

BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES

ICSID Case No. ARB/19/6

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 In the Matter of Arbitration Between: :
 :
 ANGEL SAMUEL SEDA AND OTHERS, :
 :
 Claimants, :
 :
 and :
 :
 REPUBLIC OF COLOMBIA, :
 :
 Respondent. :
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VIDEOCONFERENCE: HEARING ON [REDACTED] AND
U.S. TREATY PRACTICE ON ESSENTIAL SECURITY INTEREST
EXCEPTIONS

Wednesday, April 26, 2023

The Hearing in the above-entitled matter
came on at 9:05 a.m. (EST) before:

PROF. DR. KLAUS SACHS
President of the Tribunal

PROF. HUGO PEREZCANO DÍAZ
Co-Arbitrator

DR. CHARLES PONCET
Co-Arbitrator

ALSO PRESENT:

MS. SARA MARZAL YETANO
Secretary to the Tribunal

MR. MARCUS WEILER
Assistant to the Tribunal

Realtime Stenographers:

MR. DAVID A. KASDAN
Registered Diplomate Reporter (RDR)
Certified Realtime Reporter (CRR)
B&B Reporting/Worldwide Reporting, LLP
529 14th Street, S.E.
Washington, D.C. 20003
United States of America

MR. LEANDRO IEZZI
MR. DIONISIO RINALDI
D.R. Esteno
Colombres 566
Buenos Aires 1218ABE
Argentina

Interpreters:

MR. JESUS GETAN BORN
MS. AMALIA THALER - de KLEMM
MS. MONIQUE FERNANDEZ B.

APPEARANCES:

On behalf of the Claimants:

MR. RAHIM MOLOO
MS. ANNE CHAMPION
MS. MARRYUM KAHLOON
MR. BEN HARRIS
MS. NIKA MADYOON
Gibson, Dunn & Crutcher, LLP
200 Park Avenue
New York, New York 10166-0193
United States of America

MR. PEDRO G. SOTO
MS. ANKITA RITWIK
Gibson, Dunn & Crutcher, LLP
1050 Connecticut Ave N.W.
Washington, D.C. 20036
United States of America

Party Representatives:

MR. ANGEL SEDA
MR. STEPHEN BOBECK
MR. JUSTIN CARUSO
MR. MONTE ADCOCK
MR. PIERRE AMARILGLIO

APPEARANCES: (Continued)

Attending on behalf of the Respondent:

MS. MARTHA LUCÍA ZAMORA
MS. ANA MARÍA ORDÓÑEZ PUENTES
MR. GIOVANNY ANDRÉS VEGA BARBOSA
Agencia Nacional de Defensa
Jurídica del Estado
Carrera 7 No. 75-66 - 2do y 3er piso
Bogotá
Colombia

MS. SANDRA MONTEZUMA
Asesora en el Despacho del Vicefiscal,
Fiscalía General de la Nación

MS. TATIANA GARCÍA
Directora de Asuntos Internacionales,
Fiscalía General de la Nación

DR. YAS BANIFATEMI
MS. XIMENA HERRERA
MS. YAEL RIBCO BORMAN
MS. PILAR ALVAREZ
MS. CAROLINA BARROS
MR. CÉSAR RODRÍGUEZ
Gaillard Banifatemi Shelbaya Disputes
22 rue de Londres, 75009 Paris
France

APPEARANCES: (Continued)

On behalf of the United States of America:

MS. LISA J. GROSH
Assistant Legal Adviser
MR. DAVID BIGGE
MR. JOHN DALEY
MS. JULIA BROWER
MR. JOHN DALEY
Office of the Legal Adviser
United States Department of State
Washington, D.C. 20520
United States of America

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P R O C E E D I N G S

1
2 SECRETARY MARZAL: So, good morning,
3 everyone. There is a meeting room connected named
4 "Codian MSE 8510." We've allowed it to enter the
5 hearing room, but we would need to know if this is
6 Respondent or Claimants' room.

7 MR. MOLOO: I think, Ms. Marzal, that might
8 be our meeting room, but we can take it out. It
9 doesn't need to be connected.

10 SECRETARY MARZAL: Okay. Perfect. If that
11 is not an inconvenience, but if you want to keep it
12 there, that's fine. You would need to turn the camera
13 off because what I'm seeing is everybody else, I'm
14 seeing the image of the virtual room again. There we
15 go. Perfect.

16 So, I think that most of the Hearing
17 participants, if not all, are connected.

18 Mr. President, I think we are ready to begin.

19 PRESIDENT SACHS: Thank you, Sara, and good
20 morning or good afternoon, as the case may be, to all
21 the participants for the Third Hearing in the case
22 between Angel Samuel Seda and others v. the Republic

1 of Colombia, ICSID Case No. ARB/19/6.

2 I have in front of me the List of
3 Participants. The Tribunal is complete. Sara is
4 present. I hope that the Court Reporters, David and
5 Dante, are with us, and also the Interpreters.

6 May I ask, first, the Claimants to confirm
7 that all the participants listed on the List of
8 Participants that was circulated are connected,
9 including the Party representatives.

10 Mr. Moloo?

11 MR. MOLOO: Yes, Mr. President. I believe
12 everybody who we indicated would be participating is
13 on currently.

14 PRESIDENT SACHS: Very good. And, for the
15 Respondent, Ms. Banifatemi, the same question.

16 MS. BANIFATEMI: Good afternoon,
17 Mr. President and Members of the Tribunal. I confirm
18 that we are all here, not everybody is necessarily
19 online, but those who were expected to be, are, so we
20 can proceed.

21 PRESIDENT SACHS: Fine. So, we can proceed,
22 and the Agenda provides for housekeeping issues to be

1 addressed first.

2 Are there any housekeeping issues that we
3 should talk about?

4 Mr. Moloo.

5 MR. MOLOO: None from Claimants. Thank you,
6 Mr. President.

7 PRESIDENT SACHS: From the Respondent?

8 MS. BANIFATEMI: None, Mr. President. Thank
9 you.

10 PRESIDENT SACHS: Thank you very much.

11 Now, we would start with the U.S.

12 submission, and I therefore turn to the
13 representatives of the U.S. Are they connected?

14 MS. GROSH: Yes, Mr. President. My name is
15 Lisa Grosh, I'm the assistant Legal Advisor for
16 international claims and investment disputes within
17 the Legal Advisor's Office of the State Department. I
18 think I'm joined by some of my colleagues, Mr. Daley,
19 Mr. Peralta. I don't know if others have joined as
20 well.

21 PRESIDENT SACHS: Okay. So, you are
22 complete to proceed, even if some of your colleagues

1 are still missing?

2 MS. GROSH: Yes, Mr. President. I am.

3 PRESIDENT SACHS: Very good.

4 MS. GROSH: I will be presenting today.

5 PRESIDENT SACHS: You have seen the Agenda.

6 We will start with the U.S. submission, and the floor
7 is yours.

8 ORAL SUBMISSION BY COUNSEL FOR THE UNITED STATES

9 MS. GROSH: Thank you, Mr. President and
10 Members of the Tribunal. We appreciate this
11 opportunity for the United States to provide an
12 additional oral submission in this case pursuant to
13 Article 10.20(2) of the United States-Colombia Trade
14 Promotion Agreement, or the "TPA," as we all refer to
15 it. I will make a brief submission addressing
16 questions of treaty interpretation arising out of the
17 Claimants' and the Respondent's Submissions dated
18 December 21, 2022.

19 And, as is always the case with our
20 non-disputing Party Submissions, the United States
21 does not take a position here on how the
22 interpretations offered apply to the facts of this

1 case and no inference should be drawn from the absence
2 of any comment that I may make on any other issue.

3 Given the narrow scope of today's Hearing, I
4 will confine my remarks to the Essential Security
5 Interest Exception in Article 22.2(b). However, the
6 United States stands by its prior position on the
7 weight due to the views of the TPA Parties on matters
8 addressed in Non-Disputing Party Submissions under
9 Article 10.22.

10 So, whether the Tribunal considers the
11 concordant interpretations presented by the TPA
12 Parties as a subsequent agreement under Article
13 31(3) (a) of the Vienna Convention on the Law of
14 Treaties, or as subsequent practice under Article
15 31(3) (b), or both of these provisions, the Tribunal
16 must take the TPA Parties' common understanding of the
17 provisions of their Treaty into account.

18 I also wish to reiterate that nothing in the
19 TPA's text suggests that, by granting the Free Trade
20 Commission the ability to issue binding authoritative
21 interpretations of the TPA under Article 10.22(3), the
22 Parties intend to preclude themselves from issuing

1 non-binding but nevertheless authentic means of
2 interpretation of TPA provisions through their
3 submission to investor-State tribunals or to preclude
4 a tribunal from giving such submissions the weight to
5 which they would otherwise be entitled.

6 So, with that, Mr. President, I will make
7 three points on the Essential Security Interest
8 Exception in Article 22.2(b), and the U.S. treaty
9 practice on similarly worded Essential Security
10 Exceptions.

11 First, the United States reiterates that the
12 language of Article 22.2(b) and similarly worded
13 exceptions in other U.S. treaties is clear. The
14 Exception is self-judging, and once invoked, a
15 tribunal must find that the Exception applies.

16 Now, as I had previously explained in our
17 First Submission, this follows from the ordinary
18 meaning of Article 22.2's use of the phrase "it
19 considers". And this is further clarified by the
20 language in Footnote 2 that, "for a greater
21 certainty," if a party invokes Article 22.2, "the
22 Tribunal or panel hearing the matter shall find that

1 the Exception applies."

2 Thus, once a State to the TPA raises the
3 Exception, its invocation is non-justiciable, and a
4 Chapter 10 tribunal must find that the Exception
5 applies to the dispute before it. So, that's my first
6 point.

7 Second, I would like to address the
8 Claimants' argument that the U.S. treaty practice on
9 Essential Security Interest Exceptions supports the
10 conclusion that Article 22.2(b) merely allows a State
11 to apply or continue to apply measures that it
12 considers necessary for the protection of its own
13 Essential Security Interest, but that Article 22.2(b)
14 does not address the question of liability or
15 compensation. Again, the United States disagrees.

16 Article 22.2(b) is an exception that is
17 intended to entirely exclude from the scope of the
18 obligations in the TPA those Measures covered by
19 Article 22.2(b), as there is no obligation under the
20 TPA, with respect to covered measures. A Claimant
21 cannot establish that per Article 10.16, and I quote,
22 "Respondent has breached an obligation under Section A

1 of Chapter 10," with respect to such a measure. And,
2 for that reason, such a Claimant also cannot establish
3 that it has, again, per Article 16.1, and I quote,
4 "incurred loss or damage by reason of or rising out of
5 that breach," with respect to such a measure.

6 Consequently, where such a measure is
7 concerned, there is no basis for a tribunal to make an
8 award of any kind against a respondent.

9 Further, it is a basic principle of State
10 Responsibility that there is no obligation to make
11 reparation or restitution unless an injury has been
12 caused by an internationally wrongful act; that is, a
13 breach of an obligation for which a State is liable.

14 In short, because the Article 22.2(b)
15 Exception excludes certain measures from TPA
16 obligations, there can be no finding of liability and
17 no order of reparations with respect to those
18 Measures. The TPA Parties did not take on an
19 obligation to pay compensation for measures that they
20 consider necessary for the protection of their own
21 Essential Security Interests.

22 So, against this backdrop, there was no need

1 for explicit language in provisions like
2 Article 22.2(b) stating that, once invoked, a tribunal
3 cannot find the relevant measure in breach of any
4 Chapter 10 obligation or order any compensation.

5 Now, I would also like to note that
6 Claimants' argument also fails to grapple with the
7 fact that Article 10.26 clearly deprives a Chapter 10
8 tribunal of authority to order that any measure,
9 essential or otherwise, be withdrawn.

10 Claimants' argument that the text of the
11 Singapore-India Comprehensive Economic Cooperation
12 Agreement contains the type of language that the
13 United States and Colombia should have included in the
14 TPA, if they desired to prevent any finding of
15 liability or order compensation, is misplaced in our
16 view. That Agreement, to which the United States
17 obviously is not a party, has no bearing whatsoever on
18 the U.S. treaty practice.

19 Those are my first two points.

20 Third and finally, I wish to address the
21 Claimants' argument that Colombia's invocation of
22 Article 22.2(b) is subject to review by this Tribunal

1 for good faith. The United States, of course, accepts
2 that its Treaty partners are obligated to implement
3 their treaty obligations in good faith--and, indeed,
4 we would expect them to do so. But that is not the
5 same thing as saying, however, that a tribunal is
6 authorized to assess whether a treaty partner has done
7 so.

8 Indeed, the words "that it considers" in
9 Article 22.2(b), as well as the text of Footnote 2,
10 make clear that it is not for a Tribunal to determine
11 whether the Exception has been invoked in good faith.
12 Instead, it is solely for the State Parties to the TPA
13 to ensure that the provision is invoked in good faith.

14 Mr. President, Members of the Tribunal, in
15 concluding, I would emphasize that the United States
16 stands by the interpretation set forth in its written
17 submission as well as its first oral submission,
18 although we did not address those issues today.

19 With that final observation, I will close my
20 remarks. Mr. President, I thank the Tribunal for the
21 opportunity to present the views of the United States
22 on these important interpretive issues.

1 PRESIDENT SACHS: Thank you very much.

2 I turn to my two colleagues to ask whether
3 they have questions to the U.S. representative.

4 ARBITRATOR PONCET: I have one, if I may,
5 Mr. President.

6 PRESIDENT SACHS: Yes, Mr. Poncet.

7 ARBITRATOR PONCET: Ms. Grosh, can you hear
8 me?

9 MS. GROSH: Yes, I can.

10 ARBITRATOR PONCET: Charles Poncet, one of
11 the three arbitrators in this Panel.

12 I would like to continue your line of
13 thought with regard to the third point you made. You
14 said there is absolutely no room in the language of
15 the Treaty for any interpretation by the Arbitral
16 Tribunal which, hypothetically--I'm not saying, of
17 course, that this would apply in this case, it's
18 purely hypothetically, but if by hypothesis, an
19 arbitral tribunal were to be convinced that the
20 Exception that Article 22.2(b) is invoked purely in an
21 arbitrary and capricious manner simply to prevent an
22 investor from seeking justice, you made the point that

1 the Arbitral Tribunal had no authority to review that
2 and in fact, it would be for the States themselves.

3 Does that mean that the investor, then,
4 would have to go to its State--in this case, the
5 United States--to seek the application of the
6 provisions of the Treaty that provide for arbitration
7 between States, or does that mean that the Investor is
8 simply left to forget about any possibility of
9 international-law remedy? What is the consequence of
10 your--I'm sorry for being a little long-winded--but
11 what is the consequence of your statement that it is
12 for the States and for the States only to resolve the
13 matter?

14 MS. GROSH: Thank you, Mr. Poncet.

15 So, yes, our view is that the Essential
16 Security Interest Provision is completely self-judging
17 and there is no room for the Tribunal--for a
18 Chapter 10 Tribunal--

19 (Overlapping speakers.)

20 MS. GROSH: I just wanted to restate the
21 underlying proposition there.

22 And so, as I understand your question,

1 you're wondering, then, what efforts or avenues does
2 either the Investor or, generally, the United States
3 have for addressing a potential bad-faith invocation
4 of the Essential Security Exceptions. That's as I
5 understand your question.

6 So, I don't believe that we have a specific
7 process or avenue in mind, but certainly it might be
8 up to the Investor--in this case, a U.S. investor--to
9 come to the United States and raise its concerns about
10 the fact that the Exception has been raised in bad
11 faith.

12 I think it's also in this particular
13 situation could be up to the United States to just
14 raise this sua sponte directly with its treaty
15 partner.

16 ARBITRATOR PONCET: Sorry to interrupt you,
17 but doesn't that mean that, in effect, the
18 determination of the existence or absence of good
19 faith would be delegated to the United States?

20 MS. GROSH: Yes, that's what essentially my
21 third point was, is that we expect--the United States
22 expects all of its treaty partners, and here Colombia

1 as well--to apply and implement its treaty obligations
2 in good faith. But that is a matter that is reserved
3 to the States to a treaty.

4 ARBITRATOR PONCET: You would agree with me,
5 wouldn't you, that in the hypothetical situation of a
6 bad-faith invocation of Article 22.2(b) or the
7 equivalent in another BIT, this would leave the
8 Investor with very, very little protection, indeed.
9 It would be completely dependent on the finding of its
10 own State--in this case, the United States--that there
11 was a breach of the general duty of good faith, and if
12 the State--if the Investor's State--in our case, the
13 United States--says, no, no, we don't think it was in
14 bad faith, that's the end of the story.

15 MS. GROSH: Well, again, the treaty partners
16 have agreed to obligations to provide protections to
17 investors and such, but they also have very much
18 reserved certain exceptions to those protections. And
19 so, if one of the Measures that is invoked by the
20 Investor is governed by the Essential Security
21 Exception and that Essential Security Exception as
22 intended by the two State Parties here is meant to

1 completely take that out of the Treaty, then yes, the
2 Investor has limited avenues in terms of how it could
3 pursue its interests.

4 ARBITRATOR PONCET: And one last question,
5 with the President's permission, what is your position
6 as to whether or not the Essential Security Provision
7 can be waived, whether implicitly or explicitly?

8 MS. GROSH: Our view would not be that the
9 Essential Security Exception could be waived.

10 There is no provision in the Treaty for
11 that. The Treaty language is clear. It is for one of
12 the Parties to invoke it, if it considers that the
13 Measure is necessary in its Essential Security
14 Interest.

15 ARBITRATOR PONCET: Thank you.

16 ARBITRATOR PEREZCANO: No questions from me
17 at this point, Mr. President. Thank you.

18 PRESIDENT SACHS: Right.

19 Ms. Grosh, just a question from my side,
20 when you consider Article 26 of the Vienna Convention
21 that provides that the States should apply the
22 provisions of the Treaty in good faith as a general

1 rule and this is also accepted in the direction of
2 public law, how does this interplay with your
3 position? I mean, we understand you say it's your
4 expectation that the Treaty partner implements the
5 Measures and the provisions of the Treaty in good
6 faith, yes, but there is also this general principle
7 expressed in the--in this Article 26 of the Vienna
8 Convention. Could you elaborate on this.

9 MS. GROSH: Yes, thank you, Mr. President.

10 Yes, as you reflect, the Vienna Convention
11 does have an element of good faith that the Treaty
12 Party--Parties to a treaty are to implement their
13 Treaty obligations in good faith. This is a position
14 that the United States feels strongly about.

15 But again, consistent with what my remarks
16 provided for earlier, this is an obligation that runs
17 between State Parties to a treaty and, therefore, it
18 is to those State Parties, either diplomatically or
19 otherwise, to address if one party believes that the
20 other Party has not implemented or has applied the
21 Treaty in bad faith. And there are obviously avenues
22 that States can take, whether it's diplomatically or

1 if there are specific provisions in the Treaty at
2 issue, so this is a position that the United States
3 has taken, not just in this case but in other cases as
4 well.

5 PRESIDENT SACHS: Are you saying that such
6 good-faith obligation does not apply to the
7 beneficiaries of treaties, meaning the investors that
8 are granted protection under treaties?

9 MS. GROSH: I'm sorry, could you repeat that
10 question?

11 PRESIDENT SACHS: Are you saying that the
12 good-faith obligation laid down in Article 26 of the
13 Vienna Convention applies only in the relation between
14 the States and the expectation, as you say, to
15 implement the provisions in good faith, or is there
16 also an element of beneficiary protection, meaning the
17 Investors that are also referred to in treaties, do
18 they have a beneficiary status, meaning that they're
19 also recipients of a good-faith obligation?

20 MS. GROSH: Mr. President, I would say that
21 first part of that proposition is correct, that it
22 really is to the State Parties that have the

1 obligation to the other to implement the Treaty in
2 good faith. That is the United States's position.

3 With respect to a good-faith--and I should
4 just note there that there are lots of treaties that
5 do not have dispute-resolution mechanisms. Sometimes
6 there is no State-to-State resolution mechanism, and
7 many times there may not be--there are treaties where
8 there are no dispute-resolution mechanisms that would
9 involve interests of investors.

10 So, with that said, we do not view that
11 there would be some kind of a beneficial beneficiary
12 interest. That's obviously something that we could
13 include in express treaty language, but it is not in
14 this Treaty and not in most treatises, as I
15 understand, U.S. treaties.

16 PRESIDENT SACHS: Okay. Thank you.

17 Any follow-up questions triggered by the
18 questions put by the Tribunal from the parties?

19 Claimant?

20 MR. MOLOO: Mr. President, I plan to address
21 the comments raised by the U.S. in my submissions, if
22 that's most convenient for the Tribunal.

