on this point relies on *Plama v. Bulgaria*, the mere fact that the contracting parties have not expressly excluded a given provision or category of provisions within the scope of application of the MFN clause. But

interpretation of Article 10.4 of the Treaty consistent with Article 31.1 of the Vienna Convention supports Colombia's position, not Claimants'.

170. The text of the provision clearly states that "[e]ach Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party."[292] As the tribunal in *Ickale v. Turkmenistan* stated, "[t]he terms 'treatment accorded in similar situations' therefore suggest that the MFN treatment obligation requires a comparison of the factual situation" between parties, and that "given the limitation of the scope of application of the MFN clause to 'similar situations,' it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State."[293] It is therefore clear that Article 10.4 of the Treaty requires a comparison

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the opposite interpretation is also possible if the contracting parties' understanding was that the MFN clause would never cover this provision or category of provisions.").

[292] **Ex. RL-1**, Treaty, Article 10.4.1. The artificial distinction that Claimants attempt to create between the present and past verb tense is absolutely irrelevant. *See* Counter-Memorial, ¶ 87. In fact, the Spanish phrase "*que el que conceda*" ["than that it accords"] uses the subjunctive mood. In any of these verb tenses or moods, it is evident that two factual situations are being compared. In addition, the MFN obligation of the Treaty is restricted to the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory," and none of Claimants' allegations have anything to do with that. **Ex. RL-1**, Treaty, Article 10.4.1. Moreover, it should be noted that – curiously – Claimants refer to an alleged statement contained in the ILC Draft Articles on MFN clauses (Counter-Memorial, ¶ 88), but the citation they provide is incorrect, as that statement is not found in that document.

[293] **Ex. RL-113**, *Içkale Insaat Limited Sirketi v. Turkmenistan,* ICSID Case No. ARB/10/24, Award, March 8, 2016, ¶ 329. *See also id.* ("The standards of protection included in other investment treaties create legal rights for the investors concerned, which may be more favorable in the sense of being additional to the standards included in the basic treaty, but such differences between applicable legal standards cannot be said to amount to 'treatment accorded in similar situations,' without effectively denying any meaning to the terms 'similar situations.' Investors cannot be said to be in a 'similar situation' merely because they have invested in a particular State; indeed, if the terms 'in similar situations' were to be read to coincide with the territorial scope of application of the treaty, they would not be given any meaning and would effectively become redundant as there would be no difference between the clause 'treatment no less favourable than that accorded in similar situations . . . to investments of investors of any third country' and 'treatment no less favourable than that accorded . . . to investments of investors of any third country.' Such a reading would not be consistent with the generally accepted rules of treaty interpretation, including the principle of effectiveness, or *effet utile*, which requires that each term of a treaty provision should be given a meaning and effect."); **Ex. RL-114**, *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan,* ICSID Case No. ARB/12/6, Award, May 4, 2021, ¶¶ 784, 793 ("Accordingly, the Tribunal considers that the

of factual situations of the treatment actually accorded to parties in like circumstances,[294] and in this case Claimants do not argue that there is a factual situation in which a third-

words '*similar situations*' indicate the State parties' intention to restrict the scope of the MFN clause to apply only to discriminatory treatment between investments of investors of one of the State parties and investors of third States, insofar as such investments may be said to be in a factually similar situation. This required that the actual measures taken by the host State is directed towards investments of actual investors that are in a similar situation, and to prove that such measure had the effect of treating one less favourably than the other. . . . The Tribunal has concluded that the MFN provision in Article II(2) BIT applies to *de facto* discrimination where two actual investors in a similar situation are treated differently. That is not the case here. Further, the wording of Article II(2), requiring such factually similar situation, does not entitle Claimants to rely on the MFN provision to import substantive standards of protection from a third-party treaty which are not included in the BIT, and to rely on such standards in the present Arbitration.") (emphasis added). Claimants cite to Professor Schill, who criticized the *Içkale* decision (Counter-Memorial, ¶ 89). However, other scholars have the opposite view. *See also* **Ex. RL-311**, Simon Batifort and J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 11(4) AMERICAN JOURNAL OF INTERNATIONAL LAW 873 (2018), p. 909 ("If interpreters bracket their presumptions and intuitions about the nature of MFN clauses and MFN importation, they will need to pay closer attention than they have in the past to particular terms in MFN clauses. This reconsideration of treaty terms must begin with the scope of the term 'treatment'. Some states have expressed the view that 'treatment,' as it is used in at least some investment treaties, refers to actual measures taken vis-à-vis investors or investments, and not to 'standards of treatment' afforded in other investment treaties. It has been suggested that states, when drafting the earlier-generation investment treaties, did not envision that these provisions would apply to import standards of treatment but rather that they would forbid actual discrimination through conduct by the host state—what has been described as the 'traditional' use of MFN clauses. One investment treaty negotiator defended a similar position in a 2008 article, and argued that MFN clauses generally 'should not be used for treaty shopping purposes'. This approach would have tribunals draw a distinction between 'treatment' and 'standards of treatment.' As a conceptual matter, this view is consistent with a growing body of literature that identifies general treaty standards such as FET as 'standards of review' against which certain state measures are assessed. On this view, it might be argued, 'treatment' refers to the state measure under review in an FET claim, rather than the FET provision itself."); **Ex. RL-312**, Facundo Pérez-Aznar, *The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements*, 20(4) JOURNAL OF INTERNATIONAL ECONOMIC LAW 777 (2018), pp. 804-805 ("The nature and the text of most MFN clauses included within BITs suggest that, in cases concerning MFN clauses and treatment granted by international agreements, a tribunal should compare the treatment of the claimant under the base treaty with the treatment of investors under the reference treaty (as it was suggested by the tribunal in *Ickale v. Turkmenistan*), and then, if appropriate, they should find a violation of the MFN clause (as the *ADF v. United States* tribunal suggests), instead of going and examining the violation of a new provision from the reference treaty. The legal framework applicable to MFN clauses . . . strongly militates in favour of the proposition that the standard MFN clauses included in IIAs should not be used to import treaty provisions from other treaties unless a clear and unambiguous intention of the contracting parties can be identified in the terms of the base treaty itself or, paraphrasing the [International Court of Justice], when a consent which is 'certain' in that regard can be identified.").

[294] Curiously, Claimants cite to the language of the recent U.S.-Mexico-Canada Agreement, which expressly states in a footnote that the "treatment" referred to in the MFN clause "excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations." **Ex. RL-208**, USMCA, Chapter 14 (Investment), n. 22; Counter-Memorial, ¶ 80. This footnote was specifically included to clarify the scope of the MFN clause and, at the same time, as a reaction to arbitral tribunals that have interpreted some MFN clauses in an excessively broad manner so as to allow the importation of substantive standards from other treaties. The

country investor was actually accorded more favorable treatment, so there cannot have been a breach of this obligation. This position, which Claimants criticize so much, is the same position that the law firm representing them here advanced when it acted on behalf of Mexico in *Legacy v. Mexico*, where it cited to the *Ickale* case with approval and argued that there was a "categorical" impossibility of using the MFN clause to import standards of treatment from other treaties.[295]

171. Claimants' second argument is that the MFN clause can be used to import new rights that are not found in the base treaty, such as an umbrella clause.[296] In that respect, Respondent refers to the decision of the tribunal in *Paushok v. Mongolia* which

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lack of such express clarification in the Treaty has no relevance, but rather reaffirms that States have found the need to make such clarification in the face of overly broad interpretations by some arbitral tribunals. *See* **Ex. RL-311**, S. Batifort and J. Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, pp. 899-900, 907 ("The states parties to the NAFTA—Canada, Mexico, and the United States—have opposed the importation of standards of treatment via MFN in the context of specific investment disputes over the interpretation of Article 1105 [of NAFTA] (Minimum Standard of Treatment) . . . In several cases, claimants have sought to rely on this provision [MFN] to borrow substantive standards of treatment in treaties between a NAFTA party and a third country. These efforts have met with resistance from the three states parties to the NAFTA, either in their role as respondent or as non-disputing parties in arbitration proceedings, and the claimants' attempts have never proven successful . . . The new clarification in CETA and other treaties, moreover, is only one possible reaction to what states see as overbroad or troubling interpretations of MFN clauses.") (emphasis added); **Ex. RL-313**, Suzy H. Nikièma, *The Most-Favoured-Nation Clause in Investment Treaties*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (IISD) BEST PRACTICES SERIES (2017), pp. 21, 23-24 ("Yet, as certain tribunals and commentators have noted, it is hard to believe that, when signing BITs before 2000, states would have envisaged MFN being used to import provisions from BITs with other countries, whether substantive or procedural rules. It is more likely that [States] were referring to treatment directly granted in the host country. And as one tribunal noted, [States] did not envisage making exceptions for provisions which, in their eyes, were evidently not included. . . On this basis, several states, first the large capital-exporting countries, have reviewed their negotiation practice for BITs to counter recent MFN interpretations . . . The CETA between Canada and the European Union is an example of a recent agreement in which the parties agreed to exclude not only procedural rules but also substantive ones from the scope of MFN . . . Note that the Article [8.7.4 of CETA] begins with the wording 'for greater certainty' and could indicate that the two states have always understood the MFN clause in this way in their investment treaties, including those that do not expressly provide for that exception.").

[295] *See* **Ex. RL-273**, *Legacy Counter-Memorial*, ¶ 422. ("Thus, the award in *İçkale İnşaat Limited Şirketi v. Turkmenistan* categorically states that: 'a common formulation of the clause, by its very terms, does not permit the importation of standards of treatment'.") (partial translation from Spanish).

[296] Counter-Memorial, ¶¶ 82-90.

specifically held that an "investor cannot use [a] MFN clause to introduce into the Treaty completely new substantive rights, such as those granted under an umbrella clause."[297] While Respondent appreciates that certain tribunals have interpreted MFN clauses in an excessively broad and expansive way, it believes that even if more favorable standards of treatment are allowed to be imported from other treaties (*quod non*), entirely new rights that are not found in the base treaty cannot be imported. This position is supported by

[297] **Ex. RL-314**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia,* UNICTRAL, Award on Jurisdiction and Liability, April 28, 2011, ¶ 570.

the tribunals in *Hochtief v. Argentina*, *Accession Mezzanine v. Hungary* and *Teinver v. Argentina*,[298] among others, which Claimants do not even attempt to distinguish.[299]

172. Furthermore, importing an umbrella clause from another investment treaty concluded by Colombia would run contrary to the public policy considerations that the

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[298] **Ex. RL-115**, *Hochtief AG v. Argentine Republic, ICSID Case No. ARB/07/31,* Decision on Jurisdiction, October 24, 2011, ¶ 81 ("In the view of the Tribunal, it cannot be assumed that Argentina and Germany intended that the MFN clause should create wholly new rights where none otherwise existed under the Argentina-Germany BIT. The MFN clause stipulates a standard of treatment and defines it according to the treatment of third parties. The reference is to a standard of treatment accorded to third parties, not to the extent of the legal rights of third parties. . . . The MFN clause is not a *renvoi* to a range of totally distinct sources and systems of rights and duties: it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found."); **Ex. RL-116**, *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary,* ICSID Case No. ARB/12/3, Decision on Respondent's Objections under Arbitration Rule 41(5), January 16, 2013, ¶¶ 73-74 ("Care has to be taken in this context. MFN clauses are not and should not be interpreted or applied to create new causes of action beyond those to which consent to arbitrate has been given by the Parties. . . . The Tribunal is of the view that an investor may properly rely only on rights set forth in the basic treaty, meaning the BIT to which the investor's home state and the host state of the investment are directly parties, but not more than that."); **Ex. RL-117**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic,* ICSID Case No. ARB/09/01, Award, July 21, 2017, ¶ 884 ("The Tribunal accepts that the parties to the Treaty were in all likelihood aware of the existence of umbrella clauses and if they had intended to include such a clause in the Treaty, they would have done so. According to Respondent, use of the MFN Clause to incorporate an umbrella clause into the Treaty would result in the incorporation of a new right or standard of treatment not provided for in the Treaty. On the basis of the specific language used by the Parties in the Treaty, the Tribunal finds this argument persuasive."). *See also* **Ex. RL-119**, UNCTAD, *Most-Favoured-Nation Treatment*, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II (United Nations 2010), pp. 105-106 ("[A] broad approach towards the application of MFN treatment poses numerous policy challenges. It also may deviate from the original objective of such obligation. By automatically incorporating commitments from third treaties, a broad MFN obligation might practically ignore the sovereign freedom of States so conclude international obligations as they see fit. This may partially modify or nullify the basic treaty by means of importation of provisions from a third party treaty and may also create a sense of uniformity of standards when real variations in scope, content and intent exist for very good policy reasons. Even more so, it might be in conflict with the actual policy balance present in the IIA in question. A broad MFN obligation can also make it hard to predict the extent of host country liabilities, as the applicable protection and ISDS [Investor State Dispute Settlement] provisions will be contingent on the perception of each investor, case by case, as well on a number of combinations and permutations actually impossible to foresee or administer. The approach also makes it difficult to update, refine or improve new IIAs, as the new treaties may be modified by reason of past treaties.").

[299] Claimants' law firm defended this position when representing Mexico in another investment arbitration. *See* **Ex. RL-273**, *Legacy Counter-Memorial*, ¶ 425 ("So far, no NAFTA tribunal has ruled with respect to the introduction of an umbrella clause under Article 1103 of NAFTA. In fact, when the claimants invoked Article 1103 to introduce substantive standards of treaty treatment between a NAFTA member and a third country, their attempts have always been rejected."), ¶ 436 ("[T]he text of NAFTA itself does not permit the importation of substantive provisions from other treaties, much less general clauses, which is in accordance with the will of the Parties and the practice derived from tribunals established under NAFTA[,] which have not subscribed such theory.").

Contracting Parties took into account when deciding not to include an umbrella clause in the Treaty.[300] Colombia has maintained a consistent policy of rejecting umbrella clauses, while the United States has removed umbrella clauses from its treaties since 1994 and has since limited contractual violations to those concerning violations of an "investment agreement" (which is a term specifically defined in its treaties).[301] In the present case, the Treaty expressly provides for the possibility of submitting violations of an "investment agreement" to arbitration. Therefore, expanding the scope of contractual claims that could be submitted to arbitration under the Treaty would undermine the public policy considerations taken into account by the Contracting Parties when they decided to include in the Treaty the concept of "investment agreement" *in lieu* of an umbrella clause, thus limiting the contractual claims that can be submitted to arbitration under the Treaty to those pertaining to breaches of an investment agreement.

173. In response to this argument, Claimants argue that both the Treaty and the Contracting Parties' other investment treaties contain MFN clauses.[302] However, this is irrelevant to the fact that public policy reasons prevent the importation of new standards of treatment into the Treaty. And even assuming that new rights could be imported into the Treaty, the relevant issue here would be to determine whether such rights affect the

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[300] Memorial, ¶ 234, n. 463.

[301] *Id.*, ¶ 234, nn. 464-467. In addition, while the umbrella clause is a substantive obligation, the effect of incorporating an umbrella clause into the Treaty through the MFN clause would be tantamount to expanding the type of contractual claims that may be submitted to arbitration beyond those contractual claims linked to breaches of an investment agreement. In their Counter-Memorial, Claimants specifically refer to the fact that the Treaty expressly excludes dispute settlement mechanisms from MFN treatment. *See* Counter-Memorial, ¶ 77; **Ex. RL-1**, Treaty, n. 2. *See also* **Ex. RL-42**, C. McLachlan and others, INTERNATIONAL INVESTMENT ARBITRATION SUBSTANTIVE PRINCIPLES, ¶ 7.367 ("The application of MFN protection will not be justified where it subverts the balance of rights and obligations that the parties have carefully negotiated in their investment treaty. In particular, it will not apply to enlarge the parameters of the jurisdiction of an international arbitral tribunal, unless the parties expressly so provide.").

[302] Counter-Memorial, ¶ 85.

public policy considerations taken into account when the Contracting Parties devised the structure and content of the Treaty, and when negotiating its specific provisions. Claimants' broad and unlimited importation of rights via the MFN clause runs contrary to a good faith interpretation of the MFN obligation in the context of the other Treaty provisions, which considers the Contracting Parties' intentions when they concluded the Treaty.

174. Moreover, in its Memorial, Colombia noted that even if the MFN clause of the Treaty could be used to import an umbrella clause from another investment treaty concluded by Colombia, importing a right to submit a claim to arbitration for breach of the umbrella clause in the Colombia-Switzerland BIT would not be possible. This is because that right does not exist in the Colombia-Switzerland BIT.[303] The *Glencore v. Switzerland* tribunal – one of Claimants' favorite cases – confirmed this when it interpreted the umbrella clause in that very treaty. That tribunal held that "the State parties [of the Colombia-Switzerland BIT] excluded Umbrella Clause disputes from their consent to arbitrate."[304]

[303] Memorial, ¶¶ 235-237.

[304] **Ex. RL-20**, *Glencore*, ¶ 1009. Claimants strangely claim that Colombia cites a "single" award in support of this assertion. *See* Counter-Memorial, ¶ 90. Beyond the fact that *Glencore* has been the only tribunal called upon to interpret this provision, the very text of Article 11(3) of the Colombia-Switzerland BIT could not be any clearer. *See* **Ex. RL-43**, Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, signed on May 17, 2006 and effective from October 6, 2009 ("Colombia-Switzerland BIT"), Article 11(3) (providing that the contracting parties consent to the submission of investment disputes to international arbitration, "except for disputes with regard to Article 10 paragraph 2 [of the treaty]", *i.e.*, regarding disputes related to the umbrella clause). In addition, the *Glencore* tribunal noted that Colombia's policy of not including an umbrella clause in its model investment treaty and the opinions of several academics to the same effect confirmed its interpretation that there was no consent to arbitrate alleged breaches of the umbrella clause. *See* **Ex. RL-20**, *Glencore*, ¶¶ 1014, 1022-1023.

175. Despite the express language of the provision and how it was interpreted by the *Glencore* tribunal, Claimants insist that they can import the umbrella clause in the Colombia-Switzerland BIT by arguing that they are "only seeking to import the umbrella clause in the Colombia-Swiss BIT" and that "the consent to jurisdiction is still based on the [Treaty]."[305]

176. Claimants' argument overlooks the basic operation of the MFN clause. Even though the Colombia-Switzerland BIT does include an umbrella clause, it does not contain a consent to arbitrate claims for breach of that umbrella clause, and so importing the umbrella clause in the Colombia-Switzerland BIT via the Treaty's MFN clause would give U.S. investors more favorable rights than Swiss investors have under the Colombia-Switzerland BIT. That would contravene the nature, content, and spirit of the MFN obligation in the Treaty. The MFN obligation contained in Article 10.4 of the Treaty only guarantees to United States investors <u>treatment no less favorable</u> than that accorded, in like circumstances, to Swiss investors. It does not guarantee <u>more favorable treatment,</u> which is exactly what Claimants want and what would indeed happen if such an importation were allowed.[306] In their Counter-Memorial, Claimants do not respond to

[305] Counter-Memorial, ¶ 90.

[306] **<u>Ex. RL-1</u>**, Treaty, Article 10.4.1 ("Each Party shall accord to investors of another Party treatment <u>no less favorable</u> than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.") (emphasis added); Memorial, n. 474. The importation of an obligation from another investment treaty by means of an umbrella clause cannot be "partial" as Claimants claim. If permitted, the importation must be complete, including all rights and limitations on the imported obligations. Moreover, if Claimants were allowed to import the umbrella clause of the Colombia-Switzerland BIT, and in turn U.S. investors were allowed to submit their disputes over potential breaches of that umbrella clause to arbitration under the Treaty, such a form of "importation" would be contrary to the internationally recognized principle of "*nemo plus iuris*", as it would be giving U.S. investors a better right than that enjoyed by the Swiss investors themselves. Claimants do not say anything about this point in their Counter-Memorial either.

Respondent's argument concerning the operation of the MFN clause, which clearly defeats Claimants' attempt at a "partial" importation.

177. Claimants' third argument also lacks merit. Aware that it is impossible to import the umbrella clause of the Colombia-Switzerland BIT, Claimants alternatively argue that the Colombia-Japan BIT also contains an umbrella clause that, unlike the one in the Colombia-Switzerland BIT, contains a consent to arbitrate claims for breaches thereof.[307] Once again, Claimants are mistaken. Just like the Colombia-Switzerland BIT, the Colombia-Japan BIT does not contain consent to arbitrate claims for breach of the umbrella clause.[308] As highlighted by Respondent in its Memorial, the reality is that no

[307] Counter-Memorial, ¶¶ 91-92. Although this is a new argument that should not be considered in analyzing the merits of the preliminary objection under Article 10.20.4 of the Treaty (*see* ¶ 79, *supra*), it does not support Claimants' position anyway.

