

IN THE MATTER OF AN ARBITRATION UNDER
THE UNITED STATES – COLOMBIA TRADE
PROMOTION AGREEMENT, SIGNED ON
NOVEMBER 22, 2006 AND ENTERED
INTO FORCE ON MAY 15, 2012

and

THE ARBITRATION RULES OF THE UNITED
NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW, AS REVISED IN
2013 (the “UNCITRAL Rules”)

ALBERTO CARRIZOSA GELZIS,
FELIPE CARRIZOSA GELZIS,
ENRIQUE CARRIZOSA GELZIS,

CLAIMANTS,

v.

THE REPUBLIC OF COLOMBIA,

RESPONDENT.

(PCA Case N° 2018-56)

CLAIMANTS’ MEMORIAL
ON JURISDICTION

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May 29, 2019

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INTRODUCTION

Claimants, Alberto Carrizosa, Felipe Carrizosa, and Enrique Carrizosa, respectfully submit this Memorial on Jurisdiction pursuant to Procedural Order no. 1 dated January 29, 2019, including the procedural calendar contained under is Annex-1.

Claimants are bringing these claims against the Republic of Colombia (Colombia) pursuant to the provisions of the United States-Colombia Trade Promotion Agreement (TPA or the “Treaty”). The TPA entered into force on May 15, 2012. It provides, amongst other features, foreign investment protection and consent to investor-State arbitration.

This Treaty includes tailor-made provisions for foreign investments in the financial services sector under Article 12.1(1) of Chapter 12, and applies to measures adopted or maintained by a Party relating to: (a) financial institutions of another Party; (b) investors of another Party, and investments of such investors, in financial institutions in the Party’s territory; and (c) cross-border trade in financial services.

Claimants invested in the Colombian financial services sector, and more precisely in the savings and loan institution *Corporación Grancolombiana de Ahorro y Vivienda*

(GRANAHORRAR or the “Bank”). The investment in GRANAHORRAR was made through six (6) companies incorporated in Colombia: *Asesorias e Inversiones C.G. S.A.*, *Exultar S.A.*, *Compto S.A.*, *Lieja LTDA*, *Fultiplex S.A.*, and *I.C. Interventorias y Construcciones LTDA*.

Chapter 12 explicitly incorporates by reference a number of provisions protecting foreign investors and investments from Chapter 10 of the TPA. These provisions include consent to investor-State arbitration.

Chapter 12 contains a broad and unqualified Most Favored Nation (MFN) clause, unlike the MFN clause in Chapter 10 of the TPA, which is expressly limited in scope and reach. The MFN clause in Chapter 12 is deliberately unqualified and is intended to allow the importation of more favorable treatment, of any nature, contained in other treaties entered into by the US and Colombia. Claimants rely on the more favorable provisions contained in the Colombia-Switzerland B.I.T. in this very narrow regard.

Claimants are dual US-Colombian citizens. The TPA does not exclude dual citizens from its scope of application. In fact, it contemplates claims brought by legitimate and *bona fide* dual citizens, as is here demonstrated. It does so pursuant to the dominant and effective test to ensure that claims are asserted by genuine dual citizenship, as

is here the case. Claimants' predominant and effective citizenship is that of the US.

Claimants lament the breach of several standards of protection made available to them as US investors in Colombia, both directly and through the application of the MFN provision under Article 12.3 of the TPA.

Because of the limited scope and objectives of the current procedural phase of the proceedings, this Memorial on Jurisdiction addresses the basic requirements to the Tribunal's exercise of jurisdiction under the applicable burden of proof. Claimants forever are mindful that factual and legal issues that are inherent to merits determination might have to be addressed in establishing jurisdiction in bifurcated proceedings.

As a result, a degree of attention shall be allocated to the illustration of the more significant factual and legal aspects of the dispute that concern jurisdiction, but overlap into merits factual premises has proven to be inevitable. In this regard, we respectfully appreciate the Tribunal's understanding and indulgence.

In a nutshell, Colombia's financial regulatory authorities unlawfully expropriated Claimants' investment in that jurisdiction. That unlawful expropriation was characterized by discrimination

and a unique catalog of procedural, regulatory, and systemic wrongs.

After a protracted and exhaustive battle before the Colombian administrative courts, as here narrated, the Council of State, the highest judicial authority with jurisdiction over administrative disputes, exposed the unlawful conduct of the Colombian financial authorities and awarded Claimants compensation for the wrongful taking. That judgment represented Claimants' investment in a monetary form. It is the *res* that constitutes the subject matter of this proceeding.

The Judgment that the Council of State rendered was both an embarrassment (as it directly implicated Colombia's two highest ranking regulatory agencies and its Central Bank) *and* a source of financial loss for the Colombian Government. The matter garnered national media attention at the time. The Colombian authorities could accept neither of those scenarios.

The Superintendency of Banking and FOGAFIN turned to the Constitutional Court to have the Council of State judgment suppressed. The Constitutional Court obliged. However, doing so required: (i) repudiating the most basic principles of due process, (ii) abjuring well-defined principles of allocation of jurisdiction (an explicit encroachment of the Council of State's jurisdiction), (iii) abnegating its own jurisprudence, (iv)

committing a an arresting denial of justice, and (v) giving rise to an expropriation without compensation.

Even more importantly, and of consequence beyond the subject matter of this particular dispute, the Constitutional Court's ruling caused a national judicial institutional crisis that lingers to this day. This crisis has been amply chronicled in academic writings, as well as in the media.

This Memorial on Jurisdiction is composed of the following six sections. **Section I** provides an overview of Colombia's excessive exercise of sovereignty. **Section II** sets forth a summary of the facts leading to the June 25, 2014 Constitutional Court Opinion. **Section III** addresses issues of allocation and scope of the burden of proof. **Section IV** illustrates how Claimants meet the jurisdictional requirements *ratione personae*, *ratione temporis*, *ratione voluntatis*, and *ratione materiae*. **Section V** provides a brief illustration of Respondent's main breaches of treaty obligations. **Section VI** provides a summary indication of the damages that Claimants suffered.

I. COLOMBIA'S IRREGULAR, EXCESSIVE AND UNPRECEDENTED EXERCISE OF JUDICIAL SOVEREIGNTY AND ACTIVISM NULLIFIED CLAIMANTS' INVESTMENT IN THE MONETIZED FORM OF A JUDICIAL DECREE

A. Context to Abusive Judicial and Extreme Activism

1. The claims here presented arising from an extraordinary example of illicit judicial activism and abuse of authority matured on June 25, 2014.¹ It was on this date (June 25, 2014) that the last element giving rise to damages stemming from Colombia's violation of the TPA's protection standards took place. As will be more fully explained below, on June 25, 2014 Colombia's Constitutional Court denied the Council of State's Motion to Vacate the Constitutional Court's Opinion depriving Claimants of their monetized investment in the form of a Council of State

¹ This Memorial incorporates by reference the Notice of and Request for Arbitration ("RFA") and all exhibits to that pleading. The exhibits have kept their original designation in an effort to foster consistency.

The facts giving rise to Claimant's judicial recourse are set forth in pages 1 through 62 of the RFA, ending on paragraph 150. The RFA has been attached as an annex to this Memorial to facilitate reference when necessary. This format has been adopted in a genuine effort to mitigate redundancies, some of which regrettably are unavoidable.

Judgment finding in favor of Claimants and against Colombia's two instrumentalities, the Superintendency of Banking and FOGAFIN in the amount of \$228,762,000, exclusive of interests.²

2. The uncontrovertible evidence in this case demonstrates that the Council of State's Judgment arose as a consequence of a proceeding that was legitimate, mindful of due process, and in keeping with constitutional safeguards. The judgement rightfully stemmed from that tribunal's rightful exercise of jurisdiction.

3. As shall be explained, the Council of State's Judgment transformed the vestiges of Claimants' investment into a legally-binding and unassailable entitlement to a fixed liquidated sum of pecuniary damages. Colombia's Constitutional Court, a Tribunal of hierarchy equal to the Council of State and subject to an equally narrow and specialized jurisdictional purview as that which is incident to the Council of State, engaged in an unprecedented usurpation of the Council of State's jurisdiction on June 25, 2014 upon issuance of an order denying the Council of State's Motion to Vacate the Constitutional Court's Opinion of May 26, 2011 ("Constitutional Court's Opinion") (C-26)

² A true and correct copy of Council of State's Judgment in the matter styled: *Compto S.A. in Liquidación y Otros, contra Superintendencia Bancaria y Fondo de Garantías de Instituciones Financieras (FOGAFIN)*, File No. 25000-23-24-000-2000-00521-02-15728, is here attached as C-22.

purporting to annul the Council of State's Judgment in favor of Claimants and against Colombia.³

4. The substantive and procedural deficits characterizing the Constitutional Court's Opinion pitted the Constitutional Court against the Council of State, giving rise to a judicial institutional crisis that still lingers having institutional repercussions far exceeding the particular factual configuration of the case there at issue. The magnitude of this institutional crisis is witness to the Constitutional Court's extreme judicial activism, and abuse of authority.

³ A true and correct copy of the Opinion from the Constitutional Court styled: *Superintendencia Financiera y Fondo de Garantías de Industrias Financieras Contra el Consejo de Estado, Sección Cuarta, Sentencia de 1 de noviembre de 2007, Proferida en Proceso de Nulidad y Restablecimiento de Derecho Iniciado por la Sociedades Compto S.A. y Otras Contra Superintendencia Bancaria y Fondo de Garantías de Instituciones Financieras*, File No. T-2.089.121 and T-2.180.640, here attached as C-23.

B. Claimants Seek Judicial Recourse in Colombia Arising from a Protracted Pattern and Practice of Regulatory Irregularities and Abuse of Authority on the Part of Colombia’s FOGAFIN and Superintendency of Banking

5. The facts giving rise to the judicial proceedings that culminated with issuance of the Constitutional Court’s June 25, 2014 Order can be succinctly restated.⁴ Claimants, Alberto Carrizosa Gelzis, Enrique Carrizosa Gelzis, and Felipe Carrizosa Gelzis (collectively “Claimants” or the “U.S. Shareholders”), three U.S. citizens by birth, invested in one of the Republic of Colombia’s leading financial institutions, *Corporación Gran Colombiana de Ahorro y Vivienda “GRANAHORRAR”* (“GRANAHORRAR” or “The Bank”). The value of their investment⁵ was “reduced” to the peppercorn value of COP.⁶ This “adjustment in value” was based upon discriminatory, irregular, extreme, and excessive, and unprecedented treatment on the part of the

⁴ A factual narrative of this background in considerable detail is contained in paragraphs 1-150 of the RFA.

⁵ To facilitate reading, the term “investment” when pertaining to Claimants constitutes a reference to each individual Claimant’s investment as collectively constituting one investment, unless otherwise specified.

⁶ The acronym “COP” stands for Colombian peso in accordance with the ISO 4217 currency standard.

Central Bank of Colombia (*Banco de la República* or “the Central Bank”), *Fondo de Garantías de Industrias Financieras* (“FOGAFIN”) and Superintendency of Banking (*Superintendencia Bancaria de Colombia* n/k/a Superintendencia Financiera).

6. Consonant with the averments contained in the RFA, FOGAFIN deployed discriminatory methodologies while purportedly discharging statutory obligations to assist qualified financial institutions addressing what it identified as a “temporary liquidity” challenge confronting one of Colombia’s two principal savings and loans, GRANAHORRAR.

7. FOGAFIN discriminated against GRANAHORRAR and treated this formerly leading financial institution differently from its peers, without limitation, by enacting the following five financial acts comprising these discriminatory measures:

(i) artificially and deliberately reducing GRANAHORRAR’s solvency status below the nine percent legislative threshold,

(ii) reducing the bank’s share value to COP 0.01,

(iii) denying GRANAHORRAR’s shareholders due process statutory notice rights,

(iv) unilaterally terminating GRANAHORRAR's CEO without notice to shareholders, and

(v) replacing unilaterally GRANAHORRAR's Board of Directors.

8. The bank was expropriated but never liquidated. It was sold to Banco Bilbao Vizcaya Argentaria ("BBVA") for a payment in the amount of USD 423,000,000. These five final acts of regulatory excesses were not accompanied by *any* compensation or subjected to *any* iteration of a due process regime. As a predicate to these five regulatory measures, FOGAFIN and the Supertendency of Banking implemented nine regulating premises that materially weakened GRANAHORRAR.

9. First, FOGAFIN denied GRANAHORRAR conventional relief for a temporary liquidity deficit. Instead, FOGAFIN proceeded to cause GRANAHORRAR to pledge to FOGAFIN "A" rated performing assets having one hundred thirty-four percent of the value of a guaranty that FOGAFIN would extend to prospective GRANAHORRAR creditors who would provide GRANAHORRAR with liquidity earmarked loans ("the Guaranty-Restructuring Program").⁷⁷

⁷⁷ See RFA ¶¶ 52-66.

10. This Guaranty-Restructuring Program was unprecedented and unresponsive to GRANAHORRAR's liquidity needs. The Guaranty-Restructuring Program, however, did have the effect of materially wresting from GRANAHORRAR a significant percentage of the most productive assets that materially contributed to GRANAHORRAR's historically successful solvency status. This formula also was prejudicial to GRANAHORRAR because it did not address the bank's liquidity needs. The Guaranty-Restructuring Program was not imposed on any of GRANAHORRAR's peers.⁸

11. Second, pursuant to the Guaranty-Restructuring Program FOGAFIN provided GRANAHORRAR with a 30-60 day maturation timeframes⁹ that caused hardship and were materially shorter than the terms that FOGAFIN extended to GRANAHORRAR's peer financial institutions during the Colombia economic crisis of 1998-2001. Notably, however, these latter financial institutions were accorded direct funding (unlike GRANAHORRAR) and very generous maturation dates averaging seven (7) *years*.¹⁰

⁸ See RFA ¶ 53.

⁹ See RFA ¶¶ 94, 120.

¹⁰ See RFA ¶¶ 116, 120. FOGAFIN partially funded GRANAHORRAR withheld final payment and thus engineered a "cessation of payment" event that FOGAFIN

12. Third, within the timeframe of the Guaranty-Restructuring Program, FOGAFIN foisted on GRANAHORRAR interest rates far higher than those extended to GRANAHORRAR's peer financial institutions that found themselves in significantly more threatening solvency challenges. GRANAHORRAR was required to pay to third-party creditors availing themselves of the benefits of the guaranty that FOGAFIN provided to them pursuant to the Guaranty-Restructuring Program an average interest rate of 44%. The average interest rate, however, that FOGAFIN extended as a direct funding creditor to GRANAHORRAR's banking peers approximately during the same timeframe was 19%. When pressed, FOGAFIN was unable to account for this difference.¹¹

13. This disparity is all the more quizzical because GRANAHORRAR enjoyed greater solvency and economic soundness than its peers at all times material to the facts giving rise to Claimants' recourse to the national judicial tribunals of Colombia.¹²

itself identified as the basis for (i) expropriating GRANAHORRAR, and (ii) appropriating unencumbered ownership of the pledged assets.

¹¹ See RFA ¶ 120.

¹² See Juan Camilo Restrepo and Antonio José Nuñez, *Diálogos Sobre las Crisis Financieras* (2009), pp 295-305.

14. Fourth, FOGAFIN caused GRANAHORRAR, upon penalty of complete abandonment, to execute an adhesion contract containing a deliberately vague and *Unilateral Clause* entitling FOGAFIN to keep for its own purposes and pursuant to unqualified ownership, the assets that GRANAHORRAR pledged to FOGAFIN in furtherance of the Guaranty-Restructuring Program upon FOGAFIN's subjective determination of a "cessation of payment" event between GRANAHORRAR any *third-party* credit (irrespective of the amount, quality, cure potential, creditor terms at issue, or position of the third-party payment beneficiary).¹³

15. Fifth, FOGAFIN refused to fund GRANAHORRAR directly for the entire credit amount.¹⁴ This exercise of its lending discretion

Juan Camilo Restrepo served as Minister of Finance during the crisis from August 7, 1998 to August 7, 2000.

¹³ See RFA ¶¶ 80-92. See also Prof. Luis Fernando López-Roca (an Associate Justice of the Constitutional Court and testifies on financial regulatory practice in Colombia and Colombian administrative law) (a true and correct duplicate original of Prof. Luis Fernando López-Roca's expert opinion is here attached as CER-5) Expert Report ¶¶ 84-113.

The expert testimony in this case shall demonstrate that the use of such a *Clause* was both unresponsive to GRANAHORRAR's liquidity needs and unprecedented under the circumstances based upon FOGAFIN's entire regulatory history. Prof. López-Roca Expert Report (CER-5) ¶¶ 84-113.

¹⁴ See RFA ¶¶ 52-53.

was contrary to FOGAFIN's practice with respect to GRANAHOORAR's peer banks, particularly those predominantly configured by mortgage-based principal portfolios. This disparity in treatment is even more opaque because the GRANAHOORAR peer financial institutions receiving direct funding from FOGAFIN were not as financially sound as GRANAHOORAR.¹⁵

16. Sixth, FOGAFIN's formula for addressing GRANAHOORAR's liquidity challenge consisted in requiring GRANAHOORAR's principal shareholder block, the U.S. Shareholders, to divest themselves of their respective interests in GRANAHOORAR.¹⁶

17. Seventh, FOGAFIN caused a deposit run that FOGAFIN used as a ground for challenging GRANAHOORAR's *solvency* status. The evidence compellingly teaches that FOGAFIN deliberately notified that media to report confidential events concerning restricting negotiations between FOGAFIN and GRANAHOORAR. This run, among other

¹⁵ See RFA ¶¶ 116, 119.

¹⁶ See RFA ¶¶ 99, 108.

Here too expert testimony establishes that such methodology was not responsive to GRANAHOORAR's temporary liquidity needs.

matters, made worse GRANAHORRAR's *liquidity* status.¹⁷

18. Eighth, even though the documentary evidence of record demonstrably establishes that GRANAHORRAR's *solvency* status enjoyed a history of economic soundness surpassing the performance level of most of its peer financial institutions, and only suffered from a temporary *liquidity* event, FOGAFIN and the Superintendency of Banking based their expropriation of GRANAHORRAR on a purported *insolvency* crisis that, if at all, only existed during a matter of hours and *solely* because of FOGAFIN's and the Superintendency of Banking's machinations.¹⁸

19. Ninth and finally, the Superintendency of Banking, with FOGAFIN's blessings, provided GRANAHORRAR with a "Cure Notice" containing a fourteen-hour deadline that was physically and legally impossible to perform.¹⁹

20. This "Cure Notice" required GRANAHORRAR shareholders to meet a capital

¹⁷ See RFA ¶¶ 129-130.

¹⁸ See RFA ¶ 63. See also C-7, containing a Central bank authored report titled: Análisis Solicitud Nuevo Plan de Amortización Apoyo Especial de Liquidez C.A.V. GRANAHORRAR.

¹⁹ See RFA ¶ 135.

call in the amount of COP 157,000,000,000. That capitalization was to take place between 1:00 A.M. SATURDAY OCTOBER 3, 1998 AND 3:00 P.M. on that *same* day.²⁰

21. The “Cure Notice,” presumably earmarked for GRANAHORRAR’s shareholders, was *never* communicated to the GRANAHORRAR shareholders as required by law and in keeping with the provisions of the Administrative Code, Articles 46-48.²¹

22. Once these nine conditions took place, the Superintendency of Banking and FOGAFIN proceeded to take over the ownership and management of GRANAHORRAR.²²

23. Claimants sought judicial recourse before Colombian tribunals. It is here asserted that Claimants’ investment in GRANAHORRAR, in party, was liquidated and monetized in the November 1, 2007 Council of State’s judgment.

²⁰ See attached as C-19, correspondence dated October 2, 1998, from Sara Ordoñez Noriega to Dr. Enrique Amaya Pacheco, reference no. 1998050714 (“Cure Notice”).

²¹ Factual and expert testimony to be presented in this case shall demonstrate that this deadline was not performable or communicated to the GRANAHORRAR shareholders. It also was unresponsive to GRANAHORRAR’s needs. *See also* RFA n.93.

²² *See* RFA ¶¶ 135-137.

24. It is this factual background that constitutes the subject matter of the events submitted for adjudication to the Colombian judiciary. It is the actions of the judiciary, primarily the Constitutional Court, that are most relevant to any determination concerning this bifurcated jurisdictional briefing.

II. THE JUDICIAL PROCEEDINGS THAT CULMINATED IN THE CONSTITUTIONAL COURT'S JUNE 25, 2014 OPINION

25. It is this evisceration of Claimants' investment that constitutes the core of this dispute.

A. Claimants Commence Judicial Proceedings Against FOGAFIN and the Superintendency of Banking

26. In a stark abandonment of the then-governing law, neither the Superintendency of Banking ("Superintendency") nor FOGAFIN communicated its respective resolution²³ to GRANAHORRAR's shareholders. More than just a disavowance of governing law, the failure to communicate these resolutions defies the most basic notions of fairness and due process. Both the

²³ C-19 and C-20.

October 2, 1998 “Cure Notice”²⁴ and October 3 Resolution No. 002,²⁵ were sent to GRANAHORRAR’s CEO, who was then replaced in a matter of just minutes following service of Resolution No. 002.²⁶ Consequently, the U.S.

²⁴ See RFA ¶¶ 134-136.

²⁵ See RFA ¶¶ 136-139, and C-20.

²⁶ The then determinative provisions of the Administrative Code (*Código Contencioso Administrativo* an exemplar of “*Decreto 01 de 1984*” is here attached) were Articles 43-48. Article 46, however, is the broadest and most practical in terms of notice compliance requirements binding on the Superintendency and FOGAFIN. It commands:

When, in the authorities’ judgment, their decision directly and immediately affect third parties who have not intervened in the undertaking, they shall publish the dispositive part of the resolution in one publication session in the Official Paper or in an official media outlet earmarked for such notifications, or in a newspaper of wide circulation within the jurisdiction of the agencies that issued the decisions.

Equally relevant is compliance with Article 47 prescribing the publication of legal procedural avenues for challenging the decisions of administrative bodies. This Article provides that “the text of all notifications or publications shall set forth the appropriate legal avenue for challenges of the administrative decisions at issue, which information shall include the authorities before whom any challenge should be filed, as well as the relevant timeframes.”

The legal consequences of these Articles are best enunciated in Article 48, which provides that the failure to notify the interested parties in accordance with the referenced articles

Shareholders exercised the right to petition and served a demand on FOGAFIN and the Superintendency of Banking requesting, among other things, copies of the October 2, 1998 "Cure Notice," Resolution No. 002, dated October 3, 1998 and an explanation of the legal methodology pursuant to which the purported COP 157,000,000,000 cure amount had to be tendered.

27. These petitions were served on FOGAFIN and the Superintendency of Banking between March 15 and May 30, 2000 but it was not until four (4) months later (July 25, 2000) that true and correct copies actually were produced.²⁷

shall render the administrative acts as non-binding and without the force of law. The language of Article 48 commands citation in its entirety:

Without compliance of the foregoing requirements the notification will be deemed as not having taken place nor shall the decisions that should have been contained in the notifications have any legal effect, unless the interested party holds herself out as having been sufficiently notified, agrees to have been so informed or otherwise timely avails herself of the appropriate legal recourse.

Neither condition here occurred.

²⁷ Colombian government authorities incorrectly concluded that the affected shareholders, including the U.S. Shareholders, were planning on filing legal recourse in the form of a class action proceeding. They thus delayed tender of

**B. The Proceedings Before
Cundinamarca's Administrative
Judicial Tribunal and the Council of
State²⁸**

28. On July 28, 2000, Claimants, through the Companies,²⁹ perfected a four (4) count complaint before the *Tribunal de lo Contencioso Administrativo de Cundinamarca* styled: *Acción de Nulidad y Restablecimiento del Derecho de Compto S.A. en Liquidación y Otros, Contra la Superintendencia Bancaria y el Fondo de Garantías de Instituciones Financieras*, File No. 200000521. In that proceeding plaintiffs alleged that FOGAFIN and the Superintendency of Banking (i) issued resolutions that were void for want of premises establishing the factual phases and grounds supporting the ultimate conclusions and mandates contained in those papers (C-19 and C-20), as well as a lack of insolvency that would justify such findings, (ii) lacked due process in

the resolutions as a strategic effort aimed at triggering application of the class action limitations period so as to frustrate any action were it to proceed.

²⁸ In the Spanish language denominated “*Tribunal Administrativo de Cundinamarca* and *Consejo de Estado*.”

²⁹ The “Companies” refers to the six investment vehicles used by Claimants, which corresponds to (i) Asesorías e Inversiones C.G. S.A., (ii) Exultar S.A. (Exultar), (iii) Compto S.A. (Compto), (iv) Inversiones Lieja LTDA (Lieja), (v) Fultiplx S.A. (Fultiplx), and (vi) I.C. Interventorías y Construcciones LTDA (Interventorías).

connection with any ability to redress or address the concerns stated in C-19, (iii) violated mandatory laws, specifically Art. 72 of Legislation 45 (1990) (excessive interest rates), Art. 1203 of the Commercial Code (misappropriation akin to expropriation), and (iv) violated Art. 29 of the Constitution (lack of due process).

29. That action lay fallow for five (5) years. On July 27, 2005 (four (4) years and 364 days after the case had been filed and registered with the Tribunal on July 28, 2000), the Tribunal of Cundinamarca issued a rather inordinate judgment worthy of cross-appeals.

30. The Tribunal ruled that plaintiffs, the GRANAHORRAR shareholders,³⁰ including Claimants, did not state viable causes of action. It also found that defendants', FOGAFIN and the Superintendency, defenses were similarly legally insufficient as a matter of law fees and costs were not award. Dr. Briceño, a former Council of State Magistrate who testifies in the proceeding before this Arbitral Tribunal, explains that this odd ruling is likely politically driven.³¹

³⁰ *See supra* note 29.

³¹ *See* Dr. Martha Teresa Briceño de Valencia (former Magistrate who presided in the Fourth Chamber of the Council of State and has contemporaneous personal knowledge arising from her review of and experience with this institutional crisis) (a true and correct duplicate original

31. Claimants, through the Companies, registered an appeal with the Council of State, styled: *Compto S.A. in Liquidación y Otros, contra Superintendencia Bancaria y Fondo de Garantías de Instituciones Financieras (FOGAFIN)*, File No. 25000-23-24-000-2000-00521-02-15728.

**C. The Council of State's Judgment
Awarding the U.S. Shareholders USD
99,217,593.68**

31. On November 1, 2007, the Council of State issued a judgment overruling the Judgment dismissing the case and corresponding defendants. The Council of State's Judgment held in favor of appellants (plaintiffs below) the GRANAHORRAR shareholders. Two (2) foundational principles stand out in the extensive seventy-five-page decree.³²

of Dr. Martha Teresa Briceño de Valencia's expert opinion is here attached as CER-4), Expert Report (stating "[L]a Corte Constitucional que es un Tribunal donde puede haber mayor injerencia política (pues tres de su nueve magistrados son electos de una terna propuesta por el Presidente de la República), obtuvo de los jueces lo que solicitó el poder ejecutivo, es decir, evitar el pago de la expropiación.")

³² See *supra* note 2.

**D. The November 1, 2007 Council of
State Judgment: Analysis of
Operative Provisions**

32. First, the Council of State found that the resolutions that FOGAFIN and the Superintendency issued (C-19 and C-20) were legally insufficient to cause the entities jointly and severally to expropriate GRANAHORRAR because they lacked the appropriate factual predicates. Therefore, the Council of State concluded that the expropriation was in fact grossly illegal. In furtherance of this holding it observed:

What has here been narrated evinces to this Tribunal that GRANAHORRAR's supposed insolvency that gave rise to the order to capitalize the bank [C-19], was generated as a result of losses in the approximate amount of \$228,726 million that the Superintendency of Banking had calculated as a result of GRANAHORRAR's cessation of payment.

First of all, the capitalization order does not contain *any explanation* of how this figure was arrived at, nor does it reference any document from which such figure was calculated prior to issuance of the order. For this

reason the insolvency reference in the Superintendency of Banking of Cure Notice *lacks a necessary factual foundation and is equally wanting in evidentiary premises.*

On the other hand, the documents of record lead to the conclusion that as of that date October 2, 1998, *GRANAHORRAR was not insolvent but rather had a liquidity issue*, these are concepts that are distinguishable both by their nature and effects.

Lack of liquidity is defined as the want of disposable resources necessary to meet obligations as they become due or that make possible the everyday economic concerns of a business. Insolvency, however, is one in which an entity's net assets are below the threshold of necessary capital.

GRANAHORRAR did not have an insolvency challenge, and in order for the Central Bank to authorize the temporary liquidity credits, both ordinary and extraordinary, what was required was for the entity not to be solvent.

Indeed, Art. 1 of the *Circular Externa No. 25 de 1995*, which was in effect during the operative timeframe when the Central Bank issued the temporary liquidity credits [citation omitted], expressly contemplated that *‘in no instance shall the liquidity credits be provided to insolvent entities or have as their objective and justification for issuance the cure of an insolvency problem.’* For purposes of those liquidity credits, it was deemed that an entity would be entitled to insolvency credit only when ‘upon summarizing its financial records what is gleaned are net assets at least 50% below the capital tender.’ (italics in original, bold italic supplied)³³

33. Second, as noted immediately above, in addition to lacking the requisite factual predicates in order to state legally sustainable resolutions, FOGAFIN and the Superintendency based the resolutions (C-19 and C-20) on an erroneous legal and factual claims, *i.e.*, lack of liquidity, rather than an actual state of insolvency that would create jeopardy for account holders, and more overarchingly, the financial sector as a whole.

³³ *Id.*, C-22 at pp 42-43.

34. The Council of State's Judgment was even more scathing in passing on FOGAFIN's and the Superintendency's acts and omissions as to GRANAHORRAR.

35. The Council of State, by way of example, expressly found that FOGAFIN and the Superintendency, together during the course of just a mere twelve hours, created an economic crisis for GRANAHORRAR that was artificial and hardly indicative of GRANAHORRAR's considerable solvency and historical performance record. Therefore, the Council of State reasoned and concluded that there was no justification for reducing GRANAHORRAR's share value to that of a nominal sum. This measure was lacking in due process, aberrant, and indicative of an extreme abuse of authority. There is no substitute for the Council of State's own language:

The reduction of GRANAHORRAR's share value to a nominal amount requires that the entity or entities undertaking such measure [reducing share value to a nominal sum] has done so based upon *true and accurate information* that the Superintendency of Banking can establish *as realistically accounting for an institution's value*. Nonetheless, if the Superintendency of Banking's report does not reflect the actual net asset

value of an entity, and it is similarly established that the losses of capital are not actual or accurate, then there is no basis for the reduction of share value to a nominal amount.

In the case at bar, the actual breach of net assets or the insolvency status that Corporación Granahorrar was purportedly suffering from, were unveiled as non-existent based upon the certified accounting figures that the financial institution itself later posted, which demonstrated that in addition to its fragile substantiation, the order to capitalize GRANAHORRAR was taken without the benefit of any serious foundation or analysis concerning GRANAHORRAR's true net asset status and in the same manner in which the decision to reduce GRANAHORRAR's share value to a nominal amount.

In this Chamber's judgment, the foregoing issues demonstrate that the events marked by the repeated mail exchanges between FOGAFIN and the Superintendency of Banking, today Financiera, between the night of Friday, October 2 and the afternoon of

Saturday, October 3, placed GRANAHORRAR in a purported insolvency status, pursuant to which the bank was provided with the binding obligation to comply with a cure methodology that was impossible to meet. Instead, these exchanges of correspondence were the cause and origin for a chain of decisions on the part of the entities [FOGAFIN and the Superintendency of Banking], where one decision was supported by the other, which were all arising from FOGAFIN's failure to provide to GRANAHORRAR the additional help that GRANAHORRAR petitioned for that second day of October, consonant with what had been agreed to on October 1.

The foregoing, when added to the wrongfully substantiated insolvency claim that the Superintendency of Banking had asserted against GRANAHORRAR, together with the Central Bank's decision to undertake the capitalization order, as part of the task to reduce to a nominal value GRANAHORRAR's shares, demonstrates *the illegality of the administrative agencies' actions*, and the reason why this Court *must vacate*

the first instance trial court's judgment, which as appellant made clear, *did not at all address the material allegations asserted and had not accorded any weight to the probative evidence on which plaintiffs had based their averments.*³⁴

36. The Council of State's Judgment reversed the trial court with instructions that, among other things, also included a finding of liability against FOGAFIN and the Superintendency of Banking in favor of GRANAHORRAR's shareholders, in the amount of COP 226,961,237,735.³⁵

37. The Council of State saw through the badges of supposed legality that masked the illegal substantive content of the Superintendency of Banking's and FOGAFIN's expropriatory resolutions (C-19 and C-20). It emphasized the lack of substantive foundation, absence of due process, and extreme abuse of authority, as well as an unsustainable legal analysis defined but what appeared to be shifting and unsubstantiated legal standards that cast a blind eye and deaf ear

³⁴ *Id.* at 51-52. (emphasis supplied)

³⁵ Claimants in this case are not asserting that they would be limited in presenting evidence on damages suffered in excess of this figure.

toward the most rudimentary universally accepted principles of basic fairness and equity.