1 PRESIDENT SACHS: It certainly is.

2 Respondent?

3 MS. BANIFATEMI: No questions,

4 Mr. President. Thank you very much.

5 PRESIDENT SACHS: Thank you.

6 Then we thank the U.S. representatives for
7 their intervention, their submission and their answers
8 to the questions put by the Tribunal.

9 We have now, on our Agenda, a break of 15
10 minutes, I think we could skip that or shorten it at
11 least.

12 Mr. Moloo, are you ready to proceed with
13 your Opening Presentation, or do you need five
14 minutes? Or even more? The break has been put on the
15 Agenda, so it's up to you to tell us whether--how much
16 time you need.

17 MR. MOLOO: Just five minutes,
18 Mr. President, because we will be circulating our
19 presentation, so just to allow us to circulate that
20 and to allow all of you to--

21 (Overlapping speakers.)

22 MR. MOLOO: --download it if you so wish, so

1 five minutes is more than sufficient.

2 PRESIDENT SACHS: Very good. Thank you.

3 (Brief recess.)

4 PRESIDENT SACHS: So, Mr. Moloo, the floor
5 is yours for your Opening Presentation.

6 OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

7 MR. MOLOO: Thank you very much,
8 Mr. President and Members of the Tribunal, for
9 indulging us with a Third Hearing. You must be sick
10 of hearing from us by now, but hopefully we can keep
11 your attention for another 90 minutes this morning or
12 afternoon, as the case may be.

13 Members of the Tribunal, where I would like
14 to start is to take a step back and consider for a
15 moment where we are, because sometimes, you know, we
16 get stuck in the weeds, we, as lawyers, deal with
17 these various arguments that are put before us, but in
18 these investment disputes, we are talking about what
19 is fair, what is equitable, and sometimes it does take
20 us and require us to take a step back and see where we
21 are.

22 And, what I have on this chart is--on the

1 left--a number of the folks who Colombia has
2 identified as taking these Measures to protect society
3 against. These are the folks who they allege are
4 people that society needs to be protected from and,
5 therefore, that's why they say they've taken the
6 actions they've taken.

7 They don't say that about anybody on the
8 right: Newport; the Unit Buyers; Corficolombiana, one
9 of the most respected financial institutions in
10 Colombia; the Claimants; the workers on site, who lost
11 their jobs, the 700 workers who were sent home; and,
12 obviously, the various other investors. There were a
13 number of domestic investors too, who are not
14 represented and present before you in this case.

15 But, if you look at the Measures that were
16 taken by Colombia in this case, they didn't go after
17 any of the proceeds that any of the people on the left
18 received. To our knowledge, none of the--they say [REDACTED]

[REDACTED]
[REDACTED] Because, the Asset Forfeiture
21 Law authorizes them to do that.

22 Did they go after [REDACTED] Did they go

1 after Ivan López's properties? No evidence anywhere
2 in the record that the people who they're trying to
3 protect the people of Colombia from, that anything has
4 been done with respect to any of their assets.

5 To be honest, there is no evidence that

6 [REDACTED]
7 [REDACTED] Nothing. No action has been taken against
8 any of these individuals. Yet, the people on the
9 right, the innocent bystanders, those who were
10 good-faith third-party Buyers as is the case with
11 Newport and Royal Realty, they are the ones whose
12 rights have been affected.

13 Now, how does that advance the purpose that
14 Colombia espouses in this case? I don't know how it
15 does, I don't think it does, and that is unfair and
16 inequitable. And, it also goes to the Essential
17 Security Interest, which I'm going to talk about.

18 I'm going to start by talking about the
19 Tribunal's questions, and then we will run through the
20 other issues that I have identified on this Table of
21 Contents and show you how the new evidence that has
22 been presented to you and been submitted post-hearing

1 has had no impact on any of the key issues that the
2 Tribunal needs to decide and, in fact, only bolsters
3 the Claims that the Claimants have made. But, let me
4 start with the Tribunal's questions. And, by the way,
5 a number of these my partner, Ms. Champion, will
6 address. You will get to hear from someone other than
7 me.

8 The first question that the Tribunal asked
9 is: What is the legislative purpose of the Colombia
10 Asset Forfeiture Law? Now, this one, I think, the
11 answer is fairly clear, and you have it from the two
12 experts that made reports and were submitted by the
13 Claimants in this Arbitration.

14 The first is by Dr. Medellín, who you
15 unfortunately did not get to hear from in person, but
16 he is the former Minister of Justice of Colombia. He
17 is known to be the father of the Asset Forfeiture Law,
18 and he was not called for cross-examination, and his
19 testimony remains unrebutted. But, he really is, I
20 would say, the most knowledgeable person in Colombia
21 on the Asset Forfeiture Law, being the one who
22 authored the original Asset Forfeiture Law.

1 And, he says that "the purpose of the Asset
2 Forfeiture Law was to attack illegal activities such
3 as drug trafficking and, consequently, obtain social
4 and economic stability in the country." And, he also
5 explains that, under Article 27, it says that there
6 are certain fundamental guarantees, certain governing
7 standards, that supersede everything else in the Act,
8 and one of those governing standards and fundamental
9 guarantees that was meant to "prevail over any other
10 provision in the Code"--that's his language--was that
11 the "right to property lawfully obtained in good faith
12 without fault" must be protected. "Due-process"
13 rights must be protected. The "presumption of good
14 faith" must be recognized. Those are all within the
15 governing standards and fundamental guarantees that
16 prevail over any other provision of the Code,
17 according to the father of the Asset Forfeiture Law.

18 Dr. Wilson Martínez, who had a role in
19 authoring the most recent iteration of the law from
20 2014, he explains in his testimony that one of the
21 reasons for the updating of the Law was to clarify the
22 nature of the scope of, and "expressly recognize and

1 protect the rights of third parties acting in good
2 faith without fault." That was one of the reasons for
3 the updates, to ensure that, those who were acting in
4 good faith, their rights were adequately protected.

5 And, that makes complete sense. All of this
6 makes complete sense because if the goal is to protect
7 society from narco-trafficking, you don't advance that
8 goal by taking property away from those who bought it
9 in good faith. And, I will come back to this later,
10 but, in fact, the Investment Treaty itself, the Free
11 Trade Agreement that is at issue here in this case
12 itself, recognizes that Colombia, as a society, wanted
13 to move on from narco-trafficking and the drug trade
14 that had plagued its country. And, one of the ways it
15 thought it could do so was to foster legitimate
16 foreign investment. That's in the second
17 preambulatory clause. It's right up front in the
18 entire Treaty--that's what it says--and I will show
19 you that later.

20 Dr. Martínez explains that "the Code
21 provides a presumption of good faith as a guiding
22 principle in the proceedings, and as a rule it is

1 considered predominant over all other rules in the
2 Code..." "...any reasonable doubt as to good faith
3 must be interpreted in his/her favor."

4 Prior slide, Slide 8.

5 You can see this, here, from Dr. Wilson
6 Martínez's First Report.

7 Moving to Slide 9, these are the actual
8 provisions in the Code. And, you can see there's
9 Title II, "Guiding Rules and Fundamental Guarantees,"
10 right up front; Article 3, "Asset forfeiture shall
11 have as its limit the right to ownership legally
12 obtained in good faith without fault." So, if we're
13 looking at what is the purpose of the law, it is to
14 advance the fight against narco-trafficking but not at
15 the cost of affecting the rights of good-faith third
16 parties without fault; good faith is presumed, and it
17 is a guiding rule that is "compulsory" and must
18 "prevail over any other rule" in the Law.

19 But, moving on from the guiding rules and
20 fundamental principles, the other provisions in the
21 Code, even ones that were invoked by Colombia in this
22 case, also embed within them to reinforce the

1 principle of good faith without fault and those rights
2 being protected.

3 Precautionary Measures, that's how the
4 Property was taken in the first place, the invocation
5 of Article 87. And, the very last sentence in
6 Article 87 makes it crystal-clear that, in invoking
7 Precautionary Measures in any case--"in any case, the
8 rights of third parties acting in good faith without
9 fault must be safeguarded."

10 Article 118, "Purpose," it talks about the
11 purpose. It says "the initial stage," which is after
12 the Precautionary Measures you have the initial stage
13 where you investigate, and that's what kicks off the
14 process. We remember that Ardila Polo showed up,
15 invoked Precautionary Measures and put the padlock on
16 the doors, sent everybody home, and then engaged in
17 this initial-stage investigation. What was she
18 supposed to do during that initial stage?

19 118(5): "Search for and collect the proof
20 which makes it possible to reasonably conclude that
21 there is no good faith without fault." That was
22 supposed to be done right at the beginning. It wasn't

1 done. But, that is one of the key purposes of this
2 Law. The purpose of this Law is to ensure that, in
3 invoking Asset Forfeiture, in protecting society
4 against narco-trafficking, et cetera, it does not do
5 so at the cost of good-faith third-party purchasers,
6 and Article 124 and 152 confirm that. And, it says
7 that the burden of proof--it's the Attorney General of
8 Colombia is the one that "has the burden to identify,
9 locate, gather, and file the elements of proof which
10 show the existence of some the grounds set forth in
11 the law" and that "the affected person is not a bona
12 fide owner of rights without fault." They have to do
13 that up front. The burden of proof is not on the
14 third party, it is on the State to establish up front
15 that they're not affecting the rights of bona fide
16 owners without fault.

17 So, for answering the question: What is the
18 purpose of the Law? What is the purpose of the Law?
19 That's the first question.

20 We will go to the next slide.

21 The purpose of the Law is to protect society
22 against the people on the left while ensuring that the

1 rights of the people on the right are not affected.

2 That's the purpose of the Law.

3 Colombia flipped it. They got it wrong.

4 They affected the rights of the people on the right,

5 and they haven't gone after the people on the left.

6 They completely reversed what they were supposed to

7 do. The purpose of the Law is protect against--and

8 let's just assume that they're all narco-traffickers,

9 criminal charges haven't been brought against [REDACTED]

[REDACTED] but let's just assume that these are the

11 people that Colombia wants to protect against. No

12 charges brought. We know that there is nothing in the

13 record that suggests that we have gone after their

14 property in relation to the Meritage. Their proceeds

15 from the Maritage, nobody has seized that. Ivan López

16 still has a number of his properties, his

17 sister-in-law has the Sister Property still, nothing

18 has happened there.

19 All of the people on the right, the people

20 who acted in good faith, their rights have been

21 eviscerated.

22 The Tribunal's second question: "What is

1 the precise Essential Security Interest that the
2 Respondent is invoking in the present Arbitration?"

3 Well, we sent an email before this Hearing
4 because, quite frankly, I think the answer should be
5 clear--I think the answer should be clear, but, in
6 going through the record, I'm not sure that Colombia
7 has taken a very coherent position, but there are a
8 few places where we were able to extrapolate what we
9 think is their articulation of their Essential
10 Security Interest, which is the protection of the
11 territory and its population, maintenance of law and
12 public order, fighting against organized crime and
13 drug trafficking, fighting against the dangerous
14 effects of narco-trafficking. And so, if this is to
15 be accepted as their position, then it is basically
16 the same as the Asset Forfeiture Law. We will hear
17 from them this afternoon and see if that's changed,
18 but I think it's fair to say that that is their goal
19 in invoking the Essential Security Interest.

20 But, this is where things get interesting
21 and where I get a little confused. They didn't invoke
22 the Essential Security Interest, as we all know, at

1 the outset. When they had invoked the Asset
2 Forfeiture Law, that was their measures to invoke the
3 application of that Asset Forfeiture Law, and they
4 initially invoked it, as we all know, because of--what
5 they say is--Ivan López's prior affiliation with the
6 property. That is what they said was their initial
7 purpose, the reason why they initially invoked the
8 Asset Forfeiture Law. At that time, they did not
9 articulate any sort of Essential Security Exception,
10 and they tell us this expressly in the Letter to the
11 Tribunal, September 7, 2022, they said: "The
12 Colombian authorities have not identified, yet,
13 evidence of [REDACTED]
14 [REDACTED] "...it is precisely because of this
15 arbitration..." "...that the Colombian Authorities
16 have managed to [REDACTED]
17 [REDACTED] And for this reason, the
18 Respondent did not and could not raise the Exception
19 at the inception of the proceeding. It could not--it
20 says it could not have because there is something
21 special about [REDACTED] We will find out what it
22 is, but it wasn't the invocation of the Asset

1 Forfeiture Law itself because they invoked that at the
2 outset. So, maybe there is something special about
3 [REDACTED], I
4 don't know, but if their goal was to protect society
5 against the scourge of narco-trafficking, I'm not sure
6 why they didn't invoke it at the outset.

7 I can suppose that the only reason is
8 because they didn't actually take the Measure--they
9 didn't, they say so. They didn't take the Measure for
10 an Essential Security purpose. I am going to come
11 back to this. They say they could not have taken the
12 Measure for an Essential Security purpose because they
13 didn't know about [REDACTED] at the time. And, they
14 confirm this, if we go to the next slide, they say
15 that their [REDACTED] is directly
16 relevant to Colombia's invocation of the Essential
17 Security Exception because that's when they found out
18 that they had an Essential Security Interest. That is
19 what their case is. So, that's why I'm a bit confused
20 from what led us to send this email to the Tribunal,
21 because I'm not really sure I appreciate why all of a
22 sudden this Essential Security Interest popped up once

1 they found out that [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 But, if we're being objective about this and
5 answering the third question from the Tribunal, which
6 is on the next slide, "to what extent are the
7 legislative purpose and the Essential Security
8 Interest similar?" It must be the same
9 thing--right?--based on what they've kind of said.

10 The purpose of the Asset Forfeiture Law, as
11 we have said, is the things on the left. And, what
12 Colombia has articulated as the purpose of the
13 Essential Security Interest are reflected on the box
14 on the right, and they do match up. They do align.
15 It is to protect--it makes sense; right?--it's to
16 protect society against the dangerous effects of
17 narco-trafficking. We understand that--that's the
18 purpose of the Asset Forfeiture Law, and that must
19 also be the purpose of the Essential Security
20 Interest.

21 But, this is critical: In both cases it
22 must also then protect the rights of good-faith third

1 parties because taking property from good-faith third
2 parties does not advance that Essential Security
3 Interest. It cannot. How does it? I still have not
4 heard any reason as to how taking and affecting the
5 rights of good-faith third parties can possibly be
6 related to an Essential Security Interest. It cannot.
7 They're not saying that taking property from
8 good-faith third parties is their Essential Security
9 Interest. Affecting the rights of good-faith third
10 parties is not the Essential Security Interest.

11 And, it seemed at the Hearing, when,
12 Mr. President, you asked a question of Ms. Banifatemi,
13 that she initially appeared to agree to this
14 proposition. When asked, the Law contains this
15 Exception, that a bona fide purchaser cannot be
16 subject to the Forfeiture Proceeding, so isn't the
17 expression of the national interest contained in that
18 law with that exception? So, in other words, isn't
19 this good faith--and I don't want to be putting words
20 in the Tribunal's mouth, but as I understood this
21 question, it was really asking a similar question to
22 the one that is posed before this Hearing which is,

1 isn't there this good-faith exception built into this
2 Essential Security Interest? Because, that's also in
3 the Law.

4 And, Ms. Banifatemi, interestingly,
5 answered--and this seems to confirm our
6 position--"well, it's the whole purpose of the Asset
7 Forfeiture Proceeding to determine whether someone
8 bona fide without fault third party." "It's the whole
9 purpose," she says.

10 And then, Ms. Banifatemi expounded and said,
11 "but you have to go through the motion," and "the
12 Courts are currently seized with the matter." And,
13 that's what they're saying. The courts are seized,
14 "the Courts are making determination as to whether
15 Newport, which is now an affected party, and it was
16 before, it is again, it can make submissions, it can
17 make its view known, and that will be determined."
18 That, now that the courts are seized of the matter, we
19 were told, that we will now see whether they are a
20 good-faith third party.

21 Well, spoiler alert. You were told last
22 year that within a year you would know the answer.

1 Well, not an email or a letter or anything has gone
2 out to Newport setting dates for submissions, let
3 alone a determination of the question. It is now a
4 year later. Not one step has been taken in that
5 proceeding to determine whether or not Newport is a
6 good-faith third party. They are still waiting.
7 Seven years later, after Precautionary Measures were
8 taken.

9 And then, later, when pressed on this
10 question, Mr. President asked: "On the
11 international-law level. When we have to look at how
12 does Colombia define its national interests in this
13 regard, so we have to look into the law and the law
14 provides certain proceeding, certain thresholds and
15 certain standards and certain protection, but it also
16 provides for this exception, the bona fide acquisition
17 of a possibly tainted property. So, my question is:
18 Isn't that, then, part of the consideration that this
19 Tribunal has to carry out?"

20 And, Ms. Banifatemi then resorted to what
21 now seems to be their position with respect to the
22 Essential Security Exception and says, "well, this is

1 in event that you don't give any effect to 22.2(b),
2 which would be a problem because," and she explained
3 why she believed that would be a problem. But, her
4 primary position was that, no, we get the right to
5 choose. Once we invoke it, you can't look at
6 anything. And, that seems to be an iteration of what
7 we heard this morning from the U.S. Government. And,
8 I'm going to come on to that in a minute. I am going
9 to come on to that in a moment.

10 But, in our submission, the response to the
11 Tribunal's third question is clear: To what extent
12 are the legislative purpose and the Essential Security
13 Interest similar? I would say the Essential Security
14 Interest here was the invocation of a particular law.
15 It was the invocation of a law that has certain
16 exceptions. The purpose of that law must then be the
17 same as the purpose of the Essential Security
18 Exception, which is to protect society against
19 narco-trafficking but not at the expense of good-faith
20 third parties, and this is on the next slide, on
21 Slide 21. It is not at the expense of good-faith
22 third parties. It must involve taking into account

1 the rights of good-faith third parties because taking
2 property and interests in property from good-faith
3 third parties cannot possibly advance that objective
4 of protecting society against narco-trafficking.

5 So, in our submission, taking what I have
6 just told you, the Essential Security Exception does
7 not and cannot apply here. And, here, I want to
8 address what Colombia has said and what you have heard
9 from the U.S. Government as to this particular
10 Essential Security Exception.

11 We can go to Slide 24.

12 There is not one tribunal, that I know of,
13 that has taken the interpretation that Colombia and
14 the U.S. Government has advanced in this Arbitration,
15 that this Tribunal can't touch it.

16 In fact, if you look at--and this is a case
17 that is often cited for self-judging Essential
18 Security clauses--and, actually, I'm just going to go,
19 if we can, to Slide 26 for a moment just to show you
20 the provision that's in the GATT that we're going to
21 be looking at.

22 In Article XXI of GATT, it is a self-judging

1 provision. It says, "nothing in this Agreement shall
2 be construed..." "...to prevent any Contracting Party
3 from taking any action which it considers," that's the
4 language that the U.S. says is the magic words,
5 "necessary for the protection of its essential
6 security interest." So, that's the provision that
7 these WTO tribunals are interpreting. And, in
8 interpreting this self-judging clause, Article XXI of
9 the GATT--we can go back to Slide 24 now--this is what
10 WTO panels have said. They have said applying
11 Article 26 of the Vienna Convention on the Law of
12 Treaties, which says every treaty and forces binding
13 upon the Parties to it, and must be performed by them
14 in good faith, and in applying that, they say, there
15 is a two-pronged test.

16 The first prong, it says, at 7.132, it "does
17 not mean that a Member is free to elevate any concern
18 to that of an 'essential security interest'. Rather,
19 the discretion of a Member to designate particular
20 concerns as 'essential security interests' is limited
21 by its obligation to interpret and apply
22 Article XXI(b) (iii) of the GATT 1994 in good faith."

1 And, they talked about it as being a general principle
2 of law as codified in Article 26 of the Vienna
3 Convention. You can see that in 7.132.

4 And, they say "the obligation of good faith
5 requires that Members not use the exceptions..."
6 "...as a means to circumvent their obligations under
7 the GATT 1994." I think that goes to the answer the
8 question that Dr. Poncet asked earlier of the United
9 States. You can't use this good-faith exception to
10 circumvent your obligations.

11 So, the first question is: Do you define
12 the Essential Security Interest in good faith? So you
13 can see at 7.138, they say it applies to the member's
14 definition of "Essential Security Interests", that's
15 what you see above in the paragraphs. So, you have to
16 define the Essential Security Interests in good faith.
17 And, the second part of the test is, is the Measure
18 that you take, is it plausibly related or rationally
19 connected, as other tribunals have used, to the
20 Essential Security Interest? There has got to be a
21 connection between the Measure and the Essential
22 Security Interest.

1 So, did you define the interest in good
2 faith? Is the definition of it in good faith? And
3 then, is that interest plausibly connected to the
4 Measure you adopted? That is the good-faith test.

5 And, by the way, I just want to make one
6 other point here in terms of what the U.S. Government
7 said earlier: The obligations in Chapter 10 are to
8 investors. It's not just to the other State. Quite
9 clearly, the obligations, if you just read them, on
10 their face, are to investors.