[308] **Ex. RL-315**, Agreement between Japan and the Republic of Colombia for the liberalization, promotion and protection of investment, signed on September 12, 2011 and effective from September 11, 2015 ("Colombia-Japan BIT"), Article 28 ("1. Each Contracting Party hereby consents to the submission of investment disputes by a disputing investor to arbitration set forth in paragraph 5 of Article 27 chosen by the disputing investor, except for disputes with regard to paragraph 3 of Article 4 [the MFN clause]. 2. For investment disputes with regard to paragraph 3 of Article 4: (a) necessary consent for the submission to the arbitration will be given by the competent authority of the disputing Party set out in Article 41; and (b) in cases where the written agreement referred to in paragraph 3 of Article 4 stipulates a dispute settlement procedure, such procedure shall prevail over this Chapter.") (emphasis added). Claimants only submitted the English version of the Colombia-Japan BIT (**Ex. CL-137**), so Respondent hereby provides both the English and Spanish texts. Although Claimants cite to Article 28 of the Colombia-Japan BIT, they misinterpret it. What clearly emerges from the text of that provision is that it does not contain consent to arbitrate claims for breaches of the umbrella clause. The only exception provided therein is the possibility of granting such consent by a competent authority, but the treaty itself does not contain an offer of consent. One of the legal authorities cited by Colombia in its Memorial pointed to the lack of consent in the Colombia-Japan BIT to arbitrate umbrella clause claims. *See* Memorial, nn. 462, 464, 468; **Ex. RL-120**, José Antonio Rivas, *Colombia*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 183 (C. Brown (ed.), Oxford Scholarly Authorities on International Law 2013), p. 242 ("The practice of Colombia in rejecting the inclusion of an umbrella clause has been highly consistent, with the exception of the Colombia-U.S. [Treaty] (2006). This [Treaty] has a type of umbrella clause included under the investor-State dispute settlement section of the treaty as commitments made under 'investment agreements', and is limited to three sectors – investments in natural resources, supply of services to the public on behalf of the State, and infrastructure. The Switzerland-Colombia BIT (2007) and Japan-Colombia BIT (2011) have typical umbrella clauses, but the parties to these treaties have not given their consent to investor-State arbitration when an investor alleges a breach of the respective umbrella clause.") (emphasis added).

investment treaty concluded by Colombia contains a consent to arbitrate claims arising from the breach of an umbrella clause.[309]

178. Finally, and in any event, it should be noted that even if it were possible to import the umbrella clause of the Colombia-Switzerland BIT in the manner sought by Claimants, the requirements for applying that clause are not met (insofar as it only protects obligations arising from a written agreement between the central government or an agency thereof and an investor of the other Party in relation to a specific investment which the investor could rely on in good faith when establishing, acquiring or expanding the investment).[310] Claimants ignore this point in their Counter-Memorial. Indeed, as previously explained by Colombia, the Colombia-Switzerland BIT's umbrella clause cannot be applied because (i) Reficar is not an "agency" of the Colombia government; (ii) the Services Contract cannot simultaneously constitute an "investment" and a "written agreement" which contains the obligation relating to the investment; and (iii) Claimants' factual allegations – even if true – could not constitute a breach of the umbrella clause because there was evidently no breach of the [redacted] (Claimants' fiscal liability is autonomous and independent to their contractual liability [redacted]) and any contractual limitation imposed on Reficar could not affect its fiscal liability.[311] For the same reasons, Claimants fail to comply with the requirements for applying the umbrella

[309] Memorial, n. 468.

[310] *Id.*, ¶ 238; **Ex. RL-43**, Colombia-Switzerland BIT, Article 10(2).

[311] Memorial, ¶ 238, n. 477. *See also id.*, ¶¶ 81, 157-158, n. 343.

clause of the Colombia-Japan BIT, which is worded almost identically to the umbrella clause in the Colombia-Switzerland BIT.[312]

179. In sum, Claimants' claims are not capable of constituting a *prima facie* breach of the Treaty's MFN clause.

(2) There Could Not Have Been a Breach of an Investment Agreement

180. Claimants have not raised a valid claim of *prima facie* breach of an "investment agreement".[313] Colombia explained that the Services Contract is not an "investment agreement" – as per the Treaty definition – and that the Tribunal does not have jurisdiction under the Treaty to hear purely contractual claims.[314] In their Counter-Memorial, Claimants insist – without further argument – that the Services Contract is an "investment agreement," that Reficar is a Colombian "national authority," and that Article 10.16.1 of the Treaty gives the Tribunal jurisdiction to hear their claims regarding Colombia's alleged actions in breach of the Services Contract.[315] All of these arguments lack merit.

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[312] **Ex. RL-315**, Colombia-Japan BIT, Article 4.3 ("Each Contracting Party shall observe any obligation deriving from a written agreement concluded between its central government or agencies thereof and an investor of the other Contracting Party with regard to specific investments by the investor, which the investor could have relied on at the time of establishment, acquisition or expansion of such investments.").

[313] Article 10.16.1 of the Treaty allows a claimant to submit a claim to arbitration only if the respondent has breached an "investment agreement" – pursuant to the Treaty definition of this term – and if the claimant has incurred loss or damage by reason of, or arising out of, that breach. *See* **Ex. RL-1**, Treaty, Article 10.16.1. None of these requirements are met in this case.

[314] Memorial, ¶¶ 240-250.

[315] Counter-Memorial, ¶¶ 102-115.

181. First, the Services Contract does not constitute an "investment agreement" as defined in the Treaty.[316] Article 10.28 of the Treaty expressly defines an "investment agreement" as "a written agreement between a national authority of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself."[317] Logically, the Services Contract cannot simultaneously constitute an "investment agreement" and "a covered investment other than the written agreement itself."[318]

182. Cognizant that the Services Contract cannot be both a "covered investment" and an "investment agreement" – as per the provision's literal meaning –, Claimants try

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[316] Claimants continue arguing that "[a]greements similar to the [Services] Contract have frequently been recognized as 'investment agreements' by international tribunals." Counter-Memorial, ¶ 104. Claimants fail to consider that none of these cases involved the term "investment agreement" as defined by the Treaty. *See* Memorial, n. 492. Likewise, none of these cases involved a contract to provide consulting services. *See* Counter-Memorial, n. 191; **Ex. CL-141**, *PSEG Global Inc., the North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey,* ICSID Case No. ARB/02/5, Decision on Jurisdiction, June 4, 2004, ¶ 114 ("By its very nature and specific terms[,] the Contract embodies an investment agreement under which the investor is authorized to undertake the power generation activities therein specified.") (emphasis added); **Ex. RL-316**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, ¶ 114 (in which the tribunal analyzed a participation contract defined as "the State and contractors share in the production of crude oil, with all expenditures borne by the contractor.") (emphasis added) (Claimants only submitted the English version of **Ex. CL-77**, therefore, the English and Spanish versions are herein presented); **Ex. CL-19**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Provisional Measures, August 17, 2007, ¶ 7 ("Pursuant to the Participation Contract . . . OEPC [Occidental Exploration and Production Company] was granted the exclusive right to carry out exploration and exploitation activities in the area assigned to it, namely 'Block 15' of the Ecuadorian Amazon.") (emphasis added).

[317] **Ex. RL-1**, Treaty, Article 10.28. *See in this regard*, **Ex. RL-121**, Kenneth J. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (Oxford University Press 2009), p. 174 (clarifying that "the investment established in reliance on the written agreement cannot be the written agreement itself.").

[318] Memorial, ¶ 244. This is further confirmed by Article 10.16.1 of the Treaty, which expressly provides that the submission of a claim arising from the breach of an investment agreement is only valid if "the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement." **Ex. RL-1**, Treaty, Article 10.16.1.

to confuse the alleged contribution they made to acquire a "covered investment" under the Treaty with the investment itself. Claimants contend that they "invested significant amounts of time, capital, personnel, and labor in [the] Colombian territory" and that they provided goods and services to Colombia based on their investment agreement.[319]

183. However, irrespective of how broadly the Treaty defines an "investment," Claimants do not allege that those constituent items form part of their "covered investment" in this case, nor do those items form the basis of Claimants' damages claim.[320] The only "covered investment" alleged in this case – for purposes of establishing the Tribunal's jurisdiction *ratione materiae* – is the Services Contract. Moreover, the damages that Claimants seek relate solely and directly to the Services Contract, and not to the time, capital, personnel, and labor, goods or services they contributed to the performance of the Services Contract; [redacted].[321]

184. Second, Claimants' assertion that Reficar is a Colombian "national authority" is clearly false.[322] The Treaty defines a "national authority" as "an authority at

[319] Counter-Memorial, ¶ 106. *See also* Notice of Arbitration, ¶ 29.

[320] *See* **Ex. R-39**, Notice of Intent, December 26, 2018 ("Notice of Intent"), ¶ 12; Notice of Arbitration, ¶ 3. *See also*, Memorial n. 34.

[321] Memorial, ¶ 22, n. 34. *See* ¶ 242, *infra.* In addition, as noted by Colombia in its Memorial, even if the Services Contract could be considered a "written agreement between a national authority and . . . an investor of another Party," it would not, in any case, qualify as an "investment agreement" under the terms of the Treaty since it would not fall within the three types of agreements or sectors covered by such definition (*i.e.*, natural resources, services supply, and infrastructure). *See* Memorial, n. 497; **Ex. RL-1**, Treaty, Article 10.28. Indeed, even though the Services Contract is an agreement for the provision of consulting services related to an infrastructure project (the expansion and modernization of the Cartagena Refinery), the Contract is not an agreement entered into "to undertake" an infrastructure project, as Claimants were not a party to the EPC Contract entered into with CB&I for the engineering and construction of the Project.

[322] Counter-Memorial, ¶ 108. Claimants also argue that Reficar is a "State entity" under Colombian law. *Id.*, ¶ 104. As Colombia already explained in its Memorial, whether or not Reficar qualifies as a "state entity" under Colombian law is irrelevant for purposes of determining whether an "investment agreement" exists

the central level of government."[323] Under Colombian law, Reficar is a mixed capital company (*sociedad de economía mixta*) that carries out commercial activities – *i.e.*, not an authority – [324] and belongs to the decentralized level of government of Colombia – not the central level.[325]

185. In addition to its characterization under Colombian law as a decentralized mixed capital company, there is no way that Reficar could qualify as a "national authority" under the Treaty because the Contracting Parties expressly established that Ecopetrol, Reficar's parent company, is not an authority at the central government level. Chapter 9, Annex 9.1 of the Colombia-U.S. TPA (on Government Procurement),[326] as amended by

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as the Treaty itself contains specific provisions regarding what is to be considered a "national authority" for purposes of the Treaty. *See* Memorial, ¶ 246.

[323] **Ex. RL-1**, Treaty, n. 13.

[324] Reficar cannot be qualified as an "authority" because it does not exercise sovereign powers. *See* Memorial, n. 494.

[325] *Id.*, ¶ 245, nn. 17, 19, 494. This was recognized by Claimants themselves in the *Acción de Tutela* 2018. *See* **Ex. R-69**, Acción de Tutela 2018, p. 74 ("In particular, Reficar and Ecopetrol [are] decentralized entities of the Executive Branch."). The fact that Colombia owns all the hydrocarbons found within its national territory does not turn Ecopetrol (or Reficar) into an authority of the central level of government. Such reasoning has no merit whatsoever. For instance, the fact that Colombia owns the electromagnetic spectrum does not mean that telecommunication companies are considered "central government agenc[ies]." [redacted]. *See* Counter-Memorial, ¶ 109. [redacted]. Likewise, Claimants' reference to Law No. 80 of 1993 (**Ex. CL-140**) concerning public entities does not support their position either, since under Colombian law, public entities can exist both at the central and decentralized levels of government. *See* **Ex. RL-4**, Law 489 of 1998, which establishes rules on the organization and functioning of national entities, sets forth the provisions, principles and general rules for the exercise of the powers set forth in paragraphs 15 and 16 of Article 189 of the Political Constitution, and sets forth other provisions, Article 38.

[326] **Ex. RL-317**, United States – Colombia Trade Promotion Agreement, signed on November 22, 2006 and effective from May 15, 2012 – Chapter 9, Annex 9.1.

Decision No. 2 of the Free Trade Commission,[327] contains a list of U.S. and Colombian entities divided into four categories: Central Level of Government Entities, Sub-Central Level of Government Entities, Other Covered Entities and Special Covered Entities. Neither Ecopetrol nor Reficar are listed as Central Level of Government Entities.[328] Ecopetrol is listed as a "Special Covered Entity," *i.e.*, as an entity that "conducts its procurement under private law . . . and without any control or influence by the Government of Colombia."[329]

186. Furthermore, Claimants' discussion of the rules of attribution under international law is entirely irrelevant to Reficar's qualification as a Colombian "national authority" under the Treaty, since it is the Treaty itself that defines which entities qualify as such.[330] Whether or not Reficar's conduct is attributable to Colombia under the rules

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[327] **Ex. RL-318**, Decision No. 2 of the Free Trade Commission of the Colombia – United States Trade Promotion Agreement, signed on November 22, 2006 and effective from May 15, 2015, adopted November 19, 2012 ("Decision No. 2 of the Free Trade Commission of the Colombia-US TPA").

[328] **Ex. RL-317**, Colombia-US TPA., Chapter 9, Annex 9.1, Section A.

[329] **Ex. RL-318**, Decision No. 2 of the Free Trade Commission of the Colombia-US TPA. Contrary to Claimants' argument (Counter-Memorial, ¶109), the fact that Reficar is indirectly owned by Colombia and that "high-ranking government officials" have been appointed to Reficar's board of directors does not turn Reficar into a "national authority" under the Treaty. Further evidence of that is provided by Annex 9.1 of the Colombia-US TPA, which explicitly states that "appointment of any member of the Board of Directors of any entity by the President of Colombia or by another Colombian Government official or entity, ownership of a majority or all of the shares of an entity by the Government of Colombia, or auditing requirements related to the entity, do not constitute 'control or influence by the Government of Colombia' with respect to the entity's procurement." **Ex. RL-318**, Decision No. 2 of the Free Trade Commission of the Colombia-US TPA, n. 1.

[330] Counter-Memorial, ¶ 110. The matter of attribution under international law, apart from being irrelevant, is a legal allegation that should not be assumed to be true for the purposes of this objection. *See* Memorial, n. 496. Furthermore, as Colombia pointed out in its Memorial, the conclusion that Reficar is not a "national authority" under the terms of the Treaty is confirmed by the fact that the Treaty itself contains a specific definition for the term "state enterprise", which is a concept different from that of "national authority." *See* **Ex. RL-2**, Colombia-US TPA., Preamble and Chapter 1, Article 1.3 (defining "state enterprise" as "an enterprise that is owned, or controlled through ownership interests, by a Party"). Reficar would qualify as a "state enterprise." *See* Memorial, n. 495. The Claimants are silent on this point. The definition of "national authority" contained in the Treaty is clear, and therefore poses no interpretative difficulties. *See* Memorial, n. 496.

of public international law is not the issue. The issue is whether the Services Contract constitutes an "investment agreement" and if Reficar can be considered a "national authority" according to the Treaty's specific definitions. The answer could not be clearer: the Services Contract is not an "investment agreement" and Reficar is not a "national authority" under the Treaty's definition.

187. Third, Claimants – who have evidently modified their argument[331] – now argue that the Tribunal has jurisdiction under Article 10.16.1 of the Treaty over claims of a breach of an investment agreement, and that they are not alleging that their claims [redacted].[332] Colombia acknowledges that the Tribunal would have jurisdiction to hear claims regarding breaches of an investment agreement, provided that the requirements of Article 10.16.1 of the Treaty were satisfied – such as the existence of an "investment agreement" as well as losses or damages arising from a breach thereof. That is not the case here. Colombia clearly outlined in its Memorial (which Claimants distort in their Counter-Memorial) that the Tribunal does not have jurisdiction over purely contractual claims to the extent that those claims do not constitute breaches of the substantive obligations under the Treaty or an investment agreement.[333]

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[331] [redacted]. *See* Memorial, ¶¶ 247-249. It is perhaps for this reason that they decided to modify them in their Counter-Memorial. In any event, for purposes of determining the admissibility of their claim, what is relevant is the allegations they included in their Notice of Arbitration, and not the new allegations they are now presenting. *See* ¶ 79, *supra*.

[332] Counter-Memorial, ¶ 113. Claimants have clearly modified their argument on this point, as their previous position was untenable. *See* Notice of Arbitration, ¶¶ 203, 205; Memorial, ¶¶ 247-249.

[333] **Ex. RL-1**, Treaty, Article 10.16.1; Memorial, ¶ 241, nn. 485, 486.

188. Now Claimants also argue that they are "not asking the Tribunal to determine whether Reficar breached the [Services] Contract" and that they agree that it is for [redacted].[334] Strangely, however, they then allege that their claims "relate to CGR's. . . actions," and that such actions would constitute breaches by Colombia of the Services Contract [redacted].[335] That argument is frankly unintelligible. Article 10.16.1 of the Treaty only allows claims alleging a breach of an investment agreement to be submitted to arbitration where the claimant or enterprise has incurred loss or damage by reason of, or arising out of, that breach.[336] The Fiscal Liability Proceeding concerns Claimants' fiscal liability, not their contractual liability.[337] Any loss or damage incurred by Claimants from the alleged actions of the CGR or Colombia (which is not a party to the Services Contract) would therefore be non-contractual in nature, and beyond the scope of any contractual breach of a purported investment agreement.[338] Accordingly, Claimants' claim is not capable of constituting a *prima facie* breach of an investment agreement.

189. In sum, because the Services Contract is not an investment agreement and Claimants have not raised a valid claim for breach thereof, there can be no *prima facie* case for breach of an investment agreement.

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[334] Counter-Memorial, ¶ 114.

[335] *Id*.

[336] **Ex. RL-1**, Treaty, Article. 10.16.1.

[337] *See* ¶ 66, *supra.*

[338] The damages that Claimants assert in this Arbitration could not be considered damages incurred by reason of, or arising out, a breach of an investment agreement.

B. There Could Not Have Been a Loss or Damage by Reason of a Breach of the Substantive Obligations of the Treaty or of an Investment Agreement

190. As indicated by Respondent in its Memorial, Article 10.16.1 of the Treaty requires that a claimant must have incurred "loss or damage by reason of" or "arising out of" alleged breaches of substantive obligations under the Treaty or an investment agreement before submitting a claim to arbitration.[339] Such a requirement "restrict[s] a claimant's ability to bring a claim under Article 24(1) [of the 2012 U.S. BIT Model, which is identical to Article 10.16 of the Treaty] . . . [, because] not only must a claimant allege a breach of the kind discussed above, but it also must demonstrate that it 'has incurred loss or damage by reason of, or arising out of, that breach'."[340]

191. This explicit requirement in the Treaty is not capricious. As explained by Kenneth Vandevelde, who led the U.S. investment treaty negotiating team and wrote one of the most renowned books on the subject, this requirement is aimed at "preventing the submission of claims that are not yet ripe, because no loss has occurred."[341] It makes

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[339] **Ex. RL-1**, Treaty, Article 10.16.1(a)(ii).

[340] **Ex. RL-37**, Lee M. Caplan and Jeremy K. Sharpe, *United States*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 755 (C. Brown (ed.), Oxford University Press 2013), p. 824 (emphasis added). *See* **Ex. RL-136**, Andrea K. Bjorklund, *NAFTA Chapter 11*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (C. Brown (ed.), Oxford University Press 2013), p. 501 ("Article 1116 [of NAFTA] requires that the investor have standing – that it must have suffered loss or damage.") (emphasis added).

[341] **Ex. RL-121**, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS, p. 598. *See* **Ex. RL-48**, *Submission of the U.S. in Mesa Power*, ¶ 4 (ratifying the U.S. position that for a claim to be submitted to arbitration under the Treaty, the investor must have already incurred losses or damages and may not base its claim on speculation about future losses or damages that have not yet materialized). In their Counter-Memorial, Claimants argue that ICSID arbitration does not require proof of damage as a prerequisite to initiating a claim, citing an article by Professor Schreuer in support of that assertion. Counter-Memorial, ¶ 25, n. 47; **Ex. CL-59**, Christoph Schreuer, *What is a legal dispute?*, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION, FESTSCHRIFT IN HONOUR OF GERHARD HAFNER (I. Buffard, J. Crawford, A. Pellet, S. Wittich (eds.); Koninklijke Brill NV 2008), p. 970. Claimants are wrong. Professor Schreuer's article is quoted out of context and does not support Claimants' position. In his article, Professor Schreuer does not analyze whether or not a damage must exist before submitting a dispute to ICSID arbitration but rather discusses the requirement that the dispute submitted to ICSID arbitration be a dispute of a "legal" nature, proposing a series of criteria for determining whether or not, in a given case, a "legal dispute" exists. **Ex. CL-59**, C. Schreuer, *What is a legal dispute?*, p. 960. One of the criteria he proposes is that the

sense. If a claimant could initiate a claim against a State without first having incurred any actual damage, investment arbitration would be completely denaturalized, becoming an extortive mechanism to pressure a State to refrain from taking a certain measure in an attempt to "prevent" any eventual damage.[342]

192. In interpreting a provision virtually identical to Article 10.16.1 of the Treaty, for a claim of an alleged expropriation, the tribunal in *Glamis v. United States* found that

> Through the language of Article 1117(1) [of NAFTA], the State Parties conceived of a ripeness requirement in that a claimant needs to have incurred loss or damage in order to bring a claim for compensation under Article 1120. . . . [F]or an Article 1110 claim to be ripe, the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor. . . . Without a governmental act that moves beyond a mere threat of expropriation to an actual interference with a property interest, it is impossible to assess the economic impact of the interference.[343]

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disagreement between the parties should have practical and not merely academic relevance, and it is in this context that Professor Schreuer indicates that the lack of concrete damage or difficulties in its quantification does not necessarily imply that a dispute is hypothetical or has no "legal" character. *Id.*, pp. 970-972. In short, contrary to Claimants' suggestion, Professor Schreuer simply does not indicate that the existence of damage is not a prerequisite for initiating an ICSID claim. But even assuming for a moment that Claimants were right and that the existence of damage was not a prerequisite for submitting a dispute to ICSID arbitration, in this case, Claimants' claim must nonetheless be dismissed because the Treaty does expressly provide for such a requirement. *See* Memorial, n. 512.

[342] *See* **Ex. RL-121**, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS, p. 598 ("[Article 24(1) of the United States model BIT of 2004] explicitly requires . . . that the claimant or the Enterprise upon behalf of which the claim is submitted have 'incurred loss or damage by reason of, or arising out of, [the] breach.' This language imposes three conditions on the claimant's right to submit a claim to arbitration: loss, a breach, and a causal link between the breach and the loss. These are, of course, traditional elements of standing. The language had appeared, however, in NAFTA as well as the Chile and Singapore FTAs, and BIT negotiators saw some virtue in explicitly requiring that these elements be met.") (emphasis added).

