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

RESPONDENT'S COMMENTS ON THE NON-DISPUTING PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

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April 25, 2022

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INTRODUCTION

1. In accordance with the schedule set forth by email dated January 30, 2022, the Republic of Colombia ("Colombia" or the "Respondent") hereby comments ("Colombia's Comments") on the non-disputing party submission of the United States of America ("United States") on questions of interpretation of Chapter 10 of the United States-Colombia Trade Promotion Agreement (the "Treaty"), filed on April 4, 2022 pursuant to Article 10.20.2 of the Treaty (the "U.S. Submission").[1]

2. The U.S. Submission sets forth the interpretation of the United States – the other Contracting Party to the Treaty – of Articles 10.16, 10.17, 10.18, 10.20 and 10.28 of the Treaty (the "Relevant Articles").[2] The positions set forth in the U.S. Submission are consistent with the positions the United States has taken in other non-disputing party submissions filed in investment arbitrations under treaties with identically or similarly-worded provisions to those in the Treaty.

3. Colombia's positions as to the interpretation of the Relevant Articles – which are set forth in its written pleadings – are identical to the positions adopted by the United States in the U.S. Submission, thereby constituting a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention of the Law of Treaties ("Vienna Convention"). Such subsequent agreement is a form of authentic interpretation of the Treaty that has

[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. Capitalized terms that are not defined herein, have the meanings set forth in Colombia's prior pleadings in this case.

[2] In the U.S. Submission, the United States did not offer its interpretation of other provisions of the Treaty that are also at issue in this case. However, as the U.S. Submission itself states, no inference should be drawn from the absence of comment on any issue. U.S. Submission, ¶ 1.

binding force and must be taken into account by the Tribunal when construing the Relevant Articles.[3]

4. Colombia's Comments are organized into two sections. The first section shows that Colombia and the U.S. have a common understanding of the meaning and scope of the Relevant Articles. The second section explains why the identical interpretation of the Relevant Articles by both Contracting Parties constitutes a "subsequent agreement" under the Vienna Convention.

THE CONTRACTING PARTIES' SHARED INTERPRETATION OF THE TREATY

5. This section summarizes the positions of Colombia and the United States on the interpretation of the Relevant Articles, as set forth in Colombia's pleadings and the U.S. Submission, respectively. As shown below, the Contracting Parties fully agree on the interpretation of the Relevant Articles.

A. Article 10.16.1 (Submission of a Claim to Arbitration)

6. Both Contracting Parties agree that Article 10.16.1 of Treaty imposes two requirements to submit a claim to arbitration under the Treaty: (a) a breach of a relevant obligation, and (b) a loss or damage by reason of, or arising out of, such breach.

[3] In their Rejoinder on Preliminary Objections, Claimants argue that non-party interpretation of a different treaty does not establish subsequent agreement or subsequent practice. Claimants' Rejoinder on Preliminary Objections, ¶¶ 59-60. Although Respondent disagrees with Claimants' position, and – as Claimants themselves acknowledge – three of the non-disputing party submissions cited by Respondent referred to this Treaty, the Tribunal has now before it a specific non-disputing party submission by the United States on the Relevant Articles of this Treaty that are at issue in this case. Claimants can no longer argue that the submissions of Colombia in this case and the U.S. Submission (which is also concordant, common and consistent with its prior non-disputing party submissions) do not constitute a subsequent agreement or subsequent practice in the terms of Article 31(3) of the Vienna Convention.

Position of the U.S.	Position of Colombia
"[T]o submit a claim to arbitration, an investor must establish that (i) a relevant obligation has been breached, and (ii) that the claimant or its enterprise (a) has incurred loss or damage (b) by reason of, or arising out of, that breach."[4]	"[U]nder Article 10.16.1 of the Treaty, in order for an investor . . . 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."[5]

7. Both Contracting Parties agree that the alleged breach and associated damage must have occurred prior to the submission of the claim to arbitration. The Treaty bars claims based on speculation as to future breaches or future losses.