38. The Government of Colombia felt that its own Council of State had embarrassed its leading financial agencies (FOGAFIN, the Superintendency, and the Central Bank) and was undermining executive policy and authority.

39. What immediately ensued was a disappointing and unprecedented act of procedural aggression directed at the judicial branch of government. This procedural violence was constituted by the filing of four (4) frivolous proceedings (*tutelas*) on the part of FOGAFIN and the Superintendency of Banking.

40. FOGAFIN and the Superintendency of Banking each filed two (2) papers with the Council of State seeking re-consideration of the November 1, 2007 Judgment. All four motions were denied. FOGAFIN and the Superintendency of Banking then perfected appeals with the Constitutional Court.

41. On March 5, 2008 FOGAFIN and the Superintendency of Banking perfected an appeal with the Council of State's decision against FOGAFIN and the Superintendency of Banking and in favor of the GRANAHORRAR shareholders. That appeal generated an extraordinary decision that caused a structural-institutional crisis in

Colombia's judicial system. The respective jurisdiction of the Council of State and the Constitutional Court was tested in a manner that remains unprecedented and still lingers. This case, in large measure, arises from this institutional quagmire.

**E. The Constitutional Court's Opinion:
Abuse of Authority and Usurpation of
Jurisdiction**

42. The Constitutional Court issued a prolix 203-page Opinion that exemplifies (i) absolute lack of due process, (ii) extreme abuse of authority, (iii) the usurpation of the jurisdiction of a tribunal of equal hierarchy, and (iv) a tribunal's unqualified abandonment of its own precedent.³⁶

43. The Constitutional Court's Opinion presents fundamental due process challenges at multiple levels. The Constitutional Court exceeded its jurisdiction and placed itself in the position of a factfinder rather than a Constitutional Tribunal charged with reviewing the constitutionality of legislation, regulations, judicial decisions, and executive decrees

44. By way of example, at times the Constitutional Court itself, *sua sponte*, introduces hearsay evidence in the form of newspaper articles

³⁶ See *supra* note 3.

(unofficial publications that are not government-sponsored or legislatively identified as substitutes for due process notice) that the parties, and particularly the GRANAHORRAR shareholders never had an opportunity to review, much less to address with rebuttal evidence.

45. The Constitutional Court's Opinion represents an emblematic denial of justice that even more importantly itself gave rise to a constitutional crisis because of the extent of its abuse of regulatory-judicial authority.

46. As more fully set forth in the Expert Opinions of Dr. Martha Teresa Briceño,³⁷ Prof. Luis Fernando López-Roca,³⁸ and Prof. Jack J. Coe, Jr.,³⁹ the Constitutional Court's Opinion represents a paradigmatic abuse of authority and discretion that cannot be reconciled with the most fundamental tenets of due process.

47. Analysis of the Constitutional Court's Opinion establishes, without limitation, that it

³⁷ See Dr. Briceño Expert Report (CER-4).

³⁸ See Prof. López-Roca Expert Report (CER-5).

³⁹ A true and correct duplicate original of Prof. Jack J. Coe, Jr.'s Expert Opinion is here attached as CER-3, (addressing legal principles and standards governing an investor's encounters with national adjudicative systems, alone or in combination with the acts of other government organs and agencies to help acquaint the Tribunal with informative decisional law).

violated the U.S. shareholders' procedural and substantive due process rights by adopting, condoning, and ratifying, far beyond the ambit of its jurisdictional purview, and contrary to the most fundamental principles of due process, on at least the following sixteen (16) propositions.

48. First, the Constitutional Court disavows the Council of State's decision that the expropriation of GRANAHORRAR on the part of FOGAFIN violated Claimants' due process⁴⁰ rights because it was based on an artificial government-induced insolvency⁴¹ when in fact the bank merely suffered from a temporary liquidity challenge.

49. The Constitutional Court so acted without regard to evidence of record and based upon factual premises and other considerations that Claimants were never able to raise, let alone address, at *any* procedural juncture.

50. Second, the Constitutional Court's Opinion represents a flagrant denial of due process,⁴² in part, because in defiance of the Council of State's findings it approves discriminatory treatment directed at the GRANAHORRAR shareholders⁴³ as to FOGAFIN

⁴⁰ See Dr. Briceño Expert Report (CER-4) ¶¶ 78-86.

⁴¹ See Prof. López-Roca Expert Report (CER-5) ¶ 98.

⁴² See Dr. Briceño Expert Report (CER-4) ¶¶ 78-86.

⁴³ *Id.* ¶ 108.

credit maturation dates that caused irreparable injury to GRANAHORRAR and to its shareholders. The Constitutional Court's unqualified approval of this discriminatory treatment constitutes a violation of procedural due process, and also does violence to the GRANAHORRAR shareholders' constitutional rights by exceeding the Constitutional Court's jurisdiction and in this way proscribing the GRANAHORRAR shareholders from presenting their case.

51. Third, the Constitutional Court's Opinion represents an indefensible denial of due process, in part, because in defiance of the Council of State's findings, the Constitutional Court approves discriminatory treatment directed at the GRANAHORRAR shareholders as to FOGAFIN credit *interest rates* that caused irreparable injury to GRANAHORRAR and its shareholders.⁴⁴

52. The Constitutional Court's unqualified approval of this discriminatory treatment constitutes a violation of procedural due process, and also does violence to the GRANAHORRAR shareholders' constitutional rights by exceeding the Constitutional Court's jurisdiction and in this

⁴⁴ *Id.* ¶¶ 78-86. See also Prof. López-Roca Expert Report (CER-5) ¶ 27, n.4.

way proscribing the GRANAHORRAR shareholders from presenting their case.⁴⁵

53. Fourth, the Constitutional Court's Opinion further shocks the conscience of any witness to this writing because it approves the discriminatory treatment that FOGAFIN directed at GRANAHORRAR and the GRANAHORRAR shareholders in the form of the Guaranty-Restructuring Program, which caused FOGAFIN to weaken GRANAHORRAR's solvency and to misappropriate a significant percentage of that institution's "A" rated performing assets, contrary to principles of law, equity, finance, and customary practice.⁴⁶

54. Fifth, the Constitutional Court's Opinion approves and cloaks with the mantle of legal legitimacy the Superintendency's denial of due process as to GRANAHORRAR arising from the Superintendency's resolution (C-19), which was devoid of factual premises in support of its findings and mandates and for this reason in part proscribes Claimants from presenting their case.

55. In so doing the Constitutional Court's Opinion also approves having provided GRANAHORRAR with a "Cure Notice" that violates due process because performance under

⁴⁵ See Dr. Briceño Expert Report (CER-4) ¶¶ 78-86.

⁴⁶ See Prof. López-Roca Expert Report (CER-5) ¶¶ 84-113.

its terms was both physically and legally impossible. In this regard, the Constitutional Court's Opinion is particularly egregious because it *usurps* the role of the Council of State and of the trial court as factfinders.⁴⁷ The Opinion condones and accepts as legally viable non-compliance with notice requirements generally where no notice was supplied.

56. As the Council of State aptly notes, the purported notice itself was defective because it lacked factual premises in support of its conclusion and in this way further perpetuated multiple denials of due process.⁴⁸

57. Sixth, the Constitutional Court's Opinion by usurping the Council of State's authority gives rise to a foundational institutional crisis between that State's peer and highest appellate tribunals.⁴⁹

58. It did so because, among other considerations, the Constitutional Court was instructed and provided with no alternative but to find that FOGAFIN's and the Superintendency of Banking's resolutions, despite their manifest debilities and lack of procedural due process, were

⁴⁷ See Dr. Briceño Expert Report (CER-4) ¶ 29.

⁴⁸ *Id.* ¶¶ 78-86.

⁴⁹ *Id.* ¶¶ 21, 41. See also Prof. López-Roca Expert Report (CER-5) ¶ 136.

legally viable, upon penalty of removal of the actual justices from the Constitutional Court. The evidence on this point is compelling and determinative.⁵⁰

59. Seventh, the Constitutional Court's Opinion is an aberration and extreme departure from fundamental legality because it adopts as legally sufficient FOGAFIN's resolution reducing the value of GRANAHORRAR's shares to COP 0.01, notwithstanding the resolution's lack of factual premises and methodological bases.⁵¹

60. Eighth, the Constitutional Court's Opinion denies the GRANAHORRAR shareholders due process because it deliberately and in conclusory fashion disregards in its totality the evidence of record that the Council of State explicitly referenced as contrary to both resolutions (C-19 and C-20) and probative only of a temporary liquidity challenge, and not a solvency crisis warranting expropriation.⁵²

61. This shortcoming is particularly problematic and outlandish in the extreme because the Council of State is specifically endowed with a Chamber of the Court exclusively charged with adjudicating (the "Fourth") the

⁵⁰ See Dr. Briceño Expert Report (CER-4) ¶¶ 75, 76.

⁵¹ See Prof. López-Roca Expert Report (CER-5) ¶¶ 127, 136.

⁵² See RFA ¶¶ 52-59.

legality of financial flows attendant to financial institutions. Accordingly, the Council of State is the highest ranking national tribunal⁵³ in the Republic of Colombia charged with adjudication of insolvency and liquidity issues concerning financial institutions.⁵⁴ Deference is to be accorded to its findings particularly as they concern this subject matter.

62. In turn, the Constitutional Court is not endowed with this expertise, which is fundamentally beyond its constitutional jurisdictional competence. For this reason, it is

⁵³ See Dr. Briceño Expert Report (CER-4) ¶¶ 32-33. See also Prof. López-Roca Expert Report (CER-5) ¶¶ 102, 118.

⁵⁴ See Dr. Briceño Expert Report (CER-4) ¶ 13. There she testifies as follows:

En el año 2008 fui designada Magistrada de la Sección Cuarta del Consejo de Estado de Colombia. La Sección Cuarta, de acuerdo a la división de competencia de ese alto tribunal, está a cargo de los impuestos y las materias económicas. Además, es donde se ventila aproximadamente el 40% de las tutelas (amparos judiciales) que se presentan ante el Consejo de Estado. *El Consejo de Estado es el más alto tribunal y última instancia con competencia en lo contencioso administrativo de Colombia. Es una corte altamente especializada, que goza de gran prestigio.* (emphasis supplied)

In f.n. 3 to that paragraph Dr. Briceño provides a succinct history of the Council of State.

aberrational and legally improper for the Constitutional Court (i) outright to disregard and substitute diametrically opposed findings to those of the Council of State, specifically when addressing institutional financial matters of this kind, (ii) to engage in its own exegesis of factual premises of record, (iii) unilaterally to supplement the evidentiary record while aware that the parties would be proscribed from addressing or rebutting such “evidence,” (iv) addressing non-constitutional issues, and (v) adopting as legally sufficient resolutions that *prima facie* and based upon the findings of a tribunal of equal status in *pari materia* have been held to be legally flawed.

63. These stark departures from fundamental notions of due process are multiplied where, as here, the Constitutional Court has invaded the domain of the Council of State.⁵⁵

64. Ninth, the Constitutional Court’s Opinion denies the GRANAHORRAR due process⁵⁶ because it approves the discriminatory targeting that FOGAFIN and the Superintendency of Banking fostered and pursued with respect to the U.S. shareholders.

⁵⁵ See Dr. Briceño Expert Report (CER-4) ¶¶ 27-29. In the words of Magistrate Ostau de Lafont “se ha controvertido el concepto de especialidad como criterio de distribución de las competencias entre los órganos que integran la rama judicial.”

⁵⁶ See Dr. Briceño Expert Report (CER-4) ¶ 29.

65. The Constitutional Court *sua sponte* raised issues that are extraneous to the financial questions that underlie the Council of State's Judgment.

66. A glaring, and for this reason illustrative example, is the Constitutional Court's treatment of a purported minority interest stock sale among GRANAHORRAR investors, which was not a litigated issue, does not give rise to a constitutional question, and yet the Constitutional Court raises and identifies this transaction as the fulcrum of GRANAHORRAR's alleged insolvency concerns. Here too the Constitutional Court engages in the role of a first instance tribunal factfinder and illicitly supplements the record before it, and in so doing, denaturalizes its own role and further invades the Council of State's jurisdiction. This undertaking is extreme in its violation of fundamental due process.⁵⁷

67. Tenth, the Constitutional Court flagrantly erred and in this manner *also* deprived the GRANAHORRAR shareholders of due process because it did not engage in a constitutional review of the Council of State's Judgment, which was the subject matter of the underlying appeal

⁵⁷ *Id.* ¶¶ 93, 94, 98.

presumably giving rise to the exercise of its jurisdiction.⁵⁸

68. Eleventh, because it condones discriminatory practices by adopting FOGAFIN's departure from national mandatory norms requiring that FOGAFIN provide assistance to financial institutions that would *maximize* the institutional autonomy of such institutions while *minimizing* government intervention (proportionality doctrine requiring the least interference possible), the Constitutional Court's Opinion represents a radical departure from basic principles of law and due process.⁵⁹

69. Twelfth, as a Constitutional Court *itself is compelled to admit*, its opinion constituted an unprecedented departure from governing jurisprudence⁶⁰ and, so says the argument of the Constitutional Court *itself*, the Constitutional Court now fashions new law having *retroactive application*.

70. This very pronouncement, without more, is exemplary of a denial of due process as Claimants, nor anyone else for that matter, could have travelled on its pleadings based on an illegal formulation that at the time did not exist,

⁵⁸ *Id.* ¶¶ 30, 78-85

⁵⁹ *Id.* ¶¶ 94, 95, 97, 100-102.

⁶⁰ *Id.* ¶¶ 102-105.

according to the very pronouncements of the Constitutional Court itself. The Council of State, as shall be demonstrated *infra*, seized on this extreme pronouncement that the Constitutional Court refused to disavow.

71. Thirteenth, the Constitutional Court's Opinion is flawed to an extreme because it condones and adopts FOGAFIN's non-responsive liquidity "cure formulas" that allowed FOGAFIN to misappropriate a significant percentage of GRANAHORRAR's "A" rated working assets and in this way adversely compromised GRANAHORRAR's solvency status.⁶¹

72. Fourteenth, the Constitutional Court was neither independent nor impartial in rendering its opinion. Instead, it was serving an executory function beyond its jurisdictional competence and for this reason the opinion is radically and fundamentally flawed and bereft of any semblance of judicial propriety.⁶²

73. Fifteenth, because the opinion is both internally and externally inconsistent, it constitutes a denial of due process.⁶³

⁶¹ *Id.* ¶¶ 63, 70, *in fine*.

⁶² *See* Dr. Briceño Expert Report (CER-4) ¶¶ 75-76. *See also* Prof. López-Roca Expert Report (CER-5) ¶ 125.

⁶³ *See* Dr. Briceño Expert Report (CER-4) ¶ 79.

74. Even a surface analysis of the opinion reflects that it conflates *liquidity* and *solvency* standards that *may* trigger the exercise of regulatory sovereignty in the form of a permanent or temporary agency intervention in a financial institution.

75. This misapprehension of the factual record, which exceeds the gross negligence standard of any national law, and the governing legal standard, although extreme and of consequence, is understandable because of the dichotomy between solvency and liquidity that characterizes the underlying record. That record reflected a status of temporary lack of solvency far *below* the 9% legal threshold.⁶⁴ Yet, the intervention, expropriation, termination of the CEO, and replacement of the Board of Directors all was founded on *insolvency* concerns and not liquidity issues, as the Council of State correctly emphasized.

76. Sixteenth, the Constitutional Court's Opinion ratifies the use of the "*Clause*," which is tantamount to sanctioning the use of irregular formulas that overreach and constitute an excessive exercise of regulatory authority that further weakens solvency and liquidity. The "*Clause*" was not a formula responsive to a temporary liquidity challenge. Instead, it was

⁶⁴ *Id.* ¶ 92.

non-negotiated adhesion “*Clause*” that unconstitutionally provided FOGAFIN with the pretext of a right to expropriate based upon unrelated and self-judging default events. This predicament also is unprecedented, contrary to law, and in extreme violation of fundamental notions of due process.⁶⁵

77. The extreme and draconian nature of the Constitutional Court’s Order was such that it prompted the participation of the President of the Council of State, Dr. Mauricio Fajardo Gómez, who filed a motion seeking the annulment of the Constitutional Court’s Opinion.⁶⁶

F. The President of the Council of State’s Participation Seeking Annulment of the Constitutional Court’s Opinion

78. The extreme and aberrant character and nature of the Constitutional Court’s Opinion invited the personal appearance and intervention of the President of the Council of State to argue that agency’s Motion for *Annulment* of the Constitutional Court’s Opinion.⁶⁷ The motion asserted that the Constitutional Court engaged in

⁶⁵ See Prof. López-Roca Expert Report (CER-5) ¶¶ 93, 94, 108-113.

⁶⁶ *Id.* ¶ 25, 96.

⁶⁷ A true and correct copy of the Council of State’s Motion for Annulment is here attached as C-25.

an act of judicial-regulatory abuse of authority by usurping the Council of State's jurisdiction and improperly extending its own. The two-prong argument was framed as requiring annulment of the Constitutional Court's Opinion based upon denial of due process.

79. The Council of State's President advanced that annulment was not only warranted, but actually necessary. He emphasized that the Constitutional Court violated its own competence (jurisdiction) by acting as the first instance trier of fact ("*juez natural*"), as well as a second instance appellate body charged with adjudicating the legal propriety of (i) first instance abuse of discretion, (ii) mistake of law, and (iii) error in the application of law to fact.

80. The motion to vacate similarly characterizes the Constitutional Court's Opinion as *extreme* and *dangerous*. It observes that "even more *complex*," questionable, and *grave* is that the Court [the Constitutional Court] seizes for itself the attribution of a judge and extends its authority to adjudicate the specific merits of a case, which role is reserved for the Council of State."⁶⁸

81. In this same vein, the President of the Council of State further provides that "even in instances when the parties to a litigation do not

⁶⁸ *Id.* at 41.

allow for the actual judge [*propio juez natural*], that is to say the Council of State, to adjudicate the question at issue, the arguments and extreme positions raised on appeal limit the appellate jurisdiction of a second instance Tribunal, such that paradoxically and questionably the interested parties [FOGAFIN and the Superintendency of Banking] do not raise the corresponding challenge on appeal but they [FOGAFIN and the Superintendency of Banking] later do raise them in the form of *tutela* and the Constitutional Court address this newly-raised issue even though it was neither raised or considered by the first instance judge.”⁶⁹

⁶⁹ *Id.* at 41 (emphasis supplied), the original Spanish language iteration states:

Pero, más complicado, cuestionable y grave aún resulta que la Corte se arrogue la atribución de juez natural y falle el caso concreto en el lugar del Consejo de Estado, cuando las partes en litigio ni siquiera permitieron al propio juez natural, esto es al Consejo de Estado, pronunciarse sobre el problema jurídico en cuestión pues, como es bien sabido, los argumentos y extremos planteados en el recurso de apelación limitan la competencia del juez de segunda instancia, de modo que paradójica y cuestionablemente las partes interesadas no plantean el correspondiente problema en el recurso de alzada pero luego sí lo esgrimen en sede de tutela y la Corte Constitucional lo aborda sin que el juez natural del litigio haya sido

82. The President of the Council of State understandably framed the abuse of due process in terms of a complete “absence of reasons [*absolutamente ignotas las razones*] underlying the Constitutional Court’s judgment in opinion SU-447,2011, which is the subject matter of this Motion to Vacate, [noting that the Constitutional Court] concludes that entities such as the Superintendency of Finance [f/k/a the Superintendency of Banking] norms are to be applied by cherry-picking from fragmented doctrines and using non-systemic methodologies, from the Administrative Code,⁷⁰ which norms, to be sure, develop constitutional rights and principles that are well established.”⁷¹

debidamente llamado por los interesados a hacerlo.

⁷⁰ *See supra* note 26.

⁷¹ *Id.* at 37. The Spanish language original reads:

Resultan absolutamente ignotas las razones por las cuales la Corte Constitucional, en la sentencia SU-447 de 2011, cuya nulidad se reclama, concluye que a entidades como la Superintendencia Financiera y el FOGAFIN le deben ser aplicadas de semejante forma fraccionada y asistemática, las normas del CCA, todas las cuales, por cierto, desarrollan

83. The non-judicial and extremely political and unjustifiable denial of due process that the Constitutional Court's Opinion exemplifies can be gleaned by the extent to which, as the President of the Council of State notes, the Constitutional Court arbitrarily selected truncated doctrinal support, seemingly randomly, from the Statute of the financial system and code of civil procedure⁷² rather than operative provisions of the Administrative Code.

84. Therefore, the ill effects arising from (i) the usurpation of the trial court's adjudicatory role, and (ii) the similar usurpation of the Council of State's jurisdiction for merits appellate review, is made all the worse because of the (iii) Constitutional Court's haphazard reliance on doctrine that is inapposite but expedient as concerns its mission of implementing a political decision notwithstanding the legally untenable nature of that disposition.

85. On June 25, 2014, the Constitutional Court denied the Council of State's Motion to

principios y derechos fundamentales
constitucionalmente reconocidos.

⁷² In the original Spanish language: Estatuto Orgánico del Sistema Financiero and Código de Procedimiento Civil.

Vacate the Constitutional Court's Opinion, SUP-447.⁷³

G. The Two Dissenting Opinions in the Constitutional Court's Order Denying the Motion to Vacate

86. The Order Denying the Motion to Vacate was meaningfully qualified by two (2) dissenting opinions that embodied the egregious and shocking denial of due process because of what one of the dissents characterized as an economic motive to deny due process and to disavow fundamental constitutional protections. Here the concluding sentences comprising Justice Rojas Ríos' dissenting opinion⁷⁴ are particularly relevant:

Adujo, que en concordancia con la posición adoptada por el Consejo del Estado cuando se pretenda afectar, o en efecto se afecten derechos de terceros, debe surtirse la respectiva notificación pues la misma corresponde a un acto procesal que no puede transgredirse argumentando la

⁷³ A true and correct copy of the Constitutional Court's Order denying the Council of State's Motion to Vacate, dated December 11, 2001, is here attached as C-26.

⁷⁴ A true and correct copy of Justice Rojas Ríos' dissenting opinion contained in *Comunicado No. 25*, June 25/26, 2014, issued by Colombia's Constitutional Court, is here attached as C-27, also available at www.corteconstitucional.gov.co.

ocurrencia de un hecho notorio o de una conducta concluyente supuestamente derivada de comentarios noticiosos en medios de comunicación. A juicio del magistrado Rojas Ríos, la razón de la decisión acogida por el pleno de la Corporación desconoce al debido proceso pues autoriza que la administración pública no efectúe notificaciones a terceros, en procesos como el estudiado, cuando las normas financieras no prevean un sistema de notificación, contrariando de manera vehemente la doctrina de la doctrina de la Corte.

Concluyó, exponiendo que no podía desconocerse en el fondo, *el caso objeto de estudio estaba otorgando legalidad a una expropiación que había sido debidamente corregida por una sentencia del Consejo de Estado, cuya motivación resulta impecable, por lo cual no existe argumento jurídico aceptable y riguroso para revocarla, máxime si gran parte de su fundamentación obedeció a implicaciones económicas, por la cuales se legitimó el desconocimiento de las garantías constitucionales de los*

ciudadanos involucrados en el proceso de referencia. (emphasis supplied)⁷⁵

87. Central to Justice Rojas Ríos' dissent was the finding that the Constitutional Court deliberately turned a blind eye towards the constitutional and due process rights of the GRANAHORRAR shareholders merely because of the economic incentive incident to expropriating a valuable asset. This dissenting opinion is robust in emphasizing that the Constitutional Court's Opinion defied that very Court's precedent, as well as the normative strictures of the Administrative

⁷⁵ Consonant with the premises that the Council of State asserted with respect to notice provisions that may affect third parties or in effect are material to the rights of third parties, the actual notice must be adhered to as prescribed because such notice concerns a procedural predicate that cannot be modified merely by arguing that it is public knowledge or that notice is not necessary because of media reports. In Justice Rojas Ríos' Opinion, the reasons underlying the Constitutional Court's Opinion are contrary to due process because such reasons would justify government instrumentalities shying from providing legally prescribed notices to third parties under the theory that such notices are not necessary based upon the opinion that they already form part of the awareness of the general public. In cases such as the one at bar, where the governing financial norms do not contain any system for notification in the Constitutional Court's view, such conduct vehemently conflicts with this Court's own precedent and established doctrine.

Code, particularly with respect to the latter's Articles 46-48.⁷⁶

88. Justice Rojas Ríos' dissenting opinion carefully analyzes how the Constitutional Court, based solely on its own novel exegesis, (i) fashions out of wholecloth a new rule of law that dispenses with codified due process notice provisions replacing them with a doctrine of constructive notice from "*vox populi*" sources, (ii) without justification or legal authority substituted the due process rights that the GRANAHORRAR shareholders held pursuant to Articles 46-48 of the Administrative Code with reliance on Articles 335(19), and 74 of the Statute of the Financial System, and (iii) in so doing perpetrated violations of constitutional protections.

89. Put simply, Justice Rojas Ríos' dissent asserted that the Council of State's Judgment (C-22) actually had corrected a wrongful expropriation that FOGAFIN and the Superintendency of Banking had perpetrated.

90. Notably, on the very same day on which Justice Rojas Ríos announced to the Constitutional Court his dissent and the grounds in support of it, he was discharged from that tribunal.

⁷⁶ See *supra* at note 26.

91. These factors establish direct and explicit violations of the TPA, let alone a *prima facie* showing of jurisdiction as discussed below. The U.S. Shareholders, in addition to having averred facts that, if proven, would demonstrate Colombia's violation of the TPA and customary international law, as required from a pleading perspective at this jurisdictional phase. In assessing this prong of a jurisdictional determination, the Tribunal is invited to consult the Expert Reports that Dr. Martha Teresa Briceño de Valencia, Prof. Jack J. Coe, and Prof. and Associate Justice Luis Fernando López-Roca have submitted. Set forth below is analysis of some of their immediately relevant expert observations attaching to the material Constitutional Court's rulings before the Tribunal at this procedural juncture.

H. Expert Opinion of Prof. Jack J. Coe, Jr. Addressing the Constitutional Court's Judicial Activism Directed at the Council of State's Judgment

92. The issuance of the Constitutional Court's Order Denying Reconsideration in the form of a Motion to Vacate constitutes (i) the ripening of the conflict brought before this Arbitral

Tribunal, and (ii) the end of all judicial labor concerning the subject matter here at issue.⁷⁷

93. The expert opinion of Professor Jack J. Coe, Jr. asserts that the Constitutional Court's judicial activism, as made clear by its opinion flouting the Council of State's Judgment, is substantively akin to the exercise of judicial sovereignty present in *Saipem S.p.A. v. The People's Republic of Bangladesh*. On this point he explains:

⁷⁷ The second dissenting opinion authored by Justice Pretelt Chaljub, attached as C-26, in every material way coincides with Justice Rojas Ríos' "lack of due process" argument by asserting that the GRANAHORRAR shareholders were deprived of "the right to present a defense."

Prof. Coe observes that "[i]n this connection, [he] again found illuminating the dissent of Magistrate Chaljub." Prof. Coe observes that Magistrate Chaljub "concluded that none of the highly limited grounds that would have let the Constitutional Court nullify the relief given the investors by the [Council of State] was present. Far from it – the [Council of State] had uncovered the 'strange facts' surrounding the measures precipitously imposed on the troubled bank:

In just three days the financial authorities went from describing the financial situation of [the bank] as solvent to declaring its default Indeed, [o]nly one day before declaring insolvency, FOGAFIN had declared [the bank] solvent and ordered specific forms of aide to improve the strength of the corporation."

Prof. Coe Expert Report (CER-3) ¶ 80.

The parallels between *Saipem* and the current case seem clear. The Council of State's judgment in this case, the product of legitimate proceedings indisputably within that court's jurisdiction, transformed what was left of the Claimants' investment into an entitlement to money. That ruling could reasonably have been expected to involve the Constitutional Court only if it somehow raised issues properly within the competence of that body. The *deus ex machina* intervention of that court [Constitutional Court], and its remarkable *de novo*, first instance, approach finds a strong analogue in the Bangladeshi court's exorbitant review of the ICC award seen in *Saipem*. The judicial activism in each case was not to be expected, and in both cases those State actions nullified the investment in its then-monetized form.

Even if fidelity to domestic law were sufficient to satisfy treaty obligations (which, in general, it is not), the current case may well involve more: the use of judicial methods to change (or ignore) existing law so as to accommodate the regulatory entities'

troubling departure from seemingly established rules of notice and those entities' abrupt imposition of measures to denature what remained of Claimants' investment.⁷⁸

94. Along this same line of thought, Professor Coe notes:

84. The Tribunal in *Saipem* expressly mentioned the abuse of rights doctrine as informing its reasoning. There, ... the local courts purported to revoke the authority of an ICC arbitration tribunal in response to certain procedural and evidentiary decisions made by the tribunal; those courts would later reason that the award issued by the tribunal was without effect. As in *Metalclad* and several other cases, the Tribunal in *Saipem* looked behind what was ostensibly the undertaking of an official function to consider the substantive quality of the actions taken. In *Saipem*, the Tribunal's expropriation analysis concluded:

*Having carefully
reviewed the procedural*

⁷⁸ See Prof. Coe Expert Report (CER-3), ¶¶ 85-86.

orders referred to in the Revocation Decision as the cause of the ICC Tribunal's misconduct, the Tribunal did not find the slightest trace of error or wrongdoing. Under these circumstances, the finding of the Court that ... the 'arbitrators' committed misconduct; lacks any justification ... [I]f one carefully studies the Revocation Decision of 2 April 2000, one fails to see any reference whatsoever to the law that was allegedly 'manifest[ly] disregard[ed].' By way of consequence, it is unfounded to then infer from such ill-founded finding of misconduct that 'there is a likelihood of miscarriage of justice.' Equally unfounded is the consequence drawn by the Court when deciding the revocation of the authority of the ICC

Tribunal. This declaration can only be viewed as a grossly unfair ruling.

The Tribunal is reinforced in that conclusion by the fact that Bangladesh does not criticize in these proceedings the conduct of the ICC Arbitral Tribunal, Bangladesh does not even try to show that the ICC Arbitrators' conduct was somehow inappropriate, illegitimate or unfair. To the contrary, Bangladesh tries to justify the decision to revoke the authority of the ICC Tribunal exclusively on the ground that test set forth in Article 5 of the BAA is not stringent leaves the authority free to extrapolate that the arbitrators may be likely to commit a miscarriage of justice. In none of its submissions in the

present arbitration did Bangladesh even attempt to show that the ICC Tribunal committed misconduct and that such alleged misconduct could reasonably justify the revocation of the arbitrators. ...[to the extent that] the limited contents of the Revocation Decision allow [the Tribunal] to draw any conclusion as to the reasons of the Court, the Tribunal cannot but agree with Saipem that the judges ‘simply took as granted what Petrobangla falsely presented’ (Tr. II 57:12-13 158). Finally, the Tribunal notes that there is no indication in the record that the ICC Arbitrators were at any time consulted, let alone heard, by the courts of Bangladesh during the process leading to the

decision revoking their authority).⁷⁹

95. Beyond the uncanny parallels to *Saipem*, Prof. Coe reasons that “[a]lthough it is repeated that investor-State tribunals do not act as domestic appeals courts, in fact, such tribunals routinely, and of necessity, examine the quality of reasoning adopted by domestic adjudicative bodies.”⁸⁰

⁷⁹ See Prof. Coe Expert Report (CER-3) ¶ 84, citing to *Saipem* award, ¶¶ 155-158.

⁸⁰ *Id.* ¶ 61.

