IN THE MATTER OF AN ARBITRATION UNDER THE
UNITED STATES – COLOMBIA TRADE PROMOTION AGREEMENT, SIGNED ON 22 NOVEMBER 2006 AND ENTERED INTO FORCE ON 15 MAY 2012
- and -
THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, AS REVISED IN 2013
(the "UNCITRAL Rules")

PCA Case No. 2018-56

- -x
In the Matter of Arbitration Between: :
:
1. ALBERTO CARRIZOSA GELZIS :
2. FELIPE CARRIZOSA GELZIS :
3. ENRIQUE CARRIZOSA GELZIS :
:
Claimants, :
:
and :
:
THE REPUBLIC OF COLOMBIA, :
:
Respondent. :
- -x

VIDEOCONFERENCE: HEARING ON JURISDICTION

Monday, December 14, 2020

Washington, D.C.

The hearing in the above-entitled matter convened at 9:04 a.m. (EST) before:

MR. JOHN BEECHEY, CBE, Presiding Arbitrator

PROF. FRANCO FERRARI, Co-Arbitrator

MR. CHRISTER SÖDERLUND, Co-Arbitrator

ALSO PRESENT:

Registry of the Permanent Court of Arbitration:

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PCA Secretary of the Tribunal

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Assistant Legal Counsel

MR. LUIS POPOLI
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1 P R O C E E D I N G S

2 PRESIDENT BEECHEY: If we are all present, I will
3 open this Hearing on Jurisdiction in PCA Case
4 Number 2018-56 between Alberto Carrizosa Gelzis, Felipe
5 Carrizosa Gelzis, and Enrique Carrizosa Gelzis and the
6 Republic of Colombia.
7 First of all, my thanks to all of you for
8 enabling yourselves to be present on a day when Google
9 chose to crash. That is an achievement in itself.
10 We have a timetable sorted out. The intention is
11 that there will be some introductions and housekeeping,
12 and then we will hear the Opening Statements from the
13 Parties. And 2.5 hours have been allocated to the Parties
14 each for that purpose.
15 In terms of the day, we are going to break at
16 around 3:15 and again at 4:45. Having spoken to my two
17 colleagues, and with your indulgence, we would like to
18 reduce the length of the longer break from an hour to
19 45 minutes so that we can try to end at 8:30 p.m. GMT
20 rather than at 8:45. Unless that meets with violent
21 opposition, perhaps we can proceed on that basis, but
22 otherwise, the timetable, as indicated, will be as I've
23 just set out.
24 There is one matter of housekeeping to which I'll
25 raise now, and we can come to it in just a moment when

1 we've gone through the introductions; and that is the one
2 thing that is not clear on the timetable, is the length of
3 time that the United States would wish to take for its
4 submissions tomorrow morning.
5 So, Ms. Thornton, at an appropriate moment, in a
6 few minutes' time, perhaps you would either consult, or if
7 you have already consulted, let the Tribunal know what
8 sort of time frame you're looking at for tomorrow. That
9 would be helpful.
10 MS. THORNTON: Yes. Thank you.
11 PRESIDENT BEECHEY: And I'll ask you--
12 MS. THORNTON: I'm sorry.
13 (Overlapping speakers.)
14 PRESIDENT BEECHEY: I'll come--if I may, I will
15 give you some advance notice.
16 MS. THORNTON: Oh, sure.
17 PRESIDENT BEECHEY: What I want to do is to
18 invite the Parties to introduce their teams, and then we
19 will hear what is to be said about that. And then there
20 will be a reminder from me that this Hearing is being
21 transmitted on live feed in English and in Spanish. And
22 then after introductions and having heard from the U.S.
23 about tomorrow morning, we will proceed with the Opening
24 Statements, unless there is anything else the Parties wish
25 to raise.

1 So, without more ado, might I hand over to
2 Claimants and invite the team to introduce itself.
3 MR. MARTÍNEZ-FRAGA: Thank you, Mr. President.
4 Pedro Martínez-Fraga; and with me is Ryan Reetz, Domenico
5 Di Pietro, Craig O'Dear, and Rachel Chiu. Also with us
6 are the three Claimants: Alberto Carrizosa, Felipe
7 Carrizosa, and Enrique Carrizosa.
8 Thank you, sir.
9 PRESIDENT BEECHEY: Thank you very much indeed.
10 MR. MARTÍNEZ-FRAGA: Also--sorry. Mr. Dilmurod
11 is also here with us. Thank you.
12 PRESIDENT BEECHEY: Very well. Thank you very
13 much indeed.
14 And for Respondent.
15 MR. GRANÉ: Good afternoon, Mr. President,
16 Members of the Tribunal. Patricio Grané on behalf of
17 Respondent.
18 Today with us we have Ana María Ordónez and
19 Andrés Esteban from the Agencia. And there are other
20 colleagues who will not be active participants, so unless
21 you indicate otherwise, Mr. President, I will not read
22 their names, but they have been duly communicated in our
23 submissions. And my colleagues include my partner Paolo
24 Di Rosa in Washington, D.C.; my colleague Ms. Katelyn
25 Horne, also in D.C.

1 PRESIDENT BEECHEY: Thank you very much indeed.
2 Ms. Thornton, introductions, please, and an
3 indication of time.
4 MS. THORNTON: Yes. Thank you very much,
5 Mr. President, and thank you for allowing us to join this
6 Hearing. So, first, I'll go through the list of
7 representatives for the United States that will be
8 observing within this Hearing, and that is Lisa Grosh,
9 John Daley, John Blanck, Amanda Blunt, Catherine Gibson,
10 Amy Zuckerman, and myself.
11 And we expect to keep our submission at the top
12 of tomorrow's hearing to approximately 15 minutes, if that
13 works for the Tribunal and the Parties.
14 PRESIDENT BEECHEY: Thank you very much indeed.
15 That is 15, 1-5; right? Thank you very much indeed. That
16 is most helpful.
17 All right. Before we go to any more housekeeping
18 matters the Parties have, may I take it that no technical
19 difficulties are being experienced at the moment, that
20 everybody can hear and see?
21 I would ask, please, that whilst not actually
22 speaking or intervening, perhaps you would be kind enough
23 to ensure that systems are on mute.
24 And with that, Claimants, are there any
25 housekeeping matters to be raised on behalf of the

1 Claimants?
2 MR. MARTÍNEZ-FRAGA: None whatsoever,
3 Mr. President.
4 PRESIDENT BEECHEY: That's a most welcome
5 intervention. Thank you very much indeed,
6 Mr. Martínez-Fraga.
7 Respondent?
8 MR. GRANÉ: Mr. President, I am afraid that there
9 is one issue that we wish to raise.
10 PRESIDENT BEECHEY: Yes.
11 MR. GRANÉ: It is a point of order and it's
12 before Claimants begin with their presentation and it
13 concerns the PowerPoint presentation that Claimants have
14 sent before the commencement of the session.
15 And, of course, Mr. President, as you know,
16 Procedural Number 3, in Section 50, says that PowerPoint
17 presentations and demonstratives can be used, but that
18 exhibits that are cited in those presentations need to be
19 clearly reflected in the presentations, and they must only
20 refer to exhibits on the record.
21 Now, we have taken a very quick look at the
22 presentation, and Slides 2 and 3 contain news articles
23 from August 2018 and September 2017. There is no
24 indication of an exhibit number in those Slides. We have
25 quickly checked the record in the time that we had, and we

1 did not identify any exhibit that contains those news
2 articles.
3 And so, through you, Mr. President, I would like
4 to confirm that those news articles are on the record,
5 and, if they are not on the record, they should be
6 excluded and should never have been included as they would
7 be contrary to Procedural Order Number 3, Section 50, and
8 also P.O. 1, Section 9.3.
9 Thank you.
10 PRESIDENT BEECHEY: Okay. Mr. Martínez-Fraga.
11 MR. MARTÍNEZ-FRAGA: Sure, of course. Thank you,
12 Mr. President, Members of the Tribunal.
13 The slides that counsel is referring to are not
14 being presented as demonstrative exhibits. They don't
15 purport to summarize evidence and facilitate the
16 understanding of evidence. They are also not being
17 presented as evidence. The truth of the matter asserted
18 is also not being proposed. They are thematic records,
19 newspaper records of public records available everywhere,
20 and they are extremely relevant and central to our
21 undertaking today. We feel that the Tribunal and all
22 concerned would be better served, of course, by
23 considering them.
24 MR. GRANÉ: Mr. President, we object. We have
25 not heard anything in what Claimants' counsel has said

1 that would justify the violation of the very clear
2 procedural rules.
3 PRESIDENT BEECHEY: Mr. Martínez-Fraga, it is
4 right, isn't it, that no advance notice was given that
5 this material was going to be included?
6 MR. MARTÍNEZ-FRAGA: That's correct, no advance
7 notice was provided. That's right.
8 PRESIDENT BEECHEY: Very well. If the Parties
9 will bear with us for just, I hope, a very short moment.
10 I'm going to ask that the Members of the Tribunal to go
11 into the breakout room. We will just consult very quickly
12 and then come straight back. I don't want to delay
13 matters any further than I have to.
14 José, can we go to the breakout room, please.
15 (Tribunal conferring.)
16 (Comments off microphone.)
17 PRESIDENT BEECHEY: Very good. I can see
18 Mr. Grané and Mr. Martínez-Fraga, and, therefore, I'm
19 inclined to proceed.
20 Mr. Grané, we're going to uphold that objection.
21 Mr. Martínez-Fraga, would you please not use
22 those two Slides?
23 MR. MARTÍNEZ-FRAGA: Of course, Mr. President.
24 PRESIDENT BEECHEY: Subject to that, are there
25 any other housekeeping matters to raise?

1 MR. MARTÍNEZ-FRAGA: Not on Claimants' behalf,
2 Mr. President.
3 PRESIDENT BEECHEY: Mr. Grané?
4 MR. GRANÉ: None from Respondents. Thank you,
5 Mr. President.
6 PRESIDENT BEECHEY: In that case,
7 Mr. Martínez-Fraga, the floor is yours.
8 MR. MARTÍNEZ-FRAGA: Thank you, sir. Let's get
9 to work.
10 OPENING STATEMENT BY COUNSEL FOR CLAIMANTS
11 MR. MARTÍNEZ-FRAGA: Mr. President, Respected
12 Members of the Tribunal, Counsel, Representatives of the
13 Republic of Colombia, it a privilege for our firm to
14 represent Claimants in this proceeding.
15 The three Claimants are brothers, U.S. citizens
16 living in Colombia. They and other shareholders of the
17 former savings and loan bank known as Granahorrar share
18 the regrettable distinction of, first, having been the
19 victims of corrupt and unlawful regulatory excesses on the
20 part of the Colombian banking authorities, Fogafín and the
21 Superintendency of Banking.
22 Then, when they were made whole by a pillar of
23 the Colombian judicial system, the Council of State--the
24 highest ranking court and a court of last resort, "in pari
25 materia"--with the Constitutional Court and the Supreme

1 Court, Colombia's Executive Branch, through its banking
2 instrumentalities, filed fraudulent papers with the
3 Constitutional Court, which caused the Claimants in this
4 case to lose the totality of the investment the Council of
5 State itself had provided to them on November 1, 2007.
6 Those papers were fraudulent because then, as
7 now, you cannot use tutelas to represent the rights of a
8 government agency. That is against the law. The tutelas
9 are meant to preserve fundamental personal rights. To add
10 insult to injury, they were incompetent and filed it late
11 anyways, but it was still accepted.
12 Corruption, which resulted in the extreme
13 injustice visited upon Claimants with the Constitutional
14 Court's denial for the annulment of the June 25, 2014,
15 annulment motion was actually discussed by Colombian
16 jurist Javier Tamayo Jaramillo in a symposium at the
17 University of California at Berkeley School of Law in
18 December 2017. But we don't need Dr. Tamayo to explain
19 the extreme and unprecedented judicial activism that led
20 to the filing of this claim. The story is clearly told in
21 the extensive record before this Tribunal.
22 But his description is notable for its similarity
23 to the events of this very specific proceeding. As
24 Dr. Tamayo describes that the Constitutional Court in
25 Colombia has come to corruptly dominate political and

1 legal matters in that country, has exceeded its powers on
2 matters pertaining to the rule of law. The mechanism
3 through which this corruption is accomplished is the very
4 tutela mechanism that is critical to understand the
5 ratione temporis, among other arguments that will be
6 presented here today. It was exactly the mechanism that
7 was used against the Claimants in this proceeding.
8 The tutela action empowers and facilitates
9 unlimited and uncontrolled judicial activism by the
10 Constitutional Court. The Court has become unduly
11 political as a result of the nomination and election
12 mechanism of magistrates. We have seen this demonstrated
13 in this very proceeding with the Republic's own Expert,
14 Dr. Ibáñez, who was rewarded with an appointment to the
15 Constitutional Court after his written testimony was
16 submitted but before the proceeding was even concluded.
17 This judicial activism has become a lethal weapon
18 to pay favors to those who nominate or elect these judges.
19 It is through this process that the corruption of justice
20 of the Executive and of the political class is forged.
21 Dr. Tamayo observes that the control of constitutionality
22 and the application of the tutela mechanism are a
23 "shipwreck."
24 Use of this tutela mechanism has drawn the Court
25 into corruption scandals involving the selection to review

1 certain rulings, and that, we will show, was the case
2 here, and it's a critical ratione temporis issue. This is
3 precisely what occurred on June 25, 2014, when the
4 Constitutional Court, despite two very powerful dissents
5 in a 93-page document that, of course, Respondent would
6 have this Tribunal think that it is just a mere single
7 page piece of paper denying a Motion for Reconsideration,
8 the labor of the Colombian judicial system silencing
9 Claimants' cry for justice in that very judicial
10 proceeding.
11 Despite significant effort and some progress,
12 Colombia continues to struggle with corruption in its
13 judicial ranks. In 2018, while this very proceeding was
14 pending, Colombia's former Anticorruption Director Luis
15 Gustavo Moreno Rivera pled guilty to money laundering and
16 a bribery scheme directed to the target of a criminal
17 investigation in that country. The Director's cooperation
18 led to investigation and indictments of three Supreme
19 Court Justices, multiple legislators, and Parliamentary
20 officials. This corruption scandal was described by
21 Colombian media as "the gravest ever to hit Colombia's
22 Supreme Court.
23 "In addition to involving figures of the highest
24 echelon to the judiciary, this case was concerning because
25 the allegations suggest the repetition of consistent

1 pattern of corruption involving several top judicial
2 officials, which could point to a long-running scheme
3 operated by a structured network." End of citation.
4 Furthermore, the case involves powerful political
5 elite seemingly engaged in perverting the course of
6 justice at the highest level.
7 In 2018, news reports confirmed by Colombia's
8 Attorney-General's press release indicated that the former
9 Colombian Supreme Court Justice Francisco Ricaurte Gómez,
10 was arrested for charges of criminal association, bribery,
11 influence, peddling, and abuse of privileged information.
12 It is this judicial environment that compels Claimants to
13 seek justice before an impartial tribunal.
14 On November 1, 2007, the Council of State, a
15 Tribunal of final instance I have mentioned, and of equal
16 hierarchy with Colombia's judicial system as the Supreme
17 Court and the Constitutional Court, issued a final
18 judgment in favor of Granahorrar shareholders and against
19 Fogafín and the Superintendency of Banking in the
20 amount--in the dollar amount at that time of
21 $114,183,417.80.
22 The Council of State's November 1, 2007 Final
23 Judgment was scathing in passing on Fogafín's and the
24 Superintendency of Banking's acts and omissions as to
25 Granahorrar and the Council of State, by way of

1 example--and this is a pillar of that judicial
2 system--expressly found in its opinion that Fogafín and
3 the Superintendency of Banking together, during the course
4 of just a mere 12 hours, had created an economic crisis
5 for Granahorrar that was artificial and scarcely
6 indicative of Granahorrar's considerable solvency and
7 historical performance record.
8 The final judgment in favor of the shareholders,
9 in part, read: "The foregoing, when added to the
10 wrongfully substantiated insolvency claim that the
11 Superintendency of Banking had asserted against
12 Granahorrar, together with the Central Bank's decision to
13 undertake the Capitalization Order as part of the task to
14 reduce to a nominal value Granahorrar's shares,
15 demonstrates the illegality of the administrative agency's
16 actions."
17 And the reason why this Court must vacate the
18 first instant trial judge's judgment, which is
19 appellant--which, as appellant made clear, did not at all
20 address the material allegations asserted and had not
21 accorded any weight to the probative evidence on which
22 plaintiffs had based their arguments. And that's
23 Claimants' Memorial at 36-39, Exhibit C-22 at Pages 51 and
24 52.
25 MR. DI PIETRO: Pedro, I'm sorry for

1 interrupting.
2 Mr. President, I hate to interrupt, but it looks
3 like we have a corrupted version of this slide that we are
4 using, so if we could stop for five minutes and we can
5 upload the correct version. I apologize. Is that
6 acceptable, please?
7 PRESIDENT BEECHEY: Not at all--and my apologies
8 to your colleague for the fact that his flow will be
9 interrupted. But if you think that the slide deck is
10 corrupted, then it clearly has to be put right.
11 MR. DI PIETRO: Okay. So, if we could move to
12 the breakout rooms.
13 PRESIDENT BEECHEY: Yes. We will go to the
14 breakout rooms. Again, my apologies to both Parties for
15 the slide hiatus.
16 Would you let us know, please, Mr. Di Pietro, and
17 as soon as you're ready, we will resume?
18 MR. DI PIETRO: Thank you very much. And again,
19 apologies.
20 PRESIDENT BEECHEY: Not at all. Okay. Thank
21 you.
22 (Pause.)
23 PRESIDENT BEECHEY: Ladies and gentlemen, I can't
24 see you because the screen is being shared at the moment.
25 Mr. Martínez-Fraga, are you ready to recommence?

1 MR. GRANÉ: Mr. President, if I may before
2 counsel starts, can we please request to have a copy of
3 the PowerPoint presentation that Claimants will be using
4 now? We don't know what may have changed in the time that
5 we have been away.
6 Also, in the time that we have been away, we have
7 continued to review the presentation, and we've identified
8 other slides that appear to be referring to documents that
9 are not on the recorded. This is very regrettable,
10 Mr. President.
11 PRESIDENT BEECHEY: Yes.
12 MR. GRANÉ: But we don't wish to interrupt when
13 we get to those slides, but we find ourselves in the
14 situation that we will need to do that.
15 PRESIDENT BEECHEY: Well, the first thing that is
16 going to happen--I think it's Ms. Chiu who sharing her
17 screen. Would you mind unsharing so we can go back to a
18 gallery view? Thank you very much indeed.
19 Mr. Grané, I have heard what you have to say.
20 Mr. Martínez-Fraga, what do you want to do?
21 Because either we take this pack down until it has been
22 looked at by both sides and it's been blessed and then
23 it's shared as a sort of ex post facto event, or--or what
24 do you want to do?
25 MR. MARTÍNEZ-FRAGA: I'm not aware of any

1 documents that we--that are new that are not of record,
2 Mr. President. So, I'm fine for taking it on a
3 going-forward basis. If we put up a document and it's a
4 new document that somehow they allege is not part of the
5 record, then let's take it up then. I don't mind being
6 interrupted for that purpose, but I can't speak for what
7 they say they see or don't see.
8 MR. GRANÉ: Well, I can give you a preview--
9 PRESIDENT BEECHEY: Let's deal with it--go ahead.
10 MR. GRANÉ: I can give you a preview,
11 Mr. Martínez-Fraga. Slides 63, 103, and 104, just to cite
12 a few. There are no references to exhibits. We have
13 looked quickly. We cannot find any document on the record
14 that would match what you have on the screen.
15 PRESIDENT BEECHEY: Two things before you answer
16 that, Mr. Martínez-Fraga. Two things.
17 First of all, would you please ensure that a soft
18 copy of the entire pack is sent across to Respondent now?
19 Don't send it to us yet; just to Respondent.
20 We have a break due to come up at around 3:15 or
21 so. That will then be an opportunity to deal with these
22 matters as between counsel, I hope. If it's a question of
23 waiting until Slides 63, or 100 on, I think it unlikely we
24 will get that far, Mr. Grané. So, if anything else pops
25 up in the meantime, then clearly you will let me know, but

1 otherwise I think we might continue until the break. And
2 then, if there isn't a suitable result, we will deal with
3 it straightaway.
4 Does that work?
5 MR. GRANÉ: Thank you, Mr. President. Yes.
6 PRESIDENT BEECHEY: Very well.
7 All right. Mr. Martínez-Fraga, if you wouldn't
8 mind getting that pack over to your colleagues on the
9 other side as soon as you can, that would be grateful.
10 MR. MARTÍNEZ-FRAGA: We are doing that right now,
11 sir.
12 PRESIDENT BEECHEY: Thank you very much.
13 All right. We are back with a slide on the
14 screen.
15 You have gone mute. You are on mute.
16 MR. MARTÍNEZ-FRAGA: Yes, sir.
17 Back on the record, sir.
18 May I, Mr. President?
19 PRESIDENT BEECHEY: You may.
20 MR. MARTÍNEZ-FRAGA: Thank you, sir.
21 It is important to point out to the Tribunal that
22 at this point the Granahorrar shareholders--and we're
23 talking about November 1, 2007. This is a critical date,
24 because we say that, at this point, all judicial labor in
25 the domestic proceeding that the Granahorrar shareholders

1 had undertaken back on July 28, 2000 came to an end. They
2 won. They were restored. They were made whole, in large
3 part, and they prevailed before a Tribunal of last
4 instance.
5 Now, let me be very clear what happened: At that
6 point Fogafín and the Superintendency of Banking filed
7 Tutela Petitions with the Council of State that were
8 denied. They then appealed the denial of those Tutela
9 Petitions. That was denied. They then filed for a motion
10 for clarification an additur and remittur. That, too, was
11 denied, and it was after the end of all domestic judicial
12 labor had taken place on November 1, 2007, that the
13 fraudulent, corrupt tutelas were filed by the
14 Superintendency of Banking and Fogafín with the
15 Constitutional Court. At that point the Granahorrar
16 shareholders, Claimants in this case, were dragged into a
17 proceeding before the Constitutional Court after having
18 prevailed completely in 2007.
19 So, what happens in 2007 is critical because
20 that's really the start of the pre-Treaty action that is
21 of relevance; not materially relevant for purposes of the
22 actual breach and dispute, but that contextualizes what
23 occurred here. They won in 2007. November 1, 2007, they
24 are dragged into a proceeding before the Constitutional
25 Court.

1 This occurred three years and six months before
2 the TPA entered into force on May 15, 2012. Claimants
3 emphasize this fact because, in exercising Claimants'
4 right and prerogative to formulate its claims,
5 particularly as here in the jurisdictional stage, it is
6 critical to observe that, once the end of all judicial
7 labor was reached, an extraordinary series of events now
8 took place. Again, at this point, it is Colombia filing
9 these tutelas. And after filing tutelas with the Council
10 of State and after losing, then we are before the
11 Constitutional Court.
12 It is here that both Fogafín and Superintendency
13 of Banking, in November 2008 and February 2009, that the
14 tutelas were perfected. So, as I said before, not only
15 were they illicit. They were untimely, but still
16 accepted. The Constitutional Court conveniently exercised
17 jurisdiction over the tutelas, notwithstanding that based
18 on Colombia's own Expert testimony on the subject,
19 0.33 percent of the time are tutelas accepted, meaning
20 one-third of 1 percent or one out of every 300.
21 You will see from the timeline that this
22 remarkable event led to the Constitutional Court's
23 issuance of its May 26, 2011 Final Judgment, which
24 purported to revoke the November 1, 2007 Council of
25 State's Final Judgment, the final judgment of a peer

1 tribunal of equal hierarchy in final instance.
2 The May 26, 2011 Constitutional Court
3 Judgment was issued almost one year before the TPA's entry
4 into force.
5 The Final Judgment was so shocking to the
6 conscience of the very Council of State--in other words,
7 to a very entity of the State--that it prompted the
8 participation of the President of the Council of State,
9 Dr. Mauricio Fajardo Gómez, who filed a petition seeking
10 the annulment of the Constitutional Court's pronouncement.
11 So, you have a battle between two ---final instance,
12 nonrecourse Tribunals on this issue. So, there's an
13 institutional crisis that clearly arose.
14 The Granahorrar shareholders filed two similar
15 petitions for annulment. Now, these are not tutelas.
16 These are petitions for annulment. Totally different.
17 Unlike the tutelas, which are admitted one-third of
18 1 percent of the time, the Constitutional Court has
19 granted petitions for annulment 4 percent of the time.
20 The Constitutional Court's website, however, contradicts
21 this and says that it is really 20 percent of the time.
22 The Constitutional Court's generous reading further
23 underscores the institutionality of the annulment process.
24 The Council of State's petition for annulment
25 asserted that the Constitutional Court's May 26, 2011

1 Judgment was extreme and dangerous. Its president noted
2 in that paper that "even more complex, questionable, and
3 grave is that the Court"--the Constitutional
4 Court--"seizes for itself the attribution of a judge and
5 extends its authority to adjudicate the specific merits of
6 the case, which role is reserved for the Council of
7 State." And that's end of citation. That is at
8 Claimants' Memorial on Jurisdiction at 55, citing to
9 Exhibit C-25 at Page 41.
10 Almost three years after admitting the fraudulent
11 tutelas, on June 25, 2014, the Constitutional Court issued
12 an "auto," an order, denying the petitioner's petition for
13 annulment. This judicial measure is the State measure
14 that Claimants have alleged as constituting a breach of
15 the Colombia-U.S. TPA.
16 Can you please put up the slide?
17 The June 25, 2014 Order rendered final the
18 Constitutional Court's May 26, 2011 Judgment, and
19 simultaneously caused the Council of State's Judgment in
20 favor of Granahorrar shareholders and against Fogafín and
21 the Superintendency of Banking to be null and void.
22 Let me be perfectly clear: the June 25, 2014
23 Order--which, as I've said, it is very voluminous document
24 with two very compelling dissents--had a foundational
25 effect on the November 1, 2007 Judgment entered in favor

1 of the shareholders, and it also had a foundational effect
2 on the May 26, 2011 Judgment that the Constitutional Court
3 had issued. It had the effect of making that and
4 rendering that May 26, 2011 Judgment final. It had,
5 therefore, the effect of nullifying the November 1, 2007
6 Final Judgment from the Council of State.
7 So, the corollary is that, prior to that time,
8 the Parties' respective rights were unsettled. The
9 pendency of the petition for annulment had to be
10 finalized. It had to run its entire course before the
11 actual rights of the various Parties could be crystallized
12 and made final and determined. So, this is —more than ,
13 just a perfunctory order. This is a very significant
14 judicial event that marks the end of all judicial labor
15 before the domestic courts.
16 Claimants have elected their right to formulate
17 these claims, particularly at this jurisdictional stage,
18 based upon the June 25, 2014 Order denying the Granahorrar
19 shareholders' petition for nullification and constituting
20 the end of all judicial labor.
21 Fortunately, hardly is this scenario of having a
22 Claimant fashion and structure and cast their own claims
23 in a way that makes sense to them, and this is not an
24 issue that--where Respondents can come in, put up a
25 timeline, and say, no, no, that's not the correct State

1 measure. The correct State measure, of course, predates
2 the entry into force of the Treaty and, therefore, you are
3 precluded from arguing this case altogether because of the
4 non-retroactive application of the Treaty.
5 At the jurisdictional stage, it is particularly
6 foundational that a Claimant be allowed to shape and cast
7 its own place. The Tribunal in the ECE Projektmanagement
8 Case offered a helpful and informed observation on this
9 subject. It stated: "It is for the investor to allege
10 and formulate its claims for breach of relevant treaty
11 standard as it sees fit. It is not the place of the
12 Respondent State to recast those claims in a different
13 manner of its own choosing and the Claimants' Claims
14 accordingly fall to be assessed on the bases on which they
15 are pleaded." That is at Claimants' Reply Memorial at
16 Pages 22 and 23, Paragraph 1.
17 Respondent's attempt to recast Claimants' case is
18 particularly inappropriate, as we've said, at this stage,
19 where the Tribunal is addressing jurisdictional issues.
20 Put up the Infinito Gold, please.
21 On this particular principle, the Tribunal in
22 Infinito Gold v. Costa Rica was very, very informative.
23 It noted: "At the jurisdictional stage, a Tribunal must
24 be guided by the case as put forward by the Claimant in
25 order to avoid breaching the Claimant's due process

1 rights. To proceed otherwise is to incur the risk of
2 dismissing the case based on arguments not put forward by
3 the Claimant, at a great procedural cost to that Party."
4 That is Claimants' Reply Memorial at 23, Paragraph 2.
5 Here, Claimants' Claims arise from the Order, the
6 "auto," 188/14, the Constitutional Court's June 25, 2014,
7 denial of the petitions for annulment of that Tribunal's
8 May 26, 2011 Judgment. Specifically, it took the
9 Constitutional Court no less than three years and 30 days
10 to issue this final order, which comprises 93 pages and
11 two extremely compelling dissents.
12 There is one predicate that we would like to
13 raise as a condition before entering into the discussion
14 in detail of ratione voluntatis, temporis, materiae, and
15 personae. That proposition is that a substantial number
16 of court cases that Respondent relies on merit reading and
17 rereading. Yes, the Tribunal heard counsel correctly.
18 Claimants respectfully invite the Tribunal to recall that
19 on more than just a handful of occasions in its Reply
20 Memorial, Claimants actually urged the Tribunal to read
21 and to consult with care specific Awards upon which
22 Respondent purports to rely. And the Claimants tendered
23 this invitation on no less than 37 occasions.
24 So, please put up the slide. And it's three
25 slides.

