
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

Claimants

v.

THE REPUBLIC OF COLOMBIA

Respondent

ICSID Case No. ARB/19/34

CLAIMANTS' REJOINDER ON PRELIMINARY OBJECTIONS

February 11, 2022

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I. INTRODUCTION

1. In accordance with Procedural Order No. 1, Claimants Amec Foster Wheeler Corporation (“**Foster Wheeler**”), Process Consultants, Inc. (“**PCI**”), and Joint Venture Foster Wheeler Corporation and Process Consultants., Inc. (“**FPJVC**”, and together with Foster Wheeler and PCI, “**Claimants**”) file this Rejoinder on Preliminary Objections (“**Rejoinder**”) in response to The Republic of Colombia’s (“**Colombia**” or “**Respondent**”) Reply on Preliminary Objections (“**Reply**”).¹
2. Pursuant to the United States Colombia Trade Promotion Agreement (“**TPA**”), Respondent bears the burden to show that the claims are “certain” to fail,² including Respondent’s jurisdiction and admissibility objections,³ and Claimants are required at this stage only to allege *prima facie* violations.⁴ None of Colombia’s objections even approach that standard.
3. Article 10.20.4 of the TPA provides that in deciding Respondent’s preliminary objections, the Tribunal must only determine whether the claims in the Request for Arbitration, taken as true, fail to state a claim for relief:

In deciding an objection under this paragraph, the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration.... The tribunal may also consider any relevant facts not in dispute.
4. Colombia plainly understood this when it requested that all of its objections, including to jurisdiction and admissibility, be made on a preliminary basis, and

¹ All capitalized terms have the same meaning as Claimants’ Counter-Memorial on Preliminary Objections, dated October 14, 2021 (“**Counter-Memorial**”) unless otherwise defined.

² See ¶ 58 *infra*.

³ See Procedural Order No. 1, §§ 14.6 – 14.9 (explaining that the jurisdiction and admissibility objections would also be resolved as “preliminary issues”).

⁴ See ¶¶ 54-56, 58 *infra*.

reserved the right to assert further jurisdictional objections later in the proceedings.⁵

In the pleadings on preliminary objections, however, Colombia asks the Tribunal to evaluate the claims on the merits before the complete factual record has been developed. Furthermore, Colombia conflates (i) factual and legal allegations, (ii) jurisdictional and admissibility objections, and (iii) issues appropriate for preliminary objections as opposed to a hearing the merits.⁶ As discussed below, Colombia does not even begin to meet its burden to show that the claims identified in the Notice of Arbitration and Request for Arbitration are “certain” to fail.⁷

5. Colombia’s preliminary objections under Article 10.20.4 all fail. First, Colombia’s argument that Claimant’s Article 10.5 (“**Minimum Standard of Treatment**”) should be dismissed fails based on the facts set out in the Request for Arbitration. Respondent relies on the strict *Neer* standard set out in 1926 by the Mexico-United States General Claims Commission, which has been rejected by the overwhelming majority of Tribunals.⁸ Further, Colombia’s argument that Article 10.5 is limited to investments, and not investors, is based on a misreading of the TPA’s language and fails to account for the interpretation of identical provisions by NAFTA and other international tribunals to include investors.⁹ Moreover, Claimants have

⁵ See Respondent’s October 9, 2020 Letter to the Tribunal (**C-023**) (stating “[t]he only point at issue at this juncture is whether the Tribunal will establish a calendar to hear solely Respondent’s Article 10.20.4 objection as a preliminary matter, *or whether it will establish a calendar to hear both Respondent’s Article 10.20.4 and Respondent’s other jurisdictional and/or admissibility objections as preliminary questions.*” (emphasis added)). The Procedural Order reflects this language. See Procedural Order No. 1, §§ 14.6 - 14.9.

⁶ For example, Respondent claims that in order to pass muster on preliminary objections, Claimants must offer evidence of reputational damage. See Respondent’s Reply on Preliminary Objections, December 13, 2021, ¶ 8 (“**Reply**”).

⁷ See ¶ 58 *infra*.

⁸ See ¶¶ 62-71 *infra*.

⁹ See ¶¶ 72-76 *infra*.

pleaded a *prima facie* claim for denial of justice because the fiscal liability proceeding is an “administrative adjudicatory proceeding[.]” within the meaning of Article 10.5(a)(a).¹⁰ Finally, Claimants emphasize that their fair and equitable treatment claim is not solely for denial of justice, although that is an element of the claim. Rather, the CGR Charges and CGR Decision alone constitute a violation of fair and equitable treatment and Claimants’ legitimate expectations.¹¹

6. Second, Colombia has failed to establish that the CGR’s decision to dismiss members of the Ecopetrol Board of Directors was not discriminatory and therefore a *prima facie* breach of Article 10.4 of the TPA (“**National Treatment**”).¹² Claimants have correctly alleged that they were in “like circumstances” to the Ecopetrol Board Members (all Colombian nationals), but when the Ecopetrol Board Members were dismissed from the CGR proceeding because they were not “fiscal managers,” Colombia did not dismiss Claimants on the same grounds, even though Claimants did not meet that definition. Instead of explaining how the allegations cannot amount to a breach of National Treatment, Colombia challenges Claimants’ factual allegations and focuses on the wrong inquiry. That challenge is misplaced and inappropriate at this stage of the proceedings.
7. Third, Colombia has failed to establish that Claimants cannot import the umbrella clause from the Swiss-Colombia Treaty or the Japan-Colombia Treaty pursuant to

¹⁰ See ¶¶ 82-88 *infra*. Indeed, Colombia took the position during the hearing on Claimants’ Application for Provisional Measures that an appeal within the CGR proceeding is all part of the same procedure. See, e.g., Transcript of the Hearing on Provisional Measures, November 4, 2021, at 89:8-22 (arguing that the entire fiscal liability proceeding and collection efforts were all “the same Measure”). Colombia cannot now content that it is different when it suits them.

¹¹ See ¶¶ 77-81 *infra*.

¹² See ¶¶ 91-101 *infra*.

Article 10.4 (“**Most-Favored Nation Treatment**”).¹³ Colombia’s suggested interpretation of Article 10.4—i.e., that it requires a factual comparison of treatment in like circumstances—is prohibitively narrow and contrary to the decisions of other tribunals interpreting the same language to allow the importation of substantive rights. Colombia’s argument that Claimants have not pleaded sufficient facts for breach of an umbrella clause rests not on the pleadings, but on whether Reficar is part of Colombia’s central government, a disputed fact that the Tribunal cannot resolve at this stage.

8. Fourth, Colombia has failed to prove that Claimants do not have a claim for breach of an investment agreement under Article 16.1 of the TPA.¹⁴ Claimants have alleged that the CGR, through the fiscal liability proceeding, has deprived Claimants of the protections it received for its investment under the Contract. This is a *prima facie* breach of an investment agreement under the TPA.
9. Fifth, Respondent has failed to prove that Claimants do not have a claim for indirect expropriation under Article 10.7 (“**Expropriation and Compensation**”).¹⁵ Respondent mischaracterizes Claimants’ pleading of Colombia’s violation of Article 10.7. Claimants do not allege that Colombia has expropriated two of its rights under the Contract. Rather, Claimants have alleged that Colombia has indirectly expropriated its investment in Colombia as a result of the CGR Charges and the subsequent CGR Decision.

¹³ See ¶¶ 102-110 *infra*.

¹⁴ See ¶¶ 111-114 *infra*.

¹⁵ See ¶¶ 115-116 *infra*.

10. Colombia's preliminary jurisdictional and admissibility objections must also be dismissed, and the Tribunal has jurisdiction to hear Claimants' dispute.
11. Colombia has failed to prove that Claimants do not have an "investment" under either the TPA or Article 26 of the ICSID Convention.¹⁶ The TPA explicitly defines "construction," "management," and "other similar" contracts as "investments" under Section C of the TPA.¹⁷ If that were not sufficient by itself, Claimants have properly alleged that they had a long history of investment in Colombia, established an office in Bogota, and employed over 700 employees in order to carry out their work on the Reficar Project.¹⁸
12. Colombia's argument that the first Claimant is not a "National of another Contracting State" fails because Colombia relies on a misreading of New York law, and Colombia fails to explain why it was satisfied when FPJVC, and not its members, signed and executed the Contract, but now apparently does not qualify as a "juridical person" able to bring a claim under the ICSID Convention.¹⁹ Moreover, Article 1.3 of the TPA defines "enterprise" to include joint ventures and that definition in turn means a joint venture is included in "investor of a party" under Article 10.28.
13. Respondent's argument that the Notice of Intent was defective fails because a reading of the Notice of Intent shows that it refers to all three Claimants, and Colombia has not otherwise alleged it suffered any prejudice as a result of any

¹⁶ See ¶¶ 133-144 *infra*.

¹⁷ TPA, Art. 10.28 (CL-001).

¹⁸ See ¶¶ 19-24 *infra*.

¹⁹ See ¶¶ 145-152 *infra*.

alleged defect in the Notice of Intent.²⁰ In any event, as many tribunals have held, alleged defects in a claimant's notice do not affect a tribunal's jurisdiction.²¹

14. Respondent's objection that Claimants violated the "fork in the road" provision of Annex 10-G of the TPA also does not pass muster.²² Annex G plainly requires a claimant to definitively elect to "submit" its claim under the TPA to the local courts, and Colombia has not alleged, and could not allege, that Claimants have done so.²³
15. Further, Respondent's objection that Claimants have violated the waiver provision set out in TPA Article 10.18 by continuing to defend the fiscal liability proceedings similarly lacks merit.²⁴ Claimants' have simply defended themselves in the ongoing fiscal liability proceedings brought by Colombia and have not "initiated" or "continued" these proceedings.
16. Finally, Claimants properly pleaded their entitlement to an offsetting award, as well as separate damages for their reputational harm and attorneys' fees.²⁵ The precise form of the remedy is an issue for the merits phase of the case.
17. Claimants' Rejoinder is organized as follows:
 - a. Section II details the relevant facts that the Tribunal can rely on to decide the preliminary objections;
 - b. Section III explains why Colombia's Article 10.20.4 objections should be dismissed;

²⁰ See ¶¶ 153, 155-157 *infra*.

²¹ See ¶ 154 *infra*.

²² See ¶¶ 159-165 *infra*.

²³ *Id.*

²⁴ See ¶¶ 166-174 *infra*.

²⁵ See ¶¶ 117-130 *infra*.

- c. Section IV states why Colombia's other preliminary objections to jurisdiction and admissibility should be dismissed;
- d. Section V provides why Claimants are entitled to their attorney's fees; and
- e. Section VI includes Claimants' prayer for relief.

II. FACTS RELEVANT TO COLOMBIA'S PRELIMINARY OBJECTIONS

18. On an application on preliminary questions, the TPA requires the Tribunal to accept as true all facts alleged in the Request for Arbitration and gives the Tribunal discretion to rely on undisputed facts.²⁶ Nonetheless, Colombia improperly disputes questions of fact in the Request for Arbitration, and attempts to introduce other irrelevant and disputed facts. Claimants therefore briefly review the relevant facts that must be accepted as true at this stage and the undisputed facts upon which the Tribunal can rely.²⁷

A. Claimants Invested in Colombia

19. Claimants have a long history of investment in Colombia, which began in 1975 with a local engineering company called Tecniavance.²⁸
20. In 2004, Ecopetrol began searching for an international partner for a construction megaproject to modernize and expand an oil refinery in Cartagena from 80,000 to 165,000 barrels a day (the "**Project**").²⁹ The Project was one of the largest and most ambitious undertakings in Colombia over the last several years.³⁰

²⁶ TPA, Art. 10.20.4(c) (**CL-001**).

²⁷ For the avoidance of doubt, any facts not stated herein, but asserted by Colombia, are disputed by Claimants.

²⁸ Request for Arbitration ("**Request**"), December 6, 2019, ¶ 16.

²⁹ Request, ¶ 49. *See also* Respondent's Memorial on Preliminary Objections ("**Resp. Mem.**"), July 1, 2021, ¶¶ 14, 16.

³⁰ Request, ¶ 49. *See also* Resp. Mem., ¶ 14.

making authority and reducing FPJVC to a supporting role assisting Reficar in managing the Project.³⁹ Notwithstanding that change in Claimants' responsibilities, as set forth in Request for Arbitration, "Claimants invested significant amounts of time, capital, personnel, and labor in Colombian territory. All of these acts were done with the expectation that Claimants would return a profit."⁴⁰

24. Although the Contract [REDACTED]⁴¹ FPJVC ultimately worked on the Project until December 31, 2018—or over nine years after first entering into the Contract.⁴² While Reficar and FPJVC initially estimated the value of FPJVC's work at over [REDACTED], the total value of FPJVC's work was ultimately [REDACTED] [REDACTED].⁴³

B. The CGR Initiated Groundless Fiscal Liability Proceedings Against Claimants

25. On December 24, 2015, the Comptroller General of the CGR ordered a special audit of the Project.⁴⁴
26. On May 5 and 6, 2016, Mr. Edgardo Maya, the Comptroller General of the CGR, stated publicly that FPJVC's "management control" of the Project was "shameful" and "embarrassing."⁴⁵ That is, before either the Project or the audit was completed—let alone the fiscal liability proceedings initiated—the CGR showed

³⁹ Request, ¶¶ 56-66, 68-70.

⁴⁰ *Id.* at ¶ 29.

⁴¹ [REDACTED] (C-005).

⁴² [REDACTED] (R-32); Resp. Mem., ¶ 63; Request, ¶ 67.

⁴³ Request, ¶ 54; [REDACTED] (C-005); Resp. Mem., ¶ 53.

⁴⁴ Resp. Mem., ¶ 68.

⁴⁵ Request, ¶ 165.

that it had prejudged the merits against Claimants for their non-existent “management control”.⁴⁶

27. In November 2016, the final report on the special audit of the Project was issued.⁴⁷
28. On March 10, 2017, the CGR commenced fiscal liability proceedings against Claimants and others based on Colombian Law 610 (“**Law 610**”) for alleged acts of gross negligence in the expenditure of Colombia’s funds in connection with the Project.⁴⁸ However, pursuant to the Colombian Constitution and Law 610, only fiscal managers—those with the power to expend or dispose of public funds and assets—can be held liable for fraud or gross negligence that causes damage to the public.⁴⁹ Claimants plainly do not meet the definition of a fiscal manager and any claim that they do is clearly an issue for the merits phase.⁵⁰
29. After a supposed investigation, on June 5, 2018, the CGR issued Auto 773 (the “**CGR Charges**” or “**Auto 773**”), which charged Claimants and others with fiscal liability, alleging that certain “Change Controls” caused “loss of public funds that produced fiscal damage.”⁵¹ The CGR accused FPJVC of contributing in “great measure” to the alleged waste on the Project by not preventing, in some unspecified manner, the decisions that led to Change Control Nos. 2, 3, and 4.⁵² The CGR

⁴⁶ *Id.* at ¶¶ 163-167.

⁴⁷ Resp. Mem., ¶ 69.

⁴⁸ Request, ¶ 76. *See also* Resp. Mem., ¶¶ 122-123.

⁴⁹ Request, ¶ 78.

⁵⁰ *Id.*, ¶¶ 111-117. Colombia has attempted to dispute both the standard for finding fiscal liability pursuant to Law 610 and whether FPJVC met their alternative standard. *See, e.g.*, Resp. Mem., ¶¶ 78-80, 84. However, these assertions cannot be credited by the Tribunal at this stage because they are dispute, and they are also wrong (as Claimants will appropriately elaborate at the merits stage).

⁵¹ Request, ¶¶ 79-80. *See also* Resp. Mem., ¶¶ 125, 127.

⁵² Request, ¶¶ 80, 82.

recommended that FPJVC should be held jointly and severally liable for alleged damages of than US\$2.43 billion.⁵³

30. The CGR Charges were based on the notion that costs in excess of the original budget estimate for the Project, which was prepared by Chicago Bridge & Iron (“**CB&I**”), constituted damages to Colombia.⁵⁴ Those additional costs were reflected in formal written Change Controls that were approved by Reficar and Ecopetrol.⁵⁵ Reficar paid Claimants’ invoices without protest.⁵⁶
31. FPJVC, however, was not involved in approving the Change Controls.⁵⁷ The CGR’s analysis was based on the wrongful assumption that FPJVC’s scope of work had not changed and that, in any event, FPJVC was required, in some unspecified way, to override Reficar’s decisions so that the failure to exercise this non-existent power constituted gross negligence.⁵⁸ Auto 773 ignored the substantial evidence submitted by Claimants during the investigation about FPJVC’s change in role and scope of work.⁵⁹
32. The CGR also failed to articulate in any way what acts or omissions by FPJVC amounted to gross negligence.⁶⁰

⁵³*Id.* at ¶ 85. *See also* Resp. Mem., ¶ 128. Colombia’s characterization of Auto 773 and the standard applied is disputed by Claimants and therefore cannot be relied upon by the Tribunal for the purposes of deciding Colombia’s preliminary objections.

⁵⁴ Request, ¶¶ 14, 82.

⁵⁵ *Id.* at ¶¶ 80-81.

⁵⁶ *Id.* at ¶ 9 n. 8.

⁵⁷ *Id.* at ¶ 81.

⁵⁸ *Id.* at ¶¶ 83-84.

⁵⁹ *Id.* at ¶ 86.

⁶⁰ *Id.* at ¶¶ 86, 159-162.