11 What you heard the United States say this
12 morning is, there is a lot of treaties that don't have
13 Investor-State dispute resolution provisions, but this
14 Treaty does, and it gives this Tribunal, under
15 Article 10.16, the authority, the sole authority, to
16 interpret these protections, and to whether or not any
17 exceptions are invoked in good faith. It is within
18 the remit of this Tribunal, and solely this Tribunal,
19 to make that determination because Colombia and the
20 United States authorized and granted that authority to
21 investor-State arbitral tribunals. They allowed
22 investors the rights to invoke that investor-State

1 dispute resolution mechanism and the protections
2 contained in Article 10, and it is an obligation on
3 the State, therefore--and this is Article 26, it says
4 "these obligations," and these obligations are to
5 investors, must be performed by them in good faith.
6 That is the obligation. It is an obligation vis-à-vis
7 investors and it must be performed by them in good
8 faith.

9 In another WTO case, the Saudi Arabia case
10 versus Qatar--and this is at RL-201--the same question
11 came up as to whether or not Saudi Arabia's Essential
12 Security Interest--and in that case the Essential
13 Security Interest, you can see, was articulated at
14 7.280 of the Panel's Decision--and the Essential
15 Security Interest was protecting itself from the
16 dangers of terrorism and extremism. And, Saudi Arabia
17 had basically severed relationships with Qatar in
18 June 2017. That was the Essential Security Interest
19 espoused, and the Measure was to cut off relationships
20 with Qatar.

21 And, one of the things it did was it
22 booted--it blocked a Qatari-owned channel from its

1 television, so that folks in Saudi Arabia could not
2 watch this television channel that was owned by
3 Qataris, and the name of that channel was BN.

4 And then, there was a Saudi Arabian channel
5 that took the place of this Qatari channel, they
6 called it, conveniently, "beoutQ."

7 And the allegation was that there were
8 certain Copyright and Trademark Laws and "intellectual
9 property" rights that were affected, and what the
10 Tribunal said in that case was that the Measure taken
11 which was not implementing and not enforcing certain
12 "intellectual property" rights affects not only Qatari
13 nationals but it affected third parties. They talked
14 about the fact that there was no temporal connection
15 between the non-enforcement of these "intellectual
16 property" rights and the Essential Security Interest
17 that was being sought to be protected. And, they
18 found that there was no rational or logical connection
19 between the Measures and the Essential Security
20 Interest. That's the language: "No rational or
21 logical connection."

22 And, as such, the Panel found that there was

1 no good-faith invocation of the Measure, and so they
2 applied this test, in applying a self-judging
3 Essential Security clause, the Panel in that case
4 found that there was no rational connection between
5 the Measure and the Essential Security Interest, and
6 so it does not pass the good-faith test.

7 And, again, there is no Tribunal, no panel,
8 nothing in the record that I'm aware of, where the
9 interpretation that's being espoused by Colombia and
10 the United States has been adopted by any
11 international tribunal. Rather, there are the
12 examples that we have put in the record, two of which
13 I have just taken you to.

14 And, in fact, for that precise reason, when
15 Colombia invoked the Essential Security Interest in
16 their Rejoinder, guess what they did? They accepted
17 the good-faith test. At Paragraph 55 of the
18 Rejoinder, this is--this is before we raised it,
19 before we raised the good-faith test, they raised it.
20 They said "we are invoking the Essential Security
21 Interest." And, as to the definition of Colombia's
22 own Essential Security Interest, it is generally

1 accepted that it's up to the State to define it, "the
2 Respondent thus enjoys full discretion to define what
3 constitutes Essential Security Interests to the extent
4 that such definition is done in good faith." That's
5 what they said before we said it. In their Rejoinder
6 at Paragraph 55, that is what Colombia said in this
7 proceeding.

8 They now seem to have gone back on what
9 they, themselves, said because, I think it's
10 crystal-clear that they haven't invoked it in good
11 faith--I am going to come on to that--but they adopted
12 the WTO Panel in Ukraine v. Russia test that I just
13 took you to, the two-pronged test, that it must be
14 defined in good faith, and that there must be a
15 plausible connection between the Measure on the one
16 hand, and the Essential Security Interest on the other
17 hand. This is from Colombia's Rejoinder,
18 Paragraphs 55 and 57.

19 Now, if we go to the next slide, this goes
20 to the first prong of the test because it seems to the
21 extent--and we will hear from them this afternoon, but
22 to the extent they are defining now their Essential

1 Security Interest as not including a good-faith
2 exception, I would say that the first prong they
3 failed. They have not defined their Essential
4 Security Interest in good faith because they--in order
5 to define it in good faith, you must recognize the
6 same exception that is within the law, the Asset
7 Forfeiture Law. It is not a good-faith definition to
8 say that we want to stop narco-trafficking but we are
9 going to ignore the protection of good-faith third
10 parties. That, in my view, is not a good-faith
11 definition of the interest, that first prong of the
12 test, because it doesn't advance the objective. You
13 must recognize the rights of good-faith third parties.
14 The law itself, domestic law itself, the domestic law
15 that they're invoking, itself recognizes good-faith
16 third parties and the rights of them. So, the
17 definition of the interest must take into account the
18 rights of good-faith third parties.

19 If we go to the next slide, the second
20 concern I have with respect to the definition of the
21 Interest is, why was it not an interest with respect
22 to--in the Counter-Memorial? Why did they not

1 articulate it then? It's the same law that was being
2 invoked. They said so. They said "the present case
3 concerns the legitimate exercise of the State's
4 regulatory powers to fight the scourge of drug dealing
5 and money-laundering," but they did not at that time
6 say that was an Essential Security Interest. Why did
7 it transform into an Essential Security Interest only
8 in the Rejoinder? The same interest, the very same
9 interest, they articulated at Paragraph 2 of their
10 Counter-Memorial. It's right at the outset. Why?
11 That, I don't think, is a good-faith articulation of
12 their Essential Security Interest.

13 But, if we move to the second prong, there
14 must be a plausible or rational connection--the Saudi
15 Arabia case used the language "rational connection"
16 between the Measure and the interest in order for it
17 to be invoked in good faith; and here, there is no
18 rational connection. There just cannot be. I have
19 not heard a rational connection between the Measure
20 and the Essential Security Interest that they are
21 invoking. Why is that? I would say this can
22 essentially be taken--I view it as an admission that

1 there is no rational connection between the Measure
2 and the Essential Security Interest.

3 They say in their Opening, they said, these
4 proceedings, the Measures at question, the Measures
5 that we allege are in breach, the Asset Forfeiture
6 Proceedings--they say, these proceedings were not
7 started because of [REDACTED]. But, [REDACTED]
8 is the reason for their invocation of the Essential
9 Security Interest. That's why they said they could
10 only do it in the Rejoinder. But, they're at the same
11 time saying it was not the reason for the Measure.
12 How can the Measure be rationally connected to an
13 Essential Security Interest that they have not yet
14 defined at the time they take the Measure? It can't
15 be.

16 You can't take a measure for an Essential
17 Security purpose that you don't know about yet. The
18 two cannot be plausibly connected then.

19 In the Opening, Ms. Herrera again said:

20 [REDACTED]
21 [REDACTED]
[REDACTED]

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[REDACTED]

[REDACTED] But, that wasn't the reason for the Measure.

In their Post-Closing Submission, at Paragraph 39, they say: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] We had already taken the Measure. We've already taken the Measure. Then, how could it be rationally connected to the Essential Security Interest you later find out about? It can't be.

So, there is no plausible or rational connection. Again, in the 7 September 2022 Letter to the Tribunal, they explained that the Colombian authorities had not identified, yet, any evidence of [REDACTED] involvement. That's why we're invoking the Essential Security Interest now, only in 2022. They did not invoke it back in 2017-2016 when they took the Measures, so the Essential Security--the Measure was not taken for the Essential Security purpose.

And, again, in their Closing, they said they

1 only found out about all of this because of the
2 Arbitration, so how could it possibly be the case that
3 they took the Measure for an Essential Security
4 purpose? They could not have.

5 And, the Nicaragua v. USA Case at the ICJ, I
6 think, is instructive here because--and this was not a
7 self-judging clause but it goes to the temporal issue,
8 the question of the connection between the Measure and
9 the Essential Security identified. And, in that case,
10 the ICJ found the same thing, they say that the
11 Measure, in order for it to be taken for an Essential
12 Security purpose--I think this is an obvious
13 proposition, but--it has to have been taken for that
14 Essential Security purpose at the time that you took
15 the Measure. And, they looked at the chronological
16 sequence of events in Nicaragua v. the U.S., and they
17 said it wasn't. It wasn't taken for an Essential
18 Security purpose because the Measure itself was
19 invoked for a different purpose, not the Essential
20 Security purpose that was then later identified.

21 And, I come back to the chart that I started
22 with: It cannot be--it cannot be--that there is a

1 rational connection between the Essential Security
2 Interest which is to protect against
3 narco-traffickers, and this Measure, when the Measure
4 affected all of the people on the right here, but did
5 nothing to take away any interests in proceeds or
6 anything else, not even criminal charges, against
7 anybody that they say, like [REDACTED] or Ivan López
8 or others, [REDACTED]

[REDACTED]
[REDACTED] Well, take the money. That's
11 what you do. You take the money [REDACTED].
12 That's what the law says you do. You take the
13 Property from those who you're trying to protect
14 society against, not good-faith third parties.

15 And, they haven't taken the money;
16 otherwise, I'm sure there would be some sort of
17 evidence in the record from Colombia that they have.
18 There isn't. There's not one shred of paper to say
19 they've gone after the proceeds. So, as far as we
20 know, [REDACTED]

[REDACTED] So, how is that plausible--how
22 can they establish that plausible connection between

1 the Measure they took affecting the rights of
2 good-faith third parties and not those who they are
3 trying to protect society against?

4 Now, the U.S., this morning, talked about
5 the fact that the Essential Security Provision doesn't
6 allow for compensation. This is a completely separate
7 point. I think we prevail just on what I just told
8 you, that this Essential Security Exception has not
9 been invoked in good faith and, therefore, we're out
10 of it. It doesn't even apply here. But if the
11 Tribunal was to find it does apply, we would say you
12 need to look at, what does the application of it mean?
13 And the application of it, in our submission, simply
14 means that it allows a party to apply a measure that
15 it considers necessary for the protection of its own
16 Essential Security Interest. It means what it says.
17 It can apply a measure.

18 Now, I think it's important by way of
19 background here, and I know the Tribunal will be
20 familiar with this so I will go through it quickly,
21 but the primary remedy in international law for a
22 breach of an international legal obligation is

1 restitution. So, it is the withdrawal of the Measure.
2 If you take a property, it's to give back the
3 Property. That's the primary remedy. Article 35 of
4 the Articles of State Responsibility say that. And
5 damages is only--it's a backup remedy. Compensation
6 is insofar as such damages is not made good by
7 restitution or restitution is materially impossible,
8 then compensation is the fallback.

9 But the primary remedy if I take property is
10 to give back the property. As under international
11 law, that is the primary remedy. And by the way,
12 that's not just the Articles of State Responsibility.
13 The TPA in this case also says that. And you have to
14 remember, Article 22, the Exception that we're talking
15 about, applies equally to the Investment protections
16 and the trade protections.

17 And, if we go to the next slide, what you
18 can see is Article 10.26 that governs this Tribunal,
19 says "where tribunals make a Final Award against a
20 respondent, it can award monetary damages and it can
21 order restitution of property." The TPA authorizes
22 the Tribunal to do that.

1 With respect to trade panels established
2 under the TPA, again, in the Final Report, "if the
3 Panel determines that a Disputing Party has not
4 conformed with its obligations or that a Disputing
5 Party's measure is causing nullification or
6 impairment, wherever possible, the Resolution is that
7 you will eliminate the non-conformity or nullification
8 of the impairment."

9 So, the primary remedy in the trade section
10 is withdraw the Measure.

11 Why is this important? This is important
12 because the Exception then says, "no, you can keep the
13 Measure." That's what the language that says, nothing
14 in this Agreement shall be construed to preclude a
15 party from applying measures that it considers
16 necessary to protect its Essential Security. So, what
17 it's saying is that remedy of restitution, that remedy
18 of withdrawing the Measure, we're taking that away
19 because we want the State to be able to adopt the
20 Measure that it wants to protect its Essential
21 Security Interest.

22 So, if we're in a world where the Essential

1 Security Provision is properly invoked--and we don't
2 think it has been for the reasons I've already
3 said--then all it does is it says, it takes away
4 Article 10.26.b. It takes away the remedy of
5 withdrawing the Measure, but it keeps the compensation
6 obligation.

7 And by the way, this is exactly what the Eco
8 Oro versus Colombia Tribunal decided. And it decided
9 this in the face of non-party submissions from the
10 other Treaty Party, Canada in that case--now, this was
11 not a self-judging provision, but that's irrelevant to
12 the question that I'm addressing which is the remedy.
13 If it is properly invoked, whether self-judging or the
14 Tribunal decides it applies in the non-self-judging
15 context, what does it mean?

16 What is the implication of the application
17 of that Essential Security Protection, the Eco Oro
18 versus Colombia Tribunal interpreting very similar
19 language, said, if we find that it applies--and again,
20 because it was Essential Security, not
21 self-judging--they would have had to find that it
22 applies. But if they found it applies, what's the

1 consequence? The consequence they said was they can
2 keep their measure, but it cannot accept Canada's
3 statement that in such circumstances payment of
4 compensation is not required. This does not comport
5 with the ordinary meaning of the Article. And we are
6 taking--we say this Tribunal should follow the
7 reasoning in the Eco Oro versus Colombia decision in
8 interpreting a very similar provision with respect to
9 the consequence of proper invocation of an Essential
10 Security Protection.

11 The TPA in other clauses makes very clear
12 when they're trying to do something different, when
13 they're trying to preclude a claim. For example, on
14 Slide 40, you have a number of examples: No claim may
15 be submitted to arbitration. That's what they say
16 when they don't want a claim to be submitted to
17 arbitration. They use very different language. You
18 can see that, and that's, for example, in the statute
19 of limitations provision, where they say three years
20 have elapsed. They say in that case no claim may be
21 submitted to arbitration. And I have given you some
22 other examples here.

1 But it's very clear that when they mean no
2 claim, non-justiciable, they use different language.
3 And just to give you an example of an Essential
4 Security Use Provision that uses very different
5 language, is the India-Singapore Comprehensive
6 Economic Cooperation Agreement. And the U.S. said
7 this morning, but we're not a party to that Treaty.
8 Right. But the point here is when Parties want to use
9 more express language and say, for example, that
10 something is non-justiciable, they say it. This
11 treaty provision actually says, we mean it's
12 non-justiciable.

13 So, if the Parties--if the U.S. and Colombia
14 want to amend the Treaty, they are welcome to do so.
15 But they have not amended the Treaty, and it is this
16 Tribunal's authority, this Tribunal's sole authority,
17 to interpret the Treaty. And that's what other
18 tribunals have said. In the Infinito Gold versus
19 Costa Rica Tribunal, the Sempra versus Argentina Case,
20 for example, in the Infinito Gold versus Costa Rica
21 Case they said even if there was some by these
22 non-party submissions, if it was considered to now be

1 subsequent agreement for purposes of the Vienna
2 Convention, it would post-date the commencement of the
3 Arbitration, and we can't apply that retroactively.
4 So, even if there were subsequent agreement, it's
5 subsequent agreement after the commencement of this
6 Arbitration, and that can't possibly affect the rights
7 of a litigant. But in any event, these Tribunals all
8 say States are free to amend the Treaty--that's what
9 the *Sempra* versus Argentina Tribunal said. But that
10 doesn't affect the rights that are under the Treaty
11 that we, as a Tribunal, have the authority to
12 interpret. We are the interpreter. Not we, you,
13 gentlemen, are the sole authority that can interpret
14 this Treaty for purposes of this dispute.

15 And I think it's obvious that if you were to
16 adopt the blanket exception that's being put before
17 you, it would render completely ineffective the Trade
18 Promotion Agreement. It would be a "get out of jail
19 free" card, as we've said time and time again. And in
20 fact, it would contradict a very important purpose of
21 this TPA, which is to promote broad-based economic
22 development in order to reduce poverty and generate

1 opportunities for sustainable economic alternatives to
2 drug-crop production. That is the object and purpose
3 of this Treaty. And in interpreting this Treaty,
4 including the Essential Security Provision, this
5 Tribunal must have in mind this object and purpose of
6 the Treaty. To promote economic development, to move
7 on from drug-crop production. That's, indeed, one of
8 the very objectives of the Treaty.

9 Let me pause there, and subject to any
10 questions, I'm going to turn the floor over to my
11 partner, Ms. Champion.

12 PRESIDENT SACHS: Before you start, are
13 there questions at this point in time from my two
14 colleagues?

15 ARBITRATOR PEREZCANO: Not at this time from
16 me, Mr. Chairman.

17 PRESIDENT SACHS: Thank you.

18 MS. CHAMPION: Good morning. We thank the
19 Tribunal for its time today.

20 I'm going to just cover how the new evidence
21 that the Parties have submitted in this case has no
22 impact on Newport's good faith.

1 I want to remind the Court of the applicable
2 standard. A decision of the Colombian Constitutional
3 Court that was issued after Claimants filed their
4 Memorial but before Respondent filed its
5 Counter-Memorial, and this decision tells us a lot
6 about what is required and what is not required to
7 meet the bar of good faith without fault.

8 Colombia did not mention this Decision in
9 its Counter-Memorial because it really destroys their
10 argument that there was some obligation to dig up the
11 name of Iván López 20 years before this purchase
12 occurred. As the Constitutional Court says: The good
13 faith and diligence that may be required of third
14 party acquirers refers exclusively to assets that are
15 the object of a legal operation. In other words, here
16 the land. But not to those persons who transfer
17 domain over them. In fact, when someone intends to
18 acquire an asset, it is up to that person to ascertain
19 the legal status of the asset in order to establish
20 the history and the chain of title and tradition. In
21 other words, is title to the asset good, can the asset
22 be transferred, but not to inquire into the history or

1 personal details of the Party that transfers the
2 respective assets to him, especially when, in many
3 cases, the transfer occurs when the State itself has
4 not been able to prove or penalize the perpetration of
5 illegal activities.

6 This is exactly the situation we're facing
7 here. Colombia alleges that illegal activities took
8 place by persons in the history of the title of this
9 property, persons whose names do not appear on the
10 paper.

11 And they also allege that we should have to
12 consult rumors and rely on rumors. The Constitutional
13 Court definitively rejected that. It says: "In a
14 scenario such as this, people in legal commerce would
15 be obliged not only to study the titles to assets but
16 also to perform meticulous investigations into the
17 legal past of the sellers into any legal disputes they
18 may be involved in, different jurisdictions, into the
19 investigations and inquiries carried out by the
20 Prosecutor's Office in which they could be involved,
21 and even into opinions about said sellers in their
22 communities and on social media."

1 The Constitutional Court rejects this as
2 completely unworkable. It notes that this perspective
3 makes legal trade difficult or impossible and also
4 imposes unreasonable and unsustainable burdens on
5 individuals which go far beyond the duties that the
6 Legislator can constitutionally impose on this. So,
7 the Constitutional Court Decision is clear.

8 Now, again, at the outset of the Merits
9 Hearing in this case, Newport was finally recognized
10 by the Colombian courts as an affected party, and the
11 Colombian court based that determination on the 2012
12 Sales-Purchase Agreement which it said: "Newport is
13 entitled to participate in the case, given that it has
14 a pecuniary right with respect to the affected
15 properties." That's based on the Sales-Purchase
16 Agreement. That Agreement is signed, then diligence
17 is done on the property.

18 As this Tribunal already knows, it's been
19 covered exhaustively, that diligence was extensive.
20 It included diligence on the title, a corporate study
21 of the seller, Corficolombiana was hired, ran its own
22 SARLAFT process, made its submission to the Attorney

1 General's Office listing every past owner of the
2 property, as well as their legal representatives at
3 the time of the inquiry, including La Palma, and
4 everything comes back clean.

5 Now, as Claimants' experts have explained,
6 including the former Minister of Justice, the date of
7 signing of the Commercial Trust Agreement entered into
8 between Newport S.A.S. and Corficolombiana in the Year
9 2013 is determinant. As of that time, the Parties to
10 said agreement already had a patrimonial interest over
11 the Real Property asset. Therefore, it could not be
12 demanded of them that they continue engaging in acts
13 of due diligence regarding a Transaction that had
14 already taken place. Once good faith attaches, it's
15 permanent, and it insulates the purchaser from any
16 future revelations.