[343] **Ex. RL-40**, *Glamis*, ¶¶ 328, 331 (emphasis added). Claimants attempt to argue, unsuccessfully, that the *Glamis* case supports their position and not Colombia's position. According to Claimants, while the tribunal in *Glamis* found that claims based on future "events" do not meet the ripeness requirement, it also found that claims based on past "events" do meet the ripeness requirement. Based on that interpretation of *Glamis*, Claimants argue that their claims are ripe because they are based on past "events" that occurred during the Fiscal Liability Proceeding. Counter-Memorial, ¶ 30. Claimants make a partial reading of *Glamis*, misrepresenting the content of that award. They fail to mention that, for the tribunal in *Glamis*, the decisive criterion for deciding whether the claims were ripe was not whether the claims were based on past "events"

193. The tribunal in *Glamis* further determined that the ripeness of a claim – *i.e.*, the fulfillment of the requirements under Article 10.16.1 and, specifically, the existence or not of "actual present harm" as a result of an allegedly violative measure – must be assessed at the time of the filing of the claim to arbitration.[344]

194. As Colombia demonstrated in its Memorial, as of the date of the Notice of Arbitration, Claimants had not incurred any actual damage as a result of the alleged breaches of the Treaty by the Respondent in the context of the Fiscal Liability Proceeding or as a result of the breach of an investment agreement. By that date, only the Indictment Order had been issued. The Indictment Order is merely an administrative act of procedural nature that did not decide the legal situation of Foster Wheeler and Process Consultants and therefore could not have caused them any damage.[345]

195. Knowing that their claim is not ripe, Claimants argue in their Counter-Memorial that the Tribunal should take into account not only any alleged damages suffered at the time of the Notice of Arbitration but also those that may have materialized

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but, fundamentally, whether "damage" had already materialized in the past. **Ex. RL-40**, *Glamis*, ¶ 335. While in *Glamis* the claimant alleged the existence of past damage – losses due to the impossibility of operating the investment in the absence of the required governmental approvals (*Id.*, ¶¶ 327, 342) –, in the present case there is not – nor has there been in the past – any damage to Claimants arising from the alleged violations during the Fiscal Liability Proceeding. Thus, the tribunal in *Glamis* upholds the Respondent's position that, under the terms of the Treaty, only claims that are ripe for arbitration, *i.e.*, those that have caused actual and present damage, can be submitted to arbitration.

[344] **Ex. RL-40**, *Glamis*, ¶ 335 ("[T]he issue of ripeness therefore turns on the determination of whether the challenged California measures had effected harm upon Claimant's property interests by the time Claimant submitted its claim to arbitration.") (emphasis added). *See* ¶¶ 85-88, *supra*.

[345] Memorial, ¶¶ 7, 99, 135, 255. Claimants allege that "[i]n an effort to concoct an argument that Claimants suffered no damage, Colombia misrepresents the nature of Claimants' investment and spends several pages explaining that FPJVC was paid for services invoiced, as required by the Contract, and that it was reimbursed for expenses incurred." Counter-Memorial, ¶ 118. Claimants are wrong. Colombia's explanation of the nature and remuneration structure of the Services Contract has nothing to do with its argument that there is no damage and everything to do with its argument that there is no covered investment. *See* ¶¶ 239-254, *infra*.

thereafter.[346] Claimants' argument is based on the principle of full reparation which, according to them, "would be impossible to accomplish here if Colombia's objections were valid because Claimants' recent damages far exceed those it suffered at the time of the Request for Arbitration."[347]

196. Claimants are confusing the type of damages that would generally be recoverable under international law with the actual damages that must exist before a dispute can be submitted to arbitration under the Treaty. For purposes of determining whether a claim is ripe and meets the requirements under Article 10.16.1 of the Treaty, only those damages that have materialized by the time the notice of arbitration is filed may be taken into account.[348] The discussion as to what potential damages may be taken into account when determining the amount of any potential compensation is a separate and wholly irrelevant discussion in determining whether Claimants' claim is ripe.

197. Emphasizing the difference between the existence of damage as a requirement for submission to arbitration under the Treaty, on the one hand, and damages that can be claimed and eventually compensated, on the other hand, the tribunal in *Mobil v. Canada* – the leading case on which Claimants rely for their argument on this point – stated:

> For jurisdictional purposes, Article 1116(1) [of NAFTA, which is substantially identical to Article 10.16.1 of the Treaty,] requires *inter alia* that the investor must have incurred 'loss or

[346] Counter-Memorial, ¶¶ 24-25, 122-123.

[347] *Id.*, n. 45. Claimants intend to present this case as a case of continuing damages. *Id.*, ¶ 123. That is not the case. This is a case of hypothetical damages. No damage has materialized to date, and there is no certainty as to whether such damage will materialize in the future. *See* n. 372, *infra.*

[348] *See* ¶¶ 85-88, *supra*.

> damage by reason of, arising out of, that breach' [of Chapter XI of the NAFTA]. . . .
>
> [T]he issue of whether the damages are incurred so as to allow the Tribunal to exercise jurisdiction under Article 1116(1) and grant compensation is different from the issue of whether the amount of these damages can be established with sufficient certainty to be compensated.[349]

198. In any event, the debate regarding the cut-off date for verifying Claimants' compliance with the requirement under Article 10.16.1 of the Treaty is irrelevant in this case because Claimants have not incurred any damage as a result of the alleged breaches of the Treaty under the Fiscal Liability Proceeding (or the alleged breach of an investment agreement), either as of the date of the filing of the Notice of Arbitration or as of any time thereafter. Claimants have not made any payment on the amount of the Ruling with Fiscal Liability, either voluntarily or forced, nor have their assets been subject to any attachments or any other similar measures.[350] In addition, considering the joint and several nature of the Ruling with Fiscal Liability[351] and the practical hurdles in

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[349] **Ex. RL-171**, *Mobil*, ¶¶ 427, 431 (emphasis added). Relying on *Mobil v. Canada*, Claimants assert that a mere call for payment is sufficient for "there to be damage which can be compensated under NAFTA Article 1116" and that "[t]he existence of the [Ruling with Fiscal Liability] itself is also sufficient basis for jurisdiction." Counter-Memorial, ¶¶ 121-122. What Claimants seem to suggest by these assertions is that the Ruling with Fiscal Liability is a "call for payment" that alone satisfies the requirement for the submission of a claim to arbitration under Article 10.16.1 of the Treaty. That position is incorrect and the *Mobil* case does not support it. The jurisdictional discussion in *Mobil* turned on whether the tribunal had jurisdiction to hear and decide compensation for continuing damages, not on whether any damages had already materialized that would allow the claimants, in that case, to submit a claim to arbitration under NAFTA. In *Mobil*, there was not, as there is in this case, a question of ripeness of the claim, but rather a discussion as to whether the Tribunal's jurisdiction covered both past damages and future damages. While the tribunal in *Mobil* found that, in principle, it had jurisdiction to rule on future damages, it also indicated that only actual damages could be compensated. Ultimately, in analyzing the claimants' specific allegations, the tribunal in *Mobil* found that no present damages existed because, although the Canadian government had issued specific payment orders, it had not issued any notice of payment or set any peremptory date for payment or penalty in the event of non-payment. **Ex. RL-171**, *Mobil*, ¶¶ 429, 440, 469-472, 477-478. *See* nn. 347, 372, *infra*.

[350] As of the date of this Reply, only the insurance companies declared as civilly liable third parties have made payments of the Ruling with Fiscal Liability. *See* ¶ 51, *supra.*

[351] Memorial, ¶¶ 88, 108, 150, 275, n. 515; ¶ 52, *supra*.

searching for, identifying and eventually seizing assets abroad,[352] it is not even possible to know with certainty whether Claimants will in fact suffer any damages at all.[353]

199. There is a fundamental difference between this case and *Glencore v. Colombia*, which Claimants repeatedly cite alleging that it supports their position on the existence of a "damage". Contrary to this case, the claimant in *Glencore* actually paid the amount of the ruling with fiscal liability prior to the commencement of the arbitration, so that by the time the notice of arbitration was filed there was already an actual damage and a mature claim. Claimants argue that "Colombia reads *Glencore* to require Claimants to have 'voluntarily paid' the damages Colombia seeks before Claimants can commence an arbitration seeking those damages."[354] Colombia argues no such thing. What Respondent argues is that Claimants have not incurred any damage and therefore cannot bring a claim under the Treaty nor receive compensation since there is no damage to repair.

200. The mere fact that Claimants have filed a Provisional Measures Application confirms the absence of "actual present harm" in this case. Claimants themselves admit this, expressly stating that the provisional measures were necessary to avert the damages they seek to prevent with this Arbitration. In their own words:

> Enforcement, or attempted enforcement, of the CGR Decision against FW would likely [redacted], and would aggravate the dispute between the

[352] Answer to Application for Emergency Temporary Relief ¶¶ 35, 36, 46; Rejoinder on Application for Emergency Temporary Relief, ¶ 41, n. 71; Answer to Application for Provisional Measures, ¶ 34, n. 78; ¶ 59, n. 102, *supra*.

[353] Answer to Application for Provisional Measures, ¶¶ 34, 35; ¶¶ 52, 59, *supra*.

[354] Counter-Memorial, ¶ 133.

> parties at the same time that this arbitration, which seeks precisely to prevent such harm, is pending.[355]

201. The Provisional Measures Application in itself constitutes an acknowledgment by Claimants that they have not incurred any loss or damage arising from Colombia's alleged violations under the Fiscal Liability Proceeding.[356]

202. Claimants also admitted in their Counter-Memorial that this arbitration proceeding is purely preventive in nature since the alleged damage they claim has not materialized. According to Claimants:

> Colombia has quantified the amount of property or money it intends to take from Claimant (without basis), and this proceeding represents Claimants' best efforts to prevent that injustice.[357]

203. In their Counter-Memorial, Claimants do not dispute that the existence of loss or damage by reason of or arising out of the alleged breaches of the Treaty is a *sine qua non* for the submission of a claim to arbitration. However, they contend that they

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[355] **Ex. R-93**, Letter from Claimants to Respondent, August 24, 2021, p. 2 (emphasis added). *See also* Application for Provisional Measures, ¶¶ 126, 131, 146, 149.

[356] [redacted] What Claimants specifically sought in filing their Provisional Measures Application was to prevent it. At the Hearing on Provisional Measures, Claimants always referred to their alleged damages prospectively. *See for example,* Hearing on Provisional Measures Transcript, p. 14 ("[C]ollecting a [US$] 800 million Award, let alone a [US$] 997 million Award[,] [redacted]"), p. 15 ("If Colombia is allowed to go around the world looking for, attaching, seizing and selling the assets of Claimants, [redacted]."), p. 21 ("The Measures we request will preserve the business of Claimants while this goes on. . . . The disproportionate risk is that[,] absent this relief, [redacted]."), pp. 80-81 ("[A]bsent Interim Measures could be designed for only one purpose, [redacted] before we have had a chance to present to this Tribunal our case that this proceeding, CGR proceeding, violated numerous rights, substantive and procedural, under the Treaty. Those aren't ripe for disposition yet.").

[357] Counter-Memorial, ¶ 132 (emphasis added).

have satisfied the requirement of Article 10.16.1 of the Treaty because they have allegedly suffered reputational damage as a result of being named in the Fiscal Liability Proceeding, as well as having incurred "significant" attorney's fees defending themselves in that proceeding.[358] Neither of these two alleged categories of damages allow Claimants to satisfy the requirement of Article 10.16.1.[359]

(3) Claimants Have Not Proven That They Have Suffered Reputational Damage, and Even If They Could Prove It, Such Damage Is the Result of Their Own Conduct, Not Colombia's Acts

204. Claimants assert that they have suffered reputational damage as a result of the alleged violations perpetrated by Colombia during the Fiscal Liability Proceeding,[360] but they have failed to prove, even *prima facie*, the existence of such damage. Their assertions, without more, are not enough to satisfy the requirement of Article 10.16.1 of the Treaty.[361]

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[358] *Id.*, ¶¶ 29, 121. It is worth recalling that the Tribunal does not have the power to grant the forms of relief sought by Claimants in this Arbitration. *See* ¶¶ 216-236, *infr*a. In addition, Claimants also allege that if the Ruling with Fiscal Liability is enforced against Foster Wheeler and Process Consultants, [redacted]. Counter-Memorial, ¶ 120. This new argument does not aid them because the fact remains that, to this date, they have suffered no actual damage as a result of Colombia's allegedly violative conduct.

[359] As indicated by Colombia in its Memorial, in order to submit a claim to arbitration under Article 10.16 of the Treaty, where an investor claims a breach of a substantive obligation under the Treaty and that substantive obligation protects only the covered investment and not the investor, the loss or damage must have been incurred by the covered investment. *See* Memorial, ¶¶ 258-259; **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 62 ("The U.S.-Colombia [Treaty] authorizes claimants to seek damages for alleged breaches of specified obligations in the [Treaty]. However, in accordance with the discussion above in paragraph 5, for [Treaty] obligations that only extend to covered investments, a tribunal may only award damages for violations where the covered investment incurred damages. A tribunal has no authority to award damages that a claimant allegedly incurred in their capacity as an investor for violations of obligations that only extend to covered investments.") (emphasis added). *See also* **Ex. RL-56**, *Submission of the U.S. in Omega*, ¶ 47. Claimants mention but do not address this argument in their Counter-Memorial. Counter-Memorial, ¶ 117.

[360] Counter-Memorial, ¶ 121.

[361] While Article 10.20.4 of the Treaty states that in deciding on an objection under such provision the Tribunal "shall assume to be true claimant's factual allegations in support of any claim in the notice of

205. But even if Claimants were successful in demonstrating that they have suffered "substantial harm" to their "reputation and credit,"[362] that damage would not be by reason of or arising out of Colombia's alleged conduct but rather [redacted]

206. Article 10.16.1 of the Treaty requires that there must be "proximate causation" or a "sufficient causal link" between the alleged breach and the damage incurred.[363] In this case, there is no causal link between the alleged breaches under the Fiscal Liability Proceeding and the reputational damages to Claimants.

207. [redacted].[364]

(4) The Attorney's Fees Incurred by Claimants in their Defense in the Fiscal Liability Proceeding Do Not Constitute "Losses or Damages" Under Article 10.16.1

208. Claimants also argue that the losses or damages that entitle them to initiate an arbitration under the Treaty are the "significant attorney's fees [Claimants accrued] in defending itself in [the Fiscal Liability Proceeding].[365] However, these attorney's fees

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arbitration," the Tribunal cannot and should not assume the truthfulness of legal allegations (even those disguised as factual allegations) or conclusions not supported by the relevant factual allegations, and it should also consider any other relevant facts that are not in dispute. **Ex. RL-1**, Treaty, Article 10.20.4. *See* ¶ 79, *supra*.

[362] Notice of Arbitration, ¶ 206.

[363] *See* Memorial, n. 507.

[364] *See* ¶¶ 67-77, *supra*.

[365] Counter-Memorial, ¶ 121.

cannot be considered compensable "damages" but are rather ordinary legal burdens to be borne by Claimants as part of their costs of doing business in Colombia.

209. In a 2019 judgment, the *Consejo de Estado* – the highest court of the administrative adjudicatory jurisdiction in Colombia – expressly indicated that the expenses incurred by an investigated party in a liability proceeding were a "a legal burden that the party subject to investigation was legitimately obliged to bear."[366] In rejecting a claim for compensation by some citizens who, after having been investigated by the CGR, claimed reparation for the costs and expenses incurred during the fiscal liability proceeding (including attorney's fees, travel and copies), the *Consejo de Estado* held that:

> [T]he simple commencement of a fiscal proceeding does not imply an affection to the rights of the party subject to investigation, since the investigation is carried out in use of the legal obligation to exercise a control before acts that can possibly constitute a fiscal detriment. . . . In accordance with the foregoing, the Chamber must conclude that: (i) faced with facts that merited investigation, the Office of the Comptroller General of the Republic initiated the fiscal proceeding, in the legitimate exercise of its functions; . . . (iii) the damage is not unlawful, since the fiscal proceeding was a burden to be borne by the accused.[367]

210. As a burden to be borne by Claimants, the expenses incurred in defending themselves in the Fiscal Liability Proceeding cannot be considered damages or losses within the meaning of Article 10.16.1 of the Treaty.

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[366] **Ex. RL-141**, *Consejo de Estado* of Colombia, Chamber for Administrative Adjudicatory Proceedings, Third Section, Judgment, June 14, 2019 (Orienny Mosquera López *et al.* v. Nation-General Comptroller of the Republic), p. 24.

[367] *Id.*, pp. 20, 24 (translation from Spanish; emphasis added).

211. Claimants lament the ripeness requirements of Article 10.16.1 of the Treaty, and seek to have this Tribunal ignore the express language of the Treaty and hear their claims despite the fact that they have suffered no pecuniary or non-pecuniary damage by reason of Colombia's allegedly violative conduct. According to Claimants, [redacted] "[368] and "[t]o suggest . . . [that their claim was not ripe] would encourage absurd results, such as the need to initiate a second arbitration when the harm to Claimants is fully realized."[369]

212. What is perverse in this case is that Claimants purport to invoke the protection of the Treaty, but are unwilling to comply with the requirements therein for the submission of a claim to arbitration. Colombia has never asserted that Claimants [redacted] before they can initiate a claim. Leaving aside the fact that the collection proceeding of the Ruling with Fiscal Liability does not [redacted] to Claimants,[370] the only thing that Colombia demands is that the requirement provided for in Article 10.16.1 of the Treaty be met: that some damage has materialized as a consequence of the Respondent's alleged breach of conduct. None has materialized, and that is enough for this Tribunal to dismiss Claimants' claim in its entirety.

213. Claimants put themselves in the predicament they are in now. Had they not initiated this "preventive" arbitration, before they had incurred any damage and without

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[368] Counter-Memorial, ¶ 132.

[369] *Id.*, ¶ 31.

[370] As Colombia has already explained, [redacted] the CGR would have to [redacted] The likelihood of that happening is negligible, in addition to the fact that no assets can be auctioned until the courts of the administrative adjudicatory jurisdiction finally rule on the annulment actions filed by the fiscally liable parties against the Ruling with Fiscal Liability. *See* ¶ 122, n. 349, *supra.*

their claim being ripe, they would not now have to consider whether to initiate a second proceeding when the alleged damage they fear materializes (if it ever materializes at all).

214. In any event, there would be nothing absurd about a second arbitration. This was admitted by the tribunal in *Mobil v. Canada* – which Claimants cite despite the fact that it does not assist them –[371] in refusing to award claimed damages that had not materialized and were therefore uncertain:

> In our view, there is no basis to grant at present compensation for uncertain future damages. Given that the implementation of the 2004 Guidelines is a continuing breach, [] Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings.[372]

215. At the end of the day, the truth is that the claim before this Tribunal is wholly premature and must be dismissed out of hand because neither as of the date of the Notice of Arbitration, nor at the present time, have Claimants incurred any loss or damage by reason of or arising out of Colombia's alleged violations during the Fiscal Liability Proceeding. The absence of any actual damage constitutes a breach of the requirement under Article 10.16.1 of the Treaty, and precludes this Tribunal from making an award in favor of Claimants.

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[371] *See* Counter-Memorial, ¶ 122; n. 349, *supra.*

[372] **Ex. RL-171**, *Mobil*, ¶ 478 (emphasis added). Unlike *Mobil v. Canada*, this case is by no means a continuing damage case, but a hypothetical damage case. Claimants have not suffered any continuing damage to date, but rather all of their claims are dependent upon the eventual enforcement of the Ruling with Fiscal Liability against their assets, with no certainty as to whether or not that will occur given the joint and several nature of the Ruling and the practical difficulties in searching for and seizing assets abroad. *See* ¶ 63, n. 347 *supra.*

II.

Claimants' Claims Fall Outside the Tribunal's Powers Under Article 10.26 of the Treaty

216. In its Memorial, Colombia explained that the Tribunal cannot make an award in Claimants' favor because it is not empowered, under Article 10.26 of the Treaty, to grant the relief sought in this Arbitration.[373] In particular, Article 10.26 of the Treaty does not empower the Tribunal to (A) award moral damages; (B) award non-pecuniary damages or injunctions; nor (C) issue an offsetting award. In their Counter-Memorial, Claimants have not been able to rebut Colombia's arguments regarding the limitations imposed by the Treaty on the Tribunal's powers, which prevent it from issuing the relief they request.

C. The Tribunal Is Not Empowered to Award Moral Damages, Whether These Are Considered Non-Monetary Damages or Punitive Damages

217. The Tribunal is not empowered to award the compensation sought by Claimants in the form of "moral damages" because the Treaty expressly limits its power to award monetary damages, and further prohibits the award of punitive damages.[374]

218. In their Counter-Memorial, Claimants argue that moral damages are permitted under international law and are not punitive damages,[375] but say nothing about their qualification as non-monetary damages – which are damages that the Tribunal also

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[373] Memorial, ¶¶ 262-278.

[374] *Id.*, ¶¶ 263-268. Claimants mischaracterize Colombia's position. Counter-Memorial, ¶ 125. Colombia never stated that moral damages were punitive damages, but rather that moral damages are "non-monetary damages" that "can be punitive in nature". Memorial, ¶ 263. Notably, Claimants dispute only that moral damages are considered punitive damages, but they do not dispute that moral damages are considered non-pecuniary damages.

[375] Counter-Memorial, ¶¶ 125-131.

has no power to award.[376] In other words, whether moral damages are considered non-monetary damages or punitive damages, it is clear that the Tribunal has no power to award them, so this Tribunal, as a matter of law, cannot issue an award in favor of Claimants that grants them this relief.

219. As much as Claimants may not like it, the Treaty expressly limits the Tribunal's powers and the forms of relief it may award.[377] Article 10.26.1 of the Treaty provides that a tribunal is only empowered to award "monetary damages" ("*daños pecuniarios*")[378] and Article 10.26.3 provides that "[a] tribunal may not award punitive damages."[379] For this reason, a Tribunal constituted under the Treaty can only issue an award subject to the limitations and exclusions provided for in Article 10.26, and because moral damages are characterized as non-monetary (or punitive) damages, the Tribunal is not empowered to grant them.

220. Claimants' allegation that Colombia makes a *lex specialis* argument is frankly unintelligible.[380] Contrary to Claimants' insinuation, Colombia has not invoked the principle of *lex specialis* (nowhere in the Memorial is that principle mentioned) to support its position that the Tribunal has no power to award moral damages. Colombia has simply pointed out that the Treaty expressly limits the Tribunal's powers, and in particular excludes the award of both non-monetary damages and punitive damages, which by

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[376] Although this Tribunal does not have the power to award moral damages, there is also no proof, not even *prima facie*, that Claimants have suffered reputational damage. *See* ¶ 204, *supra*.

[377] Memorial, ¶ 264, n. 524.