33. Furthermore, Auto 773's calculation of Colombia's alleged damages was purely speculative, illogical, unreasonable, and arbitrary, and the CGR failed to explain how Claimants caused any of those damages.⁶¹ In effect, Colombia's damage theory was that all those working on the Project were bound by the original CB&I estimate, even though the Project was executed on a reimbursable basis.⁶² Moreover, all damages were assessed jointly and severally, and the CGR admittedly did not even attempt to establish a causal link between the acts or omissions of any party and its claimed damages.⁶³
34. Auto 773 constituted the largest charges brought by the CGR in the history of Colombia, and was consistently reported about in a sensationalized and inflammatory manner.⁶⁴ There is also no precedent for the sheer length of the CGR Charges.⁶⁵ However, the CGR refused to make any accommodations to Claimants that would allow them to effectively defend themselves against the charges.⁶⁶ For example, FPJVC was initially provided ten days to respond to Auto 773, which compromised 4,751 pages, and was ultimately provided only four months as the result of various recusal motions.⁶⁷
35. On August 15, 2018, the CGR issued Auto 0188, dismissing the charges against members of the Ecopetrol Board of Directors, all of whom are Colombian nationals,

⁶¹ *Id.* at ¶¶ 129-131.

⁶² *Id.* at ¶¶ 14, 52, 63, 68-69.

⁶³ *Id.* at ¶¶ 14, 125, 161 n. 82.

⁶⁴ *Id.* at ¶ 87.

⁶⁵ *Id.* at ¶ 88.

⁶⁶ *Id.* at ¶¶ 89-90, 156-157.

⁶⁷ *Id.* at ¶¶ 88-90. *See also* Resp. Mem., ¶ 135.

on the ground that they did not qualify as fiscal managers under Law 610.⁶⁸ Ecopetrol, acting through its board of directors and executives, *did* have decision-making authority and was directly involved in approving the Change Controls.⁶⁹ At the same time, the CGR refused to dismiss the charges against FPJVC, which had no decision-making authority, for the same reason.⁷⁰ In that regard, on January 17, 2020, the PGN, the Office of the Inspector General of Colombia, issued a decision (Auto DEHP 007 de 2020) that endorsed the findings of a report commissioned by Ecopetrol (the “**Jacobs Report**”).⁷¹ The Jacobs Report concluded that FPJVC did not have decision-making authority, and hence could not have been a fiscal manager.⁷²

C. Claimants Attempted To Protect Their Rights In Colombia

36. During the course of the fiscal liability proceedings, Claimants filed three *acciones de tutela* against the CGR alleging violations of Colombian Law.
37. In the first *acción de tutela*, filed on September 14, 2018 (the “**First Tutela**”), Claimants exercised their rights under Colombian law to challenge the CGR’s due process violations.⁷³ Claimants expressly reserved their rights under the TPA and

⁶⁸ Request, ¶¶ 166, 176.

⁶⁹ *Id.* at ¶¶ 5, 12, 13, 81.

⁷⁰ *Id.* at ¶¶ 5, 177. *See also* Counter-Memorial, ¶ 8; Claimants’ Application for Provisional Measures and Emergency Temporary Relief, September 2, 2021, ¶¶ 62-63 (“**Application for Provisional Measures**”) (explaining that Claimants also tried to have the CGR proceeding dismissed against them, but CGR ignored those motions and nonetheless issued the CGR Decision).

⁷¹ Counter-Memorial, ¶ 8; Application for Provisional Measures, ¶¶ 54-59; Auto DEHP 007 de 2020 (C-008). Colombia does not deny that the PGN endorsed the Jacobs Report or conclude that FPJVC did not have decision-making authority, but only claims that the findings were tangential to its main conclusion. Reply, ¶ 33 n. 60.

⁷² Request, ¶¶ 6, 68-70, 117, 135; Proyecto de Expansión de la Refinería de Cartagena Breviario de la Historia y Análisis del Proyecto, Preparando para ECOPETROL S.A., October 2015 (“**Jacobs Report**”) (C-006).

⁷³ *See Acción de Tutela* No. 2018-00182, September 14, 2018 (R-69). Resp. Mem., ¶ 136; Reply, ¶ 25. To be clear, Claimants dispute that a violation of FET was alleged. *See* Section IV.D *infra*.

limited their arguments to Colombian law.⁷⁴ The First Tutela was denied without any ruling on the merits.⁷⁵

38. In the second *acción de tutela*, filed on April 23, 2021 (“**Second Tutela**”), FPJVC objected to the inclusion of two technical reports relating to the CGR’s damages quantification in violation of Colombian law during the fiscal liability proceeding.⁷⁶

The Second Tutela was also denied without a ruling on the merits.⁷⁷

39. On April 26, 2021, the CGR issued the CGR Decision which blamed FPJVC for various budget increases on the Project and found Claimants jointly and severally liable for US\$811 million in damages, plus interest.⁷⁸ Although the CGR Decision was 6,243 pages in length, Claimants were provided only five days to file an appeal.⁷⁹

40. Claimants therefore filed the third *acción de tutela* on April 28, 2021 (“**Third Tutela**”).⁸⁰ FPJVC requested a reasonable period to respond to the findings in the CGR Decision and proposed at least ninety business days.⁸¹ The Third Tutela was denied on the grounds that five days was all that the law allowed.⁸²

⁷⁴ *Acción de Tutela* No. 2018-00182 (**R-69**). Colombia agrees that Claimants did not assert an FET claim in the First Tutela; their argument regarding fork-in-the-road is premised on the false contention that merely mentioning a potential FET violation in the local proceeding is sufficient to trigger the fork in the road pursuant to the TPA. See Section IV.D *infra*.

⁷⁵ See Reply, ¶ 25.

⁷⁶ See *Acción de Tutela* No. 2021-00138, April 23, 2021 (**R-84**); Reply, ¶ 26.

⁷⁷ Reply, ¶ 26.

⁷⁸ Counter-Memorial, ¶ 8; Application for Provisional Measures, ¶¶ 17, 72; Resp. Mem., ¶¶ 148, 150.

⁷⁹ Counter-Memorial, ¶ 8; Application for Provisional Measures, ¶¶ 21, 72; Resp. Mem., ¶¶ 149, 159. That period was later extended to twelve days because of Colombia’s failure to serve a complete copy of the decision on the respondents in that proceeding.

⁸⁰ See *Acción de Tutela* No. 2021-00385, April 28, 2021 (**R-87**).

⁸¹ Counter-Memorial, ¶ 8; Application for Provisional Measures, ¶ 72; Memorial, ¶ 159; Reply, ¶ 27.

⁸² *Acción de Tutela* No. 2021-00385, *Tutela* decision of First Instance, May 14, 2021 (**R-88**); Memorial, ¶ 159 n. 345; Reply, ¶ 27.

D. The CGR Has Begun Collection Efforts

41. On May 7, 2021, Claimants filed their appeal with the *Sala Fiscal Sancionatoria*, the Fiscal Sanctionable Section of the CGR (the “FSS”).⁸³ Claimants were provided only five days to appeal the 6,243-page decision, later extended to twelve days because the CGR failed to serve complete copies of its decision on the respondents.⁸⁴
42. On July 6, 2021, the FSS denied Claimants’ appeal and affirmed the CGR Decision in its entirety.⁸⁵ Accordingly, the CGR Decision is now final, and Claimants have exhausted their administrative remedies.⁸⁶
43. On October 6, 2021, the CGR issued an order beginning the collection proceeding for the CGR Decision.⁸⁷
44. On December 1, 2021, PCI received a “Notice of Persuasive Collection” from the Coactive Collection Unit of the Comptroller General of the Republic in connection with the fiscal liability proceeding.⁸⁸ The notice invited PCI to “pay the obligation determined through the Fiscal Liability Ruling issued by the Delegate Inter-sector Comptroller No. 15 of the Unit of Special Investigations Against Corruption

⁸³ Counter-Memorial, ¶ 8; Application for Provisional Measures, ¶¶ 21, 89; Resp. Mem., ¶ 159; Reply, ¶ 28.

⁸⁴ Counter-Memorial, ¶ 8; Application for Provisional Measures, ¶ 72. Colombia argues there was no due process violation because Claimants timely filed an appeal of the CGR Decision. *See* Reply, ¶ 28. This argument is both absurd and premature. Just because Claimants were able to file an appeal within the prescribed window does not change the fact that Claimants were deprived of the minimal amount of time required to research and draft an adequate response, and Colombia cannot seriously contend that five (or twelve) days is an adequate amount of time to respond to a 6,200+ page decision.

⁸⁵ Counter-Memorial, ¶ 8; Application for Provisional Measures, ¶ 90; Reply, ¶ 29. To be clear, Claimants do not agree with Colombia’s characterization of the FSS decision. *See* Reply, ¶¶ 31-35.

⁸⁶ Counter-Memorial, ¶ 8; Application for Provisional Measures, ¶¶ 21, 90; Reply, ¶ 36.

⁸⁷ Reply, ¶ 54.

⁸⁸ Notice of Persuasive Collection (English Translation), December 1, 2021 (C-025); *see also* Reply, ¶ 54 (noting that a voluntary collection notice was issued on November 29, 2021).

through Auto 749 of April 26 of 2021 . . . in the amount of . . . \$2.940.950.323.482,43 [Colombian Pesos],” as well as default interest.⁸⁹

45. Colombia’s contention that “[v]irtually 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”⁹⁰ conflates Claimants’ rights under Colombian law with its rights under the Treaty. Claimants’ defense in the CGR proceeding raised purely questions of Colombian law, whereas here Claimants have elected to seek relief for violations of Colombia’s international obligations under the TPA before this Tribunal.⁹¹

E. [REDACTED]

46. [REDACTED]
[REDACTED]
[REDACTED].

⁸⁹ Notice of Persuasive Collection (English Translation) (C-025). Colombia argues that Claimants will have several opportunities to “oppose” the CGR’s collection during the forced collection stage. Reply at ¶ 57. As discussed at the hearing on Claimants’ Application for Provisional Measures, while it is true that Claimants will be able to file exceptions at the forced collection stage, their opposition is limited to non-substantive challenges that address clerical or technical issues relating to the collection process, or would require filing a nullity action in the Colombian courts and posting a bond for an amount in excess of the CGR Decision. Claimants therefore dispute that they have any further meaningful opportunity to challenge the CGR decision in Colombia, aside from the nullity action.

⁹⁰ Reply, ¶ 43.

⁹¹ Colombia also uses the reply to continue to argue about Claimants’ Provisional Measures application and insist that Claimants are not required to post a bond in order to request precautionary measures. Reply, n. 82. This argument has no bearing on Colombia’s preliminary objections. Further, as discussed in its Application for Provisional Measures, Claimants do not have to post a bond in order to request precautionary measures to stay enforcement proceedings. Witness Statement of Cesar Torrente, ¶ 22 (CWS-1). [REDACTED]
[REDACTED]
[REDACTED]

47. [REDACTED]

[REDACTED].⁹² The discussion therefore has no impact on the reputational harm that Claimants have suffered. Moreover, even if Colombia could somehow show that there was such an impact, it would go, at most, to the quantum of reputational damages, and not to whether Claimants have pleaded a *prima facie* case.

48. [REDACTED]

[REDACTED] ■ [REDACTED] ■

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

⁹² [REDACTED]

[REDACTED] (R-116). [REDACTED]

[REDACTED]

⁹³ Request, ¶ 87; *see also* 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 ESTRAFAARIOS SOBRECOSTOS DE REFIJAR PASANDO POR EL SAQUEO AL PLAN DE ALIMENTACIÓN ESCOLAR (Imprenta Nacional 2018) (C-12).

⁹⁴ Instead, the CGR Decision based its liability theory on purported gross negligence. *See* Request, ¶¶ 76, 86.

III. COLOMBIA’S PRELIMINARY OBJECTIONS MUST BE DISMISSED

A. Claimants Have Stated Valid Claims, and Colombia’s Application Should be Denied

49. Article 10.20.4 of the TPA provides that “[i]n deciding an objection under this paragraph, the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration.... The tribunal may also consider any relevant facts not in dispute.”⁹⁵ Colombia asserts that Claimants have attempted to “abuse the narrow presumption of truthfulness set forth in Article 10.20.4....”⁹⁶ But this is not so. Claimants have appropriately relied on facts in their Notice of Arbitration or that have occurred since and are not in dispute, as detailed above.⁹⁷

50. Further, as the tribunal in *Kappes v. Guatemala* explained,

[t]his proposition does not mean, however, that in the event of any ambiguity in that document as to what relief Claimants are seeking, the Tribunal must flatly reject any clarifications Claimants subsequently offer on that score. It would be nonsensical to decide a proposition about the legal cognizability of a ‘claim submitted’ while ignoring Claimants’ clarifications about what that claim actually is.⁹⁸

51. Thus, Claimants may clarify or elaborate on their allegations and claims from the Request for Arbitration, and the Tribunal may also consider later facts not in

⁹⁵ See also *Pac Rim Cayman LLC v. Republic El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Objections under CAFTA Articles 10.20.4 and 10.20.5, August 2, 2010, ¶ 87 (RL-036) (“The procedure under CAFTA Article 10.20.4 mandates the tribunal to assume the relevant factual allegations made by the claimant to be ‘true’, without any express qualification....”).

⁹⁶ Reply, ¶ 80.

⁹⁷ Indeed, Colombia’s admonition in this regard is rather audacious given how many outside facts and issues Colombia has attempted to inappropriately raise at this preliminary objections stage.

⁹⁸ *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43 (DR-CAFTA), Decision on Respondent’s Preliminary Objections, March 13, 2020, ¶ 117 (RL-176).

dispute, such as the finality of the CGR Decision, the means by which the CGR attempted to justify its result, and the amount awarded.

52. The tribunal in *Pac Rim v. El Salvador*—an award quoted at several points by Colombia⁹⁹—explained that the standard for reviewing the allegations in the Notice of Arbitration is not formalistic:

This ability of a claimant to cure a notice of arbitration by pleading further factual allegations confirms that the procedure is not intended to be a technical pleading exercise where mere linguistic form should prevail over substance to the detriment of an ill-pleaded notice of arbitration.¹⁰⁰

53. Nevertheless, Colombia insists on a formalistic approach, suggesting that the Tribunal should ignore undisputed facts in their entirety if they occurred after the Request for Arbitration.¹⁰¹ Colombia’s position contravenes the accepted standard of review for preliminary objections, as well as the accepted principle that a tribunal should take account of developments since the case was commenced.

54. Furthermore, contrary to Colombia’s assertions,¹⁰² Claimants are not required at this stage to prove their allegations, as clearly explained in *Pac Rim v. El Salvador*:

The initial pleading cannot and is not required to be a complete documentary record of the claimant’s factual evidence and legal argument.

...

Therefore no proof is required at this stage. On most points a mere assertion in the request will suffice and the information thus given

⁹⁹ Reply, ¶¶ 79 n. 148, 80 n. 149, 238 n. 407.

¹⁰⁰ *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Objections under CAFTA Articles 10.20.4 and 10.20.5, ¶ 89 (RL-036). See also *id.* at ¶ 99 (“a notice of arbitration, at the very start of the arbitration, is not therefore to be judged by a formalistic standard more appropriate to a later pleading.”) and ¶ 105 (“the Tribunal approaches the procedure under CAFTA Article 10.20.4 tempered by a lack of formalism, with an emphasis on substance and practical common-sense.”).

¹⁰¹ Reply, ¶¶ 85-87.

¹⁰² See, e.g., *id.* at ¶¶ 83, 204.

may be developed at a later stage[.] By assertion, the Tribunal assumes these authors to mean an appropriate statement specifying the factual and legal bases of the claim, without evidential proof.¹⁰³

55. Indeed, as further explained in that case:

[t]he procedure under CAFTA Article 10.20.4 is clearly intended to avoid the time and cost of a trial and not to replicate it. *To that end, there can be no evidence from the respondent contradicting the assumed facts alleged in the notice of arbitration; and it should not ordinarily be necessary to address at length complex issues of law, still less legal issues dependent on complex questions of fact or mixed questions of law and fact.*¹⁰⁴

56. By attempting to dispute alleged facts, raising issues of fact and law, and attempting to turn these preliminary objections into a mini trial based on an incomplete paper record with several lengthy and misleading briefs, it is Colombia that contravenes the requirements and purpose of the TPA and the preliminary objections mechanism it has invoked.

57. Perhaps the most glaring example of this abuse of the preliminary objections procedure is Colombia's failure to acknowledge that it bears the burden of proof regarding its objections: "At all times during this exercise under CAFTA Articles 10.20.4 and 10.20.5, *the burden of persuading the tribunal to grant the preliminary objection must rest on the party making that objection, namely the respondent.*"¹⁰⁵

As to *Pac Rim* tribunal explained:

In context, reversing the negative approach in Article 10.20.4, the word [may] recognises a position where a tribunal considers that an award could eventually be made upholding the claimant's claim or,

¹⁰³ *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Objections under CAFTA Articles 10.20.4 and 10.20.5, ¶¶ 96, 98 (quotes omitted) (**RL-036**).

¹⁰⁴ *Id.* at ¶ 112 (emphasis added).

¹⁰⁵ *Id.* at ¶ 111 (emphasis added). *See also id.* at ¶ 114 ("Lastly, as already indicated, as the party invoking these procedures it is of course for the Respondent to discharge the burden of satisfying the Tribunal that it should make a final decision dismissing the relevant claim or claims pleaded by the Claimant in these arbitration proceedings.").

equally, where the tribunal considers that it was premature at this early stage of the arbitration proceedings to decide whether or not such an award could not be made.

In other words, returning to the negative language of Article 10.20.4, to grant a preliminary objection, a tribunal must have reached a position, both as to all relevant questions of law and all relevant alleged or undisputed facts, that an award should be made finally dismissing the claimant's claim at the very outset of the arbitration proceedings, without more. Depending on the particular circumstances of each case, there are many reasons why a tribunal might reasonably decide not to exercise such a power against a claimant, even where it considered that such a claim appeared likely (but not certain) to fail if assessed only at the time of the preliminary objection.¹⁰⁶

58. As emphasized by many other tribunals, the Tribunal should not consider the merits of a claim at this stage. It only needs to be satisfied that the claim, as stated by Claimants, fits into the framework of the arbitration agreement, here the TPA.¹⁰⁷
- In sum, “[t]he threshold is thus put quite high: the claim must be deemed at the outset of the arbitration proceedings ‘certain—and not simply ‘likely’—to fail.’”¹⁰⁸
- As discussed further below, Colombia falls short of meeting that standard.