17 As the President inquired of Respondent,
18 Respondent's expert in this case, Dr. Reyes: "Assume
19 I buy a property in Colombia and there is no problem,
20 nothing turns out. I do a due diligence that you
21 would consider sufficient, and 10 years later I
22 learned that a relative of Escobar was involved in the

1 initial--at the origin of the property. Now, does
2 this affect my property rights?"

3 Colombia's own expert was unequivocal:
4 "Absolutely not." The President further inquired:
5 "Okay, if I want to resell the property in the year
6 thereafter, so the new circumstance has arisen, and I
7 want to sell my property, and now it is known that
8 there was an origin at the origin an illicit
9 circumstance. Would I be able to sell the Property to
10 somebody else? Would that somebody else be a good
11 faith purchaser? Because he would know, wouldn't he?
12 Probably he would know of the illicit origin."

13 Dr. Reyes, again, was unequivocal. "Yes,
14 you can sell it." Claimants were entitled to rely on
15 the diligence that they had done even after Iván López
16 surfaced. Again, I know the Court is already familiar
17 with this. I'm not going to go over it in detail.
18 The key thing is that that diligence, even though it
19 was into the Seller as well into La Palma, it did not
20 surface [REDACTED].

21 And this is important because Colombia does
22 not really question the adequacy of Claimants' due

1 diligence into La Palma. Colombia concedes--you can
2 move ahead to Slide 55--I'm sorry, go on to this one,
3 Ben--

4 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. Indeed, Colombia admits
8 that it was not aware of it until this Arbitration.
9 And specifically until shortly before it filed its
10 Rejoinder in February of 2022.

11 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
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[REDACTED] [REDACTED]
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Recognizing that Newport's diligence

3

satisfied good faith, Colombia has now shifted; right?

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[REDACTED]

[REDACTED]

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[REDACTED] Mr. Seda was

6

cleared by an OFAC inquiry into his Colombian

7

businesses. Now, again, as set forth in Mr. Seda's

8

original Witness Statement, on 14th of February 2018,

9

agents from the FBI appeared at my home in the United

10

States while I was away and questioned the mother of

11

my children, as well as our secretary and housekeeper.

12

They said they were conducting a search based on a

13

newly published list by OFAC. [REDACTED]

14

[REDACTED]

15

[REDACTED]

16

[REDACTED] When

17

I reached out to the FBI later, they informed me that

18

the Fiscalía had sent them an alert that I was related

19

to various Colombian drug traffickers listed in the

20

new OFAC List. OFAC officials, thereafter, sent me

21

several requests for information.

22

He had to hire attorneys and a team from

1 Kroll at his own expense to respond to OFAC's detailed
2 requests, OFAC took no action. And again, Mr. Seda
3 was told that this inquiry was prompted by a tip from
4 Colombian Authorities.

5 Nothing happened as a result of that
6 inquiry. OFAC looked at the records for all of
7 Mr. Seda's Colombian businesses, not just the
8 Meritage: Luxé, everything.

9 [REDACTED]

[REDACTED]

[REDACTED]

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Finally, Mr. Seda has nothing to hide on these topics. He is happy to answer any questions that the Tribunal might have. And we made that offer during the Closings, when Colombia raised many of these allegations for the first time. And Mr. Moloo said, Mr. Seda has asked for the opportunity to explain to the Tribunal the misunderstanding around Zing. And Ms. Banifatemi said she has to object, because if he makes a further statement then we will have to cross-examine him, and this will be never-ending.

In sum, the new evidence has no effect on Newport's good faith, and as my colleague, Mr. Moloo, has already explained, that is the key issue in this case, the Asset Forfeiture Law. The Essential Security Interests invoked by Colombia here must carve out protections for good-faith third parties. It cannot affect good-faith third parties.

I turn it back over to my colleague,

1 Mr. Moloo, unless the Tribunal has questions.

2 PRESIDENT SACHS: I don't think we have
3 questions at this point of time, so we would ask
4 Mr. Moloo to proceed.

5 MR. MOLOO: Thank you, Mr. President.

6 The final part of our presentation will be
7 on how we believe the new evidence does not undermine
8 Claimants' new claims but, in fact, bolsters it, and I
9 will deal with the first half of that in the next five
10 to seven minutes.

11 The first claim, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

16 Now, one of the things they say in their
17 Post-Closing Submission is, well, they're not in like
18 circumstances because [REDACTED] are not involved.
19 So, their case is completely shifted as we know;
20 right? It's no longer about the Lópezes, it's about
21 [REDACTED]. And so, they're saying well, [REDACTED]
22 weren't involved in the Sister Property, but we have

1 to remember that the Measure, they themselves have
2 admitted, the Measure was not taken because of [REDACTED]
3 [REDACTED]. The Measure was taken because of the
4 Lópezes. And so, if you're going to take a measure
5 with respect to the Lópezes, you have to have also
6 taken that Measure with respect to other properties
7 that are similarly situated, including the Sister
8 Property, and nothing has happened with respect to
9 them.

10 In fact, at the Hearing, it was made clear,
11 everybody knew, and [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] And so, in

20 fact, I would say that it would be even more likely
21 that you would want to go after the Sister Property
22 because it would certainly be tainted if the Meritage

1 Property was. So, none of this new evidence affects
2 in any way the national-treatment claim.

3 And I think they recognized that at the
4 Hearing, and so one of the things you were told was,
5 well, actually, we're looking into the Sister
6 Property, and it's at the initial stage of the Asset
7 Forfeiture Proceeding. Well, it's been a year, and
8 nothing has happened. This was a common theme. A
9 year ago you heard a lot of things: Oh, we're looking
10 into it, this is going to happen, just come back to us
11 a year from now, it's too soon--nothing. Nothing in
12 the last year.

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] So, again, the
17 national-treatment claim is not affected in any way by
18 any of this new evidence.

19 The FET claim is likewise not affected in
20 any way. In fact, if this case is now all about [REDACTED]
21 [REDACTED], there's been no question whatsoever that I
22 have seen as to whether or not Newport did adequate

1 diligence with respect to [REDACTED]. Nobody is saying,

2 oh, [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]. Nobody is saying any of that. In fact, if

6 this is actually about [REDACTED], I would say that

7 the diligence and the fact that we wrote specifically

8 to the Fiscalía and asked, tell us, is there anything

9 with respect to [REDACTED]

10 [REDACTED]. All of the recent

11 evidence that's been submitted simply does not impact

12 in any way the FET claim with respect to the

13 good-faith third party status of Newport. [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED] It doesn't

17 change the basis of the original application of the

18 Asset Forfeiture Law. And as Ms. Champion will speak

19 to, it, in fact, reinforces the corrupt scheme that

20 was actually in place here.

21 If we go to Slide 89. In fact, you will

22 recall, Members of the Tribunal, that not only does it

1 not affect the good-faith third party status, but
2 there was no inquiry into the good-faith third party
3 status at the outset. When I cross-examined Mr. Caro
4 about that, he confirmed that there was no inquiry
5 into Newport's good-faith status at the time that they
6 were doing the investigation. Because he said we
7 didn't need to look into them, we just needed to look
8 into Corficolombiana because Newport was tied to
9 Corficolombiana, but he confirmed that there was no
10 finding with respect to Newport at all.

11 And likewise, we know because it was only in
12 April 2022 that it was only recently that Newport was
13 actually recognized as an affected third party, and so
14 they've been sitting in limbo for seven years. And at
15 that time, we were told at the hearing, and a month
16 after this Decision in April 2022, that we will find
17 out in a year. We will know in a year. When
18 cross-examined, Mr. Caro, during that
19 cross-examination, was asked by Dr. Poncet: How long
20 can we expect a Final Decision with respect to
21 Newport? When are their good-faith status finally
22 going to be reviewed and assessed? And he said, I

1 would estimate one year.

2 And in the Closing Submissions, several
3 months later, you could see a little bit of a
4 tentative answer from counsel for Colombia because at
5 that point it had already been six months and nothing
6 had happened, and when asked, from a timing
7 perspective, what's happening in these proceedings, by
8 Mr. President, counsel responded: I had been told one
9 year, whether that's really feasible, I don't know,
10 according to Caro's testimony, it's one year.

11 And in Colombia's opening, Ms. Banifatemi
12 said, the courts are making a determination as to
13 whether Newport, which is now an affected party,
14 whether it will be considered to be a good-faith third
15 party. And here we are a year later, and not one
16 step, not one step, not an email setting dates has
17 taken place.

18 So, quite clearly, all over the last year,
19 what have we learned? We've learned that, indeed,
20 Newport's due-process rights have been violated, there
21 has been an FET breach, and nothing is going to
22 change. This property is gone. It's not coming back.

1 Newport's good-faith status is not going to be
2 assessed.

3 And even if it is assessed, a week from now,
4 maybe they will wake up as a result of what I'm saying
5 at this Hearing and all of a sudden send an email and
6 set some schedule, at the end of the day, it's
7 obviously too late at this point. This investment is
8 gone. And that's why it also has no impact on our
9 expropriation claim.

10 The last thing I want to end on before
11 allowing Ms. Champion to wrap up, is to say that the
12 proper course of conduct here would not have been to
13 shoot first and ask questions later. If they were
14 concerned about protecting society from the people on
15 the left in the chart that we have seen, then the
16 right course of conduct, as Dr. Martínez explains in
17 his Expert Report, is to take their proceeds, they
18 could have [REDACTED] was
19 going to get from this sale--that's what you do--so as
20 to protect the rights of third parties and only take
21 the assets, only seize the assets of those whom you
22 are trying to protect society against. That would

1 have been the right course of conduct. And Colombia
2 can still do that. They can still do that. They
3 could take assets of those of whom they are concerned,
4 but not the assets of third party good-faith
5 purchasers.

6 Annie?

7 MS. CHAMPION: Just in conclusion, I know
8 that this Tribunal is fully familiar with the red
9 flags analysis. It's often impossible to get direct
10 evidence of corruption, so I won't dwell on this, but
11 I will just note that the red flags are blazing here,
12 and there is not just indirect evidence, there is
13 direct evidence. Mr. Seda gave undisputed testimony
14 that he has been approached for bribes. He's been
15 approached by multiple intermediaries from the
16 Attorney General's Office suggesting meetings. That
17 has happened recently. The new evidence shows this.
18 The timing--again, I won't go over what the Tribunal
19 is already familiar with, but what is interesting
20 about this new evidence is that the extortion scheme
21 for which Ms. Noguera was charged and arrested looks
22 an awful lot like the approach that was made to

1 Mr. Seda during the course of this very arbitration.

2 Colombia has no explanation for this.

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7 Again, Mr. Seda's unrebutted testimony that

8 he was approached by individuals claiming to be from

9 the Attorney General's Office, even before Asset

10 Forfeiture Proceedings were begun, unrebutted by

11 Colombia. They conceded that they do not know whether

12 there was a shakedown against Mr. Seda.

13 Documentary evidence, communications,

14 documenting the extortionate demands made to Mr. Seda

15 by Mr. López, whose attorneys claim to be able to

16 influence the Asset Forfeiture Proceedings.

17 Unrebutted.

18 Newspapers reporting corruption of

19 Prosecutors involved in the seizure of the Meritage

20 Project. Numerous investigations of these

21 Prosecutors. El Espectador reported on this, █

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[REDACTED] Then, more recently,

18

Ms. Noguera, who instigated these meetings, through an

19

intermediary, El Médico, Carlos Ramón Zapata, is

20

arrested and charged with an extortion scheme. So,

21

Ms. Noguera, to remind the Tribunal, was the Head of

22

the Asset Forfeiture Unit following Ms. Malagón.

1 According to the press and the charges against her,
2 she, along with drug lord Carlos Ramón Zapata and one
3 officer and two non-commissioned officers of the
4 National Police, located people with pending
5 proceedings at the Attorney General's office,
6 identified them and extorted them for large sums of
7 money in exchange for various forms of favorable
8 treatment. Again, this scheme centers on El Médico,
9 Carlos Ramón Zapata, an informant for the Attorney
10 General's Office.

11 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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If you go to the next slide.

3

4

The meetings arranged by Carlos Ramón Zapata had another purpose and modus operandi. To give it

5

the appearance of legality, they arranged for two

6

Prosecutors, Daniel Hernández and Daniel Cardona, to

7

receive the former drug lord's complaints, claims an

8

investigator in the case. Again, this is exactly what

9

they told Mr. Seda. We want Mr. Cardona and

10

Mr. Hernández to take your statement.

11

12

Now, naturally, as any, you know, rational person would, Mr. Seda wanted his attorney present at

13

those meetings. I attended one of those meetings. I

14

met Mr. Cardona. They assured us that they wanted to

15

hear Angel's testimony, that they wanted to take a

16

statement from him. They assured us that they wanted

17

to help us resolve the case.

18

19

Importantly, Colombian officials were aware of these meetings at the time they were happening. At

20

Ms. Noguera's urging, Mr. Seda reached out to

21

Colombian Officials about a potential settlement.

22

These communications were cc'd to Ms. Noguera, they

1 mentioned Mr. Seda's meetings with Ms. Noguera and
2 Mr. Hernández, they are both mentioned. And those
3 communications were forwarded to Colombia's very
4 counsel in this case. So, all of this was known to
5 Colombia at the time it's occurring.

6 So, Colombia's attempts to turn this into
7 something that was somehow improper on Mr. Seda's
8 part, are truly laughable, okay? [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

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So, again, I just want to return to the red flags, the blazing red flags, which indicate that Mr. Seda was approached during the course of this very arbitration in what appears to be yet another extortion scheme. If I hadn't attended those meetings, if Mr. Seda hadn't recorded it, goodness knows what would have happened. Would there have been an extortion demand, given Ms. Noguera's pattern? We can only assume that there would have been. So, again, there are ample red flags here. The Court--the Tribunal is fully empowered and entitled to connect the dots here.

But I want to note also that this demonstrates Colombia's violation of its obligation to accord fair and equitable treatment to the Claimants under Article 10.5. If the Asset Forfeiture Proceeding can be resolved with a bribe, if an asset seizure is undertaken for a corrupt purpose and can be

1 resolved with a bribe, then there can be no Essential
2 Security Interest related to that proceeding. A
3 corrupt purpose cannot correspond to an Essential
4 Security Interest.

5 And with that, we will conclude.

6 MS. BANIFATEMI: Mr. President, if I may, I
7 did not wish to interrupt Ms. Champion whilst she was
8 arguing, but we do take issue on record, that three
9 times, and she knows better, she's providing testimony
10 based on her attendance of a meeting. She's not a
11 witness here, she's counsel. So, we take issue with
12 that. And I just want to put that on record. Thank
13 you.

14 PRESIDENT SACHS: Yes, thank you. It's been
15 put on record.

16 Do you mind, do colleagues have questions to
17 Claimants' counsel at this point of time?

18 ARBITRATOR PONCET: I don't have any,
19 Mr. President.

20 PRESIDENT SACHS: Thank you.

21 ARBITRATOR PEREZCANO: I don't have any
22 questions. I do have a request, though. The

1 presentation that was sent to us by email, roughly
2 around Slide 50, the bottom of all the slides is cut
3 off. So, we lose all the references to the record, so
4 the Claimants can redo it and re-send the PDF with the
5 slides complete because otherwise some of them on the
6 margins have the references, but, you know, the bottom
7 blue footer with all the references is lost as of
8 Slide 50 or thereabouts.

9 MS. CHAMPION: We will address that right
10 away. Apologies for that.

11 ARBITRATOR PEREZCANO: And if you can
12 re-send it, I mean, just now, so that we can have it
13 and we can continue to work on it, so don't wait until
14 the Hearing is over. That's my request. Thank you.

15 MS. CHAMPION: Understood.

16 PRESIDENT SACHS: Thank you. Same here, and
17 we will now have the break of 15 minutes.

18 MS. BANIFATEMI: Mr. President, may we just
19 have the time count, just to know where we stand?

20 PRESIDENT SACHS: I think there was five or
21 10 minutes in excess. Sara, was that the case?

22 SECRETARY MARZAL: Yes, Claimants have 23

1 minutes left.

2 PRESIDENT SACHS: Okay, so seven minutes
3 over budget.

4 All right. So, let's have a 15 minutes'
5 break, meaning we will resume at 37. Right? Thank
6 you very much.

7 (Recess.)

8 MR. MOLOO: Mr. President, you were on mute,
9 I believe.

10 PRESIDENT SACHS: Okay. But, can you hear
11 me now?

12 MR. MOLOO: Yes, we can.

13 PRESIDENT SACHS: Okay. I presume we are
14 all back, and we will now give the floor to the
15 Respondent.

16 Ms. Banifatemi.

17 MR. MOLOO: Mr. President, if I may before,
18 just so I'm not interrupting Ms. Banifatemi, just our
19 quick scan of the slides that were sent. It does
20 appear that there are some Exhibits that the Tribunal
21 excluded--did not allow inclusion on to the record
22 that are nonetheless in the slide deck that Respondent

1 has sent, and we would ask that that be removed. I
2 think it is highly prejudicial to be addressing
3 Exhibits that are not in the record and that the
4 Tribunal expressly did not permit into the record in
5 the slides.

6 PRESIDENT SACHS: Can we hear the Respondent
7 on this?

8 MS. BANIFATEMI: Thank you, Mr. President.

9 I fail to see what Mr. Moloo is referring
10 to. We only referred to existing evidence on the
11 record.

12 (Overlapping speakers.)

13 MR. MOLOO: At Slide 30, for example, and I
14 think there is even a note saying that that [REDACTED]

15 [REDACTED]

16 MS. HERRERA: They also quoted from our--

17 MS. BANIFATEMI: [REDACTED]

18 [REDACTED] [REDACTED]

19 [REDACTED] [REDACTED]

20 [REDACTED]. Just bear with us, Mr. Moloo, we

21 will explain our case and the Tribunal will decide.

22 MR. MOLOO: Mr. President, I'm in your

1 hands, but it does include a quote from an excluded
2 exhibit.

3 MS. BANIFATEMI: The quote, Mr. President,
4 is from our Post-Closing Submission, which is on the
5 record by definition.

6 PRESIDENT SACHS: It's difficult for us to
7 put a view on this. It's their slide with at least
8 three quotes from various sources, and so what I would
9 suggest is that when we come to this slide, Mr. Moloo,
10 please let us know precisely what you're objecting
11 against, and then we will hear the response.

12 MS. BANIFATEMI: If I may, Mr. President, I
13 would rather not be interrupted in our submission
14 because I on purpose did not interrupt at any point in
15 time, even though Ms. Champion three times actually
16 put on record testimony whether--despite the fact that
17 she's not a witness. And, I also want to put on
18 record, since we're on complaints, I want to put on
19 record that the Claimants went well beyond the scope
20 of this Hearing, which was essentially to discuss
21 Essential Security, the Tribunal's questions, and the
22 Reports, and they have essentially reargued their

1 entire case. So, we did not say anything to just not
2 interrupt, but I have to put that on record because
3 what we heard was a scope that is well beyond what the
4 Tribunal allowed for today. So, this is my complaint
5 to the Tribunal.

6 As regards Slide 30, I want to just say
7 right away there is a reference to our Post-Closing
8 Submission on the right side, and that is our
9 Post-Closing Submission. This is what is on the
10 record, and we're flagging the fact that [REDACTED]

11 [REDACTED] that would have shown to this
12 Tribunal the evidence that we were going to rely on,
13 that was excluded. [REDACTED]

14 [REDACTED] It's as simple as that.

15 MR. MOLOO: Mr. President, if I may, I did
16 raise it now so that I would not have to interrupt
17 Ms. Banifatemi, but if you look at the bottom right
18 box, Paragraph 117, you will see an underlined
19 quotation and a bold of [REDACTED]

20 [REDACTED]
21 [REDACTED] we would have--we could have, it's very easy
22 to address but we didn't because that specific quote

1 is from a document that is excluded from the record.
2 I don't think it's fair to say we've quoted a document
3 that is excluded from the record in our Post-Hearing
4 Submission and, therefore, we can just cite to our
5 Post-Hearing Submission which quotes the document that
6 is excluded from the record. I think an exclusion
7 from the record means excluding from the Post-Hearing
8 Submissions as well.

9 That document and that reference is not on
10 the record, and I don't think they should be able to,
11 through the back door, include quotes like this. I
12 don't know if there are others, this was just the only
13 one that--this is the first one we came by. It's
14 clear that that's from a document that is not on the
15 record.

16 MS. BANIFATEMI: And again, Mr. President,
17 this is our Post-Closing Submission. It's there, it's
18 on the record. We are taking issue with the fact, as
19 a matter of due process, [REDACTED]

20 [REDACTED] [REDACTED]

21 [REDACTED] [REDACTED]

22 [REDACTED] [REDACTED]

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[REDACTED]

[REDACTED] So, there is a whole issue of due process here, but as far as we're concerned, this is just a citation from our Post-Closing Submission.

