

IN THE MATTER OF AN ARBITRATION  
UNDER THE UNCITRAL ARBITRATION RULES (2013)

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ALBERTO CARRIZOSA GELZIS,  
FELIPE CARRIZOSA GELZIS,  
ENRIQUE CARRIZOSA GELZIS,  
*Claimants,*

*v.*

THE REPUBLIC OF COLOMBIA,  
*Respondent.*

PCA Case No. 2018-56

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**Colombia's Written Observations on the  
United States' Non-Disputing Party Submission**

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15 May 2020

**Corrected Version**

**Arnold & Porter**

## **I. Introduction**

1. On 1 May 2020, the United States of America (“**United States**”) filed its non-disputing party submission (“**US Submission**”) in this arbitration. The United States, which is the sole other State party to the TPA,<sup>1</sup> set forth therein its interpretation of certain provisions of the TPA. Such interpretations are critical to the Tribunal’s determinations in the present jurisdictional phase of this proceeding.<sup>2</sup>
2. Upon receiving the US Submission, Claimants at once requested an opportunity to file written comments in response (despite the fact that the procedural calendar did not contemplate an opportunity for the Parties to do so). Claimants’ urgent request is unsurprising, considering that the US Submission debunks Claimants’ interpretation of almost the totality of the treaty provisions that set forth the scope of the States parties’ consent to arbitration under the TPA. Conversely, the United States has confirmed the correctness of Colombia’s interpretation of the provisions of the TPA that constitute the basis of Colombia’s jurisdictional objections. The US Submission is thus devastating to Claimants’ case.
3. In the following sections, Colombia will address the legal import of the agreement by the TPA Contracting States with respect to the interpretation of the terms of that treaty (**Section II**), and will demonstrate that the two States share a common understanding of the provisions at issue (**Section III**).

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<sup>1</sup> Each capitalized term in this submission shall have the meaning set forth in Colombia’s prior written submissions in this proceeding.

<sup>2</sup> See Submission of the United States of America (1 May 2020), ¶ 1 (hereinafter “**US Submission**”).

**II. Under the Vienna Convention on the Law of Treaties, the TPA Parties' common interpretation is authoritative and must be taken into account**

4. Pursuant to the Vienna Convention on the Law of Treaties (“VCLT”), the agreement between the United States and Colombia (collectively, “TPA Parties”) regarding the interpretation of the TPA is authoritative, and must therefore be taken into account when interpreting such treaty.
5. The VCLT sets forth the “[g]eneral rule of interpretation” of treaties and is recognized as embodying customary international law. Article 31 thereof sets forth the primary means of treaty interpretation. Article 31.3 states:

There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and]

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.<sup>3</sup>

6. Article 31.3(a) requires the interpreter of a treaty to take into account “any subsequent agreement between the parties [to the treaty] regarding the interpretation of the treaty.”<sup>4</sup> In establishing such an “agreement,” the question is one of substance, rather than of form. In particular, a “subsequent agreement” need not be a formal document jointly drafted or co-signed by the treaty parties (e.g., another treaty).<sup>5</sup> Rather, an “agreement” may consist of separate acts or statements by each party, so

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<sup>3</sup> CLA-0124, Vienna Convention on the Law of Treaties, United Nations, 23 May 1969 (“VCLT”), Art. 31.3.

<sup>4</sup> International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries (2018), conclusion 3, cmt. 9, available at [https://legal.un.org/ilc/texts/1\\_11.shtml](https://legal.un.org/ilc/texts/1_11.shtml) (hereinafter “ILC Draft Conclusions”). See also *id.* at conclusion 4, cmt. 4.

<sup>5</sup> ILC Draft Conclusions, conclusion 10, cmt. 7.

- long as those acts (i) manifest an undertaking by all of the treaty parties to clarify the meaning of the treaty at issue,<sup>6</sup> and (ii) reflect a common understanding—i.e., that the parties are aware of and share a particular interpretation of one or more provisions of the treaty.<sup>7</sup>
7. Article 31.3(b) also requires the interpreter of a treaty to take into account the treaty parties' subsequent *practice* in the application of the treaty. "Subsequent practice" under Article 31.3(b) captures all other forms of conduct in the application of the treaty<sup>8</sup>—a broad category that includes formal statements made during the course of legal disputes.<sup>9</sup> For State practice to be relevant under Article 31.3(b), it must contribute to the identification of an agreement as to the interpretation of the treaty. In other words, the conduct must demonstrate that the parties share an understanding of the meaning of the treaty.<sup>10</sup>
  8. Subsequent agreements and practice are of comparable importance and effect under Article 31.3; there is no difference concerning the legal effect of subsequent agreement, on the one hand, and subsequent practice, on the other.<sup>11</sup> Consistent with the text of Article 31, a subsequent agreement and/or subsequent practice *shall* be taken into account by an interpreter.<sup>12</sup>

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<sup>6</sup> See ILC Draft Conclusions, conclusion 4, cmt. 10.

<sup>7</sup> See ILC Draft Conclusions, conclusion 10, cmt. 1. See also *id.* at conclusion 10, cmt. 11.

<sup>8</sup> ILC Draft Conclusions, conclusion 4, cmt. 11.

<sup>9</sup> ILC Draft Conclusions, conclusion 4, cmt. 18.

<sup>10</sup> ILC Draft Conclusions, conclusion 6, cmt. 4.