¹⁰⁶ *Id.* at ¶¶ 109-110. See also e.g., *Kappes v. Guatemala*, Decision on Respondent's Preliminary Objections, ¶ 118 (RL-176) (accepting Claimants' further clarifications to find a claim to be valid as plead).

¹⁰⁷ See, e.g., *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Objections under CAFTA Articles 10.20.4 and 10.20.5, ¶ 56 (RL-036) (“As will appear below, the Tribunal does not otherwise address any other procedural issues or any of the merits, particularly whether or not any of the Claimant's pleaded claims are well-founded in law or fact. Apart from the Tribunal's decision on these limited issues under CAFTA Articles 10.20.4 and 10.20.5, it should not be assumed that the Tribunal has made any decision on the merits....”); see also *id.* at ¶ 244 (noting a concern by the tribunal not to prejudge or even be seen to prejudge the merits); *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, ¶¶ 46-49 (RL-174) (recounting in agreement other awards stating this standard); *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, September 25, 1983, 1 ICSID Reports 389, ¶ 35 (CL-065); *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. Arb/94/2, Decision on Jurisdiction, Dec. 24, 1996, ¶ 46 (CL-066).

¹⁰⁸ Michele Potestà & Marija Sobat, *Frivolous Claims in International Adjudication: A Study of ICSID Rule 41(5) and of Procedures of Other Courts and Tribunals to Dismiss Claims Summarily*, 3 J. Int. Disp. Settl. 137 (2012), p. 22 (CL-067).

B. The Tribunal Should Not Rely on Respondent’s Non-Disputing Party Submissions

59. Colombia refers extensively to submissions by non-disputing parties in other proceedings. Of the more than 20 non-party submissions by the United States cited by Colombia, only three refer to the TPA.¹⁰⁹ Article 31(3) of the Vienna Convention, however, refers to the subsequent agreement or subsequent practice of the relevant treaty.¹¹⁰ Therefore, by definition, a non-party’s interpretation of a different treaty does not establish the subsequent agreement or subsequent practice of the TPA.
60. Even the authorities Colombia proffers state that these non-party submissions *may* at most be considered “subsequent practice”—they are not evidence of “subsequent agreement.”¹¹¹ The weight of that subsequent practice for treaty interpretation

¹⁰⁹ *Angel Manuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/16, Submission of the United States of America, February 26, 2021 (**RL-054**) (regarding the Colombia-US TPA); *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/05, Submission of the United States of America, May 1, 2020 (same) (**RL-206**); *Alberto Carrizosa Gelzis et al. v. Republic of Colombia*, PCA Case No. 2018-56, Submission of the United States of America, May 1, 2020 (same) (**RL-207**).

¹¹⁰ Vienna Convention of the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Article 31(3)(a) (**RL-053**) (the “**Vienna Convention**”) (“any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”) (Emphasis added); *Id.* at Article 31(3)(b) (“any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”) (Emphasis added).

¹¹¹ *Mobil Investments Canada Inc. v. Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018, ¶ 159 (**RL-268**) (holding that “concordant submissions by the three NAFTA Parties to different Chapter Eleven tribunals” could be considered under Article 31(3)(b) of the Vienna Convention); *Kappes v. Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent’s Preliminary Objections, ¶ 156 (**RL-176**) (holding 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 relevant under Article 31(3)(b) of the Vienna Convention); *Cases regarding the border closure due to BSE concerns (The Canadian Cattlemen for Fair Trade) v. United States of America*, UNCITRAL, Award on Jurisdiction, January 28, 2008, ¶186 (**RL-269**) (holding that the following was evidence of subsequent practice, although not of subsequent agreement: “[Respondent’s] own statements on the issue, before this Tribunal and elsewhere; (...) Mexico’s Article 1128 submission in this arbitration; and (...) Canada’s statements on the issue, first in implementing the NAFTA, and, later, in its counter-memorial in the Myers case.”); *William Ralph Clayton, et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, January 10, 2019, ¶ 379 (**RL-270**) (holding that “the consistent practice of the NAFTA Parties in their submissions before

depends on “whether and how it is repeated.”¹¹² Therefore, in order to show subsequent practice, Colombia must prove that both the US and Colombia repeatedly interpret the TPA in a consistent way, which it cannot do.¹¹³

61. Finally, a submission by a non-disputing party is nothing more than an amicus submission, and should be given only the weight that its logic and reasoning justify.¹¹⁴ In weighing such submissions, the Tribunal should keep in mind that a non-disputing State party is not disinterested, but is necessarily concerned about facing investor claims.¹¹⁵

Chapter Eleven tribunals” could be considered “subsequent practices.”). The other authorities offered by Colombia do not advance its case at all. In the page after the one cited by Colombia, Professor Gazzini admits that: “It remains to be seen whether such an agreement may result from the concordant interpretation of any given provision contained in documents filed by the disputing party and the submission of the non-disputing party or parties to the relevant treaty.” Tarcisio Gazzini, *INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES* (Hart Publishing 2016), p. 195 (RL-271). The Tribunals in *Commerce Group Corp. and San Sebastian Gold Mines, Inc.* (RL-223), *Bayview Irrigation District et al. v. United Mexican States* (RL-272), and *United Parcel Service of America Inc. v. Government of Canada* (RL-39) did not even discuss article 31(3) of the Vienna Convention and its relation to non-party submissions.

¹¹² International Law Commission, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties*, 2 Yearbook of the Int’l L. Comm, Part Two (2018), 3-4 (RL-288). See also *Clayton v. Canada*, PCA Case No. 2009-04, Award on Damages, ¶ 379 (referring to *consistent practice*) (RL-270); *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, May 25, 2006, ¶ 113 (CL-257) (holding that practice must be “concordant, common and consistent” to be relevant).

¹¹³ Colombia has only alleged a *single* instance of common practice between itself and the U.S., which is its submissions in this case self-servingly citing to U.S. non-party submissions with approval. That is not sufficient. See note 112 *supra*.

¹¹⁴ *Telefónica v. Argentina*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, ¶ 111 (CL-257) (holding that “[t]he distinct, independent positions taken by the two Contracting States as respondents in different arbitral proceedings, moreover not involving the other Contracting State, does not amount to an “agreement”, in any one of the manifold forms admitted by international law.”); *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005, ¶ 47 n. 12 (CL-258) (rejecting the proposition that “an argument made by a party in the context of an arbitration reflects practice establishing agreement between the parties to a treaty within the meaning of Article 31(3)(b) of the Vienna Convention.”).

¹¹⁵ Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (OUP 2012), p. 35 (CL-074) (“[A] mechanism whereby a party to a dispute is able to influence the outcome of judicial proceedings, by issuing an official interpretation to the detriment of the other party, is incompatible with the principles of a fair procedure and is hence undesirable.”); Kendra Magraw, *Investor-State Disputes and the Rise of Recourse to State Party Pleadings As Subsequent Agreements or Subsequent Practice under the Vienna Convention on the Law of Treaties*, 30 ICSID REV. 142, 147 (2015) (CL-259) (“Especially in the investor–

C. Colombia Has Failed To Prove That There Is No Basis For Claimants' Allegations

1. Colombia has not proven there is no basis for Claimants' fair and equitable treatment claim

- a. The minimum treatment standard of treatment has evolved past *Neer*

62. Article 10.5 of the TPA provides that for FET Colombia must provide “treatment in accordance with customary international law” and further clarifies that “paragraph 1 prescribes the customary international law minimum standard of treatment of aliens... and do[es] not create additional substantive rights.”¹¹⁶ Annex 10-A then further states that:

The Parties confirm their shared understanding that ‘customary international law’ generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

63. In the Counter-Memorial, Claimants explained that the international standard for fair and equitable treatment has evolved past *Neer*.¹¹⁷ Indeed, many have suggested that the evolution in the *Neer* standard has rendered the difference between the minimum standard of treatment and an autonomous FET standard to be largely academic.¹¹⁸

State realm, the reliability of SPPs are called into question because States have a ‘dual role’ as both Parties and parties to a dispute.... Treaty Parties are therefore able to limit their liability and appear as a respondent in the same proceeding—or, as one Tribunal remarked, ‘be the judge in [their] own cause.’”).

¹¹⁶ TPA, Art. 10.5, p. 1-2 (CL-001).

¹¹⁷ Counter-Memorial, ¶¶ 46-50.

¹¹⁸ *Id.* at ¶¶ 44-45.

64. Nonetheless, Colombia insists that the minimum standard of treatment remains frozen as articulated by *Neer* in 1926.¹¹⁹ Colombia also argues that because the TPA states that “fair and equitable treatment” means the “minimum standard of treatment to aliens under customary international law” then there must be a distinction between the minimum standard and the autonomous standard,¹²⁰ though Colombia never articulates what that difference might be.¹²¹ Colombia has failed to carry its burden to prove that *Neer* as originally expressed in 1926 sets the applicable standard, and that Claimants’ allegations do not meet it.
65. Even the authorities cited by Colombia most often cite and follow the minimum standard of treatment expressed in *Waste Management II*, which describes the minimum standard of treatment follows, as if it were describing this case:

[A]s this survey shows, despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that

¹¹⁹ Reply, ¶¶ 130-134.

¹²⁰ *Id.* at ¶¶ 128-129.

¹²¹ A debate regarding the proper customary international law standard to apply to Claimants’ FET case is also not an appropriate matter to be decided as a preliminary question. *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Objections under CAFTA Articles 10.20.4 and 10.20.5, ¶ 112 (RL-036). It is the kind of complicated question of law that should be decided on the merits, taking into account a fully developed record. See, e.g., G. Mayeda, *Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties*, 41(2) J. OF WORLD TRADE 274, 274 (2007) (RL-299) (noting that there is “considerable debate” about the appropriate FET standard).

the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.¹²²

66. Thus, the overwhelming majority of cases that have considered the appropriate minimum standard of treatment for treaty provisions akin to Article 10.5 have endorsed the *Waste Management II* standard and rejected the applicability of *Neer*.¹²³ As the tribunal¹²⁴ stated in *Eco Oro v. Colombia*:

Colombia correctly accepts that the Tribunal is not rigidly bound by the standard set out in *Neer*, and it is the Tribunal's view that the standard today is broader than that defined in the *Neer* case.¹²⁵

¹²² *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004 ¶ 98 (RL-096). See Reply, ¶ 131 n. 219 and 221. *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada (I)*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, ¶ 152(2) (RL-171) (“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 to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety.”); see also *id.* at ¶ 141-151 (reviewing case law that all cited *Waste Management II* with approval); *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009 ¶¶ 281-285 (RL-070) (discussing the evolution of customary international law and ultimately following the *Waste Management II* standard); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶ 559 (RL-040) (citing *Waste Management II* with approval as “the most comprehensive review” of customary international law); *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006, ¶ 194 (RL-225) (citing to, among others, *Waste Management II* for the proposition that the “content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law.”); see also *id.* (noting that customary law has evolved since *Neer*).

¹²³ See, e.g., *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 348 (CL-0XX); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, ¶¶ 370, 372 (CL-0XX); *International Thunderbird v. Mexico*, UNCITRAL, Award, ¶ 194 (RL-225); *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award, November 15, 2004, ¶ 95 (CL-211).

¹²⁴ Colombia suggests that “Claimants go so far as to misrepresent a Colombian filing in the *Eco Oro* case”. Reply, ¶ 127 n. 212. It would be impossible for Claimants to have reviewed and then misrepresented what Colombia agrees is a non-public filing. Claimants’ papers accurately describe how the tribunal in that case described Colombia’s filing.

¹²⁵ *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, ¶ 744 (CL-050).

67. Colombia was right to make that concession then, and is wrong to attempt to resurrect the *Neer* standard now. Claimants have sufficiently pleaded allegations that meet this standard.¹²⁶
68. Indeed, the only authority cited by Colombia that concluded the standard is still based on *Neer* also found that what constitutes a violation of the *Neer*-based standard had evolved over time.¹²⁷ There is no basis to apply the antiquated FET standard as advocated by Colombia.¹²⁸
69. Finally, Colombia insists that legitimate expectations are not included in the minimum standard of treatment under customary international law or, even if they are, Claimants have not alleged a breach of their legitimate expectations.¹²⁹ However, as the tribunal stated in *Waste Management*, “[i]n applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”¹³⁰ Similarly, *Glamis Gold* and *International Thunderbird*—both relied on by Colombia—recognized that

¹²⁶ Request, Section V(A).

¹²⁷ *Glamis Gold v. USA*, UNCITRAL, Award, ¶¶ 612-613 (**RL-040**) (“The Tribunal finds apparent agreement that the fair and equitable treatment standard is subject to the first type of evolution: a change in the international view of what is shocking and outrageous.”). Colombia also cites to *Genin v. Estonia*, a decision from 2001 which articulates a standard similar to *Neer*, but does not expressly agree with the *Neer* standard. See Reply, ¶ 133 n. 222; *Genin v. Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, ¶ 196 (**CL-196**). The other two cases cited by Colombia in that footnote ultimately endorsed the *Waste Management II* standard. See note 123 *supra*. None of the secondary material cited by Colombia discusses the practice of States, but rather each author’s own opinion on the minimum standard of treatment, which cannot form the basis for customary international law. See Reply, ¶ 133 n. 223; TPA, Annex 10-A (**CL-001**). Similarly, Colombia’s citation to other treaties that have defined FET as equivalent to the minimum standard of treatment for aliens does not prove that the minimum standard of treatment is the same as that expressed in *Neer*. See *id.* at ¶ 133 n. 200 and 221. Finally, Colombia’s citation to self-interested State submissions is equally unavailing. Counter-Memorial, ¶ 1.

¹²⁸ That being said, Claimants maintain that Colombia’s due process violations during the CGR proceedings are sufficiently egregious to meet the *Neer* standard as well. See Counter-Memorial at IV(A).

¹²⁹ Reply, ¶¶ 135-139.

¹³⁰ *Waste Management v. Mexico (II)*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (**RL-096**).

legitimate expectations can form the basis of an FET breach.¹³¹ As have other tribunals when considering whether there has been a breach of the minimum standard of fair and equitable treatment.¹³² In the one ICJ case cited by Colombia,¹³³ the ICJ found that the concept of “legitimate expectations” did not exist between States.¹³⁴ It does not follow from the ICJ opinion that such a concept does not exist between foreign investors and States.

70. Here, Claimants have sufficiently alleged a breach of their legitimate expectations that Colombia would apply its law imposing fiscal managers only to those who fall within its terms, that it would honor the limitations on liability in that law, that it would adhere to minimum standards of due process in any proceeding under that law, that it would not retroactively amend its law to sweep Claimants within a broader definition of fiscal managers, and that any damage would be assessed in a rational and transparent manner.¹³⁵
71. Colombia’s objection that Claimants have relied on the wrong standard for FET, and do not meet the standard set out in *Neer*, should be rejected.

¹³¹ *Glamis Gold v. USA*, UNCITRAL, Award, ¶¶ 620-621 (**RL-040**); *International Thunderbird v. Mexico*, UNCITRAL, Award, ¶ 147 (**RL-225**) (“Having considered recent investment case law and the good faith principle of international customary law, the concept of ‘legitimate expectations’ relates, within the context of the NAFTA framework, to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.”).

¹³² *See, e.g., Eco Oro v. Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, ¶¶ 804, 820 (**CL-050**) (finding Colombia breached Article 805 by acting in an arbitrary and inconsistent manner and breaching Claimant’s legitimate expectations).

¹³³ Reply, ¶ 135.

¹³⁴ *See Mobil Investments v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, ¶¶ 160-162 (**RL-171**).

¹³⁵ Request, Section V(A)(4).

b. Fair and equitable treatment applies to investors, not just investments

72. Colombia maintains that Article 10.5 applies only to investments, rather than investors.¹³⁶ However, Colombia has no meaningful rebuttal to the fact that its position was considered and rejected in both *Lion v. Mexico* and *Bahgat v. Egypt*.¹³⁷ Other NAFTA tribunals have agreed with these holdings when analyzing NAFTA Article 1105, which is similar to Article 10.5. In *GAMI v. Mexico*, for example, the tribunal held that “a government’s failure to implement or abide by its own law in a manner adversely affecting a foreign *investor* may but not necessarily lead to a violation of Article 1105.”¹³⁸ In *Chemturra v. Canada*, the tribunal similarly noted that “Article 1105 of NAFTA seeks to ensure that *investors* from NAFTA member states benefit from regulatory fairness.”¹³⁹ In *Merrill & Ring v. Canada*, the tribunal agreed that “Article 1105(1) provides for the treatment of another Party’s *investors* ‘in accordance with international law’.”¹⁴⁰ In *S.D. Myers v. Canada*, the tribunal stated “that a breach of Article 1105 occurs only when it is shown that an

¹³⁶ Reply, ¶¶ 113-125.

¹³⁷ Counter-Memorial, ¶¶ 37-39. Colombia argues that the tribunal in *Bahgat v. Egypt* found the majority of actions to be taken against the investment and therefore this decision is irrelevant. See Reply, ¶ 115 n. 194. However, just because the tribunal considered that “[i]n any event, there is ample evidence of measures that were direct at the investment” does not mean that the tribunal did not also first explicitly reject the position advocated by Colombia. *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award, December 23, 2019, ¶¶ 183, 185-186 (CL-052). Similarly, Colombia has no response to the holding in *Lion v. Mexico*, except to point out that a partner from Claimants’ law firm with no connection to this case was part of Mexico’s team and to argue that the decision was wrongly decided. Reply, ¶¶ 118, 122. However, the *Lion v. Mexico* decision is based on well-established NAFTA precedent that has consistently rejected Colombia’s interpretation. See *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, Sept. 20, 2021, ¶¶ 356-58 (CL-068).