Position of the U.S.	Position of Colombia
"[A]n investor may submit a claim only once the respondent Party '*has* breached' a relevant obligation, and also '*has* incurred loss or damage by reason of, or arising out of' (*i.e.*, caused by) that breach. . . . Thus, there can be no claim under Article 10.16.1 until an investor has suffered harm from an alleged breach. The breach and loss must have already occurred prior to the submission of a claim to arbitration. No claim based solely on speculation as to future breaches or	"[I]n addition to the existence of a breach . . . two other requirements must be met for a claim to be admissible under the Treaty: (i) there must be a certain loss or damage, as opposed to merely hypothetical or speculative damage, at the time of submitting the claim to arbitration. . . . [I]t is only where loss or damage exists by reason of or as a result of a breach of the substantive Treaty obligations or an investment agreement at the time of submitting a claim to arbitration that an investor is entitled to make a

[4] U.S. Submission, ¶ 3.

[5] Respondent's Reply on Preliminary Objections, December 13, 2021 ("Reply"), ¶ 83. *See also* Respondent's Memorial on Preliminary Objections, July 1, 2021 ("Memorial"), ¶¶ 168, 170, 251.

future loss may be submitted. . . .”[6]	claim for arbitration under the Treaty.”[7]

8. Both Contracting Parties agree that ripeness is assessed as of the time of submission of the claim to arbitration.

Position of the U.S.	Position of Colombia
“The issue of ripeness therefore turns on the determination of whether the challenged measure had harmed claimant ‘by the time [c]laimant submitted its claim to arbitration.’”[8]	“[W]hether 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.”[9]

9. Both Contracting Parties agree that non-final acts cannot be the basis of a claim under the Treaty.

Position of the U.S.	Position of Colombia
“[N]on-final judicial acts cannot be the basis for claims under Chapter Ten of the U.S.-Colombia TPA, . . . Rather, an act of a domestic court (or administrative tribunal) 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.”[10]	“A mere administrative act that is not final and is subject to judicial control cannot, by itself, constitute a measure that is capable of constituting a breach of a substantive Treaty obligation . . .”[11]

[6] U.S. Submission, ¶ 3.

[7] Memorial, ¶¶ 251-252 (emphasis omitted). *See also* Reply, ¶¶ 88, 191.

[8] U.S. Submission, ¶ 4.

[9] Reply, ¶ 85. *See also Id.,* ¶ 196.

[10] U.S. Submission, ¶ 5.

[11] Memorial, ¶ 176 (emphasis omitted). *See also* Reply, ¶ 95.

B. Article 10.16.2 (Notice of Intent)

10. Both Contracting Parties agree that a claimant that does not deliver a notice of intent to the respondent fails to perfect the State's offer of consent to arbitration, thus depriving a tribunal of jurisdiction *ab initio*.

Position of the U.S.	Position of Colombia
"A disputing investor that does not deliver a Notice of Intent at least 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*. A respondent's consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration."[12]	"If any claimant fails to comply with the requirement to deliver a notice of intent at least ninety (90) days before submitting a claim to arbitration – as explicitly required by Article 10.16.2 of the Treaty – consent is not perfected at the time the arbitration commences, and it cannot then be created retroactively."[13]

11. Both Contracting Parties agree that it is mandatory for a claimant to comply with the requirements in Article 10.16.2 before submitting a claim to arbitration.

Position of the U.S.	Position of Colombia
"The procedural requirements in Article 10.16.2 are explicit and mandatory, as reflected in the way the requirements are phrased (*i.e.*, 'shall deliver;' 'shall specify'). These requirements serve important functions . . . [and] 'cannot be	"Failure to comply with the requirement of Article 10.16.2 of the Treaty affects the consent to arbitration itself. Under Article 10.17 of the Treaty, the Contracting Parties only consented to the submission of claims to arbitration 'in accordance with' the Treaty. This

[12] U.S. Submission, ¶ 9.