1 The slide is now on your screens. Claimants
2 persist in encouraging the Tribunal to engage in this task
3 because this authority actually supports a finding of
4 jurisdiction and provides no basis for the alleged
5 propositions for which the Awards actually are cited.
6 During the discussion of ratione voluntatis,
7 temporis, materiae, and personae, detailed reference will
8 be made to the actual language and holding of many of
9 these Awards.
10 Claimants meet the ratione voluntatis consent
11 jurisdictional requirement.
12 Put up the slide, please.
13 In this case, it is not disputed that
14 Article 12.1.2(b) of the TPA provides Chapter 12 financial
15 services investors with procedural right to assert ISDS
16 claims. It is very clear that 12.1.2(b) allows and
17 provides for ISDS claims to be filed by financial services
18 Chapter 12 investors.
19 This fact is extremely important, and we will
20 analyze it in considerable detail. It also is not
21 disputed, because it cannot be contested, that Chapter 12
22 financial services investors may assert direct ISDS claims
23 against the signatory State based upon two treatment
24 protection standards: 10.7, expropriation and
25 compensation, and 10.8, transfers.

1 Put up the slide of 12.1.2, please.
2 It is also important to note that Articles 10.12,
3 denial of benefits, and Article 10.4, special formalities
4 and information requirements, which are also incorporated
5 into 12.1.2(b), are not protection standards. These two
6 provisions, understandably, provide the Host State with
7 rights and transfer obligations to the investors. This is
8 important because one of the factors that the Tribunal
9 should be aware of is that, under the readings suggested
10 by Respondent of 12.1.2(b), the financial services
11 Chapter 12 investors are only provided with two,
12 enforceable by ISDS, treatment protection standards:
13 10.7, expropriation and compensation, and 10.8, transfers.
14 10.12 and 10.14 are not enforceable treatment protection
15 standards. They just aren't. So, that is critical
16 because it will point out to a lack of symmetry between
17 the way investors in the Chapter 10 common, regular,
18 investment chapter are treated and investors under
19 Chapter 12.
20 So, so far, we likely are in general agreement
21 with the Respondent. But there are a number of
22 fundamental propositions in the context of ratione
23 voluntatis with respect to which Claimants and Respondent,
24 very respectfully, disagree.
25 The first is a simple one. Claimants opine that

1 Articles 10.7 and 10.8, 10.12 and 10.14, which are
2 incorporated from Chapter 10 to Chapter 12, are aimed at
3 supplementing Chapter 12 and not limiting Chapter 12. In
4 other words, the expropriation 10.7 treatment protection
5 standard is incorporated into Chapter 12 for a simple
6 reason: It is not there. And the same happens with
7 transfers, denial of benefits, and formalities and
8 information. These are provisions that are transferred
9 from 10 to 12 to supplement 12.
10 Similarly, we say that section (b) from
11 Chapter 10--this is the dispute-resolution provision. We
12 say that is transferred from 10 to 12 also to supplement
13 Chapter 12, but not to limit Chapter 12. And this
14 distinction is a foundational difference between the two
15 Parties, and one that this Tribunal will have to look at
16 with care in terms of what MFN practice, 12.3, is
17 available and what national treatment practice, 12.2, is
18 available.
19 So, this is very important.
20 Now, Respondent, however, asserts that the
21 importation of Section (b), the investor-State settlement
22 provision, 10.7, 10.8, are meant not to supplement
23 existing rights contained in 12, but rather to limit them
24 or, if not altogether eviscerate all substantive rights
25 contained in Chapter 12. Of course, we do not opine that

1 that is even a reasonable construction because it leaves
2 all of Chapter 12 without real meaning, unless, of course,
3 that is relegated somehow to State-to-State arbitration.
4 And we will talk about that in due course.
5 The second limiting factor, or differentiating
6 factor, is that Claimants submit that, even assuming that
7 the importation of Articles 10.7, 10.8 limits Claimants to
8 the exercise of ISDS rights to only those two provisions,
9 Claimants would still have consent to arbitrate fair and
10 equitable treatment, even without having to engage in an
11 Article 12.3 Most Favored Nation practice, and we will say
12 how in just one second.
13 Respondent, however, asserts that the financial
14 services investors cannot bring claims based on FET that
15 there isn't any consent to arbitrate FET because doing so,
16 of course, would be tantamount to importing consent, and
17 that is proscribed.
18 Now, Respondent is wrong. Respondent is wrong
19 because it conveniently elects to ignore the language
20 forming part of Article 10.7, expropriation.
21 Please put up the slide of 10.7.1(a) through (d).
22 Now, quite significantly, when we look at
23 Article 10.7, it looks at first like a standard
24 expropriation article that has the four basic elements.
25 You need--it has to be for a public purpose; there must be

1 some sort of compensation; there cannot be any
2 discriminatory action; and, of course, it has to be in
3 keeping with basic and fundamental due process. So, those
4 four elements are there.
5 But then when we focus on due process, this is
6 what we see. It says--and we are looking now at
7 Article 10.7.1(d)--it says: "In accordance with due
8 process of law and"--the conjunction--"Article 10.5."
9 Can you please put up 10.5?
10 Now, Article 10.5, the minimum standard
11 treatment, at 10.5.1 reads: "Each Party shall accord to
12 covered investments treatment in accordance with customary
13 international law, including fair and equitable treatment
14 and full protection and security." End of citation.
15 Article 10.5.2(a) avails itself, but this time in
16 the very text, of the very same "for greater certainty"
17 language that we will later see in Article 10.4,
18 Footnote 2, the MFN equivalent of Chapter 10. And it
19 provides: "Fair and equitable treatment includes the
20 obligation not to deny justice in criminal, civil, or
21 administrative adjudicatory proceedings in accordance with
22 the principle of due process embodied in the principal
23 legal systems of the world." End of citation.
24 Therefore, because Article 10.5, Minimum Standard
25 of Treatment, explicitly and textually, forms part of

1 Article 10.7, expropriation and compensation, and we all
2 agree 10.7 expressly is incorporated into 12.1.2(a) and
3 (b). It follows and it cannot be denied that the Parties
4 consented to submitting to ISDS, investor-State dispute
5 arbitration, under Chapter 12 FET and denial of justice as
6 part of the Minimum Standard of Treatment set forth in
7 Article 10.5. We don't see how can you work-around it.
8 10.7 is incorporated. 10.7 includes 10.5. It is textual.
9 We don't understand the countervailing argument.
10 The proposition that Respondent, Mr. President
11 and Members of Tribunal, asserts, namely that the Parties
12 did not consent to having financial services investors
13 arbitrate claims for violation of fair and equitable
14 treatment, asks the Tribunal to omit the textual,
15 explicit, and uncontroverted reference to and
16 incorporation of Article 10.5 into Article 10.7.1(d). The
17 proposition is simply untenable and not justiciable. The
18 argument, regrettably, never should have been raised.
19 Therefore, no matter how we examine and reexamine
20 Respondent's argument, not even with non-Euclidean
21 geometry are they capable of squaring the circle.
22 Put up the next slide, please.
23 For the sake of completeness, Claimants also
24 submit that, in addition to having FET incorporated into
25 Chapter 12 pursuant to the explicit language of

1 Article 10.7, there are four Articles in Chapter 12 that
2 on separate and additional grounds, demonstrate that the
3 contracting Parties intended to provide financial services
4 investors with fair and equitable treatment protection
5 under Articles 12.4, 12.5, 12.10.4 and 12.11.
6 All four of these provisions infuse Chapter 12
7 with substantive protection obligations under Contracting
8 Parties that create corresponding rights held by financial
9 services investors.
10 Now, there's a third substantial point of
11 disagreement between the Parties, and this concerns the
12 extent to which the qualifying Footnote 2 to the MFN
13 Clause contained in Chapter 10, that is Article 10.4,
14 Footnote 2, limits Claimants' right to exercise the broad
15 scope of its Article 12.3, counterpart provision, right to
16 import more favorable treatment from the
17 Colombia-Switzerland BIT that would allow for the
18 enhancement of the existing three-year limitations period
19 by two additional years.
20 So, as to provide Chapter 12, financial services
21 investors with equal treatment of five-year limitations
22 period. Equal to that which Colombia provides to Swiss
23 investors under that BIT.
24 Put up the slide, please, 10.4.2.
25 Footnote 2 to Article 10.4 reads: "For greater

1 certainty, treatment 'with respect to the establishment,
2 acquisition, expansion, management, conduct, operation,
3 sale or disposition of the investment' referred to in
4 Paragraphs 1 and 2 of Article 10.4 does not encompass
5 dispute-resolution mechanisms, such as those in Section B
6 that are provided for in international investment treaties
7 or trade agreements." End of citation.
8 Now, Respondent's argument on this point are less
9 than clear and I really can't do justice to it. I know
10 they will, of course. They are most coherently set forth
11 on Pages 126 through 127 in Paragraph 268 of Respondent's
12 answer on jurisdiction, and Page 152, Footnote 714 of
13 Respondent's answer on jurisdiction.
14 As best as Claimants can discern, however,
15 Respondent argues that the Footnote 2 qualification to the
16 investment Chapter MFN 10.4 must be read as somehow
17 forming part of 12.1.2(b) because it was the Parties'
18 intent to have the Footnote 2 limitation apply to
19 Chapter 12, and specifically to Article 12.3, the MFN
20 counterpart to 10.4.
21 Now, that proposition, we say, is untenable for
22 many, many, many reasons, but the simplest and the most
23 self-evident reason is that Article 10.4, Footnote 2, no
24 matter how hard one tries, it is simply not listed in
25 12.1.2. In other words, we take 12.1.2, we look at it and

1 we see 10.7, 10.8, 10.12, 10.14, and Section B brought in,
2 but there is no reference to Article 10.4 in delimiting
3 Footnote 2. It is just not physically there.
4 Moreover, of course, 10.4 does not form part of
5 Section B, so that when B is transferred from 10 to 12, it
6 is not there. We can't read it in there. There is no way
7 of having that limitation transferred over to Chapter 12.
8 Now, it makes it all the more mystical and
9 somewhat metaphysical because Chapter 12 already has a
10 Most-Favored-Nation Clause, 12.3, and, of course, that
11 clause does not have the limiting language. So, we are at
12 a loss to see what argument, what possible doctrinal
13 construct takes the Footnote 10.4 limitation from 10 to
14 12, where it is not at all present in 12.1.2(a) or (b) and
15 does not, of course, form part of Section B imported from
16 10 to 12. So, that is an important difference.
17 Put up 10.2, please.
18 In addition to asking the Tribunal to
19 read 12.1.2(b), an entire Article, and qualifying language
20 that simply reading into it qualifying language and an
21 entire Article that simply is not present in the
22 provision, Respondent also invites the Tribunal to turn a
23 blind eye to the imperatives contained in Articles 10.2.1
24 and Article 10.2.3. So, it is really Article 10.2, 1 and
25 3.

1 Now, you have these provisions on your screens.
2 Article 10.2.1 reads: "One, in the event of any
3 inconsistency between this chapter, 10, and another
4 chapter, the other chapter shall prevail to the extent of
5 the inconsistency."
6 In that same connection, Article 10.3, 10.2.3
7 reads: "This chapter does not apply to measures adopted or
8 maintained by a party to the extent that they are covered
9 by Chapter 12, Financial Services, our chapter."
10 So, it is beyond cavil that in grafting
11 Article 10.4, Footnote 2, onto Chapter 12, would create a
12 rather stark conflict between the scope of Article 10.4,
13 Footnote 2, and its counterpart provision, 12.3, the
14 financial services MFN Clause, which is formally--this
15 conflict is formally and substantively and 12.3 is
16 substantially and formally different from its Chapter 10
17 counterpart.
18 And Respondent's argument that Article 10.4 and
19 its restrictive footnote must be read into Chapter 12,
20 because, inexplicably, the Parties, the signatory States
21 so intended as yet another argument that is not
22 justiciable, that cannot be justified under any reasonable
23 scenario, fact, logic, or equity, there is another glaring
24 example of let's just throw up everything and just see
25 what sticks.

1 But there's a fourth fundamental difference
2 between the Parties also undiscernible on these topics,
3 and this concerns the extent to which the scope of Article
4 12.3 for the importation of more favorable limitations
5 period is appropriate because of the ordinary meaning of
6 12.3 was intended, we say, to be much broader than its
7 10.4 counterpart, and to make available to financial
8 services, we say, investors' more favorable procedural
9 rights.
10 We say, well, you look at 10.4, and you look
11 at 12.3. There are differences, Point Number 1. And
12 Point Number 2, those differences matter. And
13 Point Number 3, those differences are in the very body of
14 text, and Point Number 4, those differences are also in
15 the presence or absence of qualifying language.
16 Now, let's get to work on this with greater
17 rigor. The Parties intended for the word "treatment"
18 within the meaning of 12.3 to be broader than its 10.4
19 investment chapter counterpart. It couldn't be clearer.
20 Beyond the proposition that Article 10.4, Footnote 2
21 somehow is contained in Chapter 12, Respondent argues that
22 12.3 MFN for some reason is no broader than its 10.4
23 footnote to counterpart, and, therefore, must be construed
24 as such.
25 This argument also asks the Tribunal to turn

1 their blind eye to the ordinary meaning of the language
2 forming part of Articles 10.4, 10.3, respectively.
3 Secondly, to the Parties' treaty practice, I think that
4 tells us something, and, third, to the majority of Awards
5 holding that MFN provisions, unless specifically
6 restricted as in the case of Article 10.4, Footnote 2,
7 should be extended to procedural rights concerning ISDS.
8 Put up the next slide, please.
9 The term "treatment" applies to the following
10 language contained in 10.4.1 and 10.4.2 with respect to
11 the establishment, acquisition, expansion, management,
12 conduct, operation, sale and other disposition of
13 investment. This is the qualifying language that we find
14 in so many investor chapters and, particularly, in trade
15 agreements where you have both an investor chapter, a
16 regular investor chapter, such as 10, and a financial
17 services investor chapter, such as 12.
18 This is the qualifying language that we typically
19 find virtually in every single of the 20 or so agreements
20 with the MFN Clause in the general investment chapter.
21 This qualification is important because the presence or
22 absence of such language has to be accorded interpretive
23 significance. We just can't ignore it.
24 The Footnote 2 qualification to the scope of
25 Article 10.4 must be understood as a limitation to the MFN

1 practice, circumscribed only to Article 10.4.
2 Please put up the next slide, 12.1.2.
3 The ordinary meaning of Article 10.4, Footnote 2,
4 cannot be being engrafted on 12.3 because Article 10.4 as
5 we have seen does not form part of 12.1.2(a) or (b).
6 Put up 12.3, please.
7 The qualifying Footnote 2 to Article 10.4 is not
8 present in Chapter 12, Article 12.3. The complete absence
9 of this qualifying language, along with the immediately
10 referenced propositions, based on an ordinary meaning
11 analysis, compellingly establishes that the term
12 "treatment" in 12.3 is broader than the scope of that word
13 as used in 10.4.
14 The Article 12.3 MFN Clause does not contain the
15 establishment language that we have seen. The absence of
16 these activities, and notably they are all verbs, mostly
17 intransitive verbs, in Article 12.3, further bolsters the
18 ordinary meaning analysis suggesting that Article 12.3 has
19 a broader scope than its Article 10.4 counterpart.
20 The Footnote 2 qualification to Article 10.4
21 illustrates the signatory States' treaty practice of
22 clearly and explicitly identifying, in ordinary language,
23 any limitations or qualifications to the scope of the
24 Treaty protection standard generally, and of an MFN
25 Clause, in particular.

1 You now have up on your screens some notable
2 examples of the signatory States' treaty practice in this
3 regard, namely explicitly stating restrictive qualifying
4 language in an investment MFN Clause and broader,
5 unrestricted MFN treatment scope pertaining to MFN Clauses
6 contained, as with Article 12.3, in financial services
7 chapters.
8 But there's another fact that should be
9 considered. The structural difference between a trade
10 protection agreement and a BIT further inform and
11 contextualize the Footnote 2 qualification to Article
12 10.4. Of relevance with respect to the question of the
13 Article 12.3 scope is that the TPA before this Tribunal
14 has no less than three MFN clauses, three national
15 treatment clauses, as well, each in a very separate and
16 particular chapter.
17 And it is clear that if we are going to analyze
18 the scope of these provisions, separately or together, we
19 have to analyze them in the context of the very chapter in
20 which they are found, in addition to obviously their
21 ordinary meaning and plain language. So, this is a big
22 difference from the type of analysis that we would
23 normally undertake and with just a Bilateral Investment
24 Treaty.
25 It is clear that the Footnote 2 restriction on

1 the scope of Article 10.4 conflicts with the Article 12.3
2 scope. Moreover, it is obvious that Chapter 12 already
3 has an MFN provision, as we have discussed, and for this
4 additional reason, any restriction on the scope of
5 Article--on the scope of Article 10.4 as well in the very
6 text of Article 10.4 itself must be viewed as standing and
7 only limited to Chapter 10, investors and investments.
8 Therefore, it cannot follow that the signatory
9 States did not consent to a Chapter 12, Article 12.3 MFN
10 provision that would be as narrow in scope as the
11 Chapter 10 counterpart.
12 You now see on your screens Article--again,
13 Article 12.1.2(b). Respondent asserts, primarily relying
14 on the expressio unius--unius est exclusio alterius axiom,
15 that somehow the incorporation of Section B into
16 Chapter 12 from Chapter 10, as well as the incorporation
17 of the other Chapter 10 importations that we have seen,
18 eliminates the enforcement on the part of financial
19 services investors of all, without exception, substantive
20 provisions contained in Chapter 12.
21 Claimants very respectfully submit that this
22 construction of Chapter 12 is flawed because of three very
23 rudimentary reasons that have the effect of completely
24 eviscerating Chapter 12, financial services, and of
25 transferring Chapter 12 investors into Chapter 10 and then

1 just providing them with two ISDS enforceable rights,
2 expropriation and transfers.
3 If that's the reading, what sense--we ask the
4 Tribunal to respectfully consider, what sense would there
5 be to having a financial services chapter at all? Why are
6 these investors segregated from all other industry sector
7 investors and provided with their own chapter if what we
8 are going to do is treat them no differently than having
9 them in 10, and just limiting their ISDS rights to two?
10 It makes no sense.
11 First, Respondent misapplies, we say, the
12 expressio axiom. Now, notably the expressio axiom does
13 not form part of any VCLT analysis. It is not. But if
14 you're going to apply the axiom, then at least it should
15 be appropriately applied, and we don't think that it has
16 been and here is why.
17 The expressio axiom only can be applied to one
18 set of listings at a time. Analytically, it cannot be
19 simultaneously applied to two or more sets of elements
20 within a particular category. Therefore, while certainly
21 Respondent would be perfectly correct in concluding that
22 the only substantive provision incorporated from 10 into
23 12 are the four that explicitly are referenced in
24 12.1.2(b), it does not and cannot at all of necessity or
25 logic follow that the incorporation of these four

1 Chapter 10 provision voids the enforceability of all
2 Chapter 10 treatment protection standards and substantive
3 provisions including national treatment and MFN.
4 Put up the slide, please.
5 This interpretation would relegate all Chapter 12
6 substantive provisions as existing only in furtherance of
7 State-to-State arbitration, a proposition that is not
8 supported by the ordinary meaning of Chapter 12's entire
9 text. Its context, object and purpose, or even the very
10 workings of State-to-State arbitration, which does not
11 provide for compensatory damages of any kind for
12 derivative investor standing, so it's not a methodology
13 that exists so that investors can assert their own claims
14 through that vehicle.
15 No, the Investor-State--or State-to-State
16 arbitration concerns macroeconomic, maintenance,
17 enhancement, and change of the Treaty, and does not
18 provide for the making whole of microeconomic concerns,
19 which is what investor claims are all about. The
20 investors cannot be made whole. Compensatory damages are
21 not awarded, but, moreover, there is also no empirical
22 data which suggests as much, that Chapter 12, the totality
23 of it, exists for purposes of State-to-State arbitration.
24 Here's why. There have only been five
25 State-to-State arbitrations in the history of Investment

1 Law. And, of those, only four reached a panel order. So,
2 there was not empirical body from which the drafters of
3 the TPA on May 15, 2012, when it was entered into, drew
4 from to somehow reach this conclusion. It just makes no
5 sense, no matter how one turns it. And this inveighed a
6 very narrow application of State-to-State arbitration. It
7 was never, of course, meant to supplement the consequence
8 of denying financial services investors ISDS rights and
9 limiting them only to two rights.
10 Now, this is important. Please put up 12.19.1.
11 In contrast to what I've just said regarding the
12 limitations of State-to-State arbitration, Article 12.19,
13 investment disputes in financial services, specifically
14 references "an investor of a party submitting a claim to
15 arbitration under Section B of Chapter 10, Investor-State
16 Dispute Settlement, and the Respondent invokes 12.10 as a
17 defense, the following provisions shall apply."
18 So, you see that 12.19 doesn't make 12.10 the
19 exception. That's a prudential measure exception, apply
20 as an exception, as something noteworthy and particular.
21 It assumes that Chapter 12 provisions apply. And the
22 question this Tribunal should ask itself, we very
23 respectfully submit is, when a claim is brought pursuant
24 to, let's say, 10.7 under 12.1.2(b), by a financial
25 services investor, what law applies?

1 Well, we say, the law that applies obviously must
2 be Chapter 12, and so does the text. You also see that in
3 Article 12.19.1, it does not place any restrictions on "a
4 claim to arbitrate under Section B of Chapter 10,
5 Investor-State Dispute Settlement." It actually
6 references the application of 12.10, understandably as
7 possibly being invoked by a Host State in such a
8 proceeding.
9 In contrast to Respondent's interpretation of
10 Article 12.1.2(b), as rendering all of Chapter 12
11 provisions of no force and effect, without remedies, we,
12 Claimants, offer a reading that provides the substantive
13 provisions of Chapter 12 with a fulsome and robust effect.
14 And here the Tribunal's observations in Eureko v. Poland,
15 a Partial Award at Paragraph 248 are helpful.
16 It says: "It is a cardinal rule of interpretation
17 of treaties that each and every operative clause of a
18 treaty is to be interpreted as meaningful rather than
19 meaningless. It is also established in the jurisprudence
20 of international law, particularly that of the Permanent
21 Court of International Justice, that Treaties, and hence
22 their clauses, are to be interpreted as to render them
23 effective rather than ineffective." That's at Claimants'
24 Reply, Memorial at Page 129, Paragraph 171, Footnote 155.
25 Put simply, the expressio axiom cannot

1 simultaneously be applied to Articles from Chapter 10 and
2 Articles from Chapter 12. If it is to be used as an
3 interpretive tool at all with respect to Article
4 12.1.2(b). To have it apply otherwise would be to divest
5 Chapter 12 of all relevance and materiality, which would
6 be, of course, a reductio ad absurdum.
7 Next slide.
8 Respondent now has elected in this case not to
9 present any evidence of any kind, Expert, fact, or
10 documentary. Colombia has taken the position that neither
11 factual nor Expert testimony or other evidence
12 contemporaneous with the entry into force of the NAFTA on
13 January 1, 1994, the template predecessor to the TPA that
14 is before us, is at all necessary.
15 Now, how Respondent presents its case, or how it
16 responds to Claimants' Expert and Fact Witnesses and
17 documentary evidence, of course, is Respondent's
18 prerogative. And this is a sixth difference that we have
19 with Respondent.
20 But Claimants and Respondent have a difference of
21 opinion on the principles that govern the extent to which
22 such evidence that Claimants have proffered should be
23 considered by this Tribunal. So, we have a difference of
24 Opinion as to governing rules that go to the extent to
25 which this evidence should be considered by the Tribunal.

1 I'll try to sharpen that in just a second.
2 In support of this assertion, Respondent very
3 generally argues on Page 126 of its Rejoinder Memorial
4 that VCLT Article 32, supplementary means of
5 interpretation, is never triggered because of the absence
6 of any ambiguity that would serve as a condition preceding
7 to any consideration of this Article. Now, this
8 proposition, we say, is incorrect for two reasons.
9 First, under Article 31 VCLT, a good-faith
10 interpretation of the ordinary meaning to be given to the
11 terms of the Treaty must be considered, together with
12 context, object, and purpose. Now, context, object and
13 purpose can best only be understood by reference to
14 evidence contemporaneous with the entry into force of a
15 treaty.
16 In this case, evidence as of January 1, 1994, the
17 entry into force of a NAFTA, November 2006, the signing of
18 the TPA, and May 15, 2012, the entry into force of the
19 TPA.
20 Now, second, and of equal significance,
21 Respondent completely misstates the stricture of Article
22 32 of the VCLT supplementary means of interpretation.
23 And put up the Slide please.
24 It so, happens that Respondent omits 50 percent
25 of the disjunctive that Article 32 makes clear

1 that: "Recourse may be had to supplementary means of
2 interpretation, including the preparatory work of the
3 Treaty and the circumstances of its conclusion, in order
4 to confirm the meaning resulting from the application of
5 Article 31." End of citation.
6 I emphasize the word "confirm." We need not have
7 an ambiguity to consider extraneous evidence that purports
8 to shed light on the context, object and purpose of the
9 Treaty language. All we need is that--that evidence can
10 be used to confirm, even in light of a scenario, which is
11 hardly the case here, where the Treaty itself lacks any
12 ambiguity.
13 There is simply no rule of interpretation forming
14 part of a VCLT holding that only where an interpretation
15 is ambiguous or obscure is recourse to supplementary means
16 of interpretation triggered. In fact, there is no such
17 rule anywhere in public international law.
18 Respondent turns the rule on its head. Moreover,
19 supplementary means of interpretation are not limited to
20 preparatory work of the Treaty. The language of Article
21 32 is very eloquent in using the word "including."
22 "Including" means, of course, that it is non-exhaustive.
23 Now, Mr. Olin Wethington testifies with respect
24 to the negotiation, drafting, implementation, and
25 operation of Chapter 14 of the NAFTA, the template

1 predecessor to Chapter 12 of the TPA, as of the 1993 and
2 January 1,1994, relevant time frame. That's the relevant
3 time frame.
4 At that time, his testimony asserts
5 that: "Financial market liberalization demand an
6 enforceable MFN and national treatment substantive
7 treatment and protection standards that would provide
8 financial services investors with ISDS enforceable rights
9 beyond just expropriation and transfer. National
10 treatment and MFN protection standards were made available
11 under the NAFTA to financial services investors." And
12 that's Mr. Wethington at Paragraph 23, First Witness
13 Statement.
14 At the time of the subject matter of
15 Mr. Wethington's testimony, Mr. Wethington, the former
16 Assistant Secretary of the Treasury for International
17 Affairs, was only accountable to the Secretary of the
18 Treasury, Secretary Brady, and to the President of the
19 United States. That's Paragraph 23.
20 Claimants respectfully remind the Tribunal that
21 the propositions contained in Mr. Wethington's two Witness
22 Statements notably have not been challenged from an
23 evidentiary perspective. Glaring, because of its absence
24 as evidence from any of Colombia's negotiators of the TPA
25 of any rank of Government.

1 Put up the slide, please.
2 (Interruption.)
3 MR. MARTÍNEZ-FRAGA: Mr. Wethington's testimony
4 with respect to--
5 PRESIDENT BEECHEY: Just a moment. Excuse me.
6 Was there an intervention just now?
7 MR. POPOLI: Mr. Chairman, that was the Spanish
8 court reporter. She is not receiving interpretation. If
9 you can bear with us for a minute.
10 PRESIDENT BEECHEY: Well, it may be that this is
11 an appropriate moment to pause for our 15-minute break
12 while we sort all that out.
13 MR. POPOLI: Of course.
14 (Interruption.)
15 MR. POPOLI: It seems to be solved.
16 PRESIDENT BEECHEY: All right.
17 Mr. Martínez-Fraga, would you kind enough to finish this
18 particular point and then we will stop for our 15-minute
19 break.
20 MR. MARTÍNEZ-FRAGA: Let's consider it finished.
21 ARBITRATOR FERRARI: You're sure? All right.
22 MR. MARTÍNEZ-FRAGA: Yeah. I'll come back to it
23 later.
24 PRESIDENT BEECHEY: We will start again then,
25 please, at--what is it?--11 minutes to 4:00 local time

1 here. 11 minutes to the hour, if you don't mind. Very
2 well. Thank you very much.
3 (Brief recess.)
4 PRESIDENT BEECHEY: Mr. Martínez-Fraga, are you
5 ready to start?
6 MR. MARTÍNEZ-FRAGA: Yes, sir. Thank you so
7 much. And I want to thank Mr. President and the Tribunal
8 for that break because I myself was falling asleep. Thank
9 you so much.
10 PRESIDENT BEECHEY: We wouldn't dare answer that
11 question because it might incriminate us, whatever we were
12 to say in response.
13 MR. MARTÍNEZ-FRAGA: I'm just confessing for
14 myself, sir.
15 PRESIDENT BEECHEY: All right. Let me confess to
16 you this. We are running a few minutes late. We are due
17 to finish the Claimants' presentation after about
18 4:45 local time here. So, we will go on another five or
19 six minutes to make up some of the time that we've lost,
20 and then we will stop. All right?
21 MR. MARTÍNEZ-FRAGA: Thank you, sir.
22 PRESIDENT BEECHEY: Very good.
23 MR. MARTÍNEZ-FRAGA: Thank you.
24 Glaring because of its absence, its evidence from
25 any of Colombia's negotiators of the TPA of any rank of

1 Government whatsoever.
2 Put up the next slide, please.
3 Mr. Wethington's testimony with respect to ISDS
4 rights available to U.S. investors concerning national
5 treatment and MFN and not just expropriation and transfer
6 is supported by the relevant and contemporaneous evidence
7 offered at the September 28, 1993, House Committee
8 Hearings on the workings of Chapter 14. Now, this Hearing
9 was dedicated only to Chapter 14, the counterpart to our
10 Chapter 12.
11 You see on your screens an excerpt from
12 Mr. Barry S. Newman, his testimony before the House
13 Committee on September 28, 1993, regarding Chapter 14.
14 Mr. Newman was the Deputy Assistant Secretary for
15 International Monetary Affairs of the Department of the
16 Treasury, and he reported directly Mr. Wethington. The
17 language that we have highlighted is the most important of
18 the quote contained in the blue box. Notice that he
19 speaks of "any violation of an investment protection," any
20 violation of an investment protection.
21 He also mentions that "an investor would be able
22 to bring a direct action against the offending NAFTA
23 country." This reference obviously is not to
24 state-to-state arbitration. In addition, he references
25 that the action would be "for the financial harm caused by

1 the violation." So, it's a money damages that
2 state-to-state could not proffer, in any case.
3 As we have discussed, there is no way that this
4 can be somehow grafted to state-to-state arbitration.
5 Put up the next slide, please.
6 Now, what follows is an exchange between
7 Mr. Newman and the late Honorable Henry B. González,
8 Chairman of the House Committee. He references robust
9 national treatment rights that investors, i.e., firms will
10 be able to bring against host States.
11 Put up the next slide, please.
12 This is Mr. Ira Shapiro, general counsel to the
13 U.S. Trade Office. In the excerpt before you, I want to
14 emphasize that the kind of dispute that General
15 Counsel Shapiro is referencing is one that concerns "our
16 faith in the Mexican court system." He clearly is not
17 referring to the type of dispute that would be the subject
18 matter of State-to-State arbitration, and no court would
19 have subject matter jurisdiction over any such thing.
20 Put up the next slide, please.
21 As you can see in the slide before you, the SPAC
22 Report, during the relevant time frame, contemplates that
23 "the NAFTA provision shall serve as the starting point and
24 model for all future trade negotiations."
25 Put up the next slide, please.