This statement is articulated and contextualized in illuminating examples:

The many illustrations of this include the awards in: *Metalclad* ([n]one of the reasons included a reference to any problems associated with the physical construction of the landfill or to any physical defects therein [thus] the construction permit was denied without any consideration of, or specific reference to, construction aspects or clause’) [citation to *Metalclad* award, ¶ 93]; *Saipem* ([‘to the extent that] the ... the Revocation Decision [allows the Tribunal] to draw any conclusion as to the [Court’s] reasons, the Tribunal cannot but agree with Saipem that the judge ‘simply took as granted what Petrolbangla falsely presented’) [citing to *Saipem* award, ¶ 157]; and *Cake* ([T]he ... seven unjustified obstacles, coupled with the remainder of the liquidator’s obligation to

96. The invitation to the Tribunal in this case does not concern *second-guessing*, even as a matter of pleading practice for jurisdictional purposes, the Constitutional Court's Opinion. Similarly, it does not entail a mere critique of a judicial gloss on settled procedural and substantive authorities that may have been misplaced or just a product of reasonable error. Along this very same vein the procedural recitation and factual narrative here presented does not seek to invite the Tribunal to confirm or deny irregularities that may or may not be subject

proceed with the sale of [the debtor's] assets, ... [is] a manifest sign that the Court simply did not *want*, for whatever reason, to do what was mandatory) [citing to *Cake* award, ¶ 142]; not unlike the municipality in *Metalclad*, in *Deutsche Bank* it was a cardinal part of the tribunal's analysis that the Central Bank had pursued an investigation and purported to exercise regulatory and remedial powers that were pretextual and in excess of the bank's authority under domestic law. This was so even though the acts of the Central Bank had nevertheless been vindicated by the Supreme Court. *De Sabla* too involved doubtful interpretations of local law, and there, as here, the tribunal was entitled to look at the content of local law, and to explore the reasoning of local authorities both regulatory and judicial that relied on that law.

Id. ¶ 60.

to reasonable qualifications, although indisputably irregular.

97. Instead, in the context of Prof. Coe's Expert Opinion the Tribunal is being invited to determine whether the Constitutional Court's Opinion is so extreme in its manifest deficits so as to impress upon a qualified reader that pretextual exercises of judicial sovereignty were employed far beyond the ambit or expectation of any legal rubric so as to warrant the reasonable conclusion that actions far afield from any reasonable expectations were undertaken to the detriment of the investors (Claimants) here at issue.

98. The best evidence for consideration of this question, certainly from a pleading perspective for jurisdictional purposes, has been generated by the Constitutional Court's own opinion together with the incident dissents. Prof. Coe's Expert Opinion informs its reasoning by judging judicial and regulatory State-conduct through the prism of twelve very relevant cases,⁸¹

⁸¹ See *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9 (August 2015) (decision on jurisdiction and liability); *Deutsche Bank A.G. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. SRB/09/2 (Award) (October 2012); *Swisslion Doo Skopje v. Republic of Macedonia (former Yugoslav Republic of Macedonia)*, ICSID Case No. ARB/09/16 (Award) (July 2012); *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, SEC Arbitration No. V (070/205) (Final Award) (September 2010); *Sistem Muhendislik v. Kyrgyz Republic*, ICSID Case No.

most of which concern the assessment of unfair treatment stemming from the exercise of judicial and/or regulatory sovereignty.

99. Significantly, common to the proceeding before this Tribunal are *all* of the excessive regulatory and judicial abuses present in the composite jurisprudence of these twelve cases. A factually analogous paradigm of abusive exercise of regulatory and judicial sovereignty identifiable in these twelve cases collectively can be gleaned from the factual matrix underlying the claims here asserted.

100. Therefore, Prof. Coe's conclusions as stated in the Preliminary Report find ample resonance in decided authority:

This Preliminary Report is intended to
provide an initial reaction to the facts

ARB(AF)/06/1 (Award) (September 2009); *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, (Award) (June 2009); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Award) (July 2008); *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1 (Award) (August 2000); *Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (October 1998); *Marguerite de Goly de Salba (US) v. Panama*, 6 Rep. of Int'l Arb. Awards (June 1993); *Oil Fields of Texas, Inc. v. Iran*, 1 Iran-U.S. Cl. Trib. Rep. 347 (December 1982); and *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain) Second Phase Judgment*, 1970 ICJ 1.

presented to me. I have tried to place those facts in a jurisprudential context and to indicate that they are of a character that might well shift relevant burdens to the state to justify its conduct with respect to the investor and its investment.⁸²

Based on the information provided to me considering the applicable rules of international law, I believe that the Claimants in this case are most likely the victims of a breach by Colombia of the FET standard of protection and of the obligation to provide full compensation when imposing measures equivalent to an expropriation.⁸³

101. Claimants invite the Tribunal to consider Prof. Coe's preliminary expert opinion as part of Claimants' *prima facie* jurisdictional tender.

⁸² See Prof. Coe Expert Report (CER-3) ¶ 87.

⁸³ See Prof. Coe Expert Report (CER-3) ¶ 88.

I. Expert Opinion of Dr. Martha Teresa Briceño Addressing the Constitutional Court’s Judicial Activism Directed at the Council of State’s Judgment

102. Dr. Martha Teresa Briceño has filed an expert report in this case.⁸⁴ Her analysis is particularly relevant for two reasons. First, in addition to serving as a university professor of law and having authored eight books on administrative law, in 2008 Dr. Briceño was appointed to serve as a Magistrate of the Council of State’s Fourth Chamber.⁸⁵

103. Second, she has contemporaneously direct and personal experience concerning the Constitutional Court’s May 26, 2001 Opinion (C-23) that pitted the Council of State against the Constitutional Court.⁸⁶

104. Notably, she characterizes the Constitutional Court’s May 26, 2011 Opinion as “a bad judgment,” using this term (“bad judgment”) euphemistically for a “destructive” judgment.⁸⁷ In fact, she describes the opinion as “tailor-made for the Executive Branch.” The judges merely issued

⁸⁴ See *supra* note 31.

⁸⁵ See Dr. Briceño Expert Report (CER-4) ¶¶ 13-16.

⁸⁶ *Id.* ¶ 20.

⁸⁷ *Id.* ¶ 75.

a judgment that would not contradict the will of the Executive Branch. It represents an example of the absence of liberty and independence that the Judicial Branch lacks from the executive branch of government.”⁸⁸

105. She qualifies this description by placing a footnote on the word “*desquiciada*” and noting that “[the word] [d]esquiciado, according to the *Dictionary of the Royal Academy* of the Spanish language, means: to take apart something by removing from it the firmness that kept it together.”⁸⁹

106. Dr. Briceño further comments on the Constitutional Court’s lack of independence from the Executive Branch with respect to the Constitutional Court’s Opinion.⁹⁰ She is “[p]ersonally convinced that there was not a real

⁸⁸ The Spanish language original reads:

75. La sentencia SU-447/11 es *equivocada*. Por no decir *salida de quicio*. Es una sentencia hecha a la medida del poder ejecutivo. Los jueces – simplemente – emitieron una sentencia que no contrariase la voluntad del ejecutivo. Un ejemplo de la ausencia de libertad e independencia del poder judicial. (emphasis supplied)

⁸⁹ See Dr. Briceño Expert Report (CER-4) ¶ 75.

⁹⁰ See Dr. Briceño Expert Report (CER-4) ¶ 73 (“[E]stoy convencida de que no hubo un real análisis legal.”).

legal analysis [with respect to the *tutelas*] that FOGAFIN and the Superintendency of Banking perfected with the Constitutional Court in order to appeal the Council of State's November 1, 2007 judgment,⁹¹ and of course, there was no independence [on the part of the Constitutional Court] to decide the case. I do not have the slightest doubt concerning the Executive Branch's interference in the matter."⁹²

107. Dr. Briceño identifies two major errors inherent in the Constitutional Court's Opinion. The first of these she identifies as a violation of due process arising from the Constitutional Court's transgression and disavowance of the constitutional principle of "natural judge."⁹³

108. The principle of "natural judge," so she explains, is a constitutionally embedded principle contained in Article 29 of the Colombian Constitution. That stricture commands that "[n]obody shall be judged except in conformance with legislation pre-existing the acts purportedly giving rise to the claim before a judge or tribunal of competent jurisdiction in compliance with the formal requirements of each case."⁹⁴

⁹¹ C-22.

⁹² See Dr. Briceño Expert Report (CER-4) ¶ 73.

⁹³ *Id.* ¶¶ 78-79.

⁹⁴ *Id.* ¶ 79.

109. Dr. Briceño observes that in the underlying case, *Compto y Otros contra Fogafin y La Superintendencia Bancaria*, the first instance (trial court level) natural judge was the Administrative Tribunal of Cundinamarca. She adds that the *only* second instance tribunal and final instance tribunal of last resort with respect to that proceeding, was the Council of State.⁹⁵ From a procedural perspective no other appeal would have been possible, except for one exception that was not there present.⁹⁶

110. Dr. Briceño informs her opinion by noting that an *exception* to this single recourse would be an extraordinary appeal to the Constitutional Court “but *only* where present would be a violation of a constitutional principle, which, in my opinion, was not present.”⁹⁷

111. The second major deficit that Dr. Briceño observes as endemic to the Constitutional Court’s ruling of May 26, 2011 (C-23) concerns a complete disavowance to the principle of *res judicata*.⁹⁸ Dr. Briceño illustrates the *res judicata* violations pursuant to a succinct but factually accurate rhetorical exercise:

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* ¶ 78.

82. Only by way of an illustrative exercise, let us count the number of appellate instances: (*) the Superintendency of Banking and FOGAFIN is one such appellate instance, but because of the delay in notification, best not to count it, (i) the Administrative Tribunal of Cundinamarca, (ii) the Council of State, (iii) the *tutela* registered with the First Instance of the Council of State, (iv) the *tutela* perfected with the Second Instance of the Council of State, (v) the *tutela* filed with the Constitutional Court, and (vi) the nullification *vacatur* perfected with the Constitutional Court.⁹⁹

83. In light of the foregoing, two questions emerge: (i) is it the case that the judicial system in Colombia has six instances? and (ii) was it not enough for the Colombian government to lose on three occasions before the Council of State?¹⁰⁰

⁹⁹ *Id.* ¶ 82.

¹⁰⁰ *Id.* ¶ 83.

Paragraphs 82 and 83 in the original Spanish language iteration read:

112. Upon posing these rhetorical questions, Dr. Briceño reasons that the queries make possible an understanding of the Bank's underlying expropriation without compensation as a regulatory action that "was not a legal issue but rather a political and economic concern."¹⁰¹ She adds that "the Council of State applied the rule of law, but that was not the government's objective."¹⁰²

113. Likewise, she concludes that as to the Constitutional Court's Order Denying the Council of State's Motion to Vacate the May 26, 2011 Opinion, describing that ruling (C-26) "as particularly *grotesque* when one understands that

82. Sólo a manera de ejercicio, contemos las instancias: (*) la Superintendencia y FOGAFIN, pero dada la demora en la notificación no la contaremos, (i) el Tribunal Administrativo de Cundinamarca, (ii) el Consejo de Estado, (iii) la tutela de Primer Instancia en el Consejo de Estado, (iv) la tutela de Segunda Instancia ante el Consejo de Estado, (v) la tutela ante la Corte Constitucional, y (vi) el incidente de nulidad ante la Corte Constitucional.

83. Dicho lo anterior, surgen dos preguntas: (i) ¿La justicia en Colombia tiene seis instancias? y (ii) ¿Al gobierno no le basto ser vencido tres veces en el Consejo de Estado?

¹⁰¹ *Id.* ¶ 84.

¹⁰² *Id.*

in so ruling ‘the Constitutional Court violates its own jurisprudence.’”¹⁰³ In this connection she explains that “the Motion to Vacate the Constitutional Court’s May 26, 2011 Opinion points to several propositions: (i) the concept of *constitutional res judicata* is a tenet that must be observed,¹⁰⁴ (ii) Article 243 of the Constitution provides that:

‘The judgments that the Court issues in the course of exercising its jurisdiction constitute *res judicata*.’ Similarly, Article 46 of Legislation 270 (1996) provides that: ‘In applying Article 241 of the Constitution, the Constitutional Court shall adjudicate all issues before it subject to the totality of constitutional principles contained in the Constitution,’¹⁰⁵

(iii) the Constitutional Court’s disavowance of its own precedent (Judgment C-252 (1994)) that concerned a matter where a rule was declared as unconstitutional in 1994, that is, seventeen years before the Constitutional Court issued the June

¹⁰³ *Id.* ¶ 85.

¹⁰⁴ *Id.* ¶ 85 citing to Motion to Vacate filed by Mauricio Fajardo Gómez, President of the Council of State, at 33.

¹⁰⁵ *Id.*, also citing to p 32 of the Motion to Vacate filed by Mauricio Fajardo Gómez, President of the Council of State.

25, 2014 Order Denying the Council of State's Motion to Vacate the May 26, 2011 Opinion."¹⁰⁶

114. Dr. Briceño's conclusion, after canvassing all of the operative papers and having firsthand knowledge of the proceedings as a Magistrate contemporaneously serving with the Council of State when this matter was aired, provides a succinct conceptual narrative of the proceedings' aberrant and legally bankrupt nature:

The Council of State, an elite professional tribunal, concluded and determined that the Superintendency of Banking and FOGAFIN violated the law and, therefore, the Council of State found both agencies liable for the expropriation. This fact notwithstanding, the Constitutional Court, which is a very politicized tribunal, had the judges produce what was requested by the executive branch, that is to say, avoiding payment of the expropriation. Hence, four years after issuance of the Council of State's Judgment, the Constitutional Court issued a ruling [i] contrary to law, [ii] contrary to jurisprudence, [iii] contrary to legal

¹⁰⁶ *Id.*

reasoning, [iv] even contrary to professional sense of shame, and [v] issued an opinion lacking in foundation, that [vi] set in disarray the entire Colombian rubric of administrative law, but that [vii] ***released the Colombian State from the obligation to tender compensation to those who were wronged, legal conduct that can be and [viii] defined as a theft.*** (emphasis in original, bold italics supplied)

Finally, on June 25, 2014, the Constitutional Court put an end to an administrative drama that had commenced on the night of October 2, 1998, arising from the abuse of authority that (i) the Superintendency of Banking, (ii) Fogafin, and (iii) the Central Bank, all had exercised.¹⁰⁷

¹⁰⁷ *Id.* ¶¶ 115-116, which in the Spanish language original read:

115. El Consejo de Estado, que es un tribunal altamente profesional, determinó que la ley fue violada por la Superintendencia y Fogafin y luego condenó a ambas agencias a pagar la expropiación. Sin embargo, la Corte Constitucional que es un tribunal donde puede haber mayor injerencia política (pues tres de su nueve magistrados son electos de una terna propuesta por el Presidente de la República), obtuvo de los jueces

**J. The Council of State's Minutes No. 15
Plenary Chamber *Contencioso*
Administrativo May 31, 2011**

115. Scarcely five days from the May 26, 2011 issuance of the Constitutional Court's Opinion, the Council of State held a plenary session requiring the presence of all Council of State Magistrates pertaining to the five chambers comprising that tribunal.

116. The minutes of that session titled: "*Acta No. 15 Sala Plena de lo Contencioso Administrativo 31 de mayo de 2011*" ("the Minutes") were signed by Magistrate Mauricio Fajardo Gómez (President of the Council of State)

lo que solicitó al poder ejecutivo, es decir, evitar el pago de la expropiación. Así, cuatro años después de la opinión emitida por el Consejo de Estado, el Tribunal Constitucional falló en contra de la ley, la jurisprudencia, la lógica legal e incluso en contra de la vergüenza profesional, y emitió una opinión sin fundamento, que trastornó el derecho administrativo colombiano, *pero que liberó al Estado colombiano de pagar una compensación a quienes sufrieron lo que hoy se puede definir como un robo.*

116. Finalmente, el 25 de junio de 2014, la Corte Constitucional puso fin a un drama administrativo que comenzó la noche del 2 de octubre de 1998, con el abuso de poder ejecutado por la Superintendencia de Bancos, Fogafin y el Banco de la República.

(emphasis in original)

and Juan Enrique Bedoya Escobar (Secretary General of the Council of State).¹⁰⁸

117. This document represents memorialized testimony contemporaneously authored at the time of case-dispositive material events to this proceeding that establishes the extraordinary character of the Constitutional Court's May 26, 2011 Opinion.¹⁰⁹

118. The Minutes bespeak (i) a profoundly serious institutional crisis concerning the State's entire judiciary, and (ii) a need to defend the integrity of basic principles of judicial sovereignty. This evidence demonstrates that at issue here before this Arbitral Tribunal is more than an irregular misguided adjudication that by way of consequence deprived Claimants of at least USD 260,000,000. More is involved. The Constitutional

¹⁰⁸ A true and correct copy of the *Acta No. 15 Sala Plena de lo Contencioso Administrativo 31 de mayo de 2011*, is here attached as C-28. Dr. Briceño comments on these minutes in her Expert Report, see Dr. Briceño Expert Report (CER-4) at ¶¶ 22-41.

¹⁰⁹ This document is being introduced at this time for purposes of the Tribunal's examination of jurisdiction because Claimants assert that if the factual allegations and premises presented are assumed to be true for purposes of testing the legal sufficiency of the treaty standard validations where alleged as part of a jurisdictional determination, it will follow that Claimants have established, let alone sufficiently alleged as matter of pleading, more than the requisite *prima facie* showing, as more fully stated below.

Court's actions, commencing with its May 26, 2011 Opinion and culminating with the June 25, 2014 Order Denying the Council of State's Motion to Vacate, represent an extreme example of judicial activism that manifestly constitutes radical abuse of authority. For this reason it defies all reasonable expectations.

119. Much is revealed in the very succinct first exchange recorded. The first speaker, Dr. Ramirez de Páez, resorting to a colloquialism makes clear that the matter at hand is not only the appropriate subject matter of a plenary session but rather of "the most plenary of plenary sessions."¹¹⁰

120. At the plenary session that discussion sought reactions and a course of action. Six comments are particularly relevant at this jurisdictional phase for purposes of testing the averments and evidence presented and consideration of the extent to which, at minimum, a *prima facie* case has been asserted.

121. First, Dr. Giraldo is represented in the Minutes as having "expressed great concern that the trainwreck is more alive than ever because the agreement among gentlemen has been breached

¹¹⁰ C-28 at 6. Dr. Ramirez de Páez is recorded as saying "Dra. Ramirez de Páez piensa que el tema es sala *plenísima*." (emphasis supplied)

and, therefore, this Chamber must address the issue.” He is also credited with sharing Dr. Ostau de Lafont’s opinion regarding “the need for the Council of State to understand that its constitutional jurisdiction also entails safeguarding the fundamental rights before it.”¹¹¹

122. Second, Dr. Gil Botero and Dr. Ramirez de Páez are cited as asserting that “an institutional response is necessary.”¹¹² Both of these Magistrates, according to the minutes, share the concern that “the encroachment of the Constitutional Court’s jurisdiction is disconcerting because it delegitimizes the jurisdiction of the Council of State and ignores that the Council of State is a Tribunal of equal hierarchy to the Constitutional Court.”¹¹³

123. Third, the understandable concern arising from the Constitutional Court’s encroachment on the Council of State’s jurisdiction is emphatically voiced by Dr. Vargas Rincón. That entry reads:

Dr. Vargas Rincón considers that, as to the Council of State’s Fourth Chamber, the Constitutional Court is tearing away at the constitutionally

¹¹¹ *Id.* at 6-7.

¹¹² *Id.* at 7.

¹¹³ *Id.*

based jurisdiction of the Fourth Chamber's *Contencioso Administrativo*, and [Dr. Vargas Rincón] opines that a vacatur proceeding directed at the Constitutional Court's Order should ensue and set forth in that paper the reasons why the Constitutional Court's Order is completely devoid of legitimate premises.¹¹⁴

124. Fourth, the need to defend the Council of State's institutional integrity is voiced by Dr. Ortiz de Rodriguez. She is attributed as having expressly stated the concern that the "Council of State's institutionality must be defended." She adds that how to proceed has to be carefully considered "because it is likely that a course of action has to be undertaken so that the Council of State's Judgment arising from the *Contenciosa*

¹¹⁴ The Spanish language original reads:

Dr. Vargas Rincón considera que en el caso de la Sección Cuarta la Corte Constitucional le está arrebatando la competencia que la Constitución le da al Contencioso Administrativo y cree que procesalmente se puede proponer un incidente de nulidad y luego si exponer las razones por las cuales carece de todo efecto la sentencia de la Corte.

Id.

Administrativa [are respected] [by the Constitutional Court].¹¹⁵

125. Fifth, along the lines of Dr. Ortiz de Rodriguez, the Minutes credit Dr. Gómez Aranguren with the extraordinary and arresting observation that “at stake is the very institutionality of the country and the configuration of a reliable and credible judicial order, [Dr. Gómez Aranguren] suggests directly speaking with the members of the Constitutional Court in order to ensure that they are aware of the institutional risk that the Constitutional Court’s ruling implies.¹¹⁶

¹¹⁵ *Id.*

The Spanish language original reads:

Dra. Ortiz de Rodriguez considera que hay que defender la institucionalidad del Consejo de Estado pero invita a la reflexión en ese punto, porque seguramente habrá que tomar alguna decisión para que se respeten los fallos en la jurisdicción contenciosa administrativa, pero pone de presente la discusión que se acaba de dar con el proyecto de la Dra. Garcia.

¹¹⁶ *Id.* at 7.

The Spanish language original reads:

Dr. Gómez Aranguren comenta que su posición en la Sección Segunda ha sido la de la posibilidad de que el juez se equivoque y la de que racionalmente sea el mejor argumento el que prevalezca para la justicia. *Piensa que*

126. Sixth and finally, a second intervention is attributed to Dr. Vargas Rincón. This entry states that Dr. Vargas Rincón “insisted that the issue concerning the plenary contentious Administrative Chamber should be addressed by the President of the Council of State by filing a Motion to Vacate [the Constitutional Court’s] Order, based upon lack of jurisdiction.” He is further paraphrased as suggesting that “if the [Motion to Vacate] does not gain traction, [the Council of State] should issue a ruling that the Constitutional Court’s Order is of no moment [void] and [the Council of State] should proceed to secure the file.”¹¹⁷

está por medio la institucionalidad del país y la configuración del orden jurídico cierto y creíble, sugiere hablar con los miembros de la Corte Constitucional y que ellos sean conscientes de riesgo institucional que esto implica. (emphasis supplied)

¹¹⁷ *Id.*

The Spanish language original reads:

Dr. Vargas Rincón insiste en que el tema es de plena contenciosa y que por ahora el Sr. Presidente proponga un incidente de nulidad de esa sentencia, por falta de competencia, y si no prospera emitir un auto dejando sin efectos el pronunciamiento de la Corte y ordenar el archivo del asunto.

127. The Minutes (*see* C-28) should be considered by this Tribunal at the jurisdictional phase as part of its analysis concerning the extent to which the allegations that Claimants have advanced, if proven, would give rise to violations of the TPA's substantive protection standards. These Minutes are relevant to that determination particularly in the context of fair and equitable treatment, denial of justice, and expropriation.

K. Expert Opinion of Prof. and Associate Justice Luis Fernando López-Roca Addressing the Constitutional Court's Judicial Activism Directed at the Council of State's Judgment

128. Prof. and Associate Justice of the Constitutional Court Luis Fernando López-Roca has presented an Expert Opinion in this case.¹¹⁸ While Professor López-Roca's Expert Opinion primarily addresses the abusive and excessive nature of FOGAFIN's and the Superintendency's regulatory mishaps giving rise to the judicial proceedings that are the subject matter of this case, he too opines as to the Constitutional Court's usurpation of the Council of State's jurisdiction that deprived Claimants of a liquidated damages award in the amount of USD 114,183,417.80. Prof.

¹¹⁸ *See* Prof. López-Roca Expert Report (CER-5) ¶¶ 4.

López-Roca specifically notes that the Constitutional Court, of which he is an Associate Justice, engaged in at least two major acts of judicial activism that are indefensible.

129. First, he observes that the Constitutional Court erred with respect to its “Constructive Notice” hypothesis, constituting an abuse of its judicial authority, far beyond just a mere error of law. He specifically notes that

In this case, the Cure Notice and the reduction of capital to 0.01 COP were never notified to the shareholders and, therefore, (i) was not effective, (ii) could not have triggered the running of applicable limitations periods, and, therefore, (iii) the claims never expired.

These propositions were underscored by the *Tribunal Administrativo de Cundinamarca*, as well as the Council of State. In fact, only the Constitutional Court turned a blind eye and a deaf ear to these premises. It did so, in my opinion, without having jurisdiction at all over the matter because the Council of State’s Judgment represents the highest and final appellate instance with respect to *Contencioso Administrativo* in the

country. For this reason, it is not possible to secure an appeal from the Council of State to any other or higher instance.¹¹⁹

130. As Dr. Briceño testified, the Constitutional Court is an extremely political institution.¹²⁰ It is not separate and distinct in practice from the Executive Branch.¹²¹ It, therefore, follows that they would ratify the excessive exercise of the State's regulatory sovereignty through the Superintendency and FOGAFIN. Those *regulatory* abuses cannot be reconciled and legitimized except by a corresponding abuse of the State's exercise of

¹¹⁹ Prof. López-Roca Expert Report (CER-5) ¶ 121. The Spanish language original reads:

En nuestro caso, el acto nunca fue notificado a los accionistas y, por tanto, (i) no fue eficaz, (ii) no comenzaron a correr los plazos y, en consecuencia, (iii) nunca hubo caducidad. Cosa se señalasen, tanto como el Tribunal Administrativo de Cundinamarca como el Consejo del Estado y que solo fue desconocido por la Corte Constitucional, *a destiempo*, en mi opinión, pues la decisión del Consejo de Estado como máxima autoridad contencioso administrativa del país, no tenía alzada ni recurso alguno. (emphasis in original)

¹²⁰ See Dr. Briceño Expert Report (CER-4) ¶ 115.

¹²¹ *Id.* ¶¶ 70, 73, 75, 115, see also n.38.

judicial sovereignty. Prof. López-Roca's Expert Report clearly underscores this proposition.

131. In this connection he states:

The notification [Cure Notice and notice of the reduction of capital to 0.01 COP] clearly should have been in keeping in with dispositive law on the subject. Therefore, having instead opted to notify the Bank's Legal Representative as a methodology for notifying the shareholders was a glaring error that first was identified by the *Tribunal Administrativo de Cundinamarca*, and later by the Council of State. Both of these Tribunals opined that neither the Cure Notice nor the devaluation of shares to a value of 0.01 COP were notified and communicated to the shareholders. Therefore, the judicial action filed on July 28, 2000 in effect *was timely filed*. To assert the contrary, as the Constitutional Court set forth, and to suggest that it was so through constructive notice ("*hecho notorio*"), and hence notice had been effective since October 3, 1998, *with*

*all due respect represents an irrational proposition.*¹²²

132. Second, Prof. López-Roca, in addition to agreeing with Justice Rojas Ríos' dissent,¹²³ also finds that the Constitutional Court's Opinion (i) is without foundation, (ii) disavows the Constitutional Court's own precedent, and (iii) is but a politically-driven *tour de force* that aspires to protect a windfall to the State arising from what was first an illicit *regulatory* expropriation that morphed into a *judicial* taking.¹²⁴

¹²² *Id.* ¶ 125. (emphasis in original)

The Spanish language original reads:

La notificación claramente debía haberse ajustado a la ley. Por tanto, haber optado por la vía de la notificación al Representante Legal para dar por notificados a los accionistas era un error garrafal, como lo reconocieron el Tribunal Administrativo de Cundinamarca, primero, y el Consejo de Estado, más tarde, quienes dijeron que los actos no habían sido notificados a los accionistas. Por tanto, la demanda, incoada el 28 de julio de 2000, *fue presentada en tiempo hábil*. Decir lo contrario, como la Corte Constitucional sostuvo, y señalar incluso que era un *hecho notorio* y que el acto era eficaz desde el 3 de octubre de 1998, *era, con todo respeto, una sin razón*.

¹²³ *Id.* ¶¶ 126-127.

¹²⁴

133. He specifically states:

The Constitutional Court, supporting without any foundation whatsoever the State's interests, reversed the judgment that a final appellate instance, the Council of State, issued, and changes its own [the Constitutional Court's] jurisprudential precedent, all probably in order to prevent the government from finding itself [the government] obligated to pay damages to private individuals that, to make matters worse, are foreigners [the U.S. Shareholders].

Even today [as of the time of this writing], the news media reports concerns over having to pay for the expropriation of GRANAHORRAR in order to avoid the State finding itself obligated to pay damages to individuals, which to make matters worse, are foreigners [the U.S. Shareholders], or as more aptly stated by Magistrate Rojas Ríos in his dissenting opinion, 'an expropriation without compensation.'¹²⁵

¹²⁵ *Id.* ¶ 136.

The Spanish language original reads:

134. Commenting on the *regulatory* expropriation that led to the *judicial* expropriation by dint of the Constitutional Court's May 26, 2011 Opinion, Prof. López-Roca identifies three extremely important financial gains redounding to the benefit of Colombia that pressured the Constitutional Court into exercise of an extreme judicial activism impervious to the most rudimentary control precepts such as adherence to the rule of law, respect for fundamental due process, deference to *stare decisis* in the form of binding legal precedent, deference to a peer judicial tribunal of equal hierarchy, and respect for the limits on a high court's jurisdiction.

135. Prof. López-Roca first observes that the expropriation caused the State "to earn" revenues arising from having taken over all of the Bank's guaranties. He notes that there is no

Entonces, la Corte Constitucional, respaldando sin ningún fundamento de los intereses del Estado, revoca la sentencia de última instancia del Consejo del Estado y cambia su propio precedente jurisprudencial, probablemente *para evitar que el gobierno se vea obligado a pagar por los daños* causados a unos particulares que – para más señas – son extranjeros. Todavía hoy, las noticias se preocupan por lo que habría que pagar por la oficialización de GRANAHORRAR, por aquello que el Magistrado Rojas Ríos denominó una expropiación sin indemnización, en su salvamento de voto. (citation omitted)

precedent of FOGAFIN and the Central Bank posting gains by virtue of this methodology, or analogous concept.¹²⁶

136. Third, Colombia earned income from servicing the guaranties (capital and interest).¹²⁷

137. Fourth and finally, on November 1, 2005 the Government of Colombia sold GRANAHORRAR to BBVA for USD 423,000,000.¹²⁸

138. When this sum, Prof. López-Roca adds, is compared to the State's contribution of COP 157 millardos (the equivalent to USD 99,795,000), representing a net gain of USD 323,205,000, he notes that this figure was transformed into a net *per annum* earning during the corresponding seven-year timeframe of USD 46,172,000 (each year).¹²⁹

139. Prof. López-Roca's Expert Opinion spills considerable ink throughout 138 paragraphs to establish the proposition that (i) the Guaranty Restructuring Program, (ii) the *Clause*, (iii) the devaluation of GRANAHORRAR's share value to

¹²⁶ *Id.* ¶ 138(i).

¹²⁷ *Id.* ¶ 138(ii).

¹²⁸ *Id.* ¶ 138(iii).

¹²⁹ *Id.* ¶ 138(i)-(iii).

0.01 COP, (iv) the Cure Notice, and (v) the wholesale disavowance of due process on the part of FOGAFIN and the Superintendency, constitute extreme, unforeseeable, and highly-politicized events far beyond that ambit of administrative discretion or applicable law.¹³⁰

140. These aberrant regulatory actions find no precedent, cannot be justified as existing within the law, and are lacking in internal economic coherence. Prof. López-Roca believes them to be politically-driven.¹³¹

141. He opines that the Council of State's November 1, 2007 Judgment aptly corrected a wrong.¹³² This "corrective measure," emanating from a specific jurisdiction Tribunal that is the highest ranking in Colombia, in turn deprived the government of approximately USD 300,000,000 and placed in high relief the regulatory abuse of authority that FOGAFIN and the Superintendency exemplified.¹³³

142. Hence, Prof. López-Roca reasons, the Executive Branch pressured its political judicial counterpart "to overrule" the Council of State as a

¹³⁰ *Id.* ¶¶ 114-138.

¹³¹ *Id.* ¶¶ 84-130.

¹³² *Id.* ¶ 96.

¹³³ *Id.* ¶ 138.

way of placing an *imprimatur* of legitimacy and legality on what otherwise cannot be characterized as anything but an abuse and excessive application of authority.¹³⁴

143. Prof. López-Roca’s Expert Opinion also should be considered in this jurisdictional phase as testimony and authority in support of Claimants’ allegations, which, if true, would establish violations of the TPA’s substantive protections.

