
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' COMMENTS TO
SUBMISSION OF THE UNITED STATES OF AMERICA**

April 25, 2022

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Claimants Amec Foster Wheeler USA Corporation (“**AFWUSA**”) and Process Consultants, Inc., (“**PCI**”) individually and as members Claimant Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. (USA) (collectively, “**FPJVC**” or “**Claimants**”) respectfully submit their comments on the submission of the United States as a non-disputing party (the “**U.S. Submission**”).¹

I. INTRODUCTION

1. The interpretations of the United States-Colombia Trade Promotion Agreement (“**TPA**” or “**Treaty**”) set forth in the Submission of the United States of America (the “**U.S. Submission**”) do not support dismissal of Claimants’ claims, because the observations by the U.S. are based on fundamentally flawed arguments and incorrect factual premises advanced by Colombia in its preliminary objections. When the actual facts are considered (a task the U.S. Submission explicitly denies having undertaken),² all of Colombia’s objections, and any effect of the interpretation of the TPA set out in the U.S. Submission (with which Claimants disagree), are rendered irrelevant.

2. *First*, Colombia’s submission asserts that Claimants’ Request for Arbitration (“**RFA**”) was based on the decision of the CGR finding Claimants liable for nearly \$1 billion in damages (the “**CGR Decision**”). This is not the case, nor was it even possible, because the CGR Decision of April 26, 2021 had not occurred at the time Claimants filed the RFA in December 2019. As a matter of logic, the measures complained of in the RFA were not, and could not have been, based on that future CGR Decision, but rather, *inter alia*, Colombia’s initiation of unfair, inequitable, and discriminatory charges against Claimants on March 10, 2017, when Claimants manifestly did

¹ All capitalized terms not otherwise defined have the same meaning as given in Claimants’ other pleadings.

² *Amec Foster Wheeler USA Corporation, et al. v. Republic of Colombia*, ICSID Case No. ARB/19/34, Submission of the United States of America, April 4, 2022, ¶ 1 (the “**U.S. Submission**”).

not “have decision-making power over State resources or public funds under their control,” the jurisdictional prerequisite to bringing such charges.³

3. Indeed, Colombia, which objected that the RFA was premature, now insists on attacking claims not yet pleaded based on the CGR Decision that was rendered after this arbitration was commenced.⁴ Colombia chose to bring its objections on a preliminary basis, limited to the RFA as pleaded, which prevented the arbitration from progressing in the ordinary course. To the extent that the U.S. Submission implicitly adopts Colombia’s attempt to shift ground, it is simply irrelevant to the issues actually before the Tribunal on Colombia’s preliminary objections.

4. To be sure, additional aspects of the CGR proceedings, including various aspects of the CGR Decision, also constitute breaches of the TPA, as will be set forth in Claimants’ Memorial on the Merits. But they were not the basis of the original claims asserted in the RFA. Accordingly, the U.S. Submission’s observations regarding the submission of a claim (addressed in Section II.A. below), claims based on judicial or administrative proceedings (Section II.B.), and the waiver requirement (Section II.D.) are immaterial to Colombia’s objections.

5. **Second**, pursuant to Procedural Order No. 1, Colombia’s otherwise untimely objections under Article 10.20.4 are to be heard now, while Colombia *proposed* that its other objections be treated on the same preliminary basis, without prejudice to renewing those objections at a later stage of these proceedings on a full record. Basic notions of due process ensure that when such other objections are heard by the Tribunal, Claimants will be allowed to present evidence to support their jurisdictional allegations in an orderly way, and Respondent will be able to present

³ *Amec Foster Wheeler USA Corporation, et al. v. Republic of Colombia*, ICSID Case No. ARB/19/34, Request for Arbitration, December 6, 2019, ¶ 78 (“**RFA**”).

⁴ Respondent’s Reply on Preliminary Objection, December 13, 2021, ¶ 106 (“**Resp. Reply**”) (“whether new facts linked to the existing claims raised in the notice of arbitration may have arisen, or whether there are additional claims that may be addressed within the same arbitration proceeding, are independent issues that are irrelevant to the preliminary objection raised herein.”).

evidence to rebut any such allegations. As such, the U.S. Submission on the Conduct of the Arbitration (Section II.E.) and Definition of Investment (Section II.F.) are irrelevant to Colombia's preliminary objections, although they are also wrong on the merits.

6. Finally, the interpretations set forth in the U.S. Submission are not binding on the Tribunal. As set forth in Section II.G., the statements made in the U.S. Submission cannot vary the terms of the TPA or the rights of Claimants thereunder. Rather, it is the language of the Treaty, as interpreted by the Tribunal, that controls.⁵ Some of the legal interpretations set forth in the U.S. Submission are consistent with the language of the TPA, decisions of previous tribunals, or other sources of international law. As discussed in more detail below, the U.S. Submission also contains a number of normative, conclusory "interpretations" that would minimize risks to actual or potential respondents, such as the United States, in investor-state arbitrations. The same points advanced in the U.S. Submission have been made in previous submissions by the U.S. as a non-disputing party. Indeed, much of the text in the U.S. Submission appears verbatim in other such submissions.⁶ Those interpretations were not adopted by the tribunals in those cases and should not be adopted by the Tribunal here.

⁵ See ¶ 85 *infra*.

⁶ Compare U.S. Submission, ¶ 3 with *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17 (NAFTA), Submission of the United States of America, July 25, 2014, ¶ 4 (**RL-48**); Compare U.S. Submission, ¶ 5 with *Gramercy Funds Management, LLC and Gramercy Peru Holdings, LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, June 21, 2019, ¶ 47 (**RL-66**); Compare U.S. Submission, ¶¶ 6-11 with *Astrida Benita Carrizosa v. The Republic of Colombia*, ICSID Case No. ARB/18/5, Submission of the United States of America, May 1, 2020, ¶¶ 23-29 (**RL-206**); Compare U.S. Submission, ¶¶ 12-22 with *Angel Manuel Seda and Others v. The Republic of Colombia*, ICSID Case No. ARB/19/16, Submission of the United States of America, February 26, 2021, ¶¶ 6-13 (**RL-54**) and *Gramercy Funds Management, LLC and Gramercy Peru Holdings, LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, June 21, 2019, ¶¶ 16-17 (**RL-66**); Compare U.S. Submission, ¶¶ 23-27 with *Seo Jin Hae v. The Republic of Korea*, HKIAC Case No. 18117, Submission of the United States of America, June 19, 2019, ¶¶ 4-13 (**RL-175**); Compare U.S. Submission, ¶¶ 28-31 with *Bay View Group and The Spalena Company v. The Republic of Rwanda*, ICSID Case No. ARB/18/21, Submission of the United States of America, February 19, 2021, ¶ 2 (**RL-63**).

II. COMMENTS ON THE U.S. SUBMISSION

A. Article 10.16 (Submission of a Claim to Arbitration)

7. The first topic addressed in the U.S. Submission is the timing of the breach and loss with respect to the submission of a claim.⁷ Article 10.16 provides, in relevant part, that “the claimant, on its own behalf, may submit to arbitration . . . a claim that the respondent has breached an obligation under Section A . . . and that the claimant has incurred loss or damage by reason of, or arising out of, that breach”⁸ The U.S. Submission interprets the text to mean that “there can be no claim under Article 10.16.1 until an investor has suffered harm from an alleged breach;”⁹ that “no claim based solely on speculation as to future breaches or future loss may be submitted”;¹⁰ and that Article 10.16.1 “does not embrace hypothetical claims – *e.g.*, that a loss may be incurred in the future if circumstances ripen into an actual breach of an obligation under the Agreement.”¹¹

8. The U.S. Submission’s comments regarding this topic may have been prompted by Colombia’s preliminary objections regarding ripeness.¹² Colombia has attempted to reframe Claimants’ case by arguing that it was not ripe at the time of the RFA by stating that (i) Claimants’ issue is really with the CGR Decision, which could not be the case because it did not exist at the time of the RFA, and (ii) Claimants have not incurred any damages arising out of that breach (the CGR Decision) because Claimants have not paid any sums arising out of its purported liability. This interpretation ignores the actual text of the RFA. Claimants’ claims in the RFA are based, *inter alia*, on the fact that on March 10, 2017, Colombia, through the CGR, improperly brought a

⁷ U.S. Submission, ¶¶ 2-3

⁸ US-Colombia Trade Promotion Agreement, May 15, 2018, Chapter 10, Article 10.16.1 (CL-001) (“TPA”).

⁹ U.S. Submission, ¶ 3.

¹⁰ *Id.*

¹¹ *Id.* at ¶ 4.

¹² See Respondent’s Memorial on Preliminary Objections, July 1, 2021, ¶¶ 168-182 (“Resp. Mem.”).

fiscal liability proceeding against Claimants, and subsequent charges on June 5, 2018, when they were manifestly not fiscal managers, and hence not subject to the CGR’s jurisdiction under Colombian law, and that this breach of the TPA’s protections caused Claimants reputational harm as well as to incur attorneys’ fees and expenses for defending themselves against such improper and extremely unfounded action.¹³ On December 26, 2018, Claimants submitted their Notice of Intent to initiate arbitration before ICSID,¹⁴ and on December 6, 2019, Claimants submitted their RFA, stating in the second paragraph:

Respondent, acting through the Contraloría General de la República of Colombia (the “CGR”), has *improperly initiated a fiscal liability proceeding* against Claimants in which Respondent seeks approximately US\$2.43 billion, despite the lack of any colorable legal or factual basis to do so, *causing serious and substantial damage to Claimants even in advance of a final ruling*.¹⁵

9. The RFA, accordingly, plainly alleges that the breaching measure complained of was the CGR’s exercise of jurisdiction over Claimants in the fiscal liability proceeding, which had caused them to incur damages.¹⁶ Therefore, there can be no dispute that at the time the RFA was filed, the claims asserted were ripe.