<sup>11</sup> ILC Draft Conclusions, conclusion 3, cmt. 10 ("The distinction between any "subsequent agreement" (article 31, paragraph 3 (a)) and "subsequent practice ... which establishes the agreement of the parties" (article 31, paragraph 3 (b)) does not denote a difference concerning their authentic character."). See also *id.* at conclusion 4, cmt. 9 ("Indeed, by distinguishing between 'any subsequent agreement' under article 31, paragraph 3 (a), and 'subsequent practice ... which establishes the understanding of the parties' under article 31, paragraph 3 (b), of the 1969 Vienna Convention, the Commission did not intend to denote a difference concerning their possible legal effect.").

<sup>12</sup> See **CLA-0124**, Vienna Convention on the Law of Treaties, United Nations, 23 May 1969, Art. 31.3 ("There **shall** be taken into account . . . ") (emphasis added); ILC Draft Conclusions, conclusion 2, cmt. 6 ("All means of interpretation in article 31 . . . are part of a single integrated rule.").

9. The interpretation of the parties established under Article 31.3(a) or (b) is authoritative. Given that a treaty is the embodiment of the common will of the States that concluded that treaty, the International Law Commission (“ILC”) has recognized that “‘objective evidence’ of the ‘understanding of the parties’ possesses considerable authority as a means of interpretation.”<sup>13</sup> The precise weight to be ascribed to a particular agreement or practice will depend upon the clarity and specificity in relation to the treaty at issue;<sup>14</sup> the clearer the link to the interpretation of the treaty, the greater the weight to be ascribed.<sup>15</sup>
10. The applicable treaty in the instant case is the TPA, negotiated and concluded by and between Colombia and the United States as the two State Parties to the TPA. Pursuant to VCLT Article 31.3, a subsequent agreement or subsequent practice of the TPA Parties regarding the interpretation of the TPA must be taken into account and given deference, since it is authoritative.
11. Here, it is clear that the TPA Parties have reached a “subsequent agreement regarding the interpretation of” several provisions of the TPA, within the meaning of VCLT Article 31.3(a).<sup>16</sup> Specifically, through their public written submissions, the TPA Parties have expressed their common understanding as to the meaning of certain provisions of the TPA. The fact that the TPA Parties have not executed a formal joint document expressing this agreement is without consequence for interpretation purposes, as Article 31.3(a) imposes no requirement as to form. What is relevant here is simply that the TPA Parties have together undertaken to clarify in formal written

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<sup>13</sup> ILC Draft Conclusions, conclusion 3, cmt. 9. *See also id.* at conclusion 3, cmt. 3.

<sup>14</sup> ILC Draft Conclusions, conclusion 9(1).

<sup>15</sup> ILC Draft Conclusions, conclusion 6, cmt. 10.

<sup>16</sup> **CLA-0124**, Vienna Convention on the Law of Treaties, United Nations, 23 May 1969 (“VCLT”), Art. 31.3(a).

documents the meaning of certain provisions of the TPA, and that they have manifested a common or shared interpretation of such provisions (see **Section III** below).

12. In addition to constituting a “subsequent agreement,” the TPA Parties’ respective written submissions also constitute “subsequent practice in the application of the [TPA] which establishes the agreement of the [P]arties regarding its interpretation.”<sup>17</sup> As noted above, submissions during the course of a legal dispute may qualify as “subsequent practice” under VCLT Article 31.3(b).<sup>18</sup> Here, the TPA Parties’ written submissions are explicitly designed to clarify the interpretation of the relevant provisions of the TPA, and (as discussed in **Section III** below) they establish agreement with respect to those provisions. These submissions therefore constitute “subsequent practice” within the meaning of Article 31.3(b), and establish the agreement of the TPA Parties regarding the interpretation of the TPA.
13. Whether understood as a “subsequent agreement” or as “subsequent practice,” the TPA Parties’ joint interpretation is an unequivocal manifestation of their will and intention as the sole parties to the TPA, and as such are authoritative. The TPA Parties’ interpretation of the relevant provisions of the TPA in this case is entitled to even greater weight given the clarity and specificity of the TPA Parties’ submissions. As noted above, the clearer and more specific the link between the Parties’ agreement or practice and the aim of interpreting the treaty, the greater the weight to be ascribed to such interpretation.

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<sup>17</sup> **CLA-0124**, Vienna Convention on the Law of Treaties, United Nations, 23 May 1969 (“VCLT”), Art. 31.3(b).

<sup>18</sup> See ILC Draft Conclusions, conclusion 4, cmt. 18.

14. In its Counter-Memorial and Rejoinder, Colombia explicitly undertook an interpretation of the relevant provisions of the TPA.<sup>19</sup> After having had an opportunity to review Colombia's interpretation of the TPA, as well as those of Claimants, the United States decided to exercise its right to file a non-disputing party submission pursuant to TPA Article 10.20.2. The United States described its Submission as "regarding the interpretation of the Agreement [(i.e., the TPA)]."<sup>20</sup> Thus, there can be no doubt that the TPA Parties have specifically sought to clarify the meaning of the TPA through their interpretation. Given that they have established a common understanding with respect to the relevant provisions of the TPA (as discussed below), the TPA Parties' agreed interpretation must be taken into account, and should be given deference.

### **III. The United States and Colombia agree on the interpretation of the TPA**

15. In this section, Colombia will demonstrate that the United States and Colombia agree on the interpretation of the relevant provisions of the TPA. Specifically, Colombia will identify the provisions in respect of which there is interpretive agreement between the TPA Parties concerning (i) the burden of proof, and (ii) each of Colombia's jurisdictional objections based upon the scope *ratione temporis*, *ratione voluntatis*, *ratione personae*, and *ratione materiae* of the TPA.