III. CLAIMANT HAS THE BURDEN OF ASSERTING THE *PRIMA FACIE* CASE IN A BIFURCATED HEARING ADDRESSING A JURISDICTIONAL CHALLENGE

A. The Minority View on the Standard for the Burden of Proof in a Bifurcated Jurisdictional Hearing is Rife with Deficits and Should Not Apply

144. Hardly is there unanimity among arbitral tribunals concerning the burden of proof attaching to a Respondent’s jurisdictional challenge. Basic academic integrity compels underscoring this conceptual state of affairs. Indeed, Arbitral Tribunals have found that even where Respondent has “raised specific jurisdictional objections, it is not for the

¹³⁴ *Id.* ¶ 96.

Respondent to disprove [t]he Tribunal's jurisdiction."¹³⁵

145. These tribunals reasoned that “[u]nder international law, as a matter of legal logic and the application of the principle traditionally expressed by the Latin maxim ‘*actori incumbit probatio*,’ it is for the Claimant to discharge the burden of proving all essential facts required to establish jurisdiction for its claims.”¹³⁶

146. They draw absolutely no distinction between (i) actual allegations that are jurisdictional, (ii) a hearing on jurisdiction and one on the merits, (iii) the consequences arising from grant and denial of a jurisdictional challenge, (iv) an allegation seeking affirmative relief and an averment pleading jurisdiction, or (v) the logic attendant to the affirmative assertion of a defense stating that there is no jurisdiction.

147. This approach, which is laced with multiple untested assumptions, leads to the *necessary* conclusion that “[s]uch jurisdictional facts are not here subject to any ‘*prima facie*’ evidential test; and, in any event, that test would be inapplicable at this stage of the arbitration proceedings where the Claimant (as with the

¹³⁵ *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, April 3, 2014.

¹³⁶ *Id.*

Respondent) had sufficient opportunity to adduce evidence in support of its case on the bifurcated jurisdictional issues and for the Tribunal to make final decisions on all relevant disputed facts.”¹³⁷

148. Glossing over foundational distinctions blurs material presumptions endemic to procedural and substantive adjudications, among other considerations.

149. Other tribunals simply hold that for purposes of assessing a jurisdictional challenge *neither* Claimant nor Respondent bear the burden of proof. Even though “it is undisputable that [a] Tribunal determines its jurisdiction without being bound by the argument of the parties.”¹³⁸

150. These tribunals enshrine this principle to the detriment of a more flexible analysis that would seek equipoise “between the need ‘to ensure that courts and tribunals are not flooded with claims which have no chance of success or may even be of an abusive nature’ on the one side, and the necessity ‘to ensure that in considering issues of jurisdiction, courts and

¹³⁷ *Id.* (citation omitted)

¹³⁸ *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007.

tribunals do not go into the merits of cases without sufficient prior debate’ on the other.”¹³⁹

151. Moreover, this methodology rests on the less than clear untested assumption that procedural differences between the parties, i.e., “Claimant” and “Respondent” does not matter, nor does the distinction between proof, allegations, substantive issues, or procedural queries. The tribunal’s reasoning in *Muhammet Çap v. Turkmenistan*¹⁴⁰ is emblematic of this approach.

152. In that proceeding the Tribunal addressed the construction and meaning applicable to Art. VII of the BIT between Turkey and Turkmenistan, which at a literal level appeared to command a mandatory obligation to litigate issues arising from the BIT before the appropriate judicial Tribunal in Turkmenistan as a condition precedent to the filing of an arbitral claim.

153. The Tribunal announced that it “does not accept that the burden of proof in respect of jurisdiction *is on either Party*. Rather, the

¹³⁹ *Id.*

¹⁴⁰ *Muhammet Çap Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Decision on Respondent’s Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty, February 13, 2015.

Tribunal must determine whether it has jurisdiction, and the scope of its jurisdiction, on the basis of all the relevant facts and arguments presented by the Parties.”¹⁴¹

154. The Tribunal set forth its methodology, which is bereft of *any* consideration of (i) the procedural posture of the case, (ii) otherwise applicable burdens and presumptions, and (iii) the relative weight to be accorded to jurisdictional pleadings and actual proof. In this regard, the determination was based in the abstract with the indirect suggestion of the particularity of the actual case before it in a fleeting boilerplate reference to “all the evidence on the record.” Instead, the Tribunal references a balancing test that only contains a basic order of proof. There is no substitute for the Tribunal’s own language:

120. In this respect, in the first instance it is for Claimants to show that the relevant requirements for the Tribunal’s jurisdiction are present, including consent to arbitration.

Consent cannot be presumed and its existence must be established. By corollary, in this case, where Respondent is challenging jurisdiction,

¹⁴¹ *Id.* ¶ 119.

it has to adduce evidence to support its objections. Accordingly, the Tribunal has to weigh the evidence and arguments from both Parties to determine on balance whether it has jurisdiction in this matter.

121. In this case, the Tribunal has to interpret the meaning of a treaty provision in accordance with the rules of interpretation of the Vienna Convention. Accordingly, in reaching its conclusion, and for the reasons given below, the Tribunal has taken into consideration the language used in the authentic texts of Article VII(2), the circumstances under which the BIT was concluded, the opinions expressed by the linguistics and other experts in their reports and at the hearing, and the legal rules of construction. The Tribunal has reached its conclusions on the basis of all the evidence in the record.¹⁴²

155. A modified iteration of this standard is articulated scarcely one year later by the Tribunal

¹⁴² *Id.* ¶¶ 120-121.

in *Spence Int'l v. Costa Rica*.¹⁴³ In that proceeding the Tribunal just added the word “burden” to what otherwise would be an analysis indistinguishable from that applied in *Muhammet Çap v. Turkmenistan*:

239. Two preliminary observations are warranted. First, the Tribunal observes that it is for a party advancing a proposition to adduce evidence in support of its case. This applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a claimant’s case. *The burden is therefore on the Claimants* to prove the facts necessary to establish the Tribunal’s jurisdiction. If that can be done, the burden will shift to the Respondent to show why, despite the facts as proved by the Claimants, the Tribunal lacks jurisdiction.

156. Still, other Tribunals have elected to distinguish between and among “facts that have

¹⁴³ *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, October 25, 2016, ¶ 239.

relevance specifically to the jurisdictional question only and facts that also are relevant for establishing the existence of claims that go to the substance of the dispute.”¹⁴⁴ Pursuant to this analysis a Claimant’s allegations concerning jurisdiction are *not* accorded any value or presumption of correctness. Under this approach the Tribunal rejects the proposition that Claimant’s jurisdictional allegations are to be taken as true as a predicate to testing whether if in fact they are so jurisdiction would attach. Rather, it “distinguish[es] between ...different sets of facts with regard to the burden of proof.”¹⁴⁵ The Tribunal in *Blue Bank International and Trust (Barbados) Ltd* in adopting this methodology stripped Respondent of any burden or presumption incident to a jurisdictional challenge. This methodology is aberrant.

157. The *Blue Bank International and Trust (Barbados) Ltd* Tribunal’s approach does not take into account *any* burden on the part of a Respondent that advances a jurisdictional challenge. To the contrary, it places the entire burden on the Claimant excising at the jurisdictional stage only a Claimant’s obligation to

¹⁴⁴ *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, April 26, 2017, ¶ 65.

¹⁴⁵ *Id.*

prove from an evidentiary perspective merits related facts:

66. However, in the Tribunal's view, it is necessary to distinguish between these different sets of facts with regard to the burden of proof. All facts that are dispositive for purposes of jurisdiction must be proven at the jurisdictional stage. In this regard, the Claimant bears the burden of proving the facts required to establish jurisdiction, insofar as they are contested by the Respondent. By contrast, facts that are relevant to the merits of the Claimant's claims, such as whether there has been a Treaty breach, whether liability has been incurred, whether the Claimant has suffered indemnifiable damages and, if so, what is the amount of liability (quantum), are all matters on which the Claimant does not need to discharge a burden of proof at the jurisdictional stage.¹⁴⁶

158. The four standards and methodologies identified in (i) *National Gas S.A.E. v. The Arab Republic of Egypt*, (ii) *Muhammet Çap v. Turkmenistan*, (iii) *Spence International*

¹⁴⁶ *Id.* ¶ 66.

Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica, and (iv) *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, are distinct but profoundly related. They share two common denominators.

159. First, these analyses do not distinguish between a burden of proof that concerns allegations seeking affirmative relief and a different standard of proof pertaining to allegations asserting legal and factual bases for the exercise of jurisdiction on the part of an arbitral tribunal. These distinctions are material and amply recognized by international law and the vast majority of national legal systems. It should not be ignored, in part, because it is related to the fundamental policy of providing parties with presumptions that would favor access to a merits hearing.

160. Second, the four methodologies and standards turn a blind eye to the disparate consequences arising from the grant or denial of a jurisdictional challenge. To state the obvious proposition that is not considered, grant of a jurisdictional challenge represents an end to the case and forecloses on technical grounds the possibility of airing what otherwise may be meritorious claims. It is for this reason that international law and the law of the overwhelming majority of national systems conceptually provides Claimants with an expansive rather than a

restrictive presumption of truth with respect to jurisdictional allegations.

161. Only upon a showing that under no rational hypothesis of law or fact can a Claimant plead the requisite jurisdictional averments, should a jurisdictional challenge be sustained. The majority of Arbitral Tribunals have adopted a methodology and standard that incorporates these concerns.

B. The Proper and Applicable Burden and Standard of Proof at the Jurisdictional Stage Representing the Majority View

162. In determining the burden of proof at the jurisdictional stage, the majority of investor-State arbitration tribunals have followed the test set forth by Judge Rosalyn Higgins in her separate opinion in the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, before the International Court of Justice.¹⁴⁷

¹⁴⁷ *Case Concerning Oil Platforms Oil Platforms (Islamic Republic of Iran v. United States of America)*, 1996 ICJ 803, 856, ¶¶ 32-34, December 12, 1996 (Separate Opinion of Judge Higgins).

See, e.g., *Tidewater Investment SRL and Tidewater Caribe C.A. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5 (Award) (March 2015), ¶ 84 (noting

standard); *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1 (Award) (May 2014), ¶ 143 (“The *Oil Platforms* test, applied by tribunals in cases such as *Impregilo v. Pakistan*, requires the tribunal to ask, not whether the claims *do* disclose violations of the treaty, but rather whether the claims are *capable* of amounting to violations of the treaty on the basis of the facts alleged by the claimant, so that the tribunal has jurisdiction to entertain those claims.”); *Ambiente Ufficio S.P.A. and others* (case formerly known as *Giordano Alpi and others*) *v. Argentine Republic*, ICSID Case No. ARB/08/9 (decision on jurisdiction and admissibility) (February 2013), ¶¶ 537-540; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29 (decision on jurisdiction) (February 2010), ¶¶ 43-51 (adopting the Higgins test and observing that “[i]t is equally well accepted that, for jurisdictional purposes, it is sufficient that the facts as asserted by Claimant, if proven, *could* (not *would*) violate the provisions of the BIT.”) (emphasis in original); *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (decision on respondent’s preliminary objections to jurisdiction and admissibility) (April 2008), ¶ 75 (“The issues of fact are ones which the Respondent bears the burden of proving according to the requisite standard, in order to sustain the claims of law it bases on them.”); *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07 (decision on jurisdiction and recommendation on provisional measures) (March 2007), ¶ 85 (“The Tribunal agrees with this test, which is in line with the one proposed by Judge Higgins in her dissenting opinion in *Oil Platforms*.”); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15 (Award) (September 2006), ¶ 68 (“The onus is on the Claimant to show what is alleged to constitute expropriation is at least capable of so doing. There must, in other words, be a *prima facie* case that the BIT applies.”); *Pan American Energy, LLC, et al. v. Argentine Republic*, ICSID Case No. ARB/03/13, (decision on preliminary objections)

(July 27, 2006), ¶ 50 (noting that “a claimant should demonstrate that *prima facie* its claims fall under the relevant provisions of the BIT for the purposes of jurisdiction of the Centre and competence of the tribunal (but not whether the claims are well founded).”; *Jan de Nul N.V., et al. v. Egypt*, ICSID Case No. ARB/04/13, (decision on jurisdiction) (June 2006), ¶¶ 69-71 (stating that Claimant must present a *prima facie* case on the merits); *Canfor Corporation v. United States; Terminal Forest Products Ltd. v. United States* (in the Consolidated Arbitration Pursuant to Article 1126 of the North American Free Trade Agreement (NAFTA) and the UNCITRAL Arbitral Rules), (decision on preliminary questions) (June 6, 2006), ¶ 176 (“However, where a respondent State invokes a provision in the NAFTA which, according to the respondent, bars the tribunal from deciding on the merits of the claims, the respondent has the burden of proof that the provision has the effect which it alleges.”); *Bayindir Insaat Turizm Ticaret Ve Sanayii A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, (decision on jurisdiction) (November 14, 2005), ¶¶ 195-196 (citing to the Higgins test and authority applying it); *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, (decision on jurisdiction) (April 2005), ¶ 239, n.103 (“In her separate Opinion, Judge Higgins proposed the following approach: ‘The only way in which, in the present case, it can be determined whether the claims of [Claimant] are sufficiently plausibly based upon [t]he ... Treaty is to accept *pro tem* the facts as alleged by [Claimant] to be true and in that light to interpret [the Treaty] for jurisdictional purposes, that is to say, to see if on the basis of [Claimant’s] claims of fact there could occur a violation of one or more of them”)(citations omitted); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, (decision on jurisdiction) (February 8, 2005), ¶¶ 118-119 (observing that “[a]s regards the burden of proof on the Respondent’s jurisdictional objection, the Tribunal adopts the test proffered by Judge Higgins in her separate opinion in the *Oil Platforms*

163. As stated by the Tribunal in *Saipem S.p.A. v. The People's Republic of Bangladesh*, “[t]he test strikes a fair balance between a more demanding standard which would imply examining the merits at the jurisdictional stage, and a lighter standard which would rest entirely on the Claimant’s characterization of its claims.”¹⁴⁸

164. In *Oil Platforms*, Judge Higgins set forth the test as follows:

The only way in which, in the present case, it can be determined whether the claims of [Claimant] are sufficiently plausibly based upon the ... [t]reaty is to accept *pro tem* the facts as alleged by [Claimant] to be true and in that light to interpret [the relevant Articles of the Treaty] for jurisdictional purposes — that is to say, to see if on the basis of [Claimant’s] claims of fact there could occur a violation of one or more of them.¹⁴⁹

165. Further, Judge Higgins explained:

Case.”); *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, (decision of the *ad hoc* committee) (March 2011), ¶¶ 117-118.

¹⁴⁸ *Supra* at note 138, ¶ 85.

¹⁴⁹ *Id.* ¶ 32.

The Court should...see if, on the facts as alleged by [Claimant], the [Respondent's] actions complained of might violate the Treaty articles. Nothing in this approach puts at risk the obligation of the Court to keep separate the jurisdictional and merits phases... and to protect the integrity of the proceedings on the merits.... What is for the merits — and which remains pristine and untouched by this approach to the jurisdictional issue — is to determine what exactly the facts are, whether as finally determined they do sustain a violation of [the Treaty] and if so, whether there is a defense to that violation.... In short, it is at the merits that one sees 'whether there really has been a breach.'¹⁵⁰

166. The majority of tribunals in investor-State arbitrations have adopted Judge Higgins' test. For example in *Plama Consortium Limited v. Republic of Bulgaria*, the Claimant asserted claims under the Energy Charter Treaty ("ECT"), the Bilateral Investment Treaty between Cyprus and Bulgaria, and the ICSID Convention. The Tribunal in *Plama* followed the Higgins test to determine who has the burden of proof concerning

¹⁵⁰ *Id.* ¶¶ 33-34.

the Respondent's objections to jurisdictions on various grounds.¹⁵¹

167. The *Plama* Tribunal also cited other ICSID Tribunals employing the Higgins test in holding that it “was up to the claimant to present its own case as it saw fit; that, in doing so, the claimant must show” that the facts alleged are capable of falling under the relevant portions of the appropriate treaty.¹⁵²

168. Observing that the Higgins test was not “in any sense controversial,” the *Plama* Tribunal applied it and held that the Claimant had established *prima facie* that (i) it was an investor under Article 1(7) of the ECT that had legal identity in Cyprus despite the Respondent's argument that it was a mere “mailbox company”; (ii) the dispute related to an investment; and (iii) the Respondent's actions might have violated certain obligations imposed on it by the ECT.¹⁵³

169. As the Tribunal in *Plama* observed, numerous other Tribunals had applied the

¹⁵¹ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (decision on jurisdiction) (February 2005), ¶ 118.

¹⁵² *Id.* ¶ 119.

¹⁵³ *Id.* ¶¶ 31, 126, 128, 131-32, 151.

Higgins' test before *Plama* (February 2005).¹⁵⁴ Many Tribunals have followed it since.

170. Scarcely decided two months after *Plama*, the Tribunal in *Impregilo S.p.A v. Islamic Republic of Pakistan*¹⁵⁵ notably adopted Judge Higgins' approach and observed that "[t]he test for jurisdiction is an objective one, and its resolution may require the definitive interpretation of the treaty provision which is relied on."¹⁵⁶ It further qualified this language reasoning that the tribunal in *SGS v. Pakistan* "stressed":

"... it is for the Claimant to formulate its case. *Provided that the facts alleged by the Claimant and as appearing from the initial pleadings* fairly raise questions of breach of one or more provisions of the BIT, the Tribunal has jurisdiction to determine the claim" [Citation omitted].¹⁵⁷

¹⁵⁴ *Id.* ¶ 119.

¹⁵⁵ *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 (decision on jurisdiction) (April 2005).

¹⁵⁶ *Id.* ¶ 243.

¹⁵⁷ *Id.* ¶ 243, citing to *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/1 (decision on objections to jurisdiction) (August 2003), 18 *ICSID Rev. – FILJ* 301 (2003). And, also citing to *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The*

171. In commenting on this methodology, the *Impregilo* Tribunal reasoned that “[i]t reflects two complimentary concerns; to ensure that courts and tribunals are not flooded with claims which have no chance of success, or may even be of an abusive nature; and equally to ensure that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate. ***In conformity with this jurisprudence, the Tribunal has considered whether the facts as alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.***”¹⁵⁸

172. In this same vein, in *Saipem S.p.A. v. The Peoples Republic of Bangladesh*¹⁵⁹ the Arbitral Tribunal accepted the Higgins’ test as the relevant standard. As part of its analysis the Tribunal made clear that “[i]n accordance with accepted international practice (and generally also with national practice), a party bears the burden of proving the facts it asserts. For instance, an ICSID tribunal held that the Claimant had to satisfy the burden of proof required at the

Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13 (Award) (November 2004).

¹⁵⁸ *Impregilo v. Pakistan*, *supra* ¶ 254. (emphasis supplied)

¹⁵⁹ *Saipem*, *supra* note 138.

jurisdictional phase and make a *prima facie* showing of Treaty breaches.¹⁶⁰

173. Further, in explaining the applicable methodology concerning the various particular determinations of whether the claims in that case fell within the scope of the BIT (i.e., are capable of constituting a violation of the protection standards at issue) the tribunal articulated in the subjunctive-conditional mood the inquiry to be applied. It made plain that “[i]n other words, the Tribunal should be satisfied that, *if* the facts alleged by *Saipem* ultimately prove true, they would be capable of constituting a violation of

¹⁶⁰ *Id.* ¶ 83, citing in fn 14 to a non-exhaustive list of cases, only one of which predates *Plama* applying the Judge Higgins’ test:

Impregilo v. Pakistan [citation omitted], ¶ 79. On the *prima facie* test for purposes of jurisdiction, see among others *UPS v. Canada*, Decision on Jurisdiction, 22 November 2002, ¶¶ 33-37; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ¶ 180, [citation to Internet omitted]; *Plama v. Bulgaria* [Fn. 11], ¶¶ 118-120, 132; *Bayindir v. Pakistan* [Fn. 11] ¶¶ 185-200; *El Paso v. Argentina*, Decision on Jurisdiction, 27 April 2006, ¶¶ 40-45, 109, [citation to Internet omitted]; *Jan de Nul v. Egypt*, Decision on Jurisdiction, 16 June 2006, ¶¶ 69-71, [citation to Internet omitted]; *Telenor v. Hungary*, Award, 13 September 2006, ¶¶ 34, 53, 68, 80 [citation to Internet omitted].

Article 5 of the BIT.”¹⁶¹ It further added that “[i]n this respect, the Tribunal agrees with the observation in *United Parcel Service v. Government of Canada* that “the reference to the facts alleged being ‘capable’ of constituting a violation of the invoked obligations, as opposed to their ‘falling within’ the provisions, may be of little or no consequence.”¹⁶²

174. The decision in *Phoenix Action Ltd. v. The Czech Republic* provides greater guidance. The test, stating that “[t]he alleged facts complained of have to be accepted *pro tem* at the jurisdictional phase.”¹⁶³

175. The exception is where the Respondent sets forth credible evidence of “facts” to contradict the Claimant’s allegations with respect to jurisdiction. At that point, the Tribunal will have to resolve the factual dispute concerning the jurisdictional issue or else join the issue to the

¹⁶¹ *Id.* ¶ 86 (emphasis supplied), citing to *Impregilo v. Pakistan*, *supra* note 155.

¹⁶² *Id.*, citing to *United Parcel Service v. Government of Canada* [NAFTA], Decision on Jurisdiction, 22 November 2000, ¶ 36 [citation to Internet omitted].

¹⁶³ *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009, at ¶ 62.

merits.¹⁶⁴ Thus, the *Phoenix Action* Tribunal stated:

If...the alleged facts are facts on which the jurisdiction of the tribunal rests, it seems evident that the tribunal has to decide on those facts, if contested between the parties, and cannot accept the facts as alleged by the claimant. The tribunal must take into account the facts and their interpretation as alleged by the claimant, as well as the facts and their interpretation as alleged by the respondent, and take a decision on their existence and proper interpretation.¹⁶⁵

(i) A Succinct Statement of the Proper Test

176. The *Phoenix Action* Tribunal stated that if a tribunal is unable to ascertain whether “there exists a protected investment” at the jurisdictional phase, then the question “should be joined to the merits.”¹⁶⁶

¹⁶⁴ *Id.* ¶ 61.

¹⁶⁵ *Id.* ¶ 63.

¹⁶⁶ *Id.* ¶ 61; *see also*, ICSID Convention, Art. 41(2) (stating that tribunals have the discretion to determine a

177. The authority adopting Judge Rosalyn Higgins' methodology set forth five essential elements that are central to its perfect workings.

178. First, the Tribunal is to accept Claimant's allegations *pro tem*. The allegations are to be accorded a presumption of correctness absent a specific factual challenge that may place them in actual controversy.¹⁶⁷

179. Second, the Claimant need only make a *prima facie* showing on the pleadings. Hence, the applicable approach requires testing the sufficiency of the averment to determine whether, if true, it would give rise to a cognizable treaty violation.¹⁶⁸

jurisdictional issue “as a preliminary question or to join it to the merits of the dispute.”); *C. Schreuer, et al.*, *The ICSID Convention: A commentary*, Art. 41, ¶ 80 (“The need for a joinder to the merits is apparent where the answer to the jurisdictional questions depends on testimony and other evidence that can only be obtained through a full hearing of the case.”)

¹⁶⁷ *Saipem, supra* note 138, ¶ 86 (stating that “[t]he Tribunal must now determine whether the claims ‘fall within the scope of the BIT, assuming *pro tem* that they may be sustained on the facts.’”), citing to *Impregilo v. Pakistan, supra* note 155, at ¶ 263.

¹⁶⁸ See, e.g., *Jan de Nul N.V. Dredging International N.V. v. Arab Republic of Egypt, supra* note 147, ¶ 69 (applying a *prima facie* test as the applicable standard), and citing to

180. Third, upon the making of a *prima facie case*, the burden shifts to the Respondent to establish that there is not jurisdiction *ratione materiae*, *ratione personae*, *ratione temporis* or *ratione voluntatis*. If the Respondent carries that burden, the objections may be granted. If the Respondent fails to carry that burden, the objections are denied. If the Tribunal is unable to make the determination on the evidence that is before it, the issue should be joined to the merits.¹⁶⁹

181. Fourth, thus, a Claimant at the jurisdictional phase need only set forth a *prima facie case* that all of the necessary conditions are satisfied (including *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione voluntatis*) in order for an arbitral tribunal to consider that it has jurisdiction over the claim.

182. A Claimant need not prove all factual allegations necessary to establish jurisdiction in

Impregilo S.p.A. v. Islamic Republic of Pakistan, *supra* note 155, ¶ 108.

¹⁶⁹ *Phoenix Action*, at ¶ 61 (if a tribunal is unable to ascertain whether “there exists a protected investment” at the jurisdictional phase, then the question “should be joined to the merits”).

the same matter that it would prove its factual allegations at the merits stage.¹⁷⁰

183. Fifth, it follows that the Tribunal should be satisfied that, *if* the facts alleged by Claimant ultimately prove true, Claimant would be capable of establishing a violation of the Treaty.¹⁷¹

184. For the sake of completeness, “[t]he reference to the facts alleged being ‘capable’ of constituting a violation of the invoked obligations, as opposed to their ‘falling within’ the provisions, may be of little or no consequence.”¹⁷²

¹⁷⁰ See, e.g., *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, February 12, 2010, *supra*, at p. 12, ¶ 47 (It is well established that, at the jurisdictional stage, Claimant need not prove the facts that it alleges in order to state a claim over which this Tribunal has jurisdiction. All Claimant needs to do is to allege facts that, if proven at the merits stage, could constitute a violation of Treaty protections. That is, absent exceptional circumstances, the Tribunal will evaluate whether the acts and omission of Respondent, taken as they are alleged by Claimant, are capable of making out a treaty violation—leaving it to the merits stage for Claimant to prove those allegations.”)

¹⁷¹ See, e.g., *Saipem v. Bangladesh*, *supra* note 138, ¶ 86 (In other words, the Tribunal should be satisfied that, if the facts alleged [Claimant] ultimately prove true, they would be capable of constituting a violation of [the Treaty]).

¹⁷² *Id.* ¶ 86, citing to *UPS v. Government of Canada*, at ¶ 36.

185. Here, the U.S. Shareholders have produced ample evidence not only establishing a *prima facie* case, but also proving under any reasonable standard that this Tribunal has jurisdiction *ratione materiae*, *ratione personae*, *ratione temporis* and *ratione voluntatis*. Claimants, as part of this submission have incorporated by reference, with only selected citations articulated as relevant, the January 24, 2018 Notice and Request for Arbitration filed and served on January 24, 2018. That writing, together with its thirty (30) exhibits, comprises Exhibit No. 1 to this Memorial. In the sections that follow, the jurisdictional elements each in turn is analyzed.

IV. CLAIMANTS HAVE PLEADED AND ESTABLISHED RATIONE PERSONAE, RATIONE VOLUNTATIS, RATIONE TEMPORIS AND RATIONE MATERIAE

A. Claimants Amply Meet the *Ratione Personae* Stricture as a Matter of Law and Fact

186. The TPA's plain language contemplates the perfection of claims under the Treaty on the part of *bona fide* genuine dual citizens. The TPA's two relevant provisions in this regard are inclusive and not restrictive. In stark

contrast to numerous BITs,¹⁷³ Article 12.20 asserts this inclusive affirmative right in defining “**investor of a Party**” as “Party or state enterprise thereof, or a person of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; *provided, however, that a natural person who is a dual citizen shall be*

¹⁷³ See, e.g., Agreement Between The Government of The Republic of Mauritius and The Government of The Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments (the “Mauritius-Egypt BIT,” 2014), Article 1(3) defines an “investor” as follows: “investor” means, with regard to either Contracting Party, any natural person or any legal entity, that has made an investment in the territory of the other Contracting Party, provided that:

- (a) the natural person derives his or her nationality in virtue of the laws of one of the Contracting Parties and is not simultaneously a national of the other Contracting Party;

See also, Treaty Between The Republic of Belarus and The Republic of India on Investments (the “Belarus-India BIT”, 2018), Article 1(1.6) defines an “investor” as follows:

1.6. “investor” means:

- (a) a natural person, who is a national or citizen of a Party in accordance with its law. A natural person who is a dual national or citizen, in accordance with its law, shall be deemed to be exclusively a national or citizen of the country of her or his dominant and effective nationality/citizenship, where she/he ordinarily or permanently resides. In no event the investor shall be a national of a Party in whose territory the investment is made;

deemed to be exclusively a citizen of the State of his or her dominant and effective nationality.” (emphasis in bold in original and emphasis in italics supplied)¹⁷⁴

187. The public policy underlying the extension of rights under the Treaty is based on three foundational premises. All three are compelling.

188. First, States with economies in transition find that dual citizenship leads to revenues that materially affect the economy (i) by encouraging expatriated former citizens to invest in their state of origin and (ii) providing a welcoming framework for expatriated citizens to

¹⁷⁴ A *virtually* counterpart provision is contained in chapter 10, Art. 10.28, defining “investor of a Party.” That provision reads:

investor of a Party means a Party, or state enterprise thereof, or a person of Party, that attempts to make, is making, or has made an investment in the territory of another Party; *provided, however, that a natural person, who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective nationality.* (emphasis in bold in original, italicized emphasis supplied)

return, or to pursue actual residency in their country of origin as well as “abroad”.¹⁷⁵

189. Second, capital exporting States generally have embraced the consensus that dual citizenship in the legislation commonly referred to as the “law of return,” provides incentives for immediate descendants of nationals of a home State, or followers in the State religion, to repatriate without practical or economic consequence.¹⁷⁶

¹⁷⁵ See generally, *Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal*, Note 83 MICH. L. REV. 597 (1984); More particularly, applying this principle and policy in the context of the State of Liberia, see, e.g., *James Butty, US, Liberians Launch Dual Citizenship Petition Drive*, VOICE AM. NEWS (Jan. 5, 2011), <http://www.voanews.com/english/news/africa/Butty-Liberia-Dual-Citizenship-Petition-Drive-Kamara-05january11-112918084.html> (noting lobbying and other efforts aimed at persuading the government of Liberia to establish dual citizenship cognizable under Liberian law).

¹⁷⁶ See Citizenship, Dep’t Foreign Aff. & Trade, <https://www.dfa.ie/passports-citizenship/citizenship/born-abroad/> (last visited April 11, 2019) (Ir.) (explaining that someone can become an Irish citizen if one of the grandparents was born on the island of Ireland); Acquisition of Israeli Nationality, Isr. Ministry Foreign Aff. (April 13, 2019), <https://mfa.gov.il/mfa/aboutisrael/state/pages/acquisition%20of%20israeli%20nationality.aspx> (explaining that the Law of Return grants every Jew the right to come to Israel and become an Israeli citizen); Italian Dual Citizenship Requirements, It. Dual Citizenship,

190. Third, the qualification on dual citizenship subject to a “dominant and effective nationality” test serves as a filter or litmus test that identifies instances in which the dual citizenship was acquired to circumvent in a fraudulent and non-genuine, non-*bona fide* manner the national laws of the country of origin, typically the Host State. In the context of a BIT or as in this case the TPA, the dominant and effective test ferrets out illicit or fraudulent abuse of process (i.e., illicit treaty shopping).

(i) **The *Nottebohm* Case**

191. The venerable chestnut, now largely criticized and disfavored, *Nottebohm Case*¹⁷⁷ largely is credited with originating the contemporary iteration of the *dominant and effective* standard. Although the *Nottebohm* story has been told and retold a very brief and abbreviated recitation is necessary. Despite the proliferation of literature on the subject, little has been contributed by way of sustained analysis of the nature of the test that it applies.

192. In *Nottebohm*, a German citizen (Nottebohm) by birth (1881) applied for

<http://www.italiandualcitizenship.com/> (last visited April 13, 2019).

¹⁷⁷ *Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4, Second Phase, April 6, 1955.

naturalization in Liechtenstein (1939), while still holding German nationality.¹⁷⁸ In 1905, however, Nottebohm “took up residence” in Guatemala.¹⁷⁹ He established his principal place of business and residence in Guatemala until 1943.¹⁸⁰

193. In 1939 Nottebohm applied for citizenship in Liechtenstein and received it in October of that year.¹⁸¹ Based on the newly acquired status of Swiss citizen of Liechtenstein, the government of Liechtenstein filed an action before the ICJ against Guatemala on Nottebohm’s behalf seeking damages and restitution of property for what it alleged to have been a wrongful arrest, detention, expulsion, and expropriation of Nottebohm’s property without compensation in violation of international law.¹⁸²

194. In its reply Guatemala “expressly stated that it could not ‘recognize that Mr. Nottenbohm, a German subject habitually resident in Guatemala, has acquired the nationality of Liechtenstein without changing its habitual residence.’”¹⁸³ The ICJ in considering the relief

¹⁷⁸ *Id.* at 13.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 19.

sought with respect to claims for wrongful arrest, detention, expropriation and expulsion, as well as the application of diplomatic protection to Nottebohm, succinctly framed the issue in a single sentence:

In the present case it is necessary to determine whether the naturalization conferred on Nottebohm can be successfully invoked against Guatemala, whether as has already been stated, it can be relied upon as against that State, so that Liechtenstein is thereby entitled to exercise its protection in favor of Nottebohm against Guatemala.¹⁸⁴

195. The ICJ answered the question in the negative. In doing so, the opinion on three occasions articulates and relies upon the predecessor of the “dominant and effective” test, which it expressed as the “real and effective” nationality.¹⁸⁵

196. The elements to consider in applying the standard and reaching a determination were broad, flexible, and non-exhaustive. The ICJ reasoned that “[d]ifferent factors are taken into consideration, and their importance will vary from

¹⁸⁴ *Id.* at 21.