10. Claimants could not have alleged, and did not allege, that future events (like the CGR Decision) had breached the TPA. That Claimants also noted, for example, that it was “clear that the CGR ha[d] prejudged the case, and that a ruling adverse to Claimants is a virtual certainty”¹⁷ does not change the fact that Claimants’ claim was already ripe when presented and that Claimants

¹³ RFA, ¶¶ 14, 76, 78, 206.

¹⁴ See Notice of Intent to Submit a Claim to Arbitration Under Chapter Ten of the United States-Colombia Free Trade Agreement, December 26, 2018 (“**Notice of Intent**”).

¹⁵ RFA, ¶ 2 (emphases added).

¹⁶ See, e.g., *id.* at ¶ 12 (“[T]he CGR’s *exercise of jurisdiction over FPJVC* is a grave misapplication of Colombian law that constitutes a denial of justice and a breach of the fair and equitable treatment standard” (emphasis added)); *id.* at ¶ 120 (“The [CGR’s] *wrongful exercise of jurisdiction against FPJVC*” violated the fair and equitable treatment standard” (emphasis added)).

¹⁷ *Id.* at ¶ 2.

did not allege damages flowing from a future event. The comments in the U.S. Submission regarding ripeness, accordingly, are entirely irrelevant here.

11. To the extent the U.S. Submission suggests that Claimants cannot complain about additional breaches or damages that occurred in the course of the CGR proceedings, this position too has been routinely rejected by other tribunals and does not even appear to be argued by Colombia.¹⁸

12. Similar interpretations set forth in other U.S. non-disputing party submissions concerning NAFTA Articles 1116(1) and 1117(1) have been rejected. For example, in *Mobil v. Canada*, the tribunal held as follows:

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 [...] and continues [...] resulting in the incurring of losses which crystallise (i.e. become quantifiable) and must be paid sometime in the future [...].¹⁹

13. In *Mesa Power v. Canada*, the United States submitted an almost identical interpretation of Article 1116(1):

U.S. Submission in This Arbitration	U.S. Submission in <i>Mesa</i>
“As the United States has previously explained with respect to substantively identical language in NAFTA Articles 1116(1) and 1117(1), to submit a claim to	“NAFTA Article 1116(1) further provides that an investor may submit a claim to arbitration that a Party “has breached” certain obligations, and that the investor “has incurred loss or

¹⁸ Resp. Reply, ¶ 106 (“whether new facts linked to the existing claims raised in the notice of arbitration may have arisen, or whether there are additional claims that may be addressed within the same arbitration proceeding, are independent issues that are irrelevant to the preliminary objection raised herein.”) and ¶ 196 (“The discussion as to what potential damages may be taken into account when determining the amount of any potential compensation is a separate and wholly irrelevant discussion in determining whether Claimants’ claim is ripe.”).

¹⁹ *Mobil Investments Inc. & Murphy Oil Corporation v. Government of Canada*, ICSID Case No ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, ¶ 427 (CL-151).

<p>arbitration, an investor must establish that (i) a relevant obligation has been breached, and (ii) that the claimant or its enterprise (a) has incurred loss or damage (b) by reason of, or arising out of, that breach. As the text of Article 10.16.1 makes clear, an investor may submit a claim only once the respondent Party “has breached” a relevant obligation, and also “has incurred loss or damage by reason of, or arising out of” (<i>i.e.</i>, caused by) that breach. Thus, there can be no claim under Article 10.16.1 until an investor has suffered harm from an alleged breach. The breach and loss must have already occurred prior to the submission of a claim to arbitration. No claim based solely on speculation as to future breaches or future loss may be submitted.”²⁰</p>	<p>damage by reason of, or arising out of, that breach.” Thus, there can be no claim under Article 1116(1) until an investor has suffered harm from an alleged breach. Consistent with Articles 1116(1) and 1120(1), therefore, a disputing investor may submit a claim to arbitration under Chapter Eleven only for a breach that already has occurred and for which damage or loss has already been incurred, provided that six months has elapsed from the events giving rise to the claim. No claim based solely on speculation as to future breaches or future loss may be submitted.”²¹</p>
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14. The *Mesa* tribunal, relying on *Mobil*, agreed “that its jurisdiction was not limited to losses that had occurred in the past, but extended to future damages resulting from a breach that had begun in the past.”²² Here, Claimants’ sufficiently alleged damages that had been incurred at the time of the RFA, and correctly predicted that it would continue to incur damages thereafter:

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

²⁰ U.S. Submission, ¶ 3.

²¹ *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Submission of the United States of America, July 25, 2014, ¶ 4 (RL-48).

²² *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, March 24, 2016, ¶ 317 (CL-279).

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.²³

15. The U.S. Submission further relies on *Glamis Gold v. U.S.* to assert that “the issue of ripeness therefore turns on the determination of whether the challenged measure had harmed claimant by the time claimant submitted its claim to arbitration.”²⁴ While the tribunal in *Glamis Gold* agreed that breaches based on alleged future events were not ripe for review, it also found that a claim based on past events—in that case that the legislation that had passed “caused such significant harm to its investment as to effect an expropriation *on the date of their passage*”—was ripe.²⁵

16. Here, the RFA specifically alleges damages flowing from the measures complained of that had already occurred, and those measures are the basis for Claimants' claims.²⁶ Claimants' claim was ripe “even in advance of a final ruling”²⁷ by the CGR and before Claimants submitted the RFA. As such, the U.S. Submission's focus on the “ripeness” of Claimants' claim is irrelevant.

B. Claims Based on Judicial or Administrative Adjudicatory Proceedings

1. The position of the U.S. regarding non-final judicial acts is irrelevant to this case because the CGR proceeding is not judicial in nature

17. The U.S. Submission next advances views of claims based on judicial or administrative proceedings. Its submission asserts that “[i]t is well-established that the international responsibility of States may not be invoked with respect to non-final *judicial acts*, unless recourse

²³ RFA, ¶ 206.

²⁴ *Id.* (internal quotations omitted).

²⁵ *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶ 342 (RL-040).

²⁶ RFA, ¶ 30.

²⁷ *Id.* at ¶ 2.

to further domestic remedies is obviously futile or manifestly ineffective.”²⁸ That statement is irrelevant to this case.

18. The breach complained of in Claimants’ RFA was that an administrative agency, the CGR, brought a fiscal liability proceeding against Claimants with no possible basis for doing so.²⁹ Colombia itself acknowledges that fiscal liability proceedings are administrative in nature, not judicial.³⁰ Moreover, other than the unsuccessful *tutela* action that Claimants brought before filing this arbitration, there are no further means available under Colombian law to overturn the filing of charges by the CGR.³¹ In any case, Colombia admits that the CGR Decision itself—which was not, and could not have been, the subject of Claimants’ claims at the time of filing the RFA—is administrative in nature and is now final at the administrative level.³²

19. Consequently, contrary to what the U.S. Submission suggests, this arbitration does not involve non-final judicial acts. The Claimants challenged the CGR bringing an improper fiscal liability proceeding against them that, as the RFA pleads, caused damage to Claimants.

2. There is no general requirement to exhaust local remedies aside for denial of justice

20. The U.S. also asserts that there is a broad requirement that an investor must exhaust local remedies before challenging non-final judicial acts as a breach of the TPA.³³

²⁸ U.S. Submission, ¶ 5 (emphasis added).

²⁹ RFA, ¶ 9. Prosecutorial actions may breach a treaty regardless of the outcome of the proceeding. *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award, December 23, 2019, ¶ 250 (CL-052).

³⁰ Resp. Mem., ¶ 77.

³¹ Law 610 of 2000, Article 59 (RL-8) (setting forth that only a final decision of the CGR is subject to nullity and restoration of rights actions before the Colombian courts).

³² Resp. Reply, ¶ 3.

³³ U.S. Submission, ¶ 5.

21. This statement is both irrelevant and inaccurate. The U.S. cites only two authorities for its interpretation, which are both explicitly confined to claims for denial of justice, and do not support the existence of a requirement to exhaust local remedies for any other TPA causes of action.

22. **First**, the U.S. Submission cites *Apotex v. U.S.*³⁴ There, both parties took the position that the requirement to exhaust local remedies applies to any and all claims for relief based on judicial acts.³⁵ The tribunal disagreed, noting that the authorities the parties invoked only discussed the exhaustion requirement in regards to denial of justice claims.³⁶

23. **Second**, the U.S. Submission cites to Professor Paulsson’s book on denial of justice.³⁷ Consistent with the award in *Apotex*, Professor Paulsson states that “[f]or a foreigner’s international grievance to proceed *as a claim of denial of justice*, the national system must have been tested.”³⁸

24. In fact, tribunals regularly accept claims other than denial of justice without any requirement for prior recourse to domestic courts, let alone exhaustion of all possible remedies.³⁹ For example, in *Glencore v. Colombia*, Colombia argued that “the local proceedings that Claimants have commenced must run their course as a pre-condition to the ripeness of Claimants’

³⁴ *Id.* at ¶ 5 n. 5.