1 That Report viewed national treatment as an
2 enforceable right available to all U.S. service providers
3 in México.
4 Put up Slide 3 of the SPAC Report, please.
5 Now, as you can see from this excerpt from the
6 Report, robust ISDS rights for financial services
7 investors were contemplated in order to strengthen "the
8 procedures for obtaining binding Awards of money damages
9 and enforcement of those decisions."
10 We submit respectfully to this Tribunal that
11 Colombia has no response to this contemporaneous evidence.
12 It has offered none. The most that it can muster now is
13 to point to a non-party submission that the Trump
14 administration has filed at this time, in 2020, 26 years
15 after the NAFTA and 8 years after the entry into force of
16 the TPA in the very middle, in the very midst of an
17 arbitration.
18 Now put up the next slide, please.
19 Now, not surprisingly, when the issue concerning
20 the arbitrability of Article 1405, the counterpart
21 provision to 12.2 in our TPA, the national treatment of
22 the NAFTA, was raised in the Fireman's Fund
23 Insurance v. México proceeding in 2003, the actual
24 relevant time frame, and not 2020, the United States'
25 non-disputing party submission had a very different look

1 to it. It had a very different tone to it. What it
2 viewed as then extremely, extremely important was a very
3 banal, I shall say, issue concerning the following:
4 "whether a bank holding company under United States law
5 would be considered a 'financial institution' within the
6 meaning of Article 1406." That's the issue that it saw as
7 important.
8 The venerable public international law principle
9 of contemporaneity renders irrelevant the Trump
10 administration's U.S. non-disputing party submission filed
11 in 2020 as at all having interpretive weight concerning
12 what was meant on January 1, 1994, the entry into force of
13 the NAFTA, or May 15, 2012, the entry into force of the
14 TPA.
15 Do not put up the following slide.
16 The principle of contemporaneity is critical to
17 the appropriate consideration of context, object, purpose,
18 element of any VCLT analysis.
19 And by way of example, in Daimler v. The
20 Argentine Republic, in exploring the scope of the word
21 "treatment" in the MFN Clause of Article 3 of the
22 Germany-Argentina BIT, the Tribunal affirmed the principle
23 of contemporaneity and in so affirming in Paragraph 220 of
24 that Award observed: "In order to shed light on whether
25 the contracting parties intended for the term 'treatment'

1 to encompass the BIT's international dispute settlement
2 provision, one must apply the classical rule of
3 interpretation known as the principle of contemporaneity.
4 This principle, particularly pertinent in the case of
5 bilateral Treaties, requires that the meaning and scope of
6 the term 'treatment' be ascertained as of the time when
7 Germany and Argentina negotiated the BIT. This BIT was
8 adopted in 1991.
9 "Unfortunately", the Tribunal goes on to say,
10 "neither disputing Party has submitted any direct
11 evidence, for example, from the Treaty's drafting history,
12 revealing the particular understanding of treatment
13 maintained by Germany and Argentina of that date. The
14 Tribunal must, therefore, look for clues to the meaning
15 generally ascribed to the term by the broader
16 international community of states at the time, 1991, in
17 that case."
18 Here in the case before this Tribunal, one party,
19 Claimants, has submitted direct evidence revealing the
20 specific understanding and applicability to ISDS of all
21 substantive provisions comprising Chapter 12 of the TPA,
22 including 12.2, national treatment, 12.3, MFN, and the
23 relevant time frames. This evidence remains unrebutted
24 from an evidentiary perspective.
25 Respondent also seeks to circumvent a reading of

1 Chapter 12 that provides financial services investors with
2 the right to arbitrate more than just one expropriation
3 and transfer claims by citing to dicta in the Fireman's
4 Fund case, but this effort also fails.
5 Now, in its May 15, 2020, submission titled
6 "Claimants Observations Concerning Non-Disputing Party
7 Submission of the United States of America," Claimants
8 identified 13 grounds demonstrating why the dicta in the
9 Fireman's Fund case cannot apply to this case. I will not
10 go through the 13 grounds. But there are two grounds that
11 do merit mention.
12 First, Fireman's Fund was a Chapter 11 investment
13 case. It was never brought pursuant to Chapter 14, the
14 financial services framework. We all know that.
15 And, second, the parties in Fireman's Fund never
16 arbitrated NAFTA Chapter 14 claims. It was never
17 arbitrated, even though the Claimants in that case allege
18 that México had violated 1405, Chapter 14's national
19 treatment provision. That claim never was contested,
20 therefore, it was never briefed, and, therefore, it was
21 never submitted for adjudication. Therefore, the Tribunal
22 never considered any authority, evidence, or argument, as
23 is the case before this Tribunal regarding the context,
24 object, purpose of Chapter 14, treatment protection
25 standards.

1 Now, Respondent has raised four, what we call,
2 the technical defenses. I will say at the very outset
3 that three of the four should be just outright dismissed
4 based on Claimants' traveling on Article 11 of the
5 Colombia-Swiss BIT. The defenses never should have been
6 raised for a multitude of reasons, but we are forced to
7 respond to them.
8 Now, the first one is the fork-in-the-road
9 defense, and this is very interesting and curious.
10 Respondent plays ping-pong between the two treaties, the
11 Colombia-Swiss BIT and the U.S.-Colombia BIT, even though
12 it spills a lot, a lot of ink, no less than 50 pages,
13 saying that the argument, I should say, that the
14 Colombia-Swiss BIT doesn't apply. It still goes on to
15 make this argument, so it pools the fork in the road from
16 the Colombia-Swiss BIT and brings it over here. We feel
17 that it is really not at all a justiciable issue.
18 Why? Because of the relevant time frames. On
19 June 25, 2014, at that point, that's the end of all
20 judicial labor. So, how could there be a fork in the
21 road? It makes absolutely no sense. We are not choosing
22 domestic litigation over arbitration. We are choosing
23 arbitration because there is nowhere else to go.
24 Now, before, on November 1, 2007, how could there
25 be a fork-in-the-road issue? First of all, there was no

1 Treaty in place. Secondly, we won. Claimants won
2 everything. They dragged us into 2011 and beyond. So
3 there, there couldn't have been a fork in the road.
4 And, of course, in 2011, there couldn't have been
5 a fork in the road for several reasons. First, there
6 couldn't be no fork because there was no Treaty in place;
7 but, secondly, Claimants had to exhaust all judicial
8 remedies, and part of the annulment proceeding is critical
9 to that.
10 So, let's move forward from this, please.
11 So, that's--we don't even understand how it could
12 conceptually be raised in good faith.
13 The consultation negotiation defense is also
14 raised. Now, this one is really particularly quizzical
15 for a number of reasons. The defense is inapplicable
16 based, really, on eight propositions, but we will only
17 cite to three that command attention because of the
18 expediency with which the defense can be eliminated.
19 First, the consultation and negotiation defense
20 is not present at all in Chapter 11 of the Colombia-Swiss
21 BIT. That should be the end of the analysis point-blank,
22 but even if it somehow were or even if Article 10.15 of
23 the TPA applied, the negotiation and consultation
24 provision of that Article is permissive and not mandatory.
25 That provision provides that the word "should" as in "in

1 the event of the investment dispute that Claimant and
2 Respondent"--so it is bilateral; they also have an
3 obligation under this provision--"the Claimant and
4 Respondent should initially seek to resolve the dispute
5 through consultation and negotiation."
6 So, there was no language that says that it's
7 mandatory and failure to abide by it would by divest this
8 Tribunal from jurisdiction, but there's also absolutely no
9 doctrine or case, even if you could modify the textual
10 language with a subsequent case that suggests that the
11 permissive "should" is somehow mandatory, let alone,
12 anything other than procedural and directional, nothing
13 suggesting that it is jurisdictional.
14 But put up the next slide, please.
15 But the real reason, beyond the technical, clear
16 arguments, they are basically hornbook law. The real
17 reason why it really doesn't make any sense is because on
18 January 24, 2018, three years ago--
19 MR. GRANÉ: Mr. President, I'm sorry to
20 interrupt, but I believe that it's time for me to raise
21 one of the objections. I don't see any reference to an
22 exhibit in this slide. I may be wrong, but let me go
23 back. I can't see a reference. So, if counsel could
24 please specify whether this is a document on the record.
25 MR. MARTÍNEZ-FRAGA: Yeah, it is. It's attached

1 to the Request for Arbitration. It's a letter that I sent
2 to the Colombian authorities inviting them to settle the
3 case, to discuss settlement, and to which the Colombian
4 authorities responded. So, it's a clear admission by a
5 party. I don't see how you would be harmed by it. You
6 wrote it.
7 MR. GRANÉ: Let me, perhaps, restate,
8 Mr. Martínez-Fraga. Is this a document on the record?
9 MR. MARTÍNEZ-FRAGA: The answer is yes. It's
10 part of the Request for Arbitration.
11 MR. GRANÉ: Okay. We will check. We reserve our
12 rights, Mr. President, while we check this.
13 MR. MARTÍNEZ-FRAGA: As you can see--may I,
14 Mr. President?
15 PRESIDENT BEECHEY: Of course, you may.
16 MR. MARTÍNEZ-FRAGA: Thank you, sir.
17 As you can see on your screens, I wrote to
18 Mr. Nicolás Palau Van Hissenhoven and invited Colombia to
19 explore a "possible nonarbitral settlement of this
20 proceeding." And he responded. He responded on
21 February 16, 2018.
22 Can you put up his response, please.
23 And here's his response, which is interesting
24 because it has this word "bodoque," which it's a very
25 Castilian word. But apparently in Colombia, what it

1 actually means is garbage.
2 So, you can see that he ignores to negotiate and
3 asserts that a formal response is forthcoming with respect
4 to the Request for Arbitration, and, moreover, again, on
5 December 20, 2019, on Page 340 of Claimants' Reply
6 Memorial, in bold lettering, Claimants invite a
7 Respondent's representative "at their convenience prior to
8 the Hearing on Jurisdiction to consult and negotiate a
9 settlement of the present dispute."
10 Well, one year later, Respondent has not provided
11 Claimants with any response to this overture. So, I mean,
12 we don't really understand any of this. Notably, that was
13 four years short of one year from today. So, Colombia
14 raised this defense, that's the fork in the road. It's
15 just a complete frivolity, I dare say.
16 Hence, Colombia received an invitation to
17 negotiate three years ago and was nonresponsive,
18 characterizing the letter containing the offer as garbage.
19 One year ago, an offer was tendered, and Colombia does not
20 respond at all.
21 Put up the next one, please, the next slide.
22 Again, and for the sake of completeness, we are
23 compelled to point out to the Tribunal that the authority
24 even--it's not relevant, but the authority on which the
25 Respondent relies in an effort to circumvent the

1 permissive treaty language, which, of course, is inimical
2 to basic treaty interpretation, we encourage the Tribunal
3 to read these cases. Yes. We are asking the Tribunal to
4 read Respondent's cases. They are completely inapposite
5 at the most rudimentary level.
6 Put up the slide of Notice of Intent.
7 They also raise a Notice of Intent defense, which
8 also is not justiciable under any analysis. The technical
9 consent defense that Respondent relies upon, there are
10 three reasons why it is not justiciable. First, there is
11 no such requirement under, again, Article 11 of the
12 Colombia-Swiss BIT. This should be the end of analysis,
13 but for the sake of completeness, we'll work with it.
14 Second, there is no language in Article 10.16.2
15 of the TPA at all suggesting that a Notice of Intent
16 provision is jurisdictional in nature. That provision,
17 much like the consultation negotiation provision, is
18 intended to promote settlement by alerting the Respondent
19 of a potential claim with respect to which Respondent may
20 likely not have any notice that may then possibly lead to
21 a settlement discussion. It is clear that the provision
22 is intended to promote settlement and not to create
23 jurisdictional hurdles to perfecting a claim.
24 Third, the Tribunal in Chemtura v. Canada, cited
25 in Claimants' Reply at Paragraph 675, observed and held

1 that a Notice of Intent clause will not be enforced where,
2 first, it is established, as here, that the Parties have
3 been aware of the dispute prior to the filing of a Request
4 for Arbitration.
5 Second, where there is no evidence of a bilateral
6 intent to settle the dispute--that is certainly clear--or,
7 third, where non-enforcement does not prejudice
8 Respondent, and they can't show any prejudice, nor have
9 they even intended or tried to do so.
10 Put up the next one, please.
11 Notably, Article 10.16.2 of the TPA, not
12 surprisingly, is premised on Article 1119 of the NAFTA, of
13 course, the template in which the entire Colombia-U.S. TPA
14 is based. Therefore, we particularly find it helpful to
15 bring to the Tribunal's attention B-Mex v. México, cited
16 at Paragraph 672 and 674 of Claimants' Reply Memorial
17 because it is a NAFTA case of this identical issue. And,
18 among other things, the Tribunal in that case provided
19 that the Notice of Intent requirement "does not condition
20 the Respondent's consent to arbitration" and "failure to
21 issue a Notice of Intent, therefore, does not deprive the
22 Tribunal of jurisdiction over them."
23 Put up the next slide, please.
24 Now, on the screen is Respondent's Legal
25 Authority on this issue. It actually, of course, supports

1 a finding that Notice of Intent is not jurisdictional and
2 not a jurisdictional requirement. We encourage the
3 Tribunal to read their own authority.
4 The fourth non-justiciable and somewhat baffling
5 defense is the waiver defense. Now, this defense, again,
6 is odd that it's being raised because, again, it is not
7 part of Article 11 of the Colombia-Swiss BIT, but for the
8 sake of completeness, we'll indulge them and address it.
9 Put up Slide 59, please.
10 Even if we were--but even if it were,
11 Article 10.18.2(b), were applicable, the elements of the
12 waiver condition to attach simply are nowhere present.
13 And here's why. I'll give you two reasons.
14 First, there is no identity of anything. One is
15 a human rights case and the other case is a breach of an
16 international treaty for investor protection or a trade
17 protection treaty having rights for investors under a
18 financial services chapter. So, these are different.
19 And secondly--and this is extremely important--in
20 the human rights case, that case is before the
21 Inter-American Commission on Human Rights. Now, there is
22 something that is very interesting. The Inter-American
23 Commission on Human Rights cannot award compensatory
24 damages. It just doesn't really matter if the
25 petitioner--which, by the way, there is also an identity

1 of party difference--if the petitioner asks for
2 compensatory damages, the Inter-American Commission on
3 Human Rights cannot award money damages.
4 So, that's completely different.
5 Now, why is that baffling? Well, that's baffling
6 because Colombia is a Respondent to that proceeding, and
7 Colombia knows perfectly well that the damages sought
8 there are really prescriptive admonition. That's the only
9 thing that that Inter-American commission can do.
10 Now, here is why it is evenly--additionally
11 baffling. The law on this issue of waiver is very clear.
12 It says that the waiver can be exercised at any point--and
13 all the cases are in unison on this--at any point before
14 the Merits Hearing.
15 Now, we have, of course, advised Respondent that
16 we're willing--if the Tribunal so finds, we're willing to
17 waive that proceeding and proceed to a merits hearing if
18 the Tribunal finds, for whatever reasons, which it should
19 not anyway, that the waiver provision attaches to that
20 type of proceeding, where, really, none of the core
21 elements are met and, most importantly, the core element
22 of damages. After all, the waiver proceeding has, as its
23 principle objective, preclusion of double recovery. It
24 is, here, impossible.
25 We are going to look now at ratione temporis.

1 The ratione temporis issue before the Tribunal is
2 extremely simple. It really is. It is based on two basic
3 questions. The first is: Does a treaty apply
4 retroactively? No, it does not. A treaty does not apply
5 retroactively, so the intertemporal question is raised.
6 We don't see how it is relevant, because our claim is the
7 dispute that we cast and identify. We identify a State
8 measure, A, the June 25, 2014 ruling, and, B, as that
9 measure as breaching the TPA. And we explained why that
10 measure breaches the TPA.
11 The second issue, of course, is the issue of
12 whether the Claim was properly filed in time, and there,
13 of course, it's--we've stated that we are relying on the
14 Colombia-Swiss BIT to enhance existing rights from
15 three years to five years. And you will hear Professor
16 Loukas Mistelis testify to this issue, and we've submitted
17 a lot of Authority on it, but it's very notable to
18 understand that this is a paradigmatic, we argue, exercise
19 of MFN practice.
20 Why? Because, since we are dealing with a
21 limitations issue, the enhancement of the already existing
22 right is quantifiable. So, there's really no way that
23 anyone can credibly argue that, by importing an additional
24 24 months, the Treaty is being rewritten. The only way
25 that that can possibly be argued, and that seems to what

1 Respondent is saying, is by saying: "Oh, wait a minute,
2 here's why you can't do it." Because it is 10.4 that
3 applies to Chapter 12. But we have already seen that
4 movie, and we know that 10.4 is nowhere present in
5 12.1.2(b). We also note that 10.4 did not form part of
6 Section (b) in Chapter 10. And for that reason, when
7 Section (b) was incorporated into 12.1.2(b), it also was
8 not there.
9 So, we don't really understand how that issue is
10 at all relevant unless, of course, we buy into
11 Respondent's argument that, no, that the relevant--that
12 somehow the material State action that should be the
13 operative claim predates the Treaty. But we are not
14 alleging that there is any measure--that we are traveling
15 on any of those measures that predate the Treaty--true,
16 there were many. But we're not traveling on those.
17 Now, that brings, before the Tribunal, I think, a
18 very interesting question, but one that has been
19 explicitly answered without any minority view, and it's
20 the following: Can a Tribunal inform itself in passing on
21 a jurisdictional question on facts that predate the entry
22 into force of the Treaty? Again, can a Tribunal inform
23 itself in passing on a jurisdictional question having to
24 do with ratione temporis on facts that predate the Treaty?
25 And the answer to that question is, of course, yes.

1 We cited a lot of Authority for that proposition.
2 The law books are full of them. Not only is there a lot
3 of Authority for that proposition, which we've cited, but
4 it's not controverted. No--there is no doctrinal writing
5 that questions it. There aren't any cases that really
6 question it. None of that is applicable here. It doesn't
7 mean that the Tribunal relies on pre-Treaty acts or
8 omissions. No, that is not what we're saying.
9 We are saying that in looking at the June 25,
10 2014 State measure, the Tribunal clearly and unequivocally
11 can look to the extent to which preceding factual acts
12 such as the domestic dispute contextualize the
13 international dispute postdating the Treaty.
14 So, on one side of May 15, 2012, the Tribunal has
15 a series of domestic disputes. On the other side of
16 May 12--May 15, 2012, the Tribunal has the Claim arising
17 from the June 25, 2014 State measure. The Tribunal can go
18 back pre-Treaty and inform itself on: Gee, what happened
19 there? How is that related to what is happening here?
20 My colleague Ryan Reetz shortly will talk about
21 ratione materiae there as well. I'm sure he will discuss
22 the Mondev Case and how it is that, even where it is
23 argued that the that the investment was extinguished,
24 that the actual events predate the entry into force of the
25 Treaty, how that is just really not what we have here and

1 how there are circumstances--as here; many of them,
2 actually; law books are full of them, and we have cited
3 many of them--where, of course, the Tribunal is privileged
4 to look to pre-Treaty action. But even if it does not, it
5 really doesn't matter. We are saying that is the June 25,
6 2014 93-page with two dissents--that's what we are talking
7 about.
8 By the way, those two dissenting justices, while
9 Justice Rojas Ríos is now the Head of the Constitutional
10 Court under a different administration, at that time both
11 justices were removed for expressing their opinion. Yes,
12 both justices were removed for expressing their opinion.
13 So, that--please put up the plenary timeline.
14 So, what's important to understand that, while
15 can you look at everything pre-Treaty, we rely on
16 post-Treaty State action, and that's our position. And
17 Respondent can't walk here before this Tribunal and say,
18 "Oh, no, no, no. They really should have--this is where
19 we damaged them, so it predates the Treaty." That
20 just--it doesn't make sense.
21 Please put up Slide 99.
22 Now, this is extremely important. Not
23 surprisingly, the TPA does not contain any of the tests
24 that Respondent relies on.
25 Here's what I mean.

1 Respondent relies, basically, on four cases to
2 argue that there's a test that has two parts. They say,
3 well, you know, in order for a State measure to be
4 actionable, first it has to alter the fundamentally--the
5 existing status quo first. That State measure--so that
6 would be the June 25, 2014 measure--would have to alter
7 fundamentally the status quo. That test doesn't exist, we
8 submit. There is no test that says that. But even if it
9 did, we will address it.
10 Then the second thing they say is, under this
11 two-part test that we glean from the Authority but is
12 stated nowhere, the State measure must be independently
13 actionable. In other words, it cannot be related to
14 anything at all that predates the Treaty. If it is, then
15 it's not independently actioned, and for that reason
16 ratione temporis, of course, cannot be met.
17 Well, in addition to the tests not being present
18 anywhere, what is very important to understand is that,
19 even if that were the test, the June 25, 2014 action, of
20 course, it is independently--one that foundationally
21 changes the status quo. That's how we started our
22 conversation today, by saying that what happened on
23 June 5, 2014 renders final the May 26, 2011 Judgment, and
24 renders final and void the November 1, 2007 Final Judgment
25 from the Council of State. That is how we began our

1 conversation, and it is not necessarily how we are going
2 to end it, but it is very important to say that, with
3 respect to this test, Respondent foundationally relies on
4 a case called Spence v. Costa Rica.
5 Now, I want to supplement their argument by
6 saying that there is some language in that case that
7 didn't make it to the brief which the Tribunal cited to
8 and emphasized, and I'll share it with the Tribunal so we
9 can have a complete record.
10 It says--this is the Spence Tribunal talking
11 about how reliable their case is as precedent: "The
12 jurisdictional aspects of this case are heavily
13 fact-specific. Although interpretations of law (notably
14 CAFTA Article 10.1.3 and 10.1.8) are necessary, the
15 Tribunal's assessment ultimately turns on appreciations of
16 fact. The Tribunal thus cautions any reading of this
17 Award that would give it wider precedential effects."
18 But here's the rub. We feel that Spence was
19 correctly decided. We feel that the facts in Spence were
20 such that it was correctly decided. It is just not
21 applicable to this case at all. Now, they, of course,
22 rely on other cases that they say raise the Spence test.
23 I'll mention those very quickly.
24 One is Corona Materials v. Dominican Republic.
25 The second is EuroGas v. Slovak Republic. Let me stop

1 there for a second. Both of those cases were properly
2 decided. In both of those cases, what was alleged to have
3 been State action was no action. What was alleged to be
4 State action was no action. In both of those cases, it
5 was the purport of Claimants that there was a breach that
6 postdated entry into force of the Treaty, but they
7 couldn't point to anything. In fact, what they alleged as
8 a breach was non-action by courts that had pending
9 disputes that predated the Treaty. Now, that's those two
10 cases.
11 Now, but the one that is really off-the-rails
12 under any, any, any analysis is the--this third case they
13 have--oh, yes--ST-AD. ST-AD v. Bulgaria. Now, that's a
14 very interesting case, because that case dealt with
15 neither a limitations provision nor an entry into force
16 provision, but rather with a fraudulent Claimant who
17 sought to raise claims that existed before the Claimant
18 ever became an investor in the BIT. It was later
19 dismissed on additional grounds; they came in with a
20 fraudulent German straw Claimant. The case is--it's
21 interesting reading, but not at all relevant.
22 So, the final thing that we want to point out to
23 the Tribunal on ratione temporis is that Respondent spends
24 a lot of time saying that we rely on the discredited
25 Maffezini Case. Nothing could be farther from the truth.