[13] Memorial, ¶ 314. *See also* Reply, ¶ 272.

regarded as merely procedural niceties.'"[14]	implies that the Contracting Parties 'did not provide unconditional consent to arbitration under any and all circumstances,' but only consented to arbitration 'in accordance with' the terms of the Treaty itself."[15]

C. Article 10.18.2(b) (Waiver Requirement)

12. Both Contracting Parties agree that a waiver pursuant to Article 10.18.2(b) is a precondition to the State's consent to arbitration. To be effective, a claimant's waiver must satisfy formal and substantive requirements.

Position of the U.S.	Position of Colombia
"An effective waiver is therefore a precondition to the Parties' consent to arbitrate claims, and accordingly, a tribunal's jurisdiction under Chapter Ten of the U.S.- Colombia TPA. . . . If all formal and material requirements under Article 10.18.2(b) 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."[16]	"[A] claim may not be submitted to arbitration unless the notice of arbitration is accompanied by a written waiver by the claimant of the claims submitted to arbitration. . . . In addition to providing a formal waiver in the exact terms of Article 10.18.2(b) of the Treaty, the claimant must act in a manner consistent with such a waiver in order for it to be truly effective. In other words, the waiver must also be material."[17]

13. Both Contracting Parties agree that a waiver containing conditions or reservations is ineffective because it does not satisfy the formal requirements.

[14] U.S. Submission, ¶ 10.

[15] Memorial, ¶ 314.

[16] U.S. Submission, ¶¶ 13, 20.

[17] Memorial, ¶¶ 330, 334. *See also* Reply, ¶¶ 287, 289.

Position of the U.S.	Position of Colombia
"As to the formal requirements, the waiver must be in writing, 'clear, explicit and categorical.'. . . [I]t 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 . . . Accordingly, a waiver containing any conditions, qualifications or reservations will not meet the formal requirements and will be ineffective."[18]	"[A] reservation of rights renders [a] purported waiver meaningless, as a reservation that allows [claimants] to continue 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."[19]

14. Both Contracting Parties agree that to comply with the waiver's substantive requirements, a claimant must actually abstain from initiating or continuing proceedings in another forum with respect to the measures alleged to constitute a breach.

Position of the U.S.	Position of Colombia
"As to the material requirements, a claimant must act consistently and concurrently with the written waiver by abstaining from initiating or continuing proceedings in another forum with respect to the measures alleged to constitute a breach of the obligations of Chapter Ten as of the date of the waiver and thereafter." [20]	"[B]eyond 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."[21]

[18] U.S. Submission, ¶ 15.

[19] Reply, ¶ 290. *See also* Memorial, ¶¶ 331, 333.

[20] U.S. Submission, ¶ 16.

[21] Reply, ¶ 292. *See also* Memorial, ¶ 334.

15. Both Contracting Parties agree that a tribunal lacks jurisdiction *ratione voluntatis* over a dispute if the claimants' waiver does not satisfy both the formal and material requirements set forth in Article 10.18.2(b).

Position of the U.S.	Position of Colombia
"The waiver requirements under Article 10.18.2(b) are . . . among the requirements upon which the Parties have conditioned their consent in Article 10.17. An effective waiver is therefore a precondition to the Parties' consent to arbitrate claims, and accordingly, a tribunal's jurisdiction under Chapter Ten of the U.S.- Colombia TPA."[22]	"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."[23]

16. Both Contracting Parties agree that a claimant may initiate or continue proceedings in another forum with respect to the measures alleged to constitute a breach only in the narrow circumstances set forth in Article 10.18.3.

Position of the U.S.	Position of Colombia
"Notwithstanding Article 10.18.2(b), the claimant . . . may initiate or continue domestic or other dispute settlement proceedings only in very narrow circumstances [Article 10.18.3] . . . In the context of judicial or administrative adjudicatory proceedings, for example, continued participation in such proceedings, including appeals, will not ordinarily	"The only exception provided for in the Treaty is that 'the claimant or the enterprise . . . 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

[22] U.S. Submission, ¶ 13.