³⁵ *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, June 14, 2013, ¶ 282 (**RL-084**).

³⁶ The U.S. omits this part of the paragraph it cited: “Although both Parties asserted that this rule applies to all causes of action premised upon judicial acts, both Parties primarily invoked authorities concerning denial of justice claims.” *Apotex v. U.S.*, Award on Jurisdiction and Admissibility, ¶ 282 (**RL-084**).

³⁷ U.S. Submission, ¶ 5 n. 5.

³⁸ Jan Paulsson, Denial of Justice in International Law, p.108 (CUP 2005) (emphasis added) (**CL-089**).

³⁹ See e.g., *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-5, Award, September 19, 2013, ¶ 4.747 (**CL-263**) (holding that “given that the Claimants have not presented their claims in the form of claims of denial of justice, those claims are not subject to any requirement to exhaust such local remedies.”); *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, June 30, 2009, ¶ 181 (**CL-264**).

claims against the *Contraloría* and the ANM.”⁴⁰ The tribunal disagreed and concluded that the CGR’s actions constituted a breach of Colombia’s treaty obligations (i) not to impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale, or liquidation of an investment; and (ii) to ensure fair and equitable treatment for investments in its territory.⁴¹

25. Similarly, in *Saipem v. Bangladesh*, the claimant challenged, among other measures, the fact that the Bangladeshi courts had revoked the authority of an international commercial arbitration tribunal formed to resolve a dispute between claimant and a State-owned company.⁴² Claimant alleged that this constituted an expropriation of its investment.⁴³ As its defense, Bangladesh relied on an alleged failure to exhaust local remedies.⁴⁴ This argument failed, and the tribunal ruled that “exhaustion of local remedies does not constitute a substantive requirement of a finding of expropriation by a court.”⁴⁵ The tribunal also rejected Bangladesh’s argument that the only way to challenge adjudicatory proceedings is through a denial of justice claim.⁴⁶

26. In sum, Claimants can challenge the measures taken by the CGR through claims other than denial of justice. Those claims, which include breaches of the TPA’s fair and equitable treatment, national treatment, and expropriation provisions, are not subject to any requirement to exhaust local remedies in Colombia.

⁴⁰ *Glencore International A.G. v Republic of Colombia*, ICSID Case No. ARB/16/6, Award, August 27, 2019, ¶¶ 1061, 1118 (CL-005). Unlike the Switzerland-Colombia BIT, the TPA does not even have a requirement to exhaust local administrative remedies.

⁴¹ *Glencore v. Colombia*, Award, ¶ 1687(2) (CL-005).

⁴² *Saipem v. Bangladesh*, Award, ¶ 174 (CL-264).

⁴³ *Id.* at ¶ 180.

⁴⁴ *Id.* at ¶ 178.

⁴⁵ *Id.* at ¶ 181.

⁴⁶ *Id.* at ¶¶ 177, 181.

3. The TPA waives the requirement to exhaust local remedies before bringing denial of justice claims

27. In any event, the TPA does not require the exhaustion of local remedies for any claim for relief, including denial of justice claims based on administrative adjudicatory proceedings such as the CGR proceeding.⁴⁷ Article 10.5(2)(a) expressly prohibits the denial of justice in “administrative adjudicatory proceedings” as well as judicial proceedings, without any requirement that an investor seek judicial review of a final decision in an administrative adjudicatory proceeding. The plain language of the TPA allows review of adjudicatory administrative acts once they are final, as is the case here.⁴⁸ Because the plain language of the TPA includes the obligation not to deny justice in “administrative adjudicatory proceedings,” such proceedings may lead to denial of justice claims regardless of the existence of a possible avenue for subsequent judicial review.⁴⁹

28. The interplay between Articles 10.5(2)(a) and 10.18 of the TPA is further evidence that this Treaty contains no requirement to exhaust local remedies for denial of justice claims. Under Article 10.18, a claimant must waive “any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.” By requiring that waiver, the TPA implicitly does away with the requirement to exhaust local

⁴⁷ The terms of the TPA are *lex specialis* and therefore trump any customary international law requirement to exhaust local remedies before bringing denial of justice claims. International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua/United States of America) (Merits) I.C.J. REPORTS 1986, ¶ 274 (CL-265) (holding that: “In general, treaty rules being *lex specialis*, it would not be appropriate that a State should bring a claim based on a customary-law rule if it has by treaty already provided means for settlement of a such a claim.”).

⁴⁸ Generally, all administrative acts in Colombia are subject to judicial review through nullity and restoration of rights actions. Colombian Administrative Code (Law 1437 of 2011), Articles 137 and 138 (CL-266).

⁴⁹ Claimants have further developed their arguments regarding this point in Claimants’ Rejoinder on Preliminary Objections, February 11, 2022, ¶¶ 80-87 (“Cl. Rej.”).

remedies.⁵⁰ Indeed, if the TPA required exhaustion of local remedies for bringing any type of claim, the waiver provision would be superfluous and the TPA would be at war with itself. Under the interpretation advanced by Colombia and the U.S., a claimant would have to exhaust all available administrative and judicial remedies before bringing a claim. It would follow that, at the time of commencing the arbitration, there would be no right to pursue any further domestic remedies for the claimant to waive, which cannot possibly be what the treaty means.

29. The tribunal in *Mondev* adopted this position when interpreting almost identical provisions of NAFTA:

First, under the system of Chapter 11, it will be a matter for the investor to decide whether to commence arbitration immediately, with the concomitant requirement under Article 1121 of a waiver of any further recourse to any local remedies in the host State, or whether initially to claim damages with respect to the measure before the local courts. The standard laid down in Article 1105(1) has to be applied in both situations, i.e., whether or not local remedies have been invoked. Thus under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule are interlocking and inseparable.⁵¹

30. Finally, even if the TPA requires the exhaustion of local remedies prior to asserting a denial of justice claim, that requirement would be inapplicable to this arbitration. Claimants sufficiently pleaded in the RFA that local judicial remedies in Colombia would be futile, ineffective, or unavailable.⁵² A debate on whether this exception to the exhaustion of local remedies requirement applies to this case can only take place at the merits stage, on a fully developed evidentiary

⁵⁰ Martin Dietrich Brauch, *Exhaustion of Local Remedies in International Investment Law*, IISD BEST PRACTICES SERIES 1, 13 (2017) (CL-267).

⁵¹ *Mondev International LTD. v. United States of America*, Case No. ARB(AF)/99/2, Award (Oct. 11, 2002), ¶ 96 (CL-238). A contrary interpretation would violate the well-settled principle that an interpretation under which a treaty provision has effects should be preferred over an interpretation that leaves that same provision inoperable. See e.g., *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, May 5, 2015, ¶ 267 (CL-268); *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, December 30, 2010, ¶ 107 (CL-269).

⁵² RFA, ¶ 110.

record.⁵³ When that evidentiary debate does take place, “[i]t is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted.”⁵⁴

31. In conclusion, there is no generally applicable requirement to exhaust local remedies before bringing a treaty claim. If any such requirement does exist, it would be limited to denial of justice claims based on judicial measures, and not to the other causes of action brought by Claimants. In any case, the TPA, unlike other treaties and customary international law, waives the requirement to exhaust local remedies for bringing denial of justice claims. To the extent that it does not, Claimants have sufficiently alleged that exhaustion would be futile or ineffective and should be allowed to prove their case on the merits.

C. Notice of Intent

32. The U.S. next focuses on the general importance of a State’s consent to arbitrate.⁵⁵ This section is irrelevant to this case because Claimants properly submitted a Notice of Intent to arbitrate.⁵⁶

33. Article 10.17 provides that “[e]ach party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.” Article 10.16.2, in turn, sets out the requirements for a notice of intent:

At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:

- (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

⁵³ Cl. Rej., Section III.A.

⁵⁴ International Court of Justice, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea/Democratic Republic of The Congo), Judgment of May 24, 2007, I.C.J. REPORTS 2007, ¶ 44 (CL-270).

⁵⁵ U.S. Submission, ¶ 6.

⁵⁶ See Notice of Intent.

- (b) for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
- (c) the legal and factual basis for each claim; and
- (d) the relief sought and the approximate amount of damages claimed.

34. Claimants provided a proper notice under Article 10.16.2. The Notice of Intent identifies “Joint Venture Foster Wheeler USA Corporation and Process Consultants Inc. (*together*, ‘FPJVC’ or the ‘Investor’)” as the parties providing notice to Respondent.⁵⁷ The Notice of Intent further makes clear that FPJVC is a “contractual joint venture”, that “[e]ach 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,” and that the Contract with Reficar was entered into by FPJVC.⁵⁸ Additionally, the Notice of Intent explains how the CGR commenced administrative proceedings against various entities and individuals, including Claimants, which Colombia is well aware includes only AFWUSA and PCI because the contractual joint venture was not a respondent to the fiscal liability proceeding. Indeed, Colombia has argued elsewhere in this case that FPJVC has no juridical status independent of its two members.⁵⁹

35. The Notice of Intent also clearly achieved its underlying objectives, including providing notice to Respondent of the dispute and giving the parties time to discuss settlement of the claim. As stated in the U.S. Submission, “[t]hese requirements serve important functions, including to provide a Party time to identify and assess potential disputes, to coordinate among relevant national and subnational officials, and to consider, if they so choose, amicable settlement or other courses

⁵⁷ *Id.* at ¶ 1.