1 Let me tell you the cases we rely on and that we encourage
2 the Tribunal to look at.
3 Siemens v. Argentina, great case.
4 AWG v. Argentina, great case. Suez v. Argentina, great
5 case. RosInvest v. Russia, great case. And if I had
6 to--National Grid v. Argentina, also a great case. But if
7 I had to point to one case, one case that the Tribunal
8 should read, of course, it's the Impregilo v. Argentina
9 case. Why? Not only was it rightfully decided, but there
10 is a very nice scholarly analysis of the lay of the land
11 on this issue. And basically--what that case basically
12 says is, while this is a real mess, some Tribunals say
13 that MFN practice could not reach or bring in procedural
14 rights; others say they do, and this is horrible, because
15 this shouldn't happen on an ad hoc basis. But what the
16 Tribunal does there and, the majority of cases, what they
17 hold--and you will hear from Professor Mistelis on
18 this--is that, in fact, in fact, of course MFN practice
19 can reach out to procedural rights, and the ejusdem
20 generis argument is not a good argument, nor could it ever
21 be. Why? Because the generis portion is the same,
22 meaning that procedural rights are no different from
23 substantive rights because both have a common purpose and
24 objective, which is to protect investors and investments.
25 Lastly, one final consideration before I turn it

1 over to Mr. Reetz, and it's the following: For the sake
2 of completeness, the Tribunal should bear in mind that,
3 under Colombian law, a limitations period is neither
4 substantive nor procedural, but a hybrid creature, a third
5 thing. So, that may weigh into the Tribunal's analysis.
6 We don't know, but for the sake of completeness, we are
7 sharing it.
8 And, with the respect and indulgence of the
9 Tribunal, I would like to tender the floor to Mr. Reetz.
10 PRESIDENT BEECHEY: Thank you,
11 Mr. Martínez-Fraga.
12 Mr. Reetz?
13 MR. REETZ: Thank you, Mr. President.
14 We are sharing a camera and a speaker here, so if
15 we can just have a moment.
16 Turning the Tribunal's attention to ratione
17 materiae, on that subject there are really just a few key
18 points to keep in mind.
19 First, Claimants clearly made an investment by
20 investing in shares of Granahorrar and having the rights
21 that arose from that investment under Colombian law.
22 Second, the form of the Claimants' investment changed over
23 time because of actions undertaken by Respondent, but
24 Claimants' investment itself continued to exist. And,
25 third, the investment was entitled to protection at the

1 time it was finally extinguished by the Constitutional
2 Court's Decision in 2014.
3 Of course we start with the relevant definitions
4 of "investor" and "investment" in Article 12.20. As you
5 see from the slide, investor of a party is defined as
6 including a person that "attempts to make, is making, or
7 has made an investment," confirming that Chapter 12 covers
8 not only investments that are in process, but investments
9 that have already been made.
10 The term "investment" is also defined in
11 Article 12.2.0, albeit by reference to the definition in
12 Article 10.28 of the general investments chapter with a
13 few qualifications that are not relevant here.
14 Turning to 10.28, that Article defines investment
15 quite broadly as "every asset that an investor owns or
16 controls, directly or indirectly, that has the
17 characteristics of an investment." And the Article goes
18 on to identify a number of different forms that an
19 investment may take, including "an enterprise" and
20 "shares, stock, and other forms of an equity participation
21 in an enterprise."
22 The investments made by Claimants were in
23 precisely this form; that is, equity participation in
24 Granahorrar.
25 Now, as I mentioned, and as the various

1 submissions and Witness Statements have detailed,
2 Claimants' investments were transformed over time by a
3 series of actions taken by Colombia, including the initial
4 regulatory actions, the later merger with BBVA, the
5 Council of States' recognition and crystallization of the
6 Claimants' rights in the form of its 2007 Judgment, the
7 tutela actions pursued by Fogafín and the Superintendency,
8 and, ultimately, the Constitutional Court's finally
9 extinguishing all of Claimants' domestic law rights in its
10 2014 Order.
11 All of those changes were the result of actions
12 by Colombia. None of them represented voluntary actions
13 by Claimants to transfer or abandon or dispose of their
14 investment. As a result, Claimants' investment subsisted
15 up until the time of the Constitutional Court's 2014
16 order.
17 Now, the Mondev Case gives us a good example of
18 how an investment receives Treaty protection throughout
19 its life until all of the Claimants' rights have been
20 finally extinguished. In that case, the Claimants'
21 original investment in a real estate development contract
22 was eliminated, allegedly by Government action, before the
23 NAFTA entered into force, so that all the Claimant had was
24 its remaining rights in litigation.
25 The United States contended that there was no

1 investment left by the time the NAFTA entered into force,
2 but the Tribunal disagreed. The Mondev Tribunal found —
3 that once an investor has made an investment the
4 investment continues to receive protection throughout its
5 existence, even if all that is left of it is a claim for
6 compensation. As we see in the second paragraph here on
7 the screen, the Tribunal noted that the shareholders, even
8 in an unsuccessful enterprise, retain interest in the
9 enterprise arising from protection of their commitment of
10 capital and other resources. The intent of NAFTA is
11 evidently to provide protection of investments throughout
12 their lifespan.
13 Recognizing the original character of the
14 investment here, notwithstanding the State's unilateral
15 transformation of it into a different form, is necessary
16 to effectuate the Treaty's purpose, which is to provide
17 protection of investments throughout their existence.
18 The Saipem Case presented a parallel question
19 about the treatment of an investment throughout its
20 lifespan. As the Tribunal will recall, the investor-State
21 dispute in Saipem concerned the State's treatment of an
22 underlying ICC commercial arbitration in which Saipem had
23 received an Award in its favor on a commercial contract
24 claim. In that investor-State case, the Respondent argued
25 that the dispute before the Tribunal did not arise

1 directly out of an investment, as required by Article 25
2 of the ICSID Convention, because the investors' original
3 investment was supplanted by the ICC Award in its favor.
4 However, the Tribunal found that the rights embodied in
5 the ICC Award were directly traceable back to the original
6 investment. That investment was Saipem's rights under the
7 original contract, which did not stop being an investment
8 when it was crystallized by the ICC award.
9 Whatever the terminology used, crystallization,
10 instantiation, incorporation, or the like, the fact
11 remains that the original investment persists, however it
12 may be transformed by the State, and is entitled to
13 protection.
14 Now, in an effort to denature Claimants'
15 investment in Granahorrar in this case, the Respondent
16 points to a particular footnote in Chapter 10 of the TPA's
17 definition of "investment." And that's Footnote 15, which
18 states that the term "investment" does not include an
19 order or judgment entered in a judicial or administrative
20 action. And Colombia would have the Tribunal believe that
21 it could shortcut the entire ratione materiae analysis by
22 relying on this footnote to conclude the Claimants did not
23 have an investment here, but Colombia's argument overlooks
24 at least three critical facts.
25 First, Footnote 15 occurs within a particular

1 context in the definition of "investment." Together with
2 Footnote 14, it's a footnote that subparagraph G of the
3 definition, which concerns licenses, authorizations,
4 permits and similar rights conferred pursuant to domestic
5 law. These provisions are best understood as
6 qualifications of that particular category of rights and
7 not as a blanket disqualification of judgments from ever
8 receiving protection under the TPA.
9 Rather, Footnote 15 is best understood as
10 providing that a judgment, in isolation and by itself, is
11 not an investment under the Treaty. This makes sense,
12 because speculative investment and judgment of assets does
13 not invoke the underlying purposes of the TPA. In
14 contrast, though, a contrary reading of the footnote, one
15 which would categorically any protection in connection
16 with judgments, would undermine the policy considerations
17 expressed in Mondev and Saipem.
18 I'm going to ask my colleague, Ms. Chiu, to
19 please hold on the next two slides--we will eventually
20 skip over them--but I do want to say that, second, the
21 existing scholarship on this point which, of course, can
22 be an important subsidiary means for determining law under
23 Article 38 of the ICJ statute also calls Colombia's broad
24 reading of Footnote 15 into question. The so-called
25 "judgments footnote" dates back to the 2004 United States

1 Model BIT where it appears as Footnote 3. And in
2 addressing that Model BIT, Professor Vandevelde explains
3 that the footnote cannot have its apparent literal
4 meaning.
5 MR. GRANÉ: Mr. President, I'm sorry to
6 interrupt, but Claimants leave us no option. Now, they
7 are not showing the slide with the Authority that is not
8 on the record, but they are referring to it. They are
9 citing from it. They did the same thing with the first
10 two slides. I did not want to interrupt at that time, but
11 it is inappropriate to identify Legal Authority, be told
12 that they cannot rely on it, and then go on the record
13 reading it. So, we raise an objection, Mr. President.
14 MR. REETZ: Mr. President, we are simply seeking
15 to make the Tribunal aware of Legal Authority that is
16 relevant and important. We were told by the Procedural
17 Order not to use the slides, and we, of course, respect
18 that.
19 PRESIDENT BEECHEY: Well, it's a little bit more
20 than surface deep, isn't it, Mr. Reetz? If this is an
21 Authority which is in the Arbitration record and has been
22 relied upon in the presentations that have been put
23 together, fine. If it's coming new now, then at the very
24 least it ought to have been referred to Mr. Grané and his
25 colleagues before it was brought to us.

1 MR. REETZ: I understand, Mr. President. But
2 this is new Authority. They are certainly aware of it,
3 because it was discussed less than a month ago in a
4 different proceeding. So, it should not be coming as any
5 sort of surprise, but I understand if the President
6 prefers that we not refer to it at this time.
7 PRESIDENT BEECHEY: Well, I'm not sure if it's a
8 question of "prefer." There are some ground rules here
9 which we are not going to observe in a way which becomes
10 absurd, but there are certain prescriptions here and it
11 seems to me reasonable to ask you to follow them. And if
12 the objection is taken on this occasion, I think, subject
13 to control from my colleagues, I'm inclined to uphold it.
14 MR. REETZ: Mr. President, I understand. Thank
15 you. We'll move along.
16 Apart from the scholarship that we encourage the
17 Tribunal to review on this point, the third and final fact
18 overlooked by Colombia in this regard is that Claimants
19 did not invest in the 2007 Judgment, but rather in
20 Granahorrar. This was, perhaps, the most classic form of
21 investment that one can make. The fact that the form of
22 investment transformed over time, and at one point some of
23 Claimants' rights were crystallized or affirmed in the
24 2007 Court of State Judgment--Council of State Judgment,
25 excuse me, does not place their investment beyond the

1 protection of Treaty.
2 Now, apart from the question of Footnote 15 to
3 Chapter 10 of the TPA, Respondent has raised an additional
4 objection to jurisdiction ratione materiae, and Respondent
5 contends that Claimants' investments were supposedly not
6 made in conformity with Colombian investment regulations
7 and, therefore, cannot support jurisdiction ratione
8 materiae.
9 This argument fails for multiple reasons as well.
10 We've addressed it very thoroughly in our papers, and in
11 the interest of time, I'll just provide a very brief recap
12 here.
13 First and most fundamentally, there is no
14 requirement in the TPA that investments must be made in
15 conformity with the laws of the host State, which is the
16 requirement the Respondent alleges was somehow breached.
17 Second, the jurisprudence is fairly clear that,
18 if such a conformity requirement is not expressed in the
19 Treaty, it may not be inferred or imposed. And the cases
20 cited by Respondent do not at all support the proposition
21 that the Tribunal may somehow find a conformity
22 requirement by implication. They either involve treaties
23 that contained express conformity requirements, or found
24 no bar to jurisdiction, or relied upon fundamental
25 principles of international law to deny jurisdiction under

1 particularly egregious circumstances.
2 For example--and we can skip to the next
3 slide--the Phoenix Action Case expressly distinguished
4 between Treaty conformity requirements and fundamental
5 principles of International Law. And the
6 SAUR v. Argentina Case makes it plain that where there is
7 no express conformity requirement in the Treaty the
8 Respondent State must show a serious violation of
9 International Law in connection with the investment in
10 order to defeat jurisdiction ratione materiae.
11 And even where an express conformity requirement
12 does exist, which it does not here, the Tribunal must
13 consider questions of proportionality as is shown in the
14 Hochtief Case.
15 Finally, we've discussed the particular details
16 of Colombia's foreign investment registration framework in
17 our written submissions. Even if there had been a showing
18 the Claimants somehow invested in violation of those
19 regulations, the nature of those regulations is such that
20 it would be disproportionate to deny Treaty protection
21 based on a failure to comply with them. That's
22 particularly the case; whereas here, Respondent was at all
23 times aware of the investments in question.
24 To conclude on the subject of jurisdiction
25 ratione materiae, then, Claimants clearly had an

1 investment in their shares of Granahorrar. Colombia's
2 attempts to rely upon a stilted reading of Footnote 15,
3 and upon an inferred violation of its foreign investment
4 regulations, are insufficient to deny Claimants'
5 investment protection under the TPA.
6 And with that, I'd like to return the floor and
7 microphone to Mr. Martínez-Fraga to discuss jurisdiction
8 ratione personae.
9 PRESIDENT BEECHEY: Thank you, Mr. Reetz.
10 MR. MARTÍNEZ-FRAGA: Mr. President, would it be
11 possible, sir, to get a time check, how much time is left?
12 PRESIDENT BEECHEY: Under correction from the
13 Secretariat, I think we said we were going to go until 5,
14 didn't we, this evening. So at the moment you have got 18
15 minutes until 5:00 p.m. And then I think we would allow
16 you a few extra minutes to make up for the lost time on
17 the way.
18 MR. MARTÍNEZ-FRAGA: Thank you, sir. May I, sir?
19 PRESIDENT BEECHEY: You may.
20 MR. MARTÍNEZ-FRAGA: Thank you.
21 Nowhere are the conceptual differences between
22 Claimants' and Respondent's theoretical and practical
23 understanding of the governing law more salient and stark
24 than with respect to ratione personae. There are 25
25 foundational differences with respect to which this

1 Tribunal will have to exercise its judgment.
2 The task, according to the Treaty governing
3 customary international law has two conceptual parts, the
4 "what" and the "how." The "how" concerns the methodology
5 for applying the test. The "what" are actual factual
6 categories comprising the test. Set forth below are 10
7 propositions constituting the "how."
8 First, Claimants opine that the governing test
9 under ratione personae requires application of
10 Article 10.22.1. The governing law provision of our TPA.
11 Put up Slide 10.22.1.
12 It is significant that Article 10.22.1, provides
13 that: "The Tribunal shall decide the issues in dispute in
14 accordance with this Agreement and applicable rules of
15 international law." End of citation.
16 The conjunction "and" matters. This means that
17 "applicable Rules of International Law" must be applied.
18 Second, because the Tribunal shall decide issues
19 in accordance with "applicable Rules of International
20 Law," end of citation, the test governing dominant and
21 effective nationality is a mandatory test and not a
22 discretionary determination that a Tribunal would exercise
23 based on its own discretion. The Respondent seems to
24 think otherwise.
25 Respondent opines that the "how" and the "what,"

1 meaning the elements of the test and how the test is to be
2 applied, are both discretionary. Claimants say read
3 Article 10.22.1 and read applicable Rules of International
4 Law. It is mandatory and not discretionary.
5 Third, Claimants submit that, by incorporating
6 the term "dominant and effective nationality," into
7 Article 12.20, the definitions of the TPA, Article 12.28
8 of the investment chapter counterpart, the signatory
9 States further underscored the interest in having
10 customary International Law applied to issues in dispute
11 concerning the TPA.
12 Fourth, all factors to be considered are to be
13 weighed equally. Customary International Law is very
14 clear on this point. There is no divergent view on this
15 issue, but Respondent sees it otherwise.
16 Fifth, the entire life of the individual is to be
17 considered in determining dominant and effective
18 nationality, notwithstanding that particular importance
19 may be placed on specific time frames, such as the accrual
20 of the right asserted, June 25, 2014, and the time of the
21 filing of the arbitration, January 2018.
22 Sixth, the presence or absence of a scheme
23 pursuant to which nationality was acquired shall be taken
24 into consideration. The practical workings are simple:
25 The absence of any such scheme or single-purpose

1 enterprise would give rise to a presumption of good faith
2 and legitimacy on the part of the dual national.
3 Respondent thinks otherwise and would read this element
4 out of any such consideration in its entirety.
5 Seventh, when the Claimant became a dual citizen
6 and acquired the second nationality is a factor that the
7 Tribunal must consider in determining the Claimants'
8 dominant and effective nationality under the TPA.
9 Now, for this reason, the conjunctive "dominant
10 and effective nationality test" requires that where, as
11 here, the dual nationality always was in effect and,
12 therefore, effective, a presumption of legitimacy must be
13 accorded to the Claimants' allegation that non-host State
14 represents her or his dominant and effective nationality.
15 Again, a presumption of legitimacy that the
16 non-host State represents the dominant and effective
17 nationality. Respondent merely suggests that where the
18 "effective prong is met" there is no consequence arising
19 from meeting that requirement and should just not be taken
20 into account, just stipulate it was met and let's move on
21 to dominant. There is no connection between dominant and
22 effective. We say, yes, there is a connection between
23 dominant and effective.
24 Eighth, customary international law, since the
25 very inception of the dominant and effective nationality

1 test has viewed this doctrinal category as expansive and
2 not restrictive. Now, what do I mean? This policy
3 proposition is a simple one.
4 The signatory State, in having a dominant and
5 effective nationality standard, clearly intended to
6 broaden the scope of the universe of existing and
7 prospective investors to make this available to dual
8 nationals, dual citizens, of course, as qualified by the
9 test.
10 So, the idea was, let's have more of these types
11 of individuals having dual nationality but, of course, not
12 ones that are Treaty shopping in play. Let's give them
13 protection. Why? So, that we can retain investment and
14 why? So, we can attract investment.
15 So, in this way, an entire new category of
16 investors was accorded rights and obligations, of course,
17 under the Treaty.
18 Therefore, the Claimants submit that the dominant
19 effect of nationality test represents a doctrine that is
20 expansive in nature, one that supplements the set of
21 qualifying investors under the Treaty and, moreover, it
22 does so by ferreting out illicit Treaty shopping where
23 alleged Claimants acquire citizenship status for purposes
24 of precisely wrongfully using or usurping Treaty
25 protection.

1 No such factual matrix is at all here present.
2 The guiding principles of customary international law
3 suggest that a holistic approach to analysis of all
4 potentially relevant factors is to be undertaken.
5 Ninth, the test is qualitative and not
6 quantitative. By way of example, it stands to reason
7 that, if a dual citizen lives in the host State, having
8 her primary residence in that jurisdiction would, of
9 course, follow that to some extent the dual citizen would
10 have a club membership in that jurisdiction, drive a car
11 in that jurisdiction, grocery shop in that jurisdiction,
12 and conduct similar everyday commerce in the jurisdiction.
13 It is understood that, if the dual citizen had a
14 pet, the pet would also be dog--would be walked in that
15 jurisdiction. But that's not the test. The qualitative
16 approach, however, would require the Tribunal to test the
17 extent to which, together with other factors, the dual
18 citizen would also have a social, civic, family and other
19 economic ties to the competing states.
20 The exercise concerns more than just bean
21 counting. 55 years of development and refinement of the
22 customary International Law with respect to this doctrine
23 requires the Tribunal to probe beyond everyday logistical
24 factors in cases in which the primary place of residence
25 is in the host State.

1 Tenth, the factors to be considered are non-
2 exhaustive. Please put up the slide.
3 Up on your screens you have before you a summary
4 of principles consulting--constituting the methodology for
5 the application of the dominant and effective nationality
6 test, what we have been identifying as the "how." These
7 elements are clearly defined in the authority and
8 doctrine. Respondent makes no mention of them whatsoever.
9 The difference of opinion is extremely meaningful. What
10 follows is a non-exhaustive listing of the "what."
11 Eleventh, what is the dual citizen's primary
12 language? Now, here, the testimony will show that when
13 the Claimants think of people who are dear to them, think
14 about ideas that matter to them, they think of these
15 things in the English language.
16 Twelfth, the dual citizens profiled in terms of
17 Treaty considerations. Here, the evidence shows that
18 these are exactly the type of people and the type of
19 investors that were sought by the dominant and effective
20 nationality test. People who create jobs, who create
21 opportunities, who bring wealth, and who do not move
22 capital.
23 Thirteenth, healthcare considerations. Where do
24 these so-called "dual nationals," where do they go for
25 healthcare when they really need healthcare?

1 Fourteenth, where do the dual nationals file tax
2 returns? That is extremely important. If someone
3 considers themselves primarily a Colombian citizen, why on
4 God's good green earth would they be filing tax returns in
5 the United States of America?
6 Fifteenth, has the dual national voluntarily
7 applied for the selective service military in the alleged
8 dominant and effective jurisdiction? Well, why would
9 anyone apply for selective military service involuntarily
10 if they did not consider themselves primarily a national
11 of that country. You'll find that Alberto Carrizosa did
12 exactly that.
13 Sixteenth. What does the dual citizen consider
14 himself or herself to be in terms of the primary
15 nationality? Now, this is a very important one because it
16 gets confused with how the dual citizen holds him or
17 herself out. This is a subjective consideration. What
18 do--what does the dual citizen believe she or he is in
19 terms of primary nationality?
20 Of course, Seventeenth, how does the dual citizen
21 hold herself out to the world? Here you'll find that all
22 three Claimants travel with their U.S. passport, for
23 example. All three Claimants--Felipe Carrizosa, when he
24 was applying for a job in Germany, he filled out the forms
25 and said that he was a U.S. citizen.

1 Alberto Carrizosa, when he was applying to
2 colleges in the United States, he filled out the form as
3 if he were a U.S. citizen, which is what he was. It is
4 how he considered himself, primarily a U.S. citizen. Now,
5 he could have probably done better, not that Boston
6 University is a bad place, but he may have done better if
7 he had written down that he wasn't a U.S. citizen.
8 Nineteenth, how and why was nationality obtained?
9 Here, I'd like to quote from the Claims Tribunal from
10 Diba v. Islamic Republic of Iran, actually a case that
11 Respondent cites to, in Paragraph 11 and it says: "The
12 sincerity of the choice of national allegiance they claim
13 to have made," is to be examined. And here, it--you'll
14 find that it couldn't be any clearer.
15 Twentieth. Where does the dual national have
16 most of her personal net worth? Well, the testimony
17 before this Tribunal is uncontroverted. All three
18 Claimants have the majority of their personal net worth
19 outside of Colombia and in the United States of America,
20 if that matters.
21 Twenty-first , place of residence should be
22 examined. In this connection, the reasons binding the
23 Claimant to the primary residence in corresponding
24 totality of circumstances that are to be examined.
25 Now, you know, the dominant and effective test

1 would fail completely if each time there is a dual citizen
2 whose primary nationality is not that of the host State
3 where the dual citizen lives, if it's a test where,
4 because you live there, because the primary residence is
5 in the host State, then you are absolutely, automatically
6 a member of that, a national of that host State,
7 primarily. The dual--the dominant and effective
8 nationality test, of course, would fail.
9 Of course, Twenty-second, cases addressing a
10 dominant and effective nationality consider the Claimants'
11 cultural affinity such as holidays, lifestyle, work ethic,
12 general disposition.
13 Twenty-third, education is a critical factor. By
14 way of example, Alberto Carrizosa attended elementary and
15 middle school in Bogotá, but in an Anglo-American school.
16 In fact, originally named the Anglo-American school called
17 Colegio Nueva Granada. He attended high school at
18 Gulliver Preparatory School in Miami, Florida, here in the
19 U.S., class of 84.
20 From 1984 to '88, Mr. Carrizosa--Alberto
21 Carrizosa attended Boston University where he received a
22 BS in business administration. Mr. Felipe Carrizosa also
23 attended Colegio Nueva Granada in Bogotá as a child. His
24 high school years took place in Miami, Florida, and he
25 also graduated from Gulliver Preparatory School, Class of

1 '86.
2 Between 1987 and 1990, he attended Lehigh
3 University in Bethlehem, Pennsylvania, where he received a
4 BS in civil engineering. He did receive an M.B.A. from
5 INALDE Universidad de la Sabana in Colombia.
6 Mr. Enrique Carrizosa attended elementary school
7 in Miami, Florida, at Gulliver Academy and then McGlannan
8 School as well. He then resided in Colombia for
9 three years and, like his brothers, attended Colegio Nueva
10 Granada. He enrolled in Northwestern University in
11 Chicago, Illinois; he graduated in 1998 with a Bachelor of
12 Science in industrial engineering.
13 Between the years 2000 and 2003, Mr. Enrique
14 Carrizosa was enrolled in the Kellogg School of Management
15 at Northwestern University, where he received an M.B.A.
16 Twenty-fourth , the family matrix constitutes an
17 important consideration that is deeply intertwined with
18 cultural affinity, language and education. We submit to
19 the Tribunal that sustained analysis of this factor also
20 compellingly demonstrates the Claimants' dominant and
21 effective nationality is that of the United States.
22 Twenty-fifth, retirement and estate planning. I
23 think that you will find that the uncontroverted evidence
24 and testimony is that all three Claimants engage in very
25 significant estate planning with the aspiration of

1 retiring in the United States.
2 Now, the Respondent, of course, has a very
3 different understanding of the test, and they basically
4 follow the Ballantine v. Dominican Republic construct.
5 But before we get to that, I want to show a couple of
6 slides that try to illustrate, and even though they appear
7 to be before--
8 Micula--could we please first put the
9 slides--yeah.
10 --that try to illustrate graphically to some
11 extent. And, again, we want to emphasize it's not a
12 bean-counting exercise. It's a qualitative analysis. A
13 graphic to help illustrate these factors for each of the
14 Claimants, even though, again, it's a qualitative.
15 Now, as more fully explained in
16 Paragraphs 801-815 of Claimants' Reply Memorial, the
17 qualitative analysis in Micula v. Romania is instructive.
18 There, the Tribunal found the Claimants' retirement plans,
19 voluntary place of pension funds, location of personal
20 assets and family ties to Sweden to outweigh the permanent
21 and physical place of residence and professional and
22 economic interest present in the host State, Romania.
23 Put up slide of Respondent's abbreviated
24 iteration on the test, please.
25 Respondent asserts that the test is a very

1 different one. It is what we call the one-divided-by-four
2 test. Respondent, in fact, uses the permanent and
3 habitual place of residence and divides the single factor
4 into four elements: First, location of permanent habitual
5 residence; two, center of Claimants' family, social,
6 personal, and political lives; three, Claimants' center of
7 economic lives; and, four, how Claimants have identified
8 themselves in terms of nationality.
9 Now, we submit that only four is one that is
10 capable of deviating from the first three if you have a
11 situation, as here, where the Claimants' primary place and
12 habitual place isn't that of the host State. That
13 analysis would not make sense because it's a test that
14 could never be met under this very common rubric.
15 Let me be very clear, to Tribunal. Again, under
16 this test, every dual national having a primary residence
17 in the host State would be unable to meet the dominant and
18 effective nationality test. It simply would not be
19 possible. That is not what the test is about.
20 Now, Colombia's abbreviated iteration of the
21 dominant and effective nationality test invites the
22 Tribunal to turn a blind eye to interpreting the Treaty
23 pursuant to Article 10.22.1, in keeping with rules of
24 customary international law and to embrace a purely
25 discretionary ad hoc approach.

1 Now, what really happened here is that in between
2 the filing of our first Memorial and the Second Memorial,
3 the Ballantine v. Dominican Republic case was decided, a
4 case where Respondent's counsel represented the Dominican
5 Republic, and that case just cites to these four elements.
6 We feel that the case is not properly decided. We don't
7 think it is thoughtfully reasoned, but, moreover, there's
8 a Separate Opinion in that case. It was only a majority
9 Opinion.
10 We feel that the Separate Opinion is, of course,
11 much more on point, and because it actually takes into
12 account Article 10.22. So, we invite the Tribunal to
13 consider both, but to see also in our papers--we are
14 running out of time--in our papers we have distinguished
15 and analyzed Ballantine very, very carefully. And if you
16 read Ballantine, and you read the papers, which I know the
17 Tribunal has, then the Tribunal will be able to reach its
18 own appreciation of what the actual test is and whether or
19 not it is actually mandatory v. permissive.
20 And with that, I would like to thank the
21 Tribunal, Mr. President, members of the Tribunal, and all
22 attendees for your grace and patience in sitting through
23 this presentation.
24 PRESIDENT BEECHEY: Thank you,
25 Mr. Martínez-Fraga.

1 Are there any questions from my colleagues before
2 we adjourn?
3 ARBITRATOR SÖDERLUND: No, thank you.
4 PRESIDENT BEECHEY: Very well. That brings us to
5 our next break. It is now just on 5:00 p.m. Let's start
6 again at quarter past the hour, and we will hear from
7 Respondent. Thank you very much indeed.
8 (Brief recess.)
9 PRESIDENT BEECHEY: The floor is yours, I think,
10 if you are leading off; is that right?
11 MR. GRANÉ: Yes.
12 Mr. President, before we begin, may we get a
13 clarification from the Tribunal as to when you intend,
14 sir, to take the 45-minute break so that we can organize
15 our presentation.
16 PRESIDENT BEECHEY: Yes. Yes, of course. It's
17 as advertised on the sheet that came from the PCA today.
18 We will adjourn at 6:30 p.m. GMT, and then we will stop
19 for 45 minutes rather than an hour and start again at
20 7:15 GMT, which should let us finish at 8:30 as originally
21 planned.
22 MR. GRANÉ: Thank you very much, sir.
23 PRESIDENT BEECHEY: Not at all.
24 MR. GRANÉ: If it pleases the Tribunal, I will
25 invite Ms. Ana María Ordóñez from the Agencia to make an

1 introduction.
2 PRESIDENT BEECHEY: Yes, of course.
3 MR. GRANÉ: And she will do so in Spanish, so
4 this may be a good opportunity to switch to the Spanish
5 translation for those who require it.
6 MS. ORDÓNEZ: Thank you very much.
7 PRESIDENT BEECHEY: The floor is yours.
8 MS. ORDÓNEZ: Thank you, Mr. President.
9 OPENING STATEMENT BY COUNSEL FOR RESPONDENT
10 MS. ORDÓNEZ: Good afternoon, Mr. President,
11 Members of the Tribunal. My name is Ana María Ordónez. I
12 am the Director of International Matters at the National
13 Agency for the Legal Defense of the State. We defend the
14 State in connection with human rights and other legal
15 matters and the International Criminal Court.
16 With me are the officials from the
17 Superintendency from the Agency of Banks and from Fogafín.
18 I appear before you here representing Colombia,
19 and this is an enormous responsibility because I am
20 representing a State. It is an honor to introduce the
21 Opening Statements by the Republic of Colombia. Colombia
22 is a democratic State. It respects the law and
23 international treaties. It has a clear suppression of
24 powers, and that guarantees a legislative branch, highly
25 representative a judiciary that is fully independent and

1 has a full institutional architecture and also has an
2 executive that follows the law.
3 We are an open country, open to investment.
4 Since 1991, we have welcomed millions of investments in
5 our territory in more than 10 sectors of importance,
6 economically and socially. We have had a number of
7 agreements for investment to provide security to these
8 investments.
9 Last year we received $14 billion in foreign
10 investment. This opening for an investment is something
11 that we're proud of, and that is why we take its
12 protection very seriously. We would like to underscore
13 that the protection presupposed by the international
14 investment regime has strict access requirements. The
15 main one has been unequivocally recognized by
16 international tribunals and international public lawyers,
17 recognition by the State of submitting their disputes,
18 investment disputes to arbitrations, and that consent is
19 not unconditional and restrictless. It is expressly
20 established in investment treaties.
21 Colombia has consented to open the doors to
22 international arbitration and to submit the controversies
23 with the purpose of protecting investment and foreign
24 investors. But with the understanding is that the key to
25 these doors is in the hands of foreign investors that meet

1 all the requirements set forth in international law and
2 the treaties. This is not the case of Messrs. Carrizosa,
3 the Claimants in these proceedings. We have shown that
4 Claimants cannot show that they meet the essential
5 requirements to have access to jurisdiction.
6 Messrs. Carrizosa do not have the keys to this lock.
7 Colombia is concerned to see that ISDS loses
8 legitimacy when resort is had to Tribunals such as this
9 when, with untenable arguments, one tries to bring about a
10 controversy that does not meet the requirements of the
11 Treaty between Colombia and the United States.
12 I have five main ideas that I would like to leave
13 with the Tribunal, five ideas that show the reproachable
14 and abuse of practice of the Claimants.
15 First idea: The consent by the State cannot be
16 imported via the Most-Favored-Nation Clause. We heard
17 very elaborate and improbable theories put by the
18 Claimants to try to fabricate fruitlessly the consent by
19 Colombia to this dispute. The Parties to the Treaty,
20 Colombia and the United States, we both had to hear the
21 Claimants change the common understanding in connection
22 with the provisions of the Treaty that the Parties have
23 had after they entered into the Treaty.
24 This common understanding has been confirmed by
25 the U.S. in writing and these proceedings. Claimants