PRESIDENT SACHS: Well, I think we should proceed. I read it--of course, it's your Post-Closing Submission here, but there is a quote in Paragraph 117, and I think the issue is about the source of this quote, if I understand correctly; no?

MS. BANIFATEMI: Yes, Mr. President, and that was what was put before the Tribunal in our Post-Closing Submission, and that stands. It is our Post-Closing Submission. That is not excluded from the record.

And, I hope the Tribunal will not now exclude our Post-Closing Submission from the record. That's one thing.

The second thing is that Mr. Moloo is taking issue, but also in their Opening earlier referred to documents that are not on record. For example, Slide 105, I understand, is referring to documents and

1 information that is not on the record. So, they're
2 quite ill-placed to come and complain about documents
3 and information that is not on the record when they
4 did the same, themselves. And, here, all we are doing
5 is referring to our own written submissions. That's
6 all we're doing.

7 PRESIDENT SACHS: It is put on record. I
8 understand now that the quote has been put in the
9 Post-Closing Submission, so if you want to complain,
10 Mr. Moloo, the complaint goes against the Post-Closing
11 Submission rather than to the slide, because the slide
12 just reproduces what has been put in the Post-Closing
13 Submission, and we have it on record now.

14 MR. MOLOO: Okay. Mr. President, and just
15 for my own clarification, my assumption was that if a
16 document was not--because they cited a number of
17 documents in their Post-Closing Submissions that were
18 excluded by the Tribunal from the record--I would
19 assume that, that would mean that by excluding a
20 document from the record they can't, through the back
21 door, just quote it in their Post-Hearing Submission
22 and include it in that way in the record, then.

1 So, by excluding something from the record,
2 it means stricken from the record. Including any
3 quotes, but those are my submissions. I will leave it
4 with you, Mr. President.

5 PRESIDENT SACHS: We understand the quote
6 comes from the Exhibit R-319, and that document,
7 indeed, has been excluded from the record.

8 MR. MOLOO: Correct.

9 PRESIDENT SACHS: So, what we are shown here
10 is the Post-Closing Submission, so it's not that the
11 slides introduce something new, they just copy what
12 has been said in the Post-Closing Submission, and the
13 understanding is that that document, if that is the
14 source of this quotation, has been excluded from the
15 record. That is correct.

16 All right. Let's now proceed, please.

17 MS. BANIFATEMI: Thank you, Mr. President.

18 It is my honor and privilege to make a
19 presentation on behalf of Colombia. Before we do
20 that, I would like to give the floor to Ms. Ana María
21 Ordóñez, the Director of ANDJE, who would like to say
22 a few words.

1 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

2 MS. ORDÓÑEZ: Thank you, yes.

3 Mr. President, Members of the Tribunal, good
4 morning and good afternoon to everyone. As the
5 Tribunal may recall, at the start of the Closing
6 Hearing in October 2022, I explained the unprecedented
7 efforts made by the Colombian State to make available
8 to the Tribunal the evidence [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED] and that touches upon Colombia's
13 highest security interests.

14 Faced with the strength of the evidence
15 which confirms that the Meritage Project has been used
16 [REDACTED] the
17 Claimants seem to have made the strategic decision not
18 to genuinely engage with the contents of [REDACTED]

19 [REDACTED] However, at the end of the day, it is not
20 the Tribunal's task to determine whether the Meritage
21 Project was or not [REDACTED]

22 [REDACTED] All it needs to do is recognize the

1 exceptional circumstances of this case, which raises
2 Colombia's Essential Security Interests. The
3 consequence of this situation is that the Tribunal
4 shall refrain from intervening in such delicate
5 matters.

6 First of all, it is generally accepted that
7 investment treaty tribunals are not to act as appeal
8 courts with respect to the decisions of domestic
9 courts, let alone interfere with the work of the
10 courts in an on-going case.

11 In this case, the very Measure in dispute is
12 the Asset Forfeiture Proceedings against the Meritage
13 Lot. Although the domestic regime on Asset Forfeiture
14 should be clear to everyone at this late stage of the
15 proceedings, I should limit myself to recall the
16 teachings of Professor Reyes, who clearly explained
17 the progressive character of the Asset Forfeiture
18 Proceeding, including the high standards of proof
19 required to progress from one stage to the other.

20 Indeed, the Asset Forfeiture Proceedings
21 project is ongoing, and the Colombian State has
22 progressively obtained evidence of the complex and

1 dangerous structure underlying the Meritage Project.
2 Currently, our courts are deciding an annulment
3 request of the proceedings filed by Newport in
4 May 2022.

5 In particular, the evidence obtained and
6 which has been made available to the Tribunal, shows
7 that the Meritage Case involves Colombia's Essential
8 Security Interests. It is on this basis that, on
9 16 February 2022, acting in good faith, Colombia
10 invoked the Essential Security Exception in
11 Article 22.2(b) of the TPA. As Colombia has shown,
12 and the United States has confirmed, once the
13 Essential Security Exception in Article 22.2(b) of the
14 TPA is invoked, the Tribunal is deprived of the power
15 to adjudicate the dispute. This has been purposefully
16 negotiated by the Contracting Parties, and it remains
17 their understanding now.

18 Conversely, the Claimants' position poses a
19 serious threat to the very basis and limits of
20 Colombia's consent and to its sovereignty. We
21 respectfully request this Tribunal, whose power to
22 adjudicate is based on the TPA, not to turn a blind

1 eye to the Contracting Parties' agreement and its
2 limitations, as reflected in Article 22.2(b) of the
3 TPA. There should be no serious concern that we
4 invoked the Essential Security Exception in absolute
5 good faith, once the fundamental factual basis for
6 such invocation were made available.

7 Importantly, out of 21 investment
8 arbitrations filed against Colombia since 2016, this
9 is the first time we invoke the Essential Security
10 Exception.

11 Mr. President, Members of the Tribunal, as a
12 representative of the State of Colombia, I am here to
13 reiterate Colombia's commitment to fight against
14 organized crime and money-laundering. As a member of
15 the international community, however, Colombia
16 requires the assistance of other international actors,
17 including this Arbitral Tribunal, to carry out this
18 important fight. Upholding the Claimant's claims
19 would not only cast doubts on one of the most valuable
20 instruments in the fight against organized crime, the
21 Asset Forfeiture Proceedings, and instrumentalize the
22 investment-protection system to perfect

1 money-laundering, but ultimately undermine Colombia's
2 sovereignty. We trust this Tribunal not to uphold
3 this.

4 Thank you for your attention.

5 MS. BANIFATEMI: Mr. President, I think
6 you're on mute.

7 PRESIDENT SACHS: Yes. Thank you very much.
8 We will now hear Ms. Banifatemi.

9 MS. BANIFATEMI: Thank you, Mr. President.

10 Moving to the next slide on our
11 presentation, this is the Table of Contents, unlike
12 the Claimants, we have truly endeavored to address the
13 scope and only the scope of the present hearing, which
14 is [REDACTED] and the
15 Tribunal's questions and the U.S. practice on
16 Essential Security.

17 I will address some further preliminary
18 remarks for a few minutes and then my partner,
19 Ms. Ximena Herrera, will address [REDACTED]
20 and the Claimant's attempt to discredit Colombia's
21 witnesses, and then I will revert to the TPA and the
22 question of Essential Security.

1 [REDACTED]

2 [REDACTED] [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

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14 My next point regards due process. Now, we
15 do take this extremely seriously, and frankly there
16 has been--and that goes, in fact, to the debate just
17 before we started, [REDACTED] There has been an
18 unequal treatment of the Parties, and I'm sorry to
19 raise that with this Tribunal, but that's the fact and
20 it's a reality.

21 The unequal treatment, you see here on
22 Slide 11, on the left side. You may recall that at

1 the Hearing last year, at the Closing Hearing, there
2 was the question [REDACTED]

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Thank you.

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PRESIDENT SACHS: Ms. Herrera.

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MS. HERRERA: Thank you.

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19 I think that's all I have to say. Finally,
20 as we knew that the Claimants were going to rehash, as
21 they always do, all their submissions and do it again
22 probably thinking that if we don't go and rebut all of

1 them, the Tribunal is going to have their last
2 impression of what they say, we refer you to Page 43
3 where we have all the points in which we have rebutted
4 what the Claimants say--what the Claimants are saying
5 in the Post-Closing Submission, and now again, where
6 to find our rebuttal.

7 Thank you very much.

8 PRESIDENT SACHS: You may proceed.

9 MS. BANIFATEMI: Thank you.

10 So, I'm moving to Section 4, and I will be
11 devoting most of my time to this, addressing the
12 Tribunal's questions in relation to the Essential
13 Security and the U.S. treaty practice which was part
14 of the scope of this hearing.

15 Moving to Slide 45, this is the outline that
16 I will address. The first point I would like to
17 address, of course, is the U.S. treaty practice, and
18 the long-standing treaty practice, which confirms that
19 Colombia's invocation of Article 22.2(b) of the TPA is
20 non-justiciable and that therefore the Tribunal lacks
21 the power to adjudicate it.

22 It was really interesting that Mr. Moloo

1 didn't care to address the long-standing practice of
2 the U.S. I should note that the U.S. is the home State
3 of the Claimants. If anything, it's more than relevant
4 to what the Tribunal will have to decide. And the U.S.
5 actually went through the pains of providing some--a
6 number of treaties to show that practice, and that's
7 what I want to address now.

8 So, I'm at Slide 46. This is a very simple
9 slide, really. It shows you there are two stages.
10 There is the stage of the U.S. treaty practice where
11 there was a reference to the security exception as a
12 self-judging matter, simply it was implicit up until
13 the decisions in the--by the ICJ in the Nicaragua and
14 the Oil Platforms cases where the Court--I will come
15 back to this--decided that because the word "it
16 considers" is not there, it means that it's not
17 self-judging somehow. So, after that, you have an
18 explicit language that was included in the U.S. treaty
19 practice from the Years 2000 onwards. So, Slide 47 you
20 see that. This is the old version, the implicit
21 version of the U.S. treaty practice. You have examples
22 given. And on top you have two treaties that were the

1 basis of the ICJ decisions, in the Nicaragua and the
2 Iran Oil Platforms cases. You see it just refers to
3 "necessary," the Measures that are necessary to
4 fulfill the obligations of the Party. And you have the
5 same thing in the U.S.-Argentina BIT of 1991, which
6 also refers to measures necessary.

7 So, this does not mean that in the U.S.
8 treaty practice this was not self-judging. It was
9 always and has always been self-judging in the U.S.
10 treaty practice. Simply, it was implicit. And then you
11 see on next slide what happened in the ICJ Case. On
12 the left side, you have the Nicaragua Case where the
13 Court said--and said that it had jurisdiction to
14 determine whether the Measures fall within the
15 Exception because a contrario, from the fact that the
16 text of Article XXI of the Treaty does not employ the
17 wording, and you see that further down, it considers
18 necessary for the protection of the Essential Security
19 Interest.

20 So, to the extent that the ICJ says: I'm
21 going to determine whether this is properly invoked
22 because I don't see the words "it considers,"

1 therefore, it's not self-judging, and having confirmed
2 that, you see on the right side in the Oil Platforms
3 Case, that the ICJ said there is no reason to vary its
4 conclusions from the Nicaragua Case, then it shows
5 that the ICJ wanted to see the word "it considers" in
6 order to say, I recognize that this is self-judging.

7 So, then you see what happens, that's on
8 Slide 49, that's the U.S. Model BIT of 2004, you see
9 that the U.S. introduces the word "it considers,"
10 "measures that it considers necessary for the
11 fulfillment of its obligations", et cetera. So, this
12 comes after the ICJ's decisions and makes explicit and
13 quite clear that this provision is self-judging, and,
14 therefore, it's enough for the State to say that it
15 considers necessary for the Measures to be excluded
16 from any consideration by any tribunal.

17 Now, next slide, you see, and that goes to
18 the efforts made by the U.S. at your request to
19 provide a number of treaties.

20 First of all, there is a number of FTAs that
21 the U.S. provided. You see that the wording of
22 security exceptions in FTAs concluded between the U.S.

1 and 18 other countries is very similar to the wording
2 of Article 22.2(b) of the TPA. And you have that, of
3 course, in the submissions by the U.S.

4 You see also that there's four BITs and you
5 have the list here: Mozambique, Bahrain, Uruguay, and
6 Rwanda, where, again, you have very similarly worded
7 provisions to the U.S.-Colombia FTA, and all of those,
8 of course, come after the ICJ decisions, and after the
9 Model BITs were adopted. This actually you see on the
10 next slide, these are the two Model BITs of the U.S.
11 of 2004 and 2012, which contain explicit self-judging
12 language "it considers necessary". And again, you see
13 this all came after the ICJ decisions. Mr. Moloo likes
14 to go back to the ICJ decisions. What you're looking
15 at is language that was adopted after those decisions
16 and consistent language adopted after the decisions,
17 including the Models adopted by the U.S.

18 I should note that you see here there's a
19 note at the bottom of the page that there is no
20 footnote in the U.S. Model BITs. You have the
21 provision which says "it considers necessary."

22 Now, if you go to Page 52, now I'm coming to

1 our Treaty, the Colombia-U.S. FTA. [REDACTED]

2 [REDACTED]

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[REDACTED] It's a belt and suspender approach, frankly, where Colombia and the U.S. include an Interpretive Note for future tribunals, which the U.S. Model does not have, by the way, to leave no doubt that the common intention of the Parties is that invocation of Article 22.2(b) renders the dispute non-justiciable. So, this is the only addition, and so you are bound, of course, by that addition because it's an interpretive note for Tribunals, and you see "for greater certainty, if a party invokes Article 22.2, the Tribunal or Panel hearing the matter shall find that the Exception applies".

On the next page, 54, this is from the U.S.' oral submission of May 2022, and you will recall--and we heard the same thing, frankly, today, once--I quote: "Once a State party to the TPA raises the Exception, it's invocation is non-justiciable."

And here they refer to Footnote 2, and they say that it is prefaced by the phrase "for greater

1 certainty", I quote, "which in U.S. practice confirms
2 that the self-judging nature and non-justiciability of
3 the Essential Security Interest Exception is inherent
4 in the language of the Exception itself. In other
5 words, the phrase for greater certainty signals that
6 the text it introduces, reflects the understanding of
7 the United States and the other Treaty Party or
8 Parties of what the provisions of the Agreement would
9 mean."

10 So, this is clear, it's not only the
11 intention and the practice of the U.S., it's also the
12 intention of the other party or parties to the U.S.

13 And my next--before I go actually to my next
14 slide, maybe I should--if you bear with me--just to
15 pause here because we are talking about the concept of
16 non-justiciability to refer to a couple of comments
17 that were made earlier.

18 Mr. Moloo earlier, I think it was in
19 relation to his Slide 27, said that we essentially
20 have agreed that this Tribunal should have the power
21 to make a determination and, therefore, it's not
22 non-justiciable because we somehow have said that

1 Colombia has raised, has invoked, the Exception, in
2 good faith. There is no contradiction here. It's
3 simply a statement by Colombia and a confirmation by
4 Colombia that it's not playing with this provision,
5 that it has raised, and it has invoked in quite good
6 faith the Exception that exists in 22.2(b).

7 The second point, Mr. Moloo, again, went
8 back to the fact, and frankly, he says read the
9 language. Yes, read the language. It says nowhere
10 that you can determine the merits of the dispute once
11 the Exception has been invoked.

12 And you heard earlier, the U.S.
13 representative saying that precisely this is a
14 derogation. The provision that you have in front of
15 you is an exception, it's a derogation, which means
16 that it excludes the entirety of the Measures from the
17 TPA obligations. It doesn't mean that you have the
18 power to go and determine whether or not the
19 obligations were fulfilled. It is excluding that
20 there are obligations in the first place. This is
21 what it says, and you have to read it as it says.

22 So, Mr. Moloo likes to go back to TPA

1 Article 10.26, he likes to argue restitution and
2 compensation. He likes to go back to Eco Oro, even
3 though it's a completely wrongly-decided decision.
4 For that matter, if you go to CMS, CMS has the right
5 approach, that's Exhibit RL-168, and I quote from CMS.
6 It's the same type of language, it says Article XI,
7 which is also a type of derogation on security
8 interest is, I quote, "a threshold requirement: if it
9 applies, the substantive obligations under the Treaty
10 do not apply." This is what you heard earlier from the
11 U.S. as well, simply when the Exception is invoked,
12 the underlying obligations of the TPA do not apply.
13 Period. So, you cannot say there is a breach, you
14 cannot say whether there is compensation, and that's
15 the end of the matter. And Eco Oro doesn't help
16 Mr. Moloo.

17 Now, one final point here, and I will move
18 on, is that the remedy exists only to the extent that
19 the States have accepted to provide the remedy. The
20 States here, both States have said there is an
21 exception, which can be invoked, once it's invoked
22 it's self-judging, it renders the dispute and any

1 determination non-justiciable, which is that it cannot
2 be determined by the Tribunal. There was a question
3 from Dr. Poncet earlier about what remedy exists and
4 you heard the response from the U.S. representation.

5 Simply again, what I want to add to that, is
6 that there is no absolute guarantee under
7 international law that any investor, alleged investor,
8 can come and use international law. No matter what
9 circumstances, no matter what the Treaty says, and
10 say: I have a right to compensation. Everything
11 depends on what the Treaty says. The remedy exists
12 only to the extent that the States have accepted the
13 remedy. In this case, the Stats have accepted the
14 remedy only to the extent that they would not invoke
15 the Exception. If they do invoke the Exception, the
16 remedy is out, the obligation is out. Simply, as
17 simple as that.

18 So, I now move to--back to the
19 interpretation of the provision. So, here on the
20 screen you have what the U.S. said, which is that it's
21 the practice of the U.S. and the other Party. On my
22 next slide you see that the Claimants are saying,

1 well, no, it's not Colombia. It's just the U.S. On
2 Slide 55. You just--this is U.S. treaty practice,
3 Colombia--actually Colombia entered into other
4 treaties and they don't have that. That's just U.S.--I
5 mean, that's wrong.

6 Look at Page 56, which shows that Colombia,
7 of course, as a sovereign State, knows what it's
8 doing, when it accepts a language, it accepts the
9 language for a purpose. On the left side, you have the
10 U.S.-Colombia TPA of 2006, our Treaty, it says
11 specifically "it considers necessary for the
12 protection of its own Essential Security Interests".
13 It says specifically in Footnote 2 that "for greater
14 certainty, if a party invokes Article 22.2, the
15 Tribunal or Panel shall find that the exception
16 applies." This is what both Parties said. This is what
17 you see the U.S. said, both Parties said.

18 When Colombia entered into the BIT with
19 China, they said something completely different. They
20 said there is an exception for public order, and
21 including measures to protect the Essential Security
22 Interests. And then you see that there is a footnote

1 that says "for greater certainty, nothing shall be
2 construed to limit the review by an arbitral tribunal
3 of a matter when such exception is invoked."

4 So, Colombia knows what it's doing. When
5 Colombia wants the Tribunal to review the invocation
6 of an exception, it says so. When Colombia does not
7 want the Tribunal to review the invocation of an
8 Exception, it says so. Just like the U.S., and here
9 you have a complete understanding of both States of
10 what exactly you have before you.

11 [REDACTED]
12 [REDACTED]
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And finally, you see on my next slide, which is my fourth point, that--and you heard the U.S. representative earlier today, about that here you are faced with an authentic interpretation of the provision, which is binding on this Tribunal.

So, you see that on the left side you have Colombia's position, on the right side, the oral submission of last year, but today we heard the same thing. You see that Colombia in its Rejoinder refers to non-justiciability, the same thing in May by the U.S., you see that Colombia talked about a self-judging clause. The U.S. said the same thing. It's not surprising, frankly, because if you look at the travaux préparatoires, they say the same thing. And it's all there. And you see that in both oral submissions of both states last year, there was a reference to the Vienna Convention on the Law of Treaties, Article 31(3). We rely specifically on Provision A of 31(3), and actually, it's on next

1 slide, if it can be of help. And today, you heard the
2 U.S. saying regardless of how you look at it, either
3 it is a subsequent agreement under (a) or it is a
4 subsequent practice under (b), it is the same thing.
5 You are bound, and you shall take into account what
6 the U.S. referred to as "concordant interpretation,"
7 and what both the U.S. and Colombia are referring to
8 as authoritative interpretation before this Tribunal.
9 And we say it is a subsequent agreement between the
10 Parties, but again you have that also during the
11 travaux préparatoires, throughout, the Parties, both
12 Parties have taken the same position, so what we say
13 is that the Tribunal is bound by this concordant and
14 authoritative interpretation that Article 22.2 is a
15 self-judging provision and it means simply that the
16 invocation is non-justiciable, and the Tribunal does
17 not have the power to make a determination.

