INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of Arbitration	:	
Between:	:	
	:	
ASTRIDA BENITA CARRIZOSA	:	
	:	Case No.
Claimant,	:	ARB/18/5
	:	
v.	:	
	:	
THE REPUBLIC OF COLOMBIA,	:	
	:	
Respondent.	:	
	x	Volume 4

VIDEOCONFERENCE: HEARING ON JURISDICTION

Friday, November 13, 2020

The World Bank Group

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

PROF. GABRIELLE KAUFMANN-KOHLER, President

PROF. DIEGO P. FERNÁNDEZ ARROYO, Co-Arbitrator

MR. CHRISTER SÖDERLUND, Co-Arbitrator

Also Present:

MS. ALICIA MARTÍN
Secretary to the Tribunal

MR. DAVID KHACHVANI
Tribunal Assistant

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT KAUFMANN-KOHLER: Good morning/good afternoon to all of you.

Do you hear me well? Yes, it looks like.

I hope you all had a good day yesterday. We are now starting the last day of this Hearing for Closing Submissions.

Is there anything anyone would like to raise before we start?

On the Claimant's side, Mr. Martínez-Fraga?

MR. MARTÍNEZ-FRAGA: No, Madam President. Thank you.

PRESIDENT KAUFMANN-KOHLER: Good.

On the Respondent's side?

MR. GRANÉ LABAT: Good afternoon, Madam President, Members of the Tribunal.

No, nothing from Colombia's side. Thank you.

PRESIDENT KAUFMANN-KOHLER: Good.

Then the first thing would be to give the floor to the U.S. for an oral submission of 15 minutes. I see Ms. Thornton from the State Department has her camera on. So, I understand you

are the one who will present? I also see Ms. Grosch.

To whom do I give the floor?

MS. THORNTON: Madam President, I will be presenting for this morning.

PRESIDENT KAUFMANN-KOHLER: Good.

MS. THORNTON: Thank You.

PRESIDENT KAUFMANN-KOHLER: You have the floor, please.

NON-DISPUTING TREATY PARTY'S ORAL SUBMISSION

MS. THORNTON: And thank you again, Madam President and Members of the Tribunal, for this opportunity.

My name is Nicole Thornton. I'm Chief of Investment Arbitration in the Office of International Claims and Investment Disputes at the United States Department of State. And the United States makes its submission pursuant to Article 10.22 of the U.S.-Columbia Trade Promotion Agreement, or TPA, on issues of treaty interpretation.

The United States does not take a position on how these treaty interpretation issues apply to the facts of this case. Moreover, as is the case with

every statement we make as an nondisputing party, in this case and all other cases, including the Fireman's Fund case under the NAFTA, no inference should be drawn from the absence of comment on any issue not addressed in this submission.

We have been following the proceedings with interest, and we have taken note that the Tribunal has posed a number of questions, some of which were not addressed in our written non-disputing party submission of earlier in this year. We would, therefore, like to briefly address three of the questions raised by the Tribunal.

The first question we would like to address is regarding the use of the words "for greater certainty" as part of Footnote 2 to Article 10.4. This was initially raised on Tuesday, at Pages 209 to 210 of the transcript and again on Wednesday at Page 415.

As a general practice, the United States uses the words "for greater certainty" in its international trade investment agreements to introduce confirmation regarding the meaning of the agreement. In U.S.

practice, the phrase "for greater certainty" signals that the sentence it introduces reflects the understanding of the United States and the other treaty party or parties of what the provisions of the agreement would mean even if the sentence were absent.

As a consequence, "for greater certainty" sentences also serve to spell out more explicitly the proper interpretation of similar provisions, mutatis mutandis, in other agreements or in the same agreement. The United States has previously made a statement to this effect in Footnote 24 of our non-disputing party submission in the Omega v. Panama case, which is an ICSID Arbitration, pursuant to the U.S. TPA and Bilateral Investment Treaty with Panama.

And that submission is publicly available on our website, but we would also be happy to provide the Tribunal and the disputing parties with the submission if it would be helpful.

The second question we would like to address is whether the Tribunal has jurisdiction to apply Article 12.3 and where in the TPA such jurisdiction is provided.

As we explained in Paragraph 15 of our written submission, an investor-State Tribunal has no jurisdiction to consider under this provision any procedural or substantive treatment extended by a TPA party to a third-State investor or investment through a multilateral or bilateral agreement that a TPA party has with a third State.

Any other conclusion would eviscerate the carefully crafted decision the TPA Parties made to make only certain obligations in the financial services sector subject to investor-State Arbitration. Rather, the TPA Parties agreed that any MFN claims may only be subject to State-to-State dispute resolution.

Moreover, jurisdiction to apply Article 12.3 does not and cannot arise out of Article 12.1.2(b) for the reasons stated in Paragraphs 8, 9, and 12 of our written submission.

The third question we would like to address is related to Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties, which was raised on Page 417 of Wednesday's transcript.

Although the United States is not a party to

the Vienna Convention, we consider that Article 31 reflects customary international law on treaty interpretation. States are well-placed to provide authentic interpretation of their treaties, including in proceedings before ISDS tribunals like this one.

TPA Article 10.22 ensures the non-disputing TPA party has an opportunity to provide its views on the correct interpretation of the TPA. And the United States consistently includes provision for such submissions in its investment agreements.

Article 31 of the Vienna Convention on the Law of Treaties recognizes the important role that the State's Parties play in the interpretation of their agreements.

In particular, Paragraph 3 states that: "In interpreting a treaty, there shall be taken into account, together with the context, any subsequent agreement between the Parties regarding the interpretation of the Treaty or the application of its provisions and any subsequent practice in the application of the Treaty which establishes the agreement of the parties regarding its

interpretation."

Article 31 of the Vienna Convention is framed in mandatory terms. "Subsequent agreements between the Parties and subsequent practice of the parties shall be taken into account."

Thus, if the Tribunal concludes that there is either a subsequent agreement between the TPA Parties or a subsequent practice that establishes such an agreement regarding the interpretation of a TPA provision, the Tribunal must take that into account in its interpretation of the provision.

In addition, there is no hierarchy of importance amongst the elements of interpretation listed in Article 31. Accordingly, the Tribunal must consider any subsequent agreement of the Parties and any subsequent practice of the Parties alongside the Treaty's text, context, and optic and purpose.

Where the submissions by the two TPA Parties demonstrate that they agree on the proper interpretation of a given provision, the Tribunal must, in accordance with Article 31(3)(a), take this agreement into account.

In addition to reflecting an agreement under Article 31(3)(a), the TPA Parties' concordant interpretations may also constitute subsequent practice under 31(3)(b).

The International Law Commission has commented that subsequent practice may include statements in the course of a legal dispute. Accordingly, where the TPA Parties' submissions in an arbitration evidence the common understanding of a given provision, this constitutes subsequent practice that must be taken into account by the Tribunal under Article 31(3)(b).

Several investment tribunals constituted under the NAFTA have agreed that submissions by the NAFTA Parties in Chapter 11 proceedings, including in non-disputing party submissions, may serve to form subsequent practice.

For example, the Mobil v. Canada Tribunal found that arbitral submissions by the NAFTA Parties constituted subsequent practice and observed that the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the

interpretation of the treaty, is entitled to be accorded considerable weight.

And I point you to Paragraphs 103, 104, and 158 through 160 of the Mobil v. Canada Decision on Jurisdiction and Admissibility dated July 13, 2018.

The Tribunal in Bilcon v. Canada reached a similar conclusion at Paragraphs 376 through 379 of its January 10, 2019, Award on Damages, as did the Tribunal in Canadian Cattlemen for Fair Trade at Paragraphs 188 to 189 of its January 28th, 2008, Award on Jurisdiction.

Whether the Tribunal considers that the concordant interpretations presented by the two TPA Parties in this proceeding as a subsequent agreement under 31(3)(a), as a subsequent practice under 31(3)(b), or both, on any particular provision, the outcome is the same. The Tribunal must take the TPA Parties' common understanding of the provisions of their Treaty as evidenced by their submissions in this Arbitration into account.

Finally, we take issue with the characterization of U.S. law and of the negotiation

process for the NAFTA during the Opening Statement of Claimant's counsel on Tuesday. We do not wish to belabor these issues today. We do, however, wish to reaffirm our strong disagreement, again, with counsel's statements on these issues.

And we reaffirm our position that under the Treasury Regulations cited in our written submission, Mr. Wethington could not provide testimony concerning official information, subjects, or activities without written approval of U.S. Department of Treasury counsel, which he has not received.

Even apart from U.S. law on this subject, it will come as no surprise to the Tribunal that complex international trade negotiations reflect the input of multiple different participants in each of the countries that is party to the Agreement. No one participant's recollections substitute for formal travaux préparatoires or other record of the negotiations.

In closing, we stand by the interpretations as set forth in our written submission of May 1 of this year.

Thank you, Madam President and Members of the Tribunal, for your time and consideration today.

PRESIDENT KAUFMANN-KOHLER: Thank you.

Now, we had said that if the Claimant wishes to have a break that we could do this. This was actually before we said that there could be a written--a short written submission if requested after the Hearing.

So, my proposal--but since I have opened the door to this break possibility, I would not close it if you disagree, but my proposal would be that we carry on.

But let me look at Mr. Martínez-Fraga.

MR. MARTÍNEZ-FRAGA: Let's carry on, Madam President.

PRESIDENT KAUFMANN-KOHLER: Is that--

MR. MARTÍNEZ-FRAGA: I would like to submit a short written response.

PRESIDENT KAUFMANN-KOHLER: That is fine. Absolutely. We can discuss this in more detail at the end of the Hearing. Absolutely.

MR. MARTÍNEZ-FRAGA: Of course.

PRESIDENT KAUFMANN-KOHLER: So, you have the floor for your closing argument, and we have received the PowerPoint presentation.

CLAIMANT'S CLOSING ARGUMENT

MR. MARTÍNEZ-FRAGA: Thank you, Madam President, Members of the Tribunal, counsel for The Republic of Colombia, distinguished representatives of The Republic of Colombia.

I shall address, Madam President, the first four questions. My colleague, Ryan Reetz, will address the last two questions, and I will also make some comments at the end, in a very brief closing, and also some non-answers to the first four questions at the end of the four questions. So, it's just housekeeping matters that we want to tie up.

So, addressing the first question. And this is the question posed by Mr. Söderlund. The question reads: "Does the wording 'for greater certainty' contained in Footnote 2 to Article 10.4 Most-Favored Nation Treaty guide us in understanding the scope of this Article and the Parties' intent?" End of citation.

Not at the risk but, rather, at the certainty of stating the obvious, the answer is in the affirmative. Yes. Of course it does. It does guide us in the Parties' understanding. And, by the way, as to this point, we do agree with the United States.

This qualifying language demonstrates a clear intent to limit Article 10.4 MFN practice only to substantive and not to procedural rights more broadly and, particularly, those procedural rights concerning dispute resolution mechanisms.

In doing so, it reflects that the Parties intended to limit consent only to those procedural rights as stated in Section B of Chapter 10, Investment State Dispute Settlement, addressing Articles 10.15 through 10.21 in Chapter 10. Nine qualifications, however, to this scope limitation with respect to the term "treatment" are necessary.

First, the term "treatment" applies--and, of course, I'm discussing the term "treatment" within the context of Article 10.4 as qualified by Footnote 2. I don't want to misstate that.

First, the term "treatment" applies to the

following language contained in Article 10.4.1 and 10.4.2. So, what we're saying is "treatment" applies to the following language: "With respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment." End of citation.

This qualification is important because the presence or absence of such qualification has to accord interpretive--has to be accorded interpretive significance.

Second, the activities to which the term "treatment" applies concerns "investments," as that term is defined in Article 10.8. Of course, this also matters because it is a Chapter 10 provision. And even though 10.8, of course, conforms with many of the aspects of investment in Chapter 12, it does not in every regard.

And as we shall see later, there are specific textual qualifications that will become very important, particularly in the context of a--of an Article 10.7 expropriation claim. We will get that--to that in a second, but now the third of the

nine propositions.

Third, Footnote 2 qualification to the scope of Article 10.4 must be understood as a limitation to MFN practice circumscribed only to that Article 10.4.

Fourth, the ordinary meaning of Article 10.4 cannot be engrafted onto Article 10--12.3 MFN. Why? Simple. Because Article 10.4 does not form part of the substantive provisions or articles listed in 12.1.2(a) and (b).

In other words, Article 10.4 is not at all--is not at all transferred into a 12.1.2(b). Why? Article 10.4 is not, of course--as you can see on the screen, is not explicitly listed and, moreover, Article 4 does not form part at all of Section B from Chapter 10 which, of course, is incorporated into 12.1.2(b).

So, that Section B, Investor-State Dispute Settlement, simply is not--does not contain Article 10.4. So, Article 10.4, in short, is not listed, so it's not part of the ordinary language. And, secondly, it doesn't form part. It's not contained in Section B in Chapter 10. So, for that

reason, it cannot be assumed and grafted onto Chapter 12. That would just simply defy ordinary language.

Six--this is the sixth of the nine reasons. The qualifying language "for greater certainty" and the entirety of Footnote 2 to Article 10.4, as we just said, is not present in the Chapter 12.3 counterpart to Article 10.4. This matters.

The complete absence of this qualifying language, together with the immediately referenced five propositions, based on an ordinary analysis compellingly suggests that the term "treatment" in Article 12.3 is broader than that term in its counterpart provision, 10.4.

Seven, Article 12.3 MFN clause does not contain the language--the establishment language "with respect to establishment acquisition, expansion, management, conduct, operation, and sale or disposition of investments in its territory." End of quote.

That qualifying language is simply not present in the text of 12.3. We just saw that's the

qualifying language, qualifying to which treatment applies, that is the subject matter, of course, of Footnote 2 in 10.4.

The "for greater certainty" Footnote 2 qualification illustrates the Signatory Parties' treaty practice of clearly and explicitly identifying, in ordinary language, any limits or qualifications to substantive rights, but particularly to MFN rights.

The next slide, please.

You now have up on your screen--on your respective screens, I'm sorry--some notable examples of the Signatory States' treaty practice in this regard, namely, explicitly stating restrictive qualifying language in an investment MFN clause and broader unrestricted MFN treatment scope pertaining to MFN clauses contained as with, for example, Article 12.3 in the Financial Services chapter.

Therefore, the "for greater certainty" Article 10.4, Footnote 2 language becomes clear as to its practical application both within the TPA and Chapter 10, Investment. The qualifying footnote to Article 10.4 demonstrates the Signatory States--that

the Signatory States exercise for their habitual treaty practice when drafting the Colombia-U.S. TPA MFN clause in Chapters 10, 11, and 12, respectively.

Eighth, the penultimate proposition. The structural differences between a trade protection agreement and a BIT, as we previously referenced, further inform and contextualize the Footnote 2 qualification to Article 10.4. Again, as we've already noted but of relevance with respect to this question, the TPA before this Tribunal has no less than three MFN clauses and three national treatment articles, each in a very separate and particular chapter.

We feel that this matters. It matters much. Interpreting one of these provisions, or any single one of these provisions, in a vacuum somehow misses the point that it's not contained in a vacuum or in a solitary freestanding section. As we typically note in the BITs that come across us, the ordinary meaning of the specific words corresponding to the scope of these clauses, the restrictive qualifications and restrictions and, of course, the purpose of the

chapter that embodies them, all constitute central considerations that simply find no residence or basic applicability when considering MFN clauses or any other treatment protection standard in the context of a BIT standing alone.

Ninth, and the final proposition, any connection between Article 10.4, Footnote 2, and Section B of Chapter 10, as this latter section is interpreted--incorporated into 12.1.2(b), also must be read in connection with Article 10.2.1 and Article 10.2.3.

You will note that Article 10.2.1 provides that "In the event of any inconsistency between this Chapter"--of course that's a reference to Chapter 10--"and another chapter, the other chapter shall prevail to the extent of the inconsistency." End of citation.

Next slide, please.

Article 10.2.3 states that "This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 12 (Financial Services)." End of citation.

Do we have the slide? I don't see it.

Okay. Yeah.

The Footnote 2 restriction on the scope of Article 10.4 conflicts under one reading with the scope of Article 12.3. Moreover, it is obvious that the Chapter 12--that Chapter 12 already has an MFN provision. And for this additional reason, any restriction on the scope of Article 10.4, as well as Article 10.4 itself, must be viewed as self-standing and only limited to Chapter 10 investors and investments.

Respondent at page--at Paragraph 272, Page 126 of its Counter-Memorial, however, ignores all of the foregoing grounds concerning Article 10.4, Footnote 2, and ingrafts a limitation on Article 12.3 that prevents Article 12.3 from expanding on the Chapter 10, Section B three-year limitations period without offering any textual support that would explain the manner in which Article 10.4, Footnote 2 at all can be gleaned from the ordinary language contained in 12.1.2(a) through (b).

And that's our effort to address the first

question.

The second question: "Assuming that Article 12.3 MFN could apply to replace the Article 12.1.2(b), Section B, three-year limitations period with a five-year limitation, (A), does the Tribunal have jurisdiction? And (B), where in the TPA is the textual support for this jurisdiction?" End of citation.

The answer to the question whether the Tribunal has jurisdiction, we answer in the affirmative, of course. The textual support, we say, is found in, first, Article 12.1.2(b); second, the actual substantive provisions contained in Chapter 12; third, Article 10.22, governing law; and, fourth, the very text of Article 12.3 MFN. A brief narrative may be helpful.

First, we note that Article 12.1.2(b) reflects the Signatory States' consent to provide financial services investors with ISDS rights to arbitrate Article 10.7, Expropriation Compensation, and Article 10.8, Transfers. Therefore, Article 12.1.2(b), in part, provides the Tribunal with

jurisdiction.

The second part of treaty textual language granting the Tribunal jurisdiction over the exercise of Article 12.3 MFN rights to increase the limitations period from three to five years is contained in the actual substantive provisions, we say, of Chapter 12. But an example may be helpful in working through this.

Assuming that a financial--and this is a hypothetical. Assuming that a financial services investor, a Chapter 12 investor, files a claim for expropriation pursuant to Article 10.7. So, we have a financial services investor filing a claim for expropriation under Article 10.7 and 12.1.2(b).