¹⁸⁵ *Id.* at 22, 24.

one case to the next: The habitual residence of the individual concerned is an important factor, but there are other factors such as the center of his interests, his family ties, his participation in public life, attachment shown by him for a given country, and inculcated in his children, etc.”¹⁸⁶

197. Application of the “real and effective” test turned on much more than just bean-counting approach with regards to connections among the three states: Liechtenstein, Guatemala, and Germany. A *qualitative* inquiry and not a *quantitative* computation of contacts with the various States was undertaken. The ICJ in fact endeavored to determine whether Nottebohm’s Liechtenstein naturalization was strategic for a single purpose, not *bona fide*, or disingenuous.

198. The Court determined that “[i]n contrast [his settled residence in Guatemala continuously during 34 years], his actual connections with Liechtenstein were extremely tenuous. No settled abode, no prolonged residence in that country at the time of his application for naturalization: the application indicates that he was paying a visit there and confirms that transient character of this visit by its request that

¹⁸⁶ *Id.* at 22.

the naturalization proceedings should be initiated and concluded without delay.”¹⁸⁷

199. Similarly, the Court observed that “[t]here [was] no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein, and no manifestation of any intention whatsoever to transfer all or some of his interests in his business activities to Liechtenstein.”¹⁸⁸

200. In this very connection it further observed that “[t]he only links to be discovered between the Principality and Nottebohm are the short sojourns already referred to in the present in Vaduz of one of his brothers: but his brother’s presence is referred to in his application for naturalization only as reference to his good conduct.”¹⁸⁹

201. This factual matrix led the ICJ to conclude that Liechtenstein’s exercise of sovereignty in granting citizenship status to Nottebohm was not opposable on Guatemala. While the naturalization may have been conducted consonant with Liechtenstein’s national law, pursuant to public international law the

¹⁸⁷ *Id.* at 25.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 25-26.

naturalization was for a specific purpose and lacking in genuineness:

These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing in close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization *was not based on any real prior connection with Liechtenstein*, nor did it in any way alter the manner of life the person upon whom it was conferred in *exceptional circumstance of speed and accommodation*. In both respects, it was lacking in the *genuineness requisite to an act of such importance*, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.¹⁹⁰

202. The ICJ in effect determined that *Nottebohm* was treaty shopping. This objective constituted the singular purpose of the newly acquired citizenship:

¹⁹⁰ *Id.* at 26. (emphasis supplied)

Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, *as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral state, with the sole aim of thus coming within the protection of Liechtenstein* but not of becoming wedded to its traditions, interests, its way of life or of assuming the obligations- other than fiscal obligations- and exercising the rights of pertaining to the status thus acquired.¹⁹¹

203. The *Nottebohm* case is instructive with respect to this proceeding for two reasons. First, it stands in stark contrast to the *ratione personae* allegations and facts of record before this arbitral proceeding. Second, the ICJ's *genuineness* and *special purpose* analysis used to substantiate its "real and dominant" test has been imported into the public international law of investment protection's dominant and effective test.

204. As to the first of these two considerations, five observations are in order.

¹⁹¹ *Id.* at 26. (emphasis supplied)

First, the ICJ in *Nottebohm* addressed a second-in-time citizenship status pursuant to *naturalization*. Such is not the case here. Claimants Alberto Carrizosa, Felipe Carrizosa, and Enrique Carrizosa never became U.S. citizens pursuant to a proceeding arising from an application for naturalization. Although the three Claimants were born in Colombia, at the time of birth, their mother was a U.S. citizen of Latvian origin.¹⁹² Accordingly, consonant with Annex 1.3 of the TPA, Alberto Carrizosa, Enrique Carrizosa, and Felipe Carrizosa are nationals and citizens of the United States who *did not* attain that status pursuant to a naturalization process, but rather by birth despite having been born both outside the geographical limits of the United States and its outlying possession.”¹⁹³

¹⁹² See Alberto Carrizosa Witness Statement (CWS-1) ¶¶ 5-6, Felipe Carrizosa Witness Statement (CWS-2) ¶¶ 6-8, Enrique Carrizosa Witness Statement (CWS-3) ¶¶ 2-5, and Astrida Benita Carrizosa Witness Statement (CWS-4) ¶¶ 1-4.

¹⁹³ Annex 1.3 (Country-Specific Definitions), in part reads:

For purposes of this Agreement, unless otherwise specified:

natural person who has the nationality of a Party means:

- (a) with respect to Colombia, Colombians by birth or naturalization, in accordance with Article 96 of the *Constitución Política de Colombia*; and

205. Section 14.01(g) of the Immigration and Nationality Act of the United States is relevant because it establishes that Claimants, although born outside the geographical limits of the United States and its territories, are U.S. citizens and were U.S. citizens decades before this cause ripened. That provision reads:

§1401. Nationals and citizens of United States at birth

The following shall be nationals and citizens of the United States at birth:

(g) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than

(b) with respect to the United States, 'national of the United States' as defined in the existing provisions of the *Immigration and Nationality Act* and ...

five years, at least two of which were after attaining the age of fourteen years[].

206. Claimants' mother, Astrida Benita Carrizosa was born in Riga, Latvia in 1939.¹⁹⁴ In approximately 1949, when she was only 10 years of age, she and her family moved to the United States.¹⁹⁵ She became a U.S. citizen before turning 16 years old.

207. Mrs. Carrizosa, in fact, lived in Cleveland, Ohio and attended Hillsdale College in Hillsdale, Michigan from September 1957 to June 1959.¹⁹⁶ She then attended Case Western Reserve University in Cleveland, Ohio where she received a Bachelor of Arts degree in languages (Class of 1962).¹⁹⁷ Mrs. Carrizosa never abandoned her U.S. citizenship and remains a U.S. citizen as of the date of this writing.¹⁹⁸

208. Indeed, Mrs. Carrizosa has testified that upon marrying her husband in Colombia, the

¹⁹⁴ See Astrida Benita Carrizosa Witness Statement (CWS-4) ¶ 6.

¹⁹⁵ *Id.* ¶ 4.

¹⁹⁶ *Id.* ¶ 6.

¹⁹⁷ *Id.* ¶ 7

¹⁹⁸ See Astrida Benita Carrizosa Witness Statement (CWS-4) ¶¶ 2, 4.

couple agreed that their children would be raised as U.S. citizens.¹⁹⁹ That is the reason why they were educated as U.S. citizens, or as ‘*gringos*,’ as they are known in Colombia.²⁰⁰

209. Therefore, unlike Nottebohm targeted naturalization effort, the U.S. Shareholders’ dual nationality did not at all concern a naturalization proceeding. It preceded by decades the ratification of the TPA, let alone the June 25, 2014 issuance of the Constitutional Court’s Order Denying the Council of State’s Motion to Vacate.

210. Second, in *Nottebohm* the ICJ determined that Nottebohm sought naturalization in Liechtenstein “not so much for the purpose of obtaining legal recognition of Nottebohm’s membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as national of a belligerent State with that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein, but not of becoming wedded to its traditions, interests, way of life or of assuming the obligations-other than fiscal obligations- and exercising the rights pertaining to the status thus acquired.”²⁰¹

¹⁹⁹ *Id.* ¶ 10.

²⁰⁰ See Alberto Carrizosa Witness Statement (CWS-1) ¶ 36.

²⁰¹ *Nottebohm*, *supra* note 177, ¶¶ 191, 204.

211. The single purpose “treaty shopping” or non-genuine, non-*bona fide* factor is inapplicable to the Claimants. Claimants have been U.S. citizens their entire lives.²⁰² It therefore follows that under no reasonable hypothesis of fact, logic, or law can they be found to have at all engaged in treaty shopping or other non-genuine premise for obtaining U.S. citizenship status. Their respective dual-citizenship status is paradigmatically genuine and *bona fide*, the type of dual citizenship that the TPA seeks to protect and to foster.

212. Third, the issue in *Nottebohm* concerned the manner in which compliance with the national laws of the State [Liechtenstein] naturalizing an applicant from a third State [Germany] accorded Liechtenstein rights opposable to or binding on a second State [Guatemala], as a matter of international law.

213. Consequently, the cornerstone issue in *Nottebohm* entails the extent to which the legitimate exercise of national law by a State *unilaterally* may engraft obligations under public international law on another State.

²⁰² Alberto Carrizosa Witness Statement (CWS-1) ¶¶ 2, 6, Felipe Carrizosa Witness Statement (CWS-2) ¶¶ 2, 8, and Enrique Carrizosa Witness Statement (CWS-3) ¶2.

214. Such is not the case here. To the contrary of any *unilateral* imposition on Colombia, Claimants' dual citizenship status for purposes of bestowing investor and investment protection under the TPA, is eminently *bilateral*. By becoming a signatory to the TPA, Colombia affirmatively recognized and consented that it would accord investment treaty protection to dual citizens.²⁰³

²⁰³ As to the *unilateral* factor in *Nottebohm*, the Court reasoned and concluded:

It is therefore clear that the Government of Guatemala considers that there are no firm principles of law generally recognized with regard to nationality, but that the right of Liechtenstein to determine under its own law that Mr. Nottebohm was its own national, and the correlative obligation of Guatemala to recognize the Liechtenstein law in this disregard- opposability – are limited not by rigid rules of international law, *but only by the rules regarding abuse of right and fraud.*

I have mentioned that no 'international conventions' are involved and that no 'international custom' has been proved. It has been conceded by Guatemala that 'there is no system of customary rules', but the link theory is supported by the view that certain international conventions suggest the existence of a trend.

Nottebohm, *supra* note 177.

215. Fourth, *Nottebohm* concerned diplomatic protection. It follows that the underlying policies and concerns incident to the public international law of diplomatic protection in many respects differ from those attendant to the public international law of foreign investment protection. These differences matter because the principles of law governing diplomatic protection are devoid of elements, such as the expectation of investors, the *bona fide* nature and character of an investor, as well as the limiting qualifications that necessarily pertain to a State's exercise of its regulatory, and judicial sovereignty. Sustained consideration of these factors further bolster the treaty-based investment protection rights of dual citizen investors, such as those of the Claimants under the TPA.

216. Fifth, and finally, the complexities of the application of the predecessor standard, "real and effective" in *Nottebohm* are multiplied and made worse in the context of that case because of the presence of three states: Liechtenstein, Germany, and Guatemala. Such issues are not common to investor-state arbitration and, therefore, find no resonance in the case before this Tribunal. The analysis here is simple. It is not clouded by the interests of a third State, or by timeframe, single purpose naturalization concerns.

This issue is altogether absent from the case before this Tribunal.

217. In addition to the helpful contrasts that the five referenced factors contribute to the analyses of this case, and more generally to treaty based investor-State arbitration addressing the contemporary *dominant and effective* test, *Nottebohm* also contributes a second relevant and helpful analytical talisman for the standard's application. The *Nottebohm* "link test" is a (i) *qualitative* inquiry into the (ii) "genuineness"²⁰⁴ of the citizenship status at issue during (iii) a relevant timeframe. In the case of *Nottebohm*, the material timeframe was "[a]t the time of his naturalization."²⁰⁵

218. It is with regard to these three factors that the ICJ sought to "ascertain whether the nationality granted to *Nottebohm* by means of naturalization is of this character or, in other words, whether the factual connection between *Nottebohm* and Liechtenstein in the period preceding, contemporaneous with, and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection that may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as *real and effective*, as the exact juridical expression of a social fact of a

²⁰⁴ *Nottebohm*, *supra* ¶¶ 201, 203.

²⁰⁵ *Id.* at 24.

connection which existed previously or came into existence thereafter.”²⁰⁶

219. In the case before this Tribunal the genuineness of Claimants’ dual citizenship status during *any* relevant timeframe is beyond cavil. The Witness Statements of Alberto, Felipe, and Enrique Carrizosa bespeak a U.S. “nationality [that] it is a legal bond having as its basis a social fact of attachments, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”²⁰⁷ with respect to the United States.

(ii) The *Mergé* Case

220. Decided on the heels of the *Nottebohm Case*, the Italian-United States Conciliation Commission in the *Mergé Case*²⁰⁸ applied the principles articulated in *Nottenbohm* in determining whether a dual citizen of the United States and Italy (Mrs. Mergé) should be considered to be dominantly a United States national within the meaning of Article 78 of the Treaty of Peace and allowed to assert claims for property damaged during World War II.

²⁰⁶ *Id.* at 24.

²⁰⁷ *Id.* at 23.

²⁰⁸ *Mergé Case - Decision No. 55*, June 10, 1955, Italian-United States Conciliation Commission.

221. After canvassing a colorful scholarly discussion that explored the extent to which diplomatic protection was excluded in dual nationality cases where the individual who is a national of the State against which claim is made by dint of Sovereign Equality of State Doctrine in contrast to the principle of effective or dominant nationality,²⁰⁹ the Commission took note that in the interval between its meetings in Paris and in Rome the ICJ issued the *Nottebohm* decision. In adopting the *Nottebohm* tenets, it observed:

The principle., based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State.²¹⁰

222. Of practical conceptual application, however, was the Commission's understanding of *Nottebohm* not as a criterion for *admissibility*, but rather as enunciating an expansive rubric (i) particular to each case, (ii) one where "habitual residence" was only one of many factors to consider and not a dominant element, and (iii) the

²⁰⁹ *Id.* at 241.

²¹⁰ *Id.* at 247.

elements to be weighed are non-exhaustive. The Commission reasoned:

In view of the principles accepted, it is considered that the Government of the United States of America shall be entitled to protect its nationals before this Commission in cases of dual nationality, United States and Italian, whenever the United States nationality is the effective nationality.

In order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, *but not the only one*. The conduct of the individual in his economic, social, political, civic, and family life, as well as the closer and more effective bond with one of the two States, *must* also be considered.²¹¹

²¹¹ *Id.* (emphasis supplied)

Commission went on to list some factors to be considered. It, however, tempered this list by underscoring that in connection the premises just referenced, “the following principles *may* serve as guides:

(a) The United States nationality shall be prevalent in cases of children born in the United States of an Italian father and who have habitually lived there.

223. The *qualitative* quantitative test applied in *Nottebohm* and *Mergé* has been imported into the public international law of investment protection.

(b) The United States nationality shall also be prevalent in cases involving Italians who, after having acquired United States nationality by naturalization and having thus lost Italian nationality, have reacquired their nationality of origin as a matter of law as a result of having sojourned in Italy for more than two years, without the intention of retransferring their residence permanently to Italy.

(c) With respect to the case of dual nationality involving American women married to Italian nationals, the United States nationality shall be prevalent in cases in which the family had had habitual residence in the United States and the interests and the permanent professional life of the head of the family were established in the United States.

(d) In case of dissolution of marriage, if the family was established in Italy and the widow transfers her residence to the United States of America, whether or not the new residence is of a habitual nature must be evaluated, case by case, bearing in mind also the widow's conduct, especially with regard to the raising of her children, for the purposes of deciding which is the prevalent nationality. (emphasis supplied)

(iii) Claimant, U.S. Shareholder Alberto Carrizosa

224. Claimant Alberto Carrizosa, by way of example, testifies that he moved to Miami (Florida, U.S.A.) in 1983 and at the time resided at 3 Grove Isle Drive, Apt. 605, Coconut Grove, Florida 33133.²¹² He attended high school at Gulliver Preparatory School in Miami, and graduated in 1984.²¹³ Upon graduating from high school Alberto Carrizosa attended college at Boston University where he received a degree of Bachelor of Science in Business Administration. His address at the time was 1038 Beacon Street, Brookline, Massachusetts 02446.²¹⁴

225. Following his graduation from Boston University in 1988, Alberto Carrizosa attended the New York Institute of Finance where he took courses in financial analysis, mergers and acquisitions. At that time, he lived in New York City and worked for Shearson Lehman Hutton (“Shearson”). During his tenure with Shearson, Mr. Carrizosa became a Series 7 license holder and was licensed to sell all types of securities with the exception of commodities and futures.²¹⁵ At that

²¹² See Alberto Carrizosa Witness Statement (CWS-1) ¶ 12.

²¹³ *Id.* ¶ 13.

²¹⁴ *Id.* ¶ 114.

²¹⁵ *Id.* ¶ 20.

time his office was located at 31 West 52nd Street, New York, New York 10019.²¹⁶

226. In 1990, as more fully detailed in Alberto Carrizosa's Witness Statement, he moved to Colombia. And on July 1, 1998 Alberto Carrizosa was promoted to Chairman of the Board of Directors of GRANAHORRAR. In that capacity much of his time was allocated to interfacing with FOGAFIN, the Superintendence, the Central Bank, and other financial institutions agencies of the Colombian government.²¹⁷

227. Mr. Alberto Carrizosa's Witness Statement establishes that he never forewent or otherwise distanced himself socially, culturally, or financially from the United States. In fact, the United States was a home to Mr. Carrizosa not only in his formative and adult educational years, and in his professional development at Shearson, but also during challenging times, such as in October of 1998 when FOGAFIN and the Superintendency (i) illicitly diluted the value GRANAHORRAR shares to the nominal amount of COP 0.01 and (ii) recapitalized the Bank in the amount of COP 157,000,000,000, providing GRANAHORRAR with an invitation to tender payment in that amount within 14 hours by 3

²¹⁶ *Id.* ¶ 21.

²¹⁷ *Id.* ¶ 28.

o'clock of that very same day: a deadline that physically could not be met.²¹⁸

228. Alberto Carrizosa further testifies that during this difficult timeframe his mental and emotional inclination was to return to Miami, which he did. In 2003 he worked at New World Network as a Director until the latter of 2003. In that capacity he was responsible for the development of a telecommunications infrastructure company that developed the 5,400 miles Arcos-1 (Americas Region Caribbean Ring System). This project consisted of an optical fiber ring that connected 14 countries in the Caribbean basin region.²¹⁹ His ties to the United States are deep and significant.

229. In 2005 Alberto Carrizosa joined Wireless Ventures USA Inc., an HV TV provider based in McLean, Virginia. He was employed there until 2007.²²⁰

230. In 2007 Alberto Carrizosa returned to Colombia and worked at I.C. Interventorías e Construcciones Group.²²¹

²¹⁸ See, RFA ¶ 136, n.89, referencing Resolution No. 002, dated October 3, 1989, there attached as Exhibit C-20.

²¹⁹ See Alberto Carrizosa Witness Statement (CWS-1) ¶ 29.

²²⁰ *Id.* ¶ 28.

²²¹ *Id.* ¶ 31.

231. Alberto Carrizosa has testified as to his dual U.S.-Colombia citizenship. In his own words he explained that he “grew up in a family where traditions, customs, and festivities were the festivities of the U.S.”²²² He testifies that his “attitude to work and ethics is definitely that of the U.S. and [his] main language is English.”²²³

232. In connection with this latter proposition concerning the English language, he tells that “the language always spoken at home when [he] lived with [his] parents and brothers”, was the English language.²²⁴ He adds that it is “perhaps telling that in Colombia [he and his] brothers are referred to as ‘*los gringos*’ (the Americans).”²²⁵

233. In his witness statement Mr. Alberto Carrizosa sets forth additional quantitative and qualitative contacts with the United States that are material to *dominant and effective* test consideration.²²⁶

²²² *Id.* ¶ 32.

²²³ *Id.* ¶ 34.

²²⁴ *Id.* ¶ 36

²²⁵ *Id.*

²²⁶ *Id.* ¶¶ 33-50.

234. Alberto Carrizosa testifies that most of his passive assets are in the United States.²²⁷ He also files tax returns in the U.S.²²⁸

235. Alberto Carrizosa uses a U.S. Passport when he travels.²²⁹

236. His testimony demonstrates that he lives in Colombia because it is the place where his business is located.²³⁰

237. Alberto Carrizosa tenders payment to a special purpose savings account for his retirement that is in the United States.²³¹

238. He owns property in the U.S. and pays *ad valorem* (property tax) in the U.S.²³²

239. He rightfully expected that the TPA would protect his investments in Colombia and for this reason did not transfer his business outside of Colombia.²³³

²²⁷ *Id.* ¶¶ 39-45.

²²⁸ *Id.* ¶ 47.

²²⁹ *Id.* ¶ 50.

²³⁰ *Id.* ¶ 45.

²³¹ *Id.* ¶ 43.

²³² *Id.* ¶ 44.

²³³ *Id.* ¶ 92.

(iv) **Claimant, U.S. Shareholder Felipe Carrizosa**

240. Felipe Carrizosa attended first a U.S. school in Colombia and then, from 1983 (i) high school at Gulliver Preparatory School and (ii) Lehigh University in Bethlehem, Pennsylvania in the United States.²³⁴

241. He testifies “that all of [his] personal interests are centered in the U.S.”²³⁵

242. He also tells how [his] parents always wanted [him] to grow up and be educated as a U.S. citizen. As a result of that perspective, all family traditions, festivities, and occurrences always have been based on U.S. culture, and in most cases celebrated in the U.S.²³⁶

243. Felipe Carrizosa testifies that the language at his parents’ home, and now in his home is English.”²³⁷

244. The testimony establishes that Felipe Carrizosa’s two daughters are U.S. citizens who travel with a U.S. passport, attend a U.S. school in

²³⁴ See Felipe Carrizosa Witness Statement (CWS-2) ¶¶ 12-13.

²³⁵ *Id.* ¶ 24.

²³⁶ *Id.* ¶ 23.

²³⁷ *Id.*

Bogotá (Colegio Nueva Granada), and frequent summer camps in the U.S.²³⁸ Felipe wants his daughters to complete their education in the U.S. and find a job there.²³⁹

245. Felipe states that he and his family “have a special connection to Florida. When work and other commitments allow, [Felipe and his family] spend time at [their] residence in Miami.”²⁴⁰ That property is located at 17475 Collins Avenue, Unit 1102, Sunny Isles, Florida.²⁴¹ As to having a genuine bond and a social fact of attachment with the United States, Felipe Carrizosa describes himself as a U.S. citizen through and through.²⁴² He always travels internationally using his United States passport.²⁴³

246. The only reason he identifies himself as a Colombian in Colombia is to comply with Article 22 of Law 43 of 1993 according to which:

The Colombian national, who holds dual nationality, *in the national territory*, will be

²³⁸ *Id.*

²³⁹ *Id.* ¶ 28.

²⁴⁰ *Id.* ¶ 31.

²⁴¹ *Id.* ¶ 34.

²⁴² *Id.* ¶ 32.

²⁴³ *Id.* ¶ 36.

subject to the Political Constitution and the Laws of the Republic. Consequently, their entry and stay in the territory, as well as their departure, must be undertaken as Colombians, *and must be identified as such in all their civil and political acts.*²⁴⁴

247. He adds that “[I]n other words, even if I had never been Colombian, the law would require me to identify myself as a Colombian national when entering Colombia for the first time.”²⁴⁵

248. In his witness statement Felipe Carrizosa sets forth additional links and factual propositions from which it may be logically inferred that he has a genuine and true bond with the United States arising from a *bona fide* social fact of attachment.

249. Felipe Carrizosa testifies that most of his passive liquid assets are in the United States (savings).²⁴⁶

²⁴⁴ *Id.* ¶ 37 (emphasis supplied), with citation to original Spanish language in f.n. 2.

²⁴⁵ *Id.*

²⁴⁶ *Id.* ¶ 33.

250. His testimony demonstrates that he lives in Colombia because it is the place where his business is located.²⁴⁷

251. Felipe Carrizosa tenders payment to a special purpose account for his retirement that is in the United States.²⁴⁸

252. He owns property in the U.S.²⁴⁹ and pays *ad valorem* (property tax) in the U.S.²⁵⁰

253. Felipe Carrizosa testifies that he rightfully expected that the TPA would protect his investments in Colombia.²⁵¹

(v) Claimant, U.S. Shareholder Enrique Carrizosa

254. Enrique Carrizosa testifies that although born in Bogotá, his memories as a child are associated, almost exclusively, with the U.S.²⁵² He explains that when he was 8 years old his family moved back to the U.S. and had a permanent residence in Miami, Florida. That

²⁴⁷ *Id.* ¶ 32.

²⁴⁸ *Id.* ¶ 24.

²⁴⁹ *Id.* ¶ 34.

²⁵⁰ *Id.* ¶ 24.

²⁵¹ *Id.* ¶ 70.

²⁵² *See* Enrique Carrizosa Witness Statement (CWS-3) ¶ 6.

address was 3 Grove Isle Drive, Apt. 6, Coconut Grove, Florida 33133.²⁵³

255. Enrique Carrizosa attended Gulliver Academy and McGlaggan School in Miami, Florida from 1983 to 1986.²⁵⁴

256. Between 1986 and 1993 Enrique Carrizosa resided in Colombia and continued his academic curriculum at the U.S. school in Bogota.²⁵⁵ Also, during that timeframe, however, he very often traveled to and from the United States. Indeed every holiday and summer vacation was spent in Miami, Florida.²⁵⁶

257. His testimony states that approximately four months of each year were spent in Miami, Florida during this 7-year timeframe. Enrique Carrizosa's best and closest friends live in Miami, Florida.²⁵⁷ Between 1993 and 2004 Enrique Carrizosa lived in the City of Evanston in Chicago, in the State of Illinois, U.S.²⁵⁸

²⁵³ *Id.*

²⁵⁴ *Id.* ¶ 7.

²⁵⁵ *Id.* ¶ 8.

²⁵⁶ *Id.* ¶ 9.

²⁵⁷ *Id.* ¶ 9.

²⁵⁸ *Id.* ¶ 10.

258. In 1993 he enrolled in Northwestern University and received a Bachelor of Science in Industrial Engineering in 1998.²⁵⁹

259. Upon graduating between 1998 and 2001, Enrique worked as a Consultant at Marakon Associates in Chicago. Marakon and Associates is a corporate strategy firm. Enrique Carrizosa's job consisted of identifying business opportunities and developing strategies.²⁶⁰

260. Between 2001 and 2003 Enrique Carrizosa was enrolled at the Kellogg School of Management at Northwestern University where he received an MBA. During that time (2002) he completed an internship at IBM in Armonk, New York. From 2003 until 2004, Enrique Carrizosa worked in Chicago, Illinois, for Bain & Co. as a consultant.²⁶¹

261. In 2004 he returned to Colombia to attend to business and has served in multiple positions. Now he is Chairman of the Board of the IC Group, supervising approximately 420 employees, including area managers, professionals

²⁵⁹ *Id.* ¶¶ 11.

²⁶⁰ *Id.* ¶ 13.

²⁶¹ *Id.* ¶ 16.

[e.g., accountants, lawyers, and engineers, among others] and non-specialized personnel.²⁶²

262. Enrique Carrizosa is married to a U.S. citizen, and has two daughters, both of whom are U.S. citizens. They attend U.S. school in Bogota.²⁶³ Enrique Carrizosa's testimony as to what he considers his predominant citizenship status could not be clearer. In addition to having English as the "language at home," his immediate family also subscribes to U.S. culture and traditions.²⁶⁴

263. Enrique Carrizosa testifies with respect to his dual citizenship as follows:

All my life U.S. culture has been the only culture I related to. I attended U.S. schools pursuing U.S. systems, curricula and values²⁶⁵ My wife and I want our daughters to complete their education and find a job

264. Enrique Carrizosa uses a U.S. Passport when he travels.²⁶⁶

²⁶² *Id.* ¶ 17.

²⁶³ *Id.* ¶ 31.

²⁶⁴ *Id.* ¶ 30.

²⁶⁵ *Id.* ¶ 30.

²⁶⁶ *Id.* ¶ 38.

265. He rightfully expected that the TPA would protect his investments in Colombia.²⁶⁷

266. Most of his income-generating assets are in the U.S.²⁶⁸ He files tax returns in the U.S.²⁶⁹

267. Enrique Carrizosa tenders payment to a retirement account in the U.S.

268. Enrique Carrizosa owns property in the U.S. pays *ad valorem* taxes (property tax) in the U.S.²⁷⁰

269. Claimants' testimony before this Tribunal places the case before it factually poles apart from *Nottebohm* but legally well within its purview. It is not possible to consult these testimonies and conclude that dual citizenship was secured, as in *Nottebohm* for the single purposes of securing some kind of strategic benefit, in this case from a Host State.

270. Similarly, Claimants' dual citizenship status is genuine, *bona fide*, and amply predates (i) the investments at issue, and (ii) the Treaty violations that underlie this cause.

²⁶⁷ *Id.* ¶ 70.

²⁶⁸ *Id.* ¶ 34.

²⁶⁹ *Id.* ¶ 41.

²⁷⁰ *Id.* ¶ 37.

271. Claimants represent precisely the kind of dual citizens the investments of whom the TPA contemplated protecting.²⁷¹ To be sure, their “nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”²⁷²

(vi) As Both a Matter of Pleading and Proof Claimants Amply Have Met the Standard for Dominant and Effective Adopted by Treaty-Based Arbitral Tribunals

272. As of the date of this writing no tribunal award has interpreted the dominant and effective test under the TPA. A number of tribunals, not all of them construing a *dominant and effective* provision akin to Articles 10.28 and 12.20 of the TPA, have applied *Nottebohm’s* “effective” or “genuine link” test to determine the extent to which dual or naturalized citizenship status is secured to flout what otherwise might be the preclusive effect of host-State nationality.

²⁷¹ *Nottebohm*, *supra* note 177.

²⁷² *Id.* at 23.

a. *Micula v. Romania*

273. The arbitral tribunal's reasoning and holding in *Ioan Micula, et al. v. Romania*,²⁷³ is particularly insightful because of its analysis of *Nottebohm*, albeit while recognizing its inapplicability to the particular facts of that case.

274. That case was decided pursuant to the Sweden-Romania BIT, which is silent as to dual citizenship and, therefore, the dominant and effective test.

275. At issue, however, was whether the nationality of two admittedly *naturalized* Swedish nationals of Romanian origin was opposable to Romania. Specifically, Respondent averred that the two natural persons participating as Claimants were not entitled to Romania's exercise of treaty protection because "a state with which the injured party (or here, an 'investor') has overwhelmingly stronger links than the state under the nationality of which a claim is being raised is entitled to defeat that claim on the basis of those overwhelming links (the absence of any material links with the state of nationality)."²⁷⁴

²⁷³ *Ioan Micula, Viorel Micula, F.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20 (decision on jurisdiction and admissibility) (September 2008).

²⁷⁴ *Id.* ¶ 71.

The “effective-genuine” test was triggered by virtue of Respondent’s contention that:

The rule of effective nationality applies even when there is only one nationality at stake as confirmed in the *Nottebohm* case [Citation omitted] the International Court of Justice held that an individual who has no genuine or effective link with the state could not invoke the nationality of that state against another state, with which that individual has a long standing and close connection.²⁷⁵

276. The Tribunal summarized Respondent’s averments as follows:

In this case, Respondent argues that [Claimants’] Swedish nationality is effective and was solely obtained ‘*to advance their purpose*’ [citation omitted]. Looking at whether a genuine connection exists, the Respondent concludes on the basis of an investigative report [citation omitted] [that Claimants] permanently reside and physically remain almost constantly in Romania. It also finds that their professional

²⁷⁵ *Id.* ¶ 72.

and economic interests, as well as their cultural, social and family ties are in and with Romania. As a result of these strong and continuous links with Romania, [Claimants] are barred from invoking their Swedish nationality with respect to Romania [citation omitted].²⁷⁶

277. The Tribunal rejected these assertions and found that Respondent's contention that Claimants' Swedish nationality could not be binding on Romania because of Claimants' alleged tenuous links with Sweden, was meritless.²⁷⁷

278. Even though the arbitral tribunal in *Micula* acknowledged that *Nottebohm* cannot be read to apply to the case or to carve out an exception barring a State from turning a blind eye to "an individual's single nationality on the basis of the fact that this individual has not resided in the country of his nationality for a period of time," it hypothetically applied the genuine or effective link test.