1 asserted that the Most-Favored-Nation Clause of Chapter 12
2 in the Treaty is sufficient to disavow the main terms that
3 the Parties provided when they consented a dispute to be
4 submitted to a Tribunal--that is to say, a direct attack
5 to one of the main principles of international law and of
6 arbitration and of itself. The Tribunal requires an
7 express power by the Parties to exercise its jurisdiction.
8 Nowhere in the Treaty, not even in Chapter 12 invoked by
9 Claimants, can we see that a Tribunal has the possibility
10 of important--a different provision of a Treaty in
11 connection with investment resolution disputes to expand
12 on the consent of these issues.
13 This is putting the cart before the horse, and in
14 connection with the BIT with Switzerland, well, we are
15 trying to drive away from reality the measures that are
16 not included in the temporal jurisdiction of the Treaty.
17 As Colombia has explained, and we will remind you of in
18 this Hearing, the Claimants don't have the jurisdictional
19 requirements with the BIT with Switzerland.
20 The second idea is that the disputed measures are
21 not within the temporal scope of the Treaty. The
22 Claimants' claim is against principles of public
23 international law in connection with the Law of Treaties.
24 One of the principles is nonretroactivity for
25 international obligations and the consequent lack of

1 jurisdiction of an international tribunal in connection
2 with disputes that do not respect the temporal limitations
3 established by the Parties that signed the Treaty.
4 The 2018 Decision that, according to the
5 Claimants, deprive them of their investments was handed
6 down a year before the Treaty came into force. More than
7 three years went by before knowledge was had of the
8 Constitutional Court Decision of 2014. Now they resort to
9 that decision to do away with the limitations imposed by
10 the Treaty and by international law. The dispute brought
11 about by those measures came into being ten years before
12 the entry into force of the Treaty.
13 Third idea: The dominant nationality of the
14 Carrizosa brothers is the Colombian nationality. This is
15 a claim that lacks one of the basic jurisdiction
16 requirements, and this is part and parcel of the essence
17 of arbitration--that is to say, to have international
18 investors. In spite of the fact that now they are trying
19 to argue otherwise, all of the pertinent factors amongst
20 which the place of habitual residence and the center of
21 economic and political and family life of
22 Messrs. Carrizosa on the relevant dates, that place was
23 Colombia.
24 Their dominant nationality and their effective
25 nationality in the vital dates is and has always been

1 Colombia. There are countless pieces of evidence that
2 show this. Just to mention some, the Tribunal must bear
3 in minded that the Carrizosa brothers have resided in
4 Colombia during the critical dates for this Arbitration.
5 They have had their economic and family life in Colombia.
6 They have continued the legacy of their Colombian father
7 in the field of business in Colombia. They have conducted
8 political and civic activities in Colombia. For example,
9 they have voted in Colombia and they have made donations
10 to electoral campaigns, from candidates, to the Presidents
11 of the Republic, to the election of Members of the Council
12 of City of Bogotá.
13 For Colombia, it is reproachable, at least, that
14 their own nationals are trying to do away with the
15 requirements of the Treaty in the field of jurisdiction
16 and establish an international situation without merits
17 and without jurisdiction. The only truth is that the
18 dominant nationality of the Carrizosa brothers is the
19 Colombian nationality. Any other statement is an
20 illusion.
21 Fourth idea: A judicial decision is not an
22 investment covered by the Treaty. We are here 22 years
23 after the facts claimed by the Claimants to debate about
24 the desperate attempts by Claimants to submit Colombia to
25 an international arbitration to question judicial measures

1 that are not covered under the Treaty. Claimants invoke
2 as the alleged investment a judicial decision of 2007, in
3 spite of the fact that the Treaty expressly excludes those
4 kinds of measures.
5 The literal language of the Treaty is clear. The
6 term "investment" does not include a resolution or a
7 decision that is handed down by a judicial or
8 Administrative Court. Although Claimants say that the
9 intentions of the Council of State of 2007, that that
10 decision was an investment, this is not a qualified
11 investment under the Treaty.
12 This is my fifth and last point--(audio
13 interference)--have access to ISDS. It is undeniable that
14 Claimants have not met the requirements to activate this
15 mechanism. One of the many defects and irreparable
16 defects of the claim by Claimants is that they did not
17 submit a Notice of Intent to--for the State to understand
18 their claims. They didn't do that during negotiations and
19 also in the consultation stage.
20 The Legal Arguments submitted by Colombia are
21 based on the specific terms of the Treaty. I'm just
22 asking for the Tribunal to determine its lack of
23 jurisdiction. We are asking the Tribunal to apply the
24 Treaty and to respect the will of the signatories and also
25 to safeguard the Agreement enshrined in the Agreement

1 between Colombia and the U.S. Claimants are trying to
2 force this lock, and we have shown that they did not have
3 the keys to this lock.
4 Members of the Tribunal, you are the ones that
5 are called upon to uphold the jurisdictional requirements
6 of the Treaty. I would like to end by emphasizing what
7 this arbitration means to Colombia. The alleged foreign
8 investors have initiated against Colombia wanton lawsuits
9 and multiple actions in different international fora.
10 Colombia has had to allocate considerable economic
11 resources paid by taxpayers to attend to this reproachable
12 strategy by Claimants and Claimants' families. So, we are
13 talking about a number of lawsuits in Colombia and also
14 two international arbitrations in the field of ISDS and an
15 international proceeding before the International
16 Commission on Human Rights--Inter-American Commission, the
17 Inter-American Commission on Human Rights. So, these are
18 unfounded, the unfounded explanation--by the Carrizosa
19 brothers, so this wanton arbitration. And we have come to
20 this because of the system.
21 I will now give the floor to Patricio Grané.
22 He's going to continue with the Opening Statements for the
23 Republic of Colombia. Thank you very much for your
24 attention.
25 PRESIDENT BEECHEY: Thank you very much,

1 Ms. Ordónez.
2 MR. GRANÉ: Thank you.
3 Mr. President, Members of Tribunal, I will start
4 with a point that should be obvious. And it's that we are
5 here today to address Colombia's jurisdictional objection
6 to this arbitration. It is obvious and, yet, it bears
7 stressing simply because even after the proceeding was
8 bifurcated, Claimants have continued during its
9 Jurisdictional Phase to focus on their arguments going to
10 merits.
11 Even the testimony of their fact witnesses and
12 Experts during this phase has focused on the merits,
13 including on quantum issues, and they do this because they
14 hoped to divert the Tribunal's attention from the
15 jurisdictional requirements which they cannot meet.
16 Colombia will not address Claimants' arguments on
17 the merits, but the fact that we will not do so should not
18 be construed as acceptance. And for the avoidance of
19 doubt, Colombia expressly and categorically rejects all of
20 Claimants' claims and expressly reserves the right to
21 respond to them should they survive this Jurisdictional
22 Phase, which they should not for the reasons that we have
23 not identified in our written submissions and that we will
24 cover again during this week.
25 We saw during the Claimants' presentation today

1 that they continued to argue the merits, and we saw
2 further that they have no reservation in violating the
3 procedural rules in order to do so, even introducing new
4 and unfounded arguments. And I will return to this point
5 later in my presentation.
6 In our presentation this afternoon, we will focus
7 on the four specific objections raised by Colombia.
8 First, I will address ratione temporis. My colleague Ms.
9 Katelyn Horne will address the objection on ratione
10 voluntatis. And my partner Mr. Paolo Di Rosa will address
11 the objection to ratione personae and the objection to
12 ratione materiae. But, first, I will offer a brief
13 summary of the facts that are relevant to the
14 jurisdictional objections raised by Colombia.
15 Astrida Benita Carrizosa, who is the Claimant in
16 the ICSID sister arbitration, was born in the United
17 States and later married a Colombian businessman, Julio
18 Carrizosa Mutis. They had three sons, who are the three
19 Claimants in the present arbitration and who are in
20 attendance today.
21 In the 1980s, Claimants used Colombian holding
22 companies to acquire shares in Granahorrar, a Colombian
23 financial institution. In 1998, Colombia experienced a
24 nationwide financial crisis. Granahorrar was affected by
25 that crisis, but its situation was exacerbated by an

1 acrimonious and public shareholder dispute that lasted
2 from late 1997 to mid-1998. That dispute was the result,
3 in part, of alleged irregularities in the Carrizosa's
4 family business dealings. You see in this Exhibits R-0062
5 and R-0063 on the record.
6 And even the President of Granahorrar explained
7 at the time that the shareholder dispute was a major cause
8 of a decrease in the deposits and a serious liquidity
9 crisis suffered by Granahorrar. This is in Exhibit
10 R-0008.
11 As of late July 1998, Granahorrar had lost
12 approximately USD 226 million in savings accounts and
13 Certificates of Deposit. Faced with this liquidity
14 crisis, which is of its own doing, Granahorrar turned to
15 the Colombian Regulatory Authorities to request urgent
16 assistance and Granahorrar received that assistance,
17 including hundreds of millions of U.S. dollars in
18 liquidity infusions from Colombia's Central Bank, which is
19 the Banco de la República, and from the Fondo de Garantía
20 de Instituciones Financieras, or Fogafín, which is the
21 State's guarantee fund for financial institutions.
22 Colombia ultimately provided nearly half a
23 billion U.S. dollars in liquidity assistance to
24 Granahorrar.
25 Despite those massive cash infusions from the

1 State, Granahorrar continued to struggle, and on
2 October 2, 1998, it defaulted on its payment obligations
3 and became insolvent.
4 The Financial Superintendency then gave
5 Granahorrar one more chance by issuing what's called or
6 what we have referred to as the Capitalization Order.
7 That order directed Granahorrar to make efforts to
8 immediately raise capital from its shareholders or from
9 third parties to address this insolvency. And this order
10 is Exhibit R-0038.
11 Now, Granahorrar or, rather, its shareholders
12 failed to comply with that Capitalization Order and inject
13 the requisite capital. Fogafín was, therefore, forced the
14 next day, October 3, 1998, to issue what we have referred
15 to as the Value Reduction Order. That order, which is
16 Exhibit R-0042, directed Granahorrar to reduce the nominal
17 value of its shares to 1 Colombian cent. Fogafín then did
18 what its shareholders had failed to do. It capitalized
19 Granahorrar in order to save it.
20 Now, these two measures, the Capitalization Order
21 and the Value Reduction Order, is what we have referred to
22 as the 1998 Regulatory Measures, and it is what gave rise
23 to the present dispute.
24 I will come back to this point when I discuss
25 Colombia's jurisdictional objections ratione temporis, but

1 I will give you a few examples of what Claimants have said
2 in respect of the 1998 Regulatory Measures.
3 In the very first page of their Notice of and
4 Request for Arbitration, Claimants said that this
5 case--"This case is about the inordinate abuse of
6 regulatory sovereignty." Regulatory sovereignty. By
7 referring to regulatory sovereignty, Claimants, of course,
8 are referring to the 1998 measures issued by the Central
9 Bank and Fogafín in 1998.
10 In their Memorial, at Paragraph 5, the Claimants
11 say that: "The value of Claimants' investment was reduced
12 based upon a discriminatory, irregular, extreme and
13 excessive and unprecedented treatment on the part
14 of"--this is important--"the Central Bank of Colombia, the
15 Fondo de Garantía de Instituciones Financieras, and the
16 Superintendency of Banking."
17 Also, in their Memorial, at Page 12--it doesn't
18 have a paragraph number, but it is Page 12--Claimants said
19 that: "In a nutshell, Colombia's financial regulatory
20 authorities unlawfully expropriated Claimants' investment
21 in that jurisdiction."
22 Again, Claimants made it clear that their case is
23 about the 1998 Regulatory Measures. Six years later, in
24 2005, BBVA purchased Granahorrar from Fogafín. And
25 shortly after that, in 2006, Granahorrar was dissolved and

1 merged into BBVA. As a result, at that time, Granahorrar
2 ceased to exist as a separate legal entity, and
3 Granahorrar shares also ceased to exist.
4 In July 2000, Claimants and their mother, through
5 their Colombian holding companies, filed a lawsuit in a
6 Colombian court against the Colombian financial regulatory
7 authorities for their adoption of the 1998 Regulatory
8 Measures seeking monetary compensation for the very same
9 regulatory measures that had saved Granahorrar.
10 That lawsuit you find at R-0050, Exhibit R-0050.
11 Now, the First Instance Court in that lawsuit
12 issued a judgment in 2005. This is Exhibit R-0051. That
13 ruling rejected the Claimants' claims and upheld the 1998
14 Regulatory Measures on the merits. Claimants then
15 appealed that ruling to the Council of State, which is the
16 highest judicial body on administrative matters in
17 Colombia.
18 That appeal yielded the 2007 Council of State
19 Judgment, which is Exhibit R-0054, which reversed the 2005
20 Administrative Tribunal Judgment. In response to the 2007
21 Council of State Judgment, the Colombian regulatory
22 agencies filed what's known as a Tutela Petition. Under
23 Colombian law, a tutela enables a petitioner to seek
24 judicial recourse for violations of fundamental rights,
25 and it was in that context that the Constitutional Court

1 reviewed the 2007 Council of State Judgment. And, through
2 a decision issued in 2011, the Constitutional Court
3 reversed the 2007 Council of State Judgment, and that is
4 another key measure challenged by the Claimants and that
5 is found in Exhibit C-0023, the 2011 Constitutional Court
6 Judgment.
7 And, for instance, in Notice of and Request for
8 Arbitration, Paragraph 220, Claimants said
9 that: "Colombia engaged in judicial expropriation because
10 the outcome of the Constitutional Court's
11 Opinion"--referring to Exhibit 23, so the 2011
12 Judgment--"was to deprive in its entirety the U.S.
13 Shareholder of their property."
14 Claimants added that the 2011 Constitutional
15 Court's Judgment "is the typical"--I'm sorry--"is the type
16 of judicial action that treaty-based investor-State
17 Arbitration Tribunals have identified as an actionable
18 taking of property in violation of public international
19 law."
20 So, Claimants have invoked the TPA as the basis
21 for this Tribunal's jurisdiction, but the TPA, as the
22 Tribunal knows, entered into force in May 2012, after the
23 regulatory measures and after the 2011 Constitutional
24 Court's Judgment was issued. What that means, as I will
25 explain in some detail in the ratione temporis objection,

1 is that Claimants cannot claim that either the 1998
2 Regulatory Measures or the 2011 Constitutional Court
3 Judgment constitute breaches of the TPA.
4 The 2011 Constitutional Court Judgment was final.
5 Nonetheless, in an attempt to fabricate jurisdiction,
6 Claimants submitted to the Constitutional Court an
7 extraordinary nullification request which was rejected by
8 the Constitutional Court through the 2014 Confirmatory
9 Order. I will also return to this point on the finality
10 of the Constitutional Court's Judgment, given what we have
11 heard from Claimants.
12 You will note from the timeline on your screen
13 that this 2014 Confirmatory Order is the only measure that
14 Claimants can point to that occurred after the TPA entered
15 into force. But the 2014 Order did not alter or affect
16 the preexisting and final 2011 Judgment in any way, and it
17 does not establish jurisdiction, as I will explain later
18 in my presentation.
19 Having failed to obtain damages for the
20 1998 Regulatory Measures in the Colombian judicial system,
21 Claimants decided to try their luck on the international
22 stage. So, in 2012, Claimants and their mother filed a
23 petition before the Inter-American Commission on Human
24 Rights challenging the 1998 Regulatory Measures and the
25 2011 Constitutional Court Judgment. They later updated

1 that petition to include claims concerning the 2014
2 Confirmatory Order.
3 A few years later, in January 2018, Claimants
4 then opened a third front by filing a Request for
5 Arbitration at the PCA asserting claims under the
6 U.S.-Colombia TPA. On that very same day, their mother
7 commenced yet another proceeding by filing at ICSID a
8 Request for Arbitration, and that ICSID Case is
9 practically identical to the present Arbitration.
10 In fact, there is an almost complete overlap
11 between these various proceedings. The claims in the
12 Inter-American proceeding are based upon the very same
13 facts and measures that are at issue in this Arbitration,
14 which are the very same facts and measures that are at
15 issue in the parallel PCA--ICSID Arbitration and which,
16 with the sole exception of the 2014 Order, the very same
17 facts and measures that were at issue in the Colombian
18 litigation.
19 This means that, after having their claims heard
20 exhaustively up and down the Colombian judicial system,
21 Claimants and their mother are attempting not two, but
22 actually three, bites at the proverbial apple at the
23 international level.
24 With that, I conclude my very brief summary of
25 the relevant facts, and I will now turn to Colombia's

1 first objection concerning this Tribunal's lack of
2 jurisdiction ratione materiae.
3 Colombia's objection ratione temporis is based,
4 on the one hand, on the fundamental principle of
5 nonretroactivity of treaties under customary international
6 law and Article 10.1.3 of the TPA, and, on the other hand,
7 on the three-year Limitation Period under Article 10.18.1
8 of the TPA.
9 Now, the straightforward application of these
10 provisions means that Claimants' claims, in their entirety
11 and without exception, lie outside the jurisdiction of
12 this Tribunal. And this conclusion is manifest.
13 Claimants have admitted that their claims are based on the
14 facts that predate the entry into force of the TPA. This
15 is not a case of Respondent attempting to recast the
16 manner in which Claimants have presented their case, as we
17 heard incorrectly from Claimants' counsel earlier today.
18 They have also admitted that the dispute arose
19 more than a decade before the TPA entered into force.
20 Now, these submissions are found not only in Claimants'
21 written submissions in this Arbitration, but also in their
22 petition before the Inter-American Commission on Human
23 Rights which is part of the record in this Arbitration.
24 Another submission by Claimants is that their
25 claim lies outside the three-year Limitation Period under

1 the TPA. This is an admission from Claimant, and knowing
2 that, they have tried to circumvent that Limitation Period
3 by invoking an MFN Clause to import a more favorable
4 condition of consent in the form of a longer Limitation
5 Period. But that, too, fails because they manifestly
6 failed to meet the longer Limitation Period under that
7 other Treaty that they tried to import, impermissibly,
8 through the MFN Clause.
9 I will discuss the above in my presentation,
10 which I will divide in two parts. First, I will address
11 the application of the nonretroactivity principle; and,
12 second, I will address the application of the Limitation
13 Period both under the TPA and under the provision that
14 Claimant tries to import from the Switzerland-Colombia
15 BIT.
16 As we have explained in our written submissions,
17 the application of the nonretroactivity principle in this
18 case means that this Tribunal lacks jurisdiction ratione
19 temporis for two reasons. First, Claimants' Claims are
20 based on acts that took place before the TPA entered into
21 force, and second, the present dispute arose before such
22 entry into force.
23 As this Tribunal knows, the customary principle
24 of nonretroactivity is codified in Article 28 of the
25 Vienna Convention on the Law of Treaties and Article 13 of

1 the Articles of State Responsibility. The TPA is subject
2 to that principle. Colombia and the United States wanted
3 to make sure that investors understood that the TPA would
4 not constitute an exception to this fundamental principle
5 of treaty law.
6 For that reason, they included Article 10.1.3,
7 which you have on your screen, and which states that, for
8 greater certainty, Chapter 10 of the TPA does not bind any
9 party in relation to any act or fact that took place or
10 any situation that ceased to exist before the date of
11 entry into force of this agreement.
12 The TPA, as I said, entered into force on 15
13 May 2012, therefore in accordance with this principle of
14 customary international law, which is enshrined also in
15 Article 10.1.3, and measures not capable of breaching the
16 TPA if it occurred before that date, before 15 May 2012.
17 You will recall that in my belief introduction, I
18 cited examples from Claimants' submissions where they
19 unequivocally challenge the 1998 Regulatory Measures and
20 the 2011 Constitutional Court's Judgment, and there are
21 many other examples in addition to the ones that I cited.
22 For instance, in Paragraph 437 of their Memorial,
23 Claimants say: "The regulatory treatment imposed by the
24 Republic of Colombia on Claimants are discriminatory and
25 in breach of the provisions under Article 12.2 of the

1 TPA."
2 Again, I emphasize the reference to "regulatory
3 measure," which can only refer to the 1998 Regulatory
4 Measures, not the 2014 Confirmatory Order, which is not a
5 regulatory measure. It is, rather, a judicial decision.
6 Similar admissions are made in respect of the
7 2011 Constitutional Court Judgment. For example, in
8 Paragraph 45 of their Memorial, Claimants say that: "The
9 Constitutional Court's Opinion"--referring to the 2011
10 Judgment --"represents an emblematic denial of justice."
11 And there is Paragraph 97 of the Memorial, which
12 you have on screen, where Claimants state that it is
13 inviting the Tribunal to determine whether the 2011
14 Constitutional Court's Opinion is so extreme in its
15 alleged manifest deficits as to warrant the conclusion
16 that actions were undertaken to the detriment of the
17 Claimants, inviting the Tribunal to pass judgment on the
18 legality of the 2011 Constitutional Court's Opinion under
19 international law.
20 Even Claimants' damages case confirms that their
21 claims are directed at pre-Treaty conduct. Claimants'
22 Damages Expert admits in the very first page of his Report
23 that was hired to quantify "damages incurred by the
24 Claimants as a result of the Colombian Government's
25 actions through its agencies (Central Bank, Fogafín, and

1 Superintendency of Banking) to expropriate Granahorrar,
2 resulting in loss of value of Claimants' interests in
3 Granahorrar." So, they base their damages case, the
4 alleged loss that they suffered, on the regulatory
5 measures that were adopted years before the entry into
6 force of the Treaty.
7 But Claimants now attempt to recast their case
8 when they were confronted with these objections. Even
9 today during their Opening Presentation, we saw that
10 Claimants were willing to keep changing their case at
11 every turn, providing Colombia a moving target.
12 We were witness to the lamentable spectacle of
13 Claimants making new, unfounded, and, frankly,
14 irresponsible arguments about corruption and fraud. There
15 is no evidence on the record to support that argument.
16 None whatsoever. In fact, Claimants did not argue in any
17 of their submissions that there had been corruption and
18 fraud in relation to the judicial Decisions at issue in
19 this case. But that did not prevent Claimants from making
20 those unsubstantiated and reckless arguments today. And
21 Colombia hereby raises a formal objection and reserves all
22 of its rights in relation to those inappropriate
23 statements by Claimants.
24 Returning to the issue of jurisdiction that is
25 before the Tribunal, after Colombia pointed out that the

1 principle of nonretroactivity in Article 10.1.3 preclude
2 claims against the 1998 Regulatory Measures and the 2011
3 Judgment, Claimants quickly changed tack. In their Reply,
4 Claimants argued instead that all their claims are based
5 upon the 2014 Confirmatory Order, which is Exhibit R-0049.
6 But even that last-minute move on the part of the
7 Claimants does not bring their case within the temporal
8 scope of the TPA because, pursuant to the principle of
9 nonretroactivity, claims based on acts or facts that are
10 rooted in pre-treaty conduct fall outside of a Tribunal's
11 jurisdiction. This has been repeatedly affirmed by
12 investment Tribunals including Corona v. Dominican
13 Republic, Spence v. Costa Rica, EuroGas v. Slovak
14 Republic, and others. All of these Authorities are on the
15 recorded.
16 In its non-disputing party submission, the United
17 States confirmed the legal rule that there is no liability
18 under the TPA for claims based on alleged breaches that
19 are rooted in pre-treaty conduct. In determining whether
20 an act is sufficiently patched from pre-treaty conduct,
21 Tribunals have considered the status quo that existed
22 before the Treaty came into force and asked whether that
23 status quo changed as a result of the post-treaty conduct.
24 Tribunals including Spence v. Costa Rica have also
25 analyzed whether a post-treaty act is independently

1 actionable.
2 The fact is that Claimants' claims, now on the
3 basis of the 2014 Order, are deeply rooted in pre-treaty
4 conduct. And specifically, as Colombia has shown and will
5 reiterate, that 2014 Order did not alter the status quo
6 that existed prior to the entry of the TPA and is not
7 independently actionable.
8 So, starting with the status quo analysis, it may
9 be helpful to recall the findings of the Tribunal in
10 Corona, which Claimants' counsel referred to in his
11 presentation. In that case the State denied the
12 Claimant's application for a mining license before the
13 critical date on the Treaty. After such critical date,
14 the Claimants requested reconsideration of the license
15 denial. The Claimants then filed for arbitration, arguing
16 that the Tribunal had jurisdiction ratione temporis
17 because the Reconsideration Request post-dated the
18 critical date. The Tribunal in Corona observed that the
19 Reconsideration Request filed by the Claimant after the
20 critical date--and I quote from Paragraph 2.11, which you
21 have on the screen--"only aimed at having the same
22 administration review its own Decision." Accordingly, in
23 the view of that Tribunal, the Respondent's post-critical
24 date conduct was "nothing but an implicit confirmation of
25 its previous Decision."

1 Now, the same is true of the 2014 Order,
2 Mr. President, Members of the Tribunal. You will recall
3 that through that Order, the Constitutional Court rejected
4 Claimants' extraordinary nullification request and thus
5 left unaltered the existing 2011 Judgment.
6 Now, Claimants argue, and we heard this again
7 today, that the 2011 Judgment was somehow not final and
8 binding. Simply put, that is wrong as a matter of
9 Colombian law. That 2011 Judgment was final when it was
10 issued. It was not subject to appeal or other recourse.
11 I would like to direct your attention to the
12 screen, where you have Article 241 of the Colombian
13 Constitution. It quotes the Judgment: "The judgments by
14 the Constitutional Court are final." There is no way
15 around this. Article 49 of Decree 2067 of 1991 also
16 provides that "there are no appeals for Constitutional
17 Court Judgments."
18 Now, Colombian law allows a litigant to request
19 the nullification of a final judgment of the
20 Constitutional Court. However, such exceptional
21 nullification is not an appeal and does not reopen the
22 debate. This has been explicitly stated by the
23 Constitutional Court in numerous judgments, including
24 judgments cited by Claimants' Legal Expert Ms. Briceño in
25 her Second Report. For example, the court has noted in a

1 decision cited by Ms. Briceño that a nullification
2 petition "does not mean that there is an appeal against
3 the Constitutional Court's Decision, nor does it become a
4 new opportunity to reopen the debate or examine disputes
5 that have already been concluded." This is Exhibit
6 R-0254.
7 The fact that the Constitutional Court's
8 Decisions are final, not subject to appeal or other
9 recourse, and that the nullification request that led to
10 the 2014 Order does not reopen the matters already decided
11 by the Court was confirmed by Dr. Ibáñez, now a sitting
12 judge of the Constitutional Court, in his two Expert
13 Reports before this Tribunal. And on the screen you will
14 find cites from and quotations from Dr. Ibáñez's Report,
15 which in the interest of time I will not read.
16 Despite what Claimants now tell you, in their
17 proceeding before the Inter-American Commission on Human
18 Rights, they have admitted that the 2011 Judgment was
19 final. But even assuming for the sake of argument that
20 the 2011 Judgment was not final--and here I stress that
21 any serious Colombian lawyer will tell you that it is
22 final--the fact remains that the 2014 Order rejected the
23 nullification petition, which means that the status quo
24 remained the same before and after the entry into force of
25 the TPA. I have made this point several times, but it

1 bears repeating because it is critical.
2 In addition to not altering the pre-treaty status
3 quo, the 2014 Order is not independently actionable.
4 Mr. President, may I suggest a very brief break,
5 perhaps a four-minute break, Mr. President, if we may?
6 PRESIDENT BEECHEY: You may. Shall we have a
7 break? That's fine.
8 MR. GRANÉ: Please. It will only be a few
9 minutes.
10 PRESIDENT BEECHEY: Yes, of course. Okay.
11 MR. GRANÉ: Thank you very much.
12 PRESIDENT BEECHEY: Yes. Of course.
13 (Pause.)
14 PRESIDENT BEECHEY: Sorry, Mr. Grané. We kept
15 you a moment longer than we thought. You've raised a
16 point we thought we better discuss a bit further.
17 Anyway, over to you now. The floor is yours.
18 MR. GRANÉ: Thank you very much, Mr. President.
19 Thank you for your indulgence.
20 PRESIDENT BEECHEY: Not at all.
21 MR. GRANÉ: I was saying before the break that
22 the 2014 Order did not alter in any way the 2011
23 Constitutional Court Judgment. It refused to nullify that
24 Judgment and, therefore, it stood as it had been issued.
25 In addition to not altering the pre-treaty status

1 quo, that 2014 Order is not independently actionable. And
2 here, first I will refer to the Tribunal in Spence, that
3 considered whether a post-treaty breach are independently
4 actionable "separable"--and here I'm quoting what the
5 Spence Tribunal said--"separable from the pre-treaty entry
6 into force conduct in which they are deeply rooted." This
7 is in Spence Interim Award Paragraph 246. In the words of
8 that Tribunal, the post-treaty conduct must "constitute an
9 actionable breach in its own right such that the alleged
10 breach can be evaluated on the merits without requiring a
11 finding going to the lawfulness of pre-treaty conduct."
12 This is Spence Interim Award Paragraph 237(b).
13 That Tribunal cautioned that merely identifying a
14 post-treaty act and characterizing that act as the source
15 of liability, as Claimants do in this case, is not
16 sufficient. Instead, the Tribunal explained that "it will
17 be necessary to assess whether the Claim that is alleged
18 can be sufficiently detached from pre-entry into force
19 acts and facts." "Sufficiently detached." The ST-AD and
20 other Tribunals cited by Colombia have conducted a similar
21 analysis. And in its submission, the United States agreed
22 with this legal analysis.
23 Here, Claimants' Claims about the 2014 Order are
24 not independently actionable. To the contrary, the
25 adjudication of Claimants' Claims would require an

1 evaluation and finding on the lawfulness of pre-treaty
2 conduct. Claimants' own submissions confirm this. As I
3 already demonstrated, Claimants' pleadings are replete
4 with complaints about how the 1998 Regulatory Measures
5 expropriated, allegedly, their investments, about how the
6 financial authorities treated them badly, and about how
7 the 2011 Judgment got it wrong, according to Claimants,
8 when it ratified that conduct. And equally telling is
9 what you will not find in Claimants' submissions.
10 Claimant had listed at least 16 different reasons why the
11 2011 Judgment allegedly violated the TPA, but have not
12 been able to list a single reason why the 2014 Order
13 itself, standing alone, violated the TPA.
14 That means that Claimants are asking you to
15 evaluate the substance of the 2011 Judgment, which will
16 require evaluating the lawfulness of the 2007 Judgment of
17 the Council of State, which will in turn require
18 evaluating the lawfulness of the 1998 Regulatory Measures.
19 Mr. President, Members of the Tribunal, this is
20 not a slippery slope. This is an open invitation, to use
21 the word of Claimant in Paragraph 97 of the Memorial, to
22 evaluate pre-treaty conduct.
23 In conclusion, Claimants' Claims based on the
24 2014 Order are outside the Tribunal's jurisdiction because
25 they are rooted, and deeply so, in pre-treaty conduct.