#### **A. Burden of proof**

16. The TPA Parties agree with respect to the allocation of the burden of proof in the context of jurisdictional objections. Specifically, the United States reiterated the general principle of international law that "a claimant has the

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<sup>19</sup> See, e.g., Colombia's Rejoinder (PCA), ¶¶ 135-53 (undertaking a step-by-step analysis under the VCLT of the ordinary meaning of a provision of the TPA, the provision's context, and the object and purpose of the TPA).

<sup>20</sup> US Submission, ¶ 1.

burden of proving its claims,”<sup>21</sup> and that “[i]n the context of an objection to jurisdiction, the burden is on the claimant to prove the necessary and relevant facts to establish that a tribunal has jurisdiction to hear its claim.”<sup>22</sup> In its Answer on Jurisdiction, Colombia had similarly recalled the general principle that “the [c]laimant bears the burden of proving the facts required to establish jurisdiction, insofar as they are contested by the [r]espondent.”<sup>23</sup>

17. The TPA Parties thus agree that in an arbitral proceeding under the TPA (such as the instant case), the general principle that a claimant must prove the facts necessary to establish jurisdiction is applicable. This common understanding is supported by case law.<sup>24</sup> Accordingly, Claimants bear the burden of proving the facts necessary to establish jurisdiction. Having failed to do so, their claims should be dismissed.

## **B. Jurisdiction *ratione temporis***

### *1. General principle of non-retroactivity*

18. The United States and Colombia likewise agree on the limited scope *ratione temporis* of the TPA. In its Submission, the United States noted that under principles of international law, and unless otherwise stated, treaties do not have retroactive effect – i.e., such treaties (like the TPA) do not bind a treaty party “in relation to any act or fact which took place or any situation which

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<sup>21</sup> US Submission, ¶ 47.

<sup>22</sup> US Submission, ¶ 48. The United States further observed that “if a respondent raises any affirmative defenses, the respondent must prove such defenses.” US Submission, ¶ 47. However, Colombia has not (to date) raised any affirmative merits defenses, but has instead argued that Claimants’ claims fall outside of the jurisdiction *ratione temporis*, *ratione voluntatis*, *ratione personae*, and *ratione materiae* of the Tribunal.

<sup>23</sup> Colombia’s Answer (PCA), ¶ 146 (quoting **CLA-0014**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20 (Söderlund, Bermann, Malintoppi), Award, 26 April 2017, ¶ 66). *See also* Colombia’s Rejoinder (PCA), ¶¶ 3, 20, 345.

<sup>24</sup> *See generally* Colombia’s Answer (PCA), § III.A (citing many legal authorities in support of this proposition); US Submission, ¶¶ 45–48 (citing three cases in support of the same proposition).

ceased to exist before the date of entry into force of the treaty with respect to that Party.”<sup>25</sup> Thus, a State may only be held liable for post-entry into force conduct.<sup>26</sup>

19. In its own written submissions, Colombia had similarly recalled the general principle of non-retroactivity of treaties, invoking Article 28 of the VCLT.<sup>27</sup>
20. The TPA Parties thus agree that a claimant may not submit a claim alleging that a pre-treaty act or omission constitutes a breach of the TPA. The TPA entered into force on 15 May 2012. Thus, Claimants’ claims of TPA breaches predicated on acts that occurred before 15 May 2012 must therefore be dismissed.<sup>28</sup>

*2. Situations in which the alleged conduct straddles the entry into force of the treaty*

21. The United States also addressed in its Submission the scenario in which the alleged State conduct at issue straddles the entry into force of the treaty. Relying upon the reasoning of the tribunal in *Spence v. Costa Rica*,<sup>29</sup> the United States affirmed that “[p]re-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

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<sup>25</sup> US Submission, ¶ 3 (quoting **CLA-0124**, Vienna Convention on the Law of Treaties, United Nations, 23 May 1969, Art. 28).

<sup>26</sup> See US Submission, ¶¶ 5–6.

<sup>27</sup> Colombia’s Answer (PCA), ¶ 163 (quoting **CLA-0124**, Vienna Convention on the Law of Treaties, United Nations, 23 May 1969, Art. 28).

<sup>28</sup> As Colombia observed in its Answer and Rejoinder, Claimants have alleged that the Capitalization Order of 2 October 1998, the Value Reduction Order of 3 October 1998, and the Constitutional Court Judgment of 26 May 2011 constituted breaches of the TPA. See Colombia’s Answer (PCA), ¶ 173; Colombia’s Rejoinder (PCA), ¶¶ 39–42. To the extent that Claimants maintain these claims, all of these acts occurred prior to the entry into force of the TPA on 15 May 2012, and those claims must therefore be dismissed. See Colombia’s Answer (PCA), ¶ 174.

<sup>29</sup> See generally *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2.

own right.”<sup>30</sup> Thus, while pre-treaty conduct “may be relevant in determining whether the State *subsequently* breached that obligation” (emphasis added), “[p]re-entry into force acts and facts cannot . . . constitute a cause of action.”<sup>31</sup>

22. Colombia has taken precisely the same position as that expressed in the US Submission with respect to State conduct that straddles the TPA’s entry into force. In its Rejoinder, Colombia recalled that tribunals facing such situations have analyzed the facts to determine whether a claimant’s claims invoking post-treaty conduct are in fact rooted in pre-treaty conduct (and are therefore precluded *ratione temporis*).<sup>32</sup> In this respect, in both its Answer and Rejoinder, Colombia relied upon the reasoning of the *Spence* tribunal<sup>33</sup> – the same tribunal cited by the United States. Indeed, Colombia and the United States quoted the very same parts of the *Spence* tribunal’s interim award on jurisdiction. Specifically, the TPA Parties quoted the part of the award in which the tribunal observed that pre-treaty conduct may constitute evidence of subsequent breaches, but that the post-treaty conduct must “constitute an actionable breach in its own right.”<sup>34</sup>
23. In their Reply, Claimants criticized Colombia’s references to the *Spence* interim award, attacking the tribunal’s reasoning<sup>35</sup> and dismissing Colombia’s allegedly “expansive interpretation” of the same.<sup>36</sup> In contrast to Claimants’ arguments on this issue, and their misguided reading of the

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<sup>30</sup> US Submission, ¶ 4 (quoting *Spence Int’l Invests., LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT/13/2, Interim Award (Corrected) ¶¶ 217, n.174 (May 30, 2017)).