18 Moving to my next point, and this is also,
19 of course, in the alternative, you may recall we
20 discussed that last year. In the alternative, if you
21 believe that you do have the power to make a
22 determination, we say you do not have because it's

1 non-justiciable. Nobody, in fact, can make a
2 determination. Only the States can. And each State
3 may—when invoking the exception, makes a determination
4 for itself. Even assuming that you do not agree, you
5 will still say you do not have the jurisdiction to
6 make that determination. I will not expand on this. We
7 argued this at length last year. This is just a
8 reminder of what we discussed last year, and I
9 respectfully refer the Tribunal to our submission last
10 year at the Closing where we took each of the
11 interpretation means of the Vienna Convention:
12 ordinary meaning, context, object and purpose, effet
13 utile principle, authentic interpretation, which I
14 just discussed, and the travaux préparatoires.

15 And you have, of course, each time a
16 reference to our PHB on exactly what we discuss there
17 and also a reference to our closing.

18 The one point I do want to discuss is the
19 new point that is made by the Claimants, and you see
20 the allegation here, which is that essentially the
21 Preamble, looking at the Preamble. And they try to
22 create some confusion here. So, I quote, "the U.S.

1 submission makes clear that Article 22.2(b) is a
2 typical provision that the U.S. includes in its
3 investment treaties with countries all over the world,
4 the majority of which are not afflicted by significant
5 drug-trafficking. The inclusion of the provision in
6 the U.S.-Colombia TPA does not appear to carry with it
7 an inherent policy objective, contrary to Colombia's
8 suggestion."

9 So, I have a number of points to make here.
10 The first, you see on this slide, is that there is a
11 misrepresentation by the Claimants of Colombia's
12 position. It is not the inclusion of the explicit
13 self-judging language in Article 22.2 that carries a
14 policy objective. The policy objective is reflected in
15 the Preamble of the TPA, as I will show now, in fact.
16 You see on Slide 63. And interestingly, you look at,
17 again, you look at the travaux préparatoires and what
18 the State said, and in this case is the Press Releases
19 of the U.S. Trade Representative at the time, there
20 was a recognition by the U.S. that this is about--and
21 the policy objective of the States, both U.S. and
22 Colombia, is the fight against narco-trafficking and

1 terrorists. You see the 23 March 2004, Colombia's
2 greatest fight against narco-trafficking and
3 terrorists that threatened democracy and regional
4 stability can be assisted by promoting economic
5 development, et cetera.

6 After the negotiation, same thing. You see
7 again the U.S. saying an agreement with Colombia is an
8 essential component of our regional strategy to
9 advance free trade within our hemisphere, combat
10 narco-trafficking. This is part of the policy
11 objective of the two States. And you see the Preamble,
12 itself, it says, generate opportunities for
13 sustainable economic alternatives to drug-crop
14 production.

15 So, the preamble essentially shows, that the
16 contracting parties intended the Preamble to carry the
17 objective of fighting against drugs. So, this is the
18 policy, the policy reflected in the Preamble, and
19 that's as simple as that.

20 And if you compare the Treaty that we have
21 with all of the other Treaties provided by the U.S.,
22 you see that there's--this Preamble is reflected in

1 two treaties, our Treaty, with Colombia, and the
2 Treaty with Perú, and you see that in the Preamble in
3 the U.S.-Perú TPA, there's reference to generating
4 opportunities for sustainable--economic alternatives
5 to drug-crop production. So, essentially, the
6 U.S.-Colombia TPA was precisely conceived to assist
7 the contracting States to fight against
8 drug-trafficking, and the Tribunal has to take that
9 objective into account when it looks at its mandate in
10 this case.

11 My third point, and that's a further
12 alternative, if you were to find that you have not
13 only the power to make a determination but the
14 jurisdiction to make a determination, and actually you
15 were going to assess the invocation by Colombia of the
16 Essential Security Interest, we say that the
17 Respondent has not and cannot have breached its
18 obligations under the TPA.

19 Here, I would like to address briefly the
20 Tribunal questions, the three of them.

21 So, the first, Question No. 1.

22 What is the legislative purpose of the

1 Colombian Asset Forfeiture Law? You have on the left
2 side, the provision from the Constitution, Article 34,
3 which refers to the prohibition of confiscation with
4 the exception of what you have before you, which is
5 Asset Forfeiture, I quote, "assets acquired by illegal
6 means to the detriment of the Treasury or resulting in
7 severe deterioration of social morals shall be subject
8 to forfeiture by judicial order." This is what we're
9 talking about.

10 You have on the right side a couple of
11 decisions, important decision by the Constitutional
12 Court of Colombia, which explain the context for the
13 Asset Forfeiture Law, and you see that, again,
14 historically this came about and I think that there is
15 no disagreement between the Parties, as a consequence.
16 I quote from the Court here, "a consequence of the
17 serious proliferation of illicit conduct of very
18 diverse origin, especially drug-trafficking, and the
19 high degree of corruption that had taken hold of
20 Colombian society. Asset Forfeiture arose as society's
21 reaction against organized crime."

22 And you see the second decision of 2016,

1 again, it refers to the law's main purpose being to
2 combat drug-trafficking and illicit enrichment.

3 This was confirmed, on my next slide, by
4 Professor Reyes, the expert for Colombia. On your own
5 time you can refer to that, but if you look at the
6 right side of the page, you see that it's important to
7 keep in mind that all of this was about solving the
8 most complicated problems existing in the fight
9 against drug-trafficking because these things take
10 time. Right? And because the assets of the
11 drug-traffickers could only be seized after they had
12 been criminally convicted for the crimes, there was
13 this policy of allowing criminal proceedings which are
14 very long, to not allow the drug-traffickers to
15 benefit from that.

16 So, this gave, Professor Reyes says,
17 drug-traffickers time to create new mechanisms to
18 conceal their assets. This is the rationale, this is
19 the reason, the raison d'être, of the Asset Forfeiture
20 Law as explained by Professor Reyes.

21 On my next slide and the experts don't
22 disagree, Mr. Moloo actually referred to their own

1 experts. Here you have excerpts from both experts who
2 refer to Asset Forfeiture Proceedings allowing to
3 attack illegal activities, such as drug-trafficking.
4 You see that from Professor Medellín and Mr. Wilson
5 Martínez said the same thing, to fight organized
6 crime, go after the proceeds that fund criminal
7 organizations.

8 Question 2.

9 What is the precise Essential Security
10 Interest that the Respondent is invoking? Mr. Moloo
11 pretends to not know what we're saying and he vaguely
12 referred to a number of different excerpts. It's very
13 clear, Rejoinder, Respondent's Rejoinder, you have it
14 here, I quote: "The position of the Republic of
15 Colombia in this Arbitration is that it seeks, through
16 Asset Forfeiture Proceedings, to fight against
17 organized crime, money-laundering, and
18 drug-trafficking." This is the Essential Security
19 Interest invoked by Colombia, simple.

20 Question three.

21 To what extent the legislative purpose and
22 the Essential Security Interest are similar? There

1 is, of course, an overlap. You see that the fight
2 against organized crime, money-laundering and
3 drug-trafficking is the same thing as the rationale
4 for the law which is to protect the social morals and
5 fight drug-trafficking, et cetera.

6 So, just one word, there is an overlap here
7 in this case, the law itself is broader, as you may
8 recall from Article 34 of the Constitution, it is
9 about the severe deterioration of social morals, and
10 the detriment to the Treasury. So, there may be
11 situations where Asset Forfeiture may occur which are
12 not related to drug-trafficking, but the main purpose
13 of the law is drug-trafficking as you've seen from the
14 history of the Asset Forfeiture Law.

15 One point here, I think that Mr. Moloo in
16 relation to Slide 19 referred to our invocation of the
17 Law being the Essential Security Interest. No, the
18 Essential Security Interest that we invoked is as we
19 have phrased, which you see on the slide, is that,
20 through the Asset Forfeiture Proceedings, we are
21 fighting against organized crime, money-laundering and
22 drug-trafficking. And that is, again, quite simple.

1 Now, moving to my next point--I'm sorry, I'm
2 trying to get rid of the echo that I have. Thank you.

3 So, my next point is, assuming that you have
4 the power to assess Colombia's invocation of Article
5 22.2(b), the standard that you have to apply is a
6 prima facie test that we fulfill. So, the first point
7 is that if you look at the features of Article 22.2,
8 they're all present here. The first is to have
9 Measures that are applied, and that's what we have.

10 We have applied Measures as part of the Asset
11 Forfeiture Proceedings. These are Measures that are
12 considered necessary, so Colombia considers them
13 necessary. And these are for the protection of
14 Essential Security Interests, and as you see, we have
15 said, and I will come back to this, these Measures are
16 plausibly expected to protect Colombia's Essential
17 Security Interests. And in relation to the footnote,
18 once the Exception has been invoked, the Tribunal is
19 bound by the State's determination that these, indeed,
20 are for purposes of the Essential Security Interests.
21 And this determination, you have to defer and
22 tribunals have to, at some point in time, when it's a

1 matter of sovereignty, especially when it goes to such
2 important aspects, as criminal investigation and
3 criminal liability and fight against corruption and
4 fight against money laundering and fight against
5 organized crime, there has to be a point where
6 tribunals have to defer to the determination by States
7 of what is necessary for the protection of that
8 interest, and that's exactly what you see in Footnote
9 2, which is that once it's invoked, the Tribunal shall
10 find that the exception applies.

11 Now, the Claimants allege here that Colombia
12 has not raised it in good faith. Essentially, what
13 they say is that this should have been done earlier,
14 at the outset of the proceeding.

15 I would like to pause here for one second to
16 respond to a point that was made by Mr. Moloo. It was
17 not quite clear. Mr. Moloo put words in my mouth by
18 saying that because at some point last year I said
19 that the purpose of the Asset Forfeiture Proceedings
20 is to determine whether there is a bona fide third
21 party, in this case Newport, somehow I'm accepting
22 that there is a power for this Tribunal to determine

1 the invocation of Colombia, by Colombia, in good faith
2 of the Exception.

3 Good faith in the interpretation of treaties
4 and the invocation and application of treaties is one
5 thing under international law. Good faith under
6 Colombian law in relation to Asset Forfeiture is
7 completely different. So, it's not because you have
8 good faith and the word good faith that is the same
9 good faith or the same mechanism or the same process.

10 So, the first thing I want to say is that
11 Colombian law, indeed and Mr. Moloo went through that,
12 does have a number of safeguards, and a number of
13 processes to determine whether there is a good-faith
14 third party. That is precisely the subject of the
15 ongoing proceedings in Colombia. That's why we say
16 it's completely premature for this Tribunal to make
17 any determination because the process is ongoing.
18 Newport is now a party to that process and can fully
19 defend itself, so this is premature, and it's an
20 ongoing process.

21 And in any event, this Tribunal does not
22 have the power to make a determination of whether

1 Newport is a third party bona fide holder or not
2 because this 1) is the subject of the proceedings in
3 Colombia, and 2) it's not the subject of whether
4 there's a breach of international law, because this is
5 a complete different matter.

6 What this Tribunal needs to do, if this
7 Tribunal says it would like to, in fact, assess
8 whether Colombia has invoked the exception in good
9 faith, all that the Tribunal can do is to determine
10 the plausibility that the Measures taken by Colombia
11 are in response for the protection of the interests
12 that are at stake, which is the fight against
13 drug-trafficking, and I'm coming to this now.

14 So, going to, first, the point of timing,
15 Slide 74, here you have the Resolution 125 of 2016 by
16 the Attorney General's Office which essentially
17 started and initiated the proceedings, you have to see
18 there's reference to priority of the investigation, it
19 involved a criminal organization related to the
20 Envigado Cartel. So, at the time, when these
21 proceedings were initiated, the involvement of the
22 Oficina in the chain of ownership appeared to be

1 historic. Essentially, Iván López, there was some
2 trace of the Cartel appearing in the chain of
3 ownership and that was part of the investigation.

4 You see on the next slide that the
5 initiation is based on Article 25 of the Asset
6 Forfeiture Law, which refers to a cause, I quote from
7 Article 25, "the cost-benefit analysis of the
8 forfeiture of the assets, as well as the risk which
9 such assets create for national security."

10 So, the Resolution relied on this provision
11 and on the national security risk that the historic
12 involvement of the Oficina with the Meritage Lot could
13 entail to Colombia. That was the initiation of the
14 proceedings.

15 And you see on the next slide, the actual
16 resolution of the Attorney General, and the reference
17 to Article 25 and the reference to the cost-benefit
18 analysis and the risk that said assets may entail for
19 national security.

20 On Slide 77, you see that the Superior Court
21 of Bogotá in April 2022 essentially summarized the
22 evidence that was available to the Attorney General's

1 Office at the time that the proceedings were
2 initiated, essentially showing the historic
3 involvement of the Oficina, look at the box here,
4 which we have highlighted, I quote: "It was
5 established that the Envigado Cartel coerced the
6 owners of plots located over a large range of the
7 metropolitan area of Medellín, to place them in the
8 responsibility of agents of an undisclosed principal,
9 executing real estate projects of broad scope with an
10 appearance of legality, which constituted a method of
11 money-laundering. For these reason, the initiation of
12 investigations to clarify the origin and accusation of
13 the property was ordered."

14 So, this is the initiation. This is what
15 Colombia, the Attorney General's Office started
16 looking at the origin and acquisition of the Property.

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
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One last point, my next slide is about the fact that Essential Security is a narrow concept, and this is from the WTO Decision. Mr. Moloo likes this decision. It does refer to that WTO, as you know, is a different animal. It has a different type of provision because it has a list. As you know, I'm not going to go back to that, and you see that here it says that the Essential Security Interest essentially is the core, is the very narrow core of what is the interest of the State, and it says it depends on the particular situation of perceptions of the State and can be expected to vary with changing circumstances. For these reasons, it is left in general to every member to define what it considers to be Essential Security

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1 Interests.

2 And of course, all of this is in the
3 alternative, we say that you do not have the power or
4 the jurisdiction to make that determination, of
5 course, but even assuming that you do, this is what
6 you have to look at. It's the narrow, the core,
7 Essential Security Interest, as determined by
8 Colombia. And you remember also the footnote of the
9 Treaty which says that once it's invoked, you're bound
10 by the determination by Colombia.

11 One last point, and this goes to
12 plausibility, they say, the Claimants, that there is
13 no plausible connection between the Measures and the
14 interest that's protected. Of course, Colombia's
15 Measures are protective of the Essential Security
16 Interest of fighting drug-trafficking and
17 money-laundering by criminal organizations [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

- 1 [REDACTED]
- 2 [REDACTED]
- 3 [REDACTED]
- 4 [REDACTED]
- 5 [REDACTED]
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14 A couple of final points. This is just the
15 standard, my next slide is the plausibility standard.
16 This is from the WTO Russia Case, which is where you
17 see the standard. The minimum requirement of
18 plausibility in relation to the preferred Essential
19 Security Interest, i.e., that they're not implausible
20 as Measures protective of these interests. And as I've
21 shown you, this is more than plausible that what
22 Colombia is doing is indeed to stop the bleeding, stop

1 the money-laundering cycle, and stop drug-traffickers
2 from getting money through an arbitration here.

3 For your own time, this is Slides 87 and 88,
4 is really the summary of our position that this is a
5 derogation of the entirety of the TPA. It's completely
6 premature. This is still ongoing in Colombia and the
7 Meritage has not been forfeited yet. There has not
8 been a determination that Newport is a bone fide
9 without fault third party or not. And the Essential
10 Security Interest, of course, that I discussed, and
11 that you should not allow these Claimants to use this
12 Arbitral Tribunal as an instrumentalization of
13 arbitration for organized--criminal organization and
14 organized crime.

15 Very quickly, Slide 90, they take issue, the
16 Claimants, with the fact that we have raised the
17 illegality objection in relation to money-laundering.
18 Yes, we have. It's your duty, and this is a reference
19 to one example only, Infinito Gold, which is--and
20 that's Rule 41(2) of the ICSID Rules. You have the
21 duty to raise ex officio any--at any stage of the
22 proceedings, anything that goes to jurisdiction,

1 illegality of the investment is one such objection.
2 We have raised it, and you have, of course, to make a
3 determination. Mr. Moloo himself when he writes
4 articles, agrees that international public policy and
5 fraud should prevent the claim from proceeding.

6 He talked about admissibility in his
7 article, by the way, we say it's jurisdiction, but
8 nevertheless, the claims should not proceed as he
9 accepts in his own writings. And, of course, what we
10 say is that because the Investment is tainted by
11 illegality and money-laundering, you do not have
12 jurisdiction overall.

13 And you have on the last slide, our Prayer
14 for Relief, with all of the alternatives. I will not
15 go through that. That's for your own time, and I thank
16 you very much for your patience. That completes our
17 submissions.

18 PRESIDENT SACHS: Thank you very much.

19 I turn to my two colleagues. Do they have
20 questions at this moment?

21 ARBITRATOR PONCET: Just a quick question to
22 Professor Banifatemi, Mr. President.

1 PRESIDENT SACHS: Yes. Please go ahead.

2 ARBITRATOR PONCET: Dr. Banifatemi, turning
3 to what you just said, and again making a
4 hypothetical, if a State were to wend all the way
5 through an arbitration to see how things are going and
6 then raise at the last minute an Essential Security
7 Defense, you are saying, aren't you, that the Arbitral
8 Tribunal will have to defer anyway, and the only
9 answer would be costs?

10 MS. BANIFATEMI: Our answer is very simple,
11 indeed. The very wording of the Essential Security
12 Exception, as agreed by the States, is that, once it's
13 invoked, it's self-judging, and the Tribunal does not
14 have the power to make a determination as to whether
15 or not it was raised in good faith, so that's the end
16 of the matter, and it should be the end of the matter.

17 And you have to consider that rights,
18 including rights for investors, exist only to the
19 extent that States accept to give those rights. If
20 States in a treaty say, "We are going to exclude any
21 obligation when we have or when we are faced with an
22 Essential Security as we deem it, that is the limit of

1 the Treaty, and that is the limit of the protection of
2 investors. It's as simple as that.

3 So, the answer is yes.

4 ARBITRATOR PONCET: I think I've gathered
5 that, by now, but you haven't really answered my
6 question. My question was: Assuming--assume that a
7 State wants to see how things work out, and at the
8 last minute raises the Essential Security Exception,
9 the only thing that an arbitral tribunal can do is
10 adjudicate costs, award costs because this was raised
11 at the last minute, isn't it?

12 MS. BANIFATEMI: The thing that the Tribunal
13 has to do is to take note of what the State is saying-
14 -

15 ARBITRATOR PONCET: I understand that.

16 MS. BANIFATEMI: --in relation to its
17 Essential Security Interest.

18 ARBITRATOR PONCET: I understand that, but
19 there is no other answer than costs.

20 MS. BANIFATEMI: But it may well be that
21 it's in relation to parts of the factual matrix that's
22 before the Tribunal. I don't know in what

1 circumstances the Essential Security Interest can be
2 raised. In this case, what we're saying is that, in
3 this case, the invocation covers the entirety of the
4 dispute because this is about the Property and an
5 asset that is the object of Asset Forfeiture
6 Proceedings in Colombia in relation to
7 narco-trafficking, and the Essential Security that we
8 are pursuing is the fight against corruption, the
9 fight narco-trafficking, fight against
10 money-laundering.

11 ARBITRATOR PONCET: Does it make a
12 difference when it's raised?

13 MS. BANIFATEMI: No, it doesn't, and it
14 shouldn't.

15 ARBITRATOR PONCET: In terms of costs?

16 MS. BANIFATEMI: It's a State's discretion.

17 If a State, under a treaty, has--the States
18 have agreed to have that right and to exclude the
19 application of the Treaty, so that's the limit of the
20 Treaty. Either you do not have such a provision, in
21 which case you do not have this problem, or you have a
22 provision such as the one that you have in the

1 Colombia-China BIT where the Parties said
2 specifically, this does not exclude court review, in
3 that case the Tribunal has the power to make a
4 determination or you have what you have here, which is
5 self-judging. And yes, the Tribunal is bound by what
6 the States are saying.

7 ARBITRATOR PONCET: Sorry for interrupting
8 you again, but I think I have understood that. My
9 question is specifically with regard to the costs of
10 the arbitration. Let's assume the Essential Security
11 Exception is raised at the very beginning or in the
12 middle or at the end of the arbitration, is there an
13 impact in the way an arbitral tribunal should award
14 costs?

15 MS. BANIFATEMI: To the extent that the
16 Tribunal is faced with a self-judging provision--

17 ARBITRATOR PONCET: But with a self-judging
18 provision that can be invoked early, in the middle, or
19 at the end of a case?

20 MS. BANIFATEMI: Well, first of all, just to
21 be clear, we do not accept that we raised it early or
22 late. We raised it when the matter became clear, that

1 is, in relation to narco-traffickers being the
2 beneficial owners of the Property that is before this
3 Tribunal, to be very clear. And we have said, and
4 that is not contradictory, that we have said that this
5 was raised in good faith. That is to give reassurance
6 to this Tribunal.