[378] **Ex. RL-1**, Treaty, Article 10.26.1 (the Spanish version refers to "*daños pecuniarios*" and the English version refers to "*monetary damages*").

[379] *Id.*, Article 10.26.3.

[380] Counter-Memorial, ¶¶ 126-127.

logical derivation implies that the Tribunal is not empowered to award moral damages – whether these are considered non-monetary damages or punitive damages. It is much less plausible to argue that there is a potential "conflict" between Article 10.26.1 and Article 10.26.3 of the Treaty;[381] on the contrary, both concordantly and consistently make it clear that the Tribunal is only empowered to award monetary damages.

221. Thus, in light of the unambiguous text of the Treaty, Claimants' main argument is that moral damages are not punitive damages, but compensatory damages.[382] Claimants do not dispute that under international law moral damages are considered non-monetary damages.[383] While there are various legal authorities that

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[381] *Id.*, ¶ 127.

[382] *Id.*, ¶¶ 127-128.

[383] Memorial, ¶ 265. Even the legal authorities cited by Claimants refer to moral damages as non-pecuniary damages. *See* **Ex. CL-153**, Ceren Zeynep Pirim, *Reparation by Pecuniary Means of Direct Moral Damages Suffered by States as a Result of Internationally Wrongful Acts*, 11 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 242 (2020), pp. 253-254, 257 (where moral damages are referred to, in various contexts, as "non-pecuniary damages"); **Ex. CL-154**, Patrick Dumberry, CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT ARBITRATION (Brill 2018), n. 4 (where moral damages are also referred to as "non-pecuniary damages" resulting from "pain and mental anguish", within the framework of the United Nations Compensation Commission). *See also* **Ex. RL-144**, *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Judgment – Compensation owed by the Republic of the Congo to the Republic of Guinea, I.C.J. REPORTS 324, June 19, 2012, ¶¶ 24-25 (where the International Court of Justice described moral damages as compensation for "non-material injury", noting that the "[q]uantification of compensation for non-material injury necessarily rests on equitable considerations," as the damage is not financially assessable); **Ex. RL-148**, *Case of Cantoral-Benavides v. Peru*, Inter-American Court of Human Rights, Judgment of December 3, 2001 (Reparation and Costs), ¶ 53 (in which the Inter-American Court of Human Rights addressed moral damages or "non-pecuniary damages" (or immaterial damages) separately from pecuniary damages, and noted that "[i]t frequently happens that the various types of non-pecuniary damages have no specific monetary equivalent," and that tribunals shall be guided by principles of equity in awarding such damages). According to the Articles drafted by the International Law Commission ("ILC") on Responsibility of States for Internationally Wrongful Acts ("ILC Articles"), the obligation to compensate includes any damage that is "financially assessable", which excludes moral damages. *See* Memorial, n. 529. Claimants misrepresent Colombia's position and refer to the "bewildering assertion that the ILC articles 'exclud[e] moral damages.'" Counter-Memorial, ¶ 129. However, that is not what Colombia argued. What Colombia argued is that the ILC Articles state that "the obligation to compensate covers any damage that is 'financially assessable', thus excluding moral damages." Memorial, ¶ 265. *See also*, Memorial, n. 529. This does not entail that moral damages are not recognized by the ILC Articles or that they cannot be redressed by means of another form of reparation, such as satisfaction. *See* n. 387, *supra*.

consider moral damages to be punitive damages, and many others that consider moral damages to be non-pecuniary (or non-monetary) damages,[384] such an academic discussion is irrelevant for the purposes of this objection, as the Treaty prohibits the award of both punitive damages and non-monetary damages, making it impossible for the Tribunal to grant moral damages – however characterized – to Claimants.

222. In addition, the fact that moral damages are recognized under international law, or that other investment tribunals have awarded moral damages in certain exceptional situations, is irrelevant to the present case.[385] The only relevant point is that Article 10.26 of the Treaty prohibits the award of moral damages (by prohibiting the award of non-monetary and punitive damages), so the fact that some international tribunals have awarded moral damages does not overrule the clear language of the Treaty.

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[384] *See* Memorial, ¶ 266; **Ex. RL-151**, Reza Mohtashami, Romilly Holland and Farouk El-Hosseny, *Non-Compensatory Damages in Civil- and Common-Law Jurisdictions - Requirements and Underlying Principles*, in THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION 22 (2d ed., GAR 2018), p. 29, n. 107 ("Notwithstanding that moral damages are considered as compensatory in both the civil and common-law systems (as well as in international law), they stand distinct to monetary damages. Moreover, certain recent investment treaty awards demonstrate that moral damages are beginning to be understood as having a punitive (and therefore non-compensatory) function. . . . It should be noted that moral damage may also be referred to as 'non-pecuniary', 'non-economic', 'non-material' or 'intangible' damages.'") (emphasis added); **Ex. RL-152**, Stephen Jagusch and Thomas Sebastian, *Moral Damages in Investment Arbitration: Punitive Damages in Compensatory Clothing?*, 29(1) ARBITRATION INTERNATIONAL 45 (2013), pp. 45-46, 62 ("There appear to be two conceptions of moral damages. The first is as a compensatory remedy for a particular category of harms: those involving mental distress. The second is as a form of punitive damages. . . . In summary: a. Moral damages can be thought of as fines for egregious behaviour or as compensation for non-pecuniary injury. b. If they are fines then it is a radical step for tribunals to award them because punitive damages are not well-recognized in public international law. Tribunals seeking to award punitive damages would be introducing a novel remedy on grounds which have not been agreed in the treaties which they are charged with applying. c. The better view, therefore, is that moral damages are compensation for non-pecuniary injury.") (emphasis added); **Ex. RL-153**, Simon Weber, *Demistifying Moral Damages in International Investment Arbitration*, 19 LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 417 (2020), pp. 419, 432 ("The simplest definition of a moral damage is 'a damage that is not material'. A material damage is a financial or economic loss and can therefore be expressed in monetary terms. On the contrary, a moral damage cannot be expressed in monetary terms and hence cannot be objectively quantified. . . . [A] moral damage cannot be objectively quantified, which excludes an award of compensation.") (emphasis added).

[385] Counter-Memorial, ¶¶ 128-131. *See* Memorial, nn. 533-534

223. Claimants further argue that the international law principle of full reparation cannot be achieved without reparation for moral damages.[386] Once again, Claimants ignore that the Treaty provides an express limitation on the Tribunal's power to award non-monetary and punitive damages, which makes it impossible for the Tribunal to award moral damages.[387]

224. In conclusion, Article 10.26 of the Treaty expressly circumscribes the Tribunal's powers, and does not empower the Tribunal to award the moral damages Claimants request in this case.[388]

D. The Tribunal Is Also Not Empowered to Award Non-Monetary Orders or Injunctions, As Claimants Themselves Seem to Acknowledge

225. In their Notice of Arbitration, Claimants also requested that the Tribunal enjoin any attempt by the CGR or any other Colombian organ to seize any of Claimants' assets in Colombia or elsewhere.[389] Colombia explained in its Memorial that Article 10.26 of the Treaty does not permit the granting of non-monetary orders or injunctions such as

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[386] Counter-Memorial, ¶ 129.

[387] Memorial, n. 524; **Ex. RL-142**, Borzu Sabahi, COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE (Oxford University Press 2011), p. 138 ("Investment treaties generally do not seem to limit a tribunal's powers to award compensation for moral damages. Investment treaty tribunals, as long as they have jurisdiction over a dispute, may award compensation for moral harm caused to the investor or the investment, unless there is a limitation on awarding compensation in such cases in the applicable treaty.") (emphasis added). Claimants' reference to the ILC Articles does not aid them, as full or complete reparation for damages caused by internationally wrongful acts includes restitution, compensation, and satisfaction. **Ex. RL-138**, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2(2) YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 31 (2001), Article 34. However, due to the limitations on the available forms of relief set out in the Treaty, the Tribunal could not award satisfaction as a form of relief, and this would not prevent the relief from being full or complete. In other words, while relief must be full, the forms of relief may be limited, as the Treaty does in this case.

[388] However, as Respondent has already explained, the alleged moral damages suffered by Claimants are not the result of Colombia's alleged breaches. *See* ¶¶ 67-77 *supra*.

[389] Notice of Arbitration, ¶ 216(c).

those sought by Claimants in this case. Surprisingly, in their Counter-Memorial Claimants were silent in this regard, implicitly accepting that the Tribunal does not have the power to grant the type of relief they originally requested.

226. The Treaty expressly limits the Tribunal's powers to award "only" monetary damages or order restitution of property, such that the Tribunal is not empowered to grant the non-monetary orders or injunctions sought by Claimants.[390] This means that the Tribunal cannot enjoin the application of the measure that allegedly constitutes a breach of the Treaty, much less modify it or request that it be rendered ineffective.[391]

227. In conclusion, as Claimants themselves implicitly acknowledge by not insisting on this form of relief in their Counter-Memorial, the Tribunal has no power under the Treaty to grant non-monetary orders or injunctions.

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[390] **Ex. RL-1**, Treaty, Article 10.26; Memorial, ¶¶ 269-271.

[391] Claimants have attempted to obtain the same non-monetary order as interim relief. However, the Tribunal has no power to grant a non-monetary order either on a provisional or permanent basis. *See* Answer to Application for Provisional Measures, ¶ 9; **Ex. RL-37**, L. Caplan and J. Sharpe, *United States*, pp. 835-836 ("Article [10.20.8], which mirrors Article 1134 of the NAFTA, provides that a tribunal may order (including by recommendation) interim measures of protection to preserve the rights of a disputing party or to ensure that the tribunal's jurisdiction is made fully effective. Article [10.20.8], however, is not unbounded. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article [10.16]. This provision thus complements Article [10.26], which limits final awards to restitution of property or monetary damages.") (emphasis added); **Ex. RL-121**, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS, p. 618 ("[A] tribunal would not have the authority to order a host state not to enact or not to enforce a law. This clause is based on Article 1135 of NAFTA [which is identical to Article 10.26 of the Treaty]. It responds to concerns raised by critics that investor-state arbitral tribunals would have the power to invalidate U.S. law or overrule decisions of U.S. courts.") (emphasis added).

E. The Tribunal Cannot Grant an Offsetting Award Because It Is Not Empowered to Award Hypothetical Damages or to Make Declaratory Awards

228. Colombia also explained that the Tribunal cannot grant the offsetting award (equivalent to the amount of the Ruling with Fiscal Liability)[392] that Claimants request because it is not empowered under the Treaty to award hypothetical damages.

229. As Respondent has repeatedly indicated, Claimants have so far not made payment of any amount of the fiscal liability determined in the Ruling with Fiscal Liability, either voluntarily or forcibly, so there is no actual monetary damage that could be offset by this Tribunal in an award made under Article 10.26 of the Treaty.[393] Claimants themselves admitted in their Provisional Measures Application that they have not yet suffered any damage.[394]

230. However, Claimants argue in their Counter-Memorial that, as the Ruling with Fiscal Liability is now "final", and Colombia has requested assistance from several

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[392] Notice of Arbitration, ¶ 216(b)(1) (requesting "an offset award equal to any amounts awarded in the CGR proceeding.").

[393] Memorial, ¶¶ 272-278. The requirement that damage must be certain, and not merely hypothetical, in order to be compensable is widely recognized in international investment law. *See* Memorial, ¶ 273; Notice of Arbitration, ¶ 214 (quoting an article by Marc Allepuz, titled "*Moral Damages in International Investment Arbitration*" (*Revista del Club Español del Arbitraje*), which states that an arbitral tribunal must award damages "where the existence of damage is certain."); **Ex. RL-168**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3, Award on the Merits, May 20, 1992, ¶ 189 (acknowledging that it is a basic principle that damages that are "possible but contingent and undeterminate" cannot be compensated by an arbitral tribunal); **Ex. RL-169**, *Occidental Exploration and Production Company v. Republic of Ecuador,* LCIA Case No. UN3467, Final Award, July 1, 2004 ("*Occidental*"), ¶ 210 (not ordering the payment of compensation or the reimbursement of amounts that "[were] not yet due or [had not been] paid", since "contingent and undeterminate" damage could not be compensated); **Ex. RL-170**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan,* SCC Case No. V(064/2008), Final Award, June 8, 2010, ¶ 103 (pointing that "[t]o the extent that Claimant is now suggesting that Respondent should be held liable . . . for damages which have not yet occurred, or may not yet be calculated, but which may occur in the future as a result of future circumstances", such questions could not be resolved by that tribunal.). Likewise, the occurrence of damage (*i.e.*, the existence of certain and not merely hypothetical damage) is a necessary requirement under the Treaty for a valid claim to be submitted to arbitration. **Ex. RL-1**, Treaty, Article 10.16.1; Memorial, ¶¶ 251-261.

[394] *See* ¶ 200, *supra*.

countries to locate Claimants' assets in anticipation of their seizure and refuses to agree to halt enforcement proceedings, the damages incurred by Claimants are no longer "merely hypothetical" or "undetermin[ed]".[395]

231. Claimants are wrong. Until they have to make some payment (whether voluntary or forced) to satisfy the Ruling with Fiscal Liability, their damages will remain merely hypothetical because there is no certainty as to whether they will materialize.[396] First, the Ruling with Fiscal Liability establishes the joint and several liability of Foster Wheeler and Process Consultants and the other fiscally liable parties, and thus it is impossible to know whether they will ever have to make a full or partial payment on the amount of the Ruling with Fiscal Liability.[397] Second, the Ruling with Fiscal Liability is subject to several judicial remedies, and could eventually be declared null and void.[398] Third, the forced collection against Foster Wheeler and Process Consultants faces enormous legal and practical hurdles, so it is possible that none of the assets of these companies can be identified, seized and much less auctioned.[399]

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[395] Counter-Memorial, ¶ 132.

[396] *See* ¶¶ 63, 198, nn. 347, 349, 372, *supra.*

[397] Memorial, ¶¶ 88, 108, 150, n. 515; ¶¶ 31, 63, *supra*. As previously mentioned, part of the amount of the Ruling with Fiscal Liability has already been paid by civilly liable third parties. *See* ¶¶ 50-52 *supra*. If Foster Wheeler, Process Consultants, or other fiscally liable parties do not voluntarily pay the pending amount of the Ruling with Fiscal Liability, the CGR could proceed with a forced collection against Foster Wheeler and Process Consultants, or it could choose to seize and/or auction the assets of the other natural or legal persons found to be fiscally liable.

[398] Memorial, n. 226; ¶¶ 42-47, *supra*.

[399] It is worth recalling that the CGR has not been able to locate any assets of Foster Wheeler or Process Consultants in Colombia. Answer to Application for Emergency Relief, ¶ 36; Rejoinder on Application for Emergency Temporary Relief, ¶ 41, n. 71; **Ex. R-96**, Letter from the Deputy Comptroller No. 15 to Agencia Nacional de Defensa Jurídica del Estado, September 28, 2021, p. 1. *See* **CWS-3**, Thomas Grell Witness Statement, ¶ 9. In addition, it was not possible to seize the assets of Foster Wheeler and Process Consultants on a preventive basis. Rejoinder on Application for Emergency Temporary Relief, n. 72; **Ex. R-96**, Letter from the Deputy Comptroller No. 15 to Agencia Nacional de Defensa Jurídica del Estado, September 28, 2021, p. 1; **Ex. R-97**, Letter from the Deputy Comptroller No. 15 to the CGR's Forced Collection Office, July 18, 2021, pp. 7-8; **Ex. R-98**, Letter from the Director of Forced Collection No. 1 to

232. But what is most astonishing and frankly absurd is that, with their request for an offsetting award equal to the full amount of the Ruling with Fiscal Liability, Claimants are seeking not only compensation for purely hypothetical damages (which the Tribunal cannot award them), but are seeking an extraordinary windfall. Having not paid a single penny to satisfy the amount of the Ruling with Fiscal Liability, Claimants now seek to have the Tribunal award them more than US$ 900 million in damages.

233. Claimants continue their unsuccessful attempt to equate the *Glencore* case (where the tribunal granted the Claimant an offsetting award) with this Arbitration.[400] However, Claimants themselves have acknowledged that, in *Glencore*, the claimant paid the ruling with fiscal liability,[401] so the situation is diametrically opposed to that of Claimants, who have made no payment whatsoever to satisfy the Ruling with Fiscal Liability.

234. Now, as Respondent indicated in its Memorial, if what Claimants are really seeking is a declaratory award ordering Respondent to compensate Claimants for any future damages Claimants might hypothetically suffer from any future payment they might eventually have to make (either voluntarily or by way of a forced collection proceeding) to satisfy all or part of the amount of the Ruling with Fiscal Liability, the Tribunal is not

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Agencia Nacional de Defensa Jurídica del Estado, September 27, 2021. Finally, it should be noted that the forced collection proceeding would eventually allow Foster Wheeler and Process Consultants to file an annulment action before the administrative adjudicatory jurisdiction against the resolution ordering the auction and sale of assets, which makes an eventual damage even more hypothetical. Memorial, ¶ 120; ¶ 54, *supra*.

[400] Counter-Memorial, ¶ 133.

[401] Application for Provisional Measures, ¶ 113 ("[T]he tribunal in *Glencore* granted claimant an award equal to the biased fiscal liability award previously paid by the claimant to the CGR.") (emphasis added); Counter-Memorial, n. 226 ("[i]n the *Glencore* case, which awarded the claimant an amount equal to the amount assessed by the CGR in a fatally flawed proceeding and paid by the claimant") (emphasis added). *See also* **Ex. RL-20**, *Glencore*, ¶ 525; Memorial, ¶ 277.

empowered under the Treaty to award such relief either, since it is only empowered to award monetary damages.[402]

235. Finally, it is worth noting that it is difficult to reconcile Claimants' request for an offsetting award with their recent statement that they do not seek any compensation from this Tribunal for the consequences of the enforcement of the Ruling with Fiscal Liability. At the Provisional Measures Hearing, Claimants asserted that the consequences of the enforcement of the Ruling with Fiscal Liability "[are] not part of our claim now" and "[are] not presently before the Tribunal".[403] Therefore, regardless of the impossibility of compensating hypothetical damages under the Treaty, if the consequences of any enforcement of the Ruling with Fiscal Liability are outside the scope of this Arbitration – as Claimants themselves contend – the Tribunal would have no

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[402] Memorial, n. 539. *See also* **Ex. RL-1**, Treaty, Articles 10.16.1 and 10.26.1; **Ex. RL-136**, A. Bjorklund, *NAFTA Chapter 11*, p. 523 ("[A]rticle 1135 restricts the kind of relief that a NAFTA tribunal can award. . . . This limitation means that other types of relief, such as specific performance, declaratory judgments, rectification, or contractual gap-filling are not allowed.") (emphasis added); **Ex. RL-166**, Stefan Leimgruber, *Declaratory Relief in International Commercial Arbitration*, 32(3) ASA BULLETIN 467 (Kluwer International Law 2014), p. 467 ("A declaratory award is a statement by an arbitral tribunal on the existence or non-existence of a state of affairs."); **Ex. RL-167**, Patrick Dunand, Maria Kostyska, *Declaratory Relief in International Arbitration*, 29 JOURNAL OF INTERNATIONAL ARBITRATION 1 (Kluwer International Law 2012), p. 1 ("The parties seek declaratory relief to ascertain their legal positions, clarify their rights and obligations, and determine whether they are bound by contracts or other legal instruments. Declaratory awards are intended to allow the parties to adjudicate their disputes early, quickly and cost-effectively, before they suffer damage.") (emphasis added).

[403] Hearing on Provisional Measures Transcript, p. 107 ("ARBITRATOR KOHEN: Just to understand well, assuming that the Contraloría General de la República goes ahead with the enforcement; assuming that [the Ruling with Fiscal Liability] is enforced either in Colombia or elsewhere, would you include the consequences of this in your final Prayer for Relief, or not? Mr. SILLS: If they caused damage, we would, I suppose, have a separate claim for that, but it's not presently before the Tribunal and whether it would be in the form of a separate proceeding or not, I have to say I think it's premature. But it's not part of our claim now, and we're trying to avoid aggravating the dispute and turning that into a claim."). *See also id.*, p. 95 ("ARBITRATOR BEECHEY: Mr. Sills, so there is absolutely no doubt, would you be kind enough to look at Article 10.20.8 of the [Treaty]? And so there is absolutely no doubt about this whatever, looking at the sentence which is at the heart of the debate we've had today, 'A tribunal may not order attachment or enjoin the application', and then comes 'of a measure alleged to constitute a breach referred to in Article 10.16'. To be absolutely clear, what do you say is the Measure alleged to constitute a breach referred to in Article 10.16? MR. SILLS: [The Ruling with Fiscal Liability] of the CGR.").

jurisdiction to compensate Claimants for any eventual damages arising from the enforcement of the Ruling with Fiscal Liability, within which their request for an offsetting award would fall.

236. For all of the foregoing reasons, the Tribunal is not empowered under the Treaty to grant the offsetting award that Claimants request.

OBJECTIONS TO JURISDICTION

237. In their Counter-Memorial, Claimants have not been able to provide tenable answers or explanations to any of the five objections to jurisdiction that Colombia raised and the Tribunal will address as preliminary questions.[404]

238. Contrary to Claimants' assertion,[405] the limitations imposed by Article 10.20.4 of the Treaty on the manner in which an objection is to be addressed, and in particular, the requirement to assume "to be true claimant's factual allegations," do not

[404] Several of these objections to jurisdiction were raised by Colombia in its letter to ICSID opposing registration of this claim. *See* Letter from Respondent to the ICSID Secretary General, December 19, 2019.

[405] Counter-Memorial, ¶ 35 (wrongly stating that the limitations and standards applicable to the objection under Article 10.20.4 of the Treaty are applicable to all preliminary objections raised by Colombia).

apply to these objections to jurisdiction.[406] Claimants have the burden of proving all facts on which the Tribunal's jurisdiction is based.[407]

I.

The Services Contract Does Not Qualify as a Covered Investment Under the Treaty and the ICSID Convention

239. Colombia objected to the Tribunal's jurisdiction *ratione materiae* on the ground that the Services Contract does not constitute an "investment" under the terms of the Treaty or the ICSID Convention.[408]

240. In their Counter-Memorial, Claimants contend – without any real analysis – that the Services Contract is covered by the definitions of "investment" in both the Treaty and the ICSID Convention, essentially arguing that no investment risk is required to have a covered investment. As will be demonstrated below, Claimants' argument is without merit and should be dismissed.