279. Application of *Nottebohm* led the tribunal to conclude that "the links of [Claimants] with Sweden are not of such nature as to require that the Tribunal question the effectiveness of the

²⁷⁶ *Id.* ¶ 74.

²⁷⁷ *Id.* at 105.

Swedish nationality of [Claimants] or its opposability to Romania.”²⁷⁸ It arrived at this determination upon considering the following six propositions, all of which, apply in the case before this Tribunal as to *all* three Claimants, Alberto Carrizosa, Enrique Carrizosa, and Felipe Carrizosa:

First, it was noted that Claimants had “assets in Sweden”;²⁷⁹

Second, one of the Claimants had “in-laws ... living in Sweden”;²⁸⁰

Third, one of the Claimants had “two daughters [who were] Swedish nationals”;²⁸¹

Fourth, Claimants “intend[ed] to retire in Sweden”;²⁸²

²⁷⁸ *Id.* at 104.

²⁷⁹ *Id.* ¶ 104. The testimony before this tribunal is that all three Claimants have assets in the United States. *See* Alberto Carrizosa Witness Statement (CWS-1) ¶¶ 39, 45, Felipe Carrizosa Witness Statement (CWS-2) ¶¶ 32-34, and Enrique Carrizosa Witness Statement (CWS-3) ¶¶ 33-35.

²⁸⁰ *Id.* ¶ 26. Enrique Carrizosa’s in-laws live in the U.S.

²⁸¹ *Id.*

See Felipe Carrizosa Witness Statement (CWS-2) ¶ 27, and Enrique Carrizosa Witness Statement (CWS-3) ¶ 24.

²⁸² *Id.*

Fifth, Claimants paid “into pension funds to that effect”;²⁸³

Sixth, the Tribunal observed in its reasoning that “[t]he fact that they [Claimants] presently reside in Romania is not a decisive factor. Indeed, it is clear that they have done so in order to run their business, and as testified by [one of the Claimants] they could live in another country if they had their business located somewhere else.”²⁸⁴

280. To be sure, *Micula*’s factual configuration differs from the case here at issue.

In this case, all three Claimants have testified of their intent to retire in the United States. See Alberto Carrizosa Witness Statement (CWS-1) ¶ 43, Felipe Carrizosa Witness Statement (CWS-2) ¶ 29, and Enrique Carrizosa Witness Statement (CWS-3) ¶ 32.

²⁸³ *Id.*

Claimants here also tender payments to pension funds in the United States for the identical reason. See Alberto Carrizosa Witness Statement (CWS-1) ¶ 43 Felipe Carrizosa Witness Statement (CWS-2) ¶ 33, and Enrique Carrizosa Witness Statement (CWS-3) ¶ 36.

²⁸⁴ *Id.*

The same holds true in the case before this Tribunal. Indeed, all three Claimants have testified that they only live in Colombia because it is where their business is located. See Alberto Carrizosa Witness Statement (CWS-1) ¶ 45, Felipe Carrizosa Witness Statement (CWS-2) ¶ 32, and Enrique Carrizosa Witness Statement (CWS-3) ¶¶ 33. (emphasis supplied)

281. As stated, the Sweden-Romania BIT is silent on the question of dual citizenship. Also, *Micula* also only concerns the nationality of a single State, Sweden. Unlike in *Nottebohm* where Guatemala never granted Nottebohm nationality, in *Micula* (although challenged by Respondent) Claimants affirmatively had rejected their Romanian citizenship when they became citizens of Sweden.²⁸⁵ These differences notwithstanding, the analysis in *Micula* is dispositive in the U.S. Shareholders' favor here.

282. In engaging in a hypothetical application of *Nottebohm*, the Tribunal stressed that the genuine link test is *qualitative* in nature. This interpretation of the test is supported by the construction that the Tribunal placed on Claimants' dominant physical presence in Romania, the host-State.

283. Setting to one side any consideration of the single-State issue, the Tribunal analyzed factors that went to the legitimacy and depth of Claimants' bond with Sweden, notwithstanding what appeared to be the unchallenged proposition that Respondents habitually resided in Romania, the host-State.²⁸⁶

²⁸⁵ *Id.* ¶ 3(a) and (b).

²⁸⁶ In this regard the Award in *Micula* in pertinent part reads:

In this case, Respondent argues that Messrs. Micula's Swedish nationality is ineffective and was solely obtained '*to advance their purpose*' [citation omitted]. Looking at whether a genuine connection exists, the Respondent concludes on the basis of an investigative report [citation omitted] that Messrs. Micula permanently reside and physically remain almost constantly in Romania. It also finds that their professional and economic interests, as well as their cultural, social and family ties are in and which Romania. As a result of these strong and continuous links with Romania, Messrs. Micula are barred from invoking their Swedish nationality with respect to Romania [citation omitted].

Id. ¶ 74.

Respondent also sought to cast doubt on Claimants' habitual and continuous residence in Sweden. Reference to this evidence is helpful:

According to Respondent, such an objection [to the legitimacy of Swedish nationality], if presented, would strike at the root of the nationality, and would be in lieu of the 'inopposability' objection [citation omitted]. Romania wrote to the Tribunal on 4 July 2008 as agreed at the close of the hearing and asked for an extension of time until 18 July 2008 to make any application for leave to object to [one of the natural person Claimants] acquisition of Swedish nationality. In its letter, Romania cast doubt as to his compliance with the five-year residence requirement for grant of nationality under Swedish law between February 1989 (the date of his permanent residence permit) and 23

284. In *Micula* the Tribunal accepted the dominant physical presence raised in Romania's averment both as a matter of pleading and actual proof. Upon, however, considering the totality of circumstances, it observed that the quality of Claimants' bond of allegiance to Sweden far outweighed the habitual presence in Romania contention as a determinative factor.

285. Along this line of thinking, the Tribunal correctly dismissed Respondent's "single-purpose" argument because that allegation simply was not reconcilable with the established link and bond of allegiance to Sweden, as demonstrated by the governing chronology of material events, and

February 1994 (acquisition of nationality). Not only did Romania question the intent of [Claimant] to reside in Sweden but it contended that he '*did not as a matter of fact 'habitually' reside in Sweden after some time in 1992 at the latest*' [italics in original].

Moreover, Respondent argued that the validity of the renunciation of Romanian nationality was a condition of validity of the acquisition of the Swedish nationality. [Claimant's] renunciation was based on the fact that he resided in Sweden and that he had no interest in returning to Romania, which according to Respondent, both proved to be incorrect.

Id. ¶ 75. (emphasis in original)

the “effectiveness” of the Swedish nationality of [Claimants].²⁸⁷

286. Here, in the case before this Tribunal, Claimants’ links to the U.S. are opposable to Colombia as a matter of fact and law.

287. Structurally and, to *some* extent, closer to the case before this Tribunal is *Olguín v. Paraguay*.²⁸⁸ There Claimant, a dual national of the United States, filed a claim under the ICSID rubric against the Republic of Paraguay arising from treaty violations in connection with an investment in the food processing sector in Paraguay (specifically a corn products plant), to be owned and operated by an in-country entity.²⁸⁹ Even though the dominant and effective test understandably was not considered because the applicable BIT is silent on the issue, the Tribunal did express relevant propositions as part of its analysis finding that it lacked jurisdiction on the ground of the ICSID regime’s preclusive effect on the issue.²⁹⁰

²⁸⁷ *Id.* at 104.

²⁸⁸ *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5 (Award) (July 26, 2001).

²⁸⁹ *Id.* ¶¶ 50-51.

²⁹⁰ The Award makes no effort to distinguish between a dual-State case and a three-State case. Based on the facts before it, Claimant’s nationality should not have given rise to

288. The Tribunal, did, however, recognize that “[t]here was no dispute regarding the fact that [Claimant] has dual nationality, and that *both are effective*.”²⁹¹

289. The case before this Tribunal also exemplifies dual nationalities *both* of which are effective. The relevant analysis entails close and sustained scrutiny of the nature of the “effectiveness” of the respective bonds to the United States and Colombia.

290. Claimants’ collective and individual testimony establishes that the effectiveness of the bond with Colombia, which is real and genuine, exclusively is determined because it is the situs of Claimants’ business. Most other cultural, social, and educational effective links with Colombia have been minimized to bare essentials, mitigated, or

dismissal even under the ICSID Art. 25 strictures for the simple reason that the dual nationality status was that of a third State and did not concern the contracting States under the BIT. The Tribunal ignored this critical fact and also refrained from engaging in any Art. 25 analysis. Indeed the Award does not even in passing reference the Article. Similarly, it does not entertain analysis of awards interpreting Article 25. Instead, the Tribunal reasoned that because Claimant resided in the United States and under Peruvian law the venue of the registered address is determinative of “specific rights by that person ... [Claimant] may not claim the protection under the BIT [Peru-Paraguay].”

²⁹¹ *Id.* ¶ 61. (emphasis supplied)

altogether eviscerated. While Claimants certainly recognize the many great cultural contributions that the fine State of Colombia has to offer, and they indeed also share in that rich culture, their preference has been to embrace and to emphasize their U.S. heritage.

291. Accordingly, their physical presence in Colombia notwithstanding, the *nature* of that principal place of residence matters. A helpful example of this proposition and of its attendant analysis is found in the testimony of Enrique Carrizosa and Felipe Carrizosa with respect to their respective children's education.²⁹²

292. Claimants' children attend the *Colegio Nueva Granada* (f/k/a *The Anglo-American School*).²⁹³

293. This school has a preparatory curriculum for U.S. colleges.²⁹⁴ It offers "Advanced Placement" ("AP") courses for which U.S. colleges grant credit.²⁹⁵ The majority of classes are taught

²⁹² Alberto Carrizosa's testimony in this respect is silent because he has no children.

²⁹³ See Enrique Carrizosa Witness Statement (CWS-3) ¶ 31 and Felipe Carrizosa Witness Statement (CWS-2) ¶ 27.

²⁹⁴ The school's website address is <https://cng.edu/>. Notably, the website is in the English language.

²⁹⁵ *Id.*

in the English language.²⁹⁶ Consequently, even though *Colegio Nueva Granada* is in Colombia, qualitatively its predominant substantive and cultural links primarily are with the U.S., its history, language, culture, and cultural traditions.

b. *Ballantine v. The Dominican Republic*

294. The admitted paucity of treaty-based arbitral awards construing the dominant and effective test in the context of public international law of investment protection was noted in a case filed in September 2014 arising from alleged violations of the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA) captioned: *Ballantine v. The Dominican Republic*.²⁹⁷ Despite the passage of five years, that proceeding remains pending. Procedural Order No. 2, entered on April 21, 2017, hardly two years ago, offers some valuable insights that comport with the expansive qualitative construction of the dominant and effective test at issue before this Tribunal.

²⁹⁶ *Id.*

²⁹⁷ *Michael Ballantine v. The Dominican Republic*, PCA Case No. 2016-17 (CAFTA-DR) (UNCITRAL) (September 2014). Notably, counsel for respondent in *Ballantine v. The Dominican Republic* is the same as counsel for the Republic of Colombia in the case before this Tribunal.

295. Because Article 10.28 of the CAFTA-DR is identical in every respect, except for the use of the word “national” in lieu of “citizen,” to the definition of “investor of a Party” in Art. 12.20 of the TPA, the methodology that the Tribunal identifies as appropriate, although it does not openly elaborate on the issue, certainly is here applicable.²⁹⁸

296. Upon noting that “the Parties agree that the CAFTA-DR does not articulate any standard for [the] determination [of *dominant and effective nationality*] and agree that reference to international law is appropriate ... [t]he Tribunal notes that this appears thus to be a question of first impression where a provision which addresses this standard would have to be interpreted in the investor-State-investment-treaty-context.”²⁹⁹

²⁹⁸ Article 10.28 of the CAFTA-DR states:

investor of Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality; (emphasis in original)

²⁹⁹ Procedural Order No. 2 ¶ 22.

297. In paragraph number 25 of the Procedural Order, the Tribunal engages in its own exegesis of *Nottebohm* and the *Mergé* Case, although somewhat abbreviated in scope and depth.³⁰⁰ Citation to paragraph number 25 of Procedural Order No. 2 compels reference in its entirety:

25. The Tribunal notes that it is clear from the text of this provision that the CAFTA-DR allows an ‘investor of a Party’ to have dual nationality. Thus, the Tribunal opines that the key question before it is to ascertain the meaning of the words ‘dominant and effective’ in determining the nationality of the Claimants in the context of the CAFTA-DR. The Tribunal considers that the elements analyzed by other tribunals (even if not involved in interpreting investment treaty provisions) will certainly be relevant to the Tribunal’s analysis, including, [i] among others, the State of habitual residence, [ii] the circumstances in which the second nationality was acquired, [iii] the individual’s personal attachment for a

³⁰⁰ In footnote 27 of paragraph number 25 of Procedural Order No. 2 the Tribunal makes clear its reliance on *Nottebohm* and *Mergé*.

particular country, [iv] the center of the person's economic, social and family life.³⁰¹

298. The Tribunal observed that any comprehensive interpretation of the dominant and effective test would need to be rooted in the factual particularities of the case before it. It specifically observed having to examine (i) “the immediate context” of the factual matrix, (ii) Claimants’ “acquisition of Dominican nationality,” (iii) the “asserted reasons for acquiring that nationality,” (iv) “the facts surrounded by the investment” at issue, (v) “the conduct of the host-State *vis-à-vis* the [Claimants], (vi) Claimants’ conduct with respect to the host State, and (vii) “the evidence concerning the facts previous to the date of filling for arbitration.”³⁰²

299. Application of these factors here makes clear that the U.S. and not Colombia constitutes Claimants’ dominant and effective citizenship.

300. In *Ballantine* the majority of the Tribunal elected to deny Respondent’s request for bifurcation upon noting that the factors to be considered and “in the circumstances of the present case, the facts concerning the Objection

³⁰¹ *Id.* ¶ 25.

³⁰² *Id.* ¶¶ 26-27.

appear to be intertwined with those concerning the merits, which would justify hearing them together.”³⁰³

301. Even though it is somewhat of a challenge to glean a pristine narrative of the factual record before the Tribunal, it is plain that *Ballantine* concerns a case of *voluntary naturalization*, oddly in connection with the host State. This fact alone renders it poles apart from the case before this Tribunal.

302. Claimants in this case did not undergo any naturalization process. For this reasons they have been U.S. citizens from the time of birth and educated in the ways and traditions of the United States since birth. U.S. citizenship and the ways of American culture did not visit them as adults or young adults. This uncontested fact matters. Claimants enjoy a disposition and lifestyle to which they have adhered from their formative years until the present.

303. The testimony before this Tribunal also asserts that Claimants shared the expectation that the TPA would protect their investment in Colombia.³⁰⁴

³⁰³ *Id.* ¶ 28.

³⁰⁴ *See* Alberto Carrizosa Witness Statement (CWS-1) ¶ 92, Felipe Carrizosa Witness Statement (CWS-2) ¶ 61, and Enrique Carrizosa Witness Statement (CWS-3) ¶ 70.

1. Claims Tribunal Authority on Dominant and Effective Nationality

304. Occupying a space different from the international law of diplomatic protection and closer to that of investment protection are the Iran-U.S. claims tribunal cases. One of the first cases to adjudicate the dominant and effective standard in the context of dual nationality was *Nasser Esphahanian v. Bank Tejarat*³⁰⁵.

305. That proceeding concerned a dual national of the United States and Iran who brought a claim against a bank for dishonoring a check. Analytically the Tribunal at the very outset rejected a plain meaning textual contention that both parties asserted concerning the interpretation of the claims settlement declaration.³⁰⁶ Claimant had contended that “the

³⁰⁵ *Nasser Esphahanian v. Bank Tejarat*, (Award), IUSCT Case No. 157 (31-157-2) (March 29, 1983).

³⁰⁶ Article XI(1) of the Claims Settlement Declaration in pertinent part provides:

1. An International arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States

Article VII(1) of the Declaration provides in pertinent part that a ‘national’ of Iran or of the United States, as the case may be, means

text is clear and unambiguous in that it applies to all nationals of the United States and of Iran, including dual nationals, without restriction.”³⁰⁷ Respondent in part asserted that “Iran does not recognize dual nationality and could not be presumed to have accepted it when the Declaration was signed.”³⁰⁸

306. In rejecting both claims as facile and self-serving, the Claims Tribunal canvassed what it understood to be “contemporary” legal literature on the subject of dual nationality and the applicable standard, together with the extent to which the principle of dominant and effective nationality comported with the structure of the Algiers Declarations, as well as the circumstances surrounding the conclusion of that declaration.³⁰⁹

(a) a natural person who is a citizen of Iran or the United States

³⁰⁷ *Esphahanian v. Tejarat*, *supra* note 305, ¶ 19.

³⁰⁸ *Id.* ¶ 20.

³⁰⁹ *Id.* ¶¶ 38-41.

It was noted that fifty-two U.S. nationals were seized in Tehran and at that time a number of plaintiffs secured court attachments concerning Iranian assets located in the United States. It was within such factual framework that the governments of the United States and Iran agreed to substitute the jurisdiction of the claims tribunal for the jurisdiction of Iranian and United States courts with respect to disputes that had previously constituted the subject matter of litigation in the national courts of both countries. *Id.* ¶ 41.

307. Upon so proceeding the Claims Tribunal observed that “[t]here is a considerable body of law, precedence and legal literature, analyzed herein, which leads to the conclusion that the applicable rule of international law is that of dominant and effective nationality.”³¹⁰ The Claims Tribunal studiously crafted the jurisdictional issue before it as presenting a determination of whether Claimant’s “factual connections with the United States ‘in the period preceding, contemporaneous with and following’ his naturalization as a United States citizen [are] more *effective* than his factual connections with Iran during the same period?”³¹¹

308. Even from the very framing of the issue the Claims Tribunal’s analysis begins to be illustrative and analytically helpful for present purposes. The jurisdictional issue as framed identifies a “*more effective than*” standard.³¹² The term “more effective” that the Claims Tribunal employed bespeaks a qualitative analysis of the nature and kind of connections to the States at issue, that also is not absolute in character.

309. Careful consideration was accorded to this test, which consisted in more than just a

³¹⁰ *Id.* ¶ 24.

³¹¹ *Id.* ¶ 48 (emphasis supplied), the Claims Tribunal *citing to Nottebohm* [1955] I.C.J. Rpts. at 24.

³¹² *Id.* ¶ 48.

surface enumeration or counting of “relevant” contacts. The Claims Tribunal’s holding that Claimant’s most effective and, therefore, dominant nationality was that of the United States was reached despite observing two very relevant facts of record.

310. First, it was established that Claimant’s “contacts with Iran since he went to the United States to study have been significant, but much more limited.”³¹³

311. As part of this analysis it was noted that “[a]side from contact with relatives still living in Iran, [i] he has made many visits to Iran, [ii] has retained his Iranian passport and [iii] ‘most important, had his principal residence there for approximately nine months of each of the years 1970-77 [iv] where his family lived [v] while the children attended the American school in Tehran.”³¹⁴

312. The record evidence also established that Claimant “operated out of Iran” and dedicated approximately “one-third of his time” to that jurisdiction.³¹⁵ Along these lines, the record additionally demonstrated that Claimant’s family annually returned to the United States for

³¹³ *Id.* ¶ 50.

³¹⁴ *Id.* ¶ 50.

³¹⁵ *Id.*

summer vacation and “maintained a *secondary* residence there.”³¹⁶ A part of Claimant’s taxes, that portion attributed to his work in Iran, were paid to the Government of Iran.³¹⁷ In fact, “[a]ll of [Claimant’s] salary and reimbursement from his employer were paid to him in Iran in rials ..., most of which he invested in certificates of deposit, which were the source of funds for the dishonored check that [was] the basis of [his] claim.”³¹⁸

313. A second critical finding that did not deter the Claims Tribunal from holding that the more effective links were with the United States and not Iran, was that Claimant likely may have been using his Iranian nationality “*to disguise* the true extent of [the ownership interest of a subsidiary of a U.S., Houston based entity].”³¹⁹ The Claims Tribunal’s understandable concern with this fact was expressed because, as it stated, it “is the kind of use of a secondary nationality

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* ¶ 51.

It is significant that as to this narrow but important issue the Tribunal did not engage in a “but for” causation test that may have led it to conclude otherwise. A plain meaning interpretation of the factual narrative provided in the opinion does set forth a sufficient factual basis from which to conclude that “but for” this citizenship status Claimant likely would not have been employed.

that may cause the Tribunal to deny a claim.” It did not do so because apparently “there [was] ‘no evidence that his allowing his employer to use him as its nominee shareholder was a substantial part of his job thus, it did not seem that the Claimant used that *subterfuge* in a *significant* way to obtain benefits available only to Iranian nationals for which he is now claiming.’”³²⁰

314. The Claims Tribunal’s consideration of these two sets of factors compellingly suggests a qualitative approach. It tested the nature of the context.

315. Similarly illustrative are the actual contacts that persuaded the Tribunal to find that Claimant’s more effective contacts were with the United States. A number of these factors were listed.³²¹ This listing of factors notwithstanding,

³²⁰ *Id.* ¶ 51.

³²¹ The Tribunal observed:

[Claimant’s] contacts with the United States were long and consistent. [Claimant] has resided in the United States since 1946. He served in the U.S. Armed Forces. He became an American citizen in 1958. He is married to an American woman, and they have two children who are American, speak no Farsi and have been educated solely in American schools. Except for a limited time during the period 1970-78 ..., [Claimant’s] investments have all been in the United States. He bought four residences in the United States between

the Claims Tribunal accorded particular consideration in reaching its determination that Claimant's dominant and effective nationality was that of the United States, to one factor. Analyzing all of the factual premises attaching to both nationalities in their totality, it was concluded that "all of [Claimant's] actions relevant to this claim could have been done by a non-Iranian."³²²

316. This same conclusion applies to the case at hand. The testimony before this Tribunal establishes that most of all of Claimants' passive assets (i.e., non-business revenue producing assets) are located (i) outside of Colombia and (ii) principally in the United States.³²³ The testimony is equally compelling in asserting that but for the location of the business in Colombia, Claimants would live in the United States, much along the lines of the *Micula* Tribunal's analysis.³²⁴

1957 and 1979. Since becoming a citizen of the United States, [Claimant] has paid U.S. taxes and has voted in U.S. elections, even during the years 1970-78 when he was outside the United States most of the year.

Id. ¶ 49.

³²² *Id.* ¶ 53.

³²³ See Alberto Carrizosa Witness Statement (CWS-1) ¶¶ 38-44, Felipe Carrizosa Witness Statement (CWS-2) ¶¶ 32-34, and Enrique Carrizosa Witness Statement (CWS-3) ¶¶ 33-37.

³²⁴ *Supra* ¶ 273 citing to *Micula* note 286.

317. *Attaollah Golpira v. Iran*³²⁵ almost was decided contemporaneously with *Esphahanian v. Iran*. It thus shares in the distinction of being one of the first cases to contribute a substantive standard to the dominant and effective nationality test, albeit also in the context of a Claims Tribunal. The very first sentence of the Claims Tribunal’s Chamber Two applicable law jurisdictional issue analysis references the *Esphahanian* case as having been signed “today,” the same date on which the *Golpira* case’s opinion was authored.

318. The Claims Tribunal in *Golpira* ruled in favor of Claimant on jurisdiction, finding that his dominant and effective nationality was that of the United States, but in favor of Iran on the substantive claim alleging expropriation. The jurisdictional ruling, much along lines of *Esphahanian*, framed the jurisdictional issue before it as whether “*Golpira*’s factual connections with the United States ‘in the period preceding [1953]³²⁶ contemporaneous with [February 1964]³²⁷ and following’ his naturalization as a United States citizen [February 1964 through March

³²⁵ *Attaollah Golpira v. The Government of the Islamic Republic of Iran*, IUSCT Case No. 211 (Award No. 32-211-2) (March 1983).

³²⁶ *Id.* ¶ 6.

³²⁷ *Id.* ¶ 7.

1983]³²⁸ were more effective than his factual connections with Iran during the same period?”³²⁹ Here too a qualitative analysis ensued.

319. Particularly telling is that Claimant in that case *also concerning a naturalization proceeding* (materially distinguishing it from the case before this Tribunal), had spent all of his formative years in Iran, which included high school, college, and medical school. (Also materially distinguishable from the case before this Tribunal.)³³⁰ In fact, it was at the age of twenty-six that “[Claimant] left Iran to intern in Jacksonville, Florida, the United States of America, arriving in 1953.”³³¹ Moreover, it was not until February 14, 1964, *eleven years after leaving Iran*, that Claimant “became an American citizen.”³³² Claimant also registered “both of his children with the consular section of the Iranian embassy in the United States in Washington soon after they were born.”³³³ There is no such analogue in the present case.

³²⁸ *Id.*

³²⁹ *Id.* ¶ 15 citing to *Nottebohm*.

³³⁰ *Id.* ¶ 6.

³³¹ *Id.*

³³² *Id.* ¶ 7.

³³³ *Id.* ¶ 11.

320. These contacts notwithstanding, the Claims Tribunal found sufficient grounds for the exercise of jurisdiction fundamentally on the strength of the following two paragraphs:

[Claimant's] two children have been educated exclusively in United States schools. [Claimant] has participated regularly in cultural, civic, and business activities in the United States. He is a registered voter in Maryland, and owns both residential and commercial real estate in the United States.³³⁴

[Claimant's] contacts with the United States were long and consistent. He has resided in the United States since 1953 and has practiced medicine in Baltimore, Maryland since 1958. He became an American citizen in 1964. Although *married to an Iranian*, they have two children who were born in the United States and have lived and been educated solely in the United States. His entire professional life and *virtually* all his investments have been centered in the United States. He owns both residential and commercial property in the United

³³⁴ *Id.* ¶ 8.

States. Since becoming a citizen of the United States, [Claimant] has paid U.S. taxes and has voted in U.S. elections.³³⁵

321. When read together, the totality of contacts and qualitative character of those contacts in *Espahanian* and *Golpira* compare very favorably to Claimants' contacts in this case and certainly invite a finding that the United States is Claimants' dominant and effective place of citizenship within the meaning of the TPA. Even the most surface review of paragraphs 6 and 16 of the *Golpira* case demonstrates that Claimants' contacts, collectively and individually, are at least as profound pursuant to any qualitative consideration of these bonds.

322. This favorable comparison is further bolstered where the particular facts of the case before this Tribunal are analyzed within the framework of the public international law of investment protection. In an age of economic globalization rather than a special Claims Tribunal with a very limited number of attendant policy considerations. Irrespective of the policy prism through which the facts material to any determination of the scope and quality of the dominant and effective nationality test is arrived at, Claimants' lifetime links and bonds with the

³³⁵ *Id.* ¶ 16 (emphasis supplied).

United States outstrip the litany of considerations framing both the *Esphahanian* and *Golpira* cases.

B. Claimants Amply Meet the *Ratione Voluntatis* Stricture as a Matter of Law and Fact

323. The case before this Tribunal meets the *ratione voluntatis* stricture. Indeed, consent is here present as both a matter of *pleading* and *proof*. The TPA contains two consent provisions that this Tribunal should consider. Both make clear that Colombia has consented to arbitrate investor-State disputes pursuant to the TPA. First, Article 10.17 (**Consent of Each Party to Arbitration**) in pertinent part reads:

1. *Each party consents to the submission of a claim to arbitrate under this Section in accordance with this Agreement.*

324. The qualifications to consent under Chapter 10 of the TPA are enunciated in Article 10.18 (**Conditions and Limitations of Each Party**).³³⁶

³³⁶ Citation to Article 10.18 in its entirety is compelled:

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first

acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damages.

2. No claim may be submitted to arbitration under this Section unless:

- (a) the claimants consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
- (b) the notice of arbitration is accompanied,
 - (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver and
 - (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and enterprise's written waivers

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 proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article

10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

4. (a) No claim may be submitted to arbitration:
- (i) for breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or
 - (ii) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C),
- if the claimant (for claims brought under 10.16.1(a) or the claimant or the enterprise (for claims brought under 10.16.1(b)) has previously submitted the same alleged breach to administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure.
- (b) For greater certainty, if a claimant elects to submit a claim of the type described in subparagraph (a) to an

325. None of the six qualifying factors to consent, as set forth in Article 10.18 of the TPA are here present, as more fully set forth below.

326. Notably, in addition to the tailor-made provisions offered by the contracting Parties pursuant to Chapter 12 of the TPA (**Financial Services**), additional basic protections are imported into Chapter 12 from other chapters of the TPA for the specific purpose of according those benefits to investors and investments in the financial services sector, as is here the case. Hence, the Parties to the TPA sought to provide expansive protections to Chapter 12 investments and investors beyond those detailed in that chapter. Article 12.1(2) expands the protection available under Chapter 12 by incorporating certain provisions under Chapter 10 into Chapter 12. Article 12.1(2) provides:

*Chapter Ten (Investment) and Eleven
(Cross-Border Trade in Services)
applied to measures described in
paragraph 1 only to the extent that*

administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, that election shall be definitive, and the claimant may not thereafter submit the claim to arbitration under Section B.

such Chapters or Articles of such Chapters are incorporated into this Chapter.

...

(b) Section B (Investor-State Dispute Settlement) of Chapter Ten (Investment) is hereby incorporated into and made a part of this Chapter solely for 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 Information Requirements), as incorporated into this Chapter.

327. Accordingly, Articles 10.5 to Articles 10.7 are incorporated into Chapter 12 of the TPA. Most importantly, however, the contracting Parties expressly imported into Chapter 12 the consent to arbitrate investor-State disputes available under Chapter 10 of the TPA.

328. It is necessary to underscore that Art. 10.2(1) clarifies the distinct protections available under Chapter 10 and Chapter 12. It states:

In the event of inconsistency between this Chapter and any other Chapter, the other Chapter shall prevail to the extent of the inconsistency.

329. The incorporation by reference of Chapter 10 is significant. This incorporation establishes, among other things, that the contracting-Parties:

- (i) **consented** to provide foreign investors and investments in the financial services sector with certain fundamental standards of protection made available to foreign investors under Chapter Ten that are additional to those provided for in Chapter 12; and
- (ii) **have consented expressly and unequivocally** to arbitrate investor-State disputes under Chapter 12 of the TPA.

330. This framework makes perfect rational sense because it clearly seeks to vest investors in the financial services sector with an equal panoply of protections as those accorded to other investors.

331. Consequently, the combined application of the relevant provisions of Art. 12, Art. 10, and customary international law, to treatment made available to investors and investments in the financial services sector, includes, among others, the following protection standards:

- (i) Fair and Equitable Treatment,
- (ii) Expropriation and Compensation,
- (iii) Most Favored Nation (“MFN”),
- (iv) National Treatment,
- (v) Effective Means, and
- (vi) Arbitration.

332. Article 12.3 of the TPA grants financial services investors the benefit of most favored nation treatment. Therefore, investors under Chapter 12 of the TPA may import substantive and procedural rights beyond those embodied in Chapters Ten and Twelve.

(i) The MFN Clause under Chapter 12 Expands the TPA’s Scope of Protection

333. The TPA has two relevant MFN clauses. Even though Claimants here only rely on the MFN clause contained in Art. 12.3, for interpretive purposes reference to the MFN clause set forth in Chapter 10 is helpful.

334. Article 10.4(2) reads:

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like

circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment.

335. Significantly, this provision contains a meaningful *restrictive* qualification at footnote 2. That provision reads:

For greater certainty, ‘with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments’ referred to in paragraphs 1 and 2 of Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B [of Chapter Ten], that are provided for in international investment treaties or trade agreements.³³⁷

336. The plain meaning of the Art. 10.4 MFN clause, as qualified by footnote 2, only contemplates the importation of *substantive* and not *procedural* rights. Therefore, a claimant whose claims do not concern the financial institutions sector, prosecuting its claims pursuant

³³⁷ Art. 10.4(2) n.2.

to Chapter 10 of the TPA is proscribed from availing itself of procedural standards of protection and rights accorded to any non-party pursuant to another investment treaty or trade agreement. The textual language of Article 10.4(2), at n.2 simply states as much. Its ordinary plain meaning imperative is unambiguous.

337. Claimants have filed this proceeding under Chapter 12. As set forth in the Request for Arbitration,³³⁸ Claimants are U.S. shareholders who held shares in GRANAHORRAR, a financial institution in Colombia. Neither of these propositions is nor can be contested. The MFN clause in Chapter 12 on which Claimants rely, in part, reads:

1. Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords to the investors, financial institutions, investment of investors in financial institutions, and cross-border financial service suppliers of any other Party or of a non-Party, in like circumstances.