1 Now, the Tribunal also lacks jurisdiction ratione
2 temporis because the present dispute arose prior to the
3 entry into the force of the TPA. Again, consistent with
4 the customary international law principle of
5 nonretroactivity, a treaty will not apply retroactively
6 unless the treaty expressly provides otherwise. And the
7 TPA in this case does not expressly provide for its
8 retroactive application. Quite the opposite, as we've
9 seen based on Article 10.1.3.
10 Now, Claimants, despite this, argue that the TPA
11 does apply to disputes that arose prior to its entry into
12 force. They hang that argument on the fact that the TPA
13 does not include a provision expressly excluding
14 pre-treaty disputes. But Claimants are wrong on the law
15 again. Previous Tribunals have noted that, even in the
16 absence of such an express exclusion, treaties do not
17 apply to pre-treaty disputes. For example, the MCI
18 Tribunal held that "the silence of the text of the BIT
19 with respect to its scope in relation to disputes prior to
20 its entry into force does not alter the effects of the
21 principle of nonretroactivity of treaties." This is Legal
22 Authority RL-8, Paragraph 61.
23 Now, confronted with this, Claimants have relied
24 on inapposite case law. For instance, they cite the
25 Chevron Interim Award, but the Treaty at issue in Chevron

1 contained a unique clause that, as pointed out by the
2 Tribunal in that case, "makes an exception to the
3 principle of nonretroactivity in accordance to Article 28
4 of the Vienna Convention." This is Chevron Interim Award
5 Paragraph 265.
6 Now, in applying the principle of
7 nonretroactivity, one must then define and identify the
8 dispute to determine whether it arose before or after the
9 Treaty. In Mavrommatis Advisory Opinion, the Permanent
10 Court of International Justice articulated the now-widely
11 recognized definition of "a dispute," and according to
12 that definition, a dispute is "a disagreement on a point
13 of law or fact; a conflict of legal views or of interest
14 between two persons." That definition has been used by
15 the ICJ in its judgments and its advisory opinions, and
16 investment Tribunals likewise have adopted that
17 definition. Even Claimants previously acknowledged this
18 to be "the classic definition of a dispute."
19 Unaware of this, Claimants are now trying to
20 portray the 2014 Order as if it were the source of a new
21 dispute. It is not. At best, at best, the 2014 Order is
22 the continuation of a dispute that arose at the latest in
23 July 2000, which is when they filed suit in Colombian
24 courts against those Regulatory Measures in 1998. And
25 recall that the 2014 Order merely refused to nullify the

1 2011 Constitutional Court Order--I'm sorry, the
2 Constitutional Court Judgment issued by the TPA--I'm
3 sorry, issued before the TPA entered into force.
4 International tribunals including Lucchetti,
5 RLA-0020, have noted that acts or facts that take place
6 after a dispute has arisen may confirm or prolong the same
7 dispute. Such acts or facts, however, do not trigger a
8 new dispute. If it were otherwise, any and every Claimant
9 could fabricate jurisdiction by eliciting a new State
10 measure, pointing to that measure, declare that a new
11 dispute has arisen, and thus, circumvent the temporal
12 limitations under international law.
13 As we have demonstrated, the present dispute
14 arose before the TPA entered into force on 15 May 2012,
15 and the 2014 Order did not give rise to a new dispute,
16 despite what Claimants would have you believe after they
17 were confronted with the limitations ratione temporis
18 under claims.
19 In fact, the dispute arose more than a decade
20 before the entry into force of the TPA. To be precise, as
21 I've said, on 28 July 2000, when Claimants through their
22 holding companies filed suit in Colombia challenging the
23 lawfulness of the 1998 Regulatory Measures, and through
24 that suit, Claimants articulated their opposition to
25 Claimants' regulatory actions.

1 What has followed since then are a series of
2 judicial Decisions related to the same dispute, indeed,
3 Claimants do not and cannot deny that the 2014 Order is
4 ultimately tethered and anchored to their legal challenge
5 of the 1998 Regulatory Measures.
6 Claimants' written submissions make this clear;
7 even after the 2014 Order, they continued to point to the
8 1998 Regulatory Measures and the 2011 Constitutional Court
9 Judgment as the source of the dispute. In their
10 supplementary petition to the Inter-American Commission of
11 Human Rights dated 20 July 2016--so, after the 2014
12 Order--Claimants stated that the facts that constitute the
13 alleged violation of their rights "took place starting in
14 1998." We find this in R-0119, Page 11.
15 That and other submissions by Claimants are
16 replete with the admission that the dispute arose in 1998
17 and was, to use Claimants' word, "reanimated." That's a
18 word that they use in their filings before the
19 Inter-American Commission on Human Rights.
20 It was reanimated by the 2011 Constitutional
21 Court Judgment, not that it arose. It was reanimated. We
22 have added slides that provide a free translation of some
23 of those submissions by Claimants. Now, in the interest
24 of time, I will not stop to read the examples of the long
25 list of admissions, but in these slides, you will find

1 some of the references to those submissions which are on
2 the record.
3 Now, we can just scroll through those slides with
4 those admissions.
5 In sum, the dispute arose before the entry into
6 force of the TPA, and is, therefore, outside of the
7 Tribunal's jurisdiction. And you see on the screen many,
8 but certainly not all, of the admissions by Claimants in
9 their submissions to the Inter-American Commission of
10 Human Rights.
11 I will now turn to the third and final reason why
12 this Tribunal--and we say this with respect, of
13 course--lacks jurisdiction ratione temporis.
14 Claimants--and that reason is that Claimants did not
15 comply with the three-year Limitation Period under the
16 TPA, and there are three parts to this objection.
17 First, the TPA limitations period applies to and
18 bars Claimants' Claims.
19 Second, Claimants cannot circumvent that
20 limitations period by invoking Chapter 12 MFN Clause.
21 And, third, even if Claimants could circumvent
22 the conditions of consent under the TPA using the
23 Chapter 12 MFN Clause, which, again, they cannot,
24 Claimants did not comply with the five-year Limitations
25 Period that they invoke from the Switzerland-Colombia BIT.

1 Let me very quickly try to address those three
2 points. The first issue is the straightforward one.
3 Claimants have submitted their claims under Chapter 12 of
4 the TPA. As my colleague, Ms. Horne, will discuss in
5 greater detail, Chapter 12 expressly incorporates the
6 investor-State arbitration mechanism of Chapter 10, with
7 limitations, which Ms. Horne will address.
8 Chapter 10 sets forth a number of conditions of
9 consent for investor-State arbitration, which apply to
10 Claimants' Claims by virtue of Article 12.1.2(b). And one
11 such condition of consent is the TPA Limitation Period.
12 Let's look at that Limitation Period that I have referred
13 to. And it is Article 10.18.1, which you have on the
14 screen and which, of course, you have read coming into
15 this Hearing.
16 Now, Claimants have submitted their claims on
17 24 January 2018. So, that means, according--or applying
18 the Limitation Period of 10.18.1. That means that if
19 Claimants knew or should have known of the alleged breach
20 and loss before 24 January 2015, that is three years
21 counting back from January 2018, their Claims would be
22 barred under the TPA. So, 24 January 2015 is the cutoff
23 date that results from applying 10.18.1, and taking the
24 date of submission of Claimants' Claims.
25 And as I noted a few minutes ago, Claimant now

1 argue that their claims arose from the 2014 Order, which
2 was issued precisely on 25 June 2015, which, of course,
3 predates the cutoff date under the TPA limitations period
4 by seven months.
5 PRESIDENT BEECHEY: 2014. You said 2015.
6 MR. GRANÉ: I apologize. Thank you for the
7 correction, Mr. President.
8 24 January 2015.
9 PRESIDENT BEECHEY: 25 January 2014, and
10 24 January 2015.
11 MR. GRANÉ: Yes. Thank you, Mr. President.
12 Now, that alone is reason enough to dismiss this
13 entire case. This is a very straightforward issue that is
14 before the Tribunal based on undisputed facts.
15 So, recognizing that they have not satisfied this
16 condition of consent under the TPA, Claimants' only option
17 is to try to get around the TPA limitations period, and to
18 try to do that, they invoke the Chapter 12 MFN Clause and
19 attempt to import a longer, five-year Limitation Period
20 from the Colombia-Switzerland BIT. But two fundamental
21 problems.
22 First, Claimants cannot rely on the Chapter 12
23 MFN Clause in this way. As a preliminary matter that
24 clause is excluded from the application of the
25 investor-State arbitration mechanism under the TPA, as

1 confirmed by the United States in its non-disputing party
2 submission. And, again, this will be further explained by
3 my colleague, Ms. Horne.
4 But, in any event, the proper interpretation of
5 the Chapter 12 MFN Clause, in according with the
6 Vienna--in accordance with the Vienna Convention, and as
7 confirmed by the leading case law, is that such clause
8 cannot be used to circumvent conditions of consent under
9 the TPA. The Parties are in agreement that Chapter 12,
10 which you now have on your screen, does not explicitly
11 authorize a Claimant to import dispute resolution
12 provisions from other treaties.
13 In its written submission, Claimants cited
14 multiple Tribunals that have expressly rejected the
15 interpretation of the word "treatment" in an MFN Clause as
16 permitting the importation of the dispute resolution
17 clauses from other treaties, absent express language to
18 that effect.
19 And, indeed, there is a long line of
20 jurisprudence including the majority of recent Decisions
21 on the subject holding that the MFN Clause cannot be used
22 to import conditions of consent, unless the text of the
23 clause "clearly and unambiguously provides for such
24 application." And you find this, for instance, in the

1 Legal Authority submitted by Claimants, CLA-0093[1] in the
2 Award in that case.
3 That is Berschader, Paragraph 206.
4 The ordinary meaning of the Chapter 12 MFN Clause
5 does not allow, let alone clearly and unambiguously, for
6 the importation of more favorable conditions of consent to
7 arbitration.
8 Now, Claimants argue that the use of the word
9 "treatment" means that the MFN Clause can be used to
10 import conditions of consent, and we heard Claimants'
11 counsel spend some time on the interpretation of
12 "treatment." But despite their surprising denial this
13 afternoon, Claimants do rely for this proposition on
14 Maffezini, as does their Expert, Professor Mistelis--I'm
15 sorry, Mistelis. But Claimants have failed to engage with
16 the critical distinction between Maffezini and its line of
17 cases and the present dispute.
18 Colombia has addressed those distinctions, as I
19 explained why Maffezini and the line of cases its progeny
20 should not apply--cannot apply to this case given the MFN
21 Clause that we have.
22 Most of those cases, Maffezini line of cases,

[1] Here, and where applicable in the remainder of the transcripts, the document number has been corrected to reflect the document to which the speaker was referring.

1 allowed for the importation of more favorable conditions
2 of consent based on treaty language that is broader than
3 that in Chapter 12 MFN Clause.
4 All of the post-Maffezini line of cases cited by
5 Claimants involve a Claimants' attempt to circumvent an
6 18-month litigation clause, which is different in nature,
7 and must be distinguished from the limitations period that
8 Claimant is attempting to circumvent in this case. And a
9 number of Tribunals have criticized that the Tribunal, of
10 course, is aware the reasoning and effects of the
11 Maffezini Decision and of its progeny, thus, Claimants
12 attempt to distance themselves from Maffezini this
13 afternoon despite what they have said in their written
14 submissions.
15 And, in addition, the Maffezini Tribunal itself
16 notes that does not apply to all treaties. An analysis of
17 the context of Chapter 12, likewise leads to the
18 conclusion that such clause cannot be used to circumvent
19 Colombia's and the United States' condition of consent.
20 And specifically, at Footnote to the MFN Clause
21 contained in Chapter 12, clarifies what the Parties meant
22 by "treatment" in the context of that MFN Clause. That
23 footnote explicitly states, for greater certainty,
24 treatment does not encompass dispute resolution mechanism
25 such as those in Section B of Chapter 10.

1 Now, recall that the only manner in which
2 Claimants can bring claims under Chapter 12 is by relying
3 on the investor-State dispute mechanism that is in
4 Section B of Chapter 10 and is imported into Chapter 12.
5 But it is imported with the limitations of consent that
6 the Parties expressed in Chapter 12 to the conditions of
7 consent.
8 But even if Claimants could circumvent the
9 conditions of consent under the TPA, using the Chapter 12
10 MFN Clause, which they cannot, we insist, Claimants do not
11 even comply with the five-year Limitation Period in that
12 Colombia-Switzerland BIT that they now invoke.
13 Now, the Tribunal will note and you have this on
14 your screen, that Article 11(5) of the
15 Colombia-Switzerland BIT precludes the submission of a
16 dispute to arbitration if Claimants obtained knowledge, or
17 should have obtained knowledge of the events giving rise
18 to the dispute, more than five years before they submitted
19 their claims to arbitration. The dispute being what will
20 determine the Application, the trigger, and the potential
21 violation of that Limitation Period.
22 Now, recall that Claimants filed their Claims on
23 24 January 2018. That means that, in order to comply with
24 the five-year Limitation Period under the
25 Switzerland-Colombia BIT, Claimants must not have obtained

1 knowledge of the events giving rise to the dispute before
2 24 January 2013.
3 But as discussed earlier, and applying the
4 established definition of a "dispute," the present dispute
5 arose in July 2000, at the latest. That is when, again--I
6 repeated this, but it bears stressing. That is when
7 Claimants filed suit in Colombian court challenging the
8 1998 regulatory measures. That is some 13 years before
9 the cutoff date under the five-year Limitation Period
10 under the Colombia-Switzerland BIT.
11 The Claimants knew of the events giving rise to
12 their dispute well before the five-year Limitation Period
13 under the Switzerland-Colombia BIT. It is also evident
14 again from Claimants' written submissions in the present
15 arbitration as well as in their submissions to the
16 Inter-American Commission of Human Rights.
17 I have already cited some of Claimants'
18 submissions but could continue giving you examples all day
19 long. Now, time does not allow that but I have cited a
20 few more examples in the slides on your screen, and we
21 have provided a free translation of the text from the
22 original Spanish.
23 Again, time will not allow me to stop and read
24 these submissions, but they are in the record in the
25 documents that that are cited in these slides, which the

1 Tribunal can consult.
2 Now, given those admissions and the established
3 facts, Claimants cannot seriously deny that the dispute
4 arose before the cutoff date under the
5 Colombia-Switzerland BIT. Their attempt to latch onto the
6 2014 Order and present it as giving rights to a new
7 dispute is desperate and unavailing.
8 As I stated, temporal limitations cannot be
9 circumvented by pointing to the latest development in a
10 series of related acts as other Tribunals have warned.
11 The Tribunals in Corona, EuroGas, and Grand River, and
12 others that we have cited have rejected such attempts by
13 Claimants to evade limitations periods by basing their
14 claims on the most recent alleged transgression in a
15 series of acts.
16 Now, it is evident and has been confirmed by
17 Claimants that this entire case is about Colombia's
18 regulatory conduct in the late 1990s and the lawsuit that
19 followed commencing in July 2000. Again, 13 years before
20 the cutoff date under the Colombia-Switzerland BIT.
21 The conclusion, therefore, is that Claimants have
22 not complied even with the longer Limitation Period that
23 they tried to import using--impermissibly, the MFN Clause.
24 And for the reason that I had summarized and which
25 Colombia expounded in its written submissions, and we

1 respectfully refer the Tribunal to those submissions, of
2 course. Claimants' case in its entirely should be
3 dismissed for lack of jurisdiction ratione temporis.
4 And unless the Tribunal has any questions,
5 Mr. President, may I invite Ms. Horne to present
6 Colombia's ratione voluntatis but, perhaps,
7 Mr. President--of course, we are in our hands. This may
8 be a good opportunity to take the 45-minute break.
9 PRESIDENT BEECHEY: Yes. I think that would be a
10 good opportunity. Thank you, Mr. Grané.
11 One thing I would ask is this: Subject to
12 sorting out whatever remaining wrinkles there may be to be
13 sorted out, it would be very helpful if the Tribunal might
14 be provided with the presentation that you've been using
15 and, indeed, before that, Claimant was using.
16 MR. GRANÉ: We will do so immediately,
17 Mr. President.
18 PRESIDENT BEECHEY: Thank you very much indeed.
19 All right. We will start again at quarter past the hour,
20 if we might. Thank you very much.
21 MR. GRANÉ: Thank you.
22 (Whereupon, at 1:30 p.m., (EST) the Hearing was
23 adjourned until 2:15 p.m., (EST) the same day.)
24 PRESIDENT BEECHEY: I see the leaders of both
25 teams on the screen.

1 Is there anybody else we need to wait for, or can
2 we proceed now to invite Ms. Horne to make her
3 presentation?
4 MR. GRANÉ: From Respondent's side we can
5 proceed. Mr. President, I misspoke in my presentation
6 when I said that Ms. Astrida Benita Carrizosa, the mother
7 of Claimants in this case, was born in the United States.
8 She was not born in the United States. I believe she was
9 born in Lativa (phonetic). So, apologies for that mistake
10 on my part.
11 And, lastly, Mr. President, we have re-sent the
12 presentation, so you should have that in your inbox. That
13 is all that we have to say before Ms. Horne takes the
14 floor with the--your permission, Mr. President.
15 PRESIDENT BEECHEY: Thank you. Well, I can
16 confirm that the presentations have arrived, and,
17 Mr. Martínez-Fraga, we'll have a final edition when we get
18 the Claimants' presentation in due course?
19 MR. MARTÍNEZ-FRAGA: Absolutely. It is supposed
20 to be there.
21 PRESIDENT BEECHEY: Okay. That's very good.
22 MR. MARTÍNEZ-FRAGA: Thank you, sir.
23 PRESIDENT BEECHEY: I'll keep looking. Don't
24 worry. All right.
25 MR. MARTÍNEZ-FRAGA: I'll follow up on my end.

1 PRESIDENT BEECHEY: Okay. Very well. Thank you
2 very much.
3 MR. MARTÍNEZ-FRAGA: Yes, sir.
4 PRESIDENT BEECHEY: Ms. Horne, over to you.
5 MS. HORNE: Thank you very much, Mr. President
6 and Members of the Tribunal. On behalf of all of my
7 colleagues in this time zone, I'd like to thank you for
8 the opportunity to take a lunch break even though it's in
9 your evening. We will endeavor to use our remaining time
10 very efficiently.
11 And I will begin by addressing the subject of
12 this Tribunal's jurisdiction ratione voluntatis. This
13 objection revolves around the fundamental principle of
14 consent. As affirmed by the ICJ a State's consent to the
15 jurisdiction of an international court of tribunal must be
16 "an unequivocal indication of the desire of that State to
17 accept jurisdiction in a voluntary and indisputable
18 manner." That quote is shown on the slide on the next
19 screen.
20 In this case, Claimants have been unable to
21 demonstrate such unequivocal consent. In fact, all of
22 Claimants' Claims fall outside of the jurisdiction ratione
23 voluntatis of this Tribunal. This is so for four reasons.
24 First, the Tribunal does not have jurisdiction
25 over Claimants' fair and equitable treatment Claim because

1 Chapter 12 of the TPA does not include or incorporate an
2 FET obligation.
3 Second, the Tribunal does not have jurisdiction
4 over Claimants' FET or national treatment Claims because
5 Colombia did not consent to arbitrate such Claims under
6 Chapter 12.
7 Third, Claimants cannot use the MFN Clause to
8 submit their FET or national treatment Claims and, fourth,
9 in any event, none of Claimants' Claims can proceed
10 because Claimants have not satisfied several conditions of
11 consent under the TPA.
12 But before I proceed with these points, I wish to
13 make a brief aside. While our arguments about the
14 application of the TPA are quite straightforward, the
15 Tribunal is aware by now that the TPA is drafted in such a
16 way as to have many cross-references and to denote
17 Articles with numbers like 12.1.2(b). I, therefore, ask
18 the Tribunal's patience as I go through these recitations.
19 I'll begin with the subject of Claimants' FET
20 Claim. Claimants have repeatedly stated that they are
21 financial services investors submitting their Claims under
22 Chapter 12. Claimants have also made clear that they are
23 submitting an FET Claim. Yet there can be no dispute that
24 Chapter 12 does not include an FET obligation.
25 Faced with this reality, Claimants now argue that

1 they can import an FET obligation from Chapter 10. It is
2 true that Chapter 12 does incorporate certain substantive
3 provisions from Chapter 10. Specifically,
4 Article 12.1.2(a), which is shown on your screen, sets
5 forth a list of provisions that are incorporated from
6 other chapters. The FET obligation of Chapter 10, which
7 is Article 10.5, is not on this list. It is not imported
8 from Chapter 10.
9 Now, earlier today in their Opening Presentation,
10 Claimants asserted that it's okay that there is not an FET
11 obligation in Chapter 12 because they can simply submit an
12 FET Claim using the expropriation clause. This is
13 nonsensical. This Treaty has an FET obligation and an
14 expropriation provision in Chapter 10. Those are
15 different provisions with different obligations.
16 Claimants cannot ignore the fact that Chapter 12
17 does not have an FET obligation. Or, simply decide
18 unilaterally that they can submit an FET claim under an
19 expropriation clause. If they want to submit a claim
20 under the expropriation obligation, they must demonstrate
21 that there has, in fact, been an expropriation.
22 For that reason, Chapter 12 does not include or
23 incorporate an FET obligation. Colombia, therefore,
24 cannot be held liable for such a breach under Chapter 12
25 and Claimants' FET obligation falls outside of the

1 jurisdiction of this Tribunal.
2 The second part of Colombia's objection concerns
3 both the FET and national treatment Claims. Now, as this
4 relates to the FET Claim, it's an argument in the
5 alternative because I've just described that there is no
6 FET obligation for Claimants to invoke. Claimants are
7 submitting their FET and national treatment Claims under
8 Chapter 12. Chapter 12 does not have an investor-State
9 arbitration mechanism of its own.
10 Instead, Article 12.1.2(b) incorporates the
11 investor-State arbitration provision from Chapter 10 into
12 Chapter 12. Claimants believe that Article 12.1.2(b)
13 gives them license to submit to arbitration any and every
14 kind of claim that they can contrive under Chapter 12.
15 But an interpretation of Article 12.1.2(b) shown on your
16 screen in accordance with customary principles of Treaty
17 interpretation demonstrate that Claimants are wrong.
18 The reality is that Article 12.1.2(b) expressly
19 limits the set of claims that a financial services
20 investor can submit to arbitration.
21 Let's begin with the ordinary meaning of the
22 Treaty's terms. The text of Article 12.1.2(b) states that
23 the investor-State arbitration provisions of Chapter 10
24 are "hereby incorporated into and made a part of this
25 Chapter solely for claims that a Party has breached," the

1 four listed obligations.
2 The word "solely" circumscribes the types of
3 claims that can be submitted to arbitration. The meaning
4 of this provision is unequivocal. Only those four listed
5 claims can be submitted to arbitration under Chapter 12.
6 A claimant cannot submit to arbitration under Chapter 12,
7 under any other obligations, whether those obligations are
8 contained in Chapter 10 or in Chapter 12.
9 This is shown on your screen. Here, Claimants
10 have purported to submit a variety of Claims, including
11 FET, national treatment, and MFN Claims. But those
12 privileges are not included in Article 12.1.2(b)'s
13 exhaustive list, and there is no consent to arbitrate such
14 Claims.
15 Importantly, the only other State Party to this
16 Bilateral Agreement, the United States, fully agrees with
17 this ordinary meaning interpretation. In its
18 Non-Disputing Party submission, the United States affirmed
19 that "by using the word 'solely' the Parties expressly
20 identified the only obligations found in Chapter 10 that
21 they were willing to arbitrate under Chapter 12." The
22 U.S. continued: "Nor did the Parties consent to arbitrate
23 investor's Claims based on any of the substantive
24 obligations contained in Chapter 12."
25 The ordinary meaning of Article 12.1.2(b) is,

1 thus, clear.
2 Now, for their part, Claimants avoided
3 interpreting the TPA, instead insisting on interpreting
4 the analogous provision in NAFTA.
5 However, Claimants' interpretation of even that
6 provision is incorrect. Like the TPA, NAFTA has one
7 chapter, Chapter 11, governing investments, and an
8 entirely separate chapter, Chapter 14, governing financial
9 services. NAFTA Article 1401 regulates the scope and
10 coverage of the financial services chapter, just like TPA
11 Article 12.1.
12 And just like TPA Article 12.1.2(b), NAFTA
13 Article 1401(2), which is shown on your screen, serves to
14 incorporate the investor-State arbitration mechanism from
15 NAFTA's investment chapter into the financial services
16 chapter. As you will see from the text on your screen, it
17 incorporates the arbitration mechanism "solely for
18 breaches" of a listed set of Articles.
19 Just as with the TPA, all of the States Parties
20 to NAFTA agree that Article 1401(2) sets forth an
21 exhaustive list of claims that a financial services
22 investor can submit to arbitration.
23 México and Canada had an opportunity to address
24 the issue of interpretation in the Fireman's
25 Fund v. México arbitration. Claimants believe that this

1 case is inapposite, but the description of this case given
2 by Claimants earlier today is inaccurate. We respectfully
3 refer the Tribunal to the actual Decision on the record as
4 RLA-0112.
5 In that case, México, as respondent, objected
6 that the Claimant could not submit certain claims,
7 including a minimum standard of treatment claim under the
8 financial services chapter of NAFTA. As a part of its
9 preliminary Decision, the Tribunal, therefore, had to
10 determine whether the Claimants were submitting their
11 claims under the financial services chapter or under the
12 investment chapter.
13 In their Witness submissions, both México and
14 Canada agreed that the list of claims in Article 1401(2)
15 that could be submitted to arbitration under the financial
16 services chapter was exhaustive. The Minimum Standard of
17 Treatment and national treatment claims that the Claimant
18 had tried to submit were not on that list.
19 In the present proceeding, the United States has
20 expressed its own agreement with that interpretation,
21 which means that all three NAFTA Parties are in complete
22 agreement about the proper interpretation of
23 Article 1401(2).
24 The Fireman's Fund Tribunal itself also agreed
25 with this ordinary meaning interpretation. It dismissed,

1 for lack of jurisdiction, the Claimants' major standard
2 treatment and national treatment claims, holding that such
3 claims could not be submitted to arbitration under the
4 financial services chapter.
5 The ordinary meaning of the plain text of the TPA
6 demands the same result in this case. With the plain
7 meaning of Article 12.1.2(b) clear and confirmed by the
8 jurisprudence, I'll turn to the next step of the VCLT
9 analysis. That's the context of Article 12.1.2(b). This
10 includes the surrounding provisions of the Treaty. The
11 chapeau of Article 12.1.2 is relevant in this regard.
12 That Article is shown on your screen, and it
13 clarifies that the provisions of Chapters 10 and 11 apply
14 "only to the extent that such chapters or articles of such
15 chapters are incorporated into this chapter."
16 This is a clear limitation.
17 The context of Article 12.1.2(b) also includes
18 TPA Article 12.18. This provides a dispute settlement
19 mechanism for disputes arising under the financial
20 services chapter. This is the State-to-State dispute
21 settlement mechanism.
22 Now, this part of the context directly refutes
23 one of Claimants' arguments. Claimants argue that the
24 Chapter 12 obligations would be unenforceable if
25 Article 12.1.2(b) were to be read in the way that the

1 Treaty Parties have indicated. But the Chapter 12
2 obligations are subject to State-to-State dispute
3 settlement and, therefore, are enforceable.
4 Now, this morning, Claimants asked why the Treaty
5 would do this and how this structure could possibly make
6 sense. There's a very simple answer. As I just noted,
7 the Fireman's Fund Tribunal is the only Tribunal to have
8 interpreted the analogous provision of NAFTA. It
9 considered the scope of consent to arbitration, and it
10 also considered that very question of why the NAFTA Treaty
11 Parties had structured the Treaty in this way.
12 It stated: "The regulations concerning financial
13 services were not the same in all three countries, but
14 each of the States Parties was clear, the challenges to
15 such regulations or interpretations of the regulations and
16 the relevant Authorities should not be committed to
17 investor-State arbitration under NAFTA.
18 On the other hand, investment and financial
19 institutions across borders was to be encouraged, and
20 investors were to be protected through the NAFTA from
21 expropriation and measures tantamount to expropriation."
22 So, the NAFTA Parties were faced with a delicate balance.
23 The Fireman's Fund Tribunal continued. "The
24 solution arrived at in the NAFTA was to include a separate
25 Chapter 14 on financial services. The expropriation

1 provisions of the NAFTA as set out in Chapter 11,
2 including the provisions for investor-State arbitration,
3 were made maybe to claims under Chapter 14. But Claims
4 based on other provisions designed to protect cross-border
5 investors and investments, including provisions for
6 national treatment and Most Favored Nation Treatment, are
7 excluded from the competence of an Arbitral Tribunal in a
8 case involving investment in financial institutions."
9 Chapter 14 contains no counterpart to
10 Article 1105 concerning Minimum Standard of Treatment.
11 In other words, the NAFTA Treaty Parties made a
12 deliberate choice, given the realities on the ground in
13 the three countries, to refer all of the substantive
14 protections of the financial services chapter to
15 State-to-State arbitration only. The TPA Parties then
16 adopted this same structure.
17 Moving now to the next primary means of
18 interpretation, Article 31(3)(a) and (b) of the VCLT
19 dictate that any subsequent agreement or a practice
20 between the Treaty Parties must be taken into account.
21 Here, as I've already indicated, Colombia and the United
22 States are in complete agreement that Article 12.1.2(b)
23 was intended to list the only set of claims that could be
24 submitted to arbitration under Chapter 12. This agreed
25 interpretation is authoritative.