⁵⁸ *Id.* at ¶¶ 2, 5.

⁵⁹ Resp. Memorial, ¶ 301.

of action prior to arbitration.”⁶⁰ Here, all of the Claimants were identified in the notice, and in-person discussions were held between the parties and their representatives in Colombia in July 2019, before the RFA was filed, meaning “there is no discernable prejudice to the Respondent.”⁶¹

36. Notably, those in-person discussions were held after Colombia had allowed the ninety day “cooling off” period to lapse without any response; it was Claimants who wrote to Colombia offering to defer the filing of any arbitration if Colombia would, in fact, meet. Colombia accepted that offer, although the parties’ discussions did not yield a resolution. And Colombia has conceded that it received ninety-days written notice from Claimants of their intention to submit a claim to arbitration.⁶²

37. The U.S. Submission cites *Merrill & Ring v. Canada* to show the importance of the notice.⁶³ However, *Merrill & Ring* involved an attempt by claimant to add a separate affiliate, Georgia Basin, not mentioned in the Notice of Intent.⁶⁴ Here, all parties were listed in the Notice of Intent.

38. Further, although the tribunal denied Merrill’s request to add Georgia Basin, it did not do so because of “minor technical failures,” but rather because the claim by Georgia Basin “entail[ed] the assertion of an entirely new claim by an entirely new claimant even if such a claim were considered similar in nature to that already before [the tribunal].”⁶⁵ That has not occurred in this

⁶⁰ U.S. Submission, ¶ 10.

⁶¹ *B-Mex, LLC, et al. v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, July 19, 2019, ¶ 137 (**RL-216**).

⁶² Resp. Mem., ¶ 110.

⁶³ US Submission, ¶ 10 n. 14.

⁶⁴ *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**). The United States has advocated for almost this exact same position before in *Carrizosa v. Colombia*, Submission of the United States of America, ¶¶ 23-29 (**RL-206**), and almost word for word. As such, it is clear that the United States’ position does not consider the unique facts of each case in which it chooses to file a submission, but rather seeks to provide its own self-serving interpretation at each opportunity.

⁶⁵ *Merrill & Ring v. Canada*, Decision on a Motion to Add a New Party, ¶ 31 (**RL-210**).

arbitration. Here, AFWUSA and PCI assert the same claims against Colombia because both were named jointly and severally liable respondents in the fiscal liability proceeding and improperly charged together.⁶⁶

39. *Merrill & Ring* is further distinguishable because the claimant in that arbitration only became aware of George Basin's potential new claim two years after claimant filed its original notice of intent.⁶⁷ Colombia certainly knew that FPJVC was a joint venture consisting of its two members, because Claimants' Notice of Intent said so, and the CGR's charges in the fiscal liability proceeding expressly alleged that both AFWUSA and PCI, along with other respondents, were jointly and severally liable for more than \$2.4 billion.⁶⁸

40. Finally, as discussed in Claimants' Counter-Memorial and Rejoinder on Preliminary Objections, the sensible and predominant view is that technical defects in a notice of intent do not destroy a tribunal's 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.⁶⁹ 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.⁷⁰ In *ADF v. United States*, the tribunal refused to find that a formal defect in the

⁶⁶ RFA, ¶ 85 (“The CGR claims that FPJVC had been grossly negligent in performing its contractual duties and, as such, should be jointly and severally liable for more than US\$2.43 billion.”); *See B-Mex v. Mexico*, Partial Award, ¶¶ 132-33 (“While the Tribunal takes the Respondent's point that the omission of the names of the Additional Claimants is not a ‘minor flaw’ akin to a misspelling of their names, the fact remains that the addition of those names would not have expanded on the notice given to the Respondent as regards the nature of the dispute. The claims by the Additional Claimants being co-extensive with those asserted by the Original Claimants in the Notice, the Notice still provided the Respondent with sufficient information regarding the dispute to enable a meaningful settlement effort. This is therefore not a situation where a respondent State has been ambushed, hearing about the dispute as such for the first time upon receipt of the request for arbitration.”).

⁶⁷ *Merrill & Ring v. Canada*, Decision on a Motion to Add a New Party, ¶¶ 1-3 (RL-210).

⁶⁸ Notice of Intent, ¶ 3.

⁶⁹ *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, June 24, 1998, ¶¶ 78-85 (CL-056).

⁷⁰ *Mondev v. U.S.*, Award, ¶¶ 42-44 (CL-238).

Notice of Intent resulted in the loss of jurisdiction.⁷¹ In *Chemturra v. Canada*, the tribunal agreed that the Notice of Intent was sufficient and, in any event, cured by subsequent notices.⁷² And in *B-Mex v. Mexico*, the tribunal rejected the argument that certain investors being omitted from the notice of intent meant that the tribunal had no jurisdiction.⁷³ To the extent there is any defect to the Notice of Intent here—although there was not—it would be of a minor or technical nature, did not prejudice Colombia in any cognizable way, and would not deprive the Tribunal of jurisdiction.⁷⁴

D. Article 10.18.2(b) (Waiver Requirement)

41. The most normative section of the U.S. Submission concerns Article 10.18.2 of the TPA. The U.S. advances two unsupported propositions. First, in relation to the formal requirements of Article 10.18.2, the U.S. asserts that “any conditions, qualifications or reservations” make a waiver ineffective.⁷⁵ This statement contains no citation and ignores the findings of other tribunals.

42. Second, in relation to the material requirements of Article 10.18.2(b), the U.S. asserts that an “appeal” of a judicial or administrative adjudicatory decision violates the waiver provision.⁷⁶ Again, there is no citation for this statement, and a plain reading of the TPA does not support such an assertion. Moreover, such a finding would lead to absurd and inequitable results.

43. Also, as with other interpretations offered in the U.S. Submission, the interpretations regarding Article 10.18.2(b) are ultimately irrelevant to the preliminary objections in this

⁷¹ *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003), ¶¶ 133-135 (CL-082).

⁷² *Chemturra Corporation v. Government of Canada*, UNCITRAL, Award, August 2, 2010, ¶¶ 101-105 (CL-212).

⁷³ Claimants’ Counter-Memorial on Preliminary Objections, October 14, 2021, ¶¶ 174-177 (“Cl. CM”).

⁷⁴ Gary B. Born, *International Arbitration: Law and Practice* (Third Edition), Chapter 18: Investor-State and State-to-State Arbitration, p. 509 (Kluwer Law International 2021) (CL-271) (“[t]he weight of authority treats these pre-arbitration procedural requirements as ‘non-jurisdictional,’ with non-compliance not affecting the validity of the arbitration agreement or the arbitrators’ jurisdiction . . .”).

⁷⁵ U.S. Submission, ¶ 15.

⁷⁶ U.S. Submission, ¶ 22.

arbitration. This is because Colombia's arguments that Claimants have not submitted a valid waiver are based on an incorrect assumption that the measure complained of in the RFA is the April 2021 CGR Decision, as opposed to the actual basis of the claim presently before the Tribunal, which is the commencement of the CGR proceeding in March 2017.

1. A waiver can include reservations of rights that do not conflict with Article 10.18.2(b)

44. As to the formal requirements, the U.S. Submission asserts that “a waiver containing any conditions, qualifications, or reservations will not meet the formal requirements and will be ineffective.”⁷⁷

45. The U.S. Submission's interpretation of the formal waiver requirement is formalistic and unduly restrictive, and Claimants' reservation does not conflict with the TPA. The waiver in the RFA unequivocally says that “Claimants waive their rights ‘to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16’” of the TPA.

46. The language complained of by Colombia simply states that for the avoidance of doubt, Claimants did not waive rights that are not implicated by the TPA, namely, to defend itself in the ongoing CGR proceeding or to file interim relief actions allowed by Article 10.18.3. Article 10.18.2(b) makes clear that a claimant must 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.”⁷⁸ By its plain terms and read in context,⁷⁹ Article 10.18.2(b) can only apply to offensive

⁷⁷ *Id.* at ¶ 15.

⁷⁸ TPA, Art. 10.18.2(b).

⁷⁹ Vienna Convention on the Law of Treaties, Art. 31 (RL-053) (“VCLT”).

actions in other fora related to the allegedly breaching measure, and not a claimant's right to defend itself in proceedings initiated by the State. Put another way, Claimants' waiver was limited to the waiver required by the TPA, which cannot possibly deprive the Tribunal of jurisdiction.

47. The U.S. Submission does not support Colombia's position to the contrary. It actually recognizes that the waiver provision means a claimant must "waive all rights to *pursue* claims in another forum once claims are submitted to arbitration with respect to [the same] measure..."⁸⁰ Defending oneself in a proceeding initiated by the State is, by definition, not initiating or pursuing a claim. This interpretation accords with a principal purpose of a waiver provision, also quoted in the U.S. Submission, "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."⁸¹ There is no such danger where a party simply defends itself against claims initiated by the State, which is its right.

48. Accepting Colombia's reading of the waiver provision would lead to a remarkably unjust result. Requiring a claimant to waive its right to defend itself against ongoing or future actions brought by the State (or third parties) that relate to the measure complained of would require a claimant to cease defending itself in a proceeding initiated by the State as a condition of seeking relief under an investment treaty. Such an unsupported position is just the sort of "interpretation" that would be advanced by a party seeking to give itself a wholly unfair advantage in subsequent proceedings.