Let's stop there, and let's ask ourselves: What is the law that applies to that claim? What is the law that applies to the 10.7 claim for expropriation? Let's think about that question academically in the context of this hypothetical.

Here's what we say is the more likely and reasonable answer: The law applicable to the Article 10.7 claim is the law contained in the substantive provisions in Chapter 12 and "applicable

rules of international law," according to 10.22.1, the governing law provision of the actual treaty of our TPA.

Therefore, continuing with this hypothetical, the Respondent State to this ISDS Chapter 12 claim, again, in the hypothetical, under Article 10.7 has the right to raise, for example, the prudential measures exceptions contained in Article 12.10.1, 12.10.2, 12.10.3, and 12.10.4.

Let's stop there for a second and think about where we are. So, a financial services investor files a claim under 10.7 within Chapter 12; right? 12.1.2(b). The host State, the Respondent State--could be either of the two--raises an objection and says "No, you can't--I'm going to defend your expropriation claim by raising the prudential measures exception contained in 12.10 in Chapter 12," which is a paradigmatic, emblematic, and perhaps the most important of the substantive provisions in that chapter.

It is a chapter that purports--it's the provision that purports to balance the rights of host

States to regulate the financial services industry and, at the same time, to protect investors from overzealous regulatory activity.

So, the State says, "I will raise 12.10." Why? Because that would be the governing defense to a 10.7 expropriation claim under Chapter 12. So, that's where we are in the example.

So, in this example, the substantive prudential measures exception in Article 12.10 can be raised to an Article 10.7 expropriation claim that a Chapter 12 financial investor has brought against a host State. Put simply, the host State has the right to raise the Article 12.10 prudential measures defense because Article 12.10 is the law that applies to an Article 10.7 expropriation claim brought by a Chapter 12 investor.

But there is more. The Claimant--now let's focus on the Claimant in this hypothetical for a second.

The Claimant asserting the Article 10.7 expropriation claim may raise the affirmative defense to the Respondent's prudential measures defense also

by availing itself of Article 12.10.1, "where such measures do not conform with the provisions of this agreement referred to in this paragraph, they shall not be used as a means of avoiding the Parties' commitments or obligations under such provisions."

And the Claimant also may say to the Respondent host State's prudential measures exception under 12.10, I raise 12.10.4 "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail or a disguised restriction on investment and financial institutions or cross-border trade in financial services." End of citation.

In the case--in this example, the Tribunal would have jurisdiction over the expropriation claim because of the language of 12.1.2(b), jurisdiction to consider that the Article 12.10 prudential measures defense with respect to the host State and jurisdiction to consider the non-circumvention provisions as to Claimant based on Article 10.22.1 governing law, which would include the Chapter 12

substantive provisions, Article 12.10.

Now, let's apply that hypothetical to our case, the case before this Tribunal. Claimant has selected this example because it is particularly appropriate in this case and with respect to this question, meaning the actual proceeding before the Tribunal.

Here in this case, The Republic of Colombia itself sought to raise the Article 12.10 prudential measures exceptions as a defense to Claimant's claim. And you have that in front of you. And, specifically, on June 25, 2018, Mr. Luís Guillermo Vélez Cabrera with the title director general, or general director, wrote to Ms. Catherine Kettlewell, of course of ICSID, very explicitly invoking Article 12.10 as a defense.

And he writes--you can see the letter there. But later on you see where he says (interpreted from Spanish): "The TPA is a joint determination in face of the measures adopted by Colombia in 1998 in connection with the Granahorrar crisis and the eventual use of Article 12.10 of the TPA as a valid defense in an arbitration." And it goes on.

And then, again, on May 23--the next slide, please. On May 23, 2018, a similar letter was sent, also by Mr. Luís Guillermo Vélez Cabrera to the Secretary of the Department of the Treasury of the United States and to Assistant Secretary, Chris Campbell, for Financial Institutions, also of Treasury. There, as well, Colombia seeks to avail itself at this proceeding of the prudential measures exception set forth in Article 12.10.

That letter, in part, reads--and I quote: "As subsidiary defense for an unlikely phase on the merits of this dispute, the agency considers that the prudential carve-out established under Article 12.10 of the TPA would apply."

And later on it says: "Article 12.19(d) of the TPA states that the period for a joint determination on the application of the prudential carve-out is 60 days. As such, we would greatly appreciate receiving the contacts of the officials within the Department of the Treasury assigned to these matters so we may share the relevant documentation." End of citation.

Now, before shifting focus from Article 12.10 exceptions to Article 12.3 MFN in the context of an actual and not a hypothetical claim for expropriation pursuant to Article 10.7, on the part of a Chapter 12 financial services investor invoking Article 12.1.2(b), three important observations concerning Article 12--sorry--Article 10.7, Expropriation and Compensation, are helpful. They're very helpful.

Put up the slide, please.

First, notably, the elements of expropriation that we are so used to seeing in our field for public purpose and non-discriminatory and not in violation of due process and for compensation, they're all present here in 10.7.1. But we note that there is a slight difference that makes--makes this claim--this substantive claim extremely, extremely important and materially different from the type of expropriation definition that we usually find.

Why? Because look at 10.7.1(d). And 10.7.1(d) reads: "In accordance with due process of law and Article 10.5." Now, I want to stress the "and

Article 10.5" because it's in the conjunctive and not in the disjunctive, and we feel that that matters.

Now, second--the second of the three observations. Let's look at Article 10.5 that qualifies, that enriches, that supplements the traditional elements of expropriation.

Article 10.5 is the minimum standard of treatment provisions. And at 10.5.1 it reads: "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." End of citation.

Article 10.5.2(a) avails itself, but this time in the very text of the very same "for greater certainty" language that we found in Footnote 2 to Article 10.4. To state that the obligation in Paragraph 1 provides--and I quote--"(a) 'fair and equitable' treatment includes the obligation not to deny justice"--not to deny justice--"in criminal, civil, or administrative adjudicatory proceedings in accordance with the principles of due process embodied in the principal legal systems of the world." End of

citation.

Therefore, because Article 10.5, Minimum Standard of Treatment, explicitly and textually forms part of Article 10.7, Expropriation and Compensation, and Article 10.7 expressly is incorporated into 12.1.2(a) and (b), it follows, necessarily, syllogistically, that the Parties consented to submitting ISDS investor-State arbitration under Chapter 12 FET and denial of justice as part of the minimum standard treatment set forth in Article 10.5.

And we thought it was important to raise this in this context because it also speaks to aspects of the other questions. It does also additionally follow, also syllogistically--so that in order for this not to be the case, the foundational premises would have to be wrong. It does follow that Claimant is not exercising Article 12.3 MFN to import consent to arbitrate FET.

For the reasons already stated, only more favorable FET can be reported under these circumstances because FET is already in 10.7 and 12.1.2(b).

We brief this, as the Tribunal is aware, but the Tribunal wanted the Parties, of course, to facilitate citation. We brief this in our Claimant's Memorial on Jurisdiction in Paragraph 294 and on Claimant's Reply on Jurisdiction, Paragraphs 458 and 459. All this is set forth. But I said to the Tribunal--there were three reasons, and I want to fulfill my promise and address the third reason.

May I have the slide, please.

Third, Footnote 4 to the chapeau of Article 10.7 provides that Article 10.7 shall be interpreted in accordance with Annex 10-B and, in turn, Annex 10-B, Paragraph 1, reads as follows: "The Parties confirm their shared understanding that: (1) An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right"--or intangible property right--"or property interest in an investment." End of citation.

This qualification to the scope of investments for purposes of Article 10.7, Expropriation, is important to consider. Even were

this Tribunal to accept--which it should not, of course--Respondent's characterization of the definition of "investment" in Article 10.28 and, presumably, although they don't really mention it, in Article 12.20, which is different from that contained in 10.28, it is very clear and, I think, indisputable that Annex 10-B clearly sets forth a broad definition of investment to include "tangible property rights"--I'm sorry--"intangible property rights" or "property interest."

In the same manner in which Article 10.22 would provide this Tribunal with jurisdiction to adjudicate an Article 12.10 exceptions defenses at the applicable law to an Article 10.7 expropriation claim, so, too, would it, together with Article 12.1.2(b), allow for application of the law governing an Article 10.7 claim with jurisdiction to enhance an existing right to three years--the existing right--pursuant to recourse to the two additional years that Colombia provides to Swiss investors under the Colombia-Swiss BIT.

The applicable law to the 10.7 claim allows

for the enhancement of the existing procedural right of three years to five years. An existing right merely is rendered more favorable by adding a mere 24 months. It is not a rewriting of the provision, which is what we see in the cases on this issue.

The cases on--the majority of these cases are properly adjudicated. They're properly analyzed and concluded because they--they entail situations where the MFN practice, of course, is being used to usurp the actual configuration of the provision. Not so here.

Three years is being asked to be enhanced from three to five. It could not really be more clinical because it's actually numerical in terms of being able to calibrate the extent to which an existing right is improved.

So, what we say in this connection is that this MFN practice comports with two of three existing general views on MFN practice that do not apply an a priori vision to the proposition of whether MFN rights can extend to procedural non-substantive rights. And those cases, of course, are the ejusdem

generis that find the generis to be both substantive and procedural and, therefore, the axiom foundationally inapplicable. That's our reference and comments and observations on the second question.

The third question: "Claimant asserts that the Arbitral Tribunal can entertain any dispute involving Chapter 12 substantive provisions. What is the textual basis?" End of citation. Excellent question.

The textual basis for reporting ISDS procedural treatment to the substantive provisions of Chapter 12 are threefold. First, Article 10.22, governing law. Second, Article 12.3, MFN--I'm sorry. Four. There are four provisions. Second, Article 12.3, MFN. Third, Article 12.1.2(b). And fourth, the substantive provisions contained in Chapter 12 itself. So, there are four.

The exercise of Article 12.3 to import more favorable substantive provisions than those already--and I emphasize the word "already"--contained in Chapter 12 by rendering such provisions arbitrable comports with deciding "the issues in dispute in

accordance with this agreement, the Colombia-U.S. TPA, and applicable rules of international law."

Here, the use of national treatment serves as a helpful example. It is undisputed that Chapter 12 contains an Article 12.2 national treatment protection standard. Claimant asserts that because this standard already is present in Chapter 12, step number one, an Article 12.3 MFN is not restricted; step number two. The Article 12.3 MFN can be exercised to improve the Chapter 12 national treatment protection standard by rendering it susceptible to ISDS Chapter 12, financial services investors, in the same manner in which the Republic of Colombia has rendered national treatment enforceable, pursuant to ISDS, to Swiss investors pursuant to Article 4.2 and Article 11 of the Colombia-Swiss BIT. Step number three.

Notably, this methodology has three consequences. First, it provides the host State, Colombia, with expanding control of the substantive provisions in Chapter 12 that it wishes to render susceptible to ISDS, only by doing so based upon the extent to which such rights or comparable rights the

host State has made available to investors in other states.

So, the control is always vested within the host State. In this same vein, the host State also is in control of reducing or circumscribing, if you will, provisions contained in Chapter 12 that it wishes to make available to Chapter 12 investors also by dint of its decision to discontinue, theoretically based on policy, for example, grant of those rights and existing treaties that the host State would terminate.

Second, this approach, which seeks to interpret the TPA, is a holistic--in a holistic and comprehensive manner, also renders rights contained in Chapter 12 as having actual practical effects and purpose, because those substantive rights would be able to provide investors with actual protection by virtue of compensatory damages. As previously suggested, a treatment protection standard has no practical remedial application if it does not provide for the right to pursue compensatory damages arising from its breach.

In this connection, Claimant cited to the

Tribunal's partial award separate opinion--and separate opinion--I'm sorry--in Eureko v. Poland regarding the cardinal rule of interpretation that "treaties, and hence their clauses, are to be interpreted as to render them effective rather than ineffective." And that's at--end of citation. That's at Paragraph 248 of the partial award. You can find it in our Reply Memorial at Page 129, Paragraph 171.

The third consequence of this textual approach is that it recognizes that, in addition to understanding the Chapter 12 substantive provisions as rights with remedies, that financial investors and their investments are contextually appropriately treated within the chapter that duly distinguishes them from the universe of all other investors and investments.

So, to make that point a little clearer, it's important to understand that there must be a reason why the treaty provides for a chapter that has the entire universe of investors except one single class of investors. That single class of investors is provided a separate and distinct chapter. That

separate and distinct chapter has its provisions that are very different in many regards from the Chapter 10 provisions. What I'm saying is, in many regards, there are no counterpart provisions in Chapter 10.

Now, there's a reason why this happens, and we've stated this. Our view, Claimant's view, is that these are the most vulnerable investors in the universe of investors because they are subject to understandable exercises of regulatory sovereignty that also are existential for the State. The State must regulate financial services. And this is critical.

So, these--this chapter also provides for tremendous regulatory authority to regulate in connection with the substantive protections. We're saying this has to be understood in the context of any analysis of the question here at hand. Therefore, this approach, based on Article 10.22, based on Article 12.1.2(b), Article 12.3 MFN, and the existing substantive provisions contained in Chapter 12 makes sense of the structural features of the TPA, which clearly are different from those of the BIT, as we

said before, and it would provide the investors with microeconomic relief rather than macro-prospective and non-economic relief, which is what's contemplated in State-to-State arbitration.

That cannot really be a serious remedial factor for investors, of course. And all the parties and the non-disputing party know that the history on that is very, very clear. Only five in the history of--leaving aside the Claimant's Tribunal cases, in the history of investor-State arbitration, only four panel decisions. Of course it's prospective and non-compensatory in terms of damages.

And that's our effort at Question 3--addressing Question 3. And, finally, the last question that I will address is Question 4. And it's: "We understand that the Claimant relies on the 2014 order as the international law breach. And for what reasons is this order wrongful under international law? What makes it wrong? And if so, what--is it wrongful under international law? And if so, what damages arise from this supposedly internationally wrongful act?" End of citation. Also

a piercing question.

As a preliminary matter, important to note that in connection with this jurisdictional stage, Colombia has expressly confirmed that it has not raised any objection based on a supposed failure by Claimant to articulate a prima facie claim on the merits. This is important because of the nature and scope of this question. And that's a response to Claimant's submission regarding examination of Claimant's experts dated September 4, 2020, at Paragraph 18 and Footnote 33, citing Counter-Memorial at Paragraphs 151 through 156.

In fact, Colombia has expressly objected to Claimant's presentation of "any evidence at all on the merits of her claims." Same citation.

The Tribunal acknowledged this in Paragraph 9 of its Procedural Order Number 3, September 24th, 2020. "The Tribunal further finds that, as this is a Hearing on jurisdiction and the Respondent has not raised a jurisdictional objection based on a failure by the Claimant to articulate a prima facie case on the merits, it will only hear fact and expert

testimony on jurisdiction." End of citation.

Now, that having been said, Claimant has articulated the following claims: expropriation and judicial--and judicial expropriation. The 2014 Constitutional Court's opinion had the effect of finally removing, without compensation, Claimant's entitlement to the value of her investment in Granahorrar that had been embodied in the 2007 Judgment that the Council of State had rendered.

Now, we don't really care what the 2007 Judgment is called. We don't care if it's called "the investment." We don't care if it's called "the receptacle of residual rights to the investment that have been monetized." We don't care if it's called "the instantiation of the investment." And I believe that the Tribunal also doesn't care what Claimant calls it, because the Tribunal is not bound by the arguments of counsel, just as the Tribunal is not bound by any single or set of awards.

What's important is that that judgment, that 2007 Judgment, arose from a covered investment and is the consequence of State measure that gave rise to the

instantiation of a monetized award. Based on Colombia's own calculation and findings of wrongdoing, that's what's important, that it is a legal dispute arising from a covered investment.

Why a violation of international law? Flushing out the specific elements to be applied by the Tribunal in this case would be part of the proceeding on the merits. But here we have a deprivation of Claimant's rights resulting in the complete extinguishment of her investment, which is completed by the 2014 Order without any compensation to the Claimant. That process ends in 2014.

And I reiterate for the Panel's benefit, again, that in 2007 Claimant had everything, based upon a judgment from a non-appealable--a tribunal of last instance. It was Respondent, the State, that filed tutelas--after exhausting tutelas with the Council of State, filed tutelas with the Constitutional Court and, therefore, involuntarily dragged Claimant into that proceeding.

By the way, our expert, Dr. Briceño, speaks about those tutelas and says, "Look, those tutelas

themselves were not even lawful," just for the sake of completeness. Why? Because tutelas at that time could only be filed on behalf of persons and--natural persons having fundamental rights. Now, that was later extended to corporations, but never to the State. So, even those tutelas--which by their own Expert's testimony had one-third of 1 percent chance, 1 in 300, of being accepted--were even wrongfully--wrongfully, substantively and procedurally, as well.

But that's just a side observation to what happened. Assuming for the sake of discussion that in this context there would be a further requirement of illegality or violation of due process, or some similar formulation, Claimant will be able to show in the merits phase that this standard is amply met. As Justice Rojas Ríos orally concluded in connection with his dissenting opinion, C-27, the effect of the Order 188/14, the 2014 order, in the end was "granting legality to an expropriation that had been duly corrected by the Council of State, whose reasoning is impeccable, for which there is no acceptable and

rigorous legal argument to revoke it."

As we have heard, Colombian law has a clear standard for when the Constitutional Court is legally required to nullify a previous decision. With this point, on the standard, that's one of only three points with which we agree with Dr. Ibáñez. Dr. Ibáñez, in his Second Report, he sets forth specific and general requirements for a nullity proceeding, an annulment proceeding. We agree with him there.

We also agree with him in his citation to his name. And the third point we agree with him on is on Paragraph 164 of his Second Report where he, in effect, provides a more coherent and academically rigorous answer to the question that Madam President posed to him in a hypothetical context. But there he does answer it correctly. The rigors of the written word have that effect on people.

Here we have testimony from Dr. Briceño in her First Report at Paragraphs 87 through 107 and in her Second Expert Report in Paragraphs 33 through 37, supported by the dissenting opinions of Justices

Pretelt Chaljub and Rojas Ríos, as to why that standard clearly met and the degree of the order's departure from applicable norms. So, they're talking about the order.