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[406] Memorial, n. 558; **Ex. RL-175**, *Seo Jin Hae v. Republic of Korea,* HKIAC Case No. 18117 (KORUS FTA), Submission of the United States of America, June 19, 2019 *("Submission of the U.S. in Seo Jin Hae"),* ¶ 12 ("[W]hen a respondent invokes paragraph 7 to address objections to competence, there is no requirement that a tribunal 'assume to be true claimant's factual allegations.' To the contrary, there is nothing in paragraph 7 that removes a tribunal's authority to hear evidence and resolve disputed facts."), ¶ 13 ("[N]othing in the text of paragraph 7 alters the normal rules of burden of proof. In the context of an objection to competence, the burden is on a claimant to prove the necessary and relevant facts to establish that a tribunal is competent to hear a claim. It is well-established that where 'jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.' A tribunal may not assume facts in order to establish its jurisdiction when those facts are in dispute.") (emphasis added); **Ex. RL-176**, *Kappes*, ¶ 220 ("Unlike objections under Article 10.20.4, jurisdictional objections do not require a tribunal to assume as true all facts alleged in the notice of arbitration.").

[407] Memorial, n. 559. *See for example*, **Ex. RL-180**, *Pac Rim Cayman LLC. v. Republic of El Salvador,* ICSID Case No. ARB/09/12 (DR-CAFTA), Decision on the Respondent's Jurisdictional Objections, June 1, 2012, ¶ 2.9 ("[A]ll relevant facts supporting such jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant's favour.").

[408] Memorial, ¶¶ 281-198.

241. Claimants focus their analysis on the list of examples in Article 10.28 of the Treaty, and in particular paragraph (e), highlighting construction and management contracts[409] – even though the Services Contract does not qualify under either of those categories. Claimants do not have a management or construction contract,[410] but merely a contract for the provision of consultancy services, as they themselves have pointed out.[411]

242. Indeed, the main characteristics of the Services Contract entered into between Reficar and FPJVC – which have not been contested by Claimants in their Counter-Memorial[412] – are as follows:

- FPJVC provided consulting services for the management of the Project, including: [redacted]

[409] Counter-Memorial, ¶¶ 136-138.

[410] Claimants continue in their unsuccessful attempt to try to muddle the nature of the Services Contract and allege that it concerns a State infrastructure project (*i.e.*, the expansion and renovation of one of the State's oil refineries). Counter-Memorial, ¶ 104. However, the purpose of the Services Contract is merely to provide consulting services; it is not a contract for the construction of a refinery or any other type of infrastructure construction contract.

[411] Notice of Arbitration, ¶ 3 ("This dispute arises from a November 2009 contract between FPJVC and Refinería de Cartagena S.A.. . . . for the provision of services in connection with the modernization and expansion of a large, state-owned oil refinery located in Cartagena, Colombia."); ¶ 29 ("Claimants contracted with Reficar, a Colombian-owned enterprise, to provide project management services in connection with the construction and expansion of an oil refinery owned by Colombia to supply environmentally clean motor fuels to meet Colombian demand.") (emphasis added). Claimants further assert that services contracts usually qualify as covered investments. Counter-Memorial, ¶ 138. This assertion lacks legal support. In fact, the legal authority used by Claimants in support of this assertion expressly states that, to determine whether or not a contract qualifies as a covered investment, it is essential that the contract meets certain objective characteristics – such as duration, contribution and risk – and that it is irrelevant that the contract is included in a non-exhaustive list of examples in the investment treaty. **Ex. CL-162**, Velimir Zivkovic, *Recognition of Contracts as Investments in International Investment Arbitration*, 5 Eur. J. Legal Stud. (2012), p. 176 ("But the above is merely an informative list [and] a recapitulation of what can be found in legal instruments and case law. The key issue is not just to identify these contracts. The crucial question is why are these contracts recognized [as investments]?"), pp. 179, 183 ("Therefore, it is submitted that there should be a single approach. . . and in the author's opinion that approach should be an objective, semi-cumulative, three criteria test . . .[, to prove,] certain duration, contribution and existence of risk.") (emphasis added).

[412] *See* n. 34, *supra*.

[redacted].[413]

- In consideration for its services, FPJVC was entitled to receive payments from Reficar corresponding to [redacted], which represented its Remuneration. FPJVC recovered – through the different components of the Remuneration – [redacted].[414] [redacted],[415] [redacted].[416]

- FPJVC invoiced Reficar on a monthly basis for its services, receiving periodic payment of its Remuneration, [redacted].[417]

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[413] [redacted]; Memorial, ¶¶ 24, 293.

[414] [redacted]; Memorial, ¶¶ 35, 40-41, 293.

[415] [redacted]; Memorial, ¶¶ 35, 42, 293.

[416] [redacted]; Memorial, ¶¶ 35, 43, 293.

[417] Memorial, ¶¶ 45-51, 293.

243. In any event, Claimants' emphasis on Article 10.28(e) of the Treaty is misplaced because the categories listed in the definition of "investment" are illustrative, since an "investment" must always possess certain characteristics to be protected under the Treaty.[418]

244. Claimants attempt to downplay the general definition and characteristics of "investment," and in particular the characteristic of assumption of risk,[419] despite the fact that Article 10.28 of the Treaty expressly defines an "investment" as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[420] Thus, the

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[418] **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶ 2 ("Article 1 [which is identical to Article 10.28 of the Treaty] defines 'investment' . . . The '[f]orms that an investment may take include' the categories listed in the subparagraphs, which are illustrative and non-exhaustive. The enumeration of a type of an asset in Article 1, however, is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.") (emphasis added). *See also* **Ex. RL-185**, *Bridgestone Licensing Services Inc., and Bridgestone Americas Inc. v. Republic of Panama,* ICSID Case No. ARB/16/34 (Panama-U.S. TPA), Submission of the United States of America, August 28, 2017 ("*Submission of the U.S. in Bridgestone*"), ¶ 14; **Ex. RL-65**, *Submission of the U.S. in Elliott Associates*, ¶ 7; **Ex. RL-66**, *Submission of the U.S. in Gramercy*, ¶ 18; **Ex. RL-67**, *Submission of the U.S. in Italba*, ¶ 2; **Ex. RL-175**, *Submission of the U.S. in Seo Jin Hae*, ¶ 15. Colombia has endorsed the same understanding in its 2008 Model Treaty. **Ex. RL-126**, Colombia Bilateral Agreement for the Promotion and Protection of Investments Model of 2008 ("2008 Colombia Model Treaty"), Article 2.4 ("In accordance with paragraph 1 of this Article, the minimum characteristics of an investment shall be: a. The commitment of capital or other resources; b. The expectation of gain or profit; and c. The assumption of risk for the investor."). *See* **Ex. RL-120**, J. Rivas, *Colombia*, p. 206 ("[T]he Investment Negotiating Team [of Colombia] considered whether all characteristics were necessary for there to be an investment. To the extent that the characteristics are interdependent, as recognized in *Salini*, it made little sense not to make them all mandatory in the Model. Since risk is a core characteristic, and since risk logically involves an expectation of gains together with the possibility of not yielding returns from whatever resources were committed, *i.e.* the remaining two characteristics, all three elements were deemed necessary for the finding of an investment.") (emphasis added).

[419] Counter-Memorial, ¶ 139.

[420] **Ex. RL-1**, Treaty, Article 10.28 (emphasis added). Claimants argue that the text of the provision should not be ignored and that no limiting phrases should be read into the text when there are none. Counter-Memorial, ¶ 138. However, they overlook the fact that in this case there is a limiting phrase in Article 10.28 of the Treaty. Moreover, the very source they refer to in support of that argument cites as an example the requirement in the U.S. model treaty [which is the same as the Treaty] that an "investment" must have the

assumption of risk is one of those characteristics that an investment must possess, according to the explicit language of Article 10.28 of the Treaty.[421] It is not a matter of adding a requirement to the definition that is not found in the language of the Treaty, as Claimants erroneously argue.[422]

245. Indeed, investment risk is the fundamental requirement or the main characteristic for determining whether a certain asset constitutes an "investment" under the terms of the Treaty, as well as the feature that distinguishes a true "investment" from an ordinary commercial contract. Therefore, the absence of such an investment risk inexorably entails that there is no protected "investment" under the Treaty in this case.

246. As the tribunal in *Romak v. Uzbekistan* noted when referring to investment risk:

> All economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction. An 'investment risk' entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is 'risk'

"characteristics of an investment" as a "limiting phrase". **Ex. CL-81**, C. McLachlan *et al.*, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES, ¶ 6.47 (emphasis added).

[421] **Ex. RL-1**, Treaty, Article 10.28.

[422] Counter-Memorial, ¶ 138. Claimants, not Colombia, are the ones ignoring an interpretation of Article 10.28 of the Treaty under the interpretative principles of Article 31 of the Vienna Convention by focusing only on the enunciative list of assets that may eventually qualify as an "investment", but ignoring the "*chapeau*" of the provision that expressly states that an asset must possess the characteristics of an investment to qualify as such (among which is the assumption of a risk).

> of this sort, the investor simply cannot predict the outcome of the transaction.[423]

247. Notably, Claimants do not dispute that the Services Contract does not present any investment risk,[424] but merely argue that it possesses other characteristics that investments generally have (such as the contribution of money and other resources with the expectation of a profit).[425] However, without an investment risk, which is the primary characteristic for determining the existence of a true "investment," Claimants cannot seriously argue that they possess an investment covered by the Treaty. The truth is that the Services Contract is simply an ordinary commercial contract (without any investment risk), the typical contract that the Treaty's definition of "investment" seeks to exclude.[426]

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[423] **Ex. RL-181**, *Romak S.A. (Switzerland) v. Republic of Uzbekistan,* PCA Case No. AA280, Award, November 26, 2009, ¶¶ 229-230 (emphasis added). *See also* **Ex. RL-188**, *Standard Chartered Bank (Hong Kong) v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, October 11, 2019 ("*SCB*"), ¶¶ 218-220; **Ex. RL-195**, *Seo Jin Hae v. Government of the Republic of Korea,* HKIAC Case No. 18117 (KORUS FTA), Final Award, September 27, 2019, ¶ 130 ("Article 11.28 of the KORUS FTA [Free Trade Agreement between the Republic of Korea and the United States] is clear in that an asset only qualifies as an investment if it has certain characteristics, such as the assumption of risk. Those characteristics, including the assumption of risk, must go beyond the features that any asset automatically has. Otherwise, the requirement of the asset showing the characteristics of an investment would be rendered meaningless. Therefore, the risk of an asset declining in value cannot be the type of risk that the drafter of the KORUS FTA had in mind.") (emphasis omitted); **Ex. RL-120**, J. Rivas, *Colombia*, pp. 205-206 ("[T]he existence of risk is an essential characteristic of an investment which creates the potential for returns and profits.").

[424] Claimants argue that they assumed "sufficient risk" when they entered into the Services Contract, such as the risk of non-payment or default. Counter-Memorial, ¶ 139. However, none of those risks constitute investment risks but are simply ordinary commercial risks present in any economic transaction. Memorial, ¶¶ 286-288. It is the existence of an investment risk specifically – as opposed to a simple commercial risk – that distinguishes a contract that qualifies as an "investment" from an ordinary commercial contract that does not qualify as such.

[425] Counter-Memorial, ¶ 139. Claimants highlight the conjunction "or" contained in Article 10.28 of the Treaty to argue that there need not be an investment risk for there to be a covered investment under the Treaty. However, their interpretation of the provision is incorrect. Precisely what the provision does by using the word "including" is to list some of the typical characteristics of an investment (among which is the assumption of risk), making it clear that this is a non-exhaustive list, since there may be other characteristics that were not mentioned. This cannot mean, however, that there can be an "investment" even if there is no assumption of investment risk.

[426] *See* Memorial, ¶ 284; **Ex. RL-185** *Submission of the U.S. in Bridgestone*, ¶¶ 15-16 ("Subparagraph (e) of the definition lists, among forms that an investment may take, 'turnkey, construction, management,

248. Claimants attempt to draw factual differences with the cases cited by Colombia in support of their position.[427] However, beyond certain minor or insignificant differences (such as the type of contract or the degree of progress of the alleged investment), what is truly relevant in those cases is that all of them highlight the need for an investment risk to be present for there to be a protected "investment". That is to say, "an operational risk and not a commercial risk", "a risk inherent in the investment operation" or, in other words, "that the profits are not ascertained but depend on the success or failure of the economic venture concerned."[428] This is precisely what the Services Contract lacks.[429]

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production, concession, revenue-sharing, and other similar contracts.' Ordinary commercial contracts for the sale of goods or services typically do not fall within the list in subparagraph (e). The definition of 'investment' explicitly excludes claims to payment that arise from commercial contracts for the sale of goods or services and that are not immediately due.") (emphasis added). Accordingly, in its 2008 Model Treaty, Colombia expressly excluded commercial services contracts from the definition of "investment". **Ex. RL-126**, 2008 Colombia Model Treaty, Article 2.2 ("Investment does not include: . . . b. claims to money arising solely from: i. Commercial contracts for the sale of goods and services by a national or legal entity in the territory of a Contracting Party to a national or a legal entity in the territory of the other Contracting Party."). *See* **Ex. RL-120**, J. Rivas, *Colombia*, p. 204 ("As a matter of public policy the [Colombia Model Treaty of 2008] also does not consider as investments any claims to money arising exclusively from commercial contracts for the sale of goods and services. The purpose of IIAs, as understood by the Investment Negotiating Team, is reflected in this exclusion.").

[427] Counter-Memorial, ¶¶ 147-148.

[428] **Ex. RL-192**, *Posštová banka, a.s, and Istrokapital SE v. Hellenic Republic,* ICSID Case No. ARB/13/8, Award, April 9, 2015, ¶¶ 367-370 (emphasis added). *See also* **Ex. RL-182**, *Nova Scotia Incorporated (Canada) v. Bolivarian Republic of Venezuela (II*), ICSID Case No. ARB(AF)/11/1, Excerpts of the Award, April 30, 2014, ¶¶ 105, 107-108, 111 ("It may be that any transaction involves a risk, but what is required for an investment is a risk that is distinguishable from the type of risk that arises in an ordinary commercial transaction. . . . The risk the Claimant refers to is, however, the far more simple risk of exposure to a higher price for a product - for the Tribunal, this is not a risk that is inherent to an investment. . . . Thus, the type of risk involved here appears to be, for the coal industry, 'normal commercial terms.' Additionally, here, the risk is not one that affects the contribution and the alleged investment. . . . The Tribunal has not found that the risks alleged are of the sort that is inherent in the notion of investment."); **Ex. RL-193**, *Professor Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, August 23, 2019, ¶ 145; **Ex. RL-194**, *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award, March 5, 2020, ¶¶ 293- 294.

[429] *See* ¶ 22, *supra*; Memorial, ¶¶ 22, 44, 45, 52.

249. Furthermore, Claimants seem to allege that if the Services Contract qualifies as a "covered investment" under the Treaty – which it does not – that would be sufficient for it to qualify as an "investment" under the ICSID Convention.[430] This is clearly incorrect, as the fact that an "investment" may qualify as such under the definition of an investment treaty does not mean that it also qualifies as an "investment" under the terms of the ICSID Convention.[431] For this to occur, the "investment" must meet certain objective requirements established by the ICSID Convention, among which is (again) the

[430] Counter-Memorial, ¶ 140.

[431] *See* ICSID Convention, Article 25(1); **Ex. RL-187**, Christoph Schreuer *et al.*,, THE ICSID CONVENTION: A COMMENTARY (2d ed., Cambridge University Press 2009), Article 25, ¶ 122 ("The drafting history [of the ICSID Convention] leaves no doubt that the Centre's services would not be available for just any dispute that the parties may wish to submit. In particular, it was always clear that ordinary commercial transactions would not be covered by the Centre's jurisdiction no matter how far-reaching the parties' consent might be.") (emphasis added); **Ex. RL-188**, *SCB*, ¶ 194 ("The subject matter of the dispute must nevertheless still be an investment as contemplated by the ICSID Convention and consent by the Parties alone could not subject an ordinary commercial transaction or political dispute or non-legal dispute to ICSID for resolution. This is expressed in the Report by the Executive Directors on the [ICSID Convention]."). Even one of the legal authorities cited by Claimants expressly supports this position. **Ex. CL-162**, V. Zivkovic, *Recognition of Contracts as Investments in International Investment Arbitration*, p. 180 ("While . . . establishing whether or not a certain transactions falls within what the parties agreed is an investment is a necessary condition of establishing ICSID [tribunal] jurisdiction, it should not be a sufficient condition. Two main arguments speak against unrestricted deference [to the parties' consent]. Firstly, this would mean that the term 'investment' does not have and can never have any inherent meaning for the purposes of an institution intentionally created to deal with investments. Although one can accept that legal and economic definitions of an investment may differ, this cannot mean that they differ so much that former is actually *tabula rasa* to be written by the Contracting States over and over again while the latter has well-known (albeit sometimes blurry) borders. Contracting States of the ICSID Convention did not create ICSID in order to resolve all sorts of 'economic' or 'business' disputes, but only [to resolve] 'investment' disputes . . . Secondly, one should consider what would be the practical consequences of accepting unrestricted deference [to the parties' consent]. Wide acceptance of economic activities as investments could lead to many transitory and fringe activities suddenly becoming investments. This would potentially (or even likely) lead to the opening of the floodgates and undesirable massive increase in investment litigation.") (emphasis omitted).

assumption of an investment risk.[432] This is precisely what is known as the "double-keyhole approach", which is applicable in all ICSID arbitrations.[433]

250. Alternatively, Claimants argue that, even if the "double-keyhole approach" were applied, they would still satisfy the investment requirement of Article 25 of the ICSID Convention.[434] Citing to a single academic article, Claimants attempt to downplay the long-established and recognized objective definition of "investment" under the ICSID Convention. However, their position is negated by the overwhelming majority of doctrine

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[432] *See for example* **Ex. RL-189**, *Salini Construttori S.P.A and Italstrade S.P.A v. Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 16, 2001, ¶ 52 ("The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. . . . In reading the [ICSID] Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.") (emphasis added); **Ex. RL-190**, *Ulysseas, Inc. v. Republic of Ecuador,* UNCITRAL, Final Award, June 12, 2012, ¶ 251 ("As held by many ICSID tribunals, the ordinary conception of an investment includes several basic characteristics, essentially: (a) it must consist of a contribution having an economic value; (b) it must be made for a certain duration; (c) there must be the expectation of a return on the investment, subject to an element of risk; (d) it should contribute to the development of the economy of the host State.") (emphasis added); **Ex. RL-100**, *Electrabel*, ¶ 5.43 ("Article 25 of the ICSID Convention requires that the dispute arises directly from an investment, but provides no definition of investment. While there is incomplete unanimity between tribunals regarding the elements of an investment, there is a general consensus that the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment."); **Ex. RL-191**, *Quiborax S.A., Non Metallic Minerals S.A and Allan Fost Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, September 27, 2012 ("*Quiborax*"), ¶ 227 ("[T]he Tribunal concludes that the objective definition of investment under Article 25(1) of the ICSID Convention comprises the elements of contribution of money or assets, risk and duration.").

[433] *See* Memorial, n. 568; ¶ 264, n. 458, *infra*. The "double keyhole approach" or "double-barreled test" is actually supported by the case cited by Claimants. **Ex. CL-168**, *Krederi ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Excerpts of Award, July 2, 2018 ("*Krederi*"), ¶ 243 ("It is well-established that in addition to fulfilling the jurisdictional requirements of Article 25 ICSID Convention, an investment tribunal must assure itself that an investment meets the jurisdictional requirements of the applicable BIT or IIA, pursuant to what has been referred to as the so-called double-barreled test in ICSID cases. In the past, most tribunals have applied such a double-barreled test in regard to the jurisdictional requirement of an 'investment'."). *See also* **Ex. CL-184**, *Mytilineos Holdings v. Serbia & Montenegro*, Partial Award on Jurisdiction, September 8, 2006, ¶ 112 ("It is the established practice of ICSID tribunals to assess whether a specific transaction qualifies as an 'investment' under the ICSID Convention, independently of the definition of investment in a BIT or other applicable investment instrument, in order to fulfill *the ratione materiae* prerequisite of Article 25 of the [ICSID] Convention.").

[434] Counter-Memorial, ¶ 141.

and jurisprudence, which holds that the objective requirement of an investment is indispensable for the Centre to exercise its jurisdiction *ratione materiae* over a dispute.[435]

251. Strangely, Claimants themselves acknowledge that ICSID tribunals have analyzed the existence of an investment by applying a number of objective criteria such as the existence of a contribution, a certain duration and an element of risk.[436] Even the

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[435] *See for example*, **Ex. RL-187**, C. Schreuer *et al.*, The ICSID Convention: A Commentary, Article 25, ¶¶ 122-123 (clarifying that the parties do not have "unlimited freedom" because "the term 'investment' has an objective meaning independent of the parties' disposition"); **Ex. RL-191**, *Quiborax*, ¶ 217 ("In sum, Claimants must show that they have made an 'investment' under the objective definition developed in the framework of the ICSID Convention in order to establish that the Tribunal has *ratione materiae* jurisdiction over the dispute."); **Ex. RL-319**, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine,* ICSID Case No. ARB/09/11, Award, December 1, 2010, ¶ 43 ("These decisions have held that the notion of 'investment', which is one of the conditions to be satisfied for the Centre to have jurisdiction, cannot be defined simply by reference to the parties' consent. The weight of authority is thus in favour of viewing the term 'investment' as having an objective definition within the framework of the ICSID Convention."); **Ex. RL-320**, *Mr. Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20, Award, July 14, 2010, ¶ 108 ("[T]he Tribunal considers that the notion of investment, which is one of the conditions to be satisfied for the Centre to have jurisdiction, cannot be defined simply through a reference to the parties' consent, which is a distinct condition for the Centre's jurisdiction. The Tribunal believes that an objective definition of the notion of investment was contemplated within the framework of the ICSID Convention, since certain terms of Article 25 would otherwise be devoid of any meaning."); **Ex. RL-321**, *Joy Mining Machinery Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/03/11, Award on Jurisdiction, August 6, 2004, ¶ 50 ("The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.").