¹³⁸ *Gami v. Mexico*, UNCITRAL, Final Award, ¶ 91 (CL-211) (emphasis added).

¹³⁹ *Chemturra Corporation v. Government of Canada*, UNCITRAL, Award, Aug. 2, 2010, ¶ 179 (CL-212) (emphasis added).

¹⁴⁰ *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1 (NAFTA), Award, March 31, 2010¶ 183 (RL-105) (emphasis added).

investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”¹⁴¹ In fact, Annex 10-A of the TPA further clarifies that “[w]ith regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international principles *that protect the economic rights and interests of aliens.*”¹⁴²

73. Colombia’s citation to *Grand River v. United States* does not help its position because the tribunal there declined to rule that Article 1105 was limited to only protecting investments:

As worded in the Claimants’ Memorial, the claim emphasized their treatment as investors, not the treatment of their investments. This suggests a potential issue with regard to Article 1105’s limitation to ‘investments’, but not ‘investors.’ This issue was briefly raised, but was not pursued by the Parties. *In light of the Tribunal’s other findings, it need not make any decisions in this regard.*¹⁴³

74. Tribunals that have considered the same language as Article 10.5 of the TPA have overwhelmingly concluded that the provision provides protections to investors.¹⁴⁴

This is also in accordance with the FTC Interpretation Note which equates the

¹⁴¹ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000 ¶ 263 (RL-112). See also *Waste Management v. Mexico (II)*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 95 (RL-096) (endorsing the view of the *S.D. Myers v. Canada* tribunal).

¹⁴² TPA, Annex 10-A (CL-001) (emphasis added).

¹⁴³ *Grand River Enterprises Six Nations, LTD., et al. v. United States of America*, UNCITRAL, Award, January 12, 2011, ¶ 206 (RL-101).

¹⁴⁴ Colombia’s citation to the two cases it was able to find, which Claimants have already explained are inapposite, does not change that conclusion. See Counter-Memorial, ¶ 40; Reply, ¶¶ 123-124. It is also curious that Colombia accuses Claimants of relying on precedent with differently worded provisions (they do not) when *Belokon v. Kyrgyzstan*, one of only two cases on which Colombia relies, includes a differently worded provision. *Valeri Belokon v. Kyrgyz Republic*, UNCITRAL, Award, October 24, 2014, ¶ 223 (RL-058). Colombia’s other authorities are entirely irrelevant because, as Colombia itself concedes, they only relate to MFN provisions. See Reply, ¶¶ 124 n. 208.

protections of Article 1105(1) to “the customary international law minimum standard of treatment of aliens....”¹⁴⁵

75. *Bahgat v. Egypt* explains why Colombia’s proposed distinction is artificial and unsupportable: “Measures against an investor or the management, or measures deteriorating circumstances which were favourable for the investment, may equally have a negative impact upon the investment.”¹⁴⁶ This reasoning is clearly applicable here given that the measures taken by Colombia against Claimants have put the entirety of their investment, and the rest of their business, in jeopardy. Indeed, it is not at all clear how it would be possible to provide investments with FET without affording similar protection to the owners of those investments.

76. Colombia’s contention that Article 10.5 only protects investments and not investors should be dismissed.

c. Claimants’ fair and equitable treatment claim includes, but is not solely for denial of justice

77. In the Request for Arbitration, Claimants alleged several breaches of the FET standard. Specifically, Claimants explained that the CGR had “improperly initiated a fiscal liability proceeding against Claimants... causing serious and substantial damage to Claimants even in advance of a final ruling.”¹⁴⁷ Claimants alleged that the CGR had commenced fiscal liability proceedings against Claimants without any specific allegations or evidence and contrary to Colombia law.¹⁴⁸ Claimants further

¹⁴⁵ North American Free Trade Agreement (NAFTA) Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, available at <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng> (CL-260). Counter-Memorial, ¶ 39.

¹⁴⁶ *Bahgat v. Egypt*, PCA Case No. 2012-07, Final Award, ¶ 185 (CL-052).

¹⁴⁷ Request, ¶ 2.

¹⁴⁸ *Id.* at ¶¶ 76-79.

alleged that the CGR Charges ignored contrary evidence and disregarded Colombian law.¹⁴⁹ Claimants also alleged that Claimants’ due process rights had been violated because they were not provided sufficient time to respond to the Charges and because the outcome of the CGR proceedings was predetermined.¹⁵⁰ Claimants stated that “CGR’s exercise of jurisdiction over FPJVC [was] a grave misapplication of Colombia law [in and of itself] that constitutes a denial of justice and a breach of the fair and equitable treatment standard.”¹⁵¹ In sum, Claimants not only stated a denial of justice claim, but also alleged other violations of Article 10.5 for Colombia’s failure to provide fair and equitable treatment throughout the CGR proceedings.

78. The proceedings since then have further violated the FET standard, for example by retroactively applying a statute expanding the definition of fiscal manager, finding that claimants engaged in acts of gross negligence without the slightest proof, failing even to attempt to explain a causal link between Claimants’ alleged conduct and any element of damages and, as was the case in *Glencore International v. Colombia*, adopting a completely irrational theory of damages.¹⁵²
79. Colombia’s only response to Claimants’ FET claim—other than the part concerning denial of justice—is that “none of Claimants’ allegations are likely to violate the extremely high [minimum] standard [of treatment]”, based on *Neer*, that Colombia

¹⁴⁹ *Id.* at ¶¶ 80, 82-87.

¹⁵⁰ *Id.* at ¶¶ 2, 88-92.

¹⁵¹ *Id.* at ¶ 12. *See also id.* at ¶ 97 (“The CGR’s unlawful exercise of jurisdiction and assertion of fiscal liability charges against FPJVC without any colorable legal or factual basis, in contravention of both Colombian law and the Contract, has (1) denied FPJVC justice, (2) deprived it of due process, and (3) frustrated its legitimate expectations, all in violation of the TPA’s Minimum Standard of Treatment.”).

¹⁵² *See* Sections II.B-D *supra*.

claims is applicable.¹⁵³ As discussed above, that is not the applicable standard for minimum standards of treatment.¹⁵⁴ Moreover, Colombia has the burden to show that Claimants' FET claim cannot succeed as alleged and has failed to do so.¹⁵⁵ Its overheated rhetoric to the effect that its conduct may have been bad, but not bad enough, does not begin to approach that standard.

80. Ignoring the bulk of Claimants' case, Colombia focuses on the denial of justice claim and insists that Claimants have also failed to state a claim because "[a]n 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."¹⁵⁶ Although Colombia alleges that an administrative act cannot be the basis for any treaty breach, Colombia only articulates its theory how an administrative act, standing alone, is purportedly not sufficient for a denial of justice claim because, Colombia claims, local judicial remedies have not been exhausted.¹⁵⁷

81. To the extent that Colombia attempts to read into the TPA a general exhaustion of local remedies requirement, no such requirement exists under the TPA.¹⁵⁸ Indeed, Article 10.5(2)(a) states that "'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal

¹⁵³ Reply, ¶ 149.

¹⁵⁴ See Section III.C.1.a. *supra*.

¹⁵⁵ See ¶¶ 57-58 *supra*.

¹⁵⁶ Reply, ¶ 95. See also *id.* at ¶¶ 141-150.

¹⁵⁷ *Id.* at ¶¶ 96-101, 109.

¹⁵⁸ See generally TPA (CL-001).

systems of the world[.]” It does not say that this obligation is exclusive or has any effect on other violations of the TPA. Colombia also fails to explain how its insistence on the exhaustion of judicial remedies is consistent with its claim that any resort to the Colombian courts would be fatal to Claimants’ case.¹⁵⁹

82. Colombia’s objection regarding the denial of justice claim similarly fails. Colombia’s only argument is that Claimants have failed to state a claim of Article 10.5.2(a) because the CGR proceeding is not an “administrative adjudicatory proceeding.”¹⁶⁰ Colombia argues that the Spanish version of the TPA makes clear that the reference to “administrative adjudicatory proceeding” is a reference to a judicial proceeding before the administrative adjudicatory jurisdiction.¹⁶¹

83. However, the Spanish and English versions of the TPA are equally authoritative.¹⁶² The English text makes clear that the CGR proceedings qualifies. The meaning of the term “administrative adjudicatory proceeding” in English is plain: an adjudicatory proceeding before an administrative body.¹⁶³ The CGR proceeding

¹⁵⁹ Reply, ¶ 145.

¹⁶⁰ Reply, ¶ 98.

¹⁶¹ *Id.*

¹⁶² TPA, Art. 23.6 (CL-001) (“The English and Spanish texts of this Agreement are equally authentic.”).

¹⁶³ *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections, May 31, 2016, ¶¶ 251, 253, 262 (RL-041) (interpreting “administrative adjudicatory proceeding” as a proceeding before an administrative adjudicator that provides due process and is subject to review in court); *Indep. Producers Grp. V. Librarian of Cong.*, 792 F.3d 132, 134, 139 (D.C. Cir. 2015) (CL-213) (referring to the Copyright Royalty Board review process as an “administrative adjudicatory proceeding”); *Peterson v. Johnson*, 714 F.3d 905, 914 (6th Cir. 2013) (CL-214) (finding that a major misconduct hearing was an “administrative adjudicatory proceeding”); *New York Civ. Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 300 (2d Cir. 2011) (CL-215) (“More recently, *Federal Maritime Commission v. South Carolina State Ports Authority* concluded that states retained the sovereign immunity they enjoyed in court when they were subject to an administrative adjudicatory proceeding that ‘walks, talks, and squawks very much like a lawsuit.’”); 2 Fla. Jur. Admin. Law § 273 (CL-216) (“The parties to an administrative adjudicatory proceeding are entitled to a fair hearing before an impartial tribunal and to a determination made without bias, hostility, or prejudice.”); 2 N.Y. Jur. Admin. Law § 259 (CL-217) (“A party to an administrative adjudicatory proceeding may waive its right to cross-examine witnesses, such as by

fits this definition given that, as Colombia has itself emphasized, Claimants had an opportunity to submit evidence and appeal the CGR Decision.¹⁶⁴ There is nothing in the English text that indicates such a proceeding is judicial only. Other tribunals interpreting the same language have considered that this is not a reference to judicial proceedings.¹⁶⁵ Indeed, if the provision is to be interpreted as such, then the reference to “civil proceedings” would appear to be redundant.¹⁶⁶

84. To the extent there is any doubt, Claimants’ interpretation should prevail. Article 33(3) of the Vienna Convention states that “[t]he terms of the treaty are presumed to have the same meaning in each authentic text.” Claimants’ interpretation can have the same meaning in English and Spanish, but Respondent’s interpretation only makes sense, if at all, in Spanish.

inaction or by refusing to participate in the proceeding.”); 9 CRR-NY 4.131 (1989) (**CL-218**) (Ordering all administrative agencies in New York to prepare adjudication plans for administrative adjudication); Consumer Financial Protection Bureau, *Administrative adjudication proceedings*, <https://www.consumerfinance.gov/administrative-adjudication-proceedings/> (accessed Feb. 9, 2022) (**CL-219**) (“Administrative adjudication proceedings are formal adversarial proceedings conducted by an administrative law judge, who issues a recommended decision to the CFPB direct. The director issues a final decision, either adopting or modifying the administrative law judge’s recommended decision.”); Harris G. (2016) *Administrative Adjudications*, in Farazmand A. (eds) *Global Encyclopedia of Public Administration, Public Policy, and Governance*. Springer, Cham., April 22, 2016, https://doi.org/10.1007/978-3-319-31816-5_953-1 (**CL-220**) (“Administrative adjudication refers to federal and state administrative agencies’ use of judicial powers granted to them by the legislative branch.”).

¹⁶⁴ Resp. Mem. at ¶ 101, 105-107; Reply at ¶ 27-28.

¹⁶⁵ *Corona Materials v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections, ¶ 251 (**RL-041**) (“Article 10.5.2(a)’s treatment of denial of justice focuses on different forms of ‘adjudicatory proceedings’, be they criminal, civil or administrative. ...Adjudicatory proceedings that do fall within the scope of DR-CAFTA Article 10.5.1 are governed by ‘the principle of due process embodied in the principal legal systems of the world.’” (emphasis in original)). See also *id.* at ¶ 253 (“administrative adjudicatory proceedings typically do not take place in a legal vacuum; the act of such adjudicators are typically reviewable in the local courts”).

¹⁶⁶ T. Gazzini, *INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES*, p. 170 (**RL-271**) (“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.”).

85. However, even if the terms could not be reconciled in English and Spanish, Article 33(4) of the Vienna Convention provides that
- [e]xcept where a particular text prevails..., when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.
86. The TPA’s stated purpose includes, *inter alia*, (i) promoting “broad-based economic development”, (ii) ensuring “a predicable legal and commercial framework for business and investment,” and (iii) promoting “transparency in international trade and investment.”¹⁶⁷ All of these objects of the TPA are better served by Claimants’ interpretation of Article 10.5.2(a) which ensures that foreign investors’ rights are not infringed in administrative adjudicatory proceedings as well. Accordingly, Article 10.5.2(a) should correctly be interpreted as allowing for a denial of justice claim resulting from an administrative adjudicatory proceeding such as the CGR proceeding that the parties agree is now final.¹⁶⁸
87. Moreover, Colombia’s interpretation is entirely at odds with the purpose of Article 10.5.2. It would make no sense to hold that the CGR, an administrative agency with the power, or claimed power, to assess damages of hundreds of millions of dollars based on the flimsiest evidence, is not subject to any due process constraints, but that the lowest municipal court hearing a claim against a foreign national is subject to the international standard.

¹⁶⁷ TPA, Preamble (CL-001).

¹⁶⁸ See ¶ 42 *supra*.

88. Colombia also inappropriately challenges Claimants’ assertion of futility regarding further Colombian proceedings, stating that “this allegation is not supported by even the slightest evidence.”¹⁶⁹ However, Claimants are not required to put on their evidentiary case at this stage,¹⁷⁰ and Colombia’s objection completely misses the mark. The allegation of futility is sufficient at this stage.¹⁷¹ In any event, the course of proceedings to date in Colombian courts hardly suggests that they will provide an effective means of redress for Claimants.
89. Finally, Colombia accuses Claimants of attempting to ripen the claim through subsequent events.¹⁷² Not so. As set forth in Claimants’ Counter-Memorial, the claim was already ripe when filed and subsequent events have further confirmed that.¹⁷³ Specifically, since alleging their FET claim, the CGR Decision has become final and Claimants have thus exhausted their administrative remedies.¹⁷⁴ In the CGR Decision, the CGR retroactively applied a statute passed in 2021 to broaden the definition of fiscal manager, seemingly in response to Claimants’ case, and adopted an irrational and incomprehensible standard of damages.¹⁷⁵ This has exacerbated Colombia’s breaches of Article 10.5. In any event, Colombia does not

¹⁶⁹ Reply, ¶ 145.

¹⁷⁰ See Section III.A *supra*.

¹⁷¹ Request, ¶ 110.

¹⁷² Reply, ¶ 102.

¹⁷³ Counter-Memorial, ¶¶ 19-23.

¹⁷⁴ This fact is not in dispute. See Reply, ¶ 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’.”) and ¶ 101 (“While it is true that Claimants have now exhausted domestic administrative remedies against the Ruling with Fiscal Liability....”).

¹⁷⁵ See Decree 403 of 2020 (CL-007).

dispute that Claimants can add this breach to their FET claim so long as the claim as stated at the time of the Request for Arbitration was also valid (which it was).¹⁷⁶

90. For all of these reasons, Colombia's objection to Claimants' FET claim should be dismissed.

2. Colombia has not proven there is no basis for Claimants' national treatment claim

91. Colombia has not shown that the facts as alleged cannot be the basis for a claim pursuant to Article 10.3 of the TPA.¹⁷⁷ Instead, Colombia inappropriately contests Claimants' allegations and ignores the fact that it carries the burden of proof. Through two submissions, Colombia has failed to meaningfully address, let alone prove, how the CGR's decision to dismiss the Ecopetrol Board of Directors members, who were fiscal managers, but refusal to dismiss Claimants, who were not fiscal managers, from the same CGR proceedings was not discriminatory and thereby a *prima facie* breach of National Treatment.¹⁷⁸
92. Article 10.3 requires that Colombia accord "treatment no less favorable than it accords, in like circumstances, to its own investors," and "to investments in its territory of its own investors."¹⁷⁹ Claimants have alleged that they were "in like circumstances" to the Ecopetrol Board of Directors because they were both involved in the Project and indicted in the CGR proceedings.¹⁸⁰ However, during the CGR proceedings, the CGR treated Claimants less favorably than the Ecopetrol

¹⁷⁶ See Reply, ¶¶ 103-106.

¹⁷⁷ See ¶¶ 49-58 *supra*.

¹⁷⁸ Request, ¶¶ 174-178.

¹⁷⁹ TPA, Art. 10.3.1-2 (CL-001).

¹⁸⁰ Request, ¶¶ 9, 80, 176.