⁸⁰ U.S. Submission, ¶ 14.

⁸¹ *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, January 16, 2006, ¶ 118 (RL-225); *see also* ¶ 18 (stating that the purpose of the waiver provision is to "avoid the need for a respondent State to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of 'conflicting outcomes (and thus legal uncertainty).'").

49. Moreover, the waiver applies only to “any measure alleged to constitute a breach referred to in Article 10.16.1.” As explained above and in Claimants’ prior submissions, the CGR Decision was not, and could not have been, the measure alleged in the RFA to constitute a breach of the TPA. Therefore, Claimants retain their rights to initiate or continue proceedings that challenge that decision (including any judicial appeals, although none have been pursued) until the CGR Decision itself becomes the subject of a claim under Article 10.16.1 of the TPA.

50. In any case, to the extent that the U.S. Submission’s suggestion that “a waiver containing any conditions, qualifications, or reservations will not meet the formal requirements and will be ineffective”⁸² means that only the exact verbal formula in the TPA will suffice to affect a waiver, it would not represent the position adopted by multiple tribunals. Indeed, there is no citation for this statement in the U.S. Submission, and it has been rejected by at least one investment tribunal considering an essentially identical provision. In *RDC v. Guatemala*, claimant included a reservation in its waiver which stated as follows:

provided, however, that RDC, on its own behalf and on behalf of FVG, reserves the right to pursue any and all local remedies which the ICSID arbitration panel requires in order for RDC to avoid any contention by the Government of Guatemala that RDC has failed to exhaust local remedies . . .⁸³ (emphasis added).

51. According to the unsupported interpretation of Article 10.18.2(b) put forth by the U.S. Submission, such a reservation should have led to the dismissal of claimant’s claims, as Guatemala

⁸² *Id.* at ¶ 15.

⁸³ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, November 17, 2008, ¶ 43 (**RL-224**).

argued in that case.⁸⁴ The *RDC* tribunal disagreed, holding that the reservation did not violate the waiver provision or deprive the tribunal of jurisdiction.⁸⁵

52. Likewise, in *Waste Management v. Mexico*, the claimant’s waiver included a reservation that NAFTA’s waiver provision did not apply to dispute settlement proceedings involving violations arising under other sources of law.⁸⁶ Had the *Waste Management* tribunal applied the reasoning contained in the U.S. Submission, that reservation would have automatically required dismissal of claimant’s claim. It did not. The tribunal rejected Mexico’s contention that the waiver did not comply with NAFTA’s formal requirements. Rather, it found the waiver insufficient because claimant had failed to act in accordance with it by continuing parallel proceedings related to the same measure.⁸⁷ Thus, it is simply untrue that *any* reservation automatically deprives the Tribunal of jurisdiction, as suggested in the U.S. Submission.

2. Claimants have complied with the material requirements of the waiver provision

53. As discussed above, the measures complained of in the RFA included, *inter alia*, the improper initiation of fiscal liability proceedings against Claimants on March 10, 2017, the Charges brought on June 5, 2018 that were manifestly without basis under Colombian law, and the discriminatory treatment of Claimants—all of which caused Claimants reputational harm as well as to incur attorneys’ fees and expenses for defending themselves. Claimants have not

⁸⁴ *RDC v. Guatemala*, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, ¶¶ 18(b), 45.

⁸⁵ *Id.* (“The Tribunal has no authority under CAFTA or the ICSID Convention to order the Claimant to pursue domestic proceedings in order to satisfy consent requirements of the Respondent in this arbitration. In these circumstances, the express reservation in the waivers is without any possible object and it does not deprive the Tribunal of jurisdiction.”).

⁸⁶ *Waste Management v. United Mexican States (I)*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, June 2, 2000, §§ 4-5 (**RL-221**).

⁸⁷ *Waste Management v. Mexico (I)*, Arbitral Award, §§ 23, 31 (**RL-221**).

initiated or continued any proceedings before the Colombian courts or administrative agencies challenging these specific measures since filing the RFA.⁸⁸

54. Nonetheless, the U.S. Submission asserts, that, “[i]n the context of judicial or administrative adjudicatory proceedings, ... continued participation in such proceedings, including appeals, will not ordinarily fall within [the narrow exception in Article 10.18.3].”⁸⁹ Again, the U.S. Submission does not cite to any authority to support its position, and is a pure *ipse dixit*. Claimants are unaware of a single case where a tribunal determined that taking advantage of an appeal or other review of an action in which it is defending itself was a violation of Article 10.18.2(b). Rather, in instances where a tribunal has found a material breach of the waiver provision, claimants had initiated additional proceedings to challenge the same measure alleged to be a breach.⁹⁰ Here, however, Claimants have not offensively initiated or continued an action with respect to any measure alleged to be a breach in the RFA, but simply continued to defend themselves before the CGR in proceedings instituted by the State.

55. Colombia has argued that the *tutelas* and the administrative appeal to the FSS show that Claimants have initiated proceedings with respect to a measure alleged in the RFA to constitute a breach.⁹¹ This position is flawed for two reasons.

56. **First**, as with its other arguments, it misconstrues the measure alleged to constitute a breach. The RFA is clear that the primary measure alleged to constitute a breach of the TPA is the bringing of the CGR proceedings against Claimants in the first place.⁹² Claimants have not

⁸⁸ Since filing of the RFA, Claimants have filed a *tutela* objecting to the inclusion of two technical reports relating to the CGR’s damages quantification, filed a *tutela* challenging the patently insufficient term to file an internal appeal before the CGR, and subsequently filed an internal appeal with the FSS.

⁸⁹ U.S. Submission, ¶ 22.

⁹⁰ See Cl. CM, ¶ 204; Cl. Rej., ¶¶ 169-173.

⁹¹ Resp. Reply, ¶¶ 292-296.

⁹² See, e.g., RFA, ¶¶ 97-173.

challenged this measure, *i.e.*, the charges brought against them by the CGR, in any other proceeding since the filing of the RFA. Additionally, the RFA alleges that dismissing the Ecopetrol Board of Directors (who had actual decision-making authority), but not Claimants, was discriminatory and in breach of the TPA’s national treatment provision.⁹³ Claimants have not challenged this measure in any other proceeding since the RFA. Finally, the RFA complains of due process violations that occurred during the CGR proceedings, but all before the filing of the RFA. Again, Claimants have not initiated proceedings with relation to those measures since the initiation of the arbitration. Thus, Claimants have complied with the waiver provision.

57. **Second**, this position is based on misconstruing the nature of two *tutelas* filed after the RFA and the administrative appeal. These two *tutelas* sought interim injunctive relief to protect Claimants’ rights—an exception to the waiver provision that the U.S. recognizes.⁹⁴ The first of these *tutelas* was to object to the inclusion of two technical reports relating to the CGR’s damages quantification during the fiscal liability proceeding.⁹⁵ The next *tutela* was to request a reasonable period to respond to the CGR Decision.⁹⁶ Thus, even if the two *tutelas* filed after the RFA could be understood as relating to the measures alleged to be a breach in the RFA (which they should not be), they fall within the exception in Article 10.18.3.

58. As for the “appeal” to the FSS, it was an integral part of the ongoing CGR proceeding made within 12 days of the CGR Decision.⁹⁷ It was a defensive act, akin to a motion for reconsideration, and was a part of the CGR administrative proceeding initiated by the State; not a new proceeding initiated by Claimants. Indeed, the CGR Decision was not final until that internal review was

⁹³ RFA, ¶¶ 174-178, 188-200.

⁹⁴ U.S. Submission, ¶ 21.

⁹⁵ Cl. Rej., ¶ 38.

⁹⁶ Cl. Rej., ¶ 40.

⁹⁷ Cl. Rej., ¶ 41.

concluded. Continued defensive proceedings before the same administrative agency in which the State is advancing its claims, whether denominated as an internal appeal or otherwise, does not constitute a breach of the waiver provision, and there is no support for such an interpretation.

59. Thus, properly understood, Claimants have at all times complied with the material requirements of Articles 10.18.2(b).

E. Article 10.20 (Conduct of the Arbitration)

60. Regarding the conduct of the arbitration, the U.S. Submission asserts that Article 10.20.4(c) does not govern preliminary objections regarding competence so there is no requirement to assume as true claimant's factual allegations for the purposes of resolving competence objections.⁹⁸ Claimants submit that all preliminary objections should be judged according to the same standard. But even if the Tribunal disagrees, it must still assume Claimants' factual allegations as true in resolving preliminary objections. The parties' submissions regarding this arbitration's process for preliminary objections and the resulting Procedural Order No. 1 confirm that the parties did not anticipate presenting evidence at this stage. Claimants cannot be required to do so now.

61. Article 10.20.4 provides that

[w]ithout prejudice to a tribunal's authority to address other objections as a preliminary question, ... a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26. (emphasis added).

62. A plain reading of the provision shows that it clarifies that, in addition to having the authority to decide competence as a preliminary question, a tribunal may also consider whether claimants have failed to state a claim upon which relief can be granted. Subparagraph (c) then states that "[i]n deciding an objection under this paragraph, the tribunal shall assume to be true

⁹⁸ U.S. Submission, ¶¶ 24-27.

claimant’s factual allegations in support of any claim in the notice of arbitration” “[T]his paragraph” is a reference to the introduction, which explicitly provides that competence objections can be decided as preliminary questions as well. Read together, the TPA provides one standard of review for preliminary questions, which requires the Tribunal to assume alleged facts as true.