We have further testimony from Dr. López-Roca who--with respect to the impropriety of the 2011 Judgment, which does--also supports the standard was met for granting the annulment in 2014, and we have the additional testimony from Jack Coe identifying how the various factors present in this case can support conclusions of internationally wrongful acts.

For example, in Paragraph 10 of his First Report, he says: "In their totality, the facts presented seem to demonstrate disregard for basic protections that the investor was entitled to expect, including minimum levels of legal security. Significantly, one sense of these deficiencies, when viewed in terms of international minimum standard, is confirmed by jurists intimately familiar with the case."

He also says: "In contrast to the routine case, however, in the case under study here, there are

credible assessments by Colombian jurists who are certain that the Constitutional Court has engaged in a poorly justified ultra vires departure from existing law while purporting to exercise last instance appellate powers."

And, again, lastly, in Paragraph 25, Professor Coe writes: "My assessment is that the process"--"as the process unfolds, the Tribunal may well conclude that the facts presented reveal acts which shock, or at least surprise, a sense of judicial propriety and which demonstrate prejudice to investors from, inter alia, the unforeseeable applications of notice principles that seem abhorrent and idiosyncratic in their derivation and manner of application." End of citation.

Among the many grounds identified by the experts are violation of the jurisprudential principle of subsidiarity, which limits the court's jurisdiction in ignoring settled precedent without a judicially plausible basis.

Fair and equitable treatment, including denial of justice. This standard is incorporated into

the TPA 10.7 by 10.7.1(b), as we just saw, which prescribes any expropriation that is not "in accordance with due process of law in Article 10.5."

In turn, Article 10.5 requires observance of minimum standard of treatment, which expressly includes FET, FPS. FET is expressly identified as forbidden denials of justice. More favorable versions of FET and related standards from the Swiss treaty are also made applicable via 12.3 MFN, and that's our Memorial on Jurisdiction at Paragraph 294.

Wrongful judicial activism in Colombia and breach of international law. The Constitutional Court committed serious abuse of jurisdiction and authority and radically renounced universal principles of justice and due process. The 2014 Opinion was founded on economic interests and political agenda. It manifestly and seriously was in breach of basic principles of due process and fundamental justice. That's our Memorial on Jurisdiction at Paragraphs 295 and 296, and also our Request for Arbitration at Paragraphs 187 through 199. But there they are not as developed in the brief.

Irrespective of the finding that Colombia committed a denial of justice, it is Claimant's contention that judicial conduct and mistreatment attributable to the Republic of Colombia also amounts to an independent breach of fair and equitable treatment obligations binding Respondent. Again, fleshing out the specific elements to be applied by the Tribunal in this case would be part of the proceeding on the merits. But in--Azinian v. Mexico case gives us one example of a standard which would find denials of justice inter alia where the relevant courts "administer justice in a seriously inadequate way," end of citation, or where they engage in a "clear and malicious misapplication of law." And that's at Paragraphs 102 and 103 of that Decision.

Similarly, Mondev formulates the question as "whether an international level"--"whether, at an international level"--I'm sorry--"and having regard to generally accepted standards of administration of justice, a Tribunal can conclude in the light of all available facts that the impugned decision"--"that the challenged decision was clearly improper and

discreditable, with the result that the investment has been subjected to unfair and inequitable treatment." End of citation. Award at 127.

The facts previously mentioned in connection with the expropriation and judicial expropriation would also make out a claim for violation of the international minimum standard, including violation of fair and equitable treatment and denial of justice.

National treatment. Throughout the course of this unfortunate misadventure, Claimant received treatment decisively less favorable than the treatment received by Colombian investors in like circumstances. The discrimination persisted during the judicial proceedings before the Constitutional Court. No Colombian investors in like circumstances were the target of such a discriminatory campaign of political pressure and procedural mistreatment. The unprecedented misapplication of basic principles, the most basic principles, of due process and justice, the creation of new rules devoid of any factual and legal foundation, as well as a number of instances proving political pressure on and personal influence within

the Constitutional Court are all but a very small catalog of the judicial mistreatment received at the hands of Colombian executive and judicial authorities.

The judicial treatment was emphatically discriminatory because, in addition to its own failures, it validated the mistreatment that had been committed against Claimant.

Damages in each case would be the value of the property right of which Claimant was deprived by the 2014 Decision. That's the decision; i.e., the value of the judgment with appropriate interest. An alternative approach, of course, would be to apply the Chorzów Factory approach and award full compensation for the harm caused to Claimant by Respondent's conduct, which might conceivably be calculated using several different bases.

And that's the end of addressing the four questions, but I do have a couple of housekeeping matters that I would like to address that are also technical in nature. If Madam President wants me to address them now, I can. Or if Madam President believes that--I understand perfectly--understandably,

a break is in order, I, of course, would defer to that judgment.

PRESIDENT KAUFMANN-KOHLER: I'm not entirely sure what you want to address now. That's why I'm hesitating.

MR. MARTÍNEZ-FRAGA: It's not the other two questions. I want to talk about Spence v. Nicaragua and three related cases. I want to talk about Mondev and make an observation on Saipem and end there.

PRESIDENT KAUFMANN-KOHLER: And so, the choice is between going to the other questions or dealing with--

MR. MARTÍNEZ-FRAGA: The question is, if you want to, we can go to the other questions.

PRESIDENT KAUFMANN-KOHLER: No. Whatever--I mean, you're the master of the structure of your presentation.

MR. MARTÍNEZ-FRAGA: Let me--

(Overlapping speakers.)

MR. MARTÍNEZ-FRAGA: I'm sorry. So, then, let me get this out of the way, and that would be a logical breaking point, should the Tribunal

understandably seize that opportunity.

Just a couple of observations on Spence v. Costa Rica. I think it's necessary for all concerned. Can we have the slide, please.

Here's what I wanted--Claimant wanted to stress in this case. The test--and, again, we don't subscribe to a policy of extracting language out of context from a case and putting that together and calling it some sort of test. What I wanted to stress is that there is no fundamental change in status quo test in Spence v. Costa Rica.

The test that's been articulated by Respondent is just simply nowhere to be found there, when you read the entire case and you look at the fundamental change in status quo language and you--you look at the other part of the test that purportedly is said to be in there. One point that is extremely important in Spence is that the Spence Tribunal itself says that Spence is to be followed very, very carefully, if at all.

May I have the next slide, please.

And, again, what's in blue is an actual

citation. The Spence Tribunal cautioned against the application of its findings outside the very, very specific factual matrix of that case.

It said: "The jurisdictional aspects of this case are heavily fact-specific. Although interpretation of law, notably of CAFTA Article 10.1.3 and 10.18.1, are necessary, the Tribunal's assessment ultimately turns on appreciations of fact. The Tribunal thus cautions any reading of this Award that would give it wider 'precedential' effects." End of citation. And that's at Paragraph 166, RL-0024. That language is not found in Respondent's analysis of Spence.

The next slide, please.

Again, Corona Materials--the Court--the Tribunal may recall that three awards are cited in connection with--purportedly in connection with the so-called Spence test in Corona Materials v. Dominican Republic. Again, this is very, very germane to the 2014 June 25 Order from the Constitutional Court. That was a State measure, flatly and without any dispute. It's actual State measure post entry of the

treaty.

In Corona Materials v. Dominican Republic, there was nothing even remotely comparable. In Paragraph 210, the Tribunal notes: "As correctly stated by the Respondent, the absence of a response to the Motion for Reconsideration cannot be considered as a stand-alone measure, or a separate breach of the Treaty."

Again, on 212: "As recognized by Claimant, the Dominican Republic's failure to respond to Claimant's Motion for Reconsideration was understood by the Claimant itself at that time as not producing any separate effects on its investment other than those that were already produced by the initial decision. Unless the circumstances, the State's inaction following Claimant's efforts to have that same measure reconsidered cannot be considered a separate breach of the Treaty." End of citation.

There, there was absolutely no State measure. Here the 2014 Order, (a) is the end of all judicial labor; and (b), that order, based on the expert testimony before this Tribunal, finally fixes the 2011

Constitutional Court Judgment in place, having the effect, of course, of permanently eclipsing or eviscerating the 2007 Council of State Judgment. That occurs--that final act occurs in 2014 on June 25. That's the testimony before this Tribunal.

In the Opening Statement we engaged in the hypothetical moving the entry into force of the treaty from May 15, 2012, to 2010, one year before the 2011 final judgment, presumably, by the Constitutional Court. And under that set of facts, of course, the Respondent would be arguing, "No, there is not an appeal as a matter of right, but there is a challenge, which rightfully can be effectuated which forms part of the fabric of the judicial proceedings in Colombia and which could be followed, and which could lead to a final-final order that may revoke, modify, or eviscerate altogether the challenged judgment."

May I have the next slide, please.

Eurogas v. Slovak Republic. Again, this is an extremely, extremely particular case that really deals with the--a predecessor treaty and a time frame--a limitations period of three years with

conflicting language between the extinguishing treaty that's being extinguished and the actual subsequent treaty that enters into force. And it is completely, completely removed and far afield from anything that can in any way be applicable to this case.

We agree with the analysis both here and in Corona. But here--here's what the Award says in Eurogas v. the Slovak Republic: "A provision such as Article 15(6) of the Canada-Slovakia BIT obviously aims at avoiding that disputes which have accumulated for more than a certain number of years"--three years in the case of the Canada-Slovakia BIT--"give rise at the same time to a multitude of treaty claims brought before arbitral tribunals. A pre-existing dispute, in that context, is any dispute whose intrinsic elements are invoked by the investor as the basis of the treaty claim." End of citation.

Eurogas involved different facts that were found to constitute a dispute within the meaning of Article 15(6).

Now, here's what we have been saying all along, which I think is germane to an understanding of

the 2014 Auto Order. We say pre-2012, pre-entry into force, acts or disputes are not covered by the treaty. We're very clear about that. If what we're doing is applying the treaty standard to pre-treaty acts or disputes--no, we say that's not appropriate, of course. Only post entry into force disputes or acts are to be understood or analyzed in the context of applying the treaty's standard to those acts to see if there's a breach.

But, having said that, what all of these cases also say--and very clearly, and it makes sense, and it's an unremarkable event because it's such a common proposition--is that the Tribunal can and actually should look to pre-treaty disputes under the prism--or through the prism or lenses of domestic law if that would inform its application of international law post-entry of treaty, applying that international standard from the treaty to a post-treaty State measure alleged to have violated the treaty.

So, of course, the Tribunal does not apply the treaty--international treaty standard to pre-treaty acts or disputes. The Tribunal can look at

pre-treaty acts and disputes through the prism of domestic law to inform its judgment and assessment of post-treaty measures alleged to have violated international law pursuant to the standard of the treaty at issue. That's what all of these cases say.

I apologize for repeating this to so erudite and experienced a Tribunal, but I want the record to be clear, at least with respect to what we're saying.

The last one, please.

And this ST-AD v. Bulgaria is a case that really--it's a real fancy of the imagination to in any way have it apply to this case. In that case, there was a complete adjudication by the Court, and that was completely final and with respect to a very particular investor. And then a new investor comes in and calls that somehow, the investment, three days after the Supreme Cassation Court denied the application to set aside its earlier decision against the underlying company and which rendered the BIT potentially applicable.

And the Tribunal there says understandably: "It is not acceptable for a Claimant to artificially

create a new act of State and interfering with its right by simply mirroring events that occurred before it became a party investor."

That's just simply not what we have here, anything even remotely close. In 2007, this whole thing ended and the Claimant had a judgment. And then the rest. I repeat myself.

Can we have the next slide, please.

Just very quickly, an observation.

Can we have the Mondev slide, please.

We submit Mondev v. U.S. to the Tribunal's consideration. Again, let me reiterate. We understand that the Tribunal is not bound by arguments of counsel or any award, of course. But Mondev is an important case, I think analytically, for a number of reasons. The Claimant acquires the investment, of course, before the treaty--before the--it's a NAFTA case.

And you see the Claimant acquires the investment in 1978. And then, in 1991, there's a foreclosure, and it's argued that that foreclosure eliminates the investment. There's no investment

anymore.

Now the investment is phlogiston or a Kafka metamorphosis. There's no solid investment anymore, so argues the United States in that case. Again, everything that is now taking place is before January 1, 1994.

In March 1992, Claimant filed a domestic--before domestic courts in Massachusetts against the city of Boston and a Boston redevelopment authority. And post-investment, in 1994, there's a jury verdict for the Claimant, and then a jury verdict also for the Claimant that's taken away on a procedural matter called JNOV. And then sometime after 1994 the appellate court, the Massachusetts Supreme Judicial Court, upholds the city's appeal with respect to the contract claim, and the Claimant is left ultimately with absolutely nothing.

The Claimant then files a--exhausts everything, files a certiorari petition with the U.S. Supreme Court which has practically about the same chances of prevailing--of just being heard, let alone prevailing, as a tutela. They're numerically very

close. And then on September 1 files a Notice of Arbitration.

May I have the next slide, please.

And, you know, the U.S.'s position is, with the exception of the Massachusetts decision, all acts complained of occurred prior to January 1, 1994, when NAFTA entered into force, and cannot therefore sustain a NAFTA claim. Mondev says the breaches did not occur until after the decisions of the United States courts which finally failed to give it any redress.

Next one, please.

And the Tribunal said it finds both parties accept that the dispute as such arose before NAFTA's entry into force, and that NAFTA is not retrospective in effect. The Tribunal agrees with the parties, both as to the non-retrospective effect of NAFTA and as to the possibility that an act initially committed before NAFTA entered into force might, in certain circumstances, continue to be of relevance after NAFTA's entry into force, thereby becoming subject to NAFTA obligations.

And Mondev's claim could be put into three

ways, so says the Tribunal. We feel that this formulation is an extremely helpful one conceptually, because it goes to the whole point of the timeline that has been shown and explained to this Tribunal, I guess in some ways by--not just the pleadings but by both Parties.

Next, please.

And all this is very important, but the last part, I think, is particularly important. Again, all this is a quote from the actual Award. It says at the bottom: "To require the Claimant to maintain a continuing status as an investor under the law of the host State at the time the Arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct, including uncompensated expropriation of their investments and to do so throughout the lifetime of an investment up to the moment of its"--I can't read it because of the screen--"or other disposition." End of citation.

Next, please.

Finally, we also believe that it would be

helpful or instructive to look at the Saipem Award as to the question that was really raised by Respondent's counsel when Respondent's counsel said, "Well, here, you're putting--Claimant wants to put the substantive claim of finding on the merits before a finding on jurisdiction, and you have to establish jurisdiction before you can have a merits determination."

Of course, we agree with that proposition. But we've never said that you have to make a--you don't need to make a merits determination as a predicate to jurisdiction. The only thing we said is that the Tribunal only has to acknowledge that there was State action/State measures from 1998 pursuant to a covered investment. No--we're not asking this Tribunal at this stage--at this stage to make any determination on what happened in 1998 in terms of legality. Does it comport or is it inimical to public international law or the domestic law of Colombia? No. We're not asking the Tribunal to say that.

We're just--we're just asking the Tribunal to look at the State measure at all points in time. And whether the initial investment became a judgment in

2007 or became the instantiation of residual rights or became an iteration of monetized rights arising from a covered investment, what you call it and how you call it is ultimately a--can just be a nomenclature and metaphysical issue.

But the substantive actual legal issue, as with the Saipem ICC Award, is that it substantiated and crystallized rights that arose from a covered investment that was the subject of State measure that gave rise to a legal dispute. And that's what we consider to be important. The language--can you move the slide a little bit to the left because it's being cut off. No? Okay.

The language--I apologize. The language of the Tribunal is very clear. It says: "The Tribunal holds that the present dispute arises directly out of the overall investment. The rights embodied in the--the rights embodied in the ICC Award were created by the Award but arise out of the contract. The ICC Award crystallized the parties' rights and obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment,

since the contract rights which were crystallized by the Award constitute an investment within Article 1(1)(c) of the BIT." End of citation. Decision on Jurisdiction at Paragraph 114 and Paragraph 127.

Having said that, this is a natural breaking point where the Tribunal may want to take a break before Mr. Reetz addresses the last two questions and I close on our part.

PRESIDENT KAUFMANN-KOHLER: Yes, I think it's a good idea to break now, if that is a good timing for you. Should we take 10 minutes and resume at 38 after the hour?

MR. MARTÍNEZ-FRAGA: Thank you.

PRESIDENT KAUFMANN-KOHLER: And we could ask Mike to bring us to the breakout rooms.

MR. MARTÍNEZ-FRAGA: Thank you.

(Brief recess.)

MR. MARTÍNEZ-FRAGA: Madam Chair.

PRESIDENT KAUFMANN-KOHLER: Yes.

MR. MARTÍNEZ-FRAGA: Are we ready to begin?

PRESIDENT KAUFMANN-KOHLER: I don't see

Professor Fernández Arroyo.

Yes. Here he is. Good.

So, now we're ready to resume. Absolutely.

MR. MARTÍNEZ-FRAGA: Mr. Reetz will address the Tribunal on Claimant's behalf.

PRESIDENT KAUFMANN-KOHLER: Thank you.

Mr. Reetz, please.

MR. REETZ: Thank you, Madam President. I'm using Mr. Martínez-Fraga's screen. We have a similar setup to the Arnold & Porter folks.

With the Tribunal's permission, I would like to address Questions Number 5 and 6 relating, obviously, to the subject of subsequent agreements.

And I'll start with Question 5, which was as follows: The Claimant argues that the operative dates on which the intent of the Contracting States of the TPA must be ascertained for purposes of interpretation are 1994, 2006, and 2012, when the Treaty came into force. How do we reconcile this timing with Article 31, Paragraph 3(a) and (b), the Vienna Convention on the Law of Treaties, which says that the Treaty interpreter must take into account any

subsequent agreement or subsequent treaty practice?

And that was Question 5.

Claimant's submission on this point is that there is no conflict between these two ideas. The instrument that the Tribunal is charged with interpreting is the TPA. And that's an historical document that entered into force in 2012, and it is, ultimately, the context, object, and purpose and, of course, text as of 2012 that the Tribunal is considering as part of its Article 31 analysis.