Board of Directors because they dismissed the Ecopetrol Board of Directors as not being fiscal managers(although they had actual decision-making authority over the Project), but refused to dismiss Claimants from the proceedings, though Claimants were not fiscal managers under the test applied to the Ecopetrol Board of Directors.¹⁸¹

93. Instead of explaining how these allegations, which are all in the Request for Arbitration and must therefore be presumed to be true,¹⁸² cannot amount to a *prima facie* breach of Article 10.3 (which Colombia cannot do), Colombia (i) focuses on the wrong inquiry, namely that both Colombian nationals and foreigners were indicted and found liable in the CGR proceedings; and (ii) inappropriately challenges Claimants’ assertions that the Ecopetrol Board of Directors were dismissed from the CGR proceeding though they were fiscal managers.¹⁸³ Colombia further argues that Claimants were actually treated more favorably than Colombian nationals because the CGR did not issue any precautionary measures against Claimants, and that Claimants have not met the standard for a National Treatment violation as articulated in *S.D. Myers v. Canada*.¹⁸⁴ None of these contentions has merit.
94. *First*, the fact that both nationals and foreigners were indicted and found liable by the CGR is entirely irrelevant to Claimants’ specific allegations of discrimination as compared to similarly situated Colombian nationals. Indeed, Reficar (the

¹⁸¹ *Id.* at ¶¶ 13, 81, 125, 166, 176-177.

¹⁸² Colombia falsely claims that Claimants’ allegations cannot or should not be presumed to be true. *See* Reply, ¶ 161.

¹⁸³ *Id.* at ¶¶ 160-162, 166.

¹⁸⁴ *Id.* at ¶¶ 164-166.

nationals found liable) and FPJVC were not in “like circumstances” because Reficar, as owner of the Project, managed the Project itself and made all decisions on the Project, whereas Claimants were limited to providing Reficar with support and recommendations as requested.

95. *Second*, Colombia’s assertion that the CGR determined that the Ecopetrol Board of Directors were fiscal managers, but not fiscally liable, is not only inappropriate at this stage because it is a merits question, but it is also not true.¹⁸⁵ In connection with the Ecopetrol Board of Directors and Change Control 2, the General Comptroller stated

*for a person to be imputed with fiscal liability there must be fiscal management and in this case, . . . [certain Ecopetrol Board of Directors] did not have decision-making authority regarding the above-referenced change control, [since] they could only make recommendations, suggestions, and requests to the President of Ecopetrol and Reficar’s administration*¹⁸⁶

96. Similar analyses were made with respect to Change Controls 3 and 4, and certain Reficar Board of Directors.¹⁸⁷ Thus, the CGR did base its decision to dismiss the Ecopetrol Board of Directors on the erroneous conclusion that they were not fiscal managers. To the extent the Tribunal were to decide to wade into the merits of this dispute at this preliminary stage, the documents only support Claimants’ allegations.
97. *Third*, Colombia’s claim that Claimants “received even more favourable treatment than nationals in the Fiscal Liability Process” because they are the only respondents

¹⁸⁵ *Id.* at ¶ 162 n. 279.

¹⁸⁶ Auto 0188 of Aug. 15, 2018, p. 48 (C-026).

¹⁸⁷ For a discussion of Change Control 3, *see id.* at 50, and for a discussion of Change Control 4, *see id.* at 58.

in the fiscal liability proceeding against whom the CGR has not issued precautionary measures is both wrong and irrelevant. In Colombia's Answer to Claimants' Application for Emergency Temporary Relief, Colombia noted that the CGR did not issue precautionary measures against Claimants only because they could not identify any assets:

[h]aving failed to identify any assets owned by Claimants, the CGR did not decree any precautionary measures against assets of Foster Wheeler or Process Consultants during the Fiscal Liability Proceeding, even though it had authority to do so.¹⁸⁸

98. Colombia also made clear that if assets had been found, precautionary measures against Claimants would have been issued.¹⁸⁹ Indeed, the CGR even approached the United States Department of Justice for help to locate and seize Claimants' assets.¹⁹⁰ Thus, the CGR's failure to attach any assets (though not for lack of trying) does not equate to more favorable treatment.
99. More important, the fact that Colombia sought precautionary measures against those who do meet the definition of fiscal manager, and not against Claimants, is entirely irrelevant. The point is that Colombians who were not fiscal managers, because they were found to lack authority over expenditures were dismissed, while Claimants, who were not fiscal managers, by that same test, were not. That is the national discrimination complained of here.

¹⁸⁸ Respondent's Answer to Claimants' Application for Temporary Emergency Relief, September 30, 2021, ¶ 33 ("In accordance with Colombian law, during the Fiscal Liability Proceeding the CGR conducted a search – both domestically and abroad – for assets owned by the allegedly liable parties, including Foster Wheeler and Process Consultants, that could be used to satisfy the amount of a potential ruling with fiscal liability.").

¹⁸⁹ *Id.* at ¶¶ 34, 36.

¹⁹⁰ Request, ¶ 92.

100. *Finally*, none of Colombia’s authorities help its case. Colombia’s citation to various authorities for the basic proposition that National Treatment is meant to address nationality-based discrimination is entirely superfluous¹⁹¹ because Claimants have alleged nationality-based discrimination, as discussed above. Colombia’s other authorities only help Claimants. Both Colombia and all of the authorities it cites acknowledge that nationality-based discrimination need not be *de jure* but can be *de facto*.¹⁹² Claimants have alleged that a measure (the CGR proceedings), though at first initiated against nationals and foreigners alike, in practice treated two entities (Claimants and the Ecopetrol members) in like circumstances differently in practice and, as they will prove at the merits stage, that difference is due to their nationalities amounting to *de fact* discrimination.
101. Claimants have alleged a *prima facie* breach of National Treatment and Colombia’s objection should be dismissed.

¹⁹¹ See Reply, ¶ 165 n. 286.

¹⁹² Reply, ¶¶ 164-165; *Seda v. Colombia*, ICSID Case No. ARB/19/16, Submission of the United States of America, ¶ 50 (RL-054) (“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.”); Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, p. 152 (Kluwer International Law 2009) (RL-296) (“The majority of the IIA jurisprudence to date suggests that the purpose of national treatment is to prohibit *de jure* and *de facto* nationality-based discrimination.”); *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶¶ 166, 184 (RL-102) (finding a breach of Article 1102 on a *de facto* basis); *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, June 29, 2018, ¶ 249 (RL-111) (“Such discrimination... presuppose 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.”).

3. Colombia has not proven there is no basis for Claimants' most-favored-nation treatment claim

102. As the Tribunal is surely aware, the importation of substantive provisions from another investment treaty through the operation of a most favored nation clause is one issue that is well-accepted in modern investment arbitration practice.¹⁹³ The incorporation of the umbrella clause of the Colombia-Switzerland BIT is a normal exercise of that general rule. Article 10.4 of the TPA requires Colombia to accord to investors and investments “treatment no less favorable than that it accords, in like circumstances, to investors of any other Party....” As Claimants have explained, this provision allows for the importation of substantive protections from other treaties.¹⁹⁴ Colombia has failed to prove there is no basis for Claimants’ most-favored nation treatment claim under Article 10.4.¹⁹⁵
103. As an initial matter, Colombia’s arguments with respect to Article 10.4 again improperly attempt to put the burden of proof on Claimants.¹⁹⁶ Further, many of Colombia’s arguments go to the merits of the dispute which is inappropriate for preliminary objections.¹⁹⁷
104. It is also not correct, let alone “clear”, that Article 10.4 requires a “comparison of factual situations of treatment actually granted under similar circumstances,”¹⁹⁸ and Respondent’s interpretation is restrictively narrow and inconsistent with prior

¹⁹³ See United Nations Commission on Trade and Development, Most Favored Nation Treatment, UNCTAD Series on International Investment Agreements II (New York and Geneva 2010) (RL-119).

¹⁹⁴ Counter-Memorial, ¶¶ 72-90.

¹⁹⁵ Reply, ¶¶ 169-179.

¹⁹⁶ See ¶¶ 49-58 *supra*.

¹⁹⁷ *Id.*

¹⁹⁸ Reply at ¶ 170.

tribunals' decisions and analyses.¹⁹⁹ Colombia's construction, which seems to be that if the investors subject to a treaty whose provisions are treated below the standard set by that treaty, that violation sets the standard of conduct, finds no support in the decided cases. In *ATA Construction v. Jordan*, for example, the tribunal concluded that Article II(2) of the Turkey-Jordan BIT, which provided for treatment "no less favourable than that accorded in similar situations to investments" to allow for the importation of substantive rights.²⁰⁰ In *Bayindir v. Pakistan*, the tribunal interpreted the same language to allow for the importation of substantive obligations.²⁰¹ In *Rumeli v. Kazakhstan*, as a third example, the parties and the tribunal agreed that the same language allowed for the importation of substantive obligations.²⁰² In sum, though Colombia found two cases that diverge from this view, the overwhelming majority of tribunals to consider the same

¹⁹⁹ Colombia points out that Claimants cited to the ILC Draft Articles on MFN clauses for the finding that "[t]he beneficiary of the MFN clause, however, does not need to show that the third-party state (or its nationals) have, in fact, invoked the benefits of the third-party treaty. The mere existence of the third-party treaty is sufficient." Reply at n. 292 (citing to Counter-Memorial at ¶ 88). Claimants meant to cite to *The MFN Clause and Its Evolving Boundaries* at 601, which quotes from the draft articles. Cohen Smutny, Petr Polášek & Chad Farrell, *The MFN Clause and Its Evolving Boundaries*, in *Arbitration Under International Agreements: A Guide to the Key Issues* (K. Yannaca-Small ed., OUP 2018) (CL-135); see *id* at 601 (noting that in 2015, the ILC established a Study Group on the MFN clause, which concluded that "MFN clauses remain unchanged in character from the time the 1978 draft articles were concluded" and that the "core provisions of the 1978 draft articles continue to be the basis for the interpretation and application of MFN clauses today.").

²⁰⁰ *ATA Constr. v. Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010, ¶ 125 n. 16 (CL-134) ("The Tribunal notes also that, by virtue of Article II(2) of the Treaty (the "MFN" clause), the Respondent has assumed the obligation to accord to the Claimant's investment fair and equitable treatment (see the UK-Jordan BIT) and treatment no less favourable than that required by international law"); Turkey-Jordan Bilateral Investment Treaty, Art. II(2) (1993) (CL-252).

²⁰¹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, ¶¶ 230-232 (CL-033); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶ 153 (CL-126).

²⁰² *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶¶ 558, 575 (CL-070).

language have come to the conclusion that it allows for the importation of substantive provisions.²⁰³

105. Respondent’s claim that none of Claimants’ allegations have to do with “the establishment, acquisition, expansion, administration, conduct, operation and sale or other form of disposal of investments in its territory” blatantly ignores Claimants’ pleadings and the nature of umbrella clauses.²⁰⁴ Similarly, Colombia’s assertion that “the artificial distinction that Claimants attempt to create between present or past verbal test is absolutely irrelevant”²⁰⁵ fails to give deference to the Vienna Convention and its mandate that the TPA “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their

²⁰³ Moreover, as Claimants have already pointed out, the *de facto* interpretation set forth in *Ickale v. Turkmenistan* (CL-136) has been criticized. See Counter-Memorial, ¶ 89. This interpretation of Article 10.4 is further confirmed by the footnote in the TPA which specifies that dispute resolution mechanism cannot be imported through Article 10.4, meaning that substantive protections can. See Counter-Memorial, ¶¶ 73, 76. Applying the principle of *expressio unius est exclusio alterius* leads to the conclusion that substantive protections, as opposed to dispute resolution provisions, can be incorporated. See *id.* at ¶¶ 76-81; 92-93. See *Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, Decision on Jurisdiction, ICSID Case No. ARB/10/7, July 2, 2013, ¶ 87 (CL-221) (“As noted by other investment treaty tribunals, the exceptions to MFN treatment for certain preferential agreements show that the parties considered which issues should not benefit from the MFN protection. Since dispute settlement was not included among such exceptions, under the rule ‘*expressio unius est exclusio alterius*’, the MFN provision extends to dispute settlement”); see also *National Grid PLC v. The Argentine Republic*, Decision on Jurisdiction, UNCITRAL, June 20, 2006, ¶ 82 (CL-121) (interpreting a similar MFN clause to the TPA Article 10.4 to dispute resolution); see also *Waste Management v. Mexico (II)* ICSID Case No. ARB/00/3, Award, ¶ 85 (RL-096); see Reply at n. 298, citing *Teinver S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award, July 21, 2017, ¶ 884 (RL-117) for the argument that the drafters of the TPA were aware of the existence of umbrella clauses and they would have included them if they had intended to do so. The opposite argument could just as easily be true – if the drafters thought to *exclude* dispute resolution mechanisms, why not umbrella clauses too? Colombia has no substantive rebuttal to Claimants’ argument. Colombia cites to one secondary source that discusses two awards that have cautioned about the “mechanical application” of *expressio unius est exclusio alterius*, but that is not the only interpretative principles that Claimants’ argument is based on, and Claimants have not applied the principle in a mechanical way. See Reply, ¶ 169 n. 291. Colombia otherwise offers no counter argument.

²⁰⁴ Reply, ¶ 170 n. 292; see Request, ¶¶ 192-195.

²⁰⁵ Reply, ¶ 170 n. 292.

context and in the light of its object and purpose.”²⁰⁶ Claimants’ interpretation of Article 10.4 is supported by its ordinary meaning, prior decisions, and other authorities.

106. Colombia’s argument that the umbrella clause cannot be imported because this substantive right does not exist in the TPA is wrong. The TPA does have a substantive right akin to an umbrella clause pursuant to Article 10.16.1(a)(i)(C). The decisions that Respondent relies on in support of its argument that most-favored nation clauses cannot be used to import substantive rights not found in the TPA, such as the umbrella clause, are also inapposite.²⁰⁷ For example, the most-favored nation clause in *Paushok v. Mongolia* was expressly limited to the fair and equitable treatment standard, unlike Article 10.4 of the TPA, which is not limited to a particular substantive right or obligation.²⁰⁸
107. Such a limitation, which Colombia concedes is not found in the language of the TPA, also makes no sense. If the substantive right or obligation can only exist if it is already included in the relevant treaty, then that would render the MFN clause meaningless.

²⁰⁶ Vienna Convention, Art. (RL-053). While Colombia often presents the Spanish version of the TPA as the correct wording, such arguments fail to acknowledge that the TPA was authenticated in both English and Spanish, meaning the “text is equally authoritative in each language.”

²⁰⁷ Contrary to the Respondent’s position that MFN clauses cannot import substantive rights, it is actually “the general consensus . . . that the MFN clause can be applied to substantive rights.” See Chapter 6: *Standards of Protection*, in Josefa Sicard-Mirabal and Yves Derains, Introduction to Investor-State Arbitration, (Kluwer Law International 2018) pp. 133-160 (CL-222).

²⁰⁸ *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, UNICTRAL, Award on Jurisdiction and Liability, April 28, 2011, ¶¶ 562-573 (RL-314); see also *Renta 4 S.V.S.A. et al. v. Russian Federation*, SCC No. 24/2007, Separate Opinion of Charles N. Brower, March 20, 2009, ¶ 10 (CL-223) (“[I] see no reason why an issue of the incorporation of broader consent to arbitration under the host State’s third-country investment treaties should be treated differently from the consistently accepted application of MFN clauses to substantive standards of treatment, or the (rather) consistently accepted application of MFN clauses to the shortening of waiting periods.”).

108. Colombia's argument that an umbrella clause would be contrary to Colombia's public policy is equally unavailing.²⁰⁹ The Colombian Constitutional Court must review whether a treaty is constitutional before it is ratified by Colombia.²¹⁰ Other treaties with umbrella clauses have been approved by Colombia's Constitutional Court, including the TPA which allows for a breach of an investment agreement (akin to an umbrella clause).²¹¹
109. Colombia's claim that none of its treaties provide consent to arbitrate umbrella clause claims so that Claimants should not be allowed to do so is both factually and legally wrong. Factually, the Colombia-Japan BIT clearly allows for arbitration of umbrella clause claims.²¹² More importantly, there is no reason why substantive standards of protection cannot be imported from another treaty without incorporating a treaty's dispute resolution provision.²¹³ As the tribunal in *Siemens v. Argentina* stated,

This understanding of the operation of the MFN clause would defeat the intended result of the clause which is to harmonize benefits agreed with a party with those considered more favorable granted to another party. It would oblige the party claiming a benefit under a treaty to consider the advantages and disadvantages of that treaty as a whole rather than just the benefits. The Tribunal recognizes that there may be merit in the proposition that, since a treaty has been negotiated as a package, for other parties to benefit from it, they also should be subject to its disadvantages. The disadvantages may have been a trade-off for the claimed advantages. However, this is not the

²⁰⁹ Reply, ¶¶ 172-173.

²¹⁰ Colombian Political Constitution, art. 241(10) (CL-253).

²¹¹ Constitutional Court of Colombia, Judgment C-286 of May 13, 2015, Case No. LAT-433 (CL-224); Constitutional Court of Colombia, Judgment C-150 of March 11, 2009, Case No. LAT-328 (CL-225); Constitutional Court, Judgment C-750/08 of July 24, 2008, Case No. LAT-311 (CL-254).

²¹² Although Article 28(1) initially excludes umbrella clause claims, Article 28(2) then makes clear that is only because there are separate procedures for such claims—not that Colombia does not give consent to arbitrate those claims at all.

²¹³ Counter-Memorial, ¶¶ 71-81. Indeed, most of the controversy over incorporation through MFN clauses concerns procedural rights in the second treaty, and not its substantive provisions.

meaning of an MFN clause. As its own name indicates, it relates only to more favorable treatment.²¹⁴

110. Finally, Colombia's claim that Claimants have not pleaded sufficient facts for a breach of the umbrella clause is based largely on its contention that Reficar is not part of the central government.²¹⁵ Claimants have pleaded sufficient facts that Reficar's actions are attributable to Colombia, and Claimants have already noted that this is an issue for the merits.²¹⁶

4. Claimants have stated a claim for breach of an investment agreement claim

111. Colombia has failed to show how the facts as alleged in the Request for Arbitration do not allege a violation of an "investment agreement" under Article 16.1 of the TPA.
112. Claimants have addressed Colombia's argument that Claimants do not have an "investment" in Colombia as defined in the TPA and under ICSID Article 26 of the ICSID Convention.²¹⁷
113. Colombia argues that Reficar is not a "national authority" because it is not an "authority at the central level of government" as defined by Article 10.28,²¹⁸ relying

²¹⁴ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 120 (CL-123). See also Stephan W. Schill, *Multilateralizing Investment Treaties through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT'L LAW 496, 536 (2009) (CL-131) ("what appears to be a selective multilateralization of certain benefits without extending connected disadvantages can also be understood as a stringent application of the unconditional character of MFN clauses that both the historical development and the ILC's attempts at codification support.").