63. Even if the Tribunal were to disagree that one standard applies to all objections, this would not meaningfully change the standard of review. *Renco* and *Bridgestone*—the two cases cited by the U.S. Submission⁹⁹— state that the standard of review for other preliminary objections, including competence, is found in Article 41 of the ICSID Convention¹⁰⁰ and Rule 41(5) of the ICSID Arbitration Rules.¹⁰¹ The standard of review pursuant to ICSID Rule 41(5) is a high one.¹⁰² Further, “an objection under Article 41(5): (a) may go either to jurisdiction or the merits; (b) must raise a legal impediment to a claim, not a factual one; and (c) must be established clearly and obviously, with relative ease and dispatch.”¹⁰³ Therefore, “it is appropriate that a claimants’ RFA be construed liberally and that, in cases of doubt or uncertainty as to the scope of a claimant’s allegation(s), any such doubt or uncertainty should be resolved in favour of the claimant.”¹⁰⁴ As the tribunal in *Bridgestone* also acknowledged,

[w]here an objection as to competence raises issues of fact that will fall for determination at the merits stage, the usual course is to

⁹⁹ U.S. Submission, ¶ 27.

¹⁰⁰ Article 41 of the Convention states that: “(1) The Tribunal shall be the judge of its own competence. (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.”

¹⁰¹ *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama*, Decision on Expedited Objections, December 13, 2017, ¶¶ 115-116 (CL-272). *The Renco Group, Inc. v. Republic of Peru*, UNCT/13/1, Decision as to the Scope of the Respondent’s Preliminary Objections Under Article 10.20.4, December 18, 2014, ¶ 191(2) (CL-273) (“The subordinate (‘without prejudice’) clause in Article 10.20.4 preserves a tribunal’s right to decide ‘other objections’ (including competence objections) as preliminary questions pursuant to the applicable arbitration rules.”).

¹⁰² *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, December 10, 2010, ¶ 6.1.2 (CL-063).

¹⁰³ *RSM v. Grenada*, Award, ¶ 6.1.1.

¹⁰⁴ *Id.* at ¶ 6.1.3.

postpone the final determination of those issues to the merits hearing. In those circumstances, it is usual for the tribunal to make a *prima facie* decision on jurisdiction *on the assumption that the facts pleaded by the claimant are correct*.¹⁰⁵

64. Furthermore, the burden of proof remains on Respondent here because it is the one asserting the objections.¹⁰⁶ In sum, the standard of review applied to Rule 41(5) objections is in all meaningful respects the same as the standard of review pursuant to Article 10.20.4.

65. That Claimants are not required to present evidence regarding Colombia's competence objections is further confirmed by the parties' submissions after the First Session and Procedural Order No. 1. In its October 9, 2020 letter, Colombia stated that

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.¹⁰⁷

66. In other words, all objections would be heard preliminarily without requiring an evidentiary submission. Claimants, on the other hand, proposed to handle preliminary objections *and* full jurisdictional objections in one stage, following disclosure, and to allow both parties to introduce evidence.¹⁰⁸ Colombia *rejected* that proposal.¹⁰⁹ Accordingly, in Procedural Order No. 1, the Tribunal ordered that Respondent would file a memorial under Article 10.20.4, and "shall also address any other admissibility and jurisdictional objections that it *proposes* to raise for determination by the Tribunal." The Tribunal will then rule on Respondent's objections "including the scope of Article 10.20.4" and can set a further briefing schedule if necessary.

¹⁰⁵ *Bridgestone v. Panama*, Decision on Expedited Objections, ¶ 119 (emphasis added) (CL-272).

¹⁰⁶ *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules, February 24, 2022, ¶ 169 (CL-274).

¹⁰⁷ Resp. Letter, October 9, 2020, at 2 (emphasis added) (C-030).

¹⁰⁸ Cl. Letter, October 9, 2020, at ¶¶ 8-9 (C-031).

¹⁰⁹ *Id.* at ¶ 10.

67. This allows for two outcomes: (1) that all objections would be decided as preliminary questions, as a matter of law, and based on the pleadings; or (2) that the Tribunal would accept Respondent’s proposal to deal with its objections other than those under 10.20.4, and set forth a briefing and hearing schedule. There is neither precedent nor a legal basis for dismissing a claim for want of evidence at a preliminary stage before the evidentiary record is developed. And this for good reason—such an approach would violate basic notions of due process.

68. In short, the Order of the Tribunal and the standard of review for all preliminary objections does not require Claimants to prove any facts at this stage.

F. Article 10.28 (Definition of Investment)

1. Contrary to the position of the U.S., there is no requirement of risk for there to be a covered investment under the TPA

69. The final point addressed by the U.S. Submission is an alleged requirement of risk for there to be a covered investment under the TPA.¹¹⁰ To support its position, the U.S. does little more than quote the text of Article 10.28. Article 10.28 expressly includes “turnkey construction, management, production, concession, revenue-sharing and other similar contracts.” The interpretation offered by the U.S. Submission would exclude many forms of investments expressly included by the Treaty. But as Claimants have previously shown, the plain language of that provision does not require the assumption of risk for there to be a covered investment.¹¹¹ That provision states that an investment must have “such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” The use of the word “or” demonstrates that there is no requirement that an investment must have all the listed characteristics. That wording is consistent with the notion that: “[t]hese features should not

¹¹⁰ U.S. Submission, ¶¶ 28-29.

¹¹¹ Cl. CM, ¶ 139.

necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments”¹¹² It is undisputed that Claimants’ investment involved the commitment of capital and an expectation of profit. Moreover, there was always the risk of non-payment. As such, Claimants had a covered investment in Colombia.

2. If risk is a requirement for there to be a covered investment under the TPA, Claimants’ investment complies with that requirement

70. In case the Tribunal considers the assumption of risk to be a requirement under the TPA, Claimants’ investment meets that test. Other tribunals have considered that if an investment involves a medium-to-long-term duration, it necessarily also entails risk. For example, the tribunal in *A.M.F. v. Czech Republic* considered that “placing an income-generating asset in the territory of another State for a substantial amount of time” was sufficient to find that the claimant’s investment involved risk.¹¹³ Similarly, the *Salini* tribunal held 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.”¹¹⁴

71. Here, Claimants performed under their contract in Colombia for nearly a decade.¹¹⁵ That investment was part of a megaproject to more than double the production capacity of a refinery in the city of Cartagena.¹¹⁶ The risks of cost overruns and schedule delays were not only assumed by Reficar or by the EPC contractor, but by Claimants as well. Bonuses in favor of FPJVC equivalent to up to 5% the estimated value of its contract with Reficar were contingent on meeting

¹¹² Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge 2010), ¶ 122 (RL-187) (discussing similar characteristics of an investment under the ICSID Convention).

¹¹³ *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).

¹¹⁴ *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001, ¶ 56 (CL-226).

¹¹⁵ RFA, ¶¶ 50-53.

¹¹⁶ *Id.* at ¶ 49.

budget and schedule targets.¹¹⁷ Therefore, Claimants' investment involved many of the risks expressly mentioned by the *Salini* tribunal, such as cost increases, coordination problems between several contractors, unforeseeable incidents not amounting to *force majeure*, and increases in the volume of work.¹¹⁸

72. Claimants' investment not only involved the risks associated with all long-term infrastructure contracts, but it also faced the risk of arbitrary actions by the government of Colombia.¹¹⁹ That risk materialized when the CGR unjustly brought a fiscal liability proceeding against Claimants for their role in the project.¹²⁰ As other tribunals have found, the existence of a dispute is itself sufficient evidence of risk.¹²¹

73. Finally, the U.S. Submission's reference to footnote 12 of the TPA is irrelevant.¹²² That footnote states:

Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

74. Claimants' investment is not a debt or a claim to payment. As stated in the RFA, Claimants' investment comprised, *inter alia*, "significant amounts of time, capital, personnel, and

¹¹⁷ *Oferta Mercantil*, Part II, § 18.2 (C-005). See also section 5.2, which provides "[t]his OFFER is agreed upon the PERSONNEL UNIT FEE system with a PERSONNEL MULTIPLYING FACTOR, ODC (Other Direct Cost) in respect of Services abroad (off-shore) plus fixed fees, these last up to a maximum limit." (*Id.*).

¹¹⁸ *Salini v. Morocco*, Decision on Jurisdiction, ¶ 55 (CL-226).

¹¹⁹ *A.M.F. v. The Czech Republic*, Final Award, ¶ 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.").

¹²⁰ Reficar also brought an ICC proceeding against Claimants seeking damages in an unspecified amount for alleged breaches of contract.

¹²¹ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, October 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).

¹²² U.S. Submission, ¶ 29 n. 37.

labor”¹²³ Indeed, Claimants maintained an office in Bogota with over 700 personnel.¹²⁴ Colombia has not disputed (and cannot dispute) these facts. Instead, it has relied on the provisions of the contract between FPJVC and Reficar to try to minimize the obvious risks undertaken by Claimants.

75. In sum, considering the underlying facts demonstrating that Claimants had a covered investment are undisputed, there is no need for additional fact-finding to dispose of Colombia’s objection. To the extent that the Tribunal considers the introduction of further evidence to be necessary, Claimants request the opportunity to submit additional evidence.