<sup>31</sup> US Submission, ¶ 4 (quoting *Spence Int’l Invests., LLC, Berkowitz et al. v. Republic of Costa Rica*, CAFTA/ICSID Case No. UNCT/13/2, Interim Award (Corrected) ¶ 220 (May 30, 2017)).

<sup>32</sup> Colombia’s Rejoinder (PCA), ¶ 44.

<sup>33</sup> See, e.g., Colombia’s Rejoinder (PCA), ¶ 44, 56, 75–79; Colombia’s Answer (PCA), ¶¶ 171, 176, 178, 190–91, 193–95.

<sup>34</sup> Colombia’s Rejoinder (PCA), ¶ 78.

<sup>35</sup> See, e.g., Claimants’ Reply (PCA), ¶ 84 (characterizing the *Spence* tribunal’s analysis as “less precise”).

<sup>36</sup> Claimants’ Reply (PCA), ¶ 81.

case law, the TPA Parties' understanding is based on the general principle of non-retroactivity, as affirmed by the *Spence* tribunal.

24. The TPA Parties' common understanding of the relevance of State conduct that straddles the entry into force of the applicable treaty is fatal to Claimants' claims. As explained in Colombia's Rejoinder, Claimants had explicitly alleged that certain pre-treaty acts amounted to breaches of the TPA.<sup>37</sup> In Claimants' Reply, Claimants appeared to pivot, arguing instead that their claims are all based upon the lone post-treaty act that they have identified (i.e., the 2014 Confirmatory Order).<sup>38</sup> Claimants' claims, however, continue to be rooted in pre-treaty conduct. The gravamen of Claimants' complaint is that the Colombian Constitutional Court (i) failed to uphold their claims that the 1998 Regulatory Measures were unlawful, and (ii) failed to overturn the 2011 Constitutional Court Judgment, which according to Claimants was wrongful.<sup>39</sup> In other words, Claimants' claims require a finding by this Tribunal on the lawfulness of the pre-treaty conduct, which shows that the 2014 Confirmatory Order does not constitute an actionable breach in its own right. For these reasons, and consistent with the Parties' common understanding of the scope of the TPA, Claimants' claims are rooted in pre-treaty conduct, and thus must be dismissed for lack of jurisdiction *ratione temporis*.

### C. Jurisdiction *ratione voluntatis*

#### 1. Scope of Chapter 12 (TPA Article 12.1)

25. The TPA Parties also are aligned in their interpretation of the limited scope of consent to arbitration under TPA Chapter 12.

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<sup>37</sup> See Colombia's Rejoinder (PCA), ¶ 81.

<sup>38</sup> See Colombia's Rejoinder (PCA), ¶ 84.

<sup>39</sup> See Colombia's Rejoinder (PCA), ¶ 85.

26. In its Submission, the United States addressed the scope and coverage of Chapter 12 as it relates to investor-State arbitration, and confirmed the following:
- a. A claim that falls within the scope of Chapter 12 may not be arbitrated under any other chapter of the TPA;<sup>40</sup>
  - b. By the explicit terms of Chapter 12, Chapter 10 (Investment) applies to measures governed by Chapter 12 “*only to the extent that* Chapter Ten or Articles thereof ‘are incorporated into this Chapter’ [i.e., Chapter 12]” (emphasis in original of US Submission);<sup>41</sup>
  - c. By its terms, TPA Article 12.1.2(b) “incorporate[s] into Chapter 12 the dispute resolution provisions of Chapter Ten, Section B, ‘solely’ with respect to claims brought under the specific Chapter Ten Articles incorporated into Chapter Twelve;”<sup>42</sup>
  - d. Accordingly, “[t]he Parties did not consent to arbitrate any investor claims based on other substantive obligations found in Chapter Ten;”<sup>43</sup>
  - e. “Nor did the Parties consent to arbitrate investors’ claims based on any of the substantive obligations contained in Chapter Twelve.”<sup>44</sup>
27. The United States observed that NAFTA, like the TPA, contains a separate chapter for financial services (NAFTA Chapter Fourteen). It also noted that the *Fireman’s Fund v. Mexico* tribunal had addressed the scope of consent to investor-State arbitration under NAFTA Chapter Fourteen, which was

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<sup>40</sup> US Submission, ¶ 7.

<sup>41</sup> US Submission, ¶ 8 (quoting TPA Article 12.1.2).

<sup>42</sup> US Submission, ¶ 8 (quoting TPA Article 12.1.2(b)).

<sup>43</sup> US Submission, ¶ 9.