³³⁸ See RFA 1, 2, 4, 5, 196-197, 204-206, 236.

338. Article 12.3(1) *does not* contain the qualifying restrictive language that attaches to Art. 10.4(2) in the form of that provision’s footnote 2. The two Articles (Art. 10.4(2) n.2 and 12.3(1)) are eminently reconcilable conceptually and practically. Even if they were not so, however, as previously observed, Art. 10.2 (**Relation to Other Chapters**) does provide that “[i]n the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.”

(ii) **Applicable Interpretative Canons**

339. It is common for investor-State Tribunals to interpret MFN clauses pursuant to the strictures off the Vienna Convention on the Law of Treaties (“VCLT”). By way of example, the Tribunal in *National Grid v. Argentina*³³⁹ in applying the VCLT observed:

As already stated above, the Tribunal will interpret the Treaty [Argentina-U.K. BIT] as required by the Vienna Convention. Article 31 of the Convention requires an international treaty to ‘be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of

³³⁹ *National Grid, Plc v. The Argentine Republic*, UNCITRAL, (jurisdiction) (June 2006).

the Treaty in their context and in light of its object and purpose.’ [citation omitted] As regards the intention of the parties, the approach of the Vienna Convention and of the ICJ is that ‘what matters is the intention of the parties as expressed in the text, which is the best guide to the more recent common intention of the parties.’ [citation omitted] The Convention does not establish a different rule of interpretation for different clauses. The same rule of interpretation applies to all provisions of a treaty, be they dispute resolution clauses or MFN clauses.³⁴⁰

340. Further, “[t]he tribunal observes that the MFN clause does not expressly refer to dispute resolution or for that matter to any other standard of treatment provided for specifically in the Treaty. On the other hand, dispute resolution is not included among the exceptions to the application of the clause. As a matter of interpretation, specific mention of an item

³⁴⁰ *Id.* ¶ 80.

Prof. Loukas Mistelis has proffered an Expert Opinion in this case, which is attached as CER-1 (“Prof. Mistelis Expert Report (CER-1)”). He addresses this practice in paragraphs 42-59. The Tribunal is respectfully invited to consult it.

excludes others: *expressio unius est exclusio alterius*.”³⁴¹

341. Application of these often-cited and well-known canons of the VCLT, Articles 31 and 32, indeed suggest rather compellingly that the MFN clause contained in Art. 12.3(1) is expansive

³⁴¹ *Id.* ¶ 82 with the following citation:

This interpretation is confirmed by the following statement on the general rules of application of the MFN clause in the *Encyclopedia of Public International Law*: ‘By its nature, the unconditional clause, unless otherwise agreed, attracts all favors extended on whatever grounds by the Granting State to the third state.’ R. Bernhardt (ed.), 8 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 411, 415 (1985).

Id. ¶ 82, n.67.

In *National Grid* the MFN clause was used for the importation of procedural rights to arbitration:

To conclude, the Tribunal considers that, in the context in which the Respondent has consented to arbitration for the resolution of the type of disputes raised by the Claimant, ‘treatment’ under the MFN clause of the Treaty makes it possible for UK investors in Argentina to resort to arbitration without first resorting to Argentine courts as is premised under the US-Argentina Treaty. Therefore, the Tribunal rejects this objection to its jurisdiction.

Id. ¶ 82.

and not restrictive, particularly with respect to the very qualification that narrows the scope of Art. 10.4(2), i.e., non-application of the MFN clause to procedural rights.

342. This construction of Art. 12.3(1) comports with Articles 31 and 32 of the VCLT, as well as with the Republic of Colombia's own practice post-*Maffezini*³⁴² of limiting when it has so elected, the scope of MFN clauses to apply only to substantive and not to procedural rights accorded to the investors and investments of non-parties. Prof. Mistelis points to two illustrative examples:

As the treaties entered into by Colombia after the *Maffezini* decision, it can be noticed that *some* of them provide a restriction to the application of the MFN clause:

(a) Agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (done at 17 May 2006) Article 4, para. 2

³⁴² *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (jurisdiction) (January 2000).

For greater certainty, it is further understood that the most favourable treatment referred to in the said paragraph does not encompass mechanisms for the settlement of investment disputes provided for in other international agreements related to investments concluded by the Party concerned. [citation omitted]

(b) Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia (signed 17 March 2010)

Article III

**National Treatment and
Most Favoured Nation
Provisions**

1. Each Contracting Party shall grant to the investments of investors of the other Contracting Party made in its territory, a treatment not less favourable than that accorded, in like circumstances, to investments of its own investors or to investments of investors of another third State, whichever is more favourable to the investor.

2. The most favourable treatment to be granted in like circumstances referred to in this Agreement does not encompass mechanisms for the settlement of investment disputes, such as those contained in Articles IX and X of this Agreement, which are provided for in treaties or international

investment agreements.
[citation omitted]³⁴³

343. Prof. Mistelis further clarifies that “[f]ollowing the case in *Maffezini v. Spain* some States started to change their MFN clauses and introduced certain restrictions and the UK-Colombia BIT, which was signed in 2010 but entered into force in 2014, is a typical example.”³⁴⁴

344. Therefore, in addition to the “plain meaning” textual interpretation of Art. 12.3(2), Colombia’s own practice demonstrates that when it elects to do so, Respondent in effect qualifies and restricts its MFN clauses by adding specific language, typically proscribing the importation of procedural rights.

345. It did so with respect to Art. 10.4(2) of the TPA, as well as in the two BITs immediately referenced above. The absence of *any* qualifying restrictive language attaching to the MFN clause contained in Art. 12.3(1) is testimony to this provision’s expansive scope and application. It is to be read as any other provision in a treaty.

346. General and conventional post-*Maffezini* treaty practice accords similar expansive

³⁴³ Prof. Mistelis Expert Report (CER-1) ¶ 33.

³⁴⁴ *Id.* ¶ 34.

treatment to MFN clauses absent clear and express provisions to the contrary.

347. Here as well Prof. Mistelis' Expert Opinion is instructive:

There seems to be a critical mass of cases where tribunals state that absent an express exclusion or other policy reasons, dispute settlement provisions are covered by the scope of an MFN clause. In my view, this line of cases suggests the current state of affairs.

It is therefore possible to argue that investors and investments falling within the scope of Chapter XII of US-Colombia FTA [TPA] are entitled to rely on the provisions contained under Article 12.3 of the same Treaty to import the dispute settlement provisions available under other similar treaties entered into by Colombia with third states.³⁴⁵

348. The reasoning provided for the use of MFN practice to import procedural rights, and in particular rights attendant to dispute resolution provisions, is sound. Procedural rights that

³⁴⁵ *Id.* ¶¶ 95-96.

provide investors with the ability to render substantive protections actually viable, and therefore applicable, cannot be meaningfully distinguished from substantive rights the objective of which is to protect investments.

349. The governing principle incident to both sets of rights are the same; namely, the protection of foreign investors and investments. Discriminating between these rights (substantive treaty protection and procedural rights to enforce such substantive treatment) would render the substantive protection meaningless by carving out its enforcement vehicle. This matters.

350. Here too Prof. Mistelis' Expert Opinion is helpful. He notes that "dispute settlement provisions by their very nature belong to the same category as substantive protections for foreign investors. In other words, the way a right is procedurally exercised is part and parcel of substantive protection."³⁴⁶

351. This reasoning finds ample resonance in investor-State awards.

³⁴⁶ *Id.* ¶ 92.

(iii) **The “All Matters” and the “Treatment” Standard**

352. In *Siemens A.G. v. The Argentine Republic*³⁴⁷ Claimant brought an action based upon the BIT between the then Federal Republic of Germany and the Republic of Argentina, which contained the jurisdictional predicate of submission of the dispute to local courts during an eighteen-month timeframe. In an effort to avoid this predicate, Claimant sought to import the procedural right of directly filing an arbitral claim without the condition precedent of applying for judicial recourse in local courts, pursuant to the BIT between Argentina and Chile.

353. There the Tribunal dismissed the jurisdictional objection that the MFN clause in the underlying BIT, which lacked any explicit qualifications, did not provide for the importation of procedural rights.³⁴⁸ Respondent further bolstered this assertion by arguing that Claimant’s reliance on *Maffizini* was inapposite because the MFN clause in that case was uniquely broad where the treaty at issue merely mentioned the word “treatment,” without more.

³⁴⁷ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8 (jurisdiction) (August 2004).

³⁴⁸ *Id.* ¶ 32-35.

354. The Tribunal rejected Respondent’s jurisdictional objection on this ground and in so doing observed:

The Respondent has argued that, in *Ambatielos*, administration of justice refers to substantive procedural rights like just and equitable treatment and not to purely jurisdictional matters. *The tribunal does not find any basis in the reasoning of the Commission to justify such distinction.* On the other hand, the tribunal finds that the Treaty itself, together with so many other treaties of investment protection has a distinctive feature special dispute mechanisms not normally opened to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through an MFN clause.³⁴⁹

355. The Tribunal further noted that its findings on this issue comports with *Maffezini* notwithstanding the broad “all matters subject to this Agreement” MFN clause in the *Maffezini*-Spain-Argentina BIT, and the “treatment” only scope contained in the Federal German Republic-

³⁴⁹ *Id.* ¶ 102.

Argentina BIT.³⁵⁰ In this regard it held “that the formulation is narrower but, as concluded above, it considers that the term “treatment” and the phrase “activities related to the investment” are sufficiently wide to include settlement disputes.³⁵¹

356. Similarly, in *AWG v. The Argentine Republic*,³⁵² the Tribunal found that Claimant, relying on Article IV of the Argentina-Spain BIT and a second Claimant placing reliance on Article III of the Argentina-UK BIT, were able to invoke more favorable procedural rights that Argentina afforded to France in the Argentina-France BIT, and allowed to perfect a claim without first meeting the condition precedent of having sought recourse to the local courts of Argentina.³⁵³

357. In explaining its holding the Tribunal reasoned that it found “no rule and no reason for interpreting the most-favored-nation treatment clause any differently from any other clause in the two BITs.”³⁵⁴ It was further explained that “[t]he language of the two treaties is clear. Applying the normal interpretational methodology to Article IV

³⁵⁰ *Id.* ¶ 103.

³⁵¹ *Id.*

³⁵² *AWG Group Ltd. v. The Argentine Republic*, ICSID Case No. ARB/03/19 (jurisdiction) (August 2006).

³⁵³ *Id.* ¶ 68.

³⁵⁴ *Id.* ¶ 61.

of the Argentina-Spain BIT, the tribunal finds that the ordinary meaning of that provision is that matters relating to dispute settlement are included within the term ‘all matters’ and that therefore [claimant] may take advantage of the more favorable treatment provided to investors in the Argentina-France BIT with respect to dispute settlement. Similarly, in the case of the Argentina-U.K. BIT, rights with respect to dispute settlement ‘regard’ the management, maintenance, use, enjoyment and disposal of an investment as stated in Article III of the Treaty; consequently, [different claimant] may also take advantage of the more favorable treatment in the Argentina-France BIT accords to French investors.”³⁵⁵

358. More specifically on the narrow issue of drawing differences without distinctions concerning substantive and procedural rights within the ambit of an unqualified MFN clause, the Tribunal observed:

After the analysis of the substantive provisions of the BITs in question, the Tribunal finds no basis for distinguishing dispute settlement matters from any other matters covered by bilateral treaties. From the point of view of the promotion and protection of investments, the stated

³⁵⁵ *Id.*

purposes of both the Argentina-Spain BIT and the Argentina-U.K. BIT, dispute settlement is as important as other matters governed by the BITs and is an integral part of the investment protection regime that the respective sovereign states have agreed upon. In this context, the Respondent further argues that this Tribunal should apply the principle of *ejusdem generis* in interpreting the BITs so as to exclude dispute settlement matters from the scope of the most-favored-nation clause, because the category ‘dispute settlement’ is not of the same *genus* as the matters addressed in the clause. The Tribunal finds no basis for applying the *ejusdem generis* principle to arrive at that result.³⁵⁶

359. The absence of any restrictive or qualifying language in the TPA invites a reasonable and expansive interpretation of the MFN clause to include procedural rights to arbitrate, as well as substantive rights under the theory that an intellectually rigorous analysis necessarily leads to the conclusion that the procedural rights to arbitrate are endemic to and cannot be severed from substantive protection and

³⁵⁶ *Id.* ¶ 59.

themselves are paradigmatically principles of investment protection of the highest order.

360. The Tribunals *Siemens*, *AWG*, and *National Grid* are not emblematic of outlier awards that memorialize an aprioristic view of an issue. To the contrary, in holding that procedural rights protect investments as do “substantive” protection standards, these Tribunals are adhering to the appropriate historicity attaching to the origins, formation, and transformation of MFN clauses.

361. That history, as alluded to in Prof. Mistelis’ Expert Opinion,³⁵⁷ suggests that the formation (origins) transformation, and contemporary development of MFN practice is one that seeks to create parity between claimants and host States pursuant to the inclusion of basic principles that contracting parties are familiar with and have agreed to as binding because they have extended these protections (both procedural and substantive) to non-parties in other instruments.

362. Tribunals finding that MFN clauses understandably reach both procedural and substantive protection tenets absent express limitations in the underlying treaty have provided the international community with well-reasoned

³⁵⁷ See Prof. Mistelis Expert Report (CER-1) ¶¶ 11-23.

premises that the Tribunal here is encouraged to consider and to adopt.

363. The Tribunal's analysis in *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*³⁵⁸ also is helpful. In that case in holding that the Argentina-Spain MFN clause served to import procedural rights from the Argentina-France BIT, the Tribunal informed its reasoning by subscribing to the foundational principle that it found "no rule and no reason for interpreting the most-favored-nation treatment clause any differently from any other clause in the two BITs."³⁵⁹ It further noted that "[t]he language of the two treaties is clear. Applying the normal interpretational methodology to Article IV of the Argentina-Spain BIT, the Tribunal finds that the ordinary meaning of that provision is that matters relating to dispute settlement are included within the term 'all matters' and that therefore [Claimant] may take advantage of the more favorable treatment provided to investors in the

³⁵⁸ *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17 (jurisdiction) (May 2006).

³⁵⁹ *Id.* ¶ 61.

Argentina-France BIT with respect to dispute settlement.”³⁶⁰

364. While the MFN clause in *Suez* was textually of the broadest kind because of the qualifying expansive language “in all matters,” and accompanied by a listing of particular exceptions, the Tribunal’s reasoning and holding in that case here applies. To find otherwise would be to construe the word “treatment” in Art. 12.2(1) other than in keeping with its “ordinary meaning” to suggest that according specific procedural rights in a treaty does not constitute a “treatment” or that somehow the grant of procedural rights does not constitute part of “[t]he process or manner of behaving towards or dealing with a person or thing [in this case a State].”³⁶¹

365. The word “treatment” in MFN clauses providing for that scope directly was addressed by the Tribunal in *Impreglio*.³⁶² In that case, as in *Suez*, the underlying Argentina-Italy BIT contained a very broad “all other matters” scope in its MFN clause, and allowed the Claimant (MFN clause-beneficiary) to import the more generous

³⁶⁰ *Id.*

³⁶¹ OXFORD ENGLISH DICTIONARY (Fifth Edition), first entry for the noun “treatment.”

³⁶² *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17 (Award) (June 2011).

procedural rights provided for in the Argentine-U.S. BIT.³⁶³

366. The Tribunal found that the broad “all matters” scope MFN clause rightfully vested Claimant with the right to the more favorable procedural treatment contained in the Argentine-U.S. BIT. This holding rested on three pivotal premises, all of which represent helpful considerations in determining the issues in the case at hand.

367. First, and understandably, considerable emphasis was placed on the body of authority addressing MFN clauses having the “all matters” scope. Here the Tribunal observed “that there is a massive volume of case-law which indicates that, at least when there is an MFN clause applying to ‘all matters’ regulated in the BIT, more favorable dispute settlement clauses in other BITs will be incorporated. Relevant cases are *Maffezini*, *Gas Natural*, *Suez* [I and II], and *Camuzzi*.”³⁶⁴

³⁶³ *Id.* ¶ 95.

The Argentine-U.S. BIT provided the investor with a range of options for the submission of dispute resolution ranging from domestic courts, and administrative tribunals, to perfection the claim directly in the context of international arbitration.

³⁶⁴ *Id.* ¶ 104. (citations omitted)

368. It further qualified this statement by underscoring that “at least one case in which the tribunal, despite the fact that the MFN clause covered ‘all matters,’ found this insufficient to make the clause applicable to the settlement. The case is *Berschader*, but it should be noted that one of the arbitrators strongly dissented on this point and that there were also some special elements which contributed to the outcome.”³⁶⁵

³⁶⁵ *Id.* ¶ 29, also citing to Separate Opinion of Prof. Todd Weiler, ¶¶ 15-25; *Berschader*, award on jurisdiction, ¶¶ 185-208:

Notably, the MFN clause at issue in *Berschader* stated that it would apply ‘particularly to Articles 4, 5 and 6,’ *i.e.*, fair and equitable treatment, non-expropriation and free transfer of funds, but did not include within this list Article 10 of the BIT, which addressed dispute resolution, and accordingly, the tribunal concluded that the ordinary meaning of ‘all matters covered by the present Treaty’ was not really that the MFN provision extends to all matters covered by the treaty. *Id.* ¶ 194. In addition, the tribunal noted that there had been no clarity in the jurisprudence at the time the BIT had been concluded as to whether arbitration clauses could be encompassed by MFN clauses, and thus, the Parties simply may not have contemplated this outcome. *Id.* ¶ 202. Finally, the tribunal considered evidence of BIT practice from the Soviet Union which demonstrated that it pursued a policy of never consenting to arbitration and BITs concerning questions

369. Second, the Tribunal took pains to analyze the term “treatment” as a self-contained standard separate and distinct from the “all matters” and rejected Respondent’s restrictive application of the *ejusdem generis* principle:

The Arbitral Tribunal is of the opinion that the term ‘treatment’ is in itself wide enough to be applicable also to procedural matters such as dispute settlement. Moreover, the wording ‘all other matters regulated by this Agreement’ is certainly also wide enough to cover the dispute settlement rules. The argument that the ejusdem generis principle would limit its application to matters similar to ‘investments’ and ‘income and activities related to such investments’ is not convincing, since the wording does not allow ‘all other matters’ to be read as ‘all similar matters’ or ‘all other matters of the same kind.’ Nor is the argument that an embracing concept like ‘all other matters’ would make the previously mentioned terms

whether an act of expropriation had occurred, which stemmed from that State’s particular views on sovereignty. In the tribunal’s view this ‘strongly suggest[ed]’ that the Soviet Union did not intend for the MFN clause to extend to dispute resolution issues. *Id.* ¶ 204.

‘investments’ and ‘income and activities related to such investments’ superfluous, since it is indeed not unusual in legal drafting to indicate typical examples even in provisions which are intended to be of general application.³⁶⁶

370. Along this same line of reasoning, now limited only to “treatment” scope MFN clauses, the Tribunal noted that “[e]ven in some – but not all – cases where the MFN clauses were less comprehensive [than the ‘all matters’ MFN scope clauses] and only provided for MFN *treatment* of investors and investments, the tribunals found this to be sufficient to cover dispute settlement. Cases in point are *Siemens*, *National Grid* and *RosInvest*.”³⁶⁷

371. As it disclosed with respect to the “all matters” MFN clauses, the Tribunal identified *Salini*,³⁶⁸ *Plama*, *Telenor*, and *Wintershall*,³⁶⁹ as cases addressing the “treatment” MFN scope holding that the importation of procedural rights

³⁶⁶ *Id.* ¶ 99. (emphasis supplied)

³⁶⁷ *Id.* ¶ 105. (citations omitted) (emphasis supplied)

³⁶⁸ *Salini v. Jordan*, *supra* note 157.

³⁶⁹ *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/04/14 (Award) (December 2008).

were proscribed.³⁷⁰ Hence, it cautioned that “[i]t appears from these awards that *some* tribunals have had rather *strong reservations* about the general development of the case law in this area. It is therefore clear that these cases remain controversial and that the predominating jurisprudence which has developed is in no way universally accepted.”³⁷¹

372. Third, the Tribunal candidly and rightfully expressed concern that questions so consequential as presumably the right of an investor to receive the procedural protection that a contracting State accords to a third State by virtue of an investment protection treaty, “*would in each case be dependent on the personal opinions of individual arbitrators.*”³⁷² Indeed, it characterized this possible state of affairs as “*unfortunate.*”³⁷³

373. The majority of the *Impregilo* Arbitral Tribunal’s descriptive constructive comments were accompanied by the commonsensical exhortation to avoid aprioristic opinion-based adjudications by “mak[ing] the determination on the basis of case

³⁷⁰ *Impregilo v. Argentine Republic*, *supra* note 362, ¶ 107.

³⁷¹ *Id.* (emphasis supplied)

³⁷² *Id.* ¶ 108. (emphasis supplied)

³⁷³ *Id.* (emphasis supplied)

law whenever a clear case law can be discerned” and in the context of each particular case.³⁷⁴

a. Authority Proscribing Application of “Treatment” MFN Clause Scope as to Procedural Rights

374. Review of the cases holding that a “treatment” scope MFN clause *does not* extend to procedural rights to arbitrate are materially different from the case before this Tribunal. Indeed, *Claimants urge the Tribunal to consult this authority.*

375. The Tribunal in *Salini* faced an issue foundationally different from the one that here concerns the Tribunal. In *Salini* the Italy-Jordan BIT did not provide for ICSID arbitration. In an effort to circumvent this provision Claimant sought to import ICSID jurisdiction from the Jordan-U.S. BIT and the Jordan-U.K. BIT. No such effort is here at issue.

376. In addition, the *Salini* Tribunal noted that Claimant did not offer *any* authority or practice suggesting that the “treatment” scope of the Italy-Jordan BIT was expansive so as to reach dispute settlement procedural rights that Jordan had extended to non-parties in similar trade or

³⁷⁴ *Id.* ¶ 108.

investment treaties.³⁷⁵ In the case before this Tribunal the very qualification to the MFN clause contained in Art. 10.4 was meant to limit that clause as to its reach with respect to procedural rights. As noted, no such qualification attaches to the Art. 12.3(1) MFN clause. When both provisions are read in *pari materia*, it follows that both the plain language and the parties' intent is for the clause in Art. 12.3 to be sufficiently broad to include procedural rights to arbitrate. This distinction is material and dispositive as to this point. It found no place in the *Salini* record.

377. Lastly, the Tribunal in *Salini* adopted an aprioristic jurisprudentially determined approach. Without engaging in *any* analysis, it determined that an MFN "treatment" scope clause simply cannot be construed to reach procedural rights to arbitrate contained in another treaty.

378. Underlying this conceptual conviction is the untested assumption that somehow procedural rights do not protect investments, or otherwise do so in ways that are theoretically and practically different from the manner in which treaty protection standards safeguard investments. This approach, by definition, carves

³⁷⁵ *Salini*, *supra* note 157, ¶ 118.

In this connection, the Arbitral Tribunal noted "[l]astly, Claimants have not cited any practice in Jordan or Italy in support of their claims."

out the possibility of engaging in a case-by-case adjudication based on the totality of all available evidence. It is fundamentally flawed.

379. *Telenor v. Hungary* is equally inapposite.³⁷⁶ The Tribunal in that case premised its denial of extension of a “treatment” scope MFN (Norway-Hungary BIT Art. IV) to reach procedural rights. The Tribunal’s analysis is, in large measure, based upon the *Plama v. Bulgaria analysis*.³⁷⁷ *Plama*, however, was decided based upon material factual issues that are not present in the case before this Tribunal. Indeed, the *Suez* case distinguishes *Plama*. Those very same distinguishing factors, except for the scope of the MFN clause (the least important as underscored by the very *Suez* Tribunal), apply to the case at hand and for this reason neither *Plama* nor *Telenor* are reliable.

380. Specifically, the *Suez* Tribunal noted as a “more important” [than the difference in scope of the MFN clause contained in the Spain-Argentina BIT] that the *Plama* Tribunal “was guided by the actual intent of the Contracting States. Indeed, subsequent negotiations between Bulgaria and Cypress showed the ‘two Contracting

³⁷⁶ *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15 (Award) (September 2006).

³⁷⁷ *Plama v. Bulgaria*, *supra* note 147.

Parties to the BIT themselves did not consider that the MFN provision extends to the dispute settlement provisions in other BITs.”³⁷⁸ With respect to this observation, the *Suez* Tribunal in addition stated that the Parties’ intent in *Plama* to limit the reach of MFN clauses “was in line with the fact that, at the time of the conclusion of the BIT, ‘Bulgaria was under a communist regime, which favored bilateral investment treaties and limited protection for foreign investors and very limited international dispute resolution provisions.’”³⁷⁹ Moreover, in *Plama* the *Suez* Tribunal further comments, “Claimant attempted to replace the dispute settlement provisions in the applicable Bulgaria-Cyprus BIT *in toto* by dispute resolution mechanisms ‘incorporated’ from another treaty.”³⁸⁰

381. Accordingly, the *Telenor* Tribunal’s considerable reliance on *Plama* renders its analysis both internally suspect and inapplicable to this case.³⁸¹

³⁷⁸ *Suez*, *supra* note 358, ¶ 63.

³⁷⁹ *Id.* (emphasis in original)

³⁸⁰ *Id.*

³⁸¹ The *Telenor* Tribunal in pertinent part states: “[t]his Tribunal wholeheartedly endorses the *analysis* and statement of principle furnished by the *Plama* tribunal.”

382. In addition, the analysis in *Telenor* suffers from the same methodological interpretive deficit as does the approach in *Salini*. In *Telenor* as well the Tribunal applies an aprioristic approach to the issue that is evident in the following proposition from that case that merits reading and re-reading:

It is one thing to stipulate that the investor is to have the benefit of MFN investment but quite another to use an MFN clause in a bid to bypass a limitation in the very BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.³⁸²

383. The objective of an MFN clause is precisely to import a more favorable treatment than that contained in the base treaty. As such, any practical exercise of an MFN clause, whether substantive or procedural, can always be characterized as an effort by one party “to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.” The untested assumption in this statement is that the term “treatment” somehow is inherently limited and cannot be used to extend to

³⁸² *Telenor*, *supra* note 376, ¶ 92.

a more favorable premise contained in another treaty. The proposition is tautological.³⁸³

(iv) The Financial Services Sector: MFN Consideration

384. An orthodox ordinary plain meaning interpretation of the term “treatment” is rendered all the more imperative where, as here, a claim is asserted pursuant to Chapter 12 of the TPA concerning the financial services sector. Mr. Olin Wethington has submitted an Expert Witness Statement (Report) in this case and directly speaks to this issue.³⁸⁴

385. Mr. Wethington, as more fully set forth in his Expert Witness Statement,³⁸⁵ explains

³⁸³ Significantly, in *Wintershall Aktiengesellschaft v. Argentine Republic*, CSID Case No. ARB/04/14 (Award) (December 2008) (holding that the term “treatment” on a plain meaning approach cannot be construed to import procedural rights because it is “not mention[ed] that the most-favoured-nation ‘treatment’ as to investments, and investment related activities, is to be in respect of ‘all relations’ or that it extends to ‘all aspects’ or covers ‘all matters in the treaty’”). *Id.* ¶ 162. The Tribunal applies so narrow a scope to the term “treatment” that it simply cannot even satisfy the rudimentary definition of the noun as contained in the *Oxford English Dictionary*. *See supra* note 361.

³⁸⁴ A true and correct copy of Mr. Olin L. Wethington’s Expert Witness Statement (“Report”) is here attached as CER-2.

³⁸⁵ Wethington Witness Statement (CER-2) ¶¶ 19-25.

his role as the lead negotiator of the Financial Services Chapter of the North American Free Trade Agreement's ("NAFTA") Financial Services Chapter 14 (NAFTA Chapter 14), after which Chapter 12 of the TPA is patterned.

386. In this connection he explains that he "assumed the role of lead negotiator of the Financial Services Chapter of the NAFTA, Chapter 14, covering the full scope of trade and investment in financial services, but with particular focus on the banking, securities, and insurance subsectors. Investment in non-financial sectors was negotiated within Chapter 11, the Investment Chapter. The lead negotiator on the Investment Chapter was one of my deputies."³⁸⁶

387. He further explains that his "primary responsibility as lead negotiator of the Financial Services Chapter was to formulate and achieve U.S. negotiating objectives. As such, [he] directed the NAFTA negotiations relating to the Financial Services Chapter sector, including the provision governing banking, securities and insurance. This extended to the provisions related to investment and operation within these sectors, including the provisions on national treatment and most-

³⁸⁶ *Id.* ¶ 20.

favoured-nation (MFN) protection in dispute resolution in the financial services.”³⁸⁷

388. Mr. Wethington confirms the importance of MFN clauses and the practical workings of these clauses in favor of investors and investments in the financial services sector. He opines that:

Much attention during the negotiation of the NAFTA Financial Services Chapter was focused on broadening the definition of ‘financial services’ to include *all* financial services sectors, not simply major financial sectors such as banking and securities. In addition, the U.S. negotiating team believed that certain guarantees were essential to the agreement – most importantly, the obligations to provide national treatment and most-favored-nation protection.³⁸⁸

389. In this connection he details the pivotal contributions of national treatment and MFN in this sector and illustrates the perception of U.S. negotiators concerning the scope and reach of MFN clauses as follows:

³⁸⁷ *Id.* ¶ 20.

³⁸⁸ *Id.* ¶ 25.

NAFTA's inclusion of both substantive and dispute resolution rights within the scope of the Chapter 14 MFN provision reflects the desire of the Parties to increase investment opportunities and protections. At the time, these broad MFN protections for financial services investors were viewed as critical in the aftermath of the sovereign debt crisis that had engulfed the Latin American region. Where the United States intends to limit the scope of MFN provision it expressly does so.³⁸⁹

390. In particular he explains that “[n]o such exclusions applicable to financial sectors are found in the NAFTA. For example, the MFN clause in the Albania-U.S. BIT provides an express exclusion for certain procedures for multi-lateral deals concerning World Intellectual Property Organization (“WIPO”) actions. In this same vein, the United States signed (but did not ratify) the Trans-Pacific Partnership, which included an MFN clause with an explicit limitation against the inclusion of investor-State dispute settlement procedural rights.”³⁹⁰

³⁸⁹ *Id.* ¶ 30.

³⁹⁰ *Id.*

391. As to the MFN clause here at issue in Art. 12.3(1) of the TPA he explains:

The MFN provision in the financial services chapter of the Colombia-U.S. TPA should likewise be broadly construed to include both substantive and dispute resolution rights. The language in TPA Article 12.3(1) is identical to NAFTA Article 1406, except that it uses the term ‘suppliers’ instead of ‘providers’:

1. Each Party shall accord to investors of another Party, financial institutions of another Party, investments of investors in financial institutions, and cross-border financial service suppliers of another Party treatment no less favorable than that it accords to the investors, financial institutions, investments of investors in financial institutions, and cross-border financial service suppliers of any other Party or of a non-Party, in like circumstances.

Just as with NAFTA Article 1406, Article 12.3 of the TPA does not

include any express limitations on the scope of the MFN provision. If the United States and Colombia had wanted to limit the scope of the MFN provision in the financial services chapter, they would have done so.

Indeed, this is the approach the United States and Colombia took in the TPA. Footnote 1 of the MFN clause in Article 10.4 of the TPA governing protections for **non-financial** services investments *does* expressly exclude certain dispute resolution rights as follows:

For greater certainty, treatment 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments' referred to in paragraphs 1 and 2 of Article 10.4 *does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements* (emphasis supplied).

U.S. financial services investors covered by the limitation-free MFN provisions in Chapter 12 of the TPA and its counterpart Chapter 14 of NAFTA are not subject to the limitation found in Article 10.4 of the TPA.

Although the TPA contains a three-year statute of limitations for general investor-State arbitration claims, the Republic of Colombia has granted a more favorable five-year limitations period to all Swiss investors pursuant to the Colombia-Switzerland bilateral investment treaty. Thus, pursuant to the provisions of TPA Article 12.3, U.S. investors are entitled to enjoy the five-year statute of limitations term for any investment disputes against Colombia under the TPA.³⁹¹

392. Mr. Wethington's testimony is significant because the NAFTA, as he points out, has been used as a model for subsequent Free Trade Agreements. The U.S.-Colombia TPA is no exception. The TPA not only draws structures and provisions from the NAFTA but also similar, if not altogether identical, actual wording as well.

³⁹¹ *Id.* ¶¶ 31-35.