Now, there are, of course, historical antecedents in 1994 with the NAFTA and in 2006, the time of conclusion and signing, that bear clear relevance to the Treaty Parties' understandings at the later time, 2012, when the Treaty entered into force.

In contrast, subsequent agreements and subsequent practice between the Treaty Parties, by definition, come about after the Treaty has come into effect. In fact, those types of things, subsequent agreements and subsequent practice, are expressly contrasted with contemporaneous agreements that are covered by Article 31, Paragraph 2.

And to the extent that a subsequent agreement or subsequent practice exists, it would, of course, be taken into account by the Tribunal, together with the context, in conducting the Tribunal's interpretive analysis. That's what Article 31, Paragraph 3, of the VCLT provides for. But the Tribunal's fundamental task is interpreting the Treaty document itself.

And Article 31, Paragraph 1, of the VCLT clearly identifies that task. It tells us: "A treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the Treaty and their context and in the light of its object and purpose."

These four components of the principle interpretive task--the Treaty's terms, their context, and the Treaty's object and purpose--are all fixed and established by no later than the date of the Treaty's entry into force.

So, we can see that the Tribunal's interpretive task is clearly historical in nature. It's understanding the Treaty through these aspects as of the date that the Treaty comes into force. And

this point that any subsequent agreement or subsequent practice in treaty application are to be taken into account by the Tribunal in interpreting the historical document is supported by the distinction between a subsequent agreement and a treaty amendment.

A treaty amendment, of course, represents a change in the Parties' respective obligations. In interpreting an amendment under the VCLT, the relevant time, of course, is the time of the amendment itself. That's when the Parties have agreed to a change in their obligations. And the amendment's text, context, object, and purpose exists and are fixed at the time of the amendment.

In contrast to an amendment, a subsequent agreement--well, let me start with--a subsequent agreement is not an amendment. It's not intended to change the Parties' obligations nor to modify the treaty. Rather, it's an agreement by the treaty parties concerning the meaning of the existing treaty between them.

So, in the case of a subsequent agreement, the Tribunal's principal task remains the

interpretation of the treaty. The treaty has not been changed, and the fundamental parameters of interpretation remain the same. The subsequent agreement would be an additional data point that the Tribunal would take into account, together with the context, in seeking to understand the meaning of the unchanged treaty document.

So, this additional interpretive tool under Article 31(3) does not change the basic nature of the Tribunal's inquiry.

Turning to Question 6. The Tribunal had asked the Parties: "Is the fact that Colombia and the U.S. adopted the same position in this Arbitration about the interpretation of a treaty provision equivalent to a subsequent agreement under Article 31, Paragraph 3 of the Vienna Convention"?

And for Claimant, the answer to Question 6 is no. The United States' non-Disputing Party comments in this matter, which were submitted after the Parties had filed all of their scheduled submissions, did not serve to create a substantive agreement by the Treaty Parties and, similarly, did not constitute subsequent

practice under Article 31(3).

Now, before expanding on this answer, I just wanted to remind the Tribunal that due to the stage at which Colombia first raised its contention about subsequent agreements, the Parties have not had the opportunity to brief the question before the Tribunal because this came up when the Parties made their simultaneous responses to the United States' non-Disputing Party Submission.

Claimant believes that this issue is sufficiently clear that the Tribunal will not need the Parties' assistance in resolving it very expeditiously. If, however, the Tribunal would wish the Parties to make written submissions on this point, we would, of course, be happy to do that.

Because the question hasn't formally been briefed to the Tribunal, to the extent that I refer to particular sources in my response, it's really in the spirit of avoiding plagiarism, rather than seeking to argue specific authorities with which the Parties have not yet formally engaged.

So, I wanted to get that--

(Interpreter interruption).

PRESIDENT KAUFMANN-KOHLER: Is it fine? Did you get it back? Was there a problem with the channel?

THE INTERPRETER: No, I don't think there was a problem with the channel. I don't know. The sound seems to have dropped. I don't know. I'm not sure.

PRESIDENT KAUFMANN-KOHLER: In that case, I think we can continue.

Was something lost in the interpretation? Maybe I should go back to the--

THE INTERPRETER: Yes. Yes, there is part of the interpretation that was not reflected in the transcript. It was a very small portion.

PRESIDENT KAUFMANN-KOHLER: But can you see the transcript?

MR. REETZ: Madam President, I believe, looking at the Spanish language transcript, it may have stopped at the point where I referred to the timing of the briefing and that the Tribunal didn't have the opportunity to have formal briefing from the Parties. And I'd be happy to recapture that.

PRESIDENT KAUFMANN-KOHLER: Then I think--I think what we should do, Mr. Reetz--you had said that this came up with the comments of the Parties to the U.S.'s written submission. And then you were saying that you did not think that this required any further briefing, but it had not been formally briefed.

And I'm not sure you said something else that was not in the record. And you can confirm that what I have just said--restated what you had said so we have a full record.

MR. REETZ: Absolutely. That's correct, Madam President.

And I said, of course, we would be happy to brief this issue should the Tribunal feel that it would be helpful. And, also, that because we haven't formally briefed this issue, that while I would be referring to some authorities in the context of my remarks, it was not in an attempt to cite authority in the usual sense but, rather, simply to avoid engaging in a form of plagiarism by making the statements and confirming--transmitting the ideas without due attribution. But with all of that being said, I'd

like to turn to the subject of subsequent agreements.

Article 31, Paragraph 3, refers to a subsequent agreement between the Parties regarding the interpretation of the Treaty or the application of its provisions. And the Convention does not give us a further definition.

Claimant submits that in this context, the concept of an agreement requires, at a minimum, several things. There needs to be an exchange of communications between the relevant parties, with reference to one another, reflecting the Parties' mutual intention to be bound with respect to particular propositions.

This is the basic structure of an agreement, both in everyday parlance and in legal terms. And there's no reason to believe that Article 31 would confer subsequent agreement status on something that we would not recognize as an agreement in everyday life.

Indeed, given that the whole focus of Article 31 is interpreting the obligations undertaken amongst States in their treaties, we logically expect

a greater degree of formality and certainty in finding an agreement among States than in finding an agreement among non-State parties.

In any case, the United States' non-Disputing Party Submission in this case does not reflect any of the critical elements of an agreement. It's not directive to Colombia but, rather, to the Tribunal in this case.

It's not part of an exchange of communications with Colombia, and it does not refer to any particular communications by Colombia, certainly no communications by Colombia to the United States. We don't have that exchange of communications. And it does not reflect an intention shared with Colombia to be mutually bound with respect to particular propositions.

In some accrued everyday language, there's nothing about the United States' Submission that says, "We have a deal." And, in fact, we did not hear the United States in its submissions today say, "We have a deal." Everything was conditional and hypothetical. Should the Tribunal find that there is a subsequent

agreement.

If we look at Colombia's submissions in this case, they lack the same attributes that we would expect of communications that are used to form an agreement. Now, the argument is that the Tribunal should look at some overlap in the statements submitted by Colombia and the United States to the Tribunal in this case.

We don't believe that that can form an agreement, and it would raise a number of practical difficulties and concerns for the Tribunal to consider partially congruent statements by the Treaty Parties in the arbitral submissions as reflecting a subsequent agreement with respect to those partial congruities.

An initial challenge, if the Tribunal were to take this approach or if this approach were to be recognized, would be to determine the existence, extent, and content of the partial congruities and whether their context or other factors served to qualify them, change their apparent meaning, condition them upon the acceptance of other propositions, or otherwise call into question whether they could fairly

be deemed to represent an agreement by the Treaty Parties.

And the range of potentially divergent analyses of these propositions in a given case would impose a substantial burden on non-disputing parties when making submissions so that they could avoid the risk of having been deemed to have entered into a subsequent agreement or to have entered into a subsequent agreement on terms that were not intended. Let me give an example.

For example, a non-disputing party State might want to state its views on a range of treaty interpretation issues, one of which is congruent with the view of the Respondent, but not wish to enter into an agreement with Respondent that is limited to that sole issue and which might undermine the State's desire to achieve a greater alignment of views with the Respondent.

Absent very intentional and careful drafting by the non-Disputing Party would run precisely that risk if the Respondent were permitted to cherry-pick propositions from the non-Disputing Party Submission

and call them an "agreement."

Another practical difficulty of treating non-Disputing Party submissions as potential killers of a subsequent agreement is a burden that would be imposed on all of the participants to an arbitration whenever such a submission is made.

The Parties and Tribunal will need to go through the process of combing through the submission in a search for potential points of congruence and then assessing them in light of all the factors that I mentioned.

Indeed, we've already seen cases in which Respondent States have unsuccessfully pointed to congruent positions taken by their treaty counterparts in other matters as supposed evidence of a subsequent agreement. And the Tribunal, I'm sure, is aware of the jurisdictional decisions, for example, in Gas Natural, Urbaser, and Telefónica v. Argentina. These have been rejected because they simply did not reflect an agreement, which is what Article 31(3) requires.

And, finally, there's no need for an approach to subsequent agreements that will lead to these

risks, uncertainties, and burdens, because it's trivially simple for treaty parties to make an agreement that is clearly identifiable as a subsequent agreement if they wish to do so.

Apart from the obviously simple form of agreement or side letter that the parties could enter into, there is by now a well-established institution of the joint interpretive statement which is actually formalized and given an elevated status in some treaties, including the NAFTA.

So, Claimant submits there's no basis for finding a subsequent agreement here. Not only has there not been any subsequent agreement, even though it would have been quite easy for the treaty parties to have entered into one had they wished to do so, there's even less of an argument for a subsequent practice under Article 31(3)(b).

That provision requires a subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation. It should be axiomatic that an isolated statement taken from a non-Disputing Party Submission does not

establish a practice in the application of the Treaty.

But to the extent that it's not already axiomatic, the formulation adopted by the Telefónica v. Argentina Tribunal is very instructive. That Tribunal considered that subsequent practice would require 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. And the Tribunal was citing to the Japan: Alcoholic Beverages Case before the WTO.

The single submission here by the United States, in an Arbitration where it's not even a party, does not show a pattern of conduct by the parties to the TPA that establishes their agreement regarding its interpretation. So, Article 31(3)(b) is similarly not applicable here.

And, finally, for me, at the risk of answering a question that has not been asked, I'd like to emphasize that even in the cases where a subsequent agreement or subsequent practice are found to exist, they're not dispositive. What Article 31(3) requires

is that they be taken into account, together with the context, as part of the Tribunal's interpretive function.

Now, significantly, such subsequent agreements cannot be used as a means for modifying or escaping the Treaty's terms. As the Tribunal expressed in Magyar Farming v. Hungary in its Award, Paragraph 18, an interpretive declaration, as its name indicates, can only interpret the treaty terms. It cannot change their meaning.

And the Tribunal in Eskosol v. Italy in the 2019 Jurisdictional Decision reached a similar conclusion, explaining that: "VCLT Article 31(3)(a) is not, however, a trump card to allow States to offer new interpretations of old treaty language simply to override unpopular treaty interpretations based on the plain meaning of the terms actually used."

And, finally, there are well-documented concerns with the use of subsequent agreements formed after an arbitration has commenced as a basis for deciding its use in that arbitration adversely to the non-State party. And this is so even where a joint

interpretive statement purports to be binding and not merely an item to be taken into account under Article 31, Paragraph 3.

Apart from the awards which--or the decisions with which I believe the Tribunal is likely familiar, Professors Steltzer and Schwartz have explained in their work that 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.

So, I hope that we've managed to answer the Tribunal's questions. In any event, at this point I would like to return the floor to Mr. Martínez-Fraga for some final remarks.

MR. MARTÍNEZ-FRAGA: Madam Chair, may I?

PRESIDENT KAUFMANN-KOHLER: Yes, please.

MR. MARTÍNEZ-FRAGA: Just three basic comments that we wanted to address.

One was an issue raised by Respondent's counsel concerning Footnote 15 to Article 10.28,

definition, and specifically, of course, with respect to the definition of "investment."

And, in that connection, we wanted just to make a couple of observations. First of all, this footnote is a footnote that comes into being from the 2004 U.S. model BIT. And there is, of course, no--not of course, but there is no--no awards elaborating on what that means.

But I wanted to bring to the Tribunal's attention a very important point, which is where the footnote appears. The footnote appears in Subsection G under "investment." And we think where that word appears, of course, is critical. And that subsection reads: "Licenses, authorizations, permits, and similar rights conferred pursuant to domestic law."

And then you have Footnotes 14 and 15. And we feel that this also is a very important point, that the two footnotes are together and that the two footnotes appear in Subsection G. Why do we say that? Because it is--our reading from the ordinary language and the ordinary logical construction, of course, is

that it--it's a qualifying language to judgments in connection with these types of commercial items, namely, licenses, permits, authorizations. And it says: "Similar rights pursuant to domestic law."

That pulls apart from the type of judgment we have here, which has--it's not really a commercial dispute, let alone one premised on licensing rights or authorization rights or permits.

While there is no award interpreting these sections, I did want to bring to the Tribunal's attention one of Kenneth Vandevelde's writings, titled "U.S. International Investment Agreements," published by Oxford University Press. And he has a whole section on the scope of the 2004 U.S. BIT. But he addresses Footnote 3, which is basically a functional equivalent of this provision.

And he says as follows, and I'd like to quote: "Footnote 3 states simply that the term 'investment' does not include an order or judgment entered in a judicial or administrative action. This footnote, however, cannot have its apparent literal meaning. The BITs have long defined 'investment' to

include at least certain claims. No coherent policy would support the result in which a claim is an investment, but when the claim is determined by a Court to be valid and incorporated into a judgment, it ceases to be an investment. Thus, where an order or judgment affirms a legal interest that constitutes an investment, that order or judgment should be treated as an investment as well, because it merely affirms another interest that is in an investment." End of citation.

There's much more, but that's the most direct, I think, and clean language that--that I think the Tribunal should--should consider. It's an alternative view, but we think it's the more plausible view. The literal view, I think--well, we believe would frustrate the core purpose of the Treaty, both in the context of 10 or 12. In either chapter, it would just be inimical to its reason for being.

May I have the next slide, please.

Then, just as a very simple housekeeping matter. Yesterday in the--two days ago. I'm sorry. The days are merging. And I just had an arbitration

right before this one. Two days ago Mr. Grané posed a question to Dr. Briceño. And the question basically said: "Very well. For the Tribunal's information, I am going to refer the Tribunal to Reply Paragraph 91 by Claimant where that statistical data is stated."

And the earlier question was:

Question: "Well, you said only four were submitted."

Answer: "Well, that's what I said. Between 2012 and 2018, there were 15 cases, and there were annulments that had to do with constitutionality judgments, tutela judgments, and a whole slew of things were annulled."

And then Mr.--I'm sorry--Grané Labat--Mr. Grané Labat asks: "You know that the Claimant in this case had made reference to the--that statistical data, and it said that 4 of 49 applications were successful since 1996 until 2019. You're saying that Claimant is mistaken when citing that data?"

Then there was a frivolous objection by me. And then Mr. Grané asks whether the witness is

disavowing the Claimant's decision, and he cites to our writing.

Next one, please.

Now, here's what we actually said. We stand by Dr. Briceño's statement that, of course, there's a 20 percent rate, which of course stands in stark relief with the one-third of 1 percent--0.33 of the tutela. But that's neither here nor there. That's a little bit obvious. But here's what we actually say in Paragraph 91.

We were referring to Mr. Ibáñez as having said that. And we said: "Respondent seeks to paint the petitions for annulment that led to the order 188/14 as pointless requests, but is forced to acknowledge that such petitions are an established feature of Colombian jurisprudence. Respondent"--Respondent, not Claimant--"Respondent admits that, on 49 occasions between 1996 and 2019, such petitions were filed."

So, what we're saying is that that's what he says, even his own admission--it's not a position that we take. Our position is our Expert Witness's

position, which is that it's 15 percent or 20 percent based on the numbers that she provided yesterday.

And, again, I reiterate: We only agree with Mr. Ibáñez on three things: his name; we agree with him on Paragraph 164 in the Second Report; and we agree with him on his narrative of the legal standard for a tutela. We think that's completely on point.

And, finally, Madam President and Members of the Tribunal, I want to make sure that we are clear on one thing. We never tried to disparage or to paint Colombia in our opening as a lawless State. We have great respect for Colombia. Colombia has managed to do things that are incredible. They're really a Cinderella story. This country, just ten years ago, had 40 percent of its national territory controlled by narco traffickers, and they overcame all of those obstacles and united, and they're doing very well.

But just as we were clear about that, we also want to make clear that the World Bank does publish the World Bank's Worldwide Governance Index. And the World Bank "ranks Colombia in the lowest half of a percentile on a scale of 0 to 100 for Colombia's

control of corruption, Colombia's rule of law, and Colombia's voice and accountability."

Colombia also now finds itself in the--having the dubious distinction of challenging Argentina and Venezuela for the highest number of pending cases. So, while Colombia is a great state that has accomplished tremendous, tremendous goals and is formidable, and it should be acknowledged as accomplished in that regard, much--much remains to be done, and this case in many ways is exemplary of the job that remains to be done.

Finally, I want to say to the Tribunal that it has been an extreme privilege to work with Respondent's counsel. They have been fabulous, really, in every regard. And while it always has been a privilege to work for them--work with them, I also want to say that, for most of the time, it has been a pleasure.

And we want to thank them. We want to thank The Republic of Colombia, and, of course, this Tribunal for its grace and patience in considering the premises that we have here advanced.

Thank you.

PRESIDENT KAUFMANN-KOHLER: Thank you. Do my colleagues have any questions now for the Claimant? Or, if we have questions, do we want to keep them for after we've heard the Respondent?

ARBITRATOR SÖDERLAND: No questions.

PRESIDENT KAUFMANN-KOHLER: No?

ARBITRATOR FERNÁNDEZ ARROYO: No question on my side.

PRESIDENT KAUFMANN-KOHLER: No question on my side, either. I think I have covered the questions that we had fairly extensively and in a complete manner.

So, then, we can take a break now and then resume for the Respondent's Closing Statement.

Do you want 15 minutes? Let's be very generous. Or do you want 20? What is the sense of the meeting?