7 ARBITRATOR PONCET: What do you mean it's
8 not contradictory?

9 MS. BANIFATEMI: It's not contradictory with
10 the position that this is self-judging.

11 ARBITRATOR PONCET: Okay.

12 MS. BANIFATEMI: Now, it depends, if a State
13 determines at the end of the process that there is a
14 national security interest, addressed at that time,
15 how is it a matter of costs? It's a matter of the
16 Tribunal simply giving effect to the State's
17 determination that this is an Essential Security
18 Interest.

19 ARBITRATOR PONCET: Okay. But the fact that
20 the security interest exception is raised does not
21 take away the Arbitral Tribunal--the Arbitral
22 Tribunal's power to adjudicate costs in the

1 arbitration; right?

2 MS. BANIFATEMI: The general power to give
3 costs remains.

4 ARBITRATOR PONCET: In doing it, in making
5 this assessment, an arbitral tribunal, though, in your
6 view, not authorized to adjudicate whether or not the
7 Exception was raised properly, could still say, "I
8 think it would--should have been raised earlier and
9 therefore I'm awarding costs."

10 MS. BANIFATEMI: That assumes that the
11 Tribunal, in fact, engages in the assessment of the
12 manner in which the invocation occurred.

13 ARBITRATOR PONCET: Not the manner, but the
14 timing.

15 MS. BANIFATEMI: It's the same. The
16 circumstances in which the Exception was invoked.

17 Again, it's self-judging, so what we say and
18 what the U.S. has said earlier today, you have heard,
19 is self-judging. It's a discretion of the State to
20 make its own--

21 ARBITRATOR PONCET: We have understood your
22 position.

1 MS. BANIFATEMI: By its nature it's
2 Essential Security. So nobody is in a better place
3 than the State to determine that it is Essential
4 Security. So, whether it's early or in the middle or
5 the end doesn't make any difference because that
6 discretion should be untouched.

7 So, there should not be any costs related to
8 that because, by definition, if you accept that it's
9 self-judging, there should not be any determination,
10 including as to costs, in relation to the invocation
11 and the circumstances of the invocation.

12 Costs kick in only if you're in the
13 alternative of the Tribunal having the power to make
14 an assessment of the invocation and how and when it
15 was made. In that case, the Tribunal has the power of
16 the costs. Otherwise, it should defer to the State
17 and its invocation of its Essential Security
18 Interests.

19 ARBITRATOR PONCET: You will agree with me,
20 won't you, that this effectively means that if there
21 is an Essential Security Exception or Defense in a
22 treaty, the Investor is hands and feet bound. His

1 only chance to obtain an award is purely in the hands
2 of the host State which can make its own decision as
3 to whether or not it's going to raise that exception,
4 invoke that exception. There is no protection for the
5 Investor who faces or files a claim based on the
6 Treaty in which there is a provision allowing the
7 State to raise the Essential Security Exception?

8 MS. BANIFATEMI: That is why I said earlier
9 that there is no absolute right of an alleged
10 investor--

11 (Overlapping speakers.)

12 MS. BANIFATEMI: The rights exist only to
13 the extent of what the States have accepted. When
14 there is an Essential Security Exception, the States
15 have accepted obligations with the possibility that,
16 in the event that there is an Essential Security
17 Interest situation, they may exclude the obligations.

18 So, because this is a complete derogation to
19 the application of the Treaty, there is no right for
20 the Investor, and that's a risk that the Investor
21 takes. Again, the right exists only insofar as the
22 States have accepted that right to exist. If you do

1 not have that provision, there is a broader protection
2 for the Investor. If you do have that protection,
3 it's only to the extent--

4 ARBITRATOR PONCET: The provision, you mean,
5 yes.

6 MS. BANIFATEMI: Yes, the Essential Security
7 Provision, yes.

8 ARBITRATOR PONCET: Thank you very much.

9 MS. BANIFATEMI: Thank you, Dr. Poncet.

10 PRESIDENT SACHS: Mr. Moloo, you will, of
11 course, have the opportunity to comment on this
12 exchange of arguments and questions.

13 We will now have another break of 15 minutes
14 before we have the break--

15 ARBITRATOR PEREZCANO: I do have a question,
16 Mr. President, if I may.

17 PRESIDENT SACHS: Yeah. Please go ahead.
18 I'm sorry.

19 ARBITRATOR PEREZCANO: Thank you.

20 Ms. Banifatemi, Mr. Moloo made the point
21 earlier today that Colombia, in its Rejoinder,
22 accepted that the standard of review was good faith,

1 and Colombia did, indeed, say in its Rejoinder--I
2 think Mr. Moloo referred to a different paragraph of
3 the Respondent's Rejoinder or a couple of paragraphs,
4 but at Paragraph 43, the Respondent did say expressly:
5 "it is the Respondent's Submission that the Tribunal's
6 scope of review of Colombia's invocation of the
7 Exception is strictly circumscribed to an examination
8 of whether the exception of the Essential Security of
9 Article 22.2(b) has been invoked in good faith by
10 Colombia."

11 Now, the U.S. made the point earlier today
12 that it was entirely non-justiciable and that appears
13 to have been the position that Colombia has also
14 embraced, but how does one reconcile the Respondent's
15 submission in regard to the review in terms of good
16 faith with the argument that it is entirely
17 non-justiciable; and, therefore, there is really
18 nothing for the Tribunal to do. And, you know, you
19 and Arbitrator Poncet discussed this issue, but in the
20 end, if I understood you correctly, you said not even
21 as regard to costs. So, how does one reconcile the
22 position as expressed initially by the Respondent to

1 the position as has been expressed subsequently,
2 including during the course of this Hearing?

3 ARBITRATOR PONCET: I think you're on mute,
4 Yas.

5 MS. BANIFATEMI: I'm sorry, if you allow me,
6 I would like to look at Paragraph 43 of the Rejoinder
7 which I don't have in front of me because I'm not sure
8 that it was referred to correctly by Mr. Moloo, so,
9 would you allow me to come back to this after the
10 break?

11 PRESIDENT SACHS: Yes, we do allow you. I
12 think we need a break now, that was a question put to
13 you. I, myself, have another question to both of you,
14 which relates to the Tribunal's Questions Number 1, 2,
15 and 3.

16 So, if I understand correctly, you seem to
17 agree that the purpose, the protection purpose, of the
18 law and the content of the Essential Security Interest
19 that has been invoked is more or less identical. You
20 spoke of overlap, but this is my understanding.

21 Now, if this is so, could one consider that
22 the State has concretized its security interest in the

1 field of narco-trafficking fighting through the law
2 and to provide it for an exception, namely the
3 good-faith acquisition? It's national law. You
4 mentioned that this has nothing to do with
5 international law, but my question is, is that
6 position really correct? Could one say, isn't that an
7 exception to the Exception? That is my question. You
8 don't have to answer it now, but I think the question
9 is clear, and the Claimant has already, to some
10 extent, commented on this question, but I just wanted
11 to make it clearer, what is in my mind at least, to
12 have your position as to this issue.

13 Thank you very much.

14 MS. BANIFATEMI: Thank you.

15 ARBITRATOR PEREZCANO: May I make a quick
16 clarification, Mr. President, before we break?

17 PRESIDENT SACHS: Yes, certainly.

18 ARBITRATOR PEREZCANO: Thank you.

19 Just to clarify my question. My
20 question--my comment about what Mr. Moloo said earlier
21 today was just that he referred to it. My question
22 was not about what he said earlier today. My question

1 goes directly to what the Respondent said in its
2 Rejoinder, which I quoted from verbatim, so that's my
3 question.

4 As a side comment, I said Mr. Moloo raised
5 this point earlier today. So worry about my question
6 rather than how Mr. Moloo may have phrased it or not.
7 Thank you.

8 MS. BANIFATEMI: Thank you. That's
9 understood.

10 PRESIDENT SACHS: All right. So, let's have
11 a break now. We can continue at 5 past--in our time,
12 it's 5 past 8:00, so 5 past the hour that applies to
13 your time zone, if you agree.

14 Thank you very much.

15 (Recess.)

16 PRESIDENT SACHS: Sara, would you kindly
17 inform the Parties about the time budget that is left.

18 SECRETARY MARZAL: Yes, I sent actually an
19 email with--the time is 13 minutes for Respondent, 23
20 for Claimants.

21 PRESIDENT SACHS: Yes, we will not run by
22 the chess clock, but please have it in mind when

1 making your final comments.

2 So, we invite the Claimant first, Mr. Moloo.

3 MR. MOLOO: Thank you, Mr. President.

4 We do have a few slides that we're going to
5 send through, but if you can indulge me, given the
6 short amount of time, I will put them up on the
7 screen, unless you would like to wait 30 seconds for
8 them to come through by email.

9 PRESIDENT SACHS: We will wait.

10 MR. MOLOO: Okay.

11 (Pause.)

12 MR. MOLOO: It's been sent, so if the
13 Tribunal Members could let me know when it appears in
14 their in-box, I know Professor Perezcano, you prefer
15 to mark things up electronically, so let me know when
16 you receive it, and I will commence.

17 (Pause.)

18 MR. MOLOO: Dr. Poncet, are you saying you
19 received it? Okay.

20 ARBITRATOR PEREZCANO: I've got it.

21 MR. MOLOO: Okay, perfect. Thank you for
22 your patience.

1 REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANTS

2 MR. MOLOO: So, Members of the Tribunal,
3 there are just a few points I would like to raise in
4 rebuttal. The first point I wanted to address were
5 some of the due-process issues that Dr. Banifatemi
6 raised at the outset.

7 I think it is a little surprising, quite
8 frankly, that Respondent raises due-process concerns.
9 We are here discussing an Essential Security Defense
10 that was raised so late in these proceedings, and
11 quite frankly, I think the Tribunal as gone out of its
12 way to allow Respondent to raise this belated
13 objection. You will recall that, when it was raised
14 in 2022, after both of Claimants' primary submissions
15 in this Arbitration has already been submitted, they
16 characterized their defense as a jurisdictional
17 defense, and you will be well-aware that ICSID Rule
18 41(1) says that jurisdictional defenses must be raised
19 in the Counter-Memorial.

20 In Procedural Order No. 9, the Tribunal
21 allowed Respondent to raise this objection on a
22 belated basis, excepting for purpose of allowing it,

1 that it was being raised as a jurisdictional objection
2 because the Tribunal said it has discretion to deal
3 with jurisdictional issues at any point in the
4 proceedings, again showing it was going out of its way
5 to hear Respondent's objection.

6 Now, at that point, it was raised as a
7 jurisdictional objection, but it has morphed into
8 something that is not a jurisdictional objection, and
9 this is important because that's the basis on which
10 they sought to have it admitted late into the
11 proceeding. Now what they're saying is about
12 justiciability, which is not about jurisdiction.
13 Justiciability is this Tribunal has jurisdiction, but
14 it is not allowed to touch this particular issue.
15 That's justiciability goes to. It goes to
16 admissibility, not to jurisdiction. That's a merits
17 defense. And, in Procedural Order No. 1, at 14.2 and
18 14.3, it was made very clear that any defenses must be
19 raised in the Counter-Memorial, and Article 26 of the
20 Rules makes it clear, if something is late, it's late.

21 Yet, here we are in an entirely new phase us
22 having to deal with this new defense, and you have

1 Respondent saying that their due-process rights have
2 not been adhered to despite the fact that we are in a
3 Third Hearing because of this belated argument.

4 They then complain that the Transcripts that
5 they sought to have admitted were not allowed by the
6 Tribunal, and they said we gave them in advance to
7 Claimants and thought it would be helpful, they said
8 it would be helpful to them. Why did they object?

9 The reason we objected is because the first time we
10 saw those Transcripts were with the post-closing
11 written submissions of Respondents. They didn't give
12 it to us before then. That's the first time we saw
13 it. There is no more written submissions to be had in
14 this proceeding, lest we continue this proceeding
15 longer than it has already gone for with further
16 written submissions, so we objected on a procedural
17 basis. We said this is a brand-new exhibit, we had
18 never seen it. When we asked for this at the Hearing,
19 we were told no, we're not going to give you
20 Transcript, and then with your post0closing
21 submissions, you're producing these Transcripts and
22 relying on them for the first time, making brand-new

1 arguments, including relying on the quote that they
2 have now put in their slide deck before you today.

3 Our objection was merely a--it was a
4 due-process objection. It was--that was submitted to
5 the record too late. [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] [REDACTED]

12 [REDACTED] [REDACTED] An assessment of good
13 faith has to happen in 2013 when they're acquiring the
14 Property.

15 But even then, there is no evidence
16 whatsoever in the record [REDACTED]

17 [REDACTED]

18 [REDACTED] No evidence whatsoever.

19 Mr. Seda was not asked about this at the Hearing.
20 He's the only witness we have that would have been
21 able to testify to this. He was not cross-examined
22 about this. He was not asked any questions about any

1 of this. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5 So, there is simply no evidence that
6 establishes anything that they are seeking to
7 extrapolate.

8 So, aside from the due-process issue of why
9 we objected to having the Transcripts admitted with
10 the Post-Closing Submissions, substantively, there is
11 really nothing at all in there that should give rise
12 to any legitimate concern for this Tribunal, aside
13 from the timing issue of this all being 2017, once the
14 Property has already been taken, nothing-- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1

3

That's what I will say about the due-process objections that have been raised--well, there is one more thing, and this I will put up a slide.

6

In dealing with the fact that they're relying on this evidence that is not in evidence, they say, oh, we're doing the same thing. They point to our Slide 105, and they say this diagram that we are relying upon is nowhere in the record. That's just wrong. That's at C-453, which is a video. Maybe they haven't watched the video, but 52 seconds into the video, here is the chart that we have, we include in the letter, by the way, to the Tribunal February 24, 2023--there was no objection raised at that point in time--and here it is. This is a screen-shot from the video from where we have taken that particular diagram. It's not a diagram we created. This is a diagram that's from, presumably, the Government. So, it is in the record, and it's at C-453 at 52 seconds.

21

22

The second thing I want to deal with is the application of the Essential Security Provision, and

1 Professor Perezcano is correct that, at Paragraph 43,
2 and we had referred to it in our Closing Submissions
3 and we have it up here for you as well, that it is
4 clear, crystal-clear. With all due respect, I don't
5 think the representation made earlier was fair with
6 respect to Respondent's position, that what they're
7 saying today is consistent with what they said before.
8 What they said before was, it is Respondent's
9 Submission that the Tribunal's scope for review of
10 Colombia's invocation of the Exception is strictly
11 circumscribed to an examination of whether the
12 Exception of Essential Security of Article 22.2(b) has
13 been invoked in good faith by Colombia. That's what
14 they said.

15 And they articulated the two-prong test that
16 is found in the WTO case. That is what they said. We
17 will hear how they're going to explain this away
18 today, but the Tribunal can read for itself, they
19 acknowledge this is before we said anything about the
20 Essential Security Defense. They're the ones who
21 acknowledged, by raising the Essential Security
22 Defense, they must meet a good-faith standard.

1 They've changed positions because they can't meet that
2 good-faith standard. That's why they've changed
3 positions.

4 And they can't meet that good-faith standard
5 for two reasons. One is defining the standard, in
6 defining their Essential Security Interests, it must
7 be the case that, in dealing with narco-trafficking,
8 you must also acknowledge the Exception that is
9 contained within domestic law. Otherwise, it would
10 not be a good-faith definition of the Essential
11 Security Interest, and that is one of the prongs of
12 the good-faith analysis. Are they defining the
13 Essential Security Interest in good faith? How can
14 you say you are protecting narco-traffickers without
15 acknowledging that the very law that protects against
16 narco-trafficking, et cetera, with respect to Asset
17 Forfeiture, also acknowledges an exception for
18 good-faith third parties? You can't because taking
19 property from good-faith third parties does nothing to
20 advance the Essential Security Interests of protecting
21 against narco-traffickers. So, it goes to the very
22 definition of the Essential Security Interest.

1 But, second of all, it goes to the timing,
2 and here I want to look at the provision itself
3 because it's clear from the provision itself that--let
4 me take a step back.

5 There must be a rational connection, in both
6 WTO cases I cited earlier, between the Measure and the
7 Essential Security Interest, so you must adopt the
8 Measure for the Essential Security purpose. That's
9 clear, based on the wording itself. You don't even
10 need to go to the good-faith test but let's go to the
11 wording. It's on the next slide on Article 22.2.

12 It says: "Nothing in this Agreement shall
13 be construed to preclude a party from applying
14 measures," so it can take measures, I can adopt a
15 measure, "if I consider that measure necessary to
16 protect my Essential Security Interests." What does
17 that mean from a timing perspective? It means that I
18 must adopt the Measure for that Essential Security
19 purpose, so I must obviously know about the Essential
20 Security Interest at the time I'm adopting the
21 Measure. Otherwise, I'm not adopting a measure to
22 protect my Essential Security Interest if I don't know

1 about the Essential Security Interest at the time;
2 right?

3 So, I think this is really important because
4 you can't invoke a measure for an Essential Security
5 purpose for an Essential Security purpose that doesn't
6 exist at the time you invoke the Measure. It goes
7 beyond the good-faith analysis. It's the very
8 language of the provision. You must invoke the
9 Measure for the Essential Security purpose. You
10 cannot invoke the Measure for a different purpose,
11 which is what they're saying they did in this case,
12 and find out later on find out something and say, oh,
13 I have an Essential Security purpose. Too late. You
14 have to invoke a measure for that purpose.

15 The WTO cases that we rely on, by the way,
16 in those cases--and we go back two slides--the United
17 States made the same submissions it made in those
18 cases that they are making here. They're saying it's
19 non-justiciable because those provisions were
20 self-judging. You can see that in 7.52 of the
21 Ukraine-Russia Case. They said--the United States
22 says that it's non-justiciable, and the Panel rejected

1 that. The Panel rejected the United States's
2 submissions in this case, just like you should do in
3 this case.

4 So, the timing issue goes bot to the
5 good-faith analysis because it can't be positively
6 related, but it also goes to the very wording of the
7 provision.

8 The third point I want to briefly touch on
9 is, from a substantive perspective, there is no
10 evidence at all that Mr. Seda knew [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

18 And, by the way, he wasn't aware when they
19 took the property--he wasn't aware until this
20 Arbitration--and nothing in the record suggests
21 otherwise.

22 So, from a substantive perspective, it

1 doesn't change anything with respect to the good-faith
2 analysis. [REDACTED]

3 [REDACTED] I can assure you of that at
4 Procedural Order No. 2, the Redfern Schedules, Request
5 No. 53, Colombia made a request for any evidence
6 relating to third-party funders in this Arbitration,
7 and we disclosed that Tenor Capital was funding this
8 Arbitration.

9 So, unless they're accusing us as counsel of
10 like or misrepresenting or withholding information
11 from this Tribunal, there is no evidence--there is no
12 support--for that proposition that anybody other than
13 Tenor Capital is funding this Arbitration.

14 I can tell you, as counsel, that [REDACTED]
15 are not going to get any proceeds from this
16 arbitration.

17 And then they say, well, the thing that's
18 different, though, is [REDACTED] were still involved
19 at the time we took the Property. They already gotten
20 some money for purchase of the Property.

21 And here I want to take you to another
22 slide, the Asset Forfeiture Law itself. Let's assume

1 for the sake of argument that [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED] Article 16 makes it clear that if

15 assets of legal origin whose value is equivalent to

16 the assets described in the proceeding numbers

17 whenever the action is inadmissible due to recognition

18 of rights of the third party acting in good faith

19 without fault are at issue, then you go after

20 other--you go after assets of legal origin of those

21 individuals.

22 So, what does that mean? That means that,

1

[REDACTED]

2

[REDACTED]

3

[REDACTED]

4

[REDACTED]

5

[REDACTED]

6

[REDACTED]

7

[REDACTED]

8

Go to the next slide. Next slide, please.

9

Dr. Wilson Martínez makes it clear that the

10

correct course of action in that situation would have

11

been to attach the payment rights, the profits of the

12

Trustee, and to identify who was a good-faith buyer

13

and not affect their property rights. So, there is a

14

way to do this. You go after the Property--if there

15

is a money-laundering cycle here, you could cut off

16

the money-laundering cycle by taking and garnishing

17

any of the proceeds that were going to go to illicit

18

third parties, not--and you preserve the Property that

19

is in the hands of the good-faith parties. That's

20

what you're supposed to do.

21

So, as Dr. Martínez explains at

22

Paragraph 35, once it had been confirmed that Newport

1 was a good-faith buyer--we're still waiting for that,
2 by the way; haven't heard it yet, but all the Attorney
3 General's Office had to do was to look for the next
4 person in the chain title, in this case it's La Palma
5 Argentina, and you assess their good faith; and, if
6 they are not in good faith, then you could go after
7 their assets. That's what the Asset Forfeiture Law
8 allows you to do. But that's not what they did.