1 In sum, an interpretation under Article 31 of the
2 VCLT yields a clear and straightforward result.
3 Article 12.1.2(b) identifies the exhaustive set of claims
4 that States have consented to arbitrate. That set of
5 claims does not include FET or national treatment claims,
6 and the Tribunal accordingly does not have jurisdiction
7 over Claimants' FET and national treatment Claims.
8 Now, Claimants have insisted that this Tribunal
9 must resort to supplementary means of interpretation,
10 including the negotiating history.
11 Here, such supplementary means are not necessary.
12 But, in any event, Claimants have not submitted a single
13 qualifying element of the travaux of the TPA or of the
14 NAFTA. As stated in Colombia's written submissions, the
15 travaux of a treaty must reflect the Parties' joint
16 understanding. This stands to basic reason.
17 A party cannot submit as definitive evidence of
18 the interpretation of a treaty its own internal documents
19 and sources, otherwise a State Party could always
20 unilaterally propose a self-serving interpretation. Here,
21 Claimants rely on the personal recollections of Mr. Olin
22 Wethington and the testimony of U.S. officials before U.S.
23 Congress as supplementary means of interpreting NAFTA.
24 Simply put, these are not travaux. The
25 statements of U.S. officials before U.S. Congress cannot

1 be said to reflect the drafting intent of Colombia, and
2 certainly one man's personal recollections do not have
3 interpretive weight under the VCLT. But, in any event,
4 even if this evidence had any weight, the evidence does
5 not somehow save Claimants' interpretation.
6 With respect to the congressional testimony, we
7 invite the Tribunal to review the documents. Nowhere does
8 a U.S. official say that a financial services investor can
9 submit to arbitration any claim under Chapter 12. The
10 U.S. officials did confirm that, first, financial services
11 investors can submit claims of expropriation to
12 arbitration and, second, that the State's Parties will be
13 able to enforce the other obligations of Chapter 12, using
14 the State-to-State dispute settlement mechanism.
15 In any event, the testimony of Mr. Wethington has
16 also been directly rebutted, including by Colombia, a
17 Treaty Party, and his own former employer, the United
18 States Government.
19 Here are the facts. Although Mr. Wethington
20 purports to declare the official drafting intent of the
21 United States, Mr. Wethington does not speak for the
22 United States. And, in any event, there is no
23 contemporaneous evidence to support Mr. Wethington's
24 sweeping claims about what the negotiators intended.
25 Mr. Wethington's Report, thus, does not reflect

1 the drafting intentions or understanding of the United
2 States, let alone the drafting intent of all of the
3 Parties to either the NAFTA or the TPA.
4 I will now briefly address Claimants' attempt to
5 circumvent the limitations that we just discussed by
6 invoking the Chapter 12 MFN Clause. Claimants attempt to
7 use the Chapter 12 MFN Clause in two ways. First, they
8 attempt to incorporate into Chapter 12 an FET obligation,
9 and, second, they attempt to use the MFN Clause to create
10 consent to arbitrate their FET and national treatment
11 claims.
12 At the outset, I'll reiterate what I demonstrated
13 earlier. Article 12.1.2(b) does not include MFN claims
14 within its scope of consent, and for that reason Claimants
15 cannot invoke and the Tribunal has no jurisdiction to
16 apply the Chapter 12 MFN Clause. But I will further show
17 that, even if the Tribunal could apply this clause,
18 Claimants' purported uses are not permissible.
19 First, as I explained earlier, there is no FET
20 obligation in Chapter 12. Claimants seek to import an FET
21 obligation from the Colombia-Switzerland BIT, or they did
22 so in their papers. But an MFN Clause cannot be used to
23 import into a Treaty an obligation that does not exist in
24 the underlying Treaty. This is well-established in
25 arbitral case law.

1 Claimants also seek to use the Chapter 12 MFN
2 Clause to create consent to arbitrate their FET and
3 national treatment Claims. Unlike the applicable Treaty
4 in the present case, the Colombia-Switzerland BIT that
5 they seek to use, does not limit consent to a certain set
6 of claims. So, Claimants argue that if the TPA does limit
7 consent, they will turn to a treaty that doesn't.
8 There's an insurmountable obstacle to this
9 argument. An MFN Clause cannot be used to create consent
10 to arbitration where no consent exists in the underlying
11 Treaty. This is consistent with the findings of multiple
12 investment Tribunals who were applying Dispute Resolution
13 Clauses that limited consent to a certain set of claims,
14 and when Claimants tried to expand that list using an MFN
15 Clause, these Tribunals rejected that attempt.
16 In the interest of time, I will not read all of
17 the quotes, but they are included on the Tribunal's slides
18 for your future reference. This is the Telenor v. Hungary
19 Case, as well as the Austrian Airlines case. I would also
20 refer the Tribunal to the A11Y v. Czech Republic case.
21 Allowing the Claimants to use the MFN Clause to
22 create consent to arbitrate their FET and national
23 treatment Claims would subvert the clear intention of the
24 TPA State's Parties to limit the scope of consent. For
25 that reason, the attempt to use the MFN Clause in this way

1 should be rejected.
2 The fourth and final aspect of Colombia's
3 objection concerns certain conditions of consent. I'll
4 address these only briefly now, again, in the interest of
5 time, but we rely on our written submissions for our
6 complete argument.
7 As already discussed, Article 12.1.2(b)
8 incorporates from Chapter 10 into Chapter 12 the
9 investor-State arbitration mechanism. This means that the
10 conditions of consent contained in Chapter 12 apply to
11 Claimants' Claims under Chapter 12. If those conditions
12 of consent are not satisfied, a Tribunal will not have
13 jurisdiction. Here, three conditions have not been
14 satisfied.
15 First, Claimants have not satisfied the Notice of
16 Intent requirement. That is set forth in Article 10.16.2
17 on your screens.
18 Earlier today, Claimants asserted that this
19 objection was not justiciable. We're not sure why
20 Colombia's indication of a clear Treaty requirement would
21 somehow not be justiciable. But this is, in fact, a
22 mandatory requirement, as shown by the plain language of
23 Article 10.16.2, which states what a Claimant shall do in
24 order to comply with the TPA.
25 Here, the TPA State's Parties are in complete

1 agreement. You will see a part of the United States'
2 submission excerpted on your screen.
3 There's no dispute as to the facts. Claimant did
4 not submit a Notice of Intent. They failed to comply with
5 this jurisdictional requirement, and, therefore, their
6 Claims must be dismissed for lack of jurisdiction. The
7 second condition of consent that Claimants has failed to
8 satisfy is the consultation and negotiation requirement.
9 This is Article 10.15, which is shown on your screen.
10 While Claimants allege that this requirement is not
11 mandatory, a number of Tribunals have held that similar
12 requirements are, including Murphy, Salini, and Enron.
13 Moreover, the Spanish version of the TPA, which
14 the TPA defines as "equally authentic," uses the word
15 "deben," which means "must."
16 As to the facts, earlier today Claimants asserted
17 that they did, in fact, offer to consult with Colombia.
18 They referred to a couple of documents that did not have
19 exhibit numbers. The first of those documents is a letter
20 dated the same day as the Request for Arbitration.
21 Needless to say, it's not an offer to consult in advance
22 of submitting the request if it's the letter attaching the
23 request for arbitration itself.
24 Claimants also pointed to an email after that
25 time from Colombia. We have confirmed, Mr. President,

1 that this email is not on the record in this case, and,
2 therefore, should not have been submitted.
3 But we did want to address this specious
4 accusation that Colombian officials called the offer to
5 negotiate "trash." We respectfully submit that counsel
6 for Claimants should consider carefully the appropriate
7 translation. In Colombia, the word "bodeque" means
8 "draft." You can find this in a Spanish dictionary, which
9 we would be happy to submit.
10 Ultimately speaking, Claimants did not comply
11 with the obligation to consult or negotiate. The third
12 and final requirement that Claimants failed to satisfy is
13 the waiver requirement. This is in Article 10.18.2(b),
14 which is shown on your screens and requires an investor to
15 waive any right to initiate or continue proceedings with
16 respect to a measure alleged to constitute a breach of the
17 TPA.
18 The United States noted that this is a
19 precondition to the Parties' consent. The two TPA Parties
20 also agree as to the nature of this requirement. It
21 requires on the one hand that there be a clear, explicit
22 and written waiver and, on the other hand, a material
23 aspect of the requirement is that Claimants actually
24 comply with that waiver.
25 Here, they did not submit a written waiver, so

1 the first element of the requirement has not been
2 satisfied, and the analysis could end here. But Claimants
3 have also failed to satisfy the material requirement
4 because they are pursuing a proceeding that falls within
5 the scope of the waiver requirement.
6 This analysis is shown on your screen, referring
7 to the Inter-American Commission proceeding. It's an
8 ongoing proceeding initiated by Claimants before a dispute
9 settlement procedure in which they complain about the same
10 measures that they complain about before this Tribunal.
11 So, for the four reasons I have discussed, the
12 Tribunal lacks jurisdiction ratione voluntatis over all of
13 Claimants' Claims.
14 Mr. President, unless the Tribunal has any
15 questions for me at this time, I'll yield the floor to my
16 colleague Mr. Di Rosa.
17 I believe you're on mute, Mr. President.
18 PRESIDENT BEECHEY: One day I will master this
19 particular technology.
20 Professor Ferrari, Mr. Söderlund, any questions.
21 ARBITRATOR SÖDERLUND: I'm fine. Thank you.
22 PRESIDENT BEECHEY: Thank you. All right. In
23 that case, thank you very much, indeed, and I gather we
24 hear now from Mr. Di Rosa.
25 MS. HORNE: That's correct, but to that end,

1 Mr. President, may we briefly request a brief five-minute
2 technical break? We are in a conference room that
3 requires us to switch speakers and laptops.
4 PRESIDENT BEECHEY: Yes, of course. No, that's
5 understood. Yes, we will all stay here, but that's fine.
6 MS. HORNE: Thank you very much.
7 PRESIDENT BEECHEY: Thank you.
8 (Pause.)
9 PRESIDENT BEECHEY: Good afternoon, Mr. Di Rosa.
10 MR. DI ROSA: Good evening to you, Mr. President.
11 PRESIDENT BEECHEY: Are you ready to start?
12 MR. DI ROSA: I am, Mr. President, but I did want
13 to, before I start, to ask you a timing question.
14 PRESIDENT BEECHEY: Yes.
15 MR. DI ROSA: You had indicated that the Tribunal
16 was keen on ending at 8:30 your time, and by our count,
17 that is about 35 minutes from now.
18 PRESIDENT BEECHEY: Yes.
19 MR. DI ROSA: We have an hour and one minute
20 according to our tabulation of time left. So, my question
21 to you and to the Tribunal Members is, do you wish for me
22 to address the ratione personae objection today and then
23 the ratione materiae objection tomorrow, or should we push
24 through? They are about half an hour each, and we expect
25 to have more time tomorrow overall.

1 PRESIDENT BEECHEY: Mr. Di Rosa, forgive me, I
2 will--I'm going to defer to those who are keeping the
3 clock because we were, as I recollect, about seven minutes
4 behind at one point. We lost a certain amount of time
5 earlier on, which I thought we'd caught up more or less,
6 by truncating the longer break. How much time do you
7 believe you had so far?
8 MR. DI ROSA: We understand that we have one hour
9 and one minute left, Mr. President.
10 PRESIDENT BEECHEY: José, can you help us,
11 please?
12 SECRETARY ARAGÓN CARDIEL: Yes. I'm gathering
13 the numbers. My current count--it might be incorrect--is
14 that the Claimant has been speaking for 1 hour and
15 31 minutes, which means that--
16 PRESIDENT BEECHEY: Yeah, so just a shade under
17 an hour left. All right. Well, may I deal with it this
18 way, Mr. Di Rosa? Without wishing to put you under undue
19 pressure, we were--our late stop was 8:45 p.m., which is
20 50 minutes' time. Is that going to help you?
21 MR. DI ROSA: 50 minutes. Yes, I can try to do
22 that, Mr. President, if you prefer to push through and
23 finish today. We can certainly do that.
24 PRESIDENT BEECHEY: I think we would, because we
25 have already got to interpolate the submission of the

1 United States tomorrow morning, which we are going to do,
2 without wishing to cut across the time for the Witnesses.
3 MR. DI ROSA: All right. Thank you,
4 Mr. President. We will start then--
5 (Discussion off the record.)
6 MR. DI ROSA: We will start, then, with the
7 ratione personae objection first. And we begin, of
8 course, with the relevant Treaty provision, which is
9 Article 12.20 of the TPA. And the relevant passage is
10 bolded on the screen. It says: "A natural person who is
11 a dual citizen shall be deemed to be exclusively a citizen
12 of the State of his or her dominant and effective
13 nationality."
14 This is in Chapter 12 and Article 10.28 of the
15 TPA as an almost identical clause.
16 Unfortunately, the TPA does not provide any
17 guidance on how to interpret this concept of the "dominant
18 and effective nationality." And, therefore, Article 10.22
19 becomes relevant, and that's the Article that was quoted
20 today by the Claimants, and it says that the Tribunal
21 shall decide "in accordance with this Agreement and
22 applicable rules of international law."
23 We agree with the Claimants that the applicable
24 rules of international law are of mandatory application,
25 and we agree that those rules include relevant rules of

1 customary international law. We are not sure quite why
2 the Claimants understood Colombia to be disagreeing with
3 those fairly elemental propositions. In fact, our sense
4 is that the Claimants have been contorting way more than
5 they needed to on many of these ratione personae issues,
6 because we actually agree on quite a few points that they
7 strain to prove. I will identify those points later in
8 the presentation.
9 In any event, there are two observations we wish
10 to make about this clause on the screen.
11 The first is that the determination does need to
12 be made as of two critical dates, and that's by virtue of
13 the TPA itself as well as the jurisprudence and doctrine.
14 We will come back to this as well.
15 And secondly, I wish to focus on the word
16 "exclusively." That term means that, ultimately, what the
17 Tribunal must decide based on all the relevant factors is
18 whether, if you have to pick only one, it makes more sense
19 to deem the Claimants to have been exclusively Colombian
20 or exclusively American on the critical dates.
21 To try to facilitate the Tribunal's task, we have
22 devised a decision tree that we think could be useful
23 heuristically, and, you know, we think it is accurate, but
24 Claimants are obviously welcome to push back on any aspect
25 of it that they disagree with. But we think that there

1 are certain critical determinations that need to be made
2 by the Tribunal first.
3 On the legal standard, what does "dominant and
4 effective" mean? How should that determination be made?
5 In other words, what factors are relevant, what factors
6 are irrelevant? By reference to what dates must this
7 determination be made? This is the critical dates that I
8 referred to. And there are certain factual
9 determinations: What are the critical dates in this
10 particular case? What does each relevant factor suggest
11 about the Claimants' dominant and effective nationality on
12 the critical dates? And then finally, the ultimate
13 determination is: What was the Claimants' dominant and
14 effective nationality on the critical dates?
15 So, we turn now to this concept of the dominant
16 and effective nationality. There are two words there,
17 "dominant" and "effective." There are two prongs of the
18 standard which, we submit, are separate and conceptually
19 different. "Dominant" refers to which of the two
20 nationalities is preponderant or prevalent at a given
21 time. It's a comparative analysis between the two
22 relevant nationalities. And effectiveness refers to the
23 genuineness or bona fide nature of a particular
24 nationality. It's a self-contained exercise, not a
25 comparative exercise.

1 There's disagreement between the Parties on this
2 distinction. The Claimants don't appear to agree that
3 there is a significant distinction, but, you know, they do
4 agree on Slide 114 of today's Opening Presentation that it
5 is a two-prong test, and yet in the same sentence on that
6 slide, they said that the effectiveness analysis "can't be
7 severed," and both of those things can't be true. If
8 there are two prongs, then, by definition, they are
9 separate. That's what prongs are.
10 Now, why do Claimants do this? It is because
11 they are desperate to talk about effectiveness, even
12 though Colombia concedes that their U.S. nationality is
13 effective. So, there is really nothing to talk about on
14 that prong. And why do they do that? Why such a
15 disproportionate, almost bizarre, emphasis on
16 effectiveness, even though it's a point that is not in
17 dispute? Why do they strain so hard to merge the
18 dominance inquiry into the effectiveness inquiry, to blend
19 the two into what they call a "qualitative analysis"?
20 The reason for this seems fairly evident. It is
21 because they know that they can prove that their U.S.
22 nationality was effective on the critical dates, but not
23 that it was the dominant nationality.
24 Now, the case law has emphasized that there are
25 two separate concepts. You have the quote from García

1 Armas, which is a fairly recent decision, relatively
2 recent. Same with the Ballantines Decision. Both of
3 these essentially made the distinction that I identified
4 in the previous slide.
5 And, just to understand what these concepts mean,
6 effectiveness ultimately is the first inquiry that needs
7 to be made by a Tribunal. If you have two nationalities,
8 you have to establish that--first, that they are
9 effective, because if they are not effective then they
10 can't be dominant. So, in effect, it's a two-step
11 process. If you decide that the nationality is effective,
12 then you go on to assess if--you know, if you determine
13 that they are both effective, then you assess which one is
14 dominant. If one of them is not effective, then, by
15 definition, the other one that is effective is the
16 dominant one. So, really, this term should have been
17 effectiveness--"effective and dominant nationality,"
18 really, rather than the other way around. But there we
19 are.
20 Now, part of the reason that there is some
21 confusion sometimes with these concepts and, you know, how
22 they should be interpreted is because many of the factors
23 that are used to assess each of them are similar, and in
24 some cases identical. And, in fact, the case that's
25 considered the seminal dual nationality case, which is the

1 ICJ's Nottebohm Decision, was actually not a dual
2 nationality case at all. It was exclusively an
3 effectiveness case. But, even though the Court did not
4 undertake in that case a dominance analysis, it did
5 articulate certain factors that, over time, came to be
6 used for both the effectiveness and the dominance
7 analyses.
8 So, the Nottebohm Case--next slide, please.
9 Oh, sorry. Yes. The Nottebohm Case is
10 ultimately the case that permeates all of the
11 international law of nationality. The legal standard that
12 was articulated by the ICJ in that case is the relevant
13 standard that's applied in all cases governed by
14 international law and should be the case as well here.
15 In that case, while the Court did identify
16 several factors that you see on the first quote on the
17 screen there, it did stress that no single factor is
18 determinative and that all relevant factors have to be
19 considered. In other words, it's a case-by-case,
20 fact-specific inquiry. And following Nottebohm, the
21 jurisprudence on dual nationality was then developed by
22 the various Mixed Claims Commissions, such as the
23 Italy-U.S. Claims Commission that yielded the Mergé
24 Decision and various investment Tribunals.
25 And of the investment Tribunal decisions, the

1 most instructive one in our submission is the
2 Ballantines v. Dominican Republic Decision, for two
3 reasons: First, because it interpreted a substantively
4 identical clause in Article 10.28 of the DR-CAFTA Treaty,
5 and, secondly, because the Ballantines Decision is
6 relatively recent. It is from September of 2019.
7 In many of the cases that the Claimants dwell on
8 heavily, including in their presentation today--for
9 example, Micula, Olguín v. Paraguay, even the facts in the
10 Nottebohm Case itself--these are not as relevant because
11 they were exclusively effective--effectiveness cases.
12 They were not cases that dealt with the comparative
13 analysis required to determine the dominance prong.
14 The more relevant cases for the Tribunal's
15 purposes, we suggest, are those that deal directly with
16 dual nationality, which are the Mergé Case that I
17 mentioned, the Iran-U.S. Claims Tribunal Cases, and the
18 Ballantines Decision, primarily.
19 The Claimants today articulated a number of
20 guiding legal principles that we disagree with, for the
21 most part, not all of them, but given the limitation that
22 we have on time, I'm inclined to just leave that for the
23 closing, so I'll not address--I was planning to just sort
24 of go through them quickly, but we don't think that there
25 is sufficient time to do it now. So, let's turn instead

1 to the next slide.
2 This is another thing that perplexed us quite a
3 bit. We articulate here four factors, sets of factors,
4 the same ones that we had identified in our pleadings.
5 Claimants accused us of abbreviating the relevant
6 standard, that we came up with an arbitrary list of
7 factors that ignores customary international law, and so
8 forth, and we disagree with all that. The relevant
9 standard articulated by the Nottebohm Case is that all
10 relevant factors need to be considered. The ICJ did not
11 articulate or prescribe a single set of factors that must
12 be applied universally in all cases. Rather, they said,
13 "Well, you have to take the totality of the circumstances
14 and assess the relevant factors, the ones that are
15 relevant in that particular case." And that's what we
16 did. We distilled the factors that seem relevant in this
17 particular case.
18 Some factors considered by other Tribunals
19 clearly are not relevant. For example, in Ballantines and
20 in other cases like the Iran Claims cases, the
21 circumstances of the naturalization are often deemed
22 especially relevant. But that's not a factor here at all,
23 because there is no naturalization. Claimants are U.S.
24 and Colombian nationals by birth. So, you have to apply
25 the factors that are actually relevant. And the

1 Claimants, in fact, are the ones that came up with the
2 more arbitrary of the list, because they have--next slide,
3 please--an 11-item list that they essentially just drew
4 from different cases, sort of like a ransom note. But a
5 lot of these factors are actually irrelevant in this
6 particular case. They might be relevant in other cases.
7 Now, there is a few that we do agree with. You
8 know, the ones on the left-hand column are the ones that
9 overlap, essentially, with ours or that we agree with, but
10 the majority of them are irrelevant in this case.
11 How or why dual nationality was obtained; as I
12 said, in some cases naturalization is relevant, and in
13 this case it is not. So, it's completely immaterial how
14 or why the dual nationality was obtained. It happened at
15 birth.
16 Subjective considerations; this is my favorite.
17 That one they didn't get from anywhere. That one they
18 made up entirely. That is not in any case as far as I
19 know.
20 Education; it could be relevant if it happened
21 recently. They are emphasizing education that happened
22 40 years ago or 35 years ago. Irrelevant, in our opinion.
23 Healthcare; certainly irrelevant, because that is
24 just--you know, people go to wherever they can afford to
25 go to get the best healthcare possible. So, all that says

1 is really--it speaks more to their socioeconomic status
2 than their dominant nationality.
3 And then the final two are also, in our view,
4 irrelevant. Absence of Treaty shopping considerations;
5 that's exclusively an effectiveness-related factor. We
6 have conceded there was no Treaty shopping here. Their
7 U.S. nationality is perfectly legitimate. Irrelevant
8 factor.
9 Treaty policy considerations; this one they also
10 made up. Treaty policy considerations, they said, well,
11 the whole point of this dual nationality clause in this
12 Treaty is because the Parties wanted to incentivize dual
13 nationals to repatriate capitals, and all this stuff. You
14 know, the purpose ultimately of this clause, as the United
15 States confirmed in its non-disputing party submission, is
16 simply to ensure that States don't get sued by their own
17 nationals. That's a long-standing governing basic
18 principle of international law, that States should not be
19 sued in international fora by their own nationals. And
20 that's the whole point of this clause, and that's the
21 whole point of the word "exclusively" that I had
22 emphasized earlier.
23 Next slide, please.
24 Now, there are some things that we agree on, and
25 we'll come back to a longer list of those, but one thing

1 the Parties do agree on in every aspect is the whole issue
2 of the critical dates. The critical dates are those--the
3 two that appear on the screen: Date of the alleged Treaty
4 breaches, date of submission of the claim to arbitration.
5 That's agreed by the Parties. We have cites here, not
6 only to the Claimants' own briefs, but to the U.S.
7 submission, and it is also consistent with the Treaty
8 clauses which I might have walked you through otherwise,
9 but, you know, it's--essentially, these two critical dates
10 are compelled by the Treaty itself and by jurisprudence
11 and doctrine. So, that's agreed upon by the Parties.
12 And the Parties also agree--next slide--on the
13 actual critical dates that apply in this particular case,
14 which are June 25, 2014, which is the date of the sole
15 Treaty violation they are alleging at this point, and,
16 secondly, January 24 of 2018, which was the date on which
17 they filed their Arbitral Claim.
18 So, those are points that we agree on. And, you
19 know, some of these are already touched upon. I'm not
20 going to walk through all of these because I already
21 referred to them, but these are all points--all the points
22 that appear on this screen are points that the Claimants
23 devoted a lot of ink and a lot of effort to rebutting when
24 we weren't even really challenging them at all.
25 There are additional points of agreement on the

1 next slide, and that's--you know, both of the Claimants'
2 nationalities were effective at all the relevant times;
3 the Parties agree on that. Neither nationality was
4 obtained by fraud; agreed on that. We talked about the
5 critical dates, and we agree that, to establish
6 jurisdiction claim, U.S. nationality needs to be the
7 dominant and effective nationality on the two critical
8 dates in 2014 and 2018. And, finally, the Parties agree
9 that all three Claimants have been residing in Colombia
10 since 2007 at the latest, and some of them--for two of the
11 brothers, it is even longer than that.
12 All right. Next slide, please.
13 Sorry. Yes. Points of disagreement.
14 So, these are the key issues on which the Parties
15 disagree--ultimately, probably the key issues in the case
16 for purposes the ratione personae jurisdiction--which are:
17 Are these two concepts separate concepts or prongs or not?
18 Are they combined in some way? What does that really
19 mean, "dominant and effective"? Does the Tribunal need to
20 analyze effectiveness when that issue is not in dispute?
21 How should--what factors should the Tribunal apply? Which
22 past cases are relevant and how should they be
23 interpreted? And which of the Claimants' two
24 nationalities was the dominant and effective one on the
25 critical dates? So, those are the points of disagreement.

1 All right. So, we--turning now to the facts of
2 the case, we think that the evidence shows quite clearly
3 that the dominant and effective nationality of the
4 Claimants on the critical dates was their Colombian one,
5 and this has to do with the fact that they have been
6 residing there for 13 years, at least, and in some cases
7 way longer than that. It was--it has been the
8 center--Colombia has been the center of their economic and
9 professional lives for at least those 13 years. Colombia
10 has been the center of their family, social, civic,
11 personal, and political lives as well, and we will just
12 turn quickly to some of these factors in a little more
13 detail.
14 Next slide.
15 So, for example, just to focus on this slide--and
16 I won't dwell on the others as much--but permanent and
17 habitual place of residence is a factor that was
18 mentioned. It is always mentioned as the primary factor;
19 right? Everybody says, well, habitual residence is not
20 the only factor--we all agree on that--but it is a
21 critical factor that everybody focuses on first. And in
22 this case, it is overwhelmingly illustrative of the fact
23 that their nationality, their dominant nationality over
24 the last many, many years has been the Colombian one.
25 They have been residing--and this is what I

1 mentioned--2007 uninterruptedly, except for vacations and
2 the like, but, you know, they live there and have lived
3 there since 2007 in the case of Alberto, 2004 in the case
4 of Enrique, and 1994 in the case of Mr. Felipe Carrizosa.
5 So, it's a bundle of years straddling the critical dates
6 that they have been residing in Colombia.
7 Next.
8 Same thing applies to the economic and
9 professional lives. They say that they moved to Colombia
10 for purposes of attending to their business. We suggest
11 that that's, you know, not really--if anything, it
12 demonstrates what we are proposing, that it's the center
13 of their professional and economic life, which is one of
14 the factors that has been stressed in the jurisprudence.
15 And, you know, same number of years.
16 You know, obviously, if somebody has been living
17 in the same place for 13, 20, 25 years, by and large, that
18 will be the center of your life in any every respect.
19 That's why residence is always viewed as an important, if
20 not exclusive or determinant, component.
21 Next slide.
22 All right. Same concept with the other aspects
23 of their lives. The families of all three of the
24 Claimants have lived in Colombia for years and years. The
25 children live there and were born there. They were all

1 born there. All three of the Claimants were born also in
2 Colombia, but, as we say, what happened 50 years ago is
3 less relevant.
4 Key social and personal activities of Claimants
5 and their families, key civic and political activities,
6 where they voted, how often they voted, around the
7 critical dates, who they made campaign contributions to in
8 Colombia or in the U.S., these are all relevant factors,
9 and we think they all skew in favor of a conclusion that
10 Colombia is the relevant place of dominant nationality in
11 these respects. And, you know, we had a lot of
12 documentary evidence on these issues in our pleadings, so
13 we--you know, we just put on the screen here a few
14 representative ones, but we--you know, we refer the
15 Tribunal to our pleadings.
16 Next.
17 The fourth factor that we have centered on is how
18 the Claimants have held themselves out, how they have
19 self-identified around the critical dates. And there are
20 a set of documents relating to this Inter-American
21 proceeding that we have been talking about on and off
22 today. These are documents that they submitted first in
23 2012. This is the actual petition. They identified
24 themselves with their national identification number from
25 Colombia. They did not mention that they were U.S.