G. The U.S. Submission Is Not Authoritative for the Interpretation of the TPA

76. As addressed in Claimants’ Counter-Memorial on Preliminary Objections, Colombia did not rely on widely accepted sources of international law as support for its preliminary objections. Instead, Colombia chose to rely extensively on U.S. non-disputing party submissions filed in other cases.¹²⁵ To make up for that lack of actual authority, or analysis, Colombia argued that these submissions could be considered “authentic means of interpretation” of the TPA under Articles 31(3)(a) and 31(3)(b) of the VCLT.¹²⁶

77. If Colombia makes this argument again regarding the interpretations set forth in the U.S. Submission in its observations, this Tribunal should reject it. Non-disputing party submissions are neither a “subsequent agreement” under Article 31(3)(a) nor “subsequent practice” under Article 31(3)(b). As such, even if Colombia expresses its agreement with the U.S. Submission, that will carry no weight whatsoever for the interpretation of the TPA.

¹²³ RFA, ¶ 29.

¹²⁴ *Id.* at ¶ 16.

¹²⁵ Cl. CM, ¶ 1.

¹²⁶ Resp. Reply, ¶ 15.

1. Non-disputing party submissions are not an authentic means of treaty interpretation

78. States have a dual role as parties to the underlying treaty and respondents in investment disputes. That raises two distinct but closely related concerns. First, as Professor Schreuer notes, the non-disputing party has an incentive to support restrictive interpretations of the investor's rights under the relevant treaty in order to avoid liability as a respondent in future cases.¹²⁷ Second, the State respondent has an incentive to agree with the interpretations set forth by the non-disputing party to advance its position as a respondent in the ongoing arbitration.¹²⁸ Those concerns are not merely hypothetical. The U.S. consistently takes positions in its non-disputing party submissions that would limit the scope and reach of investment claims under treaties to which it is a party.¹²⁹ Colombia, in turn, relies on the submissions of the U.S. to make arguments as a respondent in this case.¹³⁰ The fact that an actual and potential respondent agreed to an “interpretation” that would limit its liability hardly makes its self-interested views conclusive.

79. Colombia, in its preliminary objections, asks this Tribunal to elevate the U.S. and Colombia's interested and unilateral assertions regarding the TPA to the status of an authentic interpretation of that treaty. This is particularly troubling considering that—to establish this alleged common interpretation—Colombia relies solely on the fact that in its pleadings in this case it has expressed its agreement with non-disputing party submissions filed by the U.S. in other

¹²⁷ Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, The Oxford Handbook of International Investment Law 1188, 1201 (Peter Muchlinski, Federico Ortino, & Christoph Schreuer eds., 2008) (CL-275).

¹²⁸ Charles H. Brower II, *Structure, Legitimacy, and NAFTA's Investment Chapter*, 36 Vand. J. Transnat'l L. 37, 74-82 (2003) (CL-276).

¹²⁹ The non-disputing party submissions filed by the United States in the following cases are examples, but not the only ones, of this practice: *See, e.g., Mesa Power Group v. The Government of Canada; Gramercy Funds Management, LLC, and Gramercy Peru Holdings, LLC v. The Republic of Peru (RL-48); B-Mex, LLC and Others v. The United Mexican States (CL-277); Detroit International Bridge Company v. The Government of Canada (RL-227); Bridgestone Licensing Services, INC., and Bridgestone Americas, Inc. v. The Republic of Panama (RL-185); and Bay View Group, LLC and The Spalena Company, LLC v. The Republic of Rwanda (RL-63).*

¹³⁰ Colombia relied on over 20 U.S. non-disputing party submissions as support for its preliminary objections. *See* Cl. CM, ¶ 1.

arbitrations. However, Colombia’s pleadings in this case are “strategic and [do] not necessarily reflect the interpretation that a State actually believes to have general application.”¹³¹ Moreover, as noted by the tribunal in *Pope & Talbot v. Canada*, allowing a respondent to elevate its arguments to authentic interpretations of the underlying treaty is at odds with the principle that “no-one should be a judge in his own cause.”¹³²

80. Accordingly, numerous tribunals have chosen not to rely on non-disputing party submissions or, more generally, on unilateral and self-serving assertions by States.¹³³ For instance, in *B-Mex v. Mexico*, Mexico argued that the tribunal was obligated to accept its interpretation that compliance with Articles 1119 to 1121 of NAFTA is a precondition for the respondent’s consent to arbitration, because all three NAFTA parties had taken that same position in formal submissions in that case and others.¹³⁴ The tribunal conducted a thorough analysis of NAFTA Articles 1119 to 1121 and rejected Mexico’s position.¹³⁵ Nonetheless, Colombia and the U.S. have reiterated Mexico’s position in *B-Mex* regarding notice in this arbitration based on similarly worded provisions in the TPA.¹³⁶ As discussed in Sections C *infra*, the Tribunal should reject it here too.

¹³¹ 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, 148 (2015) (CL-259).

¹³² *Pope & Talbot, Inc v. The Government of Canada*, UNCITRAL, Award in Respect of Damages, May 31, 2002, ¶ 13 (CL-278).

¹³³ See e.g., *B-Mex v. Mexico*, Partial Award, ¶ 81 (RL-216) (rejecting the position advanced by the U.S. in its non-disputing party submission regarding the interpretation of article 1119 of NAFTA); *Mesa v. Canada*, Award, ¶ 313 (CL-279) (rejecting the position advanced by the U.S. in its non-disputing party submission and instead concluding that “[p]roof of actual damage is a matter for the merits, as opposed to the jurisdiction phase of the arbitration.”); *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 603 (CL-280) (rejecting the notion that Argentina’s agreement with a position taken by the U.S. in a separate case was relevant for treaty interpretation).

¹³⁴ *B-Mex v. Mexico*, Respondent’s Memorial on Jurisdictional Objections, ¶ 63 (CL-286); *B-Mex v. Mexico*, Submission of the United States of America, Aug. 17, 2018, ¶¶ 10 *et seq.* (CL-287).

¹³⁵ *B-Mex v. Mexico*, Partial Award, ¶ 81 (RL-216).

¹³⁶ Resp. Memorial, ¶ 310; U.S. Submission, ¶¶ 9-10.

81. In *Telefónica v. Argentina*, Argentina argued that the tribunal had to accept its narrow reading of the MFN clause in the Spain-Argentina BIT because Spain had maintained a similar position in its pleadings in *Maffezini*.¹³⁷ The tribunal rejected Argentina’s argument, noting that “those positions, though concordant at least in appearance, do not entail a ‘concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation’.”¹³⁸

82. The fact that Argentina was relying on a pleading in *Telefónica* and not on a non-disputing party submission of Spain is immaterial. The tribunal focused on the lack of a concordant, common, and consistent sequence of acts. Further, just as Argentina expressed its agreement with Spain to avoid liability in that case, here too Colombia is “agreeing” with the U.S. to advance its position as a respondent. Similarly, just as Spain’s pleadings in *Maffezini* were aimed at avoiding liability, the U.S. Submission is influenced by the fact that the U.S. State Department’s Office of International Claims and Investment Disputes has an incentive to limit the scope and reach of investment claims against the U.S.¹³⁹ Indeed, the U.S. has faced at least 18 investor-state claims under NAFTA alone, and was recently named as the respondent in a multi-billion dollar claim arising out of the cancellation of the Keystone pipeline.¹⁴⁰

¹³⁷ *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, May 25, 2006, ¶ 109 (CL-257).

¹³⁸ *Id.* at ¶ 114. The following tribunals reached the same conclusion: *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, December 19, 2012, ¶ 51 (CL-281); *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).

¹³⁹ See Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, *The Oxford Handbook of International Investment Law* 1188, 1201 (CL-275).

¹⁴⁰ See REUTERS, *TC Energy seeks NAFTA damages over canceled Keystone XL project* <https://www.reuters.com/legal/litigation/tc-energy-seeks-nafta-damages-over-canceled-keystone-xl-project-2021-11-23/> (last visited April 25, 2022) (C-032); See Toby Fisher, *Alberta puts US on notice over Keystone XL*, <https://globalarbitrationreview.com/alberta-puts-us-notice-over-keystone-xl> (last visited April 25, 2022) (C-033).

83. In sum, Colombia is asking this Tribunal to rule that its agreement with non-disputing party submissions filed by the U.S. in this case and others constitutes binding authority for the interpretation of the TPA. Accepting that argument would, as set forth by Professors Dolzer and Schreuer, produce “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.”¹⁴¹ Such a result would be “incompatible with the principles of a fair procedure.”¹⁴²

2. The U.S. Submission does not lead to a subsequent agreement of the parties regarding the interpretation of the TPA

84. Non-disputing party submissions do not constitute a subsequent agreement between the parties regarding the interpretation of a treaty.¹⁴³ The use in Article 31(3)(a) of the VCLT of the word “agreement” “presupposes a single common act by the parties by which they manifest their common understanding regarding the interpretation of the treaty.”¹⁴⁴ A different interpretation would blur the lines between Articles 31(3)(a) and 31(3)(b) of the VCLT in violation of the principle of *effet utile*.¹⁴⁵

85. In *Telefónica*, the tribunal held that unilateral assertions made by the parties to the relevant treaty that were not directed towards one another were incapable of forming an agreement.¹⁴⁶ The tribunal also pointed to the fact that the “contracting States would of course be free to enter into

¹⁴¹ Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (OUP 2012), 33 (CL-074).