<sup>44</sup> US Submission, ¶ 9.

expressly limited.<sup>45</sup> Further, the United States emphasized that, as correctly noted by the tribunal in *Fireman's Fund*, NAFTA financial services investors cannot submit national treatment or minimum standard of treatment claims.<sup>46</sup> The United States concluded that “[l]ikewise here, the Parties to the U.S.-Colombia TPA did not consent to investor-State arbitration of any claims other than those explicitly incorporated into Chapter Twelve via Article 12.1.2(b).”<sup>47</sup>

28. The US interpretation of the TPA thus mirrors that articulated by Colombia in its written submissions. In particular, Colombia has emphasized that
- a. Article 12.1 defines the scope and coverage of Chapter 12, and the provisions of Chapter 10 apply only to the extent that they are explicitly incorporated therein;<sup>48</sup>
  - b. When interpreted pursuant to the customary principles of treaty interpretation, Article 12.1.2(b) incorporates the investor-State dispute settlement procedure of Chapter 10 into Chapter 12, but “solely” for a limited and exhaustive set of four claims;<sup>49</sup>
  - c. The TPA Parties did not consent to arbitrate under Chapter 12 fair and equitable treatment claims asserted pursuant to TPA Article 10.5;<sup>50</sup> and
  - d. The TPA Parties did not consent to arbitrate under Chapter 12 national treatment claims asserted pursuant to TPA Article 12.2.<sup>51</sup>

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<sup>45</sup> See US Submission, ¶ 10.

<sup>46</sup> US Submission, ¶¶ 10–11.

<sup>47</sup> US Submission, ¶ 12.

<sup>48</sup> See Colombia’s Rejoinder on Jurisdiction (PCA), ¶ 259.

<sup>49</sup> See Colombia’s Rejoinder on Jurisdiction (PCA), ¶¶ 245–74.

<sup>50</sup> See Colombia’s Rejoinder on Jurisdiction (PCA), ¶ 214.

<sup>51</sup> See Colombia’s Rejoinder on Jurisdiction (PCA), ¶ 214.

29. Colombia also noted that the *Fireman's Fund* tribunal had interpreted the nearly identical “scope and coverage” provision of the financial services chapter of NAFTA in the same way as Colombia and the United States interpret TPA Article 12.1.2(b).<sup>52</sup> In that case, the claimant had attempted to submit claims under NAFTA Chapter Eleven (Investment)—the equivalent of Chapter 10 of the TPA—based on the minimum standard of treatment and national treatment obligations contained in NAFTA Chapter Eleven. The tribunal in *Fireman's Fund* found (i) that NAFTA Chapter Fourteen (Financial Services) applied to the claimant's claims, and (ii) that the NAFTA States parties did not consent to the submission of minimum standard of treatment and national treatment claims under Chapter Fourteen.<sup>53</sup> The same reasoning applies with equal force in this case.<sup>54</sup>
30. The United States also commented on the expert witness testimony of Mr. Olin L. Wethington, offered and relied upon by Claimants in support of their interpretation of NAFTA. The United States noted that “[it] is not aware of any contemporaneous evidence that supports Mr. Wethington's view of the scope of investor-state dispute settlement in the financial services chapter of NAFTA.”<sup>55</sup>
31. The TPA Parties therefore agree that they expressly limited the scope of their consent to arbitration through the plain language of Article 12.1.2(b). The latter provides that the *only* claims that may be submitted to arbitration under Chapter 12 are those listed in Article 12.1.2(b), i.e., “claims that a Party has breached Articles 10.7 (Expropriation and Compensation), 10.8 (Transfers), 10.12 (Denial of Benefits), or 10.14 (Special Formalities and

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<sup>52</sup> See Colombia's Rejoinder on Jurisdiction (PCA), ¶¶ 234–44.

<sup>53</sup> See Colombia's Rejoinder on Jurisdiction (PCA), ¶ 243; **RLA-0112**, *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01 (van den Berg, Lowenfeld, Olavarrieta), Decision on the Preliminary Question, 17 July 2003, ¶¶ 66, 112(1).

<sup>54</sup> See Colombia's Rejoinder (PCA), ¶ 244.

<sup>55</sup> US Submission, ¶ 10, footnote 11.

Information Requirements).<sup>56</sup> Given the foregoing, and with the sole exception of Claimants' claim of a breach of Article 10.7, *all* claims raised by Claimants in this proceeding fall outside of the scope of the TPA Parties' consent.

2. *Most-favored nation clause (TPA Article 12.3.1)*

32. The TPA Parties also agree that the Chapter 12 MFN Clause cannot be used to create consent to arbitrate claims, where such consent does not already exist.
33. The United States recalled that TPA Article 12.1.2(b) limits the scope of the TPA Parties' consent to investor-State arbitration, and that the Chapter 12 MFN Clause does not fall within the scope of that consent.<sup>57</sup> The United States noted that, as a result, "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."<sup>58</sup> And as the United States further noted, "[a]ny 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."<sup>59</sup>
34. Like the United States, Colombia has emphasized that the Chapter 12 MFN Clause cannot be used to create consent to arbitrate claims that are otherwise excluded from the scope of consent under Chapter 12. As discussed above, the TPA Parties agree that the *only* claims that can be submitted to arbitration under Chapter 12 are the four types of claims

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<sup>56</sup> RLA-0001, TPA, Art. 12.1.2(b).

<sup>57</sup> See US Submission, ¶ 15.

<sup>58</sup> US Submission, ¶ 15.