MR. GRANÉ LABAT: Given, Madam Chair, that we didn't have time between the U.S. presentation and the start of Claimant's, can we perhaps take 20 minutes?

PRESIDENT KAUFMANN-KOHLER: Yes. Let's take

20 minutes. I think that is fine. So, that would be 31 minutes after the hour.

And we can ask--we can ask Mike to push us to the breakout rooms.

(Brief recess.)

PRESIDENT KAUFMANN-KOHLER: We're just waiting for Professor Fernández Arroyo to appear on the screen.

ARBITRATOR FERNÁNDEZ ARROYO: Here.

PRESIDENT KAUFMANN-KOHLER: Here he is. Excellent. Good.

Then we will now continue and hear the Closing Submission of the Respondent.

Do I give the floor to you, Mr. Grané?

MR. GRANÉ LABAT: Yes, please. Thank you, Madam President. First, I would like to invite, with the Tribunal's indulgence, Ms. Ana Maria Ordóñez from the Agencia Nacional de Defensa Juridica, who will make an introduction. And she will do so in Spanish. So, if you wish to switch the channel, then this is your opportunity. Thank you.

PRESIDENT KAUFMANN-KOHLER: Madam Ordoñez, you have the floor.

RESPONDENT'S CLOSING ARGUMENT

DRA. ORDOÑEZ PUENTES (interpreted from Spanish): Thank you very much, Madam President, Members of the Tribunal. On behalf of The Republic of Colombia, I would like to thank you for your commitment and dedication for hearing the clear and compelling reasons expressed by Colombia to show that this Tribunal lacks jurisdiction to take cognizance of the Claimant's claims.

This has been our position since we received the Notice of the Request for Arbitration. A thorough reading of Colombia's communications related to the request for a joint determination under Article 12.19 of the Treaty reiterates that that request does not constitute acceptance of the jurisdiction of this Tribunal.

Now, with all due respect, I hope that you recall my initial words of Tuesday. The jurisdiction of the Arbitral Tribunal depends on fulfilling the twofold requirement on the part of the investor. The

Claimant must show that they meet the requirements of both the ICSID Convention and the treaty they invoke.

In going through thousands of pages of briefs and testimony, we can show that today Colombia has shown that Ms. Carrizosa doesn't have the keys to open this lock, this twofold requirement.

I have three main comments on behalf of the Republic of Colombia before we continue with our Closing Argument. First of all, Columbia categorically rejects any subjective effort to attack the legitimacy of our country's constitutional jurisdiction. Describing the Constitutional Court as a political body or a politicized body is capricious, bias, and unfounded.

The Claimant has recourse to this unfortunate and desperate argument based on what was said by Mrs. Briceño, who has shown that she is subjective and willing to make assertions with no foundation whatsoever. The only purpose is to cast doubt with no basis on the operativity of the institutional architecture of one of the most important Constitutional Courts of the Americas.

I must be emphatic on this point. The Constitutional Court, the Council of State, and the Supreme Court of Colombia are judicial bodies with the highest technical and ethical characteristics. They carry out their functions strictly abiding by the Constitution and the law. Any subjective attack should be completely dismissed.

Second, Colombia trusts the good judgment of the Honorable Members of this Honorable Tribunal to conclude that the appropriate interpretation of the Trade Promotion Agreement between Colombia and the United States is that that has been presented by the Parties to the Treaty.

The desperate efforts of the Claimant to interpret the Treaty provisions in a manner other than what was agreed upon by the Parties thereto have proven to be useless. A treaty that has been negotiated and ratified by two sovereign states cannot be rewritten by a Claimant based on a capricious reading that is far from the intent of the Parties to the Treaty and already refused by international treaties--or tribunals that have interpreted similar

provisions.

Finally, I take this opportunity to respectfully reiterate and insist on Colombia's request, which is that this Tribunal order the Claimant to pay 100 percent of legal costs and attorneys' fees incurred by Colombia to respond to claims that are so lacking as per the jurisdiction and the merits that they can only be characterized as irresponsible.

Colombia respectfully asks this Tribunal, as others have done before, to not consent to abuse of the rights set forth in investment treaties through unfounded claims that have no possibility of success.

The Colombian State has earmarked significant resources to its defense in this arbitral proceeding, resources that could have been used to meet the most basic needs of its citizens in an economy that has been hard hit by the current crisis. The resources earmarked by Colombia are not limited to the costs for--legal costs, administrative fees, or expert fees.

As you will have observed in my communication on Wednesday, Colombia has dedicated high-level

officials in four different State agencies to this case, and they have invested a more than considerable part of their time throughout this proceeding.

Colombia trusts that we will secure a favorable decision that reflects what we said in our Opening Argument. This case is a clear example of what investment arbitration should not be.

Next, and with the permission of the Tribunal, I yield the floor to Patricio Grané to continue with the Republic of Colombia's Closing Arguments.

Thank you very much.

PRESIDENT KAUFMANN-KOHLER: Thank you.

MR. GRANÉ LABAT: Members of the Tribunal, Madam President, I would like to start by thanking the Tribunal for its questions of earlier this week around which we will structure and focus our closing arguments.

I will begin by addressing the subject of this Tribunal's jurisdiction ratione temporis. My colleague, Ms. Horne, will then address the Tribunal's jurisdiction ratione voluntatis, after which

Mr. Di Rosa will address jurisdiction ratione materiae and provide some concluding remarks on behalf of Colombia.

And as a general observation, I think it is quite evident by now, as it was from the outset, that this is a case that never should have been brought. There are a host of reasons laid out before the Tribunal, any one of which is sufficient to dismiss this case in its entirety.

Colombia's position in this case, unlike Claimant's, has been steady and unwavering. When the Tribunal returns to our two written submissions, it will be able to confirm that Colombia has been consistent throughout.

Colombia has followed a straight and clear path marked by both sides by the consent of the Parties to the TPA, as expressed in that Treaty and customary international law. And I'm afraid that the same cannot be said for Claimant.

In our Closing, my colleagues and I will recall the essence of our objections but, more importantly, we will address the questions raised by

the Tribunal during this Hearing. And as I said, I will start with ratione temporis.

And in doing so, I will not only address the Tribunal's questions and general interest in the objection, but I will also refer to what we heard from the only expert that has testified this week, Ms. Briceño.

One of Colombia's three objections to ratione temporis is that Claimant's claims should be dismissed because they are based on State acts that took place and ceased to exist before the TPA entered into force.

The sole treaty--the sole post-Treaty measure invoked by Claimant, the 2014 Order, does not alter that conclusion. In fact, it confirms that conclusion. As the Tribunal knows, the customary international law principle of non-retroactivity precludes a Claimant from submitting claims based upon acts that predate the entry into force of a treaty.

And this principle, as we saw during our Opening Presentation, is incorporated into the TPA Article 10.1.3. Even a cursory review of the Claimant's Memorial shows that her claim in this

Arbitration, as in the parallel proceedings initiated by her sons, is that Colombia breached the TPA through the 1998 regulatory measures and the 2011 Constitutional Court Judgment.

Claimant's experts followed suit. In her report, Ms. Briceño explicitly targeted and focused on the 2011 Judgment, arguing unconvincingly that the Judgment was wrong as a matter of Colombian law.

Among other examples, in her First Report, Ms. Briceño says--and I quote--and I'll switch to Spanish(interpreted from Spanish): "Judgment SU-447/11 is mistaken. Indeed, it is totally baseless. It is a judgment made to--tailor-made for the Executive Branch. The Judges simply issued a judgment that would not be against the will of the Executive as an example of the lack of liberty and independent of the judiciary."

It’s not quite the objective and the legal analysis that one would expect from an independent Legal Expert, but we can leave that aside for the moment.

In her Second Report, Ms. Briceño says, and I

quote--and you also have this on screen (interpreted from Spanish): "The Constitutional Court based itself on a mistaken interpretation. So, one can only conclude that it was Judgment SU-447 of 2011 that was plagued by procedural and substantive defects."

But it is not only Ms. Briceño. Claimant also submitted a damages report. And the entire report--the entire damages report serves as a clear admission of the source of liability under Claimant's case theory.

And the Tribunal may recall from our Opening Presentation that Claimant's damages experts assessed--and I quote from that report--that "damages incurred by the Claimant as a result of the Colombian government's actions through its agencies (Central Bank, FOGAFIN and Superintendency of Banking) to expropriate (Granahorrar), resulting in loss of value of Claimant's interest in Granahorrar."

Claimant's entire case is thus premised on the alleged wrongfulness of the 1998 regulatory measure and the 2011 Constitutional Court Judgment. However, earlier this week, Claimant's own expert,

Ms. Briceño, testified in response to questions from the Tribunal, that the 1998 regulatory measure had immediate effect. And her exact words are shown on your screen.

Referring to that regulatory--those regulatory measures, she said (interpreted from Spanish): "Everything was already done there. That is to say, there was nothing to do."

In other words, the relevant State acts took place and were completed 14 years before the entry into force of the TPA. There could be no doubt that Claimant's case, which is based on such measures, fall outside of the Tribunal's jurisdiction ratione temporis.

And this reality has left Claimant with only one choice, to change her case theory and attempt to hang all of her claims on the lone post-Treaty act, namely the 2014 Confirmatory Order.

However, as Colombia has demonstrated, pointing to that sole post-Treaty act does not bring her claims within the jurisdiction of the Tribunal. And this is because the 2014 Order is deeply rooted in

pre-Treaty conduct and cannot be detached from such conduct.

As Colombia pointed out in its submissions and recalled earlier this week, tribunals faced with situations in which the alleged State conduct straddles the entry into force of the applicable treaty have analyzed the particular claims to determine whether the post-Treaty act altered the pre-Treaty status quo or whether that post-Treaty act is independently actionable.

And the first test relates to the pre- and post-Treaty status quo that we have been discussing this week. We will not again demonstrate why Spence, Corona, Eurogas, among other cases, are apposite and offer useful guidance. We have addressed those cases and others in our written submissions and, unlike Claimant's counsel, we are certain that the Tribunal has read those decisions, as they were cited in Colombia in both written submissions.

And because Claimant knows that she cannot meet the legal test adopted by other tribunals to determine whether a claim falls within the temporal

scope of the Treaty, Claimant asks you to ignore the case law. She tells you no legal test exists and no abiding precedent cited by Colombia has any value.

And we heard it again today. Claimant's counsel displayed certain paragraphs from those awards, none of which contradict in any way the propositions for which those cases were invoked and offered by Colombia. Based on Colombia's analysis of those cases in its submissions, Colombia trusted the Tribunal will appreciate the proper value of those cases as it analyzes the facts in the present case under the principle of non-retroactivity and the temporal scope of the Treaty, which was also under consideration in those cases cited by Colombia.

And, of course, the facts are different between this case and those cases, but that is irrelevant for the purposes for which those cases were offered, which is how a tribunal determines the application of the non-retroactivity principle in situations where you have facts that straddle a critical date. And that critical date can be either the entry into force of the Treaty or the cut-off date

under a temporal limitation clause in the Treaty.

But even if Claimant wishes to quash its straws to distinguish the present case from the legal authority cited by Colombia, it offers no assistance to the Tribunal in analyzing the State measures under the life of this non-retroactivity principle that the Tribunal is called to apply, not only by the principle under customary international law, but also by the express provisions in this Treaty, Article 10.13.

And despite Claimant's efforts to divorce the 2014 Order from pre-Treaty conduct, that measure, the 2014 Order, cannot be viewed in clinical isolation. It simply does not exist in a vacuum.

When you look at it in the wider context, as one should, you find that it is deeply rooted in the measure of which Claimant complains; namely, the 2011 Constitutional Court Judgment and the 1998 regulatory measures that led to that judgment in 2011.

And not even Claimant can deny that the Order, that 2014 Order, did nothing--did nothing to alter the factual or legal situation that existed after the 2011 Judgment and before the TPA entered

into force. That Order was nothing but a confirmation by the Constitutional Court of its previous decision, the 2011 Constitutional Court Judgment, by dismissing the nullification application that was submitted after that 2011 Judgment was issued.

Now, being unable to point to any other change in the status quo, Claimant has attempted to create the impression that her legal situation was somehow unsettled or unknown after she filed the nullification request against the 2011 Constitutional Court Judgment. But knowing that to be untrue, counsel tries to change the facts.

Now, the strategy was laid bare by Claimant's counsel in his direct examination of Ms. Briceño. Claimant's counsel started Ms. Briceño's direct examination by posing a hypothetical.

And I read from the transcript and I switch to Spanish (interpreted from Spanish): "In case of annulment--in case of annulment, what would have been the next step or the next act? Would the matter have gone back to the Constitutional Court? And what could the Constitutional Court do?"

Now, Claimant's premise, then, is the following: Had the 2014 Confirmatory Order not been a confirmation at all but, rather, a decision that annulled the 2011 Judgment, what would the world look like?

But those are not the facts in this case. We don't live in Claimant's hypothetical world, which we saw again on display today.

The facts are that before the entry into force of the TPA there was the final judgment, the 2011 Judgment, from which there could be no recourse or appeal. That judgment dismissed Claimant's lawsuit.

After the entry into force of the TPA, nothing changed. The Constitutional Court rejected the exceptional nullification request, and the 2011 Judgment remained unaltered. In other words, there was no change in status quo.

And Claimant's arguments to the contrary rest entirely on Ms. Briceño's testimony, who is not even a constitutional law expert, as the Tribunal can see from the areas of expertise listed in her report. But

that did not stop Ms. Briceño from saying some pretty remarkable things about the Constitutional Court, its powers, and the legal effect of its rulings.

For example, Ms. Briceño baselessly asserted, in response to a question from Claimant's counsel, that the 2011 Constitutional Court's Judgment, despite being a judgment from the Constitutional Court which not even Ms. Briceño challenges, did not have the force of "cosa juzgada constitucional."

She suggested that certain decisions from the Constitutional Court have the force of "cosa juzgada constitucional" while others, tutela decisions, do not. But this is important. She offered no support whatsoever for that assertion.

When asked on cross whether she had made that assertion in her reports, she admitted that she had not. When asked on what law she based that testimony, that new testimony, she admitted that there was none.

I will be as direct and plain as I can be here. Ms. Briceño is wrong. There is no legal basis under Colombian law to draw the distinction that Ms. Briceño drew for the first time a couple of days

ago. Constitutional Court judgments over tutela actions have the force of "cosa juzgada constitucional."

And contrary to Ms. Briceño's testimony, Constitutional Court Judgments T-185 of 2013, T-89 of 2019, T-2019 of 2018, among others, explicitly state that Constitutional Court judgments over tutela actions have the force of "cosa juzgada constitucional."

Now, these legal authorities are not on the record because this past Wednesday was the first time that Ms. Briceño or Claimant presented this new argument. If the Tribunal is considering giving any weight to Ms. Briceño's new testimony on this issue, Colombia here and now respectfully requests leave to introduce these legal authorities into the record to impeach Ms. Briceño's testimony and the overall credibility of her as an Expert Witness.

Despite her willingness to invent theories and ignore existing laws and decisions, Ms. Briceño did make several admissions against Claimant's interests during her cross-examination. In

particular, she conceded that judgments of the Constitutional Court have a very special, “especialísimo”, importance in the Colombian judicial system.

There is no appeal or recourse against Constitutional Court judgments. The incidente de nulidad which led to the 2014 Order does not reopen the debate, nor does it provide an opportunity to reexamine the case.

And in response to questions from the Tribunal, she also admitted that in the incidente de nulidad procedure, "no hay alegato, no hay prueba." There's no argument, there's no evidence.

And you find this on the screen with the slide with the appropriate citations for the transcript.

Also, she admitted in order to nullify one of its judgments, the Constitutional Court must find that there has been a violation of due process that is notorious, flagrant, without a doubt, and certain, and also that the violation of due process must be significant and transcendental.

In general, Ms. Briceño's casual approach to Colombian constitutional law stands in stark contrast to the fastidious approach of Dr. Ibáñez, whose opinions are fully supported by citations to Colombian law and jurisprudence.

Mr. Ibáñez maintained his adherence to Colombian law and jurisprudence during his examination. During his cross-examination, Dr. Ibáñez explained to Claimant's counsel that the "petición de nulidad," this nullification petition that resulted in the 2014 Order--and I quote--(interpreted from Spanish)"is a special exceptional petition that does not constitute a remedy of any sort."

This is confirmed by the Constitutional Court through multiple orders, including those strings cited but not discussed by Ms. Briceño in her Second Report.

We had an opportunity to cross-examine Ms. Briceño on these legal authorities, not all of them because she cited more than 20. But in some of those legal authorities that she cited in the string footnote, we saw that they support what Mr.--what Dr. Ibáñez said and contradicted Ms. Briceño's Expert

Opinion.

In sum, the laws and jurisprudence on the record support the conclusions of Dr. Ibáñez regarding the nature of the 2014 Order. The reality is that that Order did not affect the pre-status quo. It did not change it.

Yet another basis for concluding that Claimant's claims are, in fact, rooted in pre-Treaty conduct is the 2014 Order, as the sole post-Treaty act is not independently actionable.

As explained in Spence, and I quote: "Pre entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post entry into force conduct would not otherwise constitute an actionable breach in its own right."

Now, of course, the Spence Tribunal, contrary to what Claimant's counsel would have you believe, never said this is only applicable in this case in the context of specific facts in this case. What the Spence Tribunal and Corona and Eurogas and ST-AD have said in relation to the application of the non-retroactivity principle is applicable and does

offer useful guidance to this Tribunal, recognizing, of course, that it is not legally binding on this Tribunal.

And, further, in determining whether a post-treaty act can serve as an independent basis for a claim, tribunals have considered whether the claim that is alleged, based on the post-treaty act, can be sufficiently detached from pre-treaty--pre-entry into force acts and facts so as to be independently justiciable.

And in assessing whether a claim is independently actionable, it is helpful to recall that there are two parts to claims that an investor may bring under Article 10.16.1 of the TPA. And you have those parts on the slide on your screen.

The first--the first part is that the Respondent has breached an obligation under Section 8. And that section, of course, is the section that contains the substantive protections.