¹⁴² *Id.*; See also Gabrielle Kaufmann-Kohler, ‘Interpretive Powers of the Free Trade Commission and the Rule of Law’ in Emmanuel Gaillard and Frédéric Bachand (eds), *Fifteen Years of NAFTA Chapter 11 Arbitration* (Juris 2011) 189 (CL-282) (stating that “[t]he exercise by States parties of their interpretive powers must not breach fundamental procedural rights. Such a breach may occur when an interpretation rendered during the pendency of an arbitration influences the outcome of that arbitration.”)

¹⁴³ VCLT, Article 31(3)(a) (RL-053).

¹⁴⁴ Report of the International Law Commission, Sixty-Fifth Session, G.A. Supplement No. 10, U.N. Doc. A/68/10, (2013) 34 (“**Report of the ILC**”) (CL-283).

¹⁴⁵ The application of *effet utile* to the interpretation of investment treaties is undisputed. See, e.g., *PNG v. Papua New Guinea*, Award, ¶ 267 (CL-268); *CEMEX v. Venezuela*, Decision on Jurisdiction, ¶ 107 (CL-269).

¹⁴⁶ *Telefónica v. Argentina*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 113 (CL-257).

consultations and conclude an interpretative agreement.”¹⁴⁷ However, Argentina and Spain had chosen not to do so; the same is true here.

86. In *Canadian Cattlemen for Fair Trade v. United States*, a case upon which Colombia relies, the tribunal rejected the claim that an agreement could be implied, noting that “[Respondent’s] own statements on the issue,” “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” were not evidence of an agreement under the VCLT.¹⁴⁸ Similarly, many other tribunals have rejected the contention that non-party submissions can constitute “subsequent agreement” under the VCLT.¹⁴⁹

87. In this case, Colombia has not identified, and cannot identify, a single common act in which the parties to the TPA manifested their mutual understanding regarding the interpretation of its provisions. Unilateral assertions by the U.S., on the one hand, and by Colombia, on the other, are not a single common act.¹⁵⁰ If Colombia and the U.S. in fact wanted to reach an agreement on the interpretation of the TPA, they could have established a mechanism for issuing joint and binding

¹⁴⁷ *Id.* at n. 65.

¹⁴⁸ *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, ¶¶ 186-187 (RL-269).

¹⁴⁹ The tribunal in *Mobil v. Canada (II)* did not even consider Article 31(3)(a) of the VCLT; it only referred to Article 31(3)(b). See *Mobil Investments Canada Inc. v. Canada (II)*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018, ¶ 160 (RL-268). The tribunal in *Kappes v. Guatemala* did not apply either provision because Guatemala only referred to the position of a subset of the parties to the CAFTA, as opposed to a position shared by all parties to that treaty. See *Daniel W. Kappes and Kappes, Cassidy & Associates v. The Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent’s Preliminary Objections, March 13, 2020, ¶ 156 (RL-176). Finally, just like the tribunal in *Mobil v. Canada (II)*, the tribunal in *Clayton v. Canada* only referred to Article 31(3)(b), not to 31(3)(a). See *William Richard Clayton, et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, January 10, 2019, ¶ 379 (RL-270).

¹⁵⁰ The following tribunals refused to find a “subsequent agreement” based the parties’ unilateral submissions to the arbitral tribunals, and not to the other State party: *Telefónica v. Argentina*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 113 (CL-257) (“These positions, expressed separately by Spain and Argentina in those distinct disputes, indicate their views set forth in those litigations for purposes of arguing as respondents therein. Moreover, these statements, individually and separately made by the Contracting States within such litigation, are not directed towards each other . . .”); *Urbaser v. Argentina*, Decision on Jurisdiction ¶ 51 (CL-281); *Gas Natural v. Argentina*, Decision of the Tribunal on Preliminary Questions on Jurisdiction, ¶ 47 n. 12 (CL-258).

interpretations of its provisions, like NAFTA’s Free Trade Commission,¹⁵¹ but they chose not to do so. Even in the absence of such a mechanism, nothing prevents Colombia and the U.S. from negotiating and ratifying an amendment to the TPA, but again, they have chosen not to do so.

88. As with any treaty, the words of the TPA control. Article 31(3)(a) of the VCLT does not operate to transform a series of self-serving and unilateral assertions by the parties to the TPA as authoritative means for the interpretation of that treaty.

3. The U.S. Submission does not show subsequent practice in the application of the TPA establishing an agreement of the State parties regarding its interpretation

89. While any form of conduct may be “subsequent practice” under Article 31(3)(b) of the VCLT,¹⁵² the weight of that conduct for the interpretation of a given treaty depends “on whether and how it is repeated,”¹⁵³ and is for the tribunal hearing a particular matter to decide. Even in the awards upon which Colombia relies, the tribunals have rejected the notion that a single instance of common conduct is dispositive for treaty interpretation. Moreover, no tribunal has relied exclusively on the non-disputing party submission filed by the other party to the treaty and the submissions filed by the State respondent in that very same arbitration to establish subsequent practice. Rather, the authorities relied on by Colombia undermine any argument that non-disputing party submissions or pleadings set forth in investment arbitration create any changes to the interpretation of the relevant treaty.

90. In *Kappes v. Guatemala*, the tribunal held that “a demonstration that all the State Parties to a particular treaty had expressed a common understanding, albeit through separate submissions in

¹⁵¹ North America Free Trade Agreement, December 17, 1992, Can-Mex-US, Art. 2001, 107 Stat. 2066, 32 I.L.M. 605, 693 (CL-284) (“NAFTA”).

¹⁵² Report of the ILC, 34 (CL-283).

¹⁵³ 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).

separate cases” could be relevant under Article 31(3)(b) of the Vienna Convention, but it reiterated (citing *Clayton v. Canada*) that “subsequent practices does not replace the primary rule of interpretation of Article 31(1).”¹⁵⁴ The tribunal further stated that State parties could clarify how a tribunal should interpret Article 10.16.1(a) of the DR-CAFTA through issuing a joint interpretation, “[b]ut unless and until they do so, tribunals interpreting DR-CAFTA must work with the tools they have, rather than ascribing to the State Parties particular intentions which (however potentially sound from a policy perspective) are not revealed through recognized VCLT analysis.”¹⁵⁵ The tribunal in *Canadian Cattlemen v. United States* defined “subsequent practice” as “[a] sequence of facts or acts that cannot in general be established by one isolated fact or act or even by several individual applications.”¹⁵⁶ And even if subsequent practice is established, its value and significance “will naturally depend on the extent to which it is concordant, common, and consistent.”¹⁵⁷ It has not been demonstrated that any TPA provisions are interpreted by both the U.S. and Colombia repeatedly in a consistent way. In *Clayton v. Canada*, the tribunal merely “took note” of non-disputing party submissions, but emphasized that “only analyzing subsequent practices does not replace the primary rule of interpretation of Article 31(1)”, namely that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁵⁸

¹⁵⁴ *Kappes v. Guatemala*, Decision on Respondent’s Preliminary Objections, ¶ 157 (RL-176).

¹⁵⁵ *Id.*

¹⁵⁶ *The Canadian Cattlemen for Fair Trade v. U.S.*, Award on Jurisdiction, ¶ 182 (RL-269).

¹⁵⁷ *Id.* (citing Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd Ed. (Manchester University Press, 1984), 137)).

¹⁵⁸ *Clayton v. Canada*, Award on Damages, ¶ 328 (RL-270); *accord Mobil v. Canada (II)*, Decision, ¶ 160 (RL-268) (noting that the Vienna Convention “directs only that [subsequent] practice should be ‘taken into account’ in relation to interpretation.”). The other authorities cited by Colombia in its Reply on Preliminary Objections do not advance its case at all. 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*

91. None of the above cases found that a limited number of non-disputing party submissions alone can constitute “subsequent practice.” Colombia has only alleged a single instance of common practice between itself and the U.S.: its submissions in this case self-servingly citing to U.S. non-disputing party submissions. That single instance of supposed common practice does not precede this dispute and it lacks the consistency and repetition that make “subsequent practice” relevant for treaty interpretation.

92. Most importantly, the cases cited by Colombia all recognize the settled principle that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁵⁹

93. In sum, the positions of the U.S. in its non-disputing party submission do not, and could not, constitute “subsequent practice” under the VCLT. Even if this Tribunal were somehow to conclude that a “subsequent practice” had been established, it is neither binding nor does it override the primary rule of interpretation of VCLT Article 31(1).

Investment Treaties (Hart Publishing 2016), 195 (RL-271). The tribunals in *Commerce Group Corp. and San Sebastian Gold Mines, Inc.* ICSID Case No. ARB/09/17, Award, March 14, 2011 (RL-223), *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, June 19, 2007 (RL-272), and *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, November 22, 2002 (RL-39) did not even discuss Article 31(3) of the VCLT and its relation to non-party submissions.

¹⁵⁹ VCLT, Art. 31(1) (RL-053). See also International Court of Justice, Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of February 3, 1994, I.C.J. REPORTS 1994, ¶ 41 (CL-285) (holding that: “Interpretation must be based above all upon the text of the treaty.”).

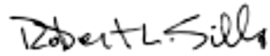
III. CONCLUSION


94. The U.S. Submission contains certain unsupported interpretations of the TPA that should not be adopted by the Tribunal. However, even if such interpretations were accepted, Respondent’s preliminary objections would fail. The U.S. Submission therefore is irrelevant to this current application.

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Respectfully submitted,

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