[23] Reply, ¶ 289.

fall within these narrow circumstances."[24]	interests during the pendency of the arbitration.'"[25]

D. Article 10.20 (Preliminary Objections)

17. Both Contracting Parties agree that Article 10.20.4 provides an additional ground for dismissal of a claim at the preliminary stage.[26] In addition, both Contracting Parties agree that the presumption of truthfulness in Article 10.20.4(c) does not apply to admissibility and jurisdictional objections other than Article 10.20.4 objections:

Position of the U.S.	Position of Colombia
"Article 10.20.4 authorizes a respondent to make 'any objection' that, 'as a matter of law,' a claim submitted is not one for which the tribunal may issue an award in favor of the claimant under Article 10.26. Article 10.20.4 clarifies that its provisions operate '[w]ithout prejudice to a tribunal's authority to address other objections as a preliminary question.' Article 10.20.4 thus provides a further ground for dismissal, in addition to 'other objections,' including those with respect to a tribunal's competence."[27]	"Article 10.20.4 of the Treaty provides that the Tribunal shall address and decide 'as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.'"[29] "[T]he 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 apply to [objections other than Article 10.20.4 objections].

[24] U.S. Submission, ¶¶ 21-22.

[25] Memorial, n. 649. *See also Id.*, n. 666; Reply, ¶ 296.

[26] Colombia has proceeded on this basis since the outset of the case. *See* Procedural Order No. 1, dated March 18, 2021, ¶¶ 14.6, 14.7 (instructing Respondent to file its objection under Article 10.20.4, together with "any other admissibility and jurisdictional objections.").

[27] U.S. Submission, ¶ 24.

[29] Memorial, ¶ 164.

"Subparagraph (c) does not address, and does not govern, other preliminary objections, such as an objection to competence, which the tribunal may already have authority to consider . . . [O]bjections to competence do not fall within the scope of Article 10.20.4 objections . . . As such, when a respondent raises other preliminary objections, there is no requirement that a tribunal 'assume to be true claimant's factual allegations.'"[28]	Claimants have the burden of proving all facts on which the Tribunal's jurisdiction is based."[30]

18. Both Contracting Parties agree that the presumption of truthfulness in Article 10.20.4 applies only to the claimant's factual allegations in the notice of arbitration or in any amendment thereof.

Position of the U.S.	Position of Colombia
"The tribunal, however, only must assume to be true the factual allegations in support of the claim put forth in the notice of arbitration (or any amendment thereof). In other words, although further factual allegations may be put before the tribunal later, those need not be assumed to be true in determining an objection under Article 10.20.4."[31]	"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 [c]laimants in their [n]otice of [a]rbitration and does not extend to subsequent factual allegations . . ."[32]

[28] U.S. Submission, ¶ 27.

[30] Reply, ¶ 238. *See also* Memorial, ¶ 280.

[31] U.S. Submission, ¶ 26.

[32] Reply, ¶ 79 (emphasis omitted).

19. Both Contracting Parties agree that, for purposes of an Article 10.20.4 objection, the tribunal need not assume as true the claimant's legal allegations or conclusory statements.

Position of the U.S.	Position of Colombia
"Article 10.20.4(c) also does not require a tribunal to assume that a claimant's legal allegations or mere conclusions unsupported by relevant factual allegations are correct."[33]	"[T]he Tribunal . . . should not assume to be true legal allegations (even those disguised as factual allegations) or conclusions that are not supported by the relevant factual allegations."[34]

E. Article 10.28 (Definition of Investment)

20. Both Contracting Parties agree that to qualify as an investment under Article 10.28, a particular asset must possess the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. The enumeration of assets listed in Article 10.28 is not dispositive; to qualify for protection under the Treaty, an asset must have the characteristics of an investment.