[436] Counter-Memorial, ¶ 143. The discussion as to whether or not the typical characteristics of an "investment" are mandatory jurisdictional requirements under Article 25 of the ICSID Convention is irrelevant to this case. *Id.*, ¶ 144. The assumption of investment risk is a fundamental characteristic that differentiates a real "investment" from a mere ordinary commercial transaction. In any event, several ICSID tribunals have considered that certain characteristic elements of an investment (such as the assumption of risk) are mandatory jurisdictional requirements for the existence of an investment under the ICSID Convention. *See for example*, **Ex. RL-183**, *Orascom TMT Investments S.a.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, May 31, 2017, ¶ 370 ("It is undisputed that, for the Tribunal to have jurisdiction over this dispute, the Claimant must establish that it has made an investment which is protected under both[,] the BIT and the ICSID Convention. Starting from the ICSID Convention, it is equally beyond dispute that the ICSID Convention does not define the term 'investment.' In the Tribunal's view, the absence of a definition of 'investment' under the ICSID Convention implies that the Contracting States intended to give to the term its ordinary meaning under Article 31(1) of the VCLT as opposed to a special meaning under Article 31(4) of the same treaty. As held by a number of recent investment awards, this ordinary meaning of the term is an objective one, and comprises the elements of (i) a contribution or allocation of resources, (ii) a duration; and (iii) risk, which includes the expectation (albeit not necessarily fulfilled) of a commercial return. As noted by the tribunal in *Saba Fakes*, these requirements 'are both necessary and sufficient to define an investment within the framework of the ICSID Convention.'") (emphasis added).

Mabco v. Kosovo decision they cite in support of their position expressly states that "[u]nder one well-established line of arbitral case law, an asset does not qualify as an investment under the ICSID Convention unless, cumulatively, it represents a substantial capital contribution, entails a certain risk, and presents a certain duration."[437]

252. Finally, in a desperate attempt to save their case, Claimants contend that they have presented sufficient facts to show that they have made an investment in Colombia, and point out in particular: that "FPJVC is a contractual joint venture that, among other things, provides engineering, management and consulting services to the oil and gas sector", that they have a long history of investment in Colombia, that they "contracted with Reficar, a Colombian-owned enterprise, to provide project management services", that they "invested significant amounts of, time, capital, personnel, and labor in Colombian territory", that they "contracted to and did provide services in connection with the construction and expansion of an oil refinery, significant capital, labor, and time", and that "FPJVC's services would last for approximately 45 months".[438]

253. Despite this long list, none of the facts described above demonstrates that Claimants have an "investment" in Colombia under the terms of the Treaty or the ICSID Convention. The only thing Claimants point to in their Notice of Arbitration as their

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[437] **Ex. CL-167**, *Mabco Constructions S.A. v. Republic of Kosovo*, ICSID Case No. ARB/17/25, Decision on Jurisdiction, October 30, 2020, ¶ 296 (emphasis added); Counter-Memorial, n. 278. The other case cited by Claimants also confirms this assertion. **Ex. CL-168**, *Krederi*, ¶ 237 ("The Tribunal will assess the question of whether Claimant's activities qualify as an investment in the sense of Article 25 ICSID Convention pursuant to a '*Salini* light-test' which has emerged as the prevailing approach by ICSID tribunals over the last years and which developed the original *Salini*-test holding that in fact only 'the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment.'"). Indeed, the discussion on the application of the *Salini* test focuses on whether or not the requirement of contribution to the economic development of a State is part of the necessary requirements for the existence of an investment under the ICSID Convention. However, there is no dispute that the existence of a risk is a necessary and indispensable requirement for an investment to be protected under the ICSID Convention.

[438] Counter-Memorial, ¶¶ 150-153.

"investment" is the Services Contract; everything else they mention is not the "investment" they invoke or for which they claim damages in this case. Moreover, while these facts may serve to demonstrate a certain contribution of resources and a certain duration, they do not demonstrate the existence of an investment risk, which is the fundamental characteristic that an "investment" must possess in order to be covered by the Treaty and the ICSID Convention. Indeed, the Remuneration structure of the Services Contract, and the periodic recovery of that Remuneration, ensured that FPJVC was never at risk of losing the human, financial and technical resources it allocated to the performance of the Services Contract, and that it had no uncertainty as to its profitability, [redacted].[439]

254. In sum, none of Claimants' arguments succeed in undermining the fact that the Services Contract does not qualify as an "investment" under the Treaty and the ICSID Convention, which means that the Tribunal lacks jurisdiction *ratione materiae* over this dispute.

II.

Claimant FPJVC Is a Contractual Joint Venture That Does Not Qualify as a "Juridical Person" Under Article 25(2)(b) of the ICSID Convention

255. Colombia also objected to this Tribunal's jurisdiction *ratione personae* in relation to Claimant FPJVC's claim because the contractual joint venture FPJVC is not a

[439] *See* Memorial, ¶¶ 33-44, 52, 294. As explained in the Memorial, the Services Contract is a simple contract for the provision of consulting services, which does not involve any risk associated with the construction and expansion of the refinery. *Id.*, ¶ 296, n. 587.

juridical person, and therefore does not qualify as a "national of another Contracting State" under Article 25(2)(b) of the ICSID Convention.[440] Claimants insist in their Counter-Memorial that a contractual joint venture such as FPJVC is a juridical person under New York law, and that, in any event, since Article 10.28 of the Treaty includes joint ventures within the definition of "enterprise of a Party," FPJVC qualifies as an "investor of a Party" for purposes of the Treaty.[441] However, both arguments are incorrect or irrelevant for purposes of determining whether Claimant FPJVC qualifies as a "national of another Contracting State" under Article 25(2)(b) of the ICSID Convention.

256. In relation to Claimants' first argument, it is not true that a contractual joint venture such as FPJVC is considered a juridical person under New York law.[442] As Respondent explained in its Memorial, a contractual joint venture is recognized under New York law as a partnership for a limited purpose, and therefore does not have a legal personality separate and independent from that of its members Foster Wheeler and

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[440] *Id.*, ¶¶ 299-309. *See* ICSID Convention, Article 25(1) (providing that the ICSID's jurisdiction shall extend to legal disputes arising directly out of an investment between a Contracting State and a national of another Contracting State), Article 25(2)(b) (considering "any juridical person which had the nationality of a Contracting State other than the State party to the dispute" as a "National of another Contracting State"); Notice of Arbitration, ¶¶ 1, 15; **Ex. R-39**, Notice of Intent, ¶ 5 (describing FPJVC as a "contractual joint venture," in English, and as a "*contrato de consorcio*," in Spanish); Counter-Memorial, ¶ 64 (identifying Claimants as a "*contractual joint venture*"); Hearing on Provisional Measures Transcript, p. 109 (in which Claimants confirmed that "FPJVC is not a corporation.").

[441] Counter-Memorial, ¶¶ 157-171.

[442] The Parties agree that the legal characterization of the contractual joint venture (meaning the issue of whether or not it has a legal personality separate and independent from that of its members) must be determined pursuant to the law of the State of New York, the law under which FPJVC was created. *See* Memorial, ¶ 301, n. 600; Counter-Memorial, ¶ 158; Hearing on Provisional Measures Transcript, p. 110.

Process Consultants.[443] Thus, contrary to Claimants' assertion, FPJVC does not qualify as a juridical person under New York law.[444]

257. Claimants criticize – without any basis whatsoever – the cases cited by Colombia that clearly demonstrate that a contractual joint venture does not have a separate and independent legal personality from that of its members under New York law.[445] However, they are unable to cite a single case to support their untenable position. The fact that a partnership may exceptionally sue or be sued does not make a limited

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[443] Memorial, ¶ 302, n. 603; **Ex. RL-201**, *Deutsche Bank Natl. Trust Co. v. Bills*, Supreme Court of New York, 37 Misc. 3d 1209(A), October 15, 2012 ("*Deutsche Bank*"), p. 4 ("'It is well settled that a joint venture . . . is in a sense a partnership for a limited purpose, and it has long been recognized that the legal consequences of a joint venture are equivalent to those of a partnership,' and, as a result, it is proper to look to the Partnership Law to resolve disputes involving joint ventures."); **Ex. RL-202**, *Tehran-Berkeley Civil & Enviromental Engineers v. Tippetts-Abbett-McCarthy-Stratton*, United States Court of Appeals for the Second Circuit, 888 F.2d 239 (1989*)* ("*Tehran-Berkeley*"), p. 5 ("Under New York law, the legal consequences of a joint venture are equivalent to those of a partnership."); **Ex. RL-203**, New York Consolidated Laws Service, Partnership Law, § 10, p. 3 ("The legal consequences of a joint venture are almost identical with those of a partnership."); **Ex. RL-204**, *Caplan v. Caplan*, 268 N.Y. 445, 447, Court of Appeals of New York (1935), p. 3 ("[A] partnership is not, like a corporation, an artificial person created by law and existing independent of the persons who create or control it."). The case cited by Claimants is to the same effect. Counter-Memorial, ¶ 159; **Ex. CL-173**, *Eskenazi v. Schapiro*, 27 A.D.3d 312, 315 (N.Y. App. Div., 1st Dep't 2006), p. 2. *See for example*, **Ex. RL-201**, *Deutsche Bank*, p. 4 ("As to all other partnership debts and obligations, all partners are jointly liable."); **Ex. RL-202**, *Tehran-Berkeley*, p. 5 ("New York law further provides that partners are liable: 1. Jointly and severally for everything chargeable to the partnership under sections twenty-four [tort law] and twenty-five [breach of trust]. 2. Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.").

[444] *See* **Ex. RL-322**, Jack B. Weinstein, Harold L. Korn and Arthur R. Miller, 3 NEW YORK CIVIL PRACTICE: CPLR, ¶ 1025.00 Procedural Context of CPLR 1025: Partnerships and Unincorporated Associations, p. 1 ("[A] partnership, unlike a corporation, is not an entity entirely separate and apart from the individuals of which it is composed"); **Ex. CL-175**, 15A N.Y. JUR. 2D BUSINESS RELATIONSHIPS, § 1498, p. 1 ("A partnership, unlike a corporation, generally, is not a legal entity separate and apart from the individuals composing it.").

[445] In particular, Claimants criticize Respondent's reference to the *Caplan* case, arguing that Respondent "ignor[es] nearly a century worth of New York law". Counter-Memorial, ¶ 160; **Ex. RL-204**, *Caplan*, p. 3. However, while it is true that *Caplan* is no longer applicable to marriage-related matters, the principles it advocates on partnerships continue being applicable. Indeed, *Caplan* was cited by the District Court for the Southern District of New York in 2005 and by another New York court in the *Deutsche Bank* case in 2012. *See also* **Ex. RL-323**, *In re Parmalat Sec. Litig.*, District Court for the Southern District of New York, 383 F. Supp. 2d 616 (2005), n. 33; **Ex. RL-201**, *Deutsche Bank*, p. 4 ("As to all other partnership debts and obligations, all partners are jointly liable."); **Ex. RL-202**, *Tehran-Berkeley*, p. 5 (arguing that the members of a joint venture are jointly and severally liable for the acts of the said joint venture*,* precisely because a separate legal entity, which could be held liable and could protect the members from personal liability, does not exist); Memorial, n. 603.

purpose partnership – such as a contractual joint venture – a separate juridical person.[446] This is clear from the very legal authority cited by Claimants:

> CPLR 1025 authorizes suit by or against a partnership in the partnership name. This is strictly a procedural expedient that neither converts the partnership into a separate legal entity nor changes the nature of a partnership's rights or liabilities or those of its individual partners.[447]

258. Likewise, New York courts have recognized the distinction between the exceptional rule allowing a partnership to sue and be sued and the partnership's lack of a separate and independent legal personality, as is evident from the following judgment of the Court of Appeals:

> Persons conducting a business as a partnership may be sued in the partnership name (see, CPLR 1025) or they each may be named individually as defendants . . . Unlike a corporation, a partnership is not a separate entity.[448]

259. Accordingly, federal courts that have analyzed New York law have also recognized this distinction and have even emphasized that this procedural remedy, which

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[446] The legal authorities used by Claimants relate to certain exceptional procedural situations under New York law, but in no way support the assertion that a partnership has a separate and independent legal personality from that of its members. *See* Counter-Memorial, ¶¶ 159-160, nn. 316, 320; **Ex. CL-174**, NEW YORK CIVIL PRACTICE LAW AND RULES, CPLR § 1025, p. 1 (providing that "[t]wo or more persons conducting a business as a partnership may sue or be sued in the partnership name"); **Ex. CL-175**, 15A N.Y. JUR. 2D BUSINESS RELATIONSHIPS, § 1498, p. 1 (noting that the fiction of a partnership as a legal entity independent of its members could be considered "for certain purposes," such as for "procedural purposes"). *See also* Counter-Memorial, n. 320; **Ex. CL-177**, *Michelman-Cancelliere Iron Works, Inc. v. Kiska Const Corp.-USA*, 18 A.D.3d 722, 723 (N.Y. 2d Dep't 2006), p. 1 (simply providing that a defendant may not assert a counterclaim against one of the individual members of the joint venture "based on matters unrelated to business of [j]oint [v]enture"); **Ex. CL-178**, *County of Monroe v. Raytheon Co.*, 156 Misc.2d 445, 454 (N.Y. Sup. Ct. 1991) (exceptionally allowing a subrogee of a joint venture member to bring an action against the joint venture).

[447] **Ex. CL-174**, NEW YORK CIVIL PRACTICE LAW AND RULES, CPLR § 1025, p. 2 (emphasis added).

[448] **Ex. RL-324**, *Niagara Mohawk Power Corp. v. Freed*, Supreme Court of New York, Appellate Division, Fourth Department, 278 A.D.2d 839 (2000), p. 2. This case, which was decided in the year 2000, is also at odds with Claimants' assertion that this principle is no longer applicable.

is merely a mechanism to facilitate litigation against a partnership, does not convert a partnership into an independent legal entity:

> [New York procedural law] permits a suit by and against a partnership in its partnership name, but it is clear that it was never intended to make a New York partnership a separate legal entity apart from that of the partners. It was merely a device to facilitate partnership litigation.[449]

260. In conclusion, Claimants have failed to cite a single case (beyond certain cases establishing this exceptional procedural rule) to support their untenable position for one simple reason: there is no case under New York law that holds that a partnership has a legal personality separate and independent from that of its members.[450]

261. It is also worth noting that under New York law a partnership cannot have its own "nationality".[451] The inability of a partnership (and thus of a contractual joint venture such as the FPJVC) to have a nationality – which is one of the essential attributes of legal personality – further reinforces the notion that under New York law a contractual

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[449] **Ex. RL-325**, *Koons v. Kaiser*, Southern District of New York, 91 F. Supp. 511 (1950), p. 6 (commenting on the legal rule preceding CPLR § 1025).

[450] At the Hearing on Provisional Measures, Claimants acknowledged that the assets are owned by the members of the joint venture and that FPJVC has no assets in its name. Hearing on Provisional Measures Transcript, pp. 111-112.

[451] *See* **Ex. RL-326**, 15A MOORE'S FEDERAL PRACTICE – CIVIL (2021), § 102.57, p. 2 ("[A] partnership is not a 'citizen' of any state within the meaning of the statutes regulating jurisdiction, and its citizenship must be determined with reference to each of its partners."); **Ex. RL-327**, 15A N.Y. 2D JUR. BUSINESS RELATIONSHIPS § 1550, p. 1 ("A partnership, as such, has no residence distinct from the residences of the individual partners."); **Ex. RL-328**, 1 FEDERAL LITIGATION GUIDE: NEW YORK AND CONNECTICUT (2021), § 6.03, p. 5 ("An allegation of citizenship of a partnership or unincorporated association should specify the particular states of citizenship for each partner or member. Partnerships and unincorporated associations lack their own citizenship for purposes of the general diversity statute. Instead, the citizenship of a partnership or unincorporated association is dependent on the citizenship of each of the individual members of the association.") (emphasis omitted); **Ex. RL-329**, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES (AMERICAN LAW INSTITUTE 1987), § 213, p. 124, comment a ("For purposes of this section [nationality of corporations], an association is not a corporation having its own nationality if the national law creating it does not treat it as an entity with its own rights, duties, and capacities. Thus, under common law systems, a partnership is not an entity having nationality.").

joint venture (which is analogous to a limited purpose partnership) is not a separate juridical person independent of its members. Obviously, if the Claimant FPJVC cannot have its own nationality under New York law, it could never qualify as a "national of another Contracting State" under Article 25(2)(b) of the ICSID Convention.

262. As if that wasn't enough, Claimants are conveniently silent about the very terms of the Joint Venture Agreement, in which Foster Wheeler and Process Consultants expressly agreed that [redacted].[452] Nor do they say anything about the fact that the Fiscal Liability Proceeding only involves Foster Wheeler and Process Consultants (which are juridical persons), but not FPJVC, precisely because FPJVC does not have separate legal personality.[453]

263. Although Claimants argue that this case is different from *Impregilo v. Pakistan*, because the joint venture in that case was governed under Swiss law,[454] the reality is that there is no relevant difference between the two cases, as both partnership agreements or contractual joint ventures (one constituted under Swiss law in *Impregilo* and the other under New York law in this case) have no separate legal personality. It is for this reason that the ICSID tribunal in *Impregilo* concluded that a contractual joint venture was not a "juridical person" for the purposes of Article 25(2)(b) of the ICSID Convention:

> The Tribunal agrees with part of Pakistan's analysis, and considers that Impregilo may not pursue claims in these

[452] [redacted].

[453] Memorial, ¶ 202, n. 605; **Ex. R-66**, Initiation Order, p. 1; **Ex. R-52**, Indictment Order – Part 1: General aspects of the proceedings and factual findings, p. 1; **Ex. R-71**, Ruling with Fiscal Liability – Part 1: Competence, evidentiary record, procedural actions and others, p. 1.

[454] Counter-Memorial, ¶ 158.

> proceedings on behalf of GBC [joint venture]. . . . It follows that the consent to arbitration contained in the BIT here does not cover claims by GBC, since GBC is not a "juridical person" for the purposes of the ICSID Convention. . . . In so far as this is a claim in respect of GBC's alleged losses, it remains a claim by an unincorporated grouping that fails to meet the requirements of the BIT and the ICSID Convention, and lies beyond the scope of Pakistan's consent to arbitration. . . . The fact that GBC has no separate legal personality may lead to the conclusion that this cannot be "GBC's claim" in any event, since GBC is nothing more than a contractual relationship between different entities. This, however, does not convert the claim into Impregilo's own claim.[455]

264. As to Claimants' second argument, the fact that a contractual joint venture may eventually be considered as an "investor of a Party" under the Treaty[456] is irrelevant to determine whether or not a contractual joint venture qualifies as a "national of another Contracting State" for the purposes of Article 25(2)(b) of the ICSID Convention. That is

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[455] **Ex. RL-129**, *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, ¶¶ 131, 134, 137, 139 (emphasis added); Memorial, ¶ 303. *See also* **Ex. RL-200**, *Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Argelia*, ICSID Case No. ARB/03/08, Award, January 10, 2005, ¶¶ 37-41; **Ex. RL-187**, C. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY, Article 25, ¶¶ 689-692 ("[T]here was also some opposition to extending the definition of the term 'company' to a mere association of natural persons or to an unincorporated partnership. . . . The subsequent drafts and the [ICSID] Convention refer to 'juridical person' without a definition. This indicates that legal personality is a requirement for the application of Art[icle] 25(2)(b) and that a mere association of individuals or of juridical persons would not qualify. In such a situation, the individuals' case might be brought under Art[icle] 25(2)(a) or the juridical persons' case forming the association would have to be brought separately under Art[icle] 25(2)(b). . . . This has been confirmed by ICSID tribunals. In *LESI-DIPENTA v. Algeria*, the Tribunal declined jurisdiction to hear a claim brought by a consortium of companies. The Tribunal in *Impregilo v. Pakistan* also held that the Claimant was not permitted to submit a BIT claim to ICSID on behalf of all of its partners in an unincorporated joint venture. The unincorporated consortium did not qualify as a legal person for ICSID purposes.") (emphasis added).

[456] Memorial, ¶ 306; **Ex. RL-1**, Treaty, Article 10.28 (defining an "investor of a Party" as "a national or an enterprise of a Party" making an investment in the territory of another Party); **Ex. RL-2**, Colombia-US TPA, Chapter 1, Article 1.3 (defining an "enterprise of a Party" as "an enterprise constituted or organized under the law of a Party," and the term "enterprise" as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture ["*empresa conjunta*"], or other association."). The English language version of Article 1.3 of the Colombia-US TPA expressly includes the term "joint venture". However, Colombia-U.S. TPA does not specify whether the term "joint venture" – or "*empresa conjunta*" in the Spanish language version – includes unincorporated joint ventures or whether it exclusively includes incorporated joint ventures.

precisely the central question that must be analyzed through the "double-keyhole approach" applicable in any ICSID arbitration.[457] If Claimants' argument is true (*i.e.*, that the only thing that matters is the consent of the contracting parties to the Treaty to ICSID arbitration), the "double-keyhole approach" would have no reason to exist, since the contracting parties to an investment treaty could determine that a given dispute is within ICSID jurisdiction without a separate analysis of compliance with the objective requirements of the ICSID Convention (such as the existence of an "investment" or that the dispute involves a "national of another Contracting State") being required for the Centre to exercise its jurisdiction.[458] This is clearly incorrect.

265. In other words, the independent qualification as an "investor" under the Treaty is not sufficient for the Centre to exercise jurisdiction *ratione personae* over Claimant FPJVC's claim: it must also qualify as a "national of another Contracting State"

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[457] The "double-keyhole approach" or "double-barreled test" provides that, for an ICSID tribunal to exercise jurisdiction *ratione personae* over a claim, the claimant must also qualify as a "national of another Contracting State" under the ICSID Convention, regardless of whether it qualifies as an "investor" under the relevant investment treaty. Thus, this Tribunal – which has been constituted under the Treaty and the ICSID Convention – will only have jurisdiction *ratione personae* over Claimant FPJVC's claim if the contractual joint venture FPJVC qualifies as an "investor" under the Treaty and also as a "national of another Contracting State" under the ICSID Convention. *See* n. 433, *supra*.