<sup>59</sup> US Submission, ¶ 15.

identified in Article 12.1.2(b). Just like the United States, Colombia observed that to allow a claimant to invoke the Chapter 12 MFN Clause in order to expand the scope of consent to other types of claims would deprive Article 12.1.2(b) of any effect, contrary to customary rules of treaty interpretation.<sup>60</sup> In support of its interpretation, Colombia recalled that the investment arbitration case law confirms that an MFN clause cannot be used to create consent to arbitrate a claim where that consent does not otherwise exist.<sup>61</sup>

35. The TPA Parties also agree that the other ways in which the Claimants rely on Chapter 12 MFN Clause are not supported by the TPA. As noted in Colombia's Rejoinder, Claimants have also attempted to use the Chapter 12 MFN Clause in two other ways: (1) to import more favorable conditions of consent (which Claimants call "procedural rights"), such as a 5-year limitations period, from another treaty; and (2) to import a substantive obligation (a fair and equitable treatment obligation) into Chapter 12 from another treaty.<sup>62</sup> Colombia explained that these purported uses of the Chapter 12 MFN Clause also fail, because (1) in accordance with the prevailing case law, the Chapter 12 MFN Clause cannot be used to import more favorable conditions of consent;<sup>63</sup> and (2) the Chapter 12 MFN Clause cannot be used to import a substantive obligation into Chapter 12 that does not otherwise exist there.<sup>64</sup> For its part, the United States made clear that "an investor-State Tribunal has no jurisdiction to consider any procedural

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<sup>60</sup> See Colombia's Rejoinder (PCA), ¶ 299.

<sup>61</sup> See Colombia's Rejoinder (PCA), ¶¶ 292–98 (citing **CLA-0088**, *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15 (Goodem, Allard, Marriott), Award, 13 September 2006, ¶¶ 97, 100; **RLA-0072**, *A11Y Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1 (Fortier, Alexandrov, Joubin-Bret), Decision on Jurisdiction, 9 February 2017, ¶ 98; **RLA-0032**, *Sanum Investments Ltd. v. Government of the Lao People's Democratic Republic*, PCA Case No. 2013-13 (Rigo Suerda, Hanotiau, Stern), Award on Jurisdiction, 13 December 2013, ¶ 358); Colombia's Answer (PCA), ¶¶ 326–41.

<sup>62</sup> See Colombia's Rejoinder (PCA), ¶ 288.

<sup>63</sup> See Colombia's Rejoinder (PCA), ¶¶ 133–57.

<sup>64</sup> See Colombia's Rejoinder (PCA), ¶¶ 217–22.

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.”<sup>65</sup> In sum, the TPA Parties agree that the Chapter 12 MFN Clause cannot be used in the other ways sought by Claimants. Claimants’ attempt to circumvent Article 12.1.2(b) by invoking the Chapter 12 MFN Clause thus fails.

3. *Notice of intent requirement (TPA Article 10.16.2)*

36. The TPA Parties also agree on the meaning and effect of the notice of intent requirement of TPA Article 10.16.2.

37. In its Submission, the United States noted that this provision

requires that “[a]t least 90 days before submitting any claim to arbitration under this Section, a claimant **shall** deliver to the respondent a written notice of its intention to submit the claim to arbitration (‘notice of intent’).” (Emphasis in original of US Submission)<sup>66</sup>

38. The United States expressed its understanding that: (i) the notice of intent required by Article 10.17.1 is a condition of consent to arbitration;<sup>67</sup> (ii) pursuant to Article 12.1.2(b), this condition applies to claims submitted under Chapter 12,<sup>68</sup> and (iii) this and the other “requirements in Article 10.16 are not merely technical ‘niceties.’”<sup>69</sup> Instead, and as affirmed by previous tribunals, the notice of intent requirement performs important functions,<sup>70</sup> such that “a tribunal cannot simply overlook an investor’s

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<sup>65</sup> US Submission, ¶ 15.

<sup>66</sup> US Submission, ¶ 24 (quoting TPA Article 10.16.2).

<sup>67</sup> See US Submission, ¶ 26. See also **RLA-0001**, TPA, Art. 10.17.1 (“Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.”).

<sup>68</sup> See US Submission, ¶ 25 (“Articles 10.16 and 10.17 are both in Section B of Chapter Ten and are thus both incorporated into Chapter Twelve by Article 12.1.2(b).”).

<sup>69</sup> US Submission, ¶ 28.

<sup>70</sup> See US Submission, ¶ 27 (“These functions include providing a Party time to identify and assess potential disputes, coordinate among relevant national and subnational officials, and to consider,

failure to comply with [such] requirement[]."71 As a result, if a claimant fails to deliver a notice of intent 90 days before its notice of arbitration, "a tribunal will lack jurisdiction *ab initio*."72

39. Like the United States, Colombia interprets the notice of intent requirement of TPA Article 10.16.2 as a mandatory condition of consent—i.e., a jurisdictional requirement—which applies to claims submitted under Chapter 12. Accordingly, a claimant's failure to comply with such requirement must result in the dismissal of the claims.<sup>73</sup>
40. This common understanding of the TPA Parties—which is based upon the plain language and context of Article 10.16.2 of the TPA—authoritatively establishes the notice of intent requirement as a mandatory condition of consent to arbitration under Chapter 12. As there is no dispute that Claimants did *not* submit to Colombia a notice of intent at least 90 days before submitting their notice of arbitration, all of Claimants' claims must be dismissed on the basis of TPA Article 10.16.2.

#### 4. Waiver requirement (TPA Article 10.18.2)

41. The TPA Parties likewise agree on the meaning and effect of the waiver requirement contained in TPA Article 10.18.2, which provides that

[n]o claim may be submitted to arbitration under this Section unless . . . the notice of arbitration is accompanied . . . by the claimant's written waiver . . . of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any

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if they so choose, amicable settlement or other courses of action prior to arbitration. Such courses of action may include preservation of evidence or the preparation of a defense.").

<sup>71</sup> US Submission, ¶ 29.