Position of the U.S.	Position of Colombia
"The enumeration of a type of an asset in Article 10.28 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	"Although Article 10.28 then lists certain examples of the forms that an investment may take, including different types of contracts, it is only in cases where such assets (whether those listed as examples in Article 10.28 or elsewhere) have the

[33] U.S. Submission, ¶ 26.

[34] Memorial, n. 350 (emphasis omitted). *See also* Reply, ¶¶ 79, 111.

investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Article 10.28's use of the word 'including' in relation to 'characteristics of an Investment' indicates that the list of identified characteristics, *i.e.*, 'the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk' is not an exhaustive list; additional characteristics may be relevant."[35]	characteristics of an investment that they may be considered to be protected by the Treaty."[36]

THE SUBSEQUENT AGREEMENT OF THE CONTRACTING PARTIES IS AN AUTHENTIC INTERPRETATION OF THE TREATY

21. The U.S. Submission coupled with Colombia's submissions in this case constitute a subsequent agreement on the interpretation and application of the Treaty under Article 31(3)(a) of the Vienna Convention. As an authentic means of treaty interpretation, such subsequent agreement is binding on the Tribunal in construing the Relevant Articles.

22. Article 31(3)(a) of the Vienna Convention states: "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."[37]

[35] U.S. Submission, ¶ 30.

[36] Memorial, ¶ 282. *See also* Reply, ¶ 243.

[37] **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 (English Original) ("Vienna Convention"), Article 31(3) (emphasis added).

23. The language is plain. A subsequent agreement is a consensus between the parties to a treaty, reached after the treaty entered into force, about the interpretation of such treaty or the application of its provisions:

> [I]t is merely the parties to a treaty themselves which can give an authoritative or authentic interpretation to the treaty. . . . The parties acting in consensus remain the masters of their treaty and can, therefore, determine its meaning with binding force. This is why issues over treaty interpretation are commonly a matter for discussion, negotiation and agreement between the parties, and why subsequent practice and subsequent agreements among the latter is of utmost importance in establishing the true (current) meaning of a treaty. . . . Since authors of the agreements referred to in [Article 31(3)(a) of the Vienna Convention] can only be the 'parties' to the treaty, acting in consensus, these agreements are also a means of an authentic interpretation of the treaty concerned . . . and must therefore be read into the latter for purposes of its interpretation. Being the masters of their treaty, the parties are, in principle, not limited in making subsequent understandings or agreements."[38]

24. A subsequent agreement between the parties to a treaty is a form of authentic interpretation that has binding force:

> Para. 2 and subparas. 3(a) and (b) [of Article 31 of the Vienna Convention] represent forms of authentic interpretation whereby all parties themselves agree on (or at least accept) the interpretation of treaty terms by means which are extrinsic to the treaty. As a result, the parties' authentic interpretation of the treaty terms is not only particularly reliable, it is also endowed with binding force. It provides *ex hypothesi* the "correct" interpretation among the parties in that it determines which of the various ordinary meanings shall apply.[39]

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[38] **Ex. RL-333**, Oliver Dörr and Kirsten Schmalenbach (eds.), VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (Springer Science & Business Media, 2011), pp. 532, 553-554 (emphasis added).

[39] **Ex. RL-334**, Mark Villiger, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (Martinus Nijhoff Publishers, 2009), p. 429 (emphasis added). *See* **Ex. RL-335**, Tarcisio Gazzini, INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES (Hart Publishing, 2016), p. 188 ("The last part of the sentence leaves no doubt as to the binding character of subsequent agreements. . . . Since subsequent

25. The ILC's 1966 commentary on the draft Vienna Convention supports this view, stating:

> [I]t is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. . . . Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.[40]

26. The International Court of Justice quoted the aforementioned passage in its 1999 judgment in *Kasikili/Sedudu Island* (*Botswana v. Namibia*) when discussing subsequent agreements.[41]