[458] Memorial, n. 568; **Ex. RL-186**, *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, February 7, 2011, ¶ 107 ("[I]n order for a proceeding based on breach of a treaty to be admissible, the investment to which the dispute relates must pass a double test (also known as the 'double keyhole approach' or 'double-barreled test.' . . .) It must in practice correspond: - on the one hand, to the meaning given to the term by the treaty, which defines the framework of the consent given by the State, and also - on the other, to the meaning given in the ICSID Convention, which determines the jurisdiction of the Centre and the arbitral tribunals acting under its auspices."); **Ex. RL-330**, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21, 2005, ¶ 278 ("This Tribunal is established pursuant to the ICSID Convention and its jurisdiction is limited by the ICSID Convention, as defined in Article 25. This Tribunal must therefore evaluate whether the dispute presented to it under the BIT passes through the jurisdictional keyhole defined by Article 25 [of the ICSID Convention]. The state parties to the BIT can seek to encompass all manner of disputes. But in attempting to place disputes under their BIT before ICSID, an institution regulated by a separate instrument, the scope of the disputes which may be submitted is necessarily limited to those disputes that pass through the jurisdictional keyhole defined by Article 25."); **Ex. RL-331**, *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, ¶ 74 ("[T]he jurisdiction of the Tribunal is contingent upon the fulfillment of the jurisdictional requirements of both the ICSID Convention and the relevant BIT.").

under Article 25(2)(b) of the ICSID Convention for a tribunal constituted under the ICSID Convention to have jurisdiction *ratione personae* over its claim, which is clearly not possible in this case since FPJVC is not a juridical person. Therefore, whether Article 10.28 of the Treaty includes a joint venture within the definition of "enterprise" has no relevance in this case for the purpose of analyzing whether a joint venture qualifies as a "national of another Contracting State" under Article 25(2)(b) of the ICSID Convention.

266. The determination of whether or not a contractual joint venture – such as FPJVC – qualifies as a "national of another Contracting State" within the meaning of Article 25(2)(b) depends on whether or not it can be considered a "juridical person" under the law under which it was created. In this respect, it is worth recalling the words of Professor Schreuer on this point:

> Some bilateral investment treaties include associations without legal personality in their definitions of 'investor'. But for purposes of the [ICSID] Convention the quality of legal personality is inherent in the concept of 'juridical person' and is part of the objective requirements for jurisdiction [of ICSID].[459]

267. In order to ignore the objective requirements of the ICSID Convention for the Centre to exercise jurisdiction *ratione personae* over a dispute, Claimants focus their argument on the "consent" to ICSID arbitration contained in the Treaty.[460] However, the "consent" argument raised by Claimants is nothing more than a mere distraction, as the relevant question with respect to this objection is not whether there is consent to ICSID arbitration under the Treaty (*i.e.*, whether ICSID jurisdiction *ratione voluntatis* exists), but

[459] **Ex. RL-187**, C. Schreuer *et al.*, THE ICSID CONVENTION: A COMMENTARY, Article 25, ¶ 693 (emphasis added).

[460] Counter-Memorial, ¶¶ 165-171. The fact that Article 10.17 of the Treaty contains a consent to ICSID arbitration has no relevance in determining whether the objective requirements prescribed by the ICSID Convention have been met, allowing the Centre to exercise jurisdiction over a given dispute.

whether all the objective requirements set forth in the ICSID Convention for an ICSID tribunal to have jurisdiction over the present dispute are met (in this case, whether ICSID jurisdiction *ratione personae* exists). The fact that consent to ICSID arbitration may be given through a unilateral offer by a State in an investment treaty does not supplant the need to meet the other objective requirements of the ICSID Convention for the Centre to exercise jurisdiction, including that the dispute be between a Contracting State and a national of another Contracting State.[461]

268. In sum, Claimant FPJVC does not qualify as a "national of another Contracting State" under Article 25(2)(b) of the ICSID Convention because it is not a juridical person, and thus this Tribunal lacks jurisdiction *ratione personae* over Claimant FPJVC's claim.

III.

Claimants Foster Wheeler and Process Consultants Failed to Send their Notices of Intent as Required by the Treaty

269. The Tribunal also lacks jurisdiction *ratione voluntatis* over the claims of Claimants Foster Wheeler and Process Consultants because they did not send their notices of intent – as required by Articles 10.16.2 and 10.17 of the Treaty – prior to the submission of their claims to arbitration.[462]

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[461] *See* **Ex. R-126**, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States, March 18, 1965, ¶ 25 ("While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto."). The paragraph from Professor Schreuer's book referenced by Claimants does not contradict other parts of his book that have been used by the Respondent. Counter-Memorial, ¶ 170.

[462] Memorial, ¶¶ 310-318.

270. In their Counter-Memorial, Claimants argue that the requirement was met when Claimant FPJVC sent its Notice of Intent, as Foster Wheeler and Process Consultants form the FPJVC joint venture, and Colombia suffered no prejudice from that alleged omission.[463] However, none of Claimants' arguments make up for the failure to comply with this essential requirement, which is part of Colombia's consent for Claimants to submit their claims to arbitration under the Treaty.

271. As Claimants themselves acknowledge, Article 10.17 of the Treaty requires that "[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this [Treaty]" and, in turn, Article 10.16.2 provides that "[a]t least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration."[464] The text and spirit of Article 10.16.2 could not be clearer: each claimant is required to deliver a notice of intent at least ninety (90) days before submitting its claim to arbitration. This

[463] Counter-Memorial, ¶¶ 172-182.

[464] **Ex. RL-1**, Treaty, Articles 10.16.2 and 10.17; Counter-Memorial, ¶ 172. It is worth noting that the Parties to the Treaty "did not provide unconditional consent to arbitration under any and all circumstances," but rather consented to arbitration exclusively "in accordance with" the specific terms of the Treaty. Memorial, ¶ 314; **Ex. RL-206**, *Astrida Benita Carrizosa v. Republic of* Colombia, ICSID Case No. ARB/18/05 (Colombia-U.S. TPA), Submission of the United States of America, May 1, 2020 ("*Submission of the U.S. in Astrida Carrizosa*"), ¶¶ 23, 26. *See also* **Ex. RL-207**, *Alberto Carrizosa Gelzis et al. v. Republic of Colombia*, PCA Case No. 2018-56 (Colombia-U.S. TPA), Submission of the United States of America, May 1, 2020 (*"Submission of the U.S. in Alberto Gelzis"*), ¶¶ 23, 26; **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶ 10. *See also* **Ex. RL-221**, *Waste Management v. United Mexican States (I*), ICSID Case No. ARB(AF)/98/2 (NAFTA), Arbitral Award, June 2, 2000 ("*Waste Management I*"), §§ 16-17 ("From the literal tenor of this Article [1122 of NAFTA], it is understood, for those effects of interest to us at present, that fulfilment, *inter alia*, of the prerequisites laid down in Article 1121, would translate as consent by NAFTA signatory parties to the dispute settlement procedure established under NAFTA Chapter XI, Section B. On the basis of the above, it is the understanding of this Tribunal that any analysis of the fulfilment of the prerequisites established as conditions precedent to submission of a claim to arbitration under NAFTA Article 1121 calls for the utmost attention, since fulfilment thereof opens the way, *ipso facto*, to an arbitration procedure in accordance with the commitment acquired by the parties as signatories to said international treaty.").

is an individual requirement that each claimant must meet for there to be consent under the Treaty to submit a claim to arbitration.[465]

272. Failure to deliver the notice of intent within ninety (90) days before filing a notice of arbitration means that the requirement of Article 10.16.2 of the Treaty is not satisfied and that, therefore, there is no consent by the Respondent to arbitrate the dispute. This is because – as the other Contracting Party to the Treaty, the United States, has stated in its submissions as a non-disputing party in analyzing the language of this provision – "[t]he procedural requirements in Article 10.16 are not merely technical 'niceties' but are explicit treaty requirements," that "a tribunal cannot simply overlook."[466]

273. Similarly, several decisions of arbitral tribunals – which Claimants conveniently ignore in their Counter-Memorial – have confirmed that this type of requirement is not a "merely procedural nicety," but "a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration," and that its "omission constitutes a grave noncompliance" that renders the "Tribunal lacks competence" over the claim.[467]

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[465] **Ex. RL-1**, Treaty, Article 10.16.2. As Colombia asserted in its Memorial, the notice of intent must specify information pertaining to each claimant, such as the "name" and the "address of the claimant", further demonstrating that the requirement is set out on an individual basis. Memorial, n. 618.

[466] **Ex. RL-206**, *Submission of the U.S. in Astrida Carrizosa*, ¶¶ 28-29. *See also* **Ex. RL-207**, *Submission of the U.S. in Alberto Gelzis*, ¶¶ 28-29; **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶¶ 13-14.

[467] Memorial, ¶ 316; **Ex. RL-209**, *Methanex Corp. v. United States of America*, UNCITRAL (NAFTA), Partial Award, August 7, 2002, ¶ 120 ("In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, *i.e.* that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.") (emphasis added); **Ex. RL-210**, *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1 (NAFTA), Decision on a Motion to Add a New Party, January 31, 2008, ¶¶ 29-30 ("The Tribunal has no doubt about the importance of the safeguards noted and finds that they cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures

274. Claimants' argument that the Notice of Intent submitted by Claimant FPJVC is sufficient to meet the requirement of Article 10.16.2 of the Treaty because the joint venture is comprised of Foster Wheeler and Process Consultants[468] is contradicted by their own position in this arbitration in arguing that each of the Claimants qualifies as a separate "enterprise" and "investor" under the Treaty.[469] In this case, Claimant FPJVC submitted its Notice of Intent on its own behalf – and not on behalf of Foster Wheeler and Process Consultants – so the other two Claimants cannot benefit from the Notice of Intent submitted by FPJVC.[470]

275. The fact that Claimants consider their lack of compliance with this requirement as unimportant – on the grounds that Colombia was allegedly already informed of their claims through Claimant FPJVC's Notice of Intent[471] – does not magically confer jurisdiction *ratione voluntatis* on this Tribunal. The requirements

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and from pursuing any attempt to defuse the claim announced. This would be hardly compatible with the requirements of good faith under international law and might even have an adverse effect on the right of the Respondent to a proper defense. Thus, even if it were to be concluded that Merrill & Ring's and Georgia Basin's claims are similar, the compliance with the above mentioned safeguards would still need to be satisfied.") (emphasis added); **Ex. RL-213**, *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, December 15, 2010, ¶ 149 ("This Tribunal finds the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, 'a procedural rule' or a 'directory and procedural' rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules."), ¶ 157 ("Based on the statements above, the Tribunal concludes that Murphy International did not comply with the requirements of Article VI of the Bilateral Investment Treaties entered into by the Republic of Ecuador and the United States of America; that such omission constitutes a grave noncompliance, and that because of such noncompliance, this Tribunal lacks competence to hear this case.") (emphasis added).

[468] Counter-Memorial, ¶ 179.

[469] Notice of Arbitration, ¶ 29; Memorial, ¶ 312, nn. 616, 617.

[470] This is confirmed by the terms of the Notice of Arbitration, where each of the three Claimants initiate the claim on their own behalf. *See for example* Notice of Arbitration, ¶¶ 26, 42 ("Claimants are submitting claims under both Article 10.16.1(a)(i)(A) and Article 10.16.1(a)(i)(C) of the [Treaty].").

[471] Counter-Memorial, ¶ 181.

provided for in the Treaty – which condition the consent given by the Contracting Parties – are to be complied with and, as expressly set forth in Articles 10.16.2 and 10.17 of the Treaty, Claimants' non-compliance results in this Tribunal's lack of jurisdiction *ratione voluntatis*.[472]

276. It is curious that Claimants rely primarily on the majority decision in *B-Mex v. Mexico* in support of their position, and consider that to be the "correct" approach,[473] when the law firm representing them (*Pillsbury Winthrop Shaw Pittman LLP*) vehemently argued precisely the opposite position in that case – the position currently argued by Colombia here. Acting on behalf of Mexico, Claimants' law firm argued that the failure to comply with the requirement to serve a notice of arbitration meant that the submission of the claim to arbitration was "null *ab initio*" and that, therefore, there was no consent under the terms of NAFTA.[474] That position – which is consistent with the explicit language of NAFTA, the Treaty and with what the Contracting Parties to the Treaty have stated themselves – was also taken by the dissenting arbitrator in *B-Mex*, Professor Vinuesa, who adopted the following logical reasoning:

> In conclusion, there must be a notice of intent evidencing the very existence of a claimant investor. This is an essential requirement so as to identify not only the claimant, but also the alleged dispute itself. . . . The existence of a notice of intent by the investor is vital for the Tribunal to have jurisdiction. . . . [N]o case in which access to arbitration was

[472] *See* Memorial, ¶ 316; **Ex. RL-206**, *Submission of the U.S. in Astrida Carrizosa*, ¶ 27 ("A disputing investor who does not deliver a Notice of Intent ninety (90) days before it submits a Notice of Arbitration or Request for Arbitration fails to satisfy the procedural requirement under Article 10.16.2 and so fails to engage the respondent's consent to arbitrate. Under such circumstances, a tribunal will lack jurisdiction *ab initio*.") (emphasis added); **Ex. RL-207**, *Submission of the U.S. in Alberto Gelzis*, ¶ 27; **Ex. RL-63**, *Submission of the U.S. in Bay View*, ¶ 12.

[473] Counter-Memorial, ¶ 180.

[474] **Ex. RL-216**, *B-Mex, LLC et al. v. United Mexican States,* ICSID Case No. ARB(AF)/16/3 (NAFTA), Partial Award, July 19, 2019, ¶¶ 3, 41, 63, 70, 118, 134.

> given to an investor who had not been identified in a notice of intent has been cited. . . . For jurisdiction to exist, every claimant must be identified by means of a notice of intent.[475]

277. In conclusion, the failure of Claimants Foster Wheeler and Process Consultants to deliver their notices of intent, in breach of the explicit requirement of Article 10.16.2 of the Treaty, entails the dismissal of their claims due to the Tribunal's lack of jurisdiction *ratione voluntatis* over them.

IV.

Claimants Have Definitively Elected to Submit their Claim for Breach of Fair and Equitable Treatment Before Colombian Courts

278. This Tribunal does not have jurisdiction under the Treaty over Claimants' FET claim because they have definitively elected to submit a claim of such a breach to the Colombian courts when they initiated an *acción de tutela* alleging such a breach.[476]

279. In their Counter-Memorial, Claimants argue that this is false because the action brought in Colombia was necessary to preserve their rights and, in any event, such action does not satisfy the triple identity test that would have to be met for the action in Colombia to have preclusive effect.[477] However, none of the arguments advanced by Claimants is effective to avoid the application of the *electa una via* provision contained in Annex 10-G of the Treaty, which provides that such election is definitive.

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[475] **Ex. RL-217**, *B-Mex, LLC et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3 (NAFTA), Partial Dissenting Opinion Arbitrator Raúl E. Vinuesa, July 6, 2019, ¶¶ 92-93 (emphasis added).

[476] Memorial, ¶¶ 319-328.

[477] Counter-Memorial, ¶¶ 183-197.

280. Indeed, by alleging before the Colombian courts in the *Acción de Tutela* 2018 that there was a breach of the FET obligation under the Treaty, Claimants made a definitive election for that forum.[478] Whether or not the action brought against Colombia was to preserve their rights, or whether or not there is a triple identity, is irrelevant under the terms of Annex 10-G of the Treaty in determining whether there was a definitive election to submit a claim for breach of the FET obligation to the Colombian courts. The only requirement for Annex 10-G's application is that a breach of the FET obligation has already been "alleged" before the Colombian courts, and that has occurred in this case.[479]

281. Notably, Claimants avoid referring to the explicit language of Annex 10-G, which is clear and unambiguous as to the requirements for its application:

> 1. An investor of the United States may not submit to arbitration under Section B a claim that a Party has breached an obligation under Section A either:
>
> (a) on its own behalf under Article 10.16.1(a), or
>
> (b) on behalf of an enterprise of a Party other than the United States that is a juridical person that the investor owns or controls directly or indirectly under Article 10.16.1(b),

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[478] *See* Memorial, ¶¶ 323-327; **Ex. R-69**, *Acción de Tutela* 2018, pp. 7-8 ("The FPJVC members are investors under the terms of the Trade Promotion Agreement between the Republic of Colombia and the United States of America (the 'Treaty') and their work on the Project corresponds to a covered/protected investment under the scope of the Treaty. Accordingly, the Republic of Colombia is obligated under the Treaty to provide 'fair and equitable treatment' to FPJVC in accordance with customary international law. One of the founding principles of such international standard is that the defendant or accused must be guaranteed due process in all administrative or judicial proceedings. This principle is entirely consistent with the constitutional principles invoked in this *acción de tutela*, which strengthens the present [*acción de tutela*]."") (translation from Spanish; emphasis added).

[479] The Claimants argue that the cause of action in both proceedings (in the *Acción de Tutela* 2018 and in this Treaty) is different. Counter-Memorial, ¶ 193. This is irrelevant because Annex 10-G only requires an allegation of a breach of a substantive obligation under the Treaty in a local proceeding, not the submission of the same claim. On the other hand, it is not true that the parties to both proceedings are different. Foster Wheeler and Process Consultants are parties to both proceedings and, as argued by Claimants themselves, the CGR is a Colombian authority. It is also not true that the relief sought by Claimants is different. *See* n. 39, *supra*.

> if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of that Party.
>
> 2. For greater certainty, if an investor of the United States elects to submit a claim of the type described in paragraph 1 to a court or administrative tribunal of a Party other than the United States, that election shall be definitive, and the investor may not thereafter submit the claim to arbitration under Section B.[480]

282. Thus, under the ordinary meaning of the terms of Annex 10-G of the Treaty analyzed in their context, if Claimants "alleged" a breach of the FET obligation before a Colombian judicial court – as they have done in the *Acción de Tutela* 2018– they cannot now submit this same claim to arbitration.[481]

283. Claimants also argue that the election cannot be considered definitive because they claim they initiated the *Acción de Tutela* 2018 because they had "no other reasonable alternative to attempt to preserve their rights under Colombian law."[482] Even if this becomes true, such an excuse proves irrelevant. Unlike the cases cited by Claimants, under the structure of the Treaty and the terms of Annex 10-G, nothing prevented Claimants from commencing administrative or judicial proceedings in Colombia first and then commencing this Arbitration (provided that they waived those local actions when they decided to commence the Arbitration). Moreover, nothing prevented Claimants from bringing the *Acción de Tutela* 2018, alleging violations of Colombian law, without alleging a breach of the FET obligation under the Treaty. However, since Claimants chose to allege the breach of the Treaty's FET obligation before the Colombian courts, they must bear the consequence of their choice.

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[480] **Ex. RL-1**, Treaty, Annex 10-G (emphasis added).

[481] *See* n. 196, *supra*.

[482] Counter-Memorial, ¶ 186.

284. Moreover, contrary to Claimants' argument, by its own terms, Annex 10-G of the Treaty does not require that the subject matter, parties and cause of action in both proceedings be identical,[483] or that the "fundamental basis" of both proceedings be the same, but merely requires that the investor or the enterprise have alleged a breach of the same substantive obligation under the Treaty (in this case, the FET obligation) before a Colombian judicial or administrative tribunal, and this undoubtedly occurred in this case.

285. The Claimants also cite Article 10.18.4 of the Treaty (which has not been invoked by Colombia) to contend that the *electa una via* provisions contained in that Article and in Annex 10-G have similar language.[484] While it is true that there is some similarity in language, there is a key difference between the two provisions: Annex 10-G of the Treaty requires only that a breach of a substantive obligation under the Treaty be alleged in a local judicial or administrative proceeding (and not that the same breach be

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[483] *Id.*, ¶¶ 190-196. Not one of the cases cited by Claimants (*Id.*, ¶ 187) involved *electa una via* provisions that exclusively required the allegation of a breach (as opposed to the submission of the same breach) of a substantive obligation under the treaty. *See* **Ex. RL-169**, *Occidental*; ¶ 37 (specifying that Respondent's objection under Article VI(3)(a) of the Ecuador-U.S. BIT, only requires that "[p]rovided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) . . . the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration") (emphasis added); **Ex. CL-191**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, February 27, 2012, ¶¶ 2.7, 4.78 ("The short answer to the fork in the road issue in the present case is that the fork is stated by Article VI(3)(a) of the BIT [Ecuador-U.S.] to be inapplicable if the 'national or company concerned has not submitted the dispute for resolution [under paragraph 2 (a) or (b)]'") (emphasis added); **Ex. RL-214**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004, ¶ 98 ("The Tribunal notes that in the present case Claimants have not made submissions before local courts [pursuant to Article VII(3)(a) of the Argentina-U.S. BIT (1991), which reads '[provided] that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) . . . the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration.']") (emphasis added).

[484] Counter-Memorial, ¶ 189 and n. 366. Both provisions have distinct scopes of application. While Article 10.18.4 of the Treaty is applicable to claims arising from a breach of an investment agreement or an investment authorization, Annex 10-G is applicable to claims arising from a breach of a substantive obligation under the Treaty and only with respect to U.S. investors. **Ex. RL-1**, Treaty, Article 10.18.4 and Annex 10-G.

submitted to a judicial or administrative tribunal, as Article 10.18.4 requires).[485] This distinction of language is clearly relevant and should be given full effect.[486]

286. In conclusion, the Tribunal lacks jurisdiction *ratione voluntatis* to hear Claimants' claim for breach of the Treaty's FET obligation that was submitted to arbitration because Claimants have already alleged such a breach before the Colombian courts in the *Acción de Tutela* 2018.

V.