The second part is that the Claimant has incurred loss or damage by reason of or arising out of that breach. What this means is that one of the most

basic requirements of the TPA is that a Claimant must be able to identify a post-treaty act that itself breached a substantive obligation, and the Claimant must also be able to identify damages arising from that post-treaty act.

And once they--the Tribunal asked Claimant to explain what is her claim against the 2014 Order--and, of course, the Tribunal knows the question that it asked, but we have put it up on the slide to recall exactly what it is that it asked Claimant to clarify.

Now, the fact that the Tribunal had to ask this question during the Jurisdictional Hearing speaks for itself. It shows that Claimant has not met its burden under the TPA, including in relation to the jurisdictional issue.

After four witness--I'm sorry. After four written submissions and a two-hour Opening Presentation, Claimant still had failed to articulate whether or how the 2014 Order independently breached the TPA and what damage she allegedly incurred as a result of that measure, as opposed to the pre-Treaty measures.

And earlier today Claimant offered a theory, trying to overcome its inability to articulate a claim against the 2014 Order until now. And it should go without saying that Claimant cannot articulate its case for the first time on the last day of the Hearing. Doing so would prejudice Colombia's due process rights.

But without prejudice to the above and reserving Colombia's rights, of course, we know that Claimant's answer to the question confirmed that its claims against the 2014 Order are reflective of and cannot be separated from its claims against the 2011 Judgment.

In fact, in their efforts this afternoon to articulate a merits case against the 2014 Order, Claimant's counsel, perhaps unwittingly, referred to merits arguments against the 2011 Judgment. For instance, he referred to Ms. Briceño's First Report, and he cited specifically--or he referred the Tribunal to Paragraphs 87 to 107 of Ms. Briceño's First Report.

Now, when the Tribunal goes back to those paragraphs, it will see that Ms. Briceño, in those

paragraphs, refers to the dissenting opinions of Justice Pretelt and Justice Rojas Ríos that criticize the 2011 Judgment.

They're devoted to criticizing the 2011 Judgment, not explaining what's wrong with the 2014 Confirmatory Order. And, also, I hope that it was not lost on the Tribunal that Claimant's counsel, in arguing that it is challenging the lawfulness of the 2014 Order, it said: "At this time--at this time Claimant is not challenging the lawfulness of the 1998 measures."

Now, that, of course, is belied by the written submissions that Claimant has put in this Arbitration. And it is also clear that Claimant is hoping that if somehow Claimant can overcome the insurmountable jurisdictional objection ratione temporis, it will then revert to its original position and will ask this Tribunal to find liability on the basis of the 1998 measures and the 2011 Constitutional Court Judgment.

Again, that is plain from the argumentation in the Memorials and in the Expert Reports, including

the damages report. It is evident that Claimant's submission has been unable to articulate an independently actionable claim based upon the 2014 Order. Her entire case rests on pre-treaty conduct.

I will turn now to the second reason why this Tribunal lacks jurisdiction ratione temporis.

In its Counter-Memorial and its Rejoinder and again in its Opening Presentation, Colombia demonstrated that the TPA applies only to disputes that arose after its entry into force. Now, determining when a dispute arose depends, in part, of course, on the definition of a dispute.

In its submissions, Colombia has applied the well-established, classic, international law definition of a dispute, first articulated by the PCIJ. And under that definition, a dispute is--and I quote--"a disagreement on a point of law or fact; a conflict of legal views or interests between two persons." And, of course, I'm citing the Mavrommatis Advisory Opinion.

In her written submissions, Claimant argued

that the Tribunal should deviate from that definition, but it has offered no alternative definition that has been accepted under international law. And it's clear why.

There can be no doubt that this dispute, under that classical definition, arose before the entry into force of the TPA. In fact, it arose at the latest in July of 2000.

And to recall, the 1998 regulatory measures were issued in October 1998, 2nd and 3rd of October 1998. On 28 July 2000, Claimant filed suit challenging those regulatory measures. And this is R-0050. And you have the reference on your screen.

In filing that lawsuit, Claimant articulated her conflict of legal use and interests with the Colombian State. She believed that those measures were unlawful, brought suit, exercising her rights through her Holding Companies in the Colombian judiciary. That is when the dispute arose.

That same lawsuit then produced and ended with the 2011 Constitutional Court Judgment, which indisputably addresses and forms part of the same

dispute about the validity and lawfulness of the 1998 regulatory measures. And that dispute, which is the dispute that is before you, falls outside of your jurisdiction.

In an attempt to overcome the above, Claimant hopes to artificially break her dispute into parts. In particular, she asks to portray each subsequent development as having triggered a new dispute. While that would undoubtedly be convenient for Claimant, that is not how the law works.

To the contrary, new State actions does not--do not necessarily trigger a new dispute. And as other tribunals have recognized, disputes can evolve over time without giving rise to new disputes. And this is logical. Otherwise a party could always take or prompt action and thereby trigger a new dispute in order to manufacture jurisdiction.

And as the Lucchetti Tribunal explained--and I quote--I quote from Lucchetti, Paragraph 50: "The critical element in determining the exercise of one or two separate disputes is whether or not they concern the same subject matter." The same subject matter.

This is RL-0050--I'm sorry--RL-0020, Paragraph 50.

And here the subject matter has remained the same throughout since the lawsuit of July 2000, and that is that the lawfulness--and it's the lawfulness of the 1998 regulatory measures. But Claimant's own statements in her written pleadings demonstrate that this is a dispute and a single dispute that arose decades ago.

Among other examples, in Claimant's Request for Arbitration, she says, and I quote: "This case is about the inordinate abuse of regulatory"--regulatory--"sovereignty."

Of course, by "regulatory," she is referring to Fogafín and the Superintendency, which are the two regulatory authorities that adopted the 1998 measures.

Another example comes from Claimant's Memorial, where she says, and I quote: "In a nutshell, Colombia's financial regulatory authorities unlawfully expropriated Claimant's investment."

The citation to the Request for Arbitration is at Page 1, and the citation to Claimant's Memorial is Page 11.

Thus, Claimant herself defines this dispute as being based on the 1998 regulatory measures. But if that wasn't enough, Claimant's statements before the Inter-American Commission on Human Rights likewise demonstrate that this is a single dispute that arose long before--long before the TPA entered into force.

And to recall, Claimant filed a petition with the Inter-American Commission on Human Rights in 2012 complaining of the 1998 regulatory measure and the 2011 Constitutional Court Judgment. She subsequently updated that petition in 2016 to include complaints about the 2014 Order. And she has even described the dispute cumulatively in her submission to the Commission, which you can find on the screen and which I will not--I will not read. But this is from R-0120, Page 116.

In sum, the present dispute arose in July 2000 at the latest, and long before the entry into force of the TPA. And for this reason, all of Claimant's claims fall outside of the jurisdiction ratione temporis of this Tribunal.

Now, in the minutes that I have left, I will

recall yet another basis why Claimant's claims must be dismissed in their entirety, and that is that they failed to comply with the temporal limitation period. Of course, as the Tribunal knows, Section B of Chapter 10 contains the investor-State dispute settlements mechanism. That mechanism contains certain conditions of consent, including the TPA limitations period. And also, as the Tribunal is aware, Section B of Chapter 10 is imported into Chapter 12 of the TPA via Article 12.1.2(b).

As a result, Claimant must satisfy the conditions of consent, including the TPA limitations period, under Article 10.11--I'm sorry--10.18.1. And that is what we have referred to as the limitations period, the TPA limitations period.

Now, the Tribunal will also recall that Claimant submitted her claims on 24 January 2018. You see this illustrated in the timeline on the screen. That means that if Claimant knew or should have known of the alleged breach and loss before 24 January 2015, her claim would be barred under the TPA under the limitations period. 24 January 2015 is thus the

cut-off date.

According to Claimant's latest case theory, the alleged breach took place on 25 June 2014, when the Constitutional Court issued its judgment, the judgment confirming--or rejecting the nullification petition against the 2011 Judgment. So, this act, this 25 June 2014 act that now Claimant is hanging onto, that is the master really for the cut-off date. It comes before the 24 January 2015 cut-off date.

And that's the end of the inquiry. It really is that simple. That act falls outside of that temporal scope. It is therefore barred from being used as a hook to create jurisdiction. There is no jurisdiction because it predates that cut-off date.

And Claimant does not dispute--this is important--Claimant does not dispute that she is subject to a limitations period. She also does not dispute that, under the TPA, there is a limitations period and that Claimant's claims over the 2014 Order are time-barred under that limitations period. None of that is challenged or denied by Claimant.

So, if the Tribunal concludes, as it should,

we respectfully submit, that the TPA limitations period applies, the case ends. It must be dismissed for lack of jurisdiction ratione temporis. Again, it is that simple.

Perfectly aware of that jurisdictional obstacle to her case under the TPA limitation period, Claimant attempts to circumvent that limitations period, and she does so by invoking the MFN clause under Chapter 12 to import a longer limitations period. In other words, the Claimant is asking you, this Tribunal, to join the Maffezini line of cases and find that the TPA allows the use of an MFN clause to import dispute resolution provisions from other treaties.

Unless the Tribunal is satisfied that the MFN clause clearly and unambiguously allows the importation of dispute resolution provisions from other treaties, it should reject Claimant's case. Conversely, if the Tribunal concludes, based on the text of the TPA, that the MFN clause either under Chapter 10 or Chapter 12 does not clearly and unambiguously allow that, the case ends.

The context of the Chapter 12 MFN clause is important. This context includes Chapter 10, including the MFN clause in Chapter 10, which has an accompanying footnote, the footnote that we have been referring to and which was the subject of a question from the Tribunal.

And the Tribunal asked whether that footnote, Footnote 2 to Article 10.4, "informs us as to how the drafters of the TPA envisioned the scope of the MFN clause as regards whether it includes dispute resolution or not," including in the light of the introductory phrase, "for greater certainty."

And the answer to the Tribunal's question is that, yes, the footnote to Article 10.4 does confirm that Colombia and the United States, parties to the TPA, did not include dispute resolution provisions or mechanism within either MFN clause in the TPA. That is what the footnote says.

The introductory phrase "for greater certainty" merely clarifies that this common intention of the parties to the TPA derived from the text of the MFN clause and does not depend on the footnote. And

this was confirmed by Ms. Thornton on behalf of the United States earlier today.

In other words, "for greater certainty"--that phrase conveys that the footnote is not modifying or is not adding to the scope of the MFN clause. That scope, based on the text of the MFN clause, does not include dispute resolution.

The meaning of that term--of that phrase, "for greater certainty," is confirmed by its use elsewhere in the TPA. For example, that same phrase, "for greater certainty," appears at the beginning of the TPA Article 10.1.3. And to recall, that article, 10.1.3, codifies the customary international law principle of non-retroactivity. And, as this Tribunal is well aware, that principle of non-retroactivity applies as a default rule regardless as to whether the rule is specifically codified in the Treaty.

The drafters of the TPA also knew this, and they were not trying to add or alter the content of that default rule, which is why they included the phrase "for greater certainty." So, that principle would apply even if you don't have that provision

which starts with "for greater certainty."

So, the use--the TPA Parties' use of the term or the phrase "for greater certainty" in Footnote 2 to the Chapter 10 MFN clause should be read and understood in the same way.

It also shows that Claimant is wrong when she argues that the non-inclusion of a similar footnote to the MFN clause under Chapter 12 must mean that the TPA parties did intend to include dispute resolution provisions within the scope of that MFN clause.

But, in any event, my colleague Ms. Horne will explain that Claimant's attempt to use the MFN clause in Chapter 12 to somehow expand the scope of the investor-State arbitration for financial measures must be rejected. As she will explain, the investor disputes--the investor dispute settlement under the chapter is circumscribed to what Article 12.1.2(b) expressly incorporates by reference, which includes the conditions of consent under Chapter 10.

Now, that the footnote in question, the one that contains "for greater certainty" in 10.4, is not under Section B of Chapter 10. It does not

negate--does not negate the fact that it defines the scope of the dispute settlement mechanism under Section B. As Colombia explained in its submission, Claimant cannot avail itself of the dispute settlement mechanism under Section B of Chapter 10, but not to the limits of the consent expressly stated by the parties to the TPA concerning dispute resolution, which is included and clarified in the footnote--in the Footnote 2, Article 10.2--I'm sorry--10.4.

Members of the Tribunal, even if the Tribunal were to allow the Claimant to import the five-year limitation period from the Colombia-Switzerland BIT, which is what Claimant is requesting, her case must be dismissed for lack of jurisdiction.

Article 11.5 of the Colombia-Switzerland BIT sets forth the temporal limitations period that Claimant attempts to import via the MFN. And that provision is shown on your screen. Again, we say that she cannot use the MFN to import. But assuming that she can, for the sake of argument, to comply with that limitations period, no more than five years must have elapsed from the date the investor first acquired or

should have acquired knowledge of the events giving rise to the dispute. Of the events giving rise to the dispute.

Now, in her written submission, Claimant admits that the dispute arose with the 1998 measures, even though--even though she later argues the dispute really matured with the 2014 Order. As Colombia has explained in its written submissions, there is no basis for that distinction, "arose and matured."

And for purposes of Article 11.5 of the Colombia-Switzerland BIT, it refers to events giving rise to the dispute. So, Claimant's reliance on the alleged maturity is irrelevant. What matters is when it arose. And, as I have shown above and Colombia has shown in the submissions, Claimant admits that the dispute arose with the 1998 measures. Even in the very first page of her Request for Arbitration, she says that this case is about the inordinate abuse of regulatory sovereignty, as I said a few minutes ago.

In the first paragraph of her Memorial, Claimant refers to the claim--and I quote: "The claim here presented arising from an extraordinary example

of illicit judicial activism and abuse of authority which matured on June 25, 2014."

So, here Claimant distinguishes, again--it says it arose from "extraordinary illicit judicial activism." What is the activism that she's referring to here? The 2011 Constitutional Court Judgment, which she says went beyond the jurisdiction of the Constitutional Court and revised and reversed the 2007 Judgment by the Council of State.

That is the judicial activism. And she's saying that it arose as a result of that. Now, clearly, of course, that is before the five-year limitation period. Even with a generous interpretation of when the dispute arose, if it's 2011, it's still outside of the temporal limitation period that Claimant is attempting to import.

As discussed at length in Colombia's Opening Presentation and its Rejoinder, applying the established definition of a dispute, the present dispute arose in July of 2000 at the latest. It was then that Claimant filed suit challenging the 1998 regulatory measures that are the source and core of

the present Arbitration.

Even assuming that the dispute arose not in July--as, in fact, it did--but, rather, with the issuance of the 2011 Judgment, what Claimant and her expert, Ms. Briceño, attack as alleged judicial activism, Claimant's case must be dismissed because the dispute arose before the five-year cut-off date under the Colombia-Switzerland BIT that the Claimant is attempting to rely on and import.

Now, that concludes our submission on the subject of the Tribunal's jurisdiction ratione temporis. And, unless the Tribunal has any questions at this stage, I will yield the floor to my colleague, Ms. Horne.

PRESIDENT KAUFMANN-KOHLER: I don't think we have questions at this stage. So, Ms. Horne, you have the floor.

MS. HORNE: Thank you very much, Madam President. Good afternoon and evening once again to the Members of the Tribunal. I will briefly address the subject of this Tribunal's jurisdiction ratione voluntatis.

As you may recall from my presentation on Tuesday, Colombia's objection is divided into four parts. Rather than repeat each of our arguments, though, I'm going to devote my time to answering the Tribunal's questions and addressing Claimant's arguments within the framework of our four-part objection.

I'll begin with the first part, the Tribunal's jurisdiction over Claimant's FET claim. As I discussed on Tuesday, Chapter 12 does not include or incorporate an FET obligation. Earlier today, Claimant seemed to argue that she can submit an FET claim because the FET obligation of Article 10.5 is somehow a part of Article 10.7, which is expropriation.

Frankly, that argument is a bit baffling. There is an FET obligation in Article 10.5. There is no FET obligation in Chapter 12. Claimant cannot, therefore, submit an FET claim under Chapter 12. This aspect of the objection is quite straightforward. I'll move, therefore, to the second part of the objection.

Colombia's position is that the TPA limits the scope of consent to arbitration under Chapter 12. This issue goes to the fundamental requirement of consent to arbitration under the Treaty. Consent to arbitration under Chapter 12 is set forth in Article 12.1.2(b). Specifically, Article 12.1.2(b) imports the investor-State arbitration mechanism from Chapter 10 into Chapter 12. This is noncontroversial.

However, that consent is imported with limits. By the language of the provision, the consent applies "solely for claims" under Articles 10.7, 10.8, 10.12, and 10.14. What this means is that those are the only four articles under which claims can be submitted to arbitration under Chapter 12.

Indeed, even Claimant now seems to admit that the other provisions of Chapter 10 are not subject to arbitration under Chapter 12, but there remains a key issue in dispute. Claimant believes that claims based on any of the provisions of Chapter 12 can be submitted to arbitration.

On Wednesday the Tribunal asked about the textual basis for Claimant's belief. Simply put,

there is no textual basis for it. In fact, the TPA disproves Claimant's theory. The chapeau of Article 12.1.2 makes clear that articles from other chapters apply "only to the extent" that they are expressly incorporated.

This provides critical context. Articles, like the imported consent to arbitration, do not apply except for and only to the extent that they are explicitly incorporated through Article 12.1.2. Article 12.1.2(b) incorporates consent, but solely for the four types of claims. There are no other provisions of the TPA that provide consent for investors to arbitration claims under Chapter 12.

In sum, the text of the TPA makes clear that the State's Parties consented to arbitrate only four types of claims under Chapter 12. National treatment and fair and equitable treatment claims are not within that list. Claimant's national treatment and FET claims, therefore, fall outside of the scope of this Tribunal's jurisdiction.

Now, this textual interpretation of Article 12.1.2(b) is also supported by the other means

of primary interpretation set forth in Article 31 of the VCLT. That includes the Treaty Parties' subsequent agreement and practice pursuant to Articles 31(3)(a) and (b).

As shown on your screen, the Tribunal has asked about the application of Articles 31(3)(a) and (b), and specifically about conduct and statements that took place after the entry into force of the Treaty and whether those should be considered. The answer is yes. The subsequent agreement and practice of parties arising after the entry into force of the TPA must be taken into account where it is found.