1 nationals at all. Then they did it again--next slide--in
2 2016. Remember, the first critical date is 2014, so these
3 two submissions straddled the first critical date. Here,
4 once again, they say--this time they actually added, you
5 know, "I'm Colombian" in addition to including their
6 national ID number. And then they did it again on the
7 second critical date, which is in 2018. This is around
8 the--this is the same year as the critical date, the
9 second critical date. And, again, they say they are
10 Colombian and so forth.
11 And this is quite revealing, we think, because
12 they didn't need to identify themselves as Colombian.
13 It's not like they needed to be Colombian to file this
14 claim. The American Convention of Human Rights says any
15 person can file a claim, so any nationality can file a
16 claim, against any state in the Americas, and at a
17 minimum, they could have said that they were dual
18 nationals, Colombian and U.S., in the same way that they
19 said they were dual nationals in this proceeding; right?
20 The fact that they did not around the critical dates
21 suggests very powerfully that they view themselves as
22 Colombian.
23 All right. I'm trying to decide on the fly here,
24 Mr. President, what I skip, so bear with me.
25 All right. So, burden of proof. Let's talk a

1 bit briefly about the burden of proof. You know, I think
2 that there is an agreement in the jurisprudence and
3 doctrine that the Claimants do bear the burden of
4 establishing the facts that are necessary to establish
5 jurisdiction, and it is important in this regard, in
6 particular in relation to the ratione personae objection,
7 that the Claimants have not provided any documentation at
8 all suggesting that their dominant nationality on the
9 critical dates was the U.S. nationality.
10 In fact, in this entire case, the only two pieces
11 of documentary evidence that they have presented relating
12 to the nationality issue are their passport and their
13 birth certificate for each of the three Claimants. That's
14 it. Those are the documents they have presented. And
15 those two documents relate exclusively to the
16 effectiveness prong. They don't at all say anything about
17 the dominant prong.
18 And we have shown you in the pleadings, and to
19 some extent today, some documentary evidence that suggests
20 that they--their dominant nationality is, in fact,
21 Colombian, and many of the key factual assertions in
22 Claimants' testimony on dominant nationality are
23 affirmatively contradicted by the documentary evidence in
24 the record presented by Colombia. Ultimately, they are
25 relying--for the dominance prong of the test, they are

1 relying exclusively on their own self-serving testimonial
2 evidence, but that is insufficient to carry their burden
3 of proof.
4 For these reasons, we submit that there is no
5 jurisdiction ratione personae and that, therefore, the
6 claims must be dismissed.
7 All right. Turning quickly to the ratione
8 materiae objection.
9 Can I get a time update, please, in terms of--how
10 much?
11 SECRETARY ARAGÓN CARDIEL: 32 minutes left.
12 MR. DI ROSA: I thought I had 45 total, something
13 like that.
14 PRESIDENT BEECHEY: Yeah, you are at right about
15 25 minutes to go.
16 MR. DI ROSA: 25?
17 PRESIDENT BEECHEY: Max.
18 MR. DI ROSA: Okay. That should suffice,
19 Mr. President.
20 Okay. So, turning now to the jurisdiction
21 ratione materiae objection, this is the fourth and final
22 objection.
23 And, Mr. President, I apologize. I know it is
24 very late in the day and everybody is tired. There is
25 only so much I can do to make ratione materiae objections

1 exciting, but here we go.
2 PRESIDENT BEECHEY: I'll leave you to do your
3 best, Mr. Di Rosa.
4 MR. DI ROSA: All right.
5 So, the Tribunal's jurisdiction ratione materiae
6 depends on the existence of a "covered investment." This
7 is required by Articles 12.1 and 10.1.1(b) of the TPA. In
8 other words, Claimants need to point to an investment that
9 actually qualifies as such under the TPA and that is
10 otherwise subject to the TPA's protections.
11 However, to this day and deep into the case as we
12 are, the Claimants are still struggling to identify with
13 clarity the investment that is relevant for ratione
14 materiae purposes, and their position and theories on this
15 issue have changed several times over the course of the
16 case. We will go into a little more detail on each of the
17 theories, but we will start by briefly identifying them.
18 These are the theories they advance in their various
19 pleadings, and then today they came up with a variation.
20 But, you know, they started off in the Request for
21 Arbitration by saying, as you would expect, "Well, you
22 know, the investment is the shares in Granahorrar."
23 Right? They have come back sort of full-circle to that.
24 But that's not what they said in their Memorial.
25 In their Memorial, they changed their theory, and instead

1 said that the investment was the 2007 Council of State
2 Judgment, which I will refer to for convenience as "the
3 2007 Judgment."
4 In their Reply, then, they advance yet another
5 theory, a third theory, which was that--and this is a
6 quote--"the investment was transformed into different
7 modes at different times." With respect, we don't know
8 what that means. An investment is a clearly defined
9 asset, not a nebulous, shape-shifting, abstract concept.
10 Today, if I understood them correctly, Claimants
11 came up with yet another variation, which is that they
12 have what they call the beneficial interest or a right to
13 redress that is derived in some fashion from the shares
14 and the 2007 Judgment. In any event, none of these
15 theories succeeds in establishing a covered investment
16 under the TPA.
17 So, we are going to explore now each of those
18 theories in a little more detail, starting with what
19 appears to be ultimately the thrust of their position. We
20 are not really sure, but the 2007 Council of State
21 Judgment certainly was defined by them in their Memorial
22 to be the critical, and the only, investment for purposes
23 of the ratione materiae analysis. And this is what they
24 said, and I'm quoting here: "For purposes of pleading
25 and/or proof of ratione materiae, the Council of State's

1 November 1, 2007 Judgment represents and constitutes
2 Claimants' investment as alleged and demonstrated in this
3 proceeding."
4 So, they switched. They went from saying, "Well,
5 the shares are the investment" to "the Judgment is an
6 investment." Why do they do that? We don't know, but
7 probably it is because they realized that, if they insist
8 that the shares in Granahorrar are the relevant
9 investment, they would face fatal ratione temporis and
10 ratione materiae objections, and so they transitioned to
11 this theory. And then, ultimately, this theory fails for
12 three different reasons, which we will address now in
13 turn.
14 The first reason is that the 2007 Judgment is
15 directly excluded from the scope of the TPA by an explicit
16 provision in the Treaty, which is Footnote 15 of
17 Article 10.28, what we've called the judgment exclusion
18 provision, which explicitly excludes court judgments from
19 the Treaty's definition of "investment." And we will see
20 the actual quote in a moment.
21 Let's just go to the next one.
22 So, here's the actual quote. It is Footnote 15,
23 and it says: "The term 'investment' does not include an
24 order or judgment entered in a judicial or administrative
25 action."

1 And just in case there is any doubt,
2 Mr. President and Members of the Tribunal, we wish to
3 confirm a couple of aspects of this clause that we just
4 quoted. First of all, Article 12.20 of the TPA explicitly
5 incorporates into Chapter 12 the definition of
6 "investment" in Article 10.28. And since the
7 judgment exclusion provision is located in a footnote
8 within Article 10.28, then there is no question that the
9 footnote applies to Chapter 12 arbitrations as well. And,
10 furthermore, Article 23.1 of the TPA explicitly confirms
11 that footnotes are an integral part of the Treaty--that is
12 that quote on the bottom there--and, therefore, the
13 judgment exclusion provision has to be treated as
14 functionally equivalent to a provision in the main text of
15 the TPA. And the U.S. in its non-disputing party
16 submission also confirmed that Footnote 15 applies in this
17 Arbitration.
18 So, now let's explore briefly, then, the nature
19 of the 2007 Judgment to see if it fits within this
20 exclusion.
21 The 2007 Judgment was a ruling issued by the
22 Council of State of Colombia, which is the highest
23 judicial branch Tribunal that adjudicates administrative
24 matters in Colombia. The Judgment was issued in response
25 to an appeal by Claimants through their holding companies

1 of an unfavorable ruling in a first instance court in a
2 lawsuit that they had started in Colombia challenging the
3 1998 Regulatory Measures. That 2007 Judgment was
4 subsequently overturned by yet another judicial body, the
5 Constitutional Court, pursuant to the 2011 Constitutional
6 Court Judgment.
7 So, the 2007 Judgment is, therefore,
8 unquestionably a judgment entered in a judicial action,
9 which is the language from Footnote 15. And Claimants
10 don't challenge that it's a court judgment, and they
11 really couldn't, for obvious reasons. So, for this
12 reason, the 2007 Judgment falls squarely within the scope
13 of the judgment exclusion provision and outside the
14 definition of "investment" under the TPA, and that is
15 fatal to Claimants' case.
16 Now, what do Claimants have to say about this?
17 They attempt in their Reply to get around the problem by
18 advancing three arguments, all of which fail.
19 First, they said that there was certain
20 jurisprudence that permitted them to rely on the 2007
21 Judgment as a covered investment. This argument fails for
22 the simple reason that no amount of jurisprudence can ever
23 override the plain text of a treaty. So, Mondev, Saipem,
24 and whatever else they cited--they cited to those two
25 again today, but any other Legal Authorities that they

1 mention are simply irrelevant. The Treaty says what it
2 says. In addition, the Decisions that the Claimants cited
3 involve treaties that did not contain a clause akin to the
4 judgment exclusion provision in the TPA. So, they are
5 also not apposite for that reason.
6 Claimants' second argument is that the
7 judgment exclusion provision only applies to certain types
8 of judgments or orders, which, according to them, do not
9 include the 2007 Judgment. And specifically what they
10 said is, "Well, the judgment exclusion provision only
11 covers the subset of court decisions that count
12 as"--here's what they said--"investments in their own
13 right." And they cite as an example of this a
14 judgment that is rendered in favor of a different party
15 that is then acquired at a discount by an investor. And
16 that argument suffers from only problem: It is entirely
17 inconsistent with the plain text of the judgment exclusion
18 provision, which does not contain any limitation,
19 exception, or qualification whatsoever. The clause
20 applies to all court judgments. So, there is simply no
21 way to reconcile the Claimants' interpretation with the
22 plain language of the Treaty provision. And the Claimants
23 haven't even attempted to offer a citation in support of
24 their interpretation, because there is none.
25 Claimants' third argument on the

1 judgment exclusion provision is that, since it was the
2 1998 Regulatory Measures that led to the issuance of the
3 2007 Judgment in the first place, it was Colombia's own
4 alleged misconduct that resulted in the 2007 Judgment, and
5 that Colombia, therefore, should be estopped from invoking
6 the judgment exclusion provision as a defense.
7 This argument also fails, for at least three
8 different reasons.
9 First, it would require that the Tribunal make a
10 ruling on the merits at the jurisdictional stage. In
11 essence, Claimants are asking this Tribunal to assume
12 liability for purposes of finding jurisdiction, but that
13 would be putting the cart before the horse. Under the
14 judgment exclusion provision, the issue of whether the
15 2007 Judgment is covered by the TPA is an issue of consent
16 and jurisdiction, not an issue of liability.
17 Second, the Tribunal, in any event, cannot
18 pronounce itself on the lawfulness of the 1998 Regulatory
19 Measures because it lacks jurisdiction ratione temporis to
20 do so, as Mr. Grané Labat explained earlier.
21 And, third, by its terms, the Judgment Exclusion
22 Provision applies directing to the 2007 Judgment,
23 irrespective of the 1998 Regulatory Measures. The only
24 determination that the Tribunal needs to make on this is
25 whether or not the 2007 Judgment constitutes a

1 judgment entered in a judicial or administrative action.
2 That's it.
3 So, the background to the 2007 Judgment,
4 including the 1998 Regulatory Measures, is irrelevant.
5 All three of these arguments, therefore, fail,
6 and the bottom line is that Claimants cannot get around
7 the insurmountable bar that is posed to their Claims by
8 the Judgment Exclusion Provision of the TPA. And because
9 all of their claims relate to the same alleged investment,
10 that means that all of their Claims must be dismissed for
11 lack of jurisdiction ratione materiae.
12 Now, we could stop the analysis there on the
13 Judgment Exclusion Provision, but there's two other
14 reasons why that the Claimants argument on this fail as we
15 have seen. But we do want to close this argument with the
16 quotes that appear on the slide because, ultimately, these
17 are the critical ones for purposes of Tribunal's Decision.
18 It is really this simple. You have the Statement
19 from the Claimants' Memorial. You have the TPA language,
20 and the claims are, therefore, outside the Tribunal's
21 ratione materiae jurisdiction. You really could dismiss
22 the whole case just based on this one slide.
23 All right. So, the two additional reasons that
24 it's--the Judgment is not a covered investment that I
25 alluded to, the first of these two additional reasons is

1 that the 2007 Judgment had already ceased to exist by the
2 time of the critical dates. Under Articles 12.1 and--the
3 next slide, please.
4 Under Articles 12.1 and 10.1 of the TPA, and
5 Article 28 of the VCLT, as well as Article 13 of the ILC
6 Draft Articles of State of Responsibility, a State must be
7 able--I'm sorry--a Claimant must be able to demonstrate
8 that its investment existed on two critical dates. The
9 first is the date on which the Treaty entered into force
10 and the second is the date of the challenged measure.
11 In this case, the two critical dates are--for
12 ratione materiae purposes are 15 May 2012, the date of
13 entry into force, and 25 June 2014, which is the date of
14 what Claimants are now identifying as the sole measure
15 they are challenging under the TPA, which the 2014
16 Confirmatory Order from the Constitutional Court.
17 By the way, just due to the nature of the
18 inquiry, the critical dates for ratione materiae purposes
19 are different from the critical dates from ratione
20 personae purposes which were 2014 and 2018. These are
21 2012 and 2014.
22 So, the 2007 Judgment ceased to exist in 2011
23 because it got overturned in 2011 and--by this judgment
24 from the Constitutional Court of 26 May 2011. And, as of
25 that point, it no longer exists to the 2007 Judgment.

1 And, by definition, Colombia could not have breached the
2 TPA with respect to an investment that had already ceased
3 to exist by the time that Colombia first became bound by
4 the TPA's obligations, which was later.
5 So, by the time the Treaty entered into force,
6 the 2007 Judgment no longer existed. It's an
7 investment--to the extent it's an investment, as they
8 claim, it would be a nonexistent investment, and it is an
9 empirical impossibility for a measure to harm a
10 nonexistent investment.
11 In sum, for this reason, too, the
12 2000 Judgment cannot constitute a covered investment under
13 the TPA.
14 The third reason the 2007 Judgment cannot be a
15 covered investment is for the simple reason that it does
16 not meet a few of the objective elements of the definition
17 of "investment" in Article 10.28 of the TPA. And if we go
18 to this definition, as you see--and this is unusual
19 because in a lot of--not unusual, but, you know, in most
20 investment treaties, you see definitions that are very
21 broad, such as "investment" means every kind of asset.
22 And, then, they just list illustrative examples.
23 But this one has a limiting clause or two. It
24 says: "Every asset that has the characteristics of an
25 investment, including such characteristics as the

1 commitment of capital, the expectation of gain or profit,
2 or the assumption of risk," right. And the
3 2007 Judgment does not meet this definition because the
4 main formal requirement here is it has to have the
5 characteristics of an investment, and, as a general
6 matter, court rulings do not have the characteristics of
7 an investment.
8 But even if you were conceptually inclined to
9 accept the notion that a court ruling could in some
10 circumstances constitute an investment, the
11 2007 Judgment also does not meet the various
12 characteristics that are specifically identified in this
13 clause. For example, the Judgment in itself did not
14 involve any commitment of capital by the Claimants, nor
15 did they assume any risk with it. They may have had an
16 expectation of gain from it at some point while the
17 Judgment was still in force, but that was no longer the
18 case once the Judgment was reversed in 2011, which was,
19 again, before the two critical dates.
20 So, in sum, for all these three reasons that I
21 just articulated, the 2007 Judgment cannot possibly be
22 considered in and of itself an investment for which the
23 Claimants can seek redress under the TPA. There is,
24 therefore, no ratione materiae jurisdiction, and all of
25 the claims must be dismissed.

1 Now, given the fact that the Granahorrar shares
2 still seem relevant in light of the Claimants' amalgam
3 theory and given what they said in their Opening today, we
4 want to show to you that the--you know, the Granahorrar
5 shares also would not constitute a covered investment
6 under the TPA for two different reasons, which are
7 summarized on this screen here at the bottom.
8 The Claimants no longer had any share interest in
9 Granahorrar by the time of the critical dates, and they
10 acquired that interest, the shareholding interest, in
11 violation of Colombian law.
12 So, the first of those two reasons, we will go
13 into in a little more depth now, did not cover--cannot
14 constitute a covered investment because the shares had
15 already ceased to exist, and that's because the shares no
16 longer were in existence as of 2006.
17 In 2006, the Granahorrar as a legal entity was
18 dissolved and its assets were absorbed by another
19 financial institution, BBVA. So, you see the sequence
20 here. In 2005, the BBVA had purchased Granahorrar from
21 Fogafín, the State agency, and became Granahorrar's
22 majority Shareholder. But, then, what happened is
23 Granahorrar merged into BBVA and it ceased to exist
24 formally as a legal entity in 2006, and that's at
25 Exhibit R-0300.

1 Since Granahorrar became defunct in 2006 that
2 means its shares ceased to exist at that time as well.
3 That was a full six years before the First Critical Date
4 and eight years before the Second Critical Date. So,
5 because the shares no longer existed by the time of both
6 critical dates, they cannot be a covered investment in
7 this case.
8 The second reason for which the shareholding
9 interest in Granahorrar is not a covered investment is
10 because the Claimants acquired that interest in violation
11 of Colombian law. And you saw that the Claimants argued a
12 lot about this today. They said: "Well, the TPA doesn't
13 have an explicit conformity requirement, and, therefore,
14 the conformity requirement doesn't apply here."
15 And, you know, we submit that these days the
16 conformity requirement applies irrespective of whether
17 there's an explicitor clause or not. And there are a
18 number of Tribunals that have found that, including the
19 Phoenix v. Czech Republic Tribunal which said what you see
20 on the screen: "This condition is implicit even when it
21 is not expressly stated in the relevant BIT." And there
22 have been other Decisions that have reached the same
23 conclusion, you know, and that's part of the general trend
24 towards battling corruption. And we would submit that
25 this clause applies in the same way that the

1 nonretroactivity clause applies, you know, whether you
2 have it expressly written in the Treaty or not.
3 Anyway. Now, the Claimants also said today:
4 "Well, you know the only types of--you know, even if there
5 were such a requirement in this case, the jurisprudence
6 only contemplates that serious or fundamental breaches of
7 the domestic law qualify." And there have, in fact, been
8 a number of Tribunals that have identified the foreign
9 investment regime rules of a State as fundamental or
10 critical, and those Tribunals include the Saba Fakes,
11 Phoenix Action, Quiborax, Metal-Tech, and Achmea all
12 support that proposition.
13 Now, Claimants argue that they are entitled to
14 claim under the TPA because they qualify as foreign
15 investors under the TPA, and they also testified in their
16 Witness Statements that they always expected the TPA to
17 protect their investment in the Granahorrar shares. That
18 means that it must be presumed that the purchase of their
19 interest in the Granahorrar shares was made with foreign
20 capital, and the Claimants have not denied in this
21 Arbitration that they used foreign capital to obtain their
22 interests in Granahorrar.
23 And they stated in their Witness Statements that
24 they first acquired their shares in Granahorrar by 1988.
25 And during that period of time, there was a Foreign

1 Capital Investment Framework in force in Colombia that
2 imposed two approval and registration requirements that
3 are relevant here, and they appear on the screen. In the
4 interest of time, I'm not going to identify them in
5 detail.
6 And the first of these requirements was
7 eliminated in 1991, but the registration requirement at
8 the Central Bank continued beyond 1991 and, therefore,
9 applied throughout the period of the investment.
10 In the Reply, Claimants argued: "Well, we were
11 precluded from complying with the foreign capital
12 investment framework due to Law 43," which is a law that
13 they say required dual nationals like them to identify as
14 Colombian while they were in Colombia. But this law was
15 promulgated in 1993, several years after their investment
16 in the Granahorrar, so they can't really invoke that
17 legitimately as an argument.
18 The Central Bank, then, confirmed in a document
19 that was submitted to us that there had not been any
20 foreign investment in either Granahorrar or the Claimants'
21 shareholdings. And the Claimants have not really produced
22 any evidence to try to rebut any of this. So, I think
23 you--you know, you have to accept that they did not comply
24 with these rules, and if they did not comply with them,
25 then other shares were purchased in violation of Colombian

1 law and, therefore, don't qualify as a qualifying
2 investment.
3 Now, the third theory and the fourth theory from
4 today, if you want to call it a fourth theory, appears to
5 be some sort of amalgam of the first two theories. They
6 appear to be saying that the Granahorrar shares morphed
7 into the 2007 Judgment, and that the--you know, the
8 investment is some sort of hybrid or combination of the
9 two, and what they described today is a beneficial
10 interest that is somehow embodied in the 2007 Judgment.
11 But this theory also--these theories, if they are more
12 than one, are also clearly insufficient for the simple
13 reason that if neither the 2007 Judgment nor the
14 Granahorrar shares qualify individually as a covered
15 investment under the TPA, then there is no combination or
16 amalgam or transformation or metamorphosis of the two that
17 would ever yield a covered investment.
18 In this context, the whole cannot be greater than
19 the sum of the parts. So, for this reason, these
20 additional theories fail as well.
21 With this we reach the end of the discussion of
22 ratione materiae objections.
23 Mr. President, Members of the Tribunal, we
24 believe we have rendered evident in our pleadings and,
25 again, today that the Claimants have failed to carry their

1 burden of proof on the key threshold matter in this
2 Arbitration at this point, which is to establish facts
3 that are sufficient to establish the existence of
4 jurisdiction by this Tribunal to hear the Claimants'
5 Claims.
6 The Republic of Colombia, therefore, respectfully
7 requests that the Tribunal dismiss the Claims in their
8 entirety for lack of jurisdiction.
9 This completes our presentation, Mr. President
10 and Members of the Tribunal. We thank you for your
11 patience and would be happy to answer any questions you
12 may have.
13 PRESIDENT BEECHEY: Thank you, Mr. Di Rosa.
14 Do my colleagues have any questions?
15 ARBITRATOR SÖDERLUND: No. Thank you.
16 PRESIDENT BEECHEY: Mr. Ferrari.
17 ARBITRATOR FERRARI: No.
18 PRESIDENT BEECHEY: Okay. Thank you very much
19 indeed.
20 My compliments to the Parties for ensuring that
21 we finished pretty well within the time frames that are
22 allocated to themselves. That's most helpful. I can
23 confirm too that we have the soft copies of the
24 presentations. Thank you for that.
25 On that basis, we'll adjourn for today, and we

1 will start again at 2:00 p.m. GMT tomorrow to hear from
2 the United States.
3 MR. DI ROSA: Mr. Chairman, I really hate to
4 impose on you further, but I do have one final order, if I
5 may, before we close today relating to the
6 cross-examinations tomorrow.
7 PRESIDENT BEECHEY: Yes.
8 MR. DI ROSA: We reviewed the Procedural Order
9 Number 3.
10 PRESIDENT BEECHEY: Yes.
11 MR. DI ROSA: And even though there was some
12 discussion about this at the first procedural--at the
13 relevant procedural session, the prehearing conference, we
14 still had some doubt because discussion was framed in the
15 context of the direct and redirect examinations and not in
16 the context of the cross-examinations. So, we were told
17 and, you know, we see it in the Procedural Order that we
18 have--what it says is, you know, a maximum of an hour 10
19 for each of the Witness examinations tomorrow.
20 PRESIDENT BEECHEY: Yes.
21 MR. DI ROSA: But, you know, earlier in the
22 discussion there was some indication from you,
23 Mr. Chairman, that the idea was to have some flexibility
24 and some examinations might take a little longer than
25 others.

1 I guess my question is, because the formal
2 Procedural Order provision says in any event there will be
3 these limits, that means that an hour 10 is, in theory,
4 the, you know, absolute cutoff for each individual
5 cross-examination. What I wanted to ask you is whether,
6 you know, we can adapt a little bit to have, if we want to
7 spend an hour 20 minutes with one witness and only an hour
8 with the other, that we have three hours and 30 minutes to
9 play with, so to speak.
10 PRESIDENT BEECHEY: I will ask Mr. Grané if he
11 has any comments on that. If the Parties agree, then
12 clearly we can allow a certain degree of flexibility.
13 I'm looking at the Order as it stands at the
14 moment, and it provides for the split of time and then it
15 says: "Within those overall time allocations the Parties
16 shall in any event observe the limits set out below in
17 respect of each phase of the examination of any fact
18 witness or expert."
19 So, I suppose the question comes down to this:
20 We are being asked, in effect, whether if, for example,
21 one witness is only 30 minutes in cross-examination, that
22 time be carried over to one of the others. That, I think,
23 is what you're saying, isn't it, Mr. Di Rosa?
24 MR. DI ROSA: It is. And the same would apply to
25 the experts, Mr. Chairman.

1 PRESIDENT BEECHEY: I follow that.
2 ARBITRATOR FERRARI: I wonder if we can go into
3 the breakout room after we hear Claimants' view on this.
4 PRESIDENT BEECHEY: Exactly. I haven't ruled
5 that out by any means. I just want to hear what the
6 Respondent has to say--I beg your pardon--the Claimants
7 have to say.
8 MR. MARTÍNEZ-FRAGA: Thank you, Mr. President,
9 Members of the Tribunal. Our understanding was that they
10 had a fixed and limited amount of time for each witness,
11 and that they had to play by those rules. You know, if
12 they wanted to spend 10 minutes with a witness or hour
13 with the witness that's their prerogative, but you can't,
14 you know, take credit and move around to the other witness
15 and then spend three hours with the witness. That was not
16 contemplated. That is not our understanding of the rule
17 or the spirit of the discussion at the time the Procedural
18 Order issued.
19 MR. DI ROSA: Mr. Chairman, that is fine by us if
20 they are going to live by the same rules with respect to
21 the direct and the redirect. So, you said there is
22 20 minutes maximum for the direct. There is X amount
23 available for the redirect. They can't, then, use their
24 time sort of fungibly.
25 But there was--you know, when we listened, when

1 we saw the Transcript of the discussion that was held in
2 that Hearing, there was, you know, some sense that there
3 would be some flexibility given that some examination
4 might take longer than others. That was the discussion
5 that caused the confusion for us. We are happy to abide
6 by the one hour 10 limit if the Claimants will do so as
7 well with respect to their allocations under the
8 provisions that govern direct and redirect examinations.
9 MR. MARTÍNEZ-FRAGA: We never suggested
10 otherwise; so, yes, of course, we will live by it.
11 PRESIDENT BEECHEY: I've got to ask my colleagues
12 whether they still want a word before we come back to you.
13 ARBITRATOR FERRARI: I have to say, I think this
14 is--both Mr. Di Rosa and Mr. Martinez are correct. We
15 did, indeed, talk about some flexibility when we talked
16 about this and I think Mr. Di Rosa is correct, but we did
17 also say some flexibility. So, the idea was really not,
18 at least this is what I think we discussed, to be able to
19 bank minutes and use some minutes. So, if it's one hour
20 and 20 minutes, I cannot imagine that we are actually
21 saying, oh, you can't do that. That is not what we
22 thought, and I think the readings that Mr. Di Rosa refers
23 to is exactly what I thought we had agreed, together with
24 the Parties. But the idea was not to be able to bank
25 minutes to be used later.

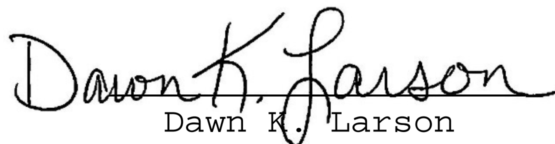
1 PRESIDENT BEECHEY: I think what I've got in
2 mind, Mr. Di Rosa, is if, for example, you've got to an
3 hour and 10 minutes and there's a seam of very useful
4 information coming out, you are clearly not going to go on
5 more than another 10 or 15 maybe but we're not going to
6 cut you off with guillotine. But what we are not going to
7 let you do is have five minutes with one witness and then
8 promptly bang the whole section--
9 MR. DI ROSA: No. No. No.
10 PRESIDENT BEECHEY: In fairness to you, I don't
11 think that's what you are suggesting in any way.
12 MR. DI ROSA: It is hard to calibrate these
13 things sometimes--
14 PRESIDENT BEECHEY: Of course. We are going to
15 be strict, but we are not going to apply guillotines just
16 for the sake of doing it. That's never been the
17 intention. And I think it is clear from what you've heard
18 from those on the other side that they are perfectly
19 prepared to play by the same rules. So, if that's good
20 enough for you, that is going to be quite fine--that's
21 fine by us, I think.
22 MR. DI ROSA: It is good enough for me. Thank
23 you, Mr. President.
24 PRESIDENT BEECHEY: Not at all. All right. Very
25 well.

1 Any other points of order before I let you all
2 go?
3 Thank you very much indeed. In that case, I will
4 join my colleagues, if I may, for a few moments in the
5 breakout room and we'll bid you good day until tomorrow.
6 Thank you.
7 MR. DI ROSA: Thank you.
8 MR. MARTÍNEZ-FRAGA: Thank you.
9 (Whereupon, at 3:58 p.m., (EST) the Hearing was
10 adjourned until 9:00 a.m. (EST) the following day.)

CERTIFICATE OF REPORTER

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

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



Dawn K. Larson