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agreements are part of the treaty, the interpreter must respect them – not only take them into account. Even more, the interpreter is expected to examine them from the very beginning of the interpretative process.") (emphasis added); **Ex. RL-336**, Michel Virally, *Preface*, in Ioan Voicu, DE L'INTERPRÉTATION AUTHENTIQUE DES TRAITÉS INTERNATIONAUX (Pedone, 1968), p. 7 ("[T]he authentic interpretation has a special legal force which no other 'kind' of interpretation can present: it has the same legal force as the original act, has the same scope as it and is not subject to any challenge or revision (except by the author or authors of the act.") (English translation; emphasis added); **Ex. RL-337**, Jean Salmon (ed.), DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC (Bruylant, 2001), p. 604 ("Authentic interpretation [:] An interpretation by the author or by all the authors of the interpreted provision - in particular, for a treaty, by all parties - in such forms that their authority cannot be challenged.") (English translation); **Ex. RL-278**, Robert Jennings and Arthur Watts, 1 OPPENHEIM´S INTERNATIONAL LAW: VOL. I (9th ed., Oxford University Press, 2008), p. 3 ("The parties to a treaty often foresee many of the difficulties of interpretation likely to arise in its application, and in the treaty itself define certain of the terms used. Or they may in some other way and before, during, or after the conclusion of the treaty, agree upon the interpretation of a term, either informally (and executing the treaty accordingly) or by a more formal procedure, as by an interpretative declaration or protocol or a supplementary treaty. Such authentic interpretations given by the parties override general rules of interpretation.").

[40] **Ex. RL-338**, International Law Commission, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1966), Vol. II, p. 221, ¶ 14 (emphasis added).

[41] **Ex. RL-339**, *Botswana v. Namibia (Kasikili/Sedudu Island)*, ICJ REPORTS (1999), Judgment, December 13, 1999 (English Original), ¶ 49 ("In relation to 'subsequent agreement' as referred to in subparagraph (a) of this provision, the International Law Commission, in its commentary on what was then Article 27 of the draft Convention, stated the following: 'an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation.'").

27. In a 2018 draft report, the ILC again observed that subsequent agreements are "authentic means of interpretation" and "objective evidence of the understanding of the parties as to the meaning of the treaty."[42] Similarly, in a separate report addressing the related issue of interpretive declarations accepted by the other contracting State to the treaty, the ILC explained that subsequent agreements "take on the nature of a treaty," stating:

> As the Permanent Court of International Justice noted, "the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it". Yet in the case of a bilateral treaty this power belongs to both parties. Accordingly, if they agree on an interpretation, that interpretation prevails and itself takes on the nature of a treaty, regardless of its form, exactly as "reservations" to bilateral treaties do once they have been accepted by the co-contracting State or international organization. It becomes an agreement collateral to the treaty in the sense of paragraphs 2 or 3 (a) of article 31 of the 1969 and 1986 Vienna Conventions; as such, it must be taken into consideration in interpreting the treaty.[43]

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[42] **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 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'.").

[43] **Ex. RL-340**, International Law Commission, *Guide to Practice on Reservations to Treaties*, in REPORT OF THE INTERNATIONAL LAW COMMISSION: SIXTY-THIRD SESSION (26 April-3 June and 4 July-12 August 2011), UN Doc. No. A/66/10/Add/1 (2011), p. 117 (quoting *Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)*, Permanent Court of International Justice, Advisory Opinion dated December 6, 1923, COLLECTION OF ADVISORY OPINIONS, Series B, No. 8, p. 37) (emphasis added). *See Id.*, p. 4 ("[Guideline] 1.6.3. Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party. The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes an authentic interpretation of that treaty.") (emphasis omitted).