<sup>72</sup> US Submission, ¶ 27. *See also id.* at ¶ 29 ("[F]or example, claimants or claims included in a Notice of Arbitration that were not included in a Notice of Intent delivered at least 90 days earlier have not been validly submitted to arbitration").

<sup>73</sup> *See* Colombia's Answer (PCA), ¶¶ 286–90; Colombia's Rejoinder (PCA), ¶¶ 185–90.

proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.<sup>74</sup>

42. In its Submission, the United States noted that the waiver requirement under Article 10.18.2 is a condition of the TPA Parties' consent to arbitration and applies to claims submitted under Chapter 12.<sup>75</sup> The United States further noted that an "effective waiver" entails "both formal and material requirements."<sup>76</sup> With respect to the formal requirement, the claimant must submit alongside the notice of arbitration a written waiver that is "'clear, explicit and categorical."<sup>77</sup> With respect to the material requirement, "a claimant must act consistently and concurrently with the written waiver by abstaining from initiating or continuing proceedings in another forum with respect to the measures alleged to constitute a breach of the obligations of [the TPA]."<sup>78</sup>
43. The United States also emphasized that the term "with respect to" in Article 10.18.2(b) "should be interpreted broadly" – i.e., the number and types of claims that are capable of falling within the scope of the waiver requirement should be viewed expansively, due to the purpose and wording of the waiver provision.<sup>79</sup> If the claimant does not fulfill both the form and material requirements, then the tribunal will lack jurisdiction over the dispute;<sup>80</sup> the tribunal does not have authority to remedy an ineffective waiver.<sup>81</sup> In support of this interpretation, the United States referenced the

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<sup>74</sup> **RLA-0001**, TPA, Art. 10.18.2.

<sup>75</sup> See US Submission, ¶¶ 31–32.

<sup>76</sup> US Submission, ¶¶ 33–34.

<sup>77</sup> US Submission, ¶ 34 (quoting **RLA-0053**, *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1 (Moser, Fortier, Landau), Partial Award on Jurisdiction, 15 July 2016, ¶ 74).

<sup>78</sup> US Submission, ¶ 35.

<sup>79</sup> US Submission, ¶ 37.

<sup>80</sup> US Submission, ¶ 36.

<sup>81</sup> US Submission, ¶ 38.

- awards of the *Renco v. Peru*, *Waste Management v. Mexico*, and *Commerce Group v. El Salvador* tribunals.<sup>82</sup>
44. Colombia has articulated the same interpretation of Article 10.18.2 in its own written submissions. Colombia has explained that the waiver requirement constitutes a mandatory condition of consent that applies to claims submitted under Chapter 12.<sup>83</sup> Colombia (i) took note of the form and material aspects of this requirement, and (ii) observed—based on the treaty text of Article 10.18.2, and as affirmed by the United States—that the waiver requirement covers a broad category of other claims, including all claims submitted to any dispute resolution forum that are based on the same measures alleged to constitute a breach of the TPA.<sup>84</sup> Like the United States, Colombia cited the awards in *Renco v. Peru*, *Waste Management v. Mexico*, and *Commerce Group v. El Salvador* in support of this interpretation.<sup>85</sup>
45. The TPA Parties therefore share the same interpretation of the waiver requirement of Article 10.18.2 of the TPA.
46. In the present case, it is an undisputed fact that Claimants did not file a written waiver, thus failing to satisfy the “form” aspect of this jurisdictional requirement under Article 10.18.2 of the TPA. Furthermore, as explained in Colombia’s Rejoinder, Claimants have continued to prosecute before another dispute settlement forum—the Inter-American Commission on Human Rights—claims that are based on the very same measures that they are challenging in this arbitration. Thus, they also fail to satisfy the “material” aspect of the waiver requirement.<sup>86</sup>

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<sup>82</sup> See, e.g., US Submission, footnote 33.

<sup>83</sup> See Colombia’s Answer (PCA), ¶¶ 291–93; Colombia’s Rejoinder (PCA), ¶¶ 194–97.

<sup>84</sup> See Colombia’s Answer (PCA), ¶¶ 294–95; Colombia’s Rejoinder (PCA), ¶¶ 200–10.

<sup>85</sup> See, e.g., Colombia’s Answer (PCA), footnotes 643, 644, 646.

<sup>86</sup> See Colombia’s Rejoinder (PCA), ¶¶ 207–09 (providing a chart comparing the measures challenged by Claimants in the present proceeding and before the Inter-American Commission on Human Rights).

47. Because Claimants have not submitted any waiver at all—let alone an effective waiver for purposes of TPA Article 10.18.2—their claims must be dismissed for failing to comply with a condition of consent under the TPA.

5. *Consultation and negotiation requirement (TPA Article 10.15)*

48. The TPA Parties do not agree on the interpretation of the consultation and negotiation requirement of Article 10.15. With due respect to the view of the United States, Colombia’s interpretation of this requirement as a mandatory condition of consent is supported by the text of the TPA and relevant case law.<sup>87</sup>

**D. Jurisdiction *ratione personae***

49. The TPA Parties share a common understanding of the nationality requirement of Chapter 12 of the TPA.
50. Interpreting the plain language of Articles 10.16.1, 10.17, 12.1.1, and 12.20, the US Submission summarizes the requirement concerning dual nationals as follows:

An individual submitting a claim to arbitration who is a dual citizen of both TPA Parties must have his or her dominant and effective nationality be that of the TPA Party which is not the respondent continuously between three critical dates: the time of the purported breach, the submission of a claim to arbitration, and the resolution of the claim.<sup>88</sup>

The United States confirms that if a claimant does not possess the dominant and effective nationality of the other TPA Party at each of those critical dates, the tribunal will lack jurisdiction *ab initio*.<sup>89</sup>

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<sup>87</sup> See Colombia’s Rejoinder (PCA), ¶¶ 176–84.