And here I'd like to make a brief point of clarification. Contrary to Claimant's statement earlier today, the Parties have had an opportunity to brief this issue. We note that Colombia addressed this issue at length in its submission dated May 26, 2020, providing observations on the United States' non-disputing party submission.

Claimant could and should have addressed this issue in their own brief and in their Opening Presentation. Today, in light of our brief, we wish

to highlight only a couple of points.

VCLT Article 31(3) provides that an interpreter "shall take into account (a) any subsequent agreement between the parties, and (b) any subsequent practice in the application of the treaty that establishes the agreement of the parties regarding its interpretation."

While Claimant seems to argue that the agreement of the practice--or practice of the treaty parties can only be taken into account in certain circumstances, the text of VCLT 31(3) makes clear that it must be taken into account.

I'll briefly now discuss the meaning of these provisions.

When considering these means of interpretation, one can look for guidance to the International Law Commission's draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. This is on the record as Respondent's Legal Authority 111.

In its draft conclusions, the ILC confirmed that the identification of a subsequent agreement

between the parties focuses on substance rather than on form. What this means is that the treaty parties need not jointly draft and execute a document in order to form an agreement. Instead, an agreement can be found based on separate statements by each party, so long as those statements first demonstrate an intent by each party to clarify the meaning of the treaty and, second, reflect a common understanding as to that meaning.

Claimant's argument from this morning on this issue is contradictory. Claimant says that, on the one hand, a subsequent agreement is not a formal amendment to the treaty but, on the other hand, a subsequent agreement must be a formal written document jointly executed by the parties. It's hard to reconcile those arguments. And in any event, the International Law Commission, Columbia, and the United States disagree.

Just hours ago the United States provided oral observations on the meaning and application of Articles 31(3)(a) and (b). The United States referenced the same ILC Legal Authority, drew the same

conclusions, and in particular noted that "where the submissions by the two TPA parties demonstrate that they agree on the proper interpretation of a given provision, the Tribunal must, in accordance with Article 31(3)(a), take this agreement into account."

Now, with respect to Article 31(3)(b), this places the State's Parties' subsequent practice on equal footing with a subsequent agreement. The ILC has confirmed that this second category captures all other forms of conduct in the application of the treaty so long as that conduct contributes to the identification of a common understanding as to the meaning of the treaty.

Here, there is just such an agreement. Both State's Parties have made formal submissions in an International Treaty Arbitration for the specific purpose of clarifying the meaning of their bilateral treaty. The VCLT requires no more, despite what Claimant may wish.

The Parties' submissions reflect the common understanding that Article 12.1.2(b) contains an exhaustive list of the types of claims that can be

submitted to arbitration under Chapter 12. Whether the Tribunal classifies this as a subsequent agreement or subsequent practice, this common understanding must be honored under Article 31(3) of the VCLT.

For her part, Claimant does wish that there was not a subsequent agreement here, and so insists that there were no attributes of an agreement. But, Members of the Tribunal, the two TPA Treaty Parties agree about, first, the submissions the two Treaty Parties can qualify as a subsequent agreement and, second, the fact that this agreement is authoritative.

In sum, by following the rules set forth in Article 31 of the VCLT, one arrives at a clear and straightforward interpretation of Article 12.1.2(b). Based on that interpretation, Claimant's national treatment and FET claims must be dismissed for lack of jurisdiction.

The third part of Colombia's objection concerns Claimant's purported use of the Chapter 12 MFN clause. Now, before addressing the ways in which Claimant tries to use the MFN clause, I'll address a threshold issue raised by the Tribunal in its

questions to the Parties.

Specifically, the Tribunal has asked whether it has jurisdiction to apply the Chapter 12 MFN clause, Article 12.3, and, if so, where such jurisdiction is provided under the TPA. The short answer, again, is that there is no clause of the TPA that provides such jurisdiction.

As discussed during our written submissions and as just addressed, Article 12.1.2(b) sets forth the exhaustive list of claims that can be submitted to arbitration. And Article 12.3 is not on that list. Somewhat inexplicably, Claimant alleges that this Tribunal does have jurisdiction to apply Article 12.3 based on Article 12.1.2(b). But the fact remains that the actual text of Article 12.1.2(b) does not support and, in fact, directly contradicts Claimant's position.

In addressing this issue, Claimant also advanced a lengthy hypothetical involving the invocation of the prudential measures defense under Article 12.10. We're not sure that we follow this argument, so it's difficult to respond. But what

Colombia can say is that Article 12.10 sets forth the prudential measures defense, and Article 12.19 expressly authorizes a State to invoke that defense in an investor-State arbitration via financial services investor.

What this means is that Chapter 12 of the TPA explicitly provides for the scope of consent to arbitration, the conditions of consent, and the use of the prudential measures defense. By contrast, the alleged bases for Claimant's claims do not appear in the text of the TPA.

Colombia also wished to make a point of clarification with respect to the letters shown on the screen by counsel for Claimant. In those letters discussing the prudential measures defense, Colombia always and consistently reserved its right to make jurisdictional objections and noted that its raising of the prudential measures defense was without prejudice to its jurisdictional objections.

Now, with respect to the application of Article 12.3, the United States provided the exact same answer to the Tribunal's question. In its

written submission, the U.S. said, and I quote: "An investor-State Tribunal has no jurisdiction to consider any procedural or substantive treatment extended by a TPA party to a third-State investor or investment through a multilateral or bilateral agreement that a TPA party has with a third State. Any other conclusion would eviscerate the carefully crafted decision the TPA parties made to make sure only certain obligations in the financial services sector subject to investor-State arbitration."

The United States continued that: "Rather, the TPA parties agreed that any MFN claims may only be subject to State to-State dispute resolution under Chapter 12." The United States reiterated that position earlier today.

Furthermore, the Fireman's Fund Tribunal explicitly affirmed this interpretation. As discussed during our Opening Presentation, the Fireman's Fund Tribunal interpreted the provision of NAFTA that is nearly identical to TPA Article 12.1.2(b). The Tribunal affirmed that claims not listed in that provision could not be submitted to arbitration under

the Financial Services chapter of NAFTA.

Subsequently, in its Award, the Fireman's Fund Tribunal reiterated the impact of its interpretation of the limited scope of consent under the Financial Services chapter. It said: "Claims based on other provisions designed to protect cross-border investors and investments, including provisions for national treatment and most-favored-nation treatment, are excluded from the competence of an arbitral tribunal in a case involving investment in financial institutions." This Tribunal, therefore, does not have jurisdiction to apply Article 12.3.

In any event, even if the Tribunal could or did apply the Chapter 12 MFN clause, Claimant could not use the MFN clause in the way she attempts to. Specifically, she would not be empowered to import an FET obligation from the Colombia-Switzerland BIT because an MFN clause cannot be used to import a substantive protection that does not exist in the underlying treaty. Claimant also cannot use the MFN clause to somehow import consent to arbitrate her

claims because an MFN clause cannot be used to create consent to arbitration.

This brings me to the fourth and final part of Colombia's objection. As I understand it, the Tribunal did not have any particular questions on this issue, so I'll be very brief. Claimant failed to satisfy three conditions of consent under the TPA. Importantly, Claimant does not dispute that she did not complete any of these steps. She never submitted a Notice of Intent, she never attempted to negotiate, and she never submitted a written waiver. With respect to the waiver requirement, Claimant even admits that she has continued to pursue a parallel proceeding before the Inter-American Commission on Human Rights.

For the reasons I've already articulated, that proceeding satisfies each of the elements of the waiver requirement. Having failed to comply with these conditions, Claimant has not engaged Colombia's consent to arbitrate, and all of Claimant's claims must be dismissed.

I hope that this presentation has served to

answer the Tribunal's questions regarding the scope of its jurisdiction ratione voluntatis. But before I conclude, I wish to take a brief step back.

This is a multipart objection. The reason for that is not that the concepts or arguments are complicated. Instead, the reason is that there are multiple jurisdictional obstacles to Claimant's claims. Ultimately, what that means is that there are multiple paths for this Tribunal to follow to dismiss the claims, and I'm going to explore those paths now.

I'll begin with Claimant's FET claim. This is the claim with the most problems, so the screen is about to get full.

First, Chapter 12 does not include or incorporate an FET claim. In the absence of this obligation to invoke, there is no jurisdiction. And even if Claimant could use the MFN clause, she can't use it to import an FET obligation from one treaty where that obligation does not exist in Chapter 12 of the TPA. Again, no jurisdiction.

Also, Colombia did not consent to arbitrate FET claims under Chapter 12. No jurisdiction. And,

even if Claimant could invoke the MFN clause to try to circumvent this obstacle, the fact is that an MFN clause cannot be used to create consent to arbitration where it does not exist in the TPA. No jurisdiction.

Third, Claimant did not satisfy three conditions of consent under the TPA. Failure to satisfy any one of these leaves the Tribunal without jurisdiction.

Claimant also attempts to submit a national treatment claim under Chapter 12. However, again, Colombia did not consent to arbitrate national treatment claims. No jurisdiction. Even if Claimant could invoke the MFN clause to try to circumvent this obstacle, the fact is, again, that an MFN clause cannot be used to create consent to arbitration. No jurisdiction. Moreover, Claimant's failure to satisfy the three conditions of consent doomed her national treatment claim. No jurisdiction.

Finally, Claimant purports to submit an expropriation claim. The problem with this claim, as with the others, is that Claimant did not satisfy the requisite conditions of consent under the TPA and,

therefore, never engaged Colombia's consent to arbitration. There is no jurisdiction.

In sum, there are many jurisdictional failings from which to choose, but the inescapable result is that all of Claimant's claims should be dismissed for lack of jurisdiction ratione voluntatis.

Unless the Tribunal has any questions for me, I will yield the floor to Mr. Di Rosa.

PRESIDENT KAUFMANN-KOHLER: Thank you. I don't think we have questions now. So, we can turn to Mr. Di Rosa.

MS. HORNE: And, Madam President, as before, we're going to switch places in the room. So, now would be a convenient time for a brief break, with the Tribunal's allowance.

PRESIDENT KAUFMANN-KOHLER: Yes. That's a good idea.

How much more time do you need? Do you have a sense for it?

MS. HORNE: We understand that we have about 50 minutes remaining in our allocated time, but we don't intend to use quite all of that time, Madam

President.

PRESIDENT KAUFMANN-KOHLER: Good. So, let's take a--do you want to take ten minutes now?

MS. HORNE: That would be very helpful. Thank you.

PRESIDENT KAUFMANN-KOHLER: And then complete the Closing Statement. Good.

MS. HORNE: Thank you very much.

(Brief recess.)

PRESIDENT KAUFMANN-KOHLER: Good.

Mr. Di Rosa, whenever you're ready, we're ready to listen, and I think we're complete.

MR. DI ROSA: Thank you, Madam President. And good afternoon and good evening to all the Tribunal Members.

I am going to discuss, just very briefly, a few points concerning the ratione materiae objection. But before I do that, Madam President, I just wanted to make a quick correction that was requested by my colleague concerning Slide 57 in our PowerPoint presentation. There's a reference there--a single reference to "FET" which should be "NT," national

treatment.

So, with respect to ratione materiae, we wish to, first of all--and we're not going to discuss this at much length because the Tribunal had no questions about it, and the Claimants made very brief reference to the ratione materiae issues, both in their Opening and in their Closing, but there are a couple of points that we did want to clarify.

One of them has to do with the question posed by Professor Fernández Arroyo to Dr. Briceño on Wednesday, concerning the nature of the 2007 Judgment and the concept of vía de hecho. And the key point that we wish to make here is simply that vía de hecho doesn't alter the nature of the Judgment. Vía de hecho means simply that the judgment had a defect, not that it was not judicial in nature.

Dr. Ibáñez thoroughly explained the concept of vía de hecho in his First Expert Report at Paragraphs 87 to 103. And in any event, neither Claimant nor either of the Parties' Experts has even suggested that 2007 Judgment is not a judicial judgment or that it is not part of a judicial action.

And, in fact, Dr. Briceño herself confirmed that in response to Professor Fernández Arroyo's question.

And if you think about it, one simple fact that proves that the 2007 Judgment is unquestionably a judicial judgment is that if there had not been any tutela petition filed at all, the 2007 Judgment would have become a final and enforceable judicial judgment.

There's only one more point that I wish to make about the 2007 Judgment, and that's that Claimant today questioned the scope of Footnote 15 in a different way than they had before. But ultimately, the plain language of the footnote is very clear and, furthermore, the U.S. has confirmed in its non-Disputing Party Submission that Footnote 15 applies to all Chapter 12 arbitrations.

Passing now to a couple of quick points on the conformity requirement.

First of all, at no point in her pleadings or at any point in this Hearing has the Claimant disputed Colombia's description of the foreign investment law regime that existed in Colombia at the time that Claimant made her investment, nor has the Claimant

denied that she did not comply with the approval and registration requirements imposed by that regime.

Rather, her argument is limited to the proposition that the conformity requirement doesn't apply to TPA in the absence of explicit--an explicit provision and that, in any event, only violations of fundamental laws are covered by the conformity requirement.

And we already discussed in our Opening Statement the issue of the implicit application of the conformity requirement, and we also discussed that issue, for the Tribunal's reference, in the Counter-Memorial at Paragraphs 385 to 391, and in the Rejoinder at Paragraphs 356 to 368.

So, today we just wish to express that even if you accept Claimant's thesis that only fundamental laws are covered, many tribunals have confirmed that foreign investment laws, in fact, do qualify as such. And we have on the screen just one of them. It's the Quiborax Decision on Jurisdiction at Paragraph 266.

That Tribunal said: "The subject-matter scope of the legality requirement is limited to

non-trivial violations of the host State's legal order, violations of the host State's foreign investment regime, and then fraud."

This issue was also addressed by Colombia at some length in the Counter-Memorial at Paragraphs 420 to 426 and in the Rejoinder at Paragraphs 369 to 374.

Passing now to a few observations on our favorite issue of the covered investment in this case. Claimants had articulated four theories through the Opening. Today there was yet another variation, so five theories. You know, all that signals is that the Claimants are still struggling, even at this point, to identify the relevant covered investment in this case.

And, if anything, during this Hearing things got even more nebulous. So, to recall, in the Opening on Monday, Claimant's counsel said--and I quote here--"The timeline supports very, very clearly that the 2007 Award in itself is not the investment, but it embodies the elements of the investment. And at all times material, the shareholder Claimant held"--I think that may have been a reference to

shareholding--"were the beneficiaries of that investment."

So, they've moved away from idea that the 2007 Award is the investment, but they say it embodies the elements of the investment.

And today the theory really took an especially sharp turn towards the esoteric and the ethereal, when Claimant said that "they don't care if the 2007 Judgment is the investment or if it's the receptacle of residual rights or the instantiation of the investment."

Taking all of these somewhat fuzzy theories in the aggregate, it appears that the covered investment here is either the Granahorrar shares themselves and/or the 2007 Judgment and/or some combination of the two and/or whatever beneficial or residual rights Claimant still possess from the shares or from the 2007 Judgment. I think that covers all the possible options.

But whatever the case may be under any of those options, the key point for ratione materiae purposes is that regardless of what theory you apply

or what combination of theories, the relevant investment or investments in this case cease to exist before the TPA's entry into force and, therefore, for that reason, they cannot be a covered investment.

We thought that some graphics might help explain why Colombia's interpretation is not only correct but logical.

There are only three possible scenarios regarding the timing of the investment. The first one, at the top, is where the entirety of the duration predates the Treaty's entry into force. And that's the case we have here.

The second scenario is one where the investment straddles the Treaty's entry into force. So, it started before, but it continues after. And that was the scenario in Mondev and Saipem, which are two of the cases that Claimant has relied upon.

Importantly--and then the third one is the one where the entire duration of the investment post-dated the entry into force. So, the investment was actually made after entry into force, and everything that happened after the investment was

after entry into force.

The important point on this slide is that only Scenarios 2 and 3 can be a covered investment under the Treaty. But Claimant's scenario is Scenario 1. And we thought we might illustrate the conceptual problem posed by Scenario 1 for ratione materiae purposes by positing an extreme example, which is the one that appears on the next slide.

This timeline illustrates how untenable Claimant's approach would be as a general matter, because it would allow investors to resuscitate disputes that had already been resolved in the domestic courts years or even decades before. And in the scenario on the slide, an investment and related litigation, in this hypothetical, ended a full 50 years--I guess it's 38 years--before the entry into force.

But under Claimant's theory, they would still be able to claim under the investment treaty simply by filing a reconsideration request or a nullification request concerning the final ruling, which in this hypothetical is 1970.

So, they wait until the treaty is about to enter into force or it has already entered into force, and they drum up a reconsideration request or a nullification request of some sort, and they file that, and all of a sudden they say they're good to go with the TPA claim.

But that can't be right. And let's now use the same timeline but applying the specific facts of this case in the next slide. As you can see--we can go to the next slide. There we go.

As you can see, this slide is substantively identical to the previous slide except that the timing is less extreme. And, critically, on this slide, the lifetime of Claimant's investment is entirely located on the red horizontal line to the left of the entry into force.

And this graphic illustrates fairly clearly why there is no covered investment and no ratione materiae jurisdiction in this case, because during the period that is encompassed by the red line, the TPA was not yet in force.

Claimant's investment or investments are

entirely on the red line. And during that period, the investment existed but not the Treaty. That means that the investment was not covered by the TPA because it is conceptually impossible for an investment to be covered by a non-existent treaty.

Then the TPA entered into force on 15 May 2012. And starting from that date, the TPA's obligations began to apply to Colombia. But on that date, the Claimant no longer had any investment in Colombia.

That means that the Treaty could not have covered Claimant's investment because it is conceptually impossible for a treaty to protect an investment that doesn't exist. It's quite simply--simple really, when you--when you look at it that way.

The reason the analysis gets complicated often is because claimants, like the Claimant here, often invoke these legal claims or residual rights that relate in some way to an investment that became extinguished before the entry into force, or they focus on treaty language that says investments that

investors--that the investor "has made." That's the language that the Mondev Tribunal focused on.