28. Commentators agree that subsequent agreements under Article 31(3)(a) of the Vienna Convention do not require any special form or formality.[44] As "masters of their work," the contracting parties "cannot be hindered by any interpretive technique."[45] As stated by the tribunal in *Methanex v. Mexico*,

> It follows form the wording of Article 31(3)(a) that it is not envisaged that the subsequent agreement need be concluded with the same formal requirements as a treaty; and indeed, were this to be the case, the provision would be otiose. . . . From the ICJ's approach in the Kasikili/Sedudu Island case, it appears that no particular formality is required for here to be an 'agreement' under Article 31(3)(a) of the Vienna Convention.[46]

29. The absence of any formal requirements also means that subsequent agreements need not be contained in a single instrument. The parties to a treaty can

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[44] *See* **Ex. RL-333**, Oliver Dörr and Kirsten Schmalenbach (eds.), VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (Springer Science & Business Media, 2011), p. 554 ("Again, since [Article 31(3)(a) of the Vienna Convention] does not contain any formal requirement, it would seem that the 'agreements' can very well be made informally. They do not have to be in treaty form but must be such as to show that the parties intended their understanding to be the basis for an agreed interpretation.") (emphasis added); **Ex. RL-340**, International Law Commission, *Guide to Practice on Reservations to Treaties*, in REPORT OF THE INTERNATIONAL LAW COMMISSION: SIXTY-THIRD SESSION (26 April-3 June and 4 July-12 August 2011), UN Doc. No. A/66/10/Add/1 (2011), n. 375 (explaining that an interpretative declaration accepted by both parties to the treaty constitutes an authentic interpretation of that treaty "regardless of its form," and noting an "[e]xchange of letters, protocol, simple oral agreement, etc." as examples of the possible form of such agreement).

[45] **Ex. RL-341**, Mustafa Kamil Yasseen, *La règle générale d'Interprétation l'article 31 de la convention*, 151 RECUEIL DES COURS 19 (1976), p. 46 ("However, parties wishing to reach agreement on the interpretation of a provision cannot be hindered by any interpretive technique. . . . . [T]hey are masters of their work: the treaty to which they are parties, of which they are both the authors and recipients.") (English translation).

[46] **Ex. RL-342**, *Methanex Corp. v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005, Part II, Chapter B, ¶ 20. *See id.* ¶ 21 ("In the light of these factors, the Tribunal has no difficulty in deciding that the FTC's Interpretation of 31st July 2001 is properly characterised as a 'subsequent agreement' on interpretation falling within the scope of Article 31(3)(a) of the Vienna Convention."); **Ex. RL-343**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award dated 9 Jan. 2003, ¶ 177 ("But whether a document submitted to a Chapter 11 tribunal purports to be an amendatory agreement in respect of which the Parties' respective internal constitutional procedures necessary for the entry into force of the amending agreement have been taken, or an interpretation rendered by the FTC under Article 1131(2), we have the Parties themselves – all the Parties – speaking to the Tribunal. No more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible.")

reach consensus regarding the interpretation of a treaty by expressing identical positions at different times and in different instruments. As explained by Gazzini,

> [S]ubsequent agreements can be less formal. It may be argued that concordant formal submissions on the interpretation of a treaty provision filed by all parties to a treaty as non-disputing parties could amount to a subsequent agreement. . . . The absence of a single instrument recording the 'meeting of the minds' does not seem an insurmountable obstacle for considering these submissions as forming an agreement between the parties on the interpretation of the treaty. They are in written form, recorded by the arbitral tribunal, transmitted to the parties to the dispute as well as to the other parties to the treaty and in principle made available to the public. . . . It may be argued that the non-disputing party submissions by two parties and their formal endorsement by the disputing party can be considered as forming a subsequent agreement for the purposes of Article 31(3)(a). All the parties to the treaty have formally and officially shared the same interpretation. The fact that the position on interpretation of one of the parties – the disputing one – has been expressed within a specific dispute is not an obstacle to this conclusion, provided that it is formulated in clear and general terms.[47]