Claimants' Formal and Material Waiver Is Invalid and Ineffective

287. Colombia also objected to the jurisdiction *ratione voluntatis* of this Tribunal on the ground that Claimants have not made a valid waiver – either formal and material –, under the terms of Article 10.18.2(b) of the Treaty, of their right to initiate or continue proceedings in other venues with respect to the measure that they allege constituted a breach of the substantive obligations of the Treaty.[487]

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[485] *Compare* **Ex. RL-1**, Treaty, Annex 10-G(1) ("An investor of the United States may not submit to arbitration under Section B a claim that a Party has breached an obligation under Section A either: (a) on its own behalf under Article 10.16.1(a), or (on behalf of an enterprise of a Party other than the United States that is a juridical person that the investor owns or controls directly or indirectly under Article 10.16.1(b), if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in proceedings before a court or administrative tribunal of that Party.") (emphasis added) *with* Article 10.18.4 ("No claim may be submitted to arbitration: (i) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or (ii) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C), if the claimant (for claims brought under 10.16.1(a)) or the claimant or the enterprise (for claims brought under 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure.") (emphasis added); Memorial, ¶ 322 and n. 634.

[486] *See* n. 202, *supra*. The Parties to the Treaty would not have used a different language if they intended the *electa una via* provisions to be subject to the same requirements in both scenarios.

[487] Memorial, ¶¶ 329-343.

288. In their Counter-Memorial, Claimants deny that their waiver was invalid, and make a series of arguments in support of their position. However, none of these arguments makes their waiver valid, as it does not meet the minimum requirements of the Treaty.[488]

289. Article 10.18 of the Treaty is clear that, in order to submit a claim to arbitration, the notice of arbitration must be accompanied by a written waiver "to initiate or continue before any administrative tribunal or court . . . any proceeding with respect to any measure alleged to constitute a breach" of the Treaty.[489] Only a waiver pursuant to Article 10.18.2(b) of the Treaty is an effective waiver for the purposes of the Treaty, and is thus capable of perfecting the offer of consent made by the Contracting Parties.[490]

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[488] Consistent with their style, Claimants point out that "[s]uch 'waiver' arguments by Colombia have been rejected in the past by ICSID tribunals," yet they rely only on the *Eco Oro v. Colombia* case, which is notably different from the present case. Counter-Memorial, n. 379. Colombia's challenge in that case was that the waiver did not refer to all the measures alleged by the claimants in the arbitration, as some of them occurred after the notice of intent (and the waiver). The tribunal concluded that the waiver was valid because "Eco Oro followed almost word for word the text contained in Annex 821 [to Colombia-Canada FTA] and the fact that it did not contain reference to the Related Measures is unsurprising given they only came into being after commencement of the arbitration" and that "the Related Measures are an evolution of the same dispute as that described in the waiver." **Ex. CL-50**, *Eco Oro*, ¶¶ 281, 339 (in the Spanish version of the Reply this legal authority was mistakenly identified as **Ex. CL-51**). However, in this case, Claimants did not follow "word for word the text contained [in Article 10.18.2(b) of the Treaty]," but instead submitted a waiver that exceeds its terms and thus runs afoul of the Parties' consent to this Arbitration. *See* Notice of Arbitration, ¶ 25 (where Claimants submitted their "waiver" "without prejudice of Claimants' right to defend themselves in the fiscal proceeding and any related proceedings, including any appeals"); Memorial, ¶¶ 337-343.

[489] **Ex. RL-1**, Treaty, Article 10.18.2(b).

[490] Memorial, ¶¶ 330-333, n. 650; **Ex. RL-218**, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1 (Peru-U.S. TPA), Partial Award on Jurisdiction, July 15, 2016 ("*Renco*"), ¶ 73 ("Compliance with Article 10.18(2) is a condition and limitation upon Peru's consent to arbitrate. Article 10.18(2) contains the terms upon which Peru's non-negotiable offer to arbitrate is capable of being accepted by an investor. Compliance with Article 10.18(2) is therefore an essential prerequisite to the existence of an arbitration agreement and hence the Tribunal's jurisdiction."), ¶ 138 ("[T]he defective waiver goes to the heart of the Tribunal's jurisdiction.") (emphasis added). *See also* **Ex. RL-287**, *Submission of the U.S. in Alicia Grace*, ¶ 46 ("Because the waiver requirements under Article 1121 [of NAFTA] are among the requirements upon which the Parties have conditioned their consent valid and effective waiver is a precondition to the Parties' consent to arbitrate claims, and accordingly to a tribunal's jurisdiction, under NAFTA Chapter Eleven. The purpose of the waiver provision is to avoid the need for a respondent to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure, and to minimize not only the risk of

290. The Claimants' waiver in their Notice of Arbitration does not comply with the formal requirements of Article 10.18.2(b) of the Treaty. Claimants added the following text in their waiver: "[T]his waiver is without prejudice of Claimants' right to defend themselves in the fiscal proceeding and any related proceedings, including any appeals."[491] As is evident, Claimants' reservation of rights renders their purported waiver meaningless, as a reservation that allows them to continue with the Fiscal Liability Proceeding, and with any related proceedings, including the filing of any appeal or judicial remedy, frustrates the purpose of the "no U-turn" structure contained in the Treaty, which seeks precisely to avoid litigation in concurrent and overlapping proceedings, thereby minimizing the risk of double recovery and conflicting outcomes.[492]

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double recovery, but also the risk of 'conflicting outcomes (and thus legal uncertainty).'"), ¶ 53 ("If all formal and material requirements under Article 1121 are not met, the waiver is ineffective and will not engage the respondent State's consent to arbitration or the tribunal's jurisdiction *ab initio* under the Agreement.") (emphasis added).

[491] Notice of Arbitration, ¶ 25 ("Claimants waive their rights 'to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16' of the [Treaty]. For the avoidance of doubt, this waiver is without prejudice of Claimants' right to defend themselves in the fiscal proceeding and any related proceedings, including any appeals, and to initiate or continue any action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of Colombia, provided that the action is brought for the sole purpose of preserving Claimants' rights and interests during the pendency of this arbitration.") (emphasis added). *See also* **Ex. C-10**, *Power of Attorney, Waiver, and Authorization to Commence Arbitration*, Waiver ("Pursuant to Article 10.18 of the [Treaty], Foster Wheeler, Process Consultants and FPJVC each waive their respective and collective rights 'to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16' of the [Treaty]. They each respectively and collective reserve the right to concurrently continue to defend themselves in the fiscal liability proceeding and any related proceedings, including any appeals, and to initiate or continue any action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of Colombia, provided that the action is brought for the sole purpose of preserving their rights and interests during the pendency of this arbitration.") (emphasis added).

[492] *See* **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 12; Memorial n. 660. *See also* **Ex. RL-332**, *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54 (NAFTA), Second Submission of the United States of America, June 25, 2021, ¶ 14 ("This waiver provision ensures that a respondent need not litigate concurrent and overlapping proceedings in multiple forums (domestic or international), and minimizes not only the risk of double recovery, but also the risk of 'conflicting outcomes (and thus legal uncertainty).'"); **Ex. RL-287**, *Submission of the U.S. in Alicia Grace*, ¶ 40.

291. As much as Claimants try to differentiate *Renco v. Peru*, the situation is analogous to this case. While the wording of the waiver is different, in both situations the claimants made reservations of rights that exceeded what is permitted by Article 10.18.2(b) of the Treaty (and the identical provision of the Peru-U.S. TPA). The tribunal in *Renco* clearly held that "waivers qualified in any way are impermissible" and that the provision requires the investor to "definitively and irrevocably to waive all rights to pursue claims before a domestic court or tribunal."[493] For these reasons, the tribunal ruled that a reservation "is not permitted by the express terms of Article 10.18(2)(b)," "undermines the object and purpose" of the provision, and is "incompatible with the 'no U-turn structure'" of the Article.[494] The same principles apply to the reservation made by Claimants in this case.[495]

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[493] **Ex. RL-218**, *Renco*, ¶¶ 79, 95.

[494] *Id.*, ¶ 119. *See also* **Ex. RL-287**, *Submission of the U.S. in Alicia Grace*, ¶ 48 ("Regarding the formal requirements, the waiver must be in writing and 'clear, explicit and categorical.' As the *Renco* tribunal stated, interpreting a waiver provision in the U.S.-Peru Trade Promotion Agreement similar to Article 1121 of the NAFTA, the waiver provision requires an investor to 'definitively and irrevocably' waive all rights to pursue claims in another forum once claims are submitted to arbitration with respect to a measure alleged to have breached the Agreement. NAFTA Article 1121 is thus 'intended to operate as a "once and for all" renunciation of all rights to initiate claims in a domestic forum, whatever the outcome of the arbitration (whether the claim is dismissed on jurisdictional or admissibility grounds or on the merits).' That is, the waiver requirement seeks to give the respondent certainty, from the very start of arbitration under the treaty, that the claimant is not pursuing and will not pursue proceedings in another forum with respect to the measures challenged in the arbitration. Accordingly, a waiver containing any conditions, qualifications or reservations will not meet the formal requirements and will be ineffective.") (emphasis added).

[495] Claimants argue that "none of the arbitrations cited by Colombia involve a waiver that reserves a claimant's right to defend itself." Counter-Memorial, ¶ 204. However, only three out of the six cases referred to by Colombia on this point were distinguished by Claimants (*Renco v. Peru*, *Waste Management v. Mexico I* and *Detroit v. Canada*). *See* Memorial, ¶¶ 329-343, nn. 650, 659; Counter-Memorial, ¶ 204 and n. 385. Still, none of the distinctions Claimants drew are accurate or support their position. There is an indisputable similarity between this case and the three cases that Claimants attempt to distinguish: all of them involved reservations of rights in excess of what was allowed by the relevant treaties. As to *Waste Management I*, Claimants only quote and transcribe an interpretation of the waiver made by the claimant in that case. In confronting these interpretations, the tribunal in *Waste Management I* held that they were not relevant for purposes of assessing compliance with the requirements of NAFTA Article 1121, which mandates "delivery of a waiver in accordance with the terms laid down by Article 1121 to the disputing party, and inclusion thereof in the submission of the claim to arbitration." **Ex. RL-221**, *Waste Management I*, § 31. Despite the foregoing, and just as in *Waste Management I*, Claimants "did not limit [themselves] to a full transcription

292. Moreover, beyond the formal waiver, without reservations, required by Article 10.18.2(b) of the Treaty, a claimant must also act consistently for the waiver to be effective,[496] so it is incompatible with their waiver for Claimants to initiate or continue other

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of the content of this Article [pertaining to the waiver] . . . but instead additionally introduced a series of statements that reflected [their] own understanding of the waiver . . . [and] did not have the intention of presenting the waiver within the terms prescribed in [the Treaty], rather, [they] had the intention to present it in accordance with [their] own interests." **Ex. RL-221**, *Waste Management I*, § 31. *See* Notice of Arbitration, ¶ 25. Solely on the basis of these findings, the *Waste Management I* tribunal declared itself without jurisdiction, and so should this Tribunal. Regarding the *Detroit* case, Claimants rely on three waivers submitted by the claimants, only the first of which was actually considered by the tribunal. *See* **Ex. RL-222**, *Detroit International Bridge Co. v. Government of Canada*, PCA Case No. 2012-25 (NAFTA), Award on Jurisdiction, April 2, 2015, ¶¶ 320-321. In any event, the *Detroit* tribunal warned that, regardless of the language of the waiver, the actions brought by the claimant were part of a "proceeding with respect to the measures that are alleged to breach NAFTA in this arbitration" and that this was prohibited by the treaty. *See id.*, ¶¶ 312, 320, 336-337. This is also the case here, as Claimants seek to continue participating in all local administrative and judicial proceedings in which the measures alleged to be in breach of the substantive obligations of the Treaty are at dispute and, at the same time, to proceed with the present Arbitration. On this point, it is worth noting that, in addition to having appealed the Ruling with Fiscal Liability, Foster Wheeler and Process Consultants have also filed two *acciones de tutela* before Colombian courts for alleged violations of due process in the Ruling with Fiscal Liability. It is self-evident that these actions are "offensive" – using Claimants' terms – and confirm that the Tribunal lacks jurisdiction *ratione voluntatis* to hear their claim.

[496] *See* Memorial, ¶ 334, n. 655; **Ex. RL-218**, *Renco*, ¶ 60 ("It is common ground that the provisions of Article 10.18(2)(b) dealing with waiver encompass two distinct requirements: a formal requirement (the submission of a written waiver which complies with the terms of Article 10.18(2)(b)) and a material requirement (the investor abstaining from initiating or continuing local proceedings in violation of its written waiver)."), ¶ 135 ("Compliance with both elements is a precondition to Peru's consent to arbitrate and to the existence of a valid arbitration agreement.") (emphasis omitted); **Ex. RL-223**, *Commerce Group*, ¶¶ 80, 84 (arguing that "a waiver must be more than just words; it must accomplish its intended effect," and assure "materially . . . that no other legal proceedings are 'initiated' or 'continued'"); **Ex. RL-221**, *Waste Management I*, § 24 ("[T]he act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued. Indeed, such a declaration of intent must assume concrete form in the intention or resolve whereby something is said or done (conduct of the deponent). Hence, in order for said intent to assume legal significance, it is not suffice for it to exist internally. Instead, it must be voiced or made manifest, in the case in point by means of a written text and specific conduct on the part of the waiving party in line with the declaration made."); **Ex. RL-121**, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS, p. 604 ("Once a claim is submitted to arbitration under the treaty, however, the investor (and the enterprise if the investor has submitted a claim on behalf of the enterprise) must abandon any other proceedings with respect to the challenged measure and waive its right to pursue other remedies with respect to that measure in the future. Where the claimant submits the waiver, but then fails to abide by the waiver, the effect is to invalidate the waiver resulting in the claimant's failure to satisfy one of the conditions upon which the tribunal's jurisdiction is based."); **Ex. RL-54**, *Submission of the U.S. in Angel Seda*, ¶ 11 ("[I]f a claimant initiates or continues proceedings with respect to the measure in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute."). *See also* **Ex. RL-287**, *Submission of the U.S. in Alicia Grace*, ¶¶ 48-50 ("Compliance with Article 1121 [of the NAFTA] entails both formal and material requirements. . . . As to the material requirements, a claimant must act consistently and concurrently with the written waiver by abstaining from initiating or continuing proceedings with respect to

legal proceedings. In this case, Foster Wheeler and Process Consultants have not only continued to actively participate in the Fiscal Liability Proceeding, having even appealed the Ruling with Fiscal Liability before the fiscal liability and administrative sanctions chamber of the CGR, but have also initiated two additional *acciones de tutela* before Colombian courts for alleged violations of due process in the Fiscal Liability Proceeding.[497]

293. In their Counter-Memorial, Claimants advance three arguments in support of their position that they have made a valid waiver under the Treaty, none of which have merit.

294. The first argument Claimants make is that this objection should be rejected because it was Colombia, and not Claimants, that instituted multiple parallel proceedings.[498] This is not true. The CGR initiated a Fiscal Liability Proceeding against Foster Wheeler, Process Consultants and other natural and juridical persons and, before the Ruling with Fiscal Liability was even issued, Claimants initiated this parallel proceeding. The purpose of Article 10.18.2(b) of the Treaty is precisely to avoid such situations: Claimants cannot continue to file appeals against or ask for annulment of the Ruling with Fiscal Liability, or initiate or continue *acciones de tutela* related to the Fiscal

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the measures alleged to constitute a Chapter Eleven breach in another forum as of the date of the waiver and thereafter. . . Thus, if a claimant initiates or continues proceedings with respect to the measure in another forum despite meeting the formal requirements of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute.").

[497] **Ex. R-84**, *Acción de Tutela* 2021-A; **Ex. R-87**, *Acción de Tutela* 2021-B. *See* Memorial, ¶ 159, nn. 327, 345; ¶¶ 26-27, *supra*.

[498] Counter-Memorial, ¶ 200.

Liability Proceeding, and simultaneously continue this Arbitration where they challenge the same measure.[499]

295. Claimants' second argument is that this objection ignores Article 10.18.3 of the Treaty, which provides that a claimant may "initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration."[500]

296. In this case, neither the actions of Foster Wheeler and Process Consultants in the Fiscal Liability Proceeding, nor the *acciones de tutela* filed before the Colombian courts, can qualify as "provisional measures". The appeal filed by Foster Wheeler and Process Consultants sought to reverse the Ruling with Fiscal Liability,[501] while the *acciones de tutela* sought, on the one hand, to extend their right of defense and contradiction *vis-à-vis* certain technical reports within the framework of the Fiscal Liability Proceeding, and, on the other hand, to extend the term for filing an appeal against the Ruling with Fiscal Liability.[502] None of these actions, if successful, would have the effect of preserving Claimants' rights at stake while this Arbitration is ongoing.[503]

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[499] What Claimants could have done was to file administrative remedies and judicial actions and to initiate the Arbitration only after these concluded. *See* ¶ 298, *infra.*

[500] **Ex. RL-1**, Treaty, Article 10.18.3.

[501] *See* **Ex. R-89**, Appeal, p. 233 (requesting the Fiscal Chamber to revoke the Ruling with Fiscal Liability and to issue a ruling without fiscal liability in favor of Foster Wheeler and Process Consultants).

[502] *See* ¶ 27, *supra.*

[503] Memorial, nn. 649, 666. Claimants argue that the proceedings in this case were initiated by Colombia and that they are forced to defend themselves. Counter-Memorial, ¶ 206. Although it is true that the Fiscal Liability Proceeding was instituted by Colombia, once the Ruling with Fiscal Liability was rendered in that administrative proceeding, Claimants were not forced to appeal that Ruling or to initiate *acciones de tutela*

297. If Claimants were now to decide to file a judicial action to annul the Ruling with Fiscal Liability before the Colombian courts of the administrative adjudicatory jurisdiction– as they are likely to do – it would constitute an additional breach of their waiver.

298. Claimants' third argument is that it would be unfair to require them to waive their right to defend themselves.[504] However, the Treaty does not require Claimants to abandon all their proceedings before administrative and judicial tribunals; it only requires Claimants to do so in the event that they wish to submit a claim to arbitration under the Treaty for breaches of the substantive obligations thereunder.[505] Claimants could (and should) have expected to obtain a final decision in the Colombian courts and then submit their claim to arbitration under the Treaty. What the Treaty (which has a "no U-turn" structure) does not permit is for Claimants to continue their proceedings before the Colombian administrative and judicial courts and, at the same time, submit a claim to arbitration before this Tribunal for the same measure that they allege has constituted a breach of the Treaty's substantive obligations.

299. In sum, the Tribunal lacks jurisdiction *ratione voluntatis* over Claimants' claim because Claimants have not made, in violation of the Treaty requirements, a waiver

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related to the Fiscal Liability Proceeding. Those actions are clearly incompatible with the waiver required by the Treaty.

[504] Counter-Memorial, ¶ 205. The reference used by Claimants in support of this argument does not back their position, as it refers to a fork-in-the-road clause situation and does not relate to the waiver issue at hand. Counter-Memorial, ¶ 205; **Ex. CL-193**, Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5(2) THE JOURNAL OF WORLD INVESTMENT & TRADE 231 (2004), p. 249. Fork-in-the-road and waiver clauses are clearly distinguishable. While a waiver clause requires a party not to initiate or continue further proceedings before local tribunals once a dispute is submitted to international arbitration, a fork-in-the-road clause provides – generally – that if a dispute is submitted to a local tribunal, it will no longer be possible to submit the same dispute to an international tribunal.

[505] Memorial, ¶ 341.

– both formal and material – to initiate or continue their proceedings in Colombian administrative and judicial courts with respect to the very measure that they allege to have constituted a breach of the Treaty in this Arbitration.

CONCLUSION

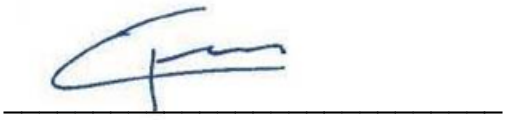
300. In view of the foregoing, Respondent respectfully requests this Tribunal to: (1) uphold the preliminary objection under Article 10.20.4 of the Treaty and dismiss the claim submitted to arbitration by Claimants; (2) declare that it lacks jurisdiction to hear the present claim on the grounds of the objections demonstrated herein; and (3) order Claimants to pay all costs and expenses of this Arbitration, including Respondent's attorneys' fees, together with interest thereon.[506]

[506] Article 10.20.6 of the Treaty - referred to by Claimants - provides that "[w]hen it decides a respondent's objection under paragraph 4 or 5 [of the Article 10.20], the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous." **Ex. RL-1**, Treaty, Article 10.20.6 (emphasis added); Counter-Memorial, ¶¶ 207, 209. In the present case, it has been demonstrated – both in the Memorial and in this Reply – that the preliminary objections raised by Colombia are sound, well-founded, and admissible under Article 10.20.4 of the Treaty and all other relevant provisions. Conversely, Claimants' Counter-Memorial not only fails to provide tenable – and certainly not convincing – answers or explanations to refute these preliminary objections, it further advances a number of contradictions and misrepresentations both factual and legal. These shortcomings in the Counter-Memorial can only confirm that Claimants' premature claim should be rejected and that the Tribunal has no jurisdiction to hear this case. Ultimately, this raises Claimants' entire case past the threshold of frivolity and, therefore, it is appropriate for Claimants to bear all costs and attorneys' fees incurred by Colombia in defending against this claim. As asserted by the very same legal authority cited by Claimants on this point , "tribunals have on a number of occasions allocated costs in favour of the winning party (so-called 'costs-follow-the-event' rule), especially if the claim was found to be manifestly lacking in merit, to be legally untenable or disclosing abuse of misconduct, fraudulent activity or abuse of process by the losing party." **Ex. CL-200**, Michele Potestà & Marija Sobat, *Frivolous in International Adjudication: A Study of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily*, 3 J. Int. Disp. Res. 137, February 1, 2012, pp. 25-26 (emphasis added). *See also* **Ex. CL-63**, *RSM*, ¶ 8.3.4 ("Having regard to its' conclusions that Claimants present claims are manifestly without legal merit, . . . the Tribunal considers it appropriate that Respondent should be fully indemnified for all of its costs, reasonably incurred or borne, in this proceeding.").

RESERVATION OF RIGHTS

301. Respondent reserves the right to submit such additional evidence and arguments as it deems appropriate to supplement this Reply, and to raise additional jurisdictional objections, as well as to respond to any evidence or arguments submitted by Claimants.

Respectfully,



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