There are still other treaties that say something like "A treaty shall apply to investments made before or after entry into force of the Treaty."

And we would submit that those types of treaty clauses signal simply that the treaty will protect investments prospectively, even if they were made before the treaty's entry into force, but only so long as they still exist by the time that the treaty first begins to apply to the State.

Some treaties do clarify this point by explicitly referring to existing investments, but we would argue that, much like the conformity requirement that we've been discussing, and also the non-retroactivity principle, this is a requirement that is implicit even when there is no express clause.

And this interpretation is also consistent with the ratione temporis principles that were discussed by Mr. Grané Labat. Because these treaties are designed to modify the State's conduct prospectively from the date of the Treaty's entry into

force onward.

And you can't--you cannot take steps prospectively to protect an investment that's already extinguished, as I mentioned. What that means is that if you--if a Tribunal holds a State liable under an investment treaty for harm to an investment that no longer existed by the time of the treaty's entry into force, you're not really protecting the investment under the treaty. Rather, what you're doing is--under the treaty you're penalizing the State for not having protected the investment in accordance with the treaty standards in the past, before the treaty entered into force.

But that's something that you cannot do because it would amount to holding the State liable under norms that did not exist and did not apply to it at the time of the relevant conduct. And that would be directly contrary to the intertemporal rule of Article 13 of the ILC and draft articles of State responsibility.

It's worth clarifying here also that in this case, unlike in Mondev and in Saipem, even the legal

claim had been fully extinguished by the time of the--of the investment--sorry--of the entry into force of the treaty.

And that's--you know, the Claimant today and on Tuesday referred to beneficial and residual interest or rights. But the issue is that there are no such interests or rights here. The Claimant's share investment is long gone, and her legal claims have been definitively rejected.

Colombia does not owe them anything at all, whether pursuant to a court judgment or not. Such being the case, Claimant doesn't actually have any beneficial or derivative or residual or vestigial right to anything at all. Their petition for nullification of the 2011 Constitutional Court Judgment didn't change that.

A legal claim or a petition is not in and of itself an asset. Anybody can file a claim. The claim doesn't have value, though, until you have an actual formal judgment that says you are owed something. And Claimants here--the Claimant here doesn't have them.

So, basically, there's nothing there. It's

what, colloquially, we would call in the U.S. a "nothing verdict."

This concludes our discussion of the ratione materiae subject, and we want to close with a few final thoughts.

The discussion this week about all these issues that we've been talking about focused on very technical treaty issues, such as whether Article 12.1.2(b) incorporates 10.7 from Article 10 or--but not 10.4, et cetera. And maybe what we all need to do is ask our colleagues from the U.S. Government to stop doing that to us in our treaties.

And, of course, the technical treaty analysis is important, but it's easy, when you get that far into the legal weeds, to lose sight of the big picture in these complex investment arbitrations. And we think it's important for the Tribunal also to take a step back and to zoom out to consider the larger context and implications of this case.

And if you look at the big picture here, none of it seems right. In fact, this case is actually perverse in a number of ways, not the least of which

is that the Claimant and her family already fully litigated these claims in Colombia, and yet somehow Colombia finds itself in the position where it's facing three international proceedings concerning the same facts and the same measures that were already litigated in Colombia.

After the adverse result in Colombia, the Carrizosa family decided to just keep pouring money into their legal quest. And that's ultimately the reason that we are here.

Claimants have struggled, as we noted, to identify a covered investment in this case. We would submit that if there's any investment in this case, it's the investment that Claimant and her sons have made, and fancy lawyers and experts, to pursue their various international claims.

And that's what this case is about ultimately. It's about the Claimant and her family rolling the dice with treaty claims in the hopes of a big payoff in the investment arbitration lottery.

We're seeing claims of this nature with increasing frequency from big companies and from

third-party funders and from wealthy individuals like the Claimant. And that's because for all of them, these arbitrations are simply a high-risk/high-yield investment. They know the chances of success in cases like this are minimal, but they pursue them anyway. And why? (A) Because they have the financial means to do it; and (B) because the pay-off is so big that it's worth the risk and the hassle and the money. But that's not a proper use of these treaties. It's not what these investment treaties were designed to do.

And, Madam President, I apologize to you because you've heard from me variations on this theme in a number of these arbitrations, but that's only because for every one claim under these treaties that's legitimate, there seem to be four or five that are frivolous or speculative or abusive in some fashion.

These investment treaties were important and empowering developments in international law, and they serve valuable functions, both for the State and for investors. They signal that a State is committed to a rule of law and that it's a safe place to invest, but

at the same time they protect investors from overreaching State conduct. But they're not intended for this kind of situation. They're not intended for investors to use investment treaties as insurance policies or as lottery tickets, nor were these investment treaties designed to thwart or to limit good-faith efforts by States to adopt sensible regulatory measures in the public interest. It shouldn't be the case that a State or a government acting in the public interest has to pay a fee to foreign investors to be able to do that.

Governing is never perfect, even in the best of circumstances. But if we add an overlay of fear of this type of claim, we risk unduly inhibiting reasonable government action because governments have to have the latitude to govern, to act for the public good.

And what kind of credibility can the investment treaty system hope to have if cases like this one can succeed? How can an investment treaty be used in circumstances like the one in this case? How can the TPA apply to measures taken by Colombia over a

decade before Colombia even first became bound by the treaty's obligations? How can the TPA apply to a dispute that arose over a decade before the treaty's entry into force? How can the TPA apply to an investment that had already ceased to exist years before the entry into force?

And what would an award of $100 million against Colombia signal to the Colombian regulators who saved Granahorrar, regulators who are just doing their job and who did it well? What would it signal to regulators in other countries? And how fair would an award of damages be to Colombian taxpayers? Isn't it enough that a half a billion dollars of their money was used to save the Claimant's company back in the '90s? Why should Colombian taxpayers have to pay the Claimant an additional $100 million now?

For what? For the privilege of hosting an investment that Claimant's company horribly mismanaged? An investment that put the whole Colombian financial system at risk? An investment that Claimant's own company asked the government to save? An investment that the Colombian government

did, in fact, save? And wouldn't we all agree that the Colombian government could certainly find better uses for those $100 million now more than ever?

The investment treaty system is under a lot of strain these days, and these types of cases have a lot to do with that. It is these types of cases that are leading so many States to question the wisdom of having these investment treaties in the first place. And you see some States have terminated their investment treaties outright. You have other States that are not terminating their existing treaties but are no longer negotiating new ones. And you have still others that are negotiating new trade agreements and including investment chapters in them but without ISDS provisions.

Can anyone blame them? How can these treaties survive if they prevent States from regulating in the public interest? How can they survive if they end up siphoning off massive amounts of taxpayer money for cases such as this one and for claimants such as this one? Why should they survive?

That's all we have to say, Madam President

and Members of the Tribunal. Thank you very much.

PRESIDENT KAUFMANN-KOHLER: Thank you. So, this concludes the Closing Statements. What remains for us to do is have a brief procedural discussion.

Do you want a five-minute break before we do this? Maybe it would be good.

ARBITRATOR FERNÁNDEZ ARROYO: Madam President?

PRESIDENT KAUFMANN-KOHLER: Have you a question, maybe? I'm sorry. I went too fast.

ARBITRATOR FERNÁNDEZ ARROYO: No. No problem. It is not a question, really. It is just a clarification concerning the starting point of Mr. Di Rosa's intervention. We respectfully--because he was quoting questions I made to Dr. Briceño--that's right--and I would like to clarify just that the--that was not an advance of my position about the very nature of the 2007 Decision. It was not my opinion on what is vía de hecho.

I was just quoting the opinion given by the expert, Dr. Ibáñez. And Mr. Di Rosa said that Mr. Ibáñez--or Dr. Ibáñez never said that the Decision

in 2007 was not a judicial decision. And, please, I invite Mr. Di Rosa and everybody here to go to the transcription in Spanish of the first day, in several parts, but in Page 43 and 44, when Dr. Ibáñez was asked about this.

I'll switch into Spanish.

"Is it a judgment?"

And he said (interpreted from Spanish): "No, it's not based on what the Constitutional Court said because there's a big difference between a judicial judgment that meets the parameters set out in the Constitution and law for a vía de hecho, which is a situation where in the appearance of a judicial decision--where there's a decision that is not a judicial decision, but it has the appearance of one."

It's not a--that was just my--my quotation in my questions to Dr. Briceño. Mr. Di Rosa can be sure that it's not my opinion. That was just a quotation of Dr. Ibáñez.

I'm very sorry, Madam President, to say that, but I thought that a clarification was good for the record.

MR. DI ROSA: No. And, Professor Fernández Arroyo, I apologize if you felt that I was attributing to you that you--I really was merely referring to the question that you had posed. And we feel that the concept of vía de hecho is explained fully, I guess--maybe more fully than in the testimony--in Mr. Ibáñez' Expert Reports in the paragraphs that I cited.

But I apologize to you.

PRESIDENT KAUFMANN-KOHLER: And I think this is--this is well-clarified now.

Do my colleagues have any other questions for counsel?

ARBITRATOR SÖDERLAND: No. Thank you.

PRESIDENT KAUFMANN-KOHLER: No. Good.

So, I have no questions either. I think you have covered the ground fairly extensively.

And so, we can take a five-minute break and then resume with the procedural discussion, and that will then lead us to the end of this hearing.

Let's take five minutes, then.

(Brief recess.)

PRESIDENT KAUFMANN-KOHLER: Now I think everybody is back. And you're all welcome to switch on your camera so we can see each other, because we have been together for now a number of days and have seen some of the actors, but not the others. And everybody does contribute to this Hearing.

Saying that, we now simply need to run through the post-hearing matters.

We have agreed that there will be no post-hearing briefs. The question that arises is whether the Claimant, especially but both Parties, would express the wish for short written submissions on the oral submission of the United States of today. Maybe I should--and then there are a number of other steps, but let me take this one first.

Should I ask you, Mr. Martínez-Fraga?

MR. MARTÍNEZ-FRAGA: Thank you, Madam President. Yes, we would like to submit a short submission on the issue.

PRESIDENT KAUFMANN-KOHLER: Fine.

How much time do you think you need? Something like--

MR. MARTÍNEZ-FRAGA: Two weeks.

PRESIDENT KAUFMANN-KOHLER: Two weeks?

MR. MARTÍNEZ-FRAGA: Yes.

PRESIDENT KAUFMANN-KOHLER: Yeah. That was what I was about to say.

Do you want a page limitation? And, yeah, I'll turn to the Respondent in a minute.

MR. MARTÍNEZ-FRAGA: We can work with a page limitation, sure. Of course. Would 20 pages suffice?

PRESIDENT KAUFMANN-KOHLER: That is exactly what I would have suggested. Yeah. So--

MR. MARTÍNEZ-FRAGA: We're on a similar wavelength.

PRESIDENT KAUFMANN-KOHLER: Do I--I should turn to the Respondent. Is this an arrangement that is acceptable to you?

MR. GRANÉ LABAT: Thank you, Madam President. We, of course, would also reserve the right to make a submission, given that Claimant has requested the opportunity to do so.

I was just consulting with Ms. Ordoñez. The timing may be a problem for us, two weeks, given the

other filings that we have and hearings as well.

Would there be any leeway, Madam President, to extend that time frame as long as possible? I recognize that we wish to carry on, but we simply ask for, perhaps, a slightly longer period of time.

PRESIDENT KAUFMANN-KOHLER: How much do you ask for? "As long as possible," what does that mean?

MR. GRANÉ LABAT: I'm afraid that if I tell you what my instructions are, it wouldn't help. But I've been instructed to request until February.

PRESIDENT KAUFMANN-KOHLER: That's too long because that conflicts with the Tribunal's timing, really.

MR. GRANÉ LABAT: Okay. Could we ask for four weeks, Madam President?

PRESIDENT KAUFMANN-KOHLER: Yes, I think that's fine. But then--then it comes in before the year-end holidays, and we can work on it. That would be good.

Mr. Martínez-Fraga, is this acceptable?

MR. MARTÍNEZ-FRAGA: I always do whatever we can to help colleagues. I understand the nature of

deadlines after 33 years in the profession.

PRESIDENT KAUFMANN-KOHLER: Good.

And is the limitation of 20 pages also acceptable to the Respondent?

MR. GRANÉ LABAT: Frankly, Madam President, we think it's excessive, given that we have already had rounds of written submissions about the very issues that have been discussed. Nothing new, really, has been raised on the part of the U.S. or Colombia, so we think, certainly, that 20 pages is excessive.

Unfortunately, we know that if lawyers are given 20 pages, they will use 20 pages, and that just keeps adding to costs. So, our request, Madam President, would be to reduce the page limit.

But, as always, we are in your hands, and we defer to you.

PRESIDENT KAUFMANN-KOHLER: Mr. Martínez-Fraga, would you agree to 15? But since we've extended the time limit...

MR. MARTÍNEZ-FRAGA: I don't want to make one thing based on an equitable--we gave them the--we don't object to the time limit because we understand

time limits. And, so long as there's no prejudice, why make life harder?

We do need 20 pages. A number of new premises were raised--

PRESIDENT KAUFMANN-KOHLER: Let's stay with 20 pages. I will translate it for the order--for the post-hearing orders into number of words, and that will be not including footnotes, provided the footnotes only contain references and not kind of hidden submissions.

MR. GRANÉ LABAT: Madam President?

PRESIDENT KAUFMANN-KOHLER: Yes.

MR. GRANÉ LABAT: May I--I am--I confess that I'm a bit embarrassed to raise this point before this Tribunal. But, unfortunately, I have seen in the past that when we set word limits instead of page limits, which I think is the correct thing to do, I've seen opposing counsel take screenshots, images quoting text, and put it in a page, and so therefore it doesn't register as word count.

I am not suggesting that opposing counsel will do that in this case. But for an abundance of

caution, I wish simply to register that copying images with text cannot be done because it circumvents the word limit.

PRESIDENT KAUFMANN-KOHLER: Yeah. I'm sure--I'm sure Mr. Martínez-Fraga will not do this.

MR. MARTÍNEZ-FRAGA: No. We're not interested in doing that, no.

PRESIDENT KAUFMANN-KOHLER: We all are now alerted.

MR. MARTÍNEZ-FRAGA: Yeah. Thank you.

PRESIDENT KAUFMANN-KOHLER: One other thing that needs to be done is transcript corrections. We had already said 21 days from today, which would lead us to the 3rd of December. Is that fine?

I see Mr. Martínez-Fraga nodding, and I see Mr. Grané as well.

Then we would need cost statements, and we would suggest that--well, if we--there needs to be some time--you could do this mid-January, because you will have the last legal fees for the submissions, and then you can finalize the cost statement by, let's say, mid-January.

The Tribunal had in mind no cost submissions, just a presentation of costs itemized by categories without supporting documentation, and--unless requested by the Tribunal, and that could be on the request of one Party if there is an issue. No replies, again, unless the Tribunal orders a reply, and that could also be at the request of one of the Parties. Is that--I see that seems acceptable.

Then the Tribunal--or, before that, the Tribunal will go into deliberations. It thinks that it has all the materials it needs to get to a decision, or an award, using the ICSID terminology. One can never exclude that there may be a question that we have not realized at this stage that comes up during the deliberations. We would then ask questions to the Parties, but that would be very limited, restricted questions. It's unlikely, but it may not be prudent to completely exclude it now.

Then we hope that we can make good progress and issue a decision relatively promptly. It's a little difficult to give you now a time. But what we would suggest that we do is give you a progress report

three months from now, which would be mid-February. You also know that we need to translate the decision or award, so that will also involve some time, but I've already asked ICSID to do its best to accelerate the translation.

So, that is really all the Tribunal had to raise at this juncture. Is there anything that I forgotten that my colleagues would like to add? No?

No.

And I don't think the secretary has anything either that she would like to--

THE SECRETARY: Nothing.

PRESIDENT KAUFMANN-KOHLER: Good. Thank you.

So, let me turn, then, to the Parties to ask whether there's any comments, questions, complaints about the conduct of the Arbitration. This is the time for complaints if you have any.

Mr. Martínez-Fraga?

MR. MARTÍNEZ-FRAGA: No comments, questions, or complaints; only gratitude to all involved, including opposing counsel and representatives of the Republic of Colombia. We appreciate the grace, time,

and temperance that's been exercised by all in hearing both Parties.

PRESIDENT KAUFMANN-KOHLER: Thank you.

Can I turn to the Respondent?

MR. GRANÉ LABAT: Thank you, Madam President. Certainly no complaints from our side. And here we echo our distinguished colleague, Mr. Martínez-Fraga, in thanking you, the Members of the Tribunal, the secretary, the court reporters, and the interpreters. Thank you very much for your patience and your hard work.

PRESIDENT KAUFMANN-KOHLER: So, it remains for me to thank you.

On behalf of the Tribunal, let me first thank the court reporters for very diligent work; the interpreters as well; Mike, the operator, who is very--who is indispensable to hold this--yes, now we see you--to hold us on the line; and Alicia, of course, as well, for the coordination, the organization.

We must say that we were very pleased about how this online hearing functioned. We have the

impression that we heard you as if we had been in the same conference room together. It may not be as pleasant, but this certainly is efficient and functional, and it allows us to proceed. So, we are lucky to have this technology.

I would then like to thank the Party Representatives. Mr. Carrizosa--where is he? I don't see him now. Yeah, here he is. Dr. Ordoñez and your colleagues from the Agencia Nacional de Defensa Juridica del Estado. And then, of course, also the representatives of the United States for their submission and their participation. Yes.

And, of course, last but not least, counsel for very professional conduct of this Arbitration, not only of the Hearing, but also of the written submissions, and the cooperation as well during the Hearing and during the entire Arbitration. It made our work easy in the sense that we could concentrate on the real issues and not be distracted by procedural incidents and skirmishes. So, we do appreciate your work very much.

And so, that leads me now to the end of this

Hearing. I cannot wish you safe travels back because you are already back. But maybe some rest and--during a well-deserved weekend. And that allows me to close.

Goodbye to everyone.

(Whereupon, at 1:45 p.m. (EST) the Hearing was concluded.)

CERTIFICATE OF REPORTER

I, Margie R. Dauster, RMR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

MARGIE R. DAUSTER