30. In this case, both the U.S. and Colombia "have formally and officially shared the same interpretation" of the Relevant Articles. The U.S. expressed its interpretative positions in the U.S. Submission, while Colombia conveyed its positions in its written pleadings, all of which have been made available to the public. The Contracting Parties' common understanding regarding the interpretation of the Relevant Articles constitutes a "subsequent agreement" within the meaning of Article 31(3)(a) of the Vienna

[47] **Ex. RL-271**, Tarcisio Gazzini, INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES (Hart Publishing 2016), pp. 193-195 (emphasis added). *See also* **Ex. RL-272**, *Bayview Irrigation District and others v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Final Award, June 19, 2007, ¶ 107 ("In particular, this interpretation of the scope of NAFTA is consistent with that adopted by Mexico before the Tribunal and by the United States in its submission dated 27 November 2006; but it is an interpretation which the Tribunal would have reached in any event, even if the United States had made no intervention in these proceedings.").

Convention,[48] and as such, has binding force and must be read into the Treaty for purposes of its interpretation.

CONCLUSION

31. In conclusion, Respondent submits that the U.S. Submission together with Colombia's submissions in this case constitute a subsequent agreement between the

[48] In addition to being a subsequent agreement, the declarations of the Contracting Parties to the Treaty are also subsequent practice in the application of the Treaty. **Ex. RL-53**, Vienna Convention, Article 31(3) ("There shall be taken into account, together with the context: . . . (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."). According to the ILC, subsequent practice "constitute[s] objective evidence of the understanding of the parties as to the meaning of the treaty" and thus it is an "authentic means of interpretation alongside interpretative agreements." **Ex. RL-338**, International Law Commission, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (1966), Vol. II, pp. 221-222. *See* **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 THE INTERNATIONAL LAW COMMISSION (2018), Conclusion No. 3, ¶ 1, Conclusion No. 4, ¶ 18; **Ex. RL-335**, Tarcisio Gazzini, INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES (Hart Publishing, 2016), p. 201 ("Subsequent agreements and subsequent practice are two contiguous notions and for all practical purposes have the same relevance to the interpretative process. As far as form is concerned, if there are no strict requirements with regard to the form of subsequent agreements, the notion of subsequent practice is obviously even more relaxed. . . . In the case of subsequent practice, . . . the agreement is *implied* in the concordant, common and consistent sequence of acts or pronouncement by the parties.") (emphasis in original). As Respondent stated in its Reply on Preliminary Objections, 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. Reply, n. 19. In this case, the position of the U.S. has been expressly stated not only in the U.S. Submission filed herein, but also in the submissions of the U.S. as non-disputing party in other investment arbitrations interpreting provisions of the Treaty or of identically or similarly-worded provisions of other treaties it entered into. *See*, *e.g.*, **Ex. RL-270**, *William Ralph Clayton, et al. v. Government of Canada*, PCA Case No. 2009-04 (NAFTA), Award on Damages, January 10, 2019, ¶¶ 378-379 ("In this regard, the Tribunal notes that the commentary to the ILC draft conclusions on 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties' includes 'statements in the course of a legal dispute' as potentially relevant subsequent practice of States for the purposes of interpretation. On this basis, the 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-176**, *Daniel W. Kappes y Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43 (DR-CAFTA), Decision on Respondent's Preliminary Objections, March 13, 2020, ¶ 156 (stating that "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-268**, *Mobil Investments Canada Inc. v. Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 158 (indicating that "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.").

Contracting Parties regarding the interpretation of the Relevant Articles of the Treaty under Article 31(3)(a) of the Vienna Convention, which is a form of authentic interpretation that has binding force. Accordingly, for the reasons set forth in the Memorial on Preliminary Objections and the Reply on Preliminary Objections, the U.S. Submission further confirms that this case should be dismissed under Article 10.20.4 of the Treaty and that this Tribunal lacks jurisdiction to hear the claims raised by Claimants in this Arbitration.

Respectfully,

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