²¹⁵ Reply, ¶ 178.

²¹⁶ Counter-Memorial, ¶¶ 108-112.

²¹⁷ *Id.* at ¶¶ 134-156; see also ¶¶ 133-144 *infra*.

²¹⁸ Colombia also argues, without support, that the Contract is not an "investment agreement" to "undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government" because FPJVC was not the EPC Contractor. See Reply at n. 321. The word "undertake" is defined to mean "to commit oneself to and begin (an enterprise or responsibility); take on" or "promise to do a particular thing." See Merriam Webster Dictionary, available

primarily on the definitions in TPA Annex 9.1. But Annex 9.1 does not refer to Chapter Ten in any way, and the text of Chapter Nine limits Annex 9.1's application to "procuring entities."²¹⁹ Annex 9.1 therefore does not inform what qualifies as a "national authority" under Chapter Ten. As with many of Colombia's objections, this is also a question that should be resolved at the merits stage.

114. Simply put, Claimants received various protections for their investments in Colombia, including [REDACTED]. In reliance on those promises, Claimants made their investment in Colombia, other than the Contract itself. Colombia, through the fiscal liability proceeding, has deprived Claimants of benefits it received under the Contract. Therefore, Claimants have pleaded a *prima facie* breach of the investment agreement.

5. Colombia has not proven there is no basis for Claimants' expropriation claim

115. Colombia argues that Article 10.7 does not permit the expropriation of two specific contractual rights, and therefore Claimants have not pleaded a *prima facie* claim for expropriation under the TPA.²²⁰ Colombia relies heavily on the fact that [REDACTED]. [REDACTED].²²¹ Putting to one side that this is

at <https://www.merriam-webster.com/dictionary/undertake>) (last visited Feb. 3, 2022) (C-028). A plain reading of the definition of "investment agreement," as required by Article 31 of the Vienna Convention (RL-053), does not result in Colombia's preferred construction that the only party to "undertake" the Reficar project would be the EPC Contractor. Rather, many parties, including Claimants, could (and did) "commit [themselves] to" the Project.

²¹⁹ Chapter Nine defines "procuring entity" to mean an "entity listed in Annex 9.1." United States – Colombia Trade Promotion Agreement, signed on November 22, 2006 and effective from May 15, 2012, Chapter 9, Annex 9.1 (RL-317).

²²⁰ Reply, ¶¶ 151-158.

²²¹ *Id.* at ¶ 158 n. 271-272.

a clear acknowledgement that facts occurring after the Notice of Arbitration may be considered by the Tribunal in evaluating objections under the TPA,²²² Colombia misunderstands Claimants' argument.

116. Claimants have broadly alleged that Colombia has expropriated its investment,²²³ which consists not merely of the Contract.²²⁴ Indeed, Colombia acknowledges that a contract may be expropriated.²²⁵ Here, Claimants made a substantial investment in Colombia, for Colombia's benefit, and Colombia indirectly expropriated that investment by imposing a groundless penalty far exceeding the revenues realized by Claimants. Accordingly, Respondent has failed to show that a claim for expropriation is certain to fail, and Claimants have alleged a *prima facie* violation for expropriation.

D. Colombia's Objections Regarding Claimants' Damages Should Be Rejected

1. Claimants have incurred damages

117. Colombia argues that Claimants must have already sustained loss or damage at the time of the Notice of Arbitration to satisfy the requirements of Article 10.16.1, and that Claimants have not suffered any loss or damage at any time (whether at the Request for Arbitration or now).²²⁶ In fact, as set forth in the Request for Arbitration, Claimants had already suffered damages when the case was brought,

²²² *Id.* at ¶ 158, n. 272. This example underscores the absurdity of Colombia's argument regarding the burden of proof – Claimants cannot rely on undisputed facts that occurred after the Notice was filed to support their claims, yet Colombia can in order to meet its burden of proof on preliminary objections. This is nonsensical and, more importantly, incorrect under a plain reading of the TPA and decisions interpreting similar treaties. *See* ¶¶ 49-58 *supra*

²²³ Request, ¶¶ 180-181.

²²⁴ *See* ¶¶ 133-144 *infra* [cross-reference Investment Section].

²²⁵ *See* Reply, ¶ 156, n. 270.

²²⁶ Reply, ¶¶ 190-215.

and the Tribunal should take into account matters that have transpired since the case was commenced, mostly importantly the CGR Decision imposing damages on Claimants.

118. Colombia's description of the award in *Mobil v. Canada* is incorrect. That case makes clear that future damages do come within NAFTA Article 1116 (a provision that is similar to Article 10.16):

For jurisdictional purposes, Article 1116(1) requires *inter alia* that the investor must have incurred 'loss or damage by reason of, or arising out of, that breach' of Chapter XI of the NAFTA. A breach giving rise to future and prospective damage may, in general terms, fall within Article 1116. There is nothing in the language of Article 1116 (1) that convinces us that the provision is directed only to damages that occurred in the past and does not extend, in principle, to damages that are the result of a breach which began in the past (the adoption of the 2004 Guidelines) and continues (the implementation of the 2004 Guidelines), resulting in the incurring of losses which crystallise (i.e. become quantifiable) and must be paid sometime in the future (hereafter 'future damages'). We consider by extension that the same reasoning applies to damages in the past which are already identified or quantified, but must be paid in the future.

This view is confirmed by the *Grand River* decision, which states that 'damage or injury may be incurred even though the amount or extent may not become known until some future time.' The *Grand River* decision also confirms that it is not required that there be an 'immediate outlay of funds' for there to be damage which can be compensated under NAFTA Article 1116. A call for payment may be sufficient.²²⁷

119. The difference that the *Mobil v. Canada* tribunal discusses regarding proof of damages for establishing jurisdiction and the damages to be granted on the merits,

²²⁷ *Mobil Investments v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, ¶¶ 427-428 (RL-171).

is in standards of proof.²²⁸ Thus, despite Colombia's attempts to distinguish the case, *Mobil v. Canada* is directly on point:

In the present case, the introduction of the 2004 Guidelines triggered an obligation to make expenditures that would continue over the life of the projects. It amounts to a continuing breach resulting in ongoing damage to the Claimants' interests in the investment. Thus, Article 1116(1) does not, in our view, *as a jurisdictional matter*, preclude the Tribunal from deciding on appropriate compensation for future damages.²²⁹

120. So too here. Claimants' damages began during the course of the CGR proceedings and continue through the present day.

121. Claimants also alleged damages already incurred at the time of the Request for Arbitration:

Claimants have suffered substantial harm as a result of Respondent's actions. Respondent's improper assertion of fiscal liability charges against Claimants seeking more than US\$2.4 billion has gravely injured Claimants' reputation and credit. That harm is compounded by Respondent's repeated incorrect and injurious statements in the media that FPJVC is responsible for fraudulent conduct and corruption on the Project. Claimants are entitled to compensation, in the form of moral damages, for such harm. Moreover, Claimants have incurred, and will continue to incur, substantial costs and attorneys' fees in connection with the CGR proceeding and the present action.²³⁰

²²⁸ *Id.* at ¶ 431 ("As mentioned above, the 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. We now turn to the legal standards that apply to such assessment."), and ¶ 437 ("The Majority of this Tribunal accepts that the Claimants do not have to prove the quantum of damages with absolute certainty. The Majority further accepts that no strict proof of the amount of future damages is required and that "a sufficient degree" of certainty or probability is sufficient. However, the amount claimed 'must be probable and not merely possible.'").

²²⁹ *Id.* at ¶ 171 (emphasis added).

²³⁰ Request, ¶ 206.

122. For the purpose of these preliminary objections, the Tribunal’s inquiry should end there.²³¹
123. Colombia argues nonetheless that Claimants have not suffered any damages because (i) attorney’s fees and costs cannot form the basis for damages,²³² and (ii) Claimants have failed to prove their moral damages.²³³ Both contentions are wrong.
124. *First*, Colombia’s assertion that attorney’s fees and costs cannot form the basis for damages is based on a supposed point of Colombian law, but damages for a breach of the TPA are determined pursuant to international law.²³⁴ Pursuant to international law, attorney’s fees resulting from proceedings that have breached treaty obligations are an appropriate basis for damages.²³⁵ Colombia’s objection based in Colombian law is inapplicable.
125. *Second*, Claimants are not required to prove their moral, or any other, damages at this stage. As stated in Article 10.20.4(c) of the TPA, “[i]n deciding an objection under this paragraph, the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration....” This provision is mandatory; not permissive. [REDACTED]

²³¹ See ¶¶ 49-58 *supra*.

²³² Reply, ¶¶ 208-215.

²³³ *Id.* at ¶¶ 204-207.

²³⁴ *Chevron Corp., et al. v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, August 30, 2018, Part IX, ¶ 9.6 (CL-042). 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) Arts. 31(1) (RL-138) (the “ILC Draft Articles”) (“The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”), and Art. 32 (“The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.”).

²³⁵ *Id.* at Art. 31(2) (“Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”).

126. *Third*, Colombia has the burden to prove its objection²³⁷ and has failed to prove that Claimants have not suffered any reputational harm resulting from the CGR proceeding and CGR Decision. Indeed, as described *supra*, Colombia’s discussion of [REDACTED], [REDACTED], precisely the sort of improper conduct that led to Claimants’ moral damages in the first place.²³⁸ Moreover, Colombia’s role at this stage is to show that the facts as alleged cannot be the basis for a claim pursuant to the TPA—not to contest the allegations themselves, especially given that Claimants have not yet had an opportunity to present their case on the merits because of Colombia’s invocation of the preliminary objections procedure.

2. The Tribunal can grant moral damages

127. Colombia argues that the Tribunal cannot award moral damages because such damages are either punitive or non-monetary, both of which are prohibited by Article 10.26.1.²³⁹ Claimants have already explained that moral damages are not punitive.²⁴⁰ None of the sources cited by Colombia establish otherwise.²⁴¹

²³⁶ Colombia’s only argument, without basis, support, or explanation, is that this is a “legal allegation.” See Reply, ¶ 204 n. 361.

²³⁷ *Pac Rim v. El Salvador*, Decision on the Respondent’s Objections under CAFTA Articles 10.20.4 and 10.20.5, ¶ 111 (RL-036) (“At all times during this exercise under CAFTA Articles 10.20.4 and 10.20.5, the burden of persuading the tribunal to grant the preliminary objection must rest on the party making that objection, namely the respondent.”).

²³⁸ See Section II.E *supra*.

²³⁹ Reply, ¶¶ 217-224.

²⁴⁰ Counter-Memorial, ¶¶ 125-131.

²⁴¹ See Reply, ¶ 221 n. 384. All of the sources Colombia cites acknowledge that the majority view is that moral damages are not punitive. R. Mohtashami, et al., *Non-Compensatory Damages in Civil- and Common-Law*

128. Colombia focuses its argument on its assertion that moral damages are non-monetary and, in that way, also prohibited by Article 10.26.1. Claimants do not dispute that moral damages are designed to compensate for a non-pecuniary loss. However, the form of damages for that loss is compensatory and monetary, and thus fully allowed by the TPA.²⁴² As stated in Comment (3) to Article 37 of the ILC Draft Articles, “[m]aterial and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation.”²⁴³ Therefore, moral damages fall within the TPA’s grant of “monetary damages and any applicable interest” and can be awarded by this Tribunal.

3. The Tribunal can grant an offsetting award

129. Finally, Colombia argues that the Tribunal does not have authority to grant an offsetting award.²⁴⁴ That is simply not so.

130. Colombia has assessed over USD 900 million in damages against Claimants in the CGR proceeding. That decision is now final, and Colombia is admittedly actively

Jurisdictions - Requirements and Underlying Principles, in THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION 22, 28 (2d ed. GAR 2018) (**RL-151**) (“an award of moral damages cannot be characterized as punitive.”); S. Jagusch and T. Sebastian, *Moral Damages in Investment Arbitration: Punitive Damages in Compensatory Clothing?* 29(1) ARBITRATION INTERNATIONAL 45, 49 (**RL-152**) (“this general statement is consistent with the precedents discussed above which do not attribute any punitive function to awards of moral damages.”) and 62 (“The better view... is that moral damages are compensation for non-pecuniary injury.”); S. Weber, *Demistifying Moral Damages in International Investment Arbitration*, 19 LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 417, 419 (**RL-153**) (describing moral damages as “damage that is not material” rather than as punitive).

²⁴² TPA, Art. 10.26.1 (**CL-001**). See, e.g., *Desert Line Projects L.L.C. v. Yemen*, ICSID Case No. ARB/05/7, Award ¶ 290 (**CL-156**) (awarding USD 1 million in moral damages); Ceren Zeynep Pirim, *Reparation by Pecuniary Means of Direct Moral Damages Suffered by States as a Result of Internationally Wrongful Acts*, 11 J. Int’l Disp. Settlement 242, 246 (**CL-153**) (discussing how both types of moral damages are compensated by pecuniary means).

²⁴³ ILC Draft Articles, Art. 37, Comment (3) (**RL-138**).

²⁴⁴ Reply, ¶¶ 228-236.

engaged in trying to collect it. An offsetting award for any amounts actually collected is an appropriate remedy. For example, in *Glencore v. Colombia*, after finding a breach of Articles 4(1) and 4(2) of the relevant treaty, the tribunal ordered Colombia to repay the amount previously taken pursuant to an improper CGR decision.²⁴⁵ Here, the Tribunal can readily craft an award directing that a compensating payment be made for any assets seized by Colombia.²⁴⁶ That is, however, a question of the form of remedy reserved for the hearing on the merits, and Colombia’s attempt to short-circuit that process on a preliminary basis should be rejected.²⁴⁷

IV. THE TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE

131. When Colombia requested that the Tribunal hear certain objections as a preliminary question, it also proposed “that the Tribunal address as a preliminary matter, together with its objection under Article 10.20.4, [certain] ... jurisdictional and/or admissibility objections[.]”²⁴⁸ At the First Session, Colombia made clear that these jurisdictional objections would be considered on a preliminary basis and insisted that Colombia could still request to bifurcate these proceedings after its objections

²⁴⁵ *Glencore International A.G. v Republic of Colombia*, ICSID Case No. ARB/16/6, Award, ¶¶ 1473-1505, 1683, 1687 (CL-005). In *Glencore*, Colombia sought nullification of the award, but raised no objection to the offsetting award. The nullification petition was denied on 22 September 2021.

²⁴⁶ See TPA, Art. 10.26(1)(b) (CL-001) (allowing the tribunal to award restitution of property). Contrary to Colombia’s assertion, Claimants do not seek a windfall because they do not ask for any recovery in excess of assets actually seized by Colombia. Reply, ¶ 232.

²⁴⁷ Claimants have sufficiently pleaded that they already incurred damages at the time the Request for Arbitration was filed, but whether they can recover all of the damages they have alleged should be reserved for the merits.

²⁴⁸ Resp. Letter, Aug. 24, 2020, p. 4.

were decided.²⁴⁹ In its letter following the First Session, Colombia confirmed that its objections to jurisdiction and/or admissibility were to be considered “as preliminary questions.”²⁵⁰ In the First Procedural order, the Tribunal then ordered that the parties would brief, and the Tribunal would decide, these “preliminary issue(s)”.²⁵¹

132. However, Colombia now asserts that for their jurisdictional objections, Claimants have the burden to prove all facts regarding the Tribunal’s jurisdiction and that Claimants’ factual allegations cannot be assumed to be true.²⁵² These assertions are wrong, and contradict Colombia’s assurances made to be given leave to proceed with preliminary objections. Colombia’s jurisdictional objections, brought on a preliminary basis, carry the same burden of proof as Colombia’s other preliminary objections. Namely, that all factual allegations in the Request for Arbitration must be deemed true, that all uncontested facts should be deemed true, and that Colombia has the burden of proof regarding its objections.²⁵³

²⁴⁹ First Session, at 2:03:30-2:04:50 (“We are asking in addition to our objections pursuant to Article 10.20.4 to listen to other objections to jurisdiction and admissibility and just for efficiency purposes. Council for Claimants keeps repeating that we can ask for bifurcation. Of course Colombia can ask for bifurcation. It has a right to do that. But we are not even there, members of the Tribunal. We are in a very different request than a bifurcation of the proceedings for purposes of the jurisdiction and admissibility objections. Colombia has the right to do the request for bifurcation later on. Even if you come with a decision—which we will regret and disagree—but if you come back to us and tell us after listening to our objection under Article 10.20.4 that you think that we should move into the merits of this case, Colombia will still have the right under the provisions of this treaty to bring a request for bifurcation—to listen to our objections on jurisdiction and admissibility as a preliminary objection.”)

²⁵⁰ Resp. Letter, Oct. 9, 2020, at 2 (“the only point at issue at this juncture is whether the Tribunal will establish a calendar to hear solely Respondent’s Article 10.20.4 objection as a preliminary matter, or whether it will establish a calendar to hear both Respondent’s Article 10.20.4 and Respondent’s other jurisdictional and/or admissibility objections as preliminary questions.”).

²⁵¹ Procedural Order No. 1, 14.1, 14.6-14.10, and Annex A.

²⁵² Reply, ¶ 238.

²⁵³ See ¶¶ 49-58 *supra*.