<sup>88</sup> US Submission, ¶ 40.

<sup>89</sup> US Submission, ¶ 40.

51. In its own written submissions, Colombia had similarly noted that pursuant to the terms of the TPA, a dual national claimant must demonstrate that it possessed the dominant and effective nationality of the non-respondent Treaty Party (in this case, the United States) on certain critical dates.<sup>90</sup> Whereas the United States identified as critical the three dates mentioned in the quote above, Colombia has identified two critical dates (i.e., the date of the alleged breach, and the date of submission of the claim) (which are the first two dates identified by the United States).<sup>91</sup> The TPA Parties therefore agree that in order to establish jurisdiction, a dual national claimant bears the evidentiary burden of demonstrating that it had the dominant and effective nationality of the non-respondent Treaty Party on at least two critical dates, namely the date of the alleged breach and the date of submission of the claim.
52. In their Reply, Claimants seemed to acknowledge the relevance of these two critical dates, but nevertheless (i) urged the Tribunal to conduct a “temporally unrestricted analysis,”<sup>92</sup> and (ii) insisted that the burden of proof lies in at least some part with Colombia.<sup>93</sup> The TPA Parties’ common interpretation, which is supported by the text of the TPA and relevant case law,<sup>94</sup> contradicts Claimants’ interpretation, and defeats their arguments. Having failed to demonstrate that they held US dominant and effective

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<sup>90</sup> See Colombia’s Answer (PCA), ¶¶ 385–86, 402.

<sup>91</sup> See Colombia’s Rejoinder (PCA), ¶ 340.

<sup>92</sup> Claimants’ Reply (PCA), ¶ 800.

<sup>93</sup> See, e.g., Claimants’ Reply (PCA), ¶ 941 (“The only kind of testimony, beyond a party-admission, that at all could credibly challenge these premises would be from a declarant having personal knowledge that in effect Claimants when being raised in their household were not in fact exposed to U.S. culture as the predominant cultural influence.”) (emphasis in original), ¶ 944 (“Respondent has not met [its] burden based upon the quality of Respondent’s evidentiary showing.”).

<sup>94</sup> See, e.g., **RLA-0088**, *Michael Ballantine and Lisa Ballantine v. the Dominican Republic*, PCA Case No. 2016-17 (Ramírez Hernández, Cheek, Vinuesa), Final Award, 3 September 2019, ¶ 556; **RLA- 0090**, *Benny Diba and Wilfred J. Gaulin v. Islamic Republic of Iran, et al.*, IUSCT Case No. 940 (Briner, Aldrich, Khalilian), Award, 31 October 1989, ¶ 13.

nationality on the date of the alleged breach(es)<sup>95</sup> and on the date of submission of their claims, Claimants' claims must be dismissed for lack of jurisdiction *ratione personae*.

**E. Jurisdiction *ratione materiae***

53. The TPA Parties also agree on the proper interpretation of the definition of "investment" in TPA Article 10.28. In particular, they agree on the meaning and import of footnote 15 to Article 10.28(g) ("**Judgment Exclusion Provision**"), which provides that "[t]he term 'investment' does not include an order or judgment entered in a judicial or administrative action."<sup>96</sup>
54. In its Submission, the United States noted that TPA Article 12.20 incorporates into Chapter 12 the definition of "investment" set forth in Article 10.28.<sup>97</sup> Thus, the Judgment Exclusion Provision applies to investor-State arbitration submitted under Chapter 12.<sup>98</sup> Colombia had likewise stated in its Rejoinder that the Judgment Exclusion Provision applies to claims submitted under Chapter 12.<sup>99</sup>
55. Given the common interpretation of the Judgment Exclusion Provision by the TPA Parties, Claimants' argument that such provision does not apply to their claims should be rejected. To the extent that Claimants insist that their qualifying investment is the 2007 Council of State Judgment (i.e., a judgement in a judicial action),<sup>100</sup> Claimants' claims must be dismissed for lack of jurisdiction *ratione materiae*.

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<sup>95</sup> Whereas Claimants had originally alleged three separate breaches of the TPA, Claimants seem to have abandoned all claims except those based upon the 2014 Confirmatory Order. *See* Claimants' Reply (PCA), ¶ 3 ("Here, Claimants' claims arise from Order 188/14, the Constitutional Court's June 25, 2014 denial of the motion for annulment of its May 26, 2011 opinion.").

<sup>96</sup> **RLA-0001**, TPA, Article 10.28(g), footnote 15.

<sup>97</sup> US Submission, ¶ 19.

<sup>98</sup> US Submission, ¶ 19.

<sup>99</sup> *See* Colombia's Rejoinder (PCA), ¶¶ 418-29.

<sup>100</sup> As explained in Colombia's Rejoinder, Claimants have not been consistent in describing their qualifying investment. *See* Colombia's Rejoinder (PCA), ¶¶ 410-16.

**IV. Conclusion**

56. In sum, the United States and Colombia – the two TPA Parties – agree with respect to the interpretation of the terms of the TPA that are relevant to Colombia’s jurisdictional objections. This common interpretation is authoritative and should therefore be accorded full weight by the Tribunal. Consistent with the TPA Parties’ interpretation, and for all of the reasons stated in Colombia’s written submissions, Colombia requests that all of Claimants’ claims be dismissed for lack of jurisdiction.

Respectfully submitted,



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