393. Significantly, Colombia's treaty practice is much in line with the well-established treaty drafting approach that Mr. Wethington references. Its treaty practice is eloquent enough. By way of example, in instances where Colombia deems necessary to limit the scope of application of MFN clauses can be found beyond Chapter 10 of the TPA. Illustrative is, the Protocol attached to the Colombia-Switzerland BIT provides:

Ad Article 4 paragraph 2

(2) For greater certainty, it is further understood that the most-favourable treatment referred to in the said paragraph does not encompass mechanisms for the settlement of investment disputes provided for in other international agreements related to investments concluded by the party concerned.

394. An ordinary plain meaning VCLT approach establishes that the United States and Colombia expressly agreed to arbitrate investor-State disputes arising out of the TPA. Indeed, Article 12.1(2)(a)(b) incorporates substantive protections standards (Art. 12.1(2)(a)) and dispute settlement procedural rights (Art. 12.1(2)(b)) from Chapter Ten.

395. For the sake of completeness only, and in an abundance of caution, Claimants also assert that consent *itself*, and not just more favorable dispute resolution treatment, can be imported by operation of the MFN clause pursuant to Art. 12.3(1) of the TPA. As Mr. Wethington points out, in the agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, Colombia in Art. 11(5) agreed that “[a]n investor may not submit a dispute for resolution according to this Article if more than five years have elapsed from the date the investor first acquired or should have acquired knowledge of the events giving rise to the dispute.”

396. The incorporation of the five-year limitation period pursuant to Art. 12.3(1) of the TPA further provides a cognizable independent additional basis for consent.³⁹²

³⁹² See, e.g., *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005 (jurisdiction) (October 2007), ¶¶ 131-135; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20 (jurisdiction) (July 2013), ¶¶ 22-23; *Austrian Airlines v. The Slovak Republic*, UNCITRAL Case (Award) (October 2009), ¶¶ 22-23, citing to *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of December 12, 1996, Separate Opinion of Judge Higgins (I.C.J. REPORTS, 1996), ¶ 35; *National Grid plc v. Argentine Republic*, UNCITRAL Case (jurisdiction) (June 2006), ¶ 80; Prof. Mistelis Expert Report (CER-1) ¶¶ 97-99; and C. SCHREUER ET AL., THE ICSID

C. Claimants Amply Meet the *Ratione Temporis* Stricture as a Matter of Law and Fact

397. *Ratione Temporis* is not an issue in this case.

398. Claimants, Alberto Carrizosa, Felipe Carrizosa, and Enrique Carrizosa, as here demonstrated, are U.S. citizens by birth.³⁹³ Unlike cases where abuse of process attaches to “single-purpose” Claimants who engage in treaty-shopping within timeframes during which they knew or should have known of an event that would trigger a possible proceeding based on alleged violations of treaty protection standards, no such averment can be credibly advanced here.

399. The claim asserted in the present proceeding matured on June 25, 2014 when the Constitutional Court denied the Council of State’s Motion to Vacate the Constitutional Court’s Opinion (C-25).³⁹⁴ That date represents the

CONVENTION—A COMMENTARY 248 (Cambridge University Press, 2nd ed.).

³⁹³ *Supra* ¶ 204, Alberto Carrizosa Witness Statement (CWS-1) ¶¶ 5-6, Felipe Carrizosa Witness Statement (CWS-2) ¶¶ 6-8, and Enrique Carrizosa Witness Statement (CWS-3) ¶ 2.

³⁹⁴ *See* Constitutional Court’s Opinion dated June 25, 2014 (C-26). The Constitutional Court in paragraph 2.2.1 and 2.2.2 establish that Council of State’s Motion for Annulment filing was a day late. However, the arguments on which the

exhaustion and end to all judicial labor giving rise to this action. No treaty-shopping based upon Claimants' U.S. citizenship status, or otherwise, is thus possible.

400. The TPA was signed on November 22, 2006. It entered into force on May 15, 2012. Therefore, the dispute before this Tribunal became ripe and accrued approximately two years *after* the subject treaty became a legally binding obligation on the contracting Parties. The common *ratione temporis* violation pursuant to which a claim accrues prior to the time at which the purported operative treaty comes into force and becomes a binding obligation on the contracting States is not here present.

401. The testimony of Claimant, Alberto Carrizosa, provides that by October 2, 1998 (the date of the Cure Notice)³⁹⁵ “[he] owned and controlled a 13.5797% equity interest in GRANAHORRAR.”³⁹⁶ As part of that testimony Mr. Alberto Carrizosa has attached his Composite Exhibit 2 to his Witness Statement a Shareholders Registry filed with the Chamber of Commerce of Bogotá, Colombia.

Council of State based its appeal, coincided with those formulated by GRANAHORRAR's shareholders. Therefore, they will be analyzed by the Constitutional Court.

³⁹⁵ See RFA at 5.

³⁹⁶ Alberto Carrizosa Witness Statement (CWS-1) ¶ 52.

402. The testimony of Claimant, Enrique Carrizosa, provides that by October 2, 1998 (the date of the Cure Notice)³⁹⁷ “[he] owned and controlled a 13.3420% equity interest in GRANAHORRAR.”³⁹⁸ As part of that testimony Mr. Enrique Carrizosa has attached his Composite Exhibit 2 to his Witness Statement a Shareholders Registry filed with the Chamber of Commerce of Bogotá, Colombia.

403. The testimony of Claimant, Felipe Carrizosa, provides that by October 2, 1998 (the date of the Cure Notice)³⁹⁹ “[he] owned and controlled a 13.3353% equity interest in GRANAHORRAR.”⁴⁰⁰ As part of that testimony Mr. Felipe Carrizosa has attached his Composite Exhibit 2 to his Witness Statement a Shareholders Registry filed with the Chamber of Commerce of Bogotá, Colombia.

404. More importantly, however, for purposes of a *ratione temporis* determination, on November 1, 2007 the Council of State issued its judgment in favor of Claimants and against Colombia.⁴⁰¹ That Judgment represents

³⁹⁷ See RFA at 5.

³⁹⁸ Enrique Carrizosa Witness Statement (CWS-3) ¶ 42.

³⁹⁹ See RFA at 5.

⁴⁰⁰ Felipe Carrizosa Witness Statement (CWS-3) ¶ 38.

⁴⁰¹ See RFA ¶ 153, C-22.

Claimants' investment in its then monetized form.⁴⁰² The Constitutional Court reversed the Council of State's Judgment on May 26, 2011. As stated immediately above, that ruling became final on June 25, 2014.

405. The Request for Arbitration in this proceeding was filed on January 24, 2018, i.e., three years and seven months (213 days) from the maturation of the last element rendering these claims ripe. Consonant with the analysis set forth in the *ratione voluntatis* section of this Memorial, Claimants have exercised their right pursuant to Art. 12.3(1) of the TPA to invoke the five-year limitations provision contained in the agreement between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments in Art. 11 paragraph 5 of that treaty.

406. The *ratione temporis* stricture is here met.

D. Claimants Amply Meet the *Ratione Materiae* Stricture as a Matter of Law and Fact

407. Article 12.20 defines financial institution as "any financial intermediary or other enterprise that is authorized to do business and

⁴⁰² C-22.

regulated or supervised as a financial institution under the law of the Party in whose territory it is located.” That same Article further defines “financial institution of another Party” as “financial institution, including a branch, located in the territory of a Party that is controlled by persons of another Party.”

408. Similarly, Art. 12.20 in defining investment explicitly references the Article 10.28 definitions with the exception of “loans” and “debt instruments.” Neither exception is here applicable. In turn, Article 10.28 provides a fairly standardized broad definition of investment as follows:

investment it means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans [citation omitted];

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; [citations omitted] and

(h) other tangibles or intangibles, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

409. As designated by the word “include” this listing is not intended to be exhaustive.

410. Claimants, as set forth in the Request for Arbitration⁴⁰³ and elsewhere⁴⁰⁴ owned shares in GRANAHORRAR.

411. Alberto Carrizosa owned and controlled a 13.5797% equity interest in GRANAHORRAR, through the following six companies:

- a. Asesorías e Inversiones C.G. S.A. had a 4.1446% shareholder interest.

The Shareholders Registry of Asesorías e Inversiones C.G. S.A. shows that I acquired 825,405 shares.

- b. Exultar S.A., had a 2.6396% shareholder interest.

The Shareholders Registry of Exultar, S.A., shows, on page 10, the acquisition of 30,000 shares from Industrias y Construcciones Ltda. Later, I acquired additional 6,000 shares in 1992, and on December 23, 1997, 46,024 shares.

- c. Compto S.A., had a 3.2828% shareholder interest.

The Shareholders Registry of Compto, S.A. reads: “acquired from Isabel

⁴⁰³ See RFA ¶¶ 8, 16-40.

⁴⁰⁴ See, *supra* ¶¶ 401-403, *infra* ¶¶ 411-417.

Zarate”, on March 15, 1991, 32,000 shares. Later I acquired 466,157 shares, on December 23, 1997.

- d. Inversiones Lieja LTDA, had a 2.3769% shareholder interest.

The Shareholders Registry of Inversiones Lieja S.A. shows that I acquired 456,949 shares, once the company was transformed to a S.A. The company was older and I was member of Inversiones Lieja, before 1998.

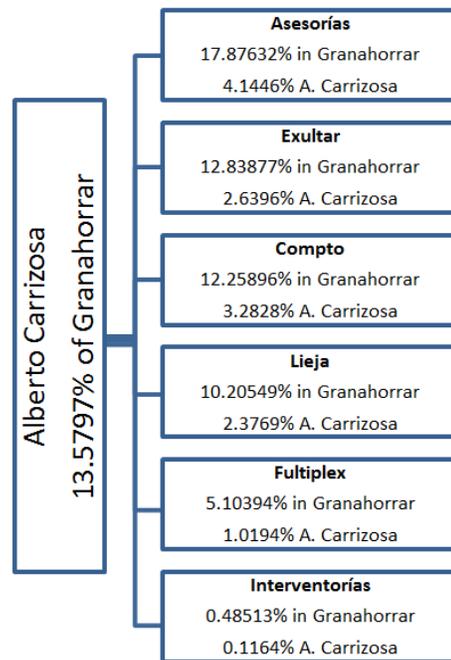
- e. Fultiplex S.A., had a 1.0194% interest.

In the Shareholders Registry of Fultiplex, S.A., at page 17, it reads: “acquired from Gloria Afanador Villegas”, on December 23, 1997, 291,253 shares.

- f. I.C. Interventorías y Construcciones LTDA, had a 0.1164% interest.

The Shareholders Registry of I.C. Interventorias y Construcciones Ltda., on page 05, shows that I acquired a total 144,000 shares between 1991 and May 30, 1997.

412. Here below is a visual summary of Alberto Carrizosa’s participation in GRANAHORRAR through the above-mentioned six corporations.



413. Enrique Carrizosa owned and controlled a 13.3420% equity interest in GRANAHORRAR, through the following six companies:

- a. Asesorías e Inversiones C.G. S.A., which owned and controlled a 4.1254% interest.

The Shareholders Registry of Asesorías e Inversiones C.G. S.A., shows that I acquired 821,261 shares, once the company was transformed to

a S.A., on November 2001. The company was older and I was member of Asesorías e Inversiones C.G., since 1997

- b. Exultar S.A., which owned and controlled a 2.5943% interest.

The Shareholders Registry of Exultar, S.A., shows, on page 9, the acquisition of 30,000 shares from Humberto Zarate Sanchez. Later, I acquired 6,000 shares in 1992, and by December 23, 1997, records shows that I owned 80,616 shares.

- c. Compto S.A., which owned and controlled a 3.1887% interest.

The Shareholders Registry of Compto, S.A., on page 9 reads: “acquired from Isabel Zarate”, on March 15, 1991, 30,000 shares. On July 18, 1992, I acquired 2,000 shares. Later on December 23, 1997 I acquired 451,890 shares.

- d. Inversiones Lieja LTDA, which owned and controlled a 2.3591% interest.

The Shareholders Registry of Inversiones Lieja S.A., shows that I acquired 453,524 shares, once the company was transformed to a S.A. The company was older and I was

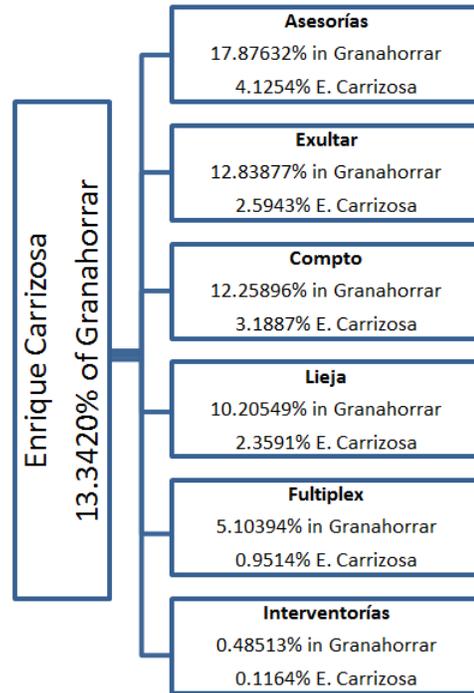
member of Inversiones Lieja, before 1998.

- e. Fultiplex S.A., which owned and controlled a 0.9514% shareholder interest.

In the Shareholders Registry of Fultiplex, S.A., on page 21, reads: "E.P. 12.840 Dic. 23, 97 Not. 29 Bta. Adquirió", which means that the purchase was made through a document signed before a notary, on December 23, 1997. I acquired 204,204,621 shares.

- f. I.C. Interventorías y Construcciones LTDA, which owned and controlled a 0.1164% interest. The Shareholders Registry of I.C Interventorias y Construcciones Ltda., on page 06, shows that he acquired 144,000 shares between 1991 and May 30, 1997.

414. Here below is a visual summary of Enrique Carrizosa's participation in GRANAHORRAR through the above-mentioned six corporations.



415. Felipe Carrizosa owned and controlled a 13.3353% equity interest in GRANAHORRAR, through the following six companies:

- a. Asesorías e Inversiones C.G. S.A., which owned and controlled a 4.1260% interest.

The Shareholders Registry of Asesorías e Inversiones C.G. S.A., shows, on page 03, that I acquired 607,379 shares, once the company was transformed to a S.A. The company

was older and I was member of Asesorías e Inversiones C.G., before 1998.

- b. Exultar S.A., which owned and controlled a 2.5956% interest.

The Shareholders Registry of Exultar, S.A., shows, on page 11, the acquisition of 30,000 shares from Industrias y Construcciones Ltda. Later, I acquired 6,000 shares in 1992, and on December 23, 1997, records shows that I owned 80,656 shares.

- c. Compto S.A., which owned and controlled a 3.1914% interest.

The Shareholders Registry of Compto, S.A., on page 10 reads: “acquired from IC Inversiones Ltda”, on March 15, 1991, 30,000 shares. On July 18, 1992, I acquired 2,000 shares. Later on December 23, 1997 I acquired 452,298 shares.

- d. Inversiones Lieja LTDA, which owned and controlled a 2.3596% interest.

The Shareholders Registry of Inversiones Lieja S.A., on page 11, shows that I acquired 453,620 shares, once the company was transformed to a S.A. The company was older and I

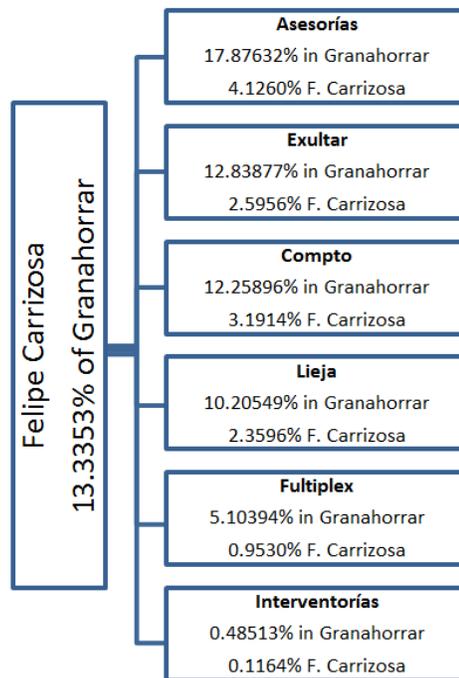
was member of Inversiones Lieja, before 1998.

- e. Fultiplex S.A., which owned and controlled a 0.9530% interest.

The Shareholders Registry of Fultiplex, S.A., on page 19, reads: “E.P. 12.840 Dic. 23, 97 Not. 29 Bta. Adquirió”, which means that the purchase was made through a document signed before a notary, on December 23, 1997. I acquired 204,969 shares.

- f. I.C. Interventorías y Construcciones LTDA, which owned and controlled a 0.1164% interest. The Shareholders Registry of I.C Interventorias y Construcciones Ltda., on page 07, shows that he acquired 144,000 shares between 1991 and May 30, 1997.

416. Here below is a visual summary of Felipe Carrizosa’s participation in GRANAHORRAR through the above-mentioned six corporations.



417. The total number of shares of GRANAHORRAR, on October 3, 1998, was 36,427,121,681.⁴⁰⁵ The six companies owned a 58.76861% of GRANAHORRAR as follows:

| Company | No. of shares | Percentage in GRANAHORRAR |
|-------------------------|---------------|---------------------------|
| Asesorías e Inversiones | 6.511.830.512 | 17.87632 |

⁴⁰⁵ See C-20 (*Considerando Décimo Tercero*)

| | | |
|---|---------------|----------|
| C.G. LTDA | | |
| Exultar S.A. | 4.676.795.978 | 12.83877 |
| Compto S.A. | 4.465.586.371 | 12.25896 |
| Inversiones Lieja | 3.717.567.931 | 10.20549 |
| Multiplex Ltda. | 1.859.220.529 | 5.10394 |
| Interventorías y Construcciones Ltda. | 176.720.030 | 0.48513 |

418. As a direct and proximate consequence of the actions and omissions that the Central Bank of the Republic of Colombia, the Superintendency and FOGAFIN undertook, as detailed in paragraphs 47 through 149 of the Request for Arbitration and also, in part, described in paragraphs 5 through 23 of this Memorial, on November 1, 2007 the Council of State issued a Judgment in favor of Claimants and against Colombia (C-22).

419. On May 26, 2011 the Constitutional Court, as more fully detail in the Request for Arbitration, paragraphs 161 through 187, and elsewhere in this Memorial, pages 40 through 54,

issued an Order Revoking the Council of State's Judgment.

420. On June 25, 2014 the Constitutional Court issued an Order Denying Claimants' Motion to Vacate the Constitutional Court's Order of May 26, 2011.⁴⁰⁶ Claimants' ownership of shares in GRANAHORRAR, as set forth in paragraphs 411 through 417 above, meet the Art. 10.28(b) definition of an investment. More importantly, however, for purposes of pleading and/or proof of *ratione materiae*, the Council of State's November 1, 2007 Judgment represents and constitutes Claimants' investment as alleged and demonstrated in this proceeding.

421. The *ratione materiae* stricture is here amply met.

V. COLOMBIA HAS BREACHED ITS OBLIGATIONS UNDER THE TPA AND INTERNATIONAL LAW⁴⁰⁷

422. Under Section II of this Memorial on Jurisdiction, Claimants have made a number of allegations against the Republic of Colombia.

⁴⁰⁶ See RFA ¶¶ 187 -192, and Memorial pp 58 -63.

⁴⁰⁷ This section of the Memorial on Jurisdiction should be read in conjunction with ¶¶ 193-233 of the Notice of and Request for Arbitration in this case (C-0).

423. Those allegations are confirmed and supported by the evidence, legal authorities, witness statements, and expert reports that Claimants have offered. As a matter of fact and pleading there is much more than just *prima facie* evidence that the Republic of Colombia is responsible, through the actions and omissions of its executive and judicial authorities, for the breach of a number of treaty obligations contained in the TPA and the Colombia-Switzerland BIT some of which are indicated below.

A. Colombia Breached the Minimum Standard of Treatment Under International Law and the TPA and the Fair and Equitable provision Under the Colombia-Switzerland BIT

424. Colombia was under an obligation to treat US investors and investments in compliance with the customary international law minimum standard of treatment. That obligation arises (i) out of customary international law principles binding upon all States and (ii) through the express provision under Article 10.5 of the TPA that is referenced by Article 10.7 addressing expropriation. As expressly recognized in Article 10.5 of the TPA, the minimum standard of treatment includes fair and equitable treatment and full protection and security. As a result of the expansive scope of the MFN provision in Article 12.3 of the TPA, Claimants also are entitled to rely

on the Fair and Equitable Treatment provisions contained in Article 4(2) of the Colombia-Switzerland BIT.

a. Colombia Committed a Denial of Justice

425. As illustrated under Section II of this Memorial on Jurisdiction, Claimants are the victims of wrongful judiciary activism in Colombia in breach of international law. The Constitutional Court in its 2011 and 2014 Opinions committed serious abuses of jurisdiction and authority, and radically renounced universal principles of justice and due process.

426. Any reasonable and impartial person exposed to the facts of the present case and their outcome would sense an arresting lack of due process and an absence of judicial propriety. The June 25, 2014 Constitutional Court Opinion was founded on economic interests and a political agenda. It manifestly and seriously was in breach of basic principles of due process and fundamental justice.

b. Colombia Treated Claimants Unfairly and Inequitably

427. The Constitutional Court's actions described in Section II were arbitrary, grossly unfair, unjust, and damaging of Claimants' legitimate expectations to rely on a fair,

independent, impartial and stable judicial system in Colombia. This rudimentary expectation was not met.

428. Irrespective of a finding that Colombia committed a denial of justice, it is Claimants' contention that the judicial conduct and mistreatment attributable to the Republic of Colombia also amounts to an independent breach of the Fair and Equitable Treatment and Full Protection and Security obligations binding on Respondent.

B. Colombia Breached the Expropriation obligations under the TPA and the Colombia-Switzerland B.I.T.

429. Article 12.1 of the TPA imports for the benefit of investors and investments in the financial services sector the expropriation provisions contained in Article 10.7 of the TPA. Claimants also are entitled to rely on the provisions on expropriation under Article 6 of the Colombia-Switzerland BIT.

430. The 2014 Constitutional Court's Opinion had the effect of finally removing without compensation Claimants' entitlement to the value of its investment in GRANAHORRAR that had been embodied in the 2007 judgment that the Council of State had rendered.

431. The 2014 Constitutional Court Opinion deprived Claimants of their property and rights, which at that point had taken the form of a final and binding judgment issued by the Council of State in 2007.

432. The Constitutional Court's Opinion amply meets the type of judicial action that treaty based investor-State arbitral tribunals have identified as an actionable taking of property in violation of public international law.

C. Colombia's Breach of the National Treatment Standard

433. Article 12.2 of the TPA purports to guarantee to investors of another Party treatment no different from that which is accorded to similarly placed investors of its own nationality. According to this Article investors of another Party can be treated no less favorably than Colombia's own investors.

434. The entire record of the present dispute is characterized by a marked connotation of discrimination against Claimants. Throughout the course of this unfortunate misadventure Claimants received treatment decisively less favorable than the treatment received by Colombian investors in like circumstances.

435. 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.

436. The unprecedented misapplication of 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 small catalog of the judicial mistreatments that Claimants, unlike Colombian nationals, received at the hands of Colombian executive and judicial authorities.

437. As demonstrated in Section II of this Memorial on Jurisdiction, both the regulatory and the judicial treatments imposed by the Republic of Colombia on Claimants were discriminatory and in breach of the provisions under Article 12.2 of the TPA. The judicial treatment was emphatically so because in addition to its own failures, it validated the mistreatment that had been committed against Claimants.

VI. Damages

434. The quantum-damages analysis in this case is very simple. The Tribunal is presented with four theoretical possibilities. Of these four scenarios two are the most relevant and

appropriate pursuant to settled assessment methodologies. They are here explained.

A. The Council of State Has Calculated the Base Damages to Which Claimants Are Entitled

435. In this remarkable case the Republic of Colombia itself has calculated a base set of damages. In fact, it has done so pursuant to its highest ranking Tribunal with jurisdiction over administrative contentious matters, the Republic of Colombia's Council of State. Within the Council of State it was the Fourth Chamber, the most specialized and best qualified unit of magistrates that calculated these damages. It did so on November 1, 2007 in its Judgment entered in the case styled: *Compto S.A. en Liquidación y Otros, contra Superintendencia Bancaria y Fondo de Garantías de Instituciones Financieras (FOGAFIN)*, File No. 25000-23-24-000-2000-00521-02-15728.⁴⁰⁸

436. The damages number contained in that Judgment is COP 226,961,237,735.99, which is the USD equivalent at the time, *exclusive* of any interest rate, of USD 114,183,417.80. This base number provides the Tribunal with a foundational figure from which to work that is plausible and reasonable. While Claimants here assert that this

⁴⁰⁸ See *supra* note 2, (C-22).

figure undervalues, based on objective metrics, their respective shareholder-equity interest in the Bank, the number still represents a useful figure from which to work for several reasons.

437. First, the number is proffered in a public records document that Colombia itself generated and held out to be true and correct. Second, and quite notably, the Council of State did set forth the methodology pursuant to which it arrived at this figure. Therefore, any adjustment to the figure can be made on an objective basis. By way of example, the Council of State's analysis uses an approximately (with a less than 1% margin of error) 5.96 per share valuation figure.

438. From this valuation methodology two foundational questions arise. The first of these queries is whether the Council of State's *general* methodology is appropriate. We believe it is with the following qualification. Assessing the damages in terms of the valuation of shareholder interest is eminently appropriate. How the Council of State arrived at this valuation does invite analysis. Thus, the analytical question becomes whether the Council of State in reaching a 5.96 per share figure considered the appropriate market factors. Claimants assert that it did not, based upon the Council of State's own analysis which is anemic on this point.

439. The second factor in the Council of State's analysis concerns the extent to which it valued the sale of the Bank adjusting for the particular circumstances attaching to that sale. As to this point several qualifying factors are in order. The first important factor to note is that the Council of State did not take into account the sale of the Bank in November 2005 to BBVA in the amount of USD 423,000,000. This matters.

440. Significantly none of the banks, peer banks were sold. Understandably, they were liquidated. The reason is both simple and important. They were liquidated because, very much unlike the Bank, the peer banks were insolvent. They did not have liquidity issues. They truly, therefore, needed to be liquidated.

441. The Government of the Republic of Colombia, through the Council of State observed, underscored, emphasized, and made clear that the Bank merely had a fleeting liquidity challenge. Its solvency was well within the 9% statutory mark at all times material to any valuation of this asset, based upon the Republic of Colombia's own admission through the Council of State. Because the Bank was financial solvent and vibrant it was not liquidated. Quite reasonably and understandably, it was sold as all performing assets are sold.

442. Because, however, it was sold under the circumstances providing for material predicates from which it may be inferred that the sale took place in a “distress sale” scenario, any objective and professionally sound valuation of the asset must adjust for this factor as well.

443. Using the Council of State’s own figure suggests that the valuation had to have been undertaken as of the October 2, 1998 date, which is the last date that the bank existed as such prior to the Superintendency’s and FOGAFIN’s artificial devaluation of the shares to the amount of 0.01 COP. Therefore, this valuation raises the question of whether the October 2, 1998 date should be the appropriate date for undertaking this task. Claimants respectfully submit to this Tribunal that it is not.

B. The May 26, 2011 Judicial Expropriation of the Council of State’s Judgment

444. As here recounted, on May 26, 2011 the Constitutional Court, for all of the reasons, premises, and authorities already presented, “vacated” the Council of State’s November 1, 2007 Judgment. The Constitutional Court’s Decree is here attached as C-23.

445. The Tribunal is invited to consider this date as one of two more plausible, reasonable,

an industry appraisal appropriate date of valuation. Under one theory this was the date of the taking, albeit not the date giving rise to accrual of a claim pursuant to the TPA. An appraisal of the shares as of this date, as more fully demonstrated below, would yield a materially different and more accurate valuation of the damages suffered. This mathematical adjustment would assume the same approach that the Council of State exercised, with minor but important qualifications on the market methodology implemented. Also, it would invite the appropriate corresponding adjustment to provide for the correct time value of money, i.e., interest rate.

C. The Constitutional Court's June 25, 2014 Order Denying the Council of State's Motion to Vacate

446. Claimants respectfully invite the Tribunal to consider June 25, 2014 as the appropriate damages valuation date. The reason is clear. On this date the last element of the factors giving rise to a treaty violation under the TPA matured, and, therefore, it is the most appropriate date on which to conduct a valuation of the shares. This date also has the added benefit that it provides the Tribunal with objective performance standards of the asset (the Bank)

over time; that being from the date of the sale (November 2005) until June 25, 2014 (the date that the cause of action accrued by dint of the end of all judicial labor).

447. Because this Tribunal has bifurcated the proceeding, at this jurisdictional stage Claimants in support of their damages analysis have retained a world-renown and pre-eminent accounting firm Morrison, Brown, Argiz & Farra, LLC (“MBAF”).

448. This firm has authored a Preliminary Damages Report here attached as CER-6. For purposes of facilitating further the Tribunal’s assessment of Claimants’ damages at this jurisdictional phase and, therefore, consonant with the applicable burden and standard of proof as discussed in Section IV of this writing, set forth below is a chart identifying the damages that each Claimant based upon the applicable respective shareholder interest suffered using four dates, each supplying the Tribunal with an option.

| Calculation of Damages for each Claimant for each relevant date | | | | |
|--|------------------|-------------------|-------------------|-------------------|
| Relevant dates | @ 10/03/98 | @ 11/01/07 | @ 05/26/11 | @ 06/25/14 |
| Alberto Carrizosa Gelzis | | | | |
| Fair Market Value of Claimant's Interest before prejudgment interest (COP \$MM) | COP 43,531 | COP 128,313 | COP 178,120 | COP 225,662 |
| Fair Market Value of Claimant's Interest at 04/30/19 including interest (COP \$MM) | COP 321,016 | COP 564,216 | COP 606,115 | COP 558,631 |
| Claimants' Damages at each relevant date (USD \$MM) | USD 98.84 | USD 173.73 | USD 186.63 | USD 172.01 |
| Felipe Carrizosa Gelzis | | | | |
| Fair Market Value of Claimant's Interest before prejudgment interest (COP \$MM) | COP 42,769 | COP 126,067 | COP 175,002 | COP 221,712 |
| Fair Market Value of Claimant's Interest at 04/30/19 including interest (COP \$MM) | COP 315,397 | COP 554,340 | COP 595,505 | COP 548,853 |
| Claimants' Damages at each relevant date (USD \$MM) | USD 97.11 | USD 170.69 | USD 183.36 | USD 169.00 |
| Enrique Carrizosa Gelzis | | | | |
| Fair Market Value of Claimant's Interest before prejudgment interest (COP \$MM) | COP 42,747 | COP 126,003 | COP 174,914 | COP 221,600 |
| Fair Market Value of Claimant's Interest at 04/30/19 including interest (COP \$MM) | COP 315,239 | COP 554,062 | COP 595,206 | COP 548,577 |
| Claimants' Damages at each relevant date (USD \$MM) | USD 97.06 | USD 170.60 | USD 183.27 | USD 168.91 |

449. In keeping with universally accepted appraisal methodology, the change in the Republic of Colombia's Gross Domestic Product has been considered in arriving at a share value for each of the possibly operative dates. This analysis,

however, does not take into consideration necessary adjustments arising from the November 2005 sale of the Bank. It also omits further adjustments that are necessary based upon the two-year asset performance history between the sale of the Bank and issuance of the Council of State's Judgment on November 1, 2007.

450. Claimants, however, in the context of this bifurcated hearing on jurisdiction invite the Tribunal to consider the following value for the shares on three material dates:

- (i) November 1, 2007 (USD 25.94 per share) (date of the issuance of the Council of State's Judgment);
- (ii) May 26, 2011 (USD 36.01 per share) (the date of the Constitutional Court's "vacatur" of the Council of State's Judgment); and
- (iii) June 25, 2014(USD 45.62 per share) (the date of the Constitutional Court's Denial of the Council of State's Motion to Vacate).

451. Claimants respectfully submit that they have advanced more than just a *prima facie* case at this jurisdictional juncture for purposes of the governing damages prayer for relief.

Conclusion

For the foregoing reasons, authority, premises, and evidence, Claimants, Alberto Carrizosa, Felipe Carrizosa, and Enrique Carrizosa, respectfully request that this Arbitral Tribunal deny Respondent's, the Republic of Colombia, objections as to jurisdiction, and proceed to a merits hearing in furtherance of the equitable administration of justice.

Dated: May 29, 2019

Respectfully,

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