A. Claimants Have Made A Qualifying Investment

133. Colombia largely reiterates its position from its Memorial that the Tribunal does not have jurisdiction because Claimants' economic activity in Colombia does not involve any kind of investment risk.²⁵⁴ This argument completely ignores the basis for this arbitration—a \$900 million+ decision against Claimants, and millions in legal fees—that undeniably arose from Claimants' economic activity in Colombia. Given this fact alone, it is impossible to conclude the Claimants' investment did not involve any risk.
134. Colombia is both legally and factually wrong. The Contract is not merely a consulting contract, nor would that disqualify the Contract from being considered an investment if it were. In the Request for Arbitration, Claimants made it clear that the Contract is not its only relevant investment in Colombia. Finally, even if Claimants are required to meet the so-called double keyhole test (which they are not), Claimants have objectively made a investment.
135. The Contract was, when first signed, among other things, a management or construction contract. By Colombia's own description, the original scope of FPJVC's services included:



²⁵⁴ Reply, ¶¶ 15, 23, 239-254. Resp. Mem., ¶¶ 281-298.

136. This scope of services describes managing a construction project and thus qualifies as a management or construction contract.²⁵⁶ The fact that Reficar later changed the scope of Claimants' work does not alter the fact that, by Colombia's own admission, the Contract qualified as an investment when executed.
137. Even if it were simply a consulting or services agreement, the Contract meets the definition of an investment in the TPA, which is defined 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."²⁵⁷ The Contract is an asset owned by Claimants that required Claimants to devote significant time, capital, personnel, and labor in Colombia with the expectation of profit and the assumption of such risks as nonpayment and termination, among others.²⁵⁸ Indeed, it is difficult to follow Colombia's assertion that Claimants took no risk given that they have been held by an arm of the Colombian state jointly and

²⁵⁵ Reply, ¶ 242 (first bullet). *See also* [REDACTED] (C-005). Colombia seems to suggest that describing the work as "consulting services for the management of the Project" makes the scope of FPJVC's work no longer management but consulting which makes no sense and has no basis in the language of the Contract that does not mention the term "consulting" in the scope of work. *See id.*

²⁵⁶ TPA, Art. 10.28 (CL-001) ("investment means every asset that an investor owns or controls.... Forms that an investment may take include: ... turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts.").

²⁵⁷ *Id.*

²⁵⁸ *See, e.g.,* C-005, Part II, § 3 (noting that Reficar could cancel the services at any time). Despite the use of illustrative language and the word "or" in the definition of investment, Colombia suggests that "including such characteristics as" means that an investment must have all of those characteristics mentioned to meet the definition of investment. Reply, ¶¶ 243-244. This argument finds no support in the text of the definition which plainly includes an illustrative rather than mandatory list. Vienna Convention, Art. 31(1) (RL-053).

severally liable for over \$900 million, [REDACTED], for their work on the Project.

138. Colombia is also wrong when it states that “[t]he only thing Claimants point to in their Notice of Arbitration as their ‘investment’ is the... Contract...”²⁵⁹ In fact, the Request for Arbitration states as follows:

Claimants contracted with Reficar, a Colombian-owned enterprise, to provide project management services in connection with the construction and expansion of an oil refinery owned by Colombia to supply environmentally clean motor fuels to meet Colombian demand. In doing so, Claimants invested significant amounts of time, capital, personnel, and labor in Colombian territory. All of these acts were done with the expectation that Claimants would return a profit. The Contract also created rights, both tangible and intangible, to a contractual benefit having economic value to Claimants. As such, Claimants are ‘investor[s] of a Party’ and have made an ‘investment’ under the TPA.²⁶⁰

139. Thus, from the outset, the Contract has not been the only basis for Claimants’ investment, although it would be sufficient.²⁶¹

140. It is also well established that investments should be considered as a whole. For example, in *ADC v. Hungary*, the Tribunal stated that “[i]n considering whether the present dispute falls within those which ‘*arise directly out of an investment*’ under the ICSID Convention, the Tribunal is entitled to, and does, look at the totality of the transaction as encompassed by the Project Agreements.”²⁶² In *Koch v. Venezuela*, as another example, the Tribunal explained that it

adopted the same holistic approach to the meaning of ‘investment’ in Article 25(1) of the ICSID Convention.... It is thus not

²⁵⁹ Reply, ¶ 253.

²⁶⁰ Request, ¶ 29.

²⁶¹ See also Counter-Memorial at ¶¶ 134-139, 150-153.

²⁶² *ADC Affiliate Ltd. and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, ¶ 331 (CL-090).

permissible to slice up an overall investment into its constituent parts, like a sausage, so as to contend that one part, isolated by itself alone, is not an ‘investment’ whereas as an integrated part of the whole investment, it is.²⁶³

141. Many other tribunals have agreed with this approach to the meaning of investment.²⁶⁴ Colombia’s attempt to focus solely on the Contract to argue no investment has been made should be rejected.

142. Notably, Colombia does not refute any of the facts put forth by Claimants regarding their long history of investment in Colombia, but only asserts that these facts still do not show that Claimants took any risk.²⁶⁵ Again, the plain language of the TPA does not require an assumption of risk,²⁶⁶ and it is the definition of investment in the relevant treaty that is most important to deciding whether an investment has been made under both the treaty and the ICSID Convention.²⁶⁷ In any event, the

²⁶³ *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, October 30, 2017, ¶ 6.59 (CL-110).

²⁶⁴ *Koch v. Venezuela*, ICSID Case No. ARB/11/19, Award, ¶ 6.59 (CL-110) (citing other decisions that have followed this approach); *see also, e.g., Inmaris v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, March 8, 2010, ¶ 92 (CL-237) (the tribunal considered the “claimed investments as component parts of a larger, integrated investment undertaking”); *Ambiente Ufficio S.P.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility ¶¶ 428, 453 (CL-236) (the tribunal stated that “when a tribunal is in presence of a complex operation, it is required to look at the economic substance of the operation in question in a holistic manner”); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, ¶ 5.44 (RL-100) (the tribunal decided that “all the elements of the Claimant’s operation must be considered for the purpose of determining whether there is an investment under Article 25”).

²⁶⁵ Reply, ¶¶ 252-253.

²⁶⁶ Counter-Memorial, ¶¶ 134-139. *See also SGS Societe Generale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, February 12, 2010, ¶ 108 (CL-180) (“In sum, ... the Tribunal does not see the features of investments identified in *Salini* as a definitional test, nor does it believe that it is necessary to even look for those elements here absent any suggestion that the BIT’s definition of investment is improperly overreaching....”); *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, ¶ 165 (CL-170) (“The Tribunal states that the requirements that were taken into account in some arbitral precedents for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) must be considered as mere examples and not necessarily as elements that are required for its existence.”).

²⁶⁷ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, ¶ 323 (CL-071); *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia*, ICSID Case

claim that a contract, if fully performed, does not put a party at risk hardly establishes that there was no commercial risk when it was executed.

143. Also, Claimants did assume risk.²⁶⁸ In *Salini v. Morocco*, for example, the tribunal found many of the same risks as present here to be sufficient, and concluded that “[a] construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor.”²⁶⁹ Indeed, some tribunals have found that even the very existence of a dispute constitutes sufficient evidence of risk.²⁷⁰
144. The cases cited by Colombia, as previously explained by Claimants, all involved single commercial transactions for the sale of goods or investments that never got off the ground.²⁷¹ None of those cases are analogous to performing a nine-year Contract to upgrade an oil refinery.²⁷² Claimants also meet the *Romak v.*

No. ARB-05-10, Decision on Annulment, April 16, 2009, ¶¶ 62, 74 (CL-240); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004, ¶ 75 (CL-119); *Alpha Projectholding v. Ukraine*, ICSID Case No. ARB/07/16, Award, November 8, 2010, ¶ 308 (CL-241); *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB-07-5, Decision on Jurisdiction and Admissibility, August 4, 2011, ¶¶ 345, 349-350 (CL-243); *Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, July 2, 2013, ¶¶ 194, 199 (CL-221); *Garanti Koza v. Turkmenistan*, ICSID Case No. ARB, Award, Dec. 19, 2006, ¶¶ 239-242 (CL-165).

²⁶⁸ Colombia’s suggestion that Claimants did not dispute that the Contract presented no investment risk, Reply at ¶ 247, is plainly wrong. Counter-Memorial, ¶¶ 134-139.

²⁶⁹ *Salini Construttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, ¶¶ 55-56 (CL-226). See also *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG, Hamburg (Germany) v. The Czech Republic*, PCA Case No. 2017-15, Final Award, May 11, 2020, ¶ 475 (CL-227) (“The long duration of the operation meant that a great number of events and contingencies could have happened to the asset while being utilised in another country, including governmental actions. Due to the location of the asset and the duration of the operation, Claimant's risk was not limited to non-payment or similar general business risk.”).

²⁷⁰ *Duetsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, Oct. 31, 2012, ¶ 301 (CL-228). *FEDAX v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, July 11, 1997, ¶ 40 (CL-161).

²⁷¹ Counter-Memorial, ¶¶ 150-151.

²⁷² See ¶¶ 19-24 *supra*.

Uzbekistan criteria for investment risk,²⁷³ on which Colombia relies. Claimants were not sure of a return on their investment, how much they would ultimately end up spending, whether they would be paid, and could not predict the outcome of the transaction.²⁷⁴ Certainly, when entering into the Contract, [REDACTED] [REDACTED] because of a fatally flawed proceeding brought by the CGR. With a nearly billion-dollar award looming over Claimants, it is difficult to see how Colombia can assert that Claimants assumed no risk.

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

145. Colombia continues to insist that “FPJVC is not a juridical person, and therefore does not qualify as a ‘national of another Contracting State’ under Article 25(2)(b).”²⁷⁵ Colombia raises no such issue with the other two Claimants, Foster Wheeler and PCI, the members of FPJVC.
146. As an initial matter, the TPA expressly includes a joint venture in the definition of an “investor of a Party.”²⁷⁶
147. The Parties agree that New York law governs and under New York law, a contractual joint venture is a partnership formed for a limited purpose.²⁷⁷ Therefore, it is appropriate to look to New York’s Partnership Law to determine whether FPJVC is a juridical person. Under the New York Partnership Law, a

²⁷³ Reply, ¶ 246.

²⁷⁴ Colombia’s emphasis on the [REDACTED], *see id.* at ¶ 253, is irrelevant to this discussion because it did not guarantee that FPJVC would profit in exchange for its services.

²⁷⁵ Reply, ¶ 255.

²⁷⁶ TPA, Art. 28 and Art. 1.3 (CL-001).

²⁷⁷ Counter-Memorial, ¶ 159. Reply, ¶ 256.

“Person” is defined as “individuals, partnerships, corporations, and other associations[.]”²⁷⁸ A partnership is defined as “an association of two or more persons to carry on as co-owners a business for profit....”²⁷⁹ A partnership can hold property in its own name,²⁸⁰ can sue and be sued in its own name,²⁸¹ and is considered to be a resident of the county in which it has its principal office—not just where the partners reside.²⁸² Thus, Colombia’s argument that a partnership cannot have its own nationality is plainly wrong.²⁸³

148. Rather as one recent appellate decision explains, “[o]f course, it is fundamental that individuals, corporations, and partnerships are each recognized as separate legal entities....”²⁸⁴

149. Colombia claims that Claimants are “conveniently silent” about the terms of the Joint Venture Agreement or that Foster Wheeler and PCI are the only entities

²⁷⁸ New York Partnership Law § 2 (**CL-245**). *See also* NY General Business Law § 130 (**CL-250**) (same).

²⁷⁹ New York Partnership Law § 10(1) (**CL-246**).

²⁸⁰ New York Partnership Law § 12 (**CL-247**).

²⁸¹ New York Civil Practice Law and Rules (“**CPLR**”), § 1025 (**CL-248**).

²⁸² CPLR § 503(d) (**CL-249**).

²⁸³ *See Reply*, ¶ 261. Two of Colombia’s legal authorities discuss citizenship for the purposes of diversity jurisdiction in federal court (i.e., when the basis for jurisdiction in federal court is that the parties are from different States and the matter in dispute is for more than \$75,000. *See* 28 U.S.C. § 1332.), and have nothing to with the juridical status of an entity under New York, let alone international, law. *See* 15A Moore’s Federal Practice – Civil § 102.57(2021) (**RL-326**), 1 Federal Litigation Guide: New York and Connecticut § 6.03 (2021) (**RL-328**). One of Colombia’s authorities is plainly wrong given that the New York Civil Practice Law and Rules (the “**CPLR**”) provides otherwise. *See* 15A N.Y. 2d Jur. Business Relationships § 1550 (**RL-327**) (saying no distinct residence) *compare* CPLR § 503(d) (**CL-249**) (“A partnership or an individually-owned business shall be deemed a resident of any county in which it has its principal office, as well as the county in which the partner or individual owner suing or being sued actually resides.”). The only relevant authority cited by Colombia regarding nationality does not show that a partnership has no nationality, but says that even “[w]here a partnership is not treated as a separate entity by the law under which it is organized, international law would look to the nationality of its individual members.” Restatement (third) Foreign Relations Law of the United States, § 213, comment a, at 125 (American Law Institute 1987) (**RL-329**). Thus, applying Colombia’s own legal authority, FPJVC qualifies as a US national.

²⁸⁴ *See, e.g., Matter of Franklin St. Realty Corp. v. NYC Envtl. Control Bd.*, 164 A.D.3d 19, 25 (1st Dep’t 2018) (**CL-233**).

named in the CGR proceedings.²⁸⁵ These points are irrelevant. Colombia does not provide any law stating that contractual joint ventures are to be treated differently from other joint ventures, and Claimants had no say over the parties the CGR chose to name in the administrative proceedings. More importantly, Colombia itself has no rebuttal to the fact that FPJVC—not Foster Wheeler or PCI—is the entity that executed the Contract.²⁸⁶ At least prior to these proceedings, Colombia considered FPJVC a sufficient juridical entity capable of entering into a long-term agreement for the Project.

150. Equally irrelevant is Colombia’s discussion of *Impregilo v. Pakistan* given that, unlike in that case, Claimants have shown that FPJVC is a juridical entity under applicable law.²⁸⁷

151. Colombia also reiterates its position that there is a double-keyhole test to jurisdiction *ratione personae* and that Claimants have not met this test.²⁸⁸ Even if the double-keyhole test applies (which it does not), Colombia never explains how an “investor of a Party” as defined in the TPA is substantively different from a “national of another Contracting State”, as stated in Article 25 of the ICSID Convention. In other words, it is not possible for an entity that qualifies as an “investor of a Party” not to also meet the definition of a “national of another Contracting State,” and Colombia’s cases do not support any such distinction. Rather, Colombia cites to caselaw discussing the double-keyhole test in the context

²⁸⁵ Reply, ¶ 262.

²⁸⁶ See generally *Ofreta Mercantil (C-005)*.

²⁸⁷ See Reply, ¶ 263.

²⁸⁸ *Id.* at ¶¶ 264-267.

of determining whether an investment has been made,²⁸⁹ or to a dispute about the correct nationality of the investor.²⁹⁰ Colombia cites no precedent making such a distinction because no such authority exists.²⁹¹

152. In sum, Colombia’s objection that FPJVC is not a “national of another Contracting Party” should be dismissed.

C. Claimants’ Notice Was Sufficient

153. Colombia asserts that the tribunal lacks jurisdiction *ratione voluntatis* because it alleges that the Notice of Intent was only sent by FPJVC prior to commencement of the arbitration.²⁹² That objection is fundamentally and legally unfounded.

154. *First*, even assuming that there was a formal defect with the notice, that would not destroy jurisdiction. In *Ethyl Corp. v. Canada*, for example, the Tribunal held that the failure to strictly comply with the notice requirement in Article 1119 did not deprive the tribunal of jurisdiction.²⁹³ In *Mondev v. United States*, the tribunal rejected the idea that a minor or technical failure to comply with a condition in Chapter 11 meant that the State had not consented to jurisdiction.²⁹⁴ In *ADF v. United States*, the tribunal refused to find a formal defect in the Notice of Intent

²⁸⁹ See *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, February 7, 2011, ¶¶ 106-107 (RL-186); *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, ¶ 74 (RL-331).

²⁹⁰ *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, ¶¶ 214-221 (RL-330).

²⁹¹ Again, Colombia has the burden of proof to show that FPJVC is *not* a juridical person, and any uncertainty should be resolved in favor of Claimants. See ¶¶ 49-58 *supra*.

²⁹² Reply, ¶¶ 269-277.

²⁹³ *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, June 24, 1998, ¶¶ 78-85 (CL-056).

²⁹⁴ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶¶ 42-44 (CL-238).

resulted in the loss of jurisdiction.²⁹⁵ In *Chemturra v. Canada*, the tribunal agreed that the Notice of Intent was sufficient and, in any event, cured by subsequent notices.²⁹⁶ In *B-Mex v. Mexico*, as already discussed by Claimants,²⁹⁷ the tribunal rejected the argument that certain investors being omitted from the notice of intent meant that the tribunal had no jurisdiction.²⁹⁸ And this is just NAFTA precedent considering provisions with similar wording to the TPA. Though Colombia cites to two NAFTA cases where the tribunals suggested that consent required perfectly satisfying all preconditions and formalities, neither case resulted in Claimants' claims being dismissed.²⁹⁹

155. *Second*, the Notice of Intent in this arbitration did provide notice from all three Claimants. The Notice of Intent starts by stating that it is from “Joint Venture Foster Wheeler USA Corporation and Process Consultants Inc. (*together*, ‘FPJVC’ or the ‘Investor’).”³⁰⁰ The Notice of Intent also makes clear that “Investor is a contractual joint venture. Each of its members is a corporation organized under the laws of the State of Delaware, United States of America, and is hence a national of the United States within the meaning of the TPA.”³⁰¹

²⁹⁵ *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, Jan. 9, 2003, ¶¶ 133-135 (**CL-082**).

²⁹⁶ *Chemturra v. Canada*, UNCITRAL, Award, ¶¶ 101-105 (**CL-212**).

²⁹⁷ Counter-Memorial, ¶¶ 174-177.

²⁹⁸ **RL-216**, ¶ 120.

²⁹⁹ See *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Decision on a Motion to Add a New Party, January 31, 2008 (**RL-210**) (tribunal was considering whether to allow Claimant to amend its Request for Arbitration to add a new party and not whether to dismiss the claim altogether); *Methanex Corp. v. United States of America*, UNCITRAL, Partial Award, August 7, 2002, ¶ 126 (**RL-209**) (tribunal denied all of the USA challenges to admissibility and jurisdiction except the challenged based on Article 1101(1)).

³⁰⁰ Notice of Intent, December 26, 2018, at 1 (emphasis added).

³⁰¹ *Id.* at ¶ 5.

156. Then, throughout the letter, and in line with the definition stated at the outset, Claimants refer to all three Claimants collectively as FPJVC. For example, the Notice of Intent mentions that “[i]n 2017, the Contraloría General de la República of Colombia (the ‘CGR’), commenced administrative proceedings against various entities and individuals, including FPJVC” and that in June 2018, charges were issued against FPJVC.³⁰² As Colombia has pointed out, only the members of FPJVC, and not FPJVC itself, were named in the CGR proceedings.³⁰³ The “FPJVC” reference in the letter is being used interchangeably for all three Claimants and Colombia was provided sufficient notice. This is a far cry from a case like *Murphy Exploration v. Ecuador* (the only other case cited by Colombia)³⁰⁴ where Claimants were trying to rely on a notice letter sent by an unrelated entity.³⁰⁵
157. Colombia also does not deny that it was aware of the other members of the joint venture and that it has suffered no prejudice as a result of the supposed omission.³⁰⁶ Further, Colombia has no response to Claimants’ point that its position regarding notice is irreconcilably contradictory to its position regarding whether FPJVC is a national of another Contracting State.³⁰⁷ Indeed, the Reply only reinforces that Colombia merely seeks to seize on a supposed technicality in bad faith, particularly

³⁰² *Id.* at ¶ 3.

³⁰³ Reply, ¶ 262.

³⁰⁴ *Id.* at ¶ 271 n. 464.

³⁰⁵ *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, December 15, 2010, ¶ 110 (RL-213).

³⁰⁶ Counter-Memorial, ¶¶ 179-181. Reply, ¶ 270.

³⁰⁷ Counter-Memorial, ¶ 179. Colombia suggests that it is Claimants who have the contradictory position without any acknowledged of the contradiction of their own position. Reply, ¶ 274. However, Claimants’ position is not based on finding that the three Claimants are not separate entities, but on a reading of the Notice letter as it was intended.

considering that Claimants' efforts to negotiate with Colombia before submitting its claims to ICSID were all rejected.³⁰⁸

158. Dismissing Foster Wheeler and PCI's claims on such a technicality at this stage would be an unnecessary waste of resources and contrary to the spirit and purpose of the TPA. This objection should be dismissed.

D. Claimants Did Not Submit Their FET Claim to the Colombian Courts

159. Colombia argues that Claimants have elected to submit their FET claim to the Colombian courts.³⁰⁹ Colombia simply ignores the portion of the provision of that TPA that it invokes, Annex 10-G, that refutes its argument.

160. Annex 10-G provides as follows:

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),

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.

³⁰⁸ After the "cooling off" period had expired, Claimants wrote to Colombia again inviting it to negotiate. Claimants and their counsel were invited to, and did, meet in Bogota with Colombia's representatives. Those discussions failed. In *Murphy Exploration v. Ecuador*, Claimant had not even attempted to negotiate a settlement with Ecuador before filing the case. *Murphy v. Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶¶ 109, 129-132 (**RL-213**). Here, after the time period for negotiation provided by the TPA had expired, Claimants wrote to the Colombian government to urge it to meet with Claimants have attempt to resolve the matter. Claimants and their counsel were invited to, and did, travel to Colombia to meet with the appropriate officials, only to be told that, in the view of the Colombian government, there could be no compromise of the dispute. It is difficult to see how Colombia could assert in good faith that it was injured because of the supposed failure to state that the members of the joint venture had claims against Colombia, as well as the joint venture itself.

³⁰⁹ Reply, ¶¶ 278-286.

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.³¹⁰

161. As paragraph 2 of Annex 10-G makes clear, “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 ... that election shall be definitive....”³¹¹ In other words, by its plain terms, only the *submission* of such a *claim* can trigger this waiver. Colombia makes no argument that Claimants submitted their FET claim in the *tutela*—at most, only that a possible FET claim was mentioned.³¹²
162. The language that Colombia focuses on in paragraph 1—“if the investor... has alleged that breach of an obligation under Section A in proceedings before a court of administrative tribunal”—does not mean that mentioning certain conduct that would also be an FET breach is sufficient to trigger this provision. Any contrary reading—such as that proposed by Colombia that the mere mention of FET is sufficient, without asserting such a claim or seeking any relief—cannot be squared with the language in paragraph 2 that the investor must have elected to submit the claim described to make that election definitive.
163. Colombia’s argument that neither the triple identity test nor the fundamental basis test apply are based on the same misinterpretation of Annex 10-G that the mention of FET is sufficient (it is not) and therefore can similarly be rejected.³¹³ As

³¹⁰ TPA, Annex 10-G (CL-001).

³¹¹ *Id.* at (2) (emphasis added).

³¹² Reply, ¶¶ 280, 282-283.

³¹³ *See id.* at ¶ 284.

Claimants have already explained, and Colombia has not otherwise refuted,³¹⁴ Colombia’s claim of an election fails under either test.³¹⁵ Indeed, here, Claimants’ First Tutela expressly disclaimed seeking any relief under the TPA, which is entirely at odds with the notion that Claimants elected to submit their claim to the Colombian courts.³¹⁶

164. Finally, Colombia’s attempt to distinguish Article 10.18.4 and Annex 10-G is without merit.³¹⁷ Both provisions require the submission of a claim, as made clear by each provision’s second paragraph which explains for greater certainty, as follows:

For greater certainty, if a claimant elects to submit a claim of the type described in subparagraph (a) to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, that	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,
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³¹⁴ Colombia concedes that the causes of action in both proceedings were different, though insists that the parties to the two actions are not different which, in any event, does not satisfy either the triple identity or fundamental basis test. *Id.* at ¶ 280 n. 479.

³¹⁵ Counter-Memorial, ¶¶ 190-197. Indeed, as evident from Colombia’s own description of the three *acciones de tutela*, these local actions are distinct from the claims alleged against Colombia under the TPA. *See* Reply, ¶¶ 24-27. First, an *acción de tutela* allows a litigant to seek “the immediate protection of its fundamental constitutional rights, when they are violated or threatened by the action or omission of any public authority.” Counter-Memorial, n. 354. Second, an *acción de tutela* is limited to evaluating when a “fundamental right has been threatened or violat[ed] by an authority and the [claimant] does not have any other means of judicial defense.” Reply, ¶ 24. Thus, fundamental rights are those recognized by Colombian law while TPA breaches are based in international law. A *tutela court* is also not competent to resolve claims for violations of a treaty, even if Claimants wanted to bring such claims before a *tutela* court. Counter-Memorial, ¶¶ 185-186, n. 354.

³¹⁶ Even as to the Colombian law claims submitted in that case, the tutela courts declined jurisdiction and made no ruling on the merits.

³¹⁷ Reply, ¶ 285.

election shall be definitive, and the claimant may not thereafter submit the claim to arbitration under Section B. ³¹⁸	and the investor may not thereafter submit the claim to arbitration under Section B. ³¹⁹
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165. Colombia’s objection has no basis in the language of the TPA or in law and should be rejected.

E. Claimants’ Waiver is Valid

166. Colombia continues to argue that the Tribunal does not have jurisdiction *ratione voluntatis*, due to the alleged invalidity and ineffectiveness of Claimants’ waiver under Article 10.18.2(b) of the Treaty.³²⁰ In short, Colombia argues that in filing this arbitration, Claimants surrendered the right to defend themselves against actions filed by Colombia.³²¹

167. The waiver provision in Article 10.18.2(b) requires a claimant to waive “any right to initiate or continue... any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.” By its plain terms,³²² the waiver requires Claimants not to act offensively. Thus, Claimants’ reservation of its right to defend itself is not contrary to the requirements of the waiver.

168. Colombia provides no rebuttal to Claimants’ contention that defensive actions to preserve Claimants’ rights are not covered by provisions like Article 10.18.2 and

³¹⁸ TPA, Art. 10.18.4(b) (CL-001).

³¹⁹ *Id.* at Annex 10-G(2).

³²⁰ Reply, ¶¶ 287-299.

³²¹ *Id.* at ¶¶ 290, 292, 294.

³²² Vienne Convention, Art. 31(1) (RL-053).

cites to no authority that suggests such a conclusion.³²³ Claimants, too, are not aware of any case in which an investor's right to defend itself in proceedings brought by the State has been found to violate the 10.18.2 waiver, or a similar waiver.

169. Because Claimants' waiver does not conflict with Article 10.18.2, the cases that Colombia cites in support of its contention that Claimants have filed an impermissible waiver are also not analogous or applicable.³²⁴ Three of those cases, *Renco v. Peru*, *Waste Management v. Mexico I*, and *Detroit v. Canada* were addressed in Claimants' Counter-Memorial.³²⁵ The other three are even less helpful to Respondent's argument.

170. First, Respondent cites to *Commerce Group v. El Salvador*.³²⁶ In that case it was the claimant that had brought the underlying affirmative action against the State, and failed to dismiss the same at the commencement of the arbitration.³²⁷ There was no dispute there that the relief sought in both claims was the same, and claimant's defense was limited to the fact that it was under no obligation to affirmatively dismiss such proceedings.³²⁸ Here, on the other hand, it was Colombia that brought the underlying action, and the actions complained of by

³²³ Counter-Memorial, ¶¶ 187-189, 205. *See also* Reply, ¶ 298 (asserting that Claimants must abandon all proceedings when filing arbitration without any legal support). Colombia's only point, made in a footnote, is that fork-in-the road and waiver provisions are distinguishable, but in the context of the TPA, the two provisions are virtually identical. *See* TPA, Art. 10.18.2 *compare* Annex 10-G (CL-001).

³²⁴ *See* Reply, ¶ 291.

³²⁵ *See* Counter-Memorial, ¶¶

³²⁶ *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 2011, ¶¶ 102-103 (RL-223).

³²⁷ *Id.* at ¶¶ 104-107.

³²⁸ *See* ¶¶ 28-40 *supra*.

Respondent are simply defenses to that action.³²⁹ Claimants did not seek affirmative relief in any of the actions of which Colombia complains. The Second Tutela was for non-monetary relief, to exclude expert reports.³³⁰ The Third Tutela was for interim relief, to allow Claimants a reasonable amount of time to file an appeal to the CGR decision.³³¹ Finally, the appeal of the CGR Decision, itself a part of the CGR proceeding, did not request any monetary relief, or any relief sought in this arbitration, namely recovery of fees and costs, or an offsetting award to avoid destruction of the Claimants' business.

171. Second, Respondent cites to *Thunderbird v. Mexico*. However, the Tribunal in that case in fact found the requirements of the waiver provision should be read in a practical, rather than technical, manner, writing:

In construing Article 1121 of the NAFTA, one must take into account the rationale and purpose of [Article 1121]. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure....³³²

172. In that case, the claimants did not file any waiver under Article 1121 until long after the arbitration had commenced. Notwithstanding that, the Tribunal refused to dismiss the claims on that ground.³³³ Here, Claimants filed an appropriate waiver and, as noted above, Claimants' defense against proceedings brought by Colombia

³²⁹ See, Sections II.C and II.D, *supra*, for a further discussion of these actions.

³³⁰ See ¶ 38 *supra*.

³³¹ See ¶ 40 *supra*.

³³² *International Thunderbird v. Mexico*, UNCITRAL, Arbitral Award, ¶ 1 (RL-225).

³³³ *Id.*

created no risk of either legal uncertainty or double redress.³³⁴ Indeed, given that the acts of the CGR are the basis for Claimants' claims under the TPA, there could be no such risk.

173. Finally, Respondent cites to *Railroad Development Corporation v. Republic of Guatemala*.³³⁵ There, as here, claimant filed a waiver with a reservation.³³⁶ However, at odds with Respondent's argument that this Tribunal should dismiss this claim on a technicality, the tribunal in that case, as in *Thunderbird Gaming*, recognized that the rationale and purpose of the waiver provision should be respected. Because it found that the reservation did not conflict with that rationale and purpose, it declined to dismiss the case on that ground.³³⁷ Further, there was no dispute in that case that claimant had filed a domestic arbitration that overlapped with the ICSID arbitration. However, rather than dismiss the whole claim, the Tribunal only dismissed the individual claims of the claimant that were at issue in the domestic arbitrations.³³⁸

³³⁴ In the event the Tribunal were to adhere to a strict view of the waiver requirement under Article 10.18 urged by Colombia—in effect, that the waiver must include the words of the treaty *in haec verba* and nothing more—any such technical deficiency in the waiver filed by Claimants is curable, and Claimants should be permitted to amend their waiver. Indeed, In *Waste Management I*, the claims were dismissed without prejudice, and claimants were permitted to refile their case, so that here an amendment would be warranted for procedural efficiency. See *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico's Preliminary Objection concerning the Previous Proceedings, June 26, 2002, ¶¶ 46-47 (CL-251).

³³⁵ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23 (DR-CAFTA), Decision on Objection to Jurisdiction CAFTA Article 10.20.5, November 17, 2008 (RL-224).

³³⁶ *Id.* at ¶ 45.

³³⁷ *Id.*

³³⁸ *Id.* at ¶¶ 72-75.

174. Because Colombia is affirmatively asserting this objection, it is Colombia's burden of proof to show that Claimants have violated the waiver.³³⁹ They cannot do so. Colombia initiated the CGR proceedings and Claimants have only defended themselves, neither of which is prohibited by the Article 10.18.2 waiver.

V. CLAIMANTS ARE ENTITLED TO THEIR ATTORNEY'S FEES AND COSTS

175. The Parties agree that the Tribunal has the authority to grant attorney's fees and costs incurred in the course of deciding objections pursuant to Article 10.20.4 and Article 10.20.5 to the prevailing party.³⁴⁰ Colombia argues, however, that it is Claimants' case, and not Colombia's objections, that is frivolous.³⁴¹ As detailed above, this is simply not true. Claimants have properly pleaded their case and Colombia's objections should fail.

176. Further, Colombia concedes that awarding Claimants attorney's fees and costs would further the objectives of Article 10.20.6 of the TPA given that Colombia has continued to abuse the preliminary objections process to extend ICSID proceedings.³⁴² To recall, Colombia raised preliminary questions or objections in the overwhelming majority of the ICSID proceedings brought against it, and thus

³³⁹ See e.g., *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, March 8, 2017, ¶ 180 (CL-229); *Bernhard Friedrich Arnd Rudiger Von Pezold, et al., v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶ 174 (CL-255) ("The general rule is that the party asserting the claim [or objection] bears the burden of establishing it by proof."); *Littop Enterprises Limited, et al., v. Ukraine*, SCC Case No. V 2015-092, Final Award, February 4, 2021, ¶¶ 325-326 (CL-256) (stating same).

³⁴⁰ Reply, ¶ 300 n. 506. Counter-Memorial, ¶ 206.

³⁴¹ Reply, ¶ 300 n. 506.

³⁴² See Counter-Memorial, ¶¶ 209-211.

far has failed to be successful.³⁴³ Yet, Colombia continues to insist on these preliminary stages, unnecessarily extending the time and cost of these proceedings.

177. Awarding attorney's fees and costs to Claimants is also particularly warranted here given Colombia's improper use of the preliminary-objections mechanism:

The procedure under CAFTA Article 10.20.4 [identical to the procedure here] is clearly intended to avoid the time and cost of a trial and not to replicate it. To that end, *there can be no evidence from the respondent contradicting the assumed facts alleged in the notice of arbitration; and it should not ordinarily be necessary to address at length complex issues of law, still less legal issues dependent on complex questions of fact or mixed questions of law and fact.*³⁴⁴

178. Colombia has completely disregarded the proper purpose of preliminary objections, instead raising factual disputes in the hundreds of pages it has submitted, introducing new facts not even relevant to the preliminary objections, and addressing both complex issues of law and mixed questions of law and fact in what is supposed to be a streamlined process determining simple questions of law. Colombia's abuse of this process has further increased the cost of what was intended to be a cost-saving mechanism. Claimants warned that this would be the outcome.³⁴⁵

179. Thus, for all of these reasons, it is Colombia that should bear all of the costs (including Claimants') of these unnecessary additional proceedings.

VI. PRAYER FOR RELIEF

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

³⁴³ *Id.*

³⁴⁴ *Pac Rim v. El Salvador*, Decision on the Respondent's Objections under CAFTA Articles 10.20.4 and 10.20.5, ¶ 112 (**RL-036**) (emphasis added).

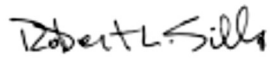
³⁴⁵ Claimants' Letter, Oct. 9, 2020, ¶¶ 5-7 (**C-027**).


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

Dated: February 11, 2022

Respectfully submitted,

PILLSBURY WINTHROP SHAW PITTMAN LLP

By: 
Robert L. Sills
31 West 52nd Street
New York, New York 10019
Tel: +1 (212) 858-1000
robert.sills@pillsburylaw.com

By: 
Charles C. Conrad
Richard D. Deutsch
Two Houston Center
909 Fanin, Suite 200
Houston, TX 77010
Tel: +1 (713) 276-7600
charles.conrad@pillsburylaw.com
richard.deutsch@pillsburylaw.com

Counsel for Claimants