9 So, if you go to the next slide, this is
10 their money-laundering scheme that they've identified.

11 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

7

The last thing I want to end on is--the last

8

thing I want to end on is the Preamble because we

9

heard a little bit about it from Professor Banifatemi

10

earlier.

11

Before I get to the Preamble, I want to

12

mention something that Professor Banifatemi mentioned.

13

She said again earlier today that this case is

14

actually premature, and I showed you where something

15

similar that was said, I think, at the Opening because

16

Newport's good faith is going to be determined. When?

17

When? How long do we have to wait? It cannot be that

18

this case is premature, after the Property had been

19

taken for seven years. If it's premature, then you

20

know what they should do? They should never have

21

assessed Newport's good faith because it will be

22

forever be premature.

1 No. At some point it is a due-process
2 violation. At some point it is a de facto
3 expropriation. At some point it is a
4 national-treatment violation when you take some
5 foreign investor's property but you don't take local
6 investors that are similarly situated. That point
7 passed long ago. Certainly by now, when they told you
8 a year ago, a year from now we will know, and no
9 progress has been made. Certainly by now this
10 Tribunal can conclude that we're past the point of
11 return; that the due-process violations of the
12 Claimants have been violated; that there has been de
13 facto expropriation; that there is disparate treatment
14 between nationals whose property has not yet been
15 taken seven years later and whose investor's
16 properties were taken seven years ago. It cannot be
17 the case this case has been premature. There has
18 clearly been a violation that has crystallized.

19 And I end with the Preamble that Professor
20 Banifatemi took you to. This is the purpose of the
21 Treaty. This is the purpose of the Treaty, outset of
22 the Treaty. The purpose of this Treaty is to promote

1 economic development in order to reduce poverty and
2 generate opportunities for sustainable economic
3 alternatives to drug-crop production. And I ask the
4 Tribunal to consider whether this particular
5 investment was exactly what this Treaty was meant to
6 promote. Was this investment advancing
7 narco-trafficking?

8 You have heard us talk about this
9 investment. You've heard the jobs it's created, the
10 investment in the hospitality sector; the training of
11 the 700 people on the construction site. I would
12 suggest to you that this is exactly what this Treaty
13 was meant to do. And every provision in it, including
14 the Essential Security Provision, must be interpreted
15 in light of this object and purpose, to move on from
16 the drug-ridden history of Colombia and to allow for
17 legitimate economic development like Mr. Seda and
18 investment vehicles engaged in. But that's not what
19 Colombia wants you to do, and I will end on this
20 slide, next slide.

21 They said, you know what? Medellín is
22 riddled with a history of drug-trafficking. And if

1 there is one legitimate expectation that Mr. Seda
2 should have had, it is that investing in Colombia,
3 when they're investing, they're investing in one of
4 the worst regions and most dangerous regions, but then
5 how do you move on from the history of
6 narco-trafficking, and how do you ever develop a
7 legitimate business in this economy if basically what
8 they're saying is no, you can't, you can't ever invest
9 here because of that history. That is fundamentally
10 contradictory, and it cannot be what this Treaty was
11 meant to achieve.

12 We urge the Tribunal to find for the
13 Claimants not just for these Claimants but so that
14 other investors know if that if they come and invest
15 in Colombia, they have the protection of this Treaty.

16 Subject to any of questions, those are our
17 submissions.

18 PRESIDENT SACHS: Thank you, Mr. Moloo.

19 My two colleagues, do you have questions?

20 ARBITRATOR PONCET: Could I have a quick
21 question, Mr. President?

22 PRESIDENT SACHS: Yes, certainly.

1 ARBITRATOR PONCET: Mr. Moloo, to make sure
2 I understand, you are, in effect, asking us, if we
3 reached the conclusion that there is a violation of
4 the Treaty, in particular if we reach the conclusion
5 that [REDACTED]
6 [REDACTED] is a fabrication, a mistake, whatever you
7 want to call it, you are asking us, aren't you, to
8 reach that conclusion, and then to draw from that
9 conclusion that Article 22.2(b) can no longer be
10 invoked. That's effectively what you're asking, isn't
11 it?

12 MR. MOLOO: As part of the analysis--that's
13 one of our arguments, Dr. Poncet, is that, in doing a
14 good-faith analysis, you, the Tribunal, should accept
15 that, in articulating that Essential Security
16 Interest, protection of narco-trafficking, the law
17 itself acknowledges the Exception of good-faith third
18 parties, so the Tribunal can and should assess whether
19 or not Mr. Seda and the Investors were good-faith
20 third parties, and that includes an assessment along
21 the lines what you're saying.

22 ARBITRATOR PONCET: It also means, does it

1 not, that we should not only reach that conclusion,
2 but conclude that even though Mr. Seda et al. would be
3 in perfect good faith, even though the provision would
4 be invoked or because the provision of 22.2(b) would
5 be invoked despite that, that would remove the
6 interpretation of 22.2(b) that your opponent suggests,
7 namely a sort of you know like a red card in a
8 football game; right? Once it's out, everybody stops,
9 and the player goes out, and must disregard that.

10 MR. MOLOO: What we're saying is it's not as
11 simple as a red card that you can just raise and get
12 out of jail free for many reasons, including that the
13 Essential Security Interest was not identified at the
14 time that the Measure was taken, and that's what the
15 provision expressly requires.

16 ARBITRATOR PONCET: That pre-supposes, does
17 it not, that we have the right, the power to assess to
18 what extent the 22.2(B) Exception is raised in good
19 faith? Your opponent was vociferously--not
20 "vociferously," your opponents challenged that very
21 much.

22 MR. MOLOO: Right.

1 So, I would say two things. Before I get to
2 good faith, just in the interpretation of the
3 provision itself--and if we could go back to 32 of
4 that slide, they are only able to invoke this
5 provision if they are saying that the Measure was
6 taken to protect an Essential Security Interest.
7 They've told you that it was not taken to protect an
8 Essential Security Interest, so this provision does
9 not apply, in my view, because they told you the
10 Measure was taken because of some other reason. It
11 was taken because of Iván López or whatever the reason
12 was. It was not taken. I think that is undisputed.
13 The Measure was not applied to protect the Essential
14 Security Interests because the Essential Security
15 Interests didn't appear, didn't--wasn't known until
16 2022.

17 So, setting aside the good faith for a
18 moment, this does not apply because there was no
19 measure that was taken to protect the Essential
20 Security Interests of Colombia. The Measure was taken
21 for some other purpose. Iván López was associated
22 with the title, whatever it was, but they have told

1 you expressly that it was not taken for the Essential
2 Security purpose that they have now identified. So,
3 that's one.

4 The second argument is the good-faith
5 argument that we are saying this Tribunal, pursuant to
6 Article 26 pursuant to the Vienna Convention on the
7 Law of Treaties and pursuant to dispute-resolution
8 clause in this Treaty has the authority to interpret
9 and assess whether or not it's being applied in good
10 faith, pursuant to Article 26 of the Vienna Convention
11 on the Law of Treaties as interpreted by other
12 tribunals.

13 ARBITRATOR PONCET: Thank you.

14 PRESIDENT SACHS: If there are no other
15 further questions, we would then have a short break
16 again before we hear from the Respondent, meaning 5 to
17 9:00 our time? Unless you tell us that you don't need
18 15 minutes.

19 MS. BANIFATEMI: We would be needing the 15
20 minutes, Mr. President. Thank you very much.

21 PRESIDENT SACHS: Okay. Let's say 5 to
22 9:00; yes?

1 MS. BANIFATEMI: Yes. Thank you.

2 (Recess.)

3 PRESIDENT SACHS: We would invite the
4 Respondent for their Rebuttal Argument.

5 Ms. Banifatemi, the floor is yours.

6 MS. BANIFATEMI: Mr. President, Ms. Herrera
7 will say just one word before I continue.

8 MS. HERRERA: Thank you very much,
9 Mr. President.

10 REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

11 MS. HERRERA: One quick point, on the
12 interpretation that Mr. Moloo has again put forward to
13 this Tribunal regarding the Asset Forfeiture Law and
14 in particular article 16(10) that he read about going
15 after assets of legal origin when the actual asset is
16 not available, the one of illegal origin, because the
17 action is not admissible.

18 First of all, it's not true that the opinion
19 of Mr. Martínez is unrebutted. It's not true that--I
20 actually cross-examined Mr. Martínez on that, and I
21 actually asked him about why he happened to say
22 nothing about this--no interpretation of this Article

1 in his opinion that he provided for Corficolombiana in
2 2016. So, not only it was a novel interpretation,
3 also the Claimants only put it forward in their Reply.

4 Second point, please, I refer you to the
5 Report of Professor Reyes that explains very clearly,
6 Paragraphs 179 and following, how this operates,
7 Article 10. In fact, first of all, you have to have
8 the determination that there is a bona fide third
9 party, that means that there has been a judgment; and
10 then, only then, you can go towards an asset of legal
11 origin.

12 Thank you.

13 MS. BANIFATEMI: And, Mr. President, Members
14 of the Tribunal, I will address very briefly first the
15 due-process points on [REDACTED] [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

1

[REDACTED]

2

[REDACTED]

3

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED] [REDACTED]

9

[REDACTED]

10

[REDACTED]

11

[REDACTED] That's the first point.

12

The second point, I want to take a bit more

13

time, is on the Essential Security Interest.

14

First of all, there is no issue of due

15

process as regards the Claimants. They have had ample

16

opportunity--at least three times--to fully brief the

17

matter, including today, so nobody can say that they

18

have been restricted in any way in briefing this

19

matter.

20

The first point I want to make on this is

21

the question of good faith, generally, and here I

22

would like to go back to the question of Dr. Poncet.

1 First of all, even though, in our
2 submission, this is self-judging, so Colombia does not
3 have to show good faith, Colombia, just to reassure
4 the Tribunal, has confirmed that it has raised this
5 exception in full good faith. How do you know it, by
6 the way? You know it from the timeline that I showed
7 you earlier.

8 Colombia did not raise--this is a serious
9 matter. Colombia did not raise the Exception until it
10 was certain and it had evidence [REDACTED]

11 [REDACTED]
12 [REDACTED] of the Meritage, which
13 is the asset that is the subject of this arbitration.
14 So, that is how seriously Colombia has taken this
15 matter and, therefore, how much in good faith it has
16 acted.

17 So, it's not, to respond to Dr. Poncet, it's
18 not late or too late, it's as soon as it became clear
19 to Colombia that the subject matter of this
20 arbitration has to do with narco-traffic, and the
21 benefit of this arbitration to narco-traffickers.

22 [REDACTED]

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[REDACTED]

[REDACTED]

when the representation of Colombia was provided with
new evidence, that's the time at which the
determination was made, so just that timeline shows
you the good-faith invocation of the Exception by
Colombia.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] And so, you do have the evidence, and you
have to look at that evidence and make a determination
on that basis, if you are going to look at the
good-faith issue where, in the alternative, of course,
in relation to the invocation of the exception.

1 So, you cannot ignore that evidence. That
2 is an extremely serious matter. You cannot ignore
3 that evidence. It's before you, and it's not enough
4 for Mr. Moloo to say: "I don't like that evidence,
5 therefore it doesn't exist."

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 That's the first point I wanted to make on
12 the invocation of the Essential Security Interest.

13 The second point I want to make is that,
14 again going to the timing--and that's also to Dr.
15 Poncet's question--there is no statute of limitations.
16 Article 22.2 doesn't say at what point in time it can
17 be raised, in what manner. It is a full discretion of
18 the State who makes that determination, when the State
19 makes the determination that this is within the
20 protection of its Essential Security Interests, so no
21 such statute of limitations.

22 Now, addressing the question of Professor

1 Perezcano--and the rejoinder specifically--the
2 position has evolved, but it has not evolved today.
3 The position evolved last year, as you may recall the
4 justiciability and the fact that this is
5 non-justiciable arose at the Hearing, and that's the
6 time at which we argued non-justiciability as an
7 additional ground, and the three layers that you have,
8 one non-justiciable, in the alternative no
9 jurisdiction, in the alternative, further alternative,
10 raised in good faith. So, you have the three layers,
11 and that was last year during the Hearing, nothing new
12 there, so this is our position, indeed. Our position
13 is that this is non-justiciable for all the reasons we
14 have given.

15 And if you recall, at that time, it was
16 after we had access to the travaux préparatoires and
17 that the travaux préparatoires show, indeed, that the
18 Parties did raise the matter as a non-justiciable
19 matter. So, that is the evolution of the position
20 last year at the Hearing after we had access to the
21 travaux préparatoires.

22 Now, one point that Mr. Moloo made is that

1 this is somehow a merits defense. This is not a
2 merits defense. This is a defense that goes to the
3 power of the Tribunal. "Non-justiciable" means that
4 there is no legal review by anyone, a tribunal for
5 that matter, of the circumstances in which the
6 Exception is invoked. So, that is not a merits
7 defense; that is a power defense. You do not have the
8 power. That's the first layer.

9 In the alternative, you don't have the
10 jurisdiction.

11 In the third layer, it's even before merits.
12 In the third alternative, it's--if you would like to
13 determine the good faith, you have ample evidence to
14 show that this is, indeed--has been raised in good
15 faith, and the timeline and everything else that we
16 said today shows that, and then you go to the merits,
17 and on the merits this doesn't apply. So, it's wrong
18 for Mr. Moloo to confuse justiciability with the
19 merits issue.

20 Now, on the provision itself, nothing in
21 this Agreement shall be construed to preclude a Party
22 from applying measures. Mr. Moloo is trying to

1 confuse the matter and say that the Measure was taken
2 at some point in time, and therefore at that time the
3 Measure was applied. Again, you have to read the text
4 for what it says. The text says that nothing in this
5 Agreement--this is a very broad exclusion--"shall be
6 construed to preclude a Party from applying measures."
7 What it means is that the State can apply measures
8 that it considers necessary for the protection of its
9 Essential Security Interest. What it means is that,
10 therefore, there cannot be any assessment, any
11 adjudication of the application of those Measures, and
12 what it means is that, therefore, there is a whole
13 exception of the application of the Treaty to those
14 Measures.

15 I refer you to exactly what the U.S. said
16 earlier today. This is the home State of the
17 Claimants, and this is our counter-party to the
18 Treaty. I quote, referring to the Claimants' point
19 that I quote, "the Exception supports the conclusion
20 that Article 22.2(b) merely allows the State to apply
21 or continue to apply measures." The U.S. Government
22 said, I quote, "the U.S. disagrees. Article 22.2(b) is

1 an exception that is intended to entirely exclude from
2 the scope of the obligations under the TPA those
3 Measures covered by Article 22.2(b), as there is no
4 obligation under the TPA with respect to covered
5 measures. A claimant cannot establish that per
6 Article 10.16," et cetera, and I discussed that
7 earlier.

8 So, indeed, it is a derogation, an entire
9 exclusion of the Treaty once the provision has been
10 invoked.

11 Now, Mr. Moloo refers to the GATT and the
12 fact that the U.S. was not following the GATT. As you
13 know, the GATT has a completely different provision.
14 It has a list of three specific circumstances.
15 Therefore, the Panel in the GATT decided that, on the
16 very limited--very limited--standard of review, they
17 will look at whether one of those circumstances is
18 fulfilled. You don't have that here. This is a very
19 broad exclusion, which says: "Measures that it
20 considers necessary for the protection of its
21 Essential Security Interests." There is no list.
22 There is no specific circumstances that the Tribunal

1 can double-check.

2 And, if you look at the actual case law,
3 there is no case law, and that's why he likes Eco Oro,
4 he likes the GATT. There is no case law in relation
5 to the provision that we have. No tribunal has ever
6 rendered a decision on this basis. You would be the
7 first tribunal, so you have a very heavy
8 responsibility of applying correctly what the two
9 States are telling you in this case. This is an
10 authentic interpretation of how this should be read,
11 and this is binding on this Tribunal.

12 This takes me, I believe, to the last point,
13 Mr. President, and this is in response to your
14 question, and I think I have about three or four
15 sub-matters to address here.

16 The first is--maybe I should start, in fact,
17 by addressing what Mr. Moloo said about--and he takes
18 issue: "seven years, oh my god, this is very long, and
19 de facto expropriation", and so forth. What he didn't
20 tell you or they don't remind you of, is that in those
21 seven years you have had one appeal which was
22 successful for Newport, where Newport sought to be

1 recognized as an afectado. Having been recognized, so
2 they used the remedies under Colombian law, they were
3 successful in that relation, and they have now been
4 admitted as an afectado party. So, that's time they
5 have benefited from the Colombian law remedies.

6 You had COVID, of course, and COVID has had
7 an impact, you cannot ignore that either.

8 And the third is that--what they don't tell
9 you--is that they currently have an appeal ongoing
10 where they are asking the courts to annul the entire
11 asset forfeiture proceeding. They are taking benefits
12 of the remedies under Colombian law, and that is time,
13 so they are taking advantage of the remedies under
14 Colombian law. They cannot come back and complain
15 that it takes time. If they are appealing, the appeal
16 will take time, and Colombian law, Colombia is
17 governed by the rule of law, and the Colombian courts
18 will look very carefully at the cases that are brought
19 before them. That's the first point I want to make.

20 The second point goes to very specifically
21 your question, Mr. President, what is the Exception,
22 and what is the invocation of the Exception?

1 Referring to your question, Colombia is not saying
2 that the Exception is the law itself. The law--and
3 you will remember from Article 34 of the
4 Constitution--has a much broader scope. If you look
5 at Article 34, it refers to illegal means, assets
6 acquired by illegal means to the detriment of the
7 Treasury or resulting in severe deterioration of
8 social morals. This is the categories that are
9 addressed in Article 34.

10 So, Asset Forfeiture Proceedings can address
11 situations that have nothing to do with narco-traffic.
12 You can have a situation of an asset that is seized in
13 relation to, for example, prostitution of minors.
14 That is social morals--that is not narco-traffic--it's
15 a very serious matter as well, and that is going to
16 the protection of the social morals.

17 So, the scope of the law is broader than the
18 narco-traffic. Historically, narco-traffic is one of
19 the main goals of the law but is not the only goal of
20 the law. So, the law is broader.

21 In this case, there is an overlap between
22 one of the raisons d'être, one of the rationales of

1 the law, which is also fight against narco-traffic and
2 organized crime--that's one, but not the only--and the
3 invocation by Colombia of the Essential Security.

4 So, the Essential Security is not the law
5 itself. It's an in concreto determination by Colombia
6 that the proceedings that are ongoing concern
7 organized crime, and that the process is to avoid
8 further money-laundering. It's that measure. It's
9 not the law as such. It's in concreto, the invocation
10 of that specific proceeding affecting the
11 money-laundering to the benefit of narco-traffickers.

12 Now, as to the exception in the Exception,
13 these are two different things. You have the domestic
14 plane, and you have the international plane. The
15 domestic plane is the fact that Colombian courts will
16 have jurisdiction to make a determination based on the
17 law in narco-traffic or more generally. They can make
18 a determination as to whether or not the rights of
19 third parties who are bona fide have been preserved or
20 should be preserved. That is something that is within
21 the power of the domestic courts. That is not
22 something that's within the power of this Tribunal.

1 This Tribunal has no means, no power, no evidence, no
2 argument--nothing before it to make that
3 determination. That is not the realm of this
4 Tribunal.

5 So, the Exception which is before the
6 domestic courts, which Newport has taken fully the
7 benefit of and, as you know, now they are appealing
8 before the domestic courts, they have a remedy. The
9 remedy is Colombian law, the remedy is before the
10 Colombian courts, and they will have an answer.

11 That's why we say it is premature. Indeed, it is
12 premature, and they have taken full advantage of what
13 Colombian law says, and they cannot complain about
14 time because these things, these matters take time.

15 And this Tribunal is not called upon to make
16 a determination of denial of justice because justice
17 has not been rendered yet. Justice is ongoing in
18 Colombia. You have to trust the judiciary in
19 Colombia. You have to trust the rule of law in
20 Colombia, and you have to trust that Colombia is doing
21 it right.

22 Now, that's the domestic level. On the

1 international level, which is now your concern, and
2 now I'm in the alternative Number 2, which is should
3 you decide that it's not self-judging--we say of
4 course you shouldn't--should you decide that it's
5 within your jurisdiction--of course we say you
6 shouldn't--but let's assume you say you have the
7 jurisdiction to determine whether the invocation was
8 in good faith. That determination is a very minimum
9 restricted "prima facie" test of plausibility. What
10 you have to determine is whether--not whether there is
11 a benefit, whether Newport is a good-faith third
12 party. That's for the courts in Colombia to determine.
13 What you have to determine in relation to whether this
14 is a good-faith invocation is whether the Asset
15 Forfeiture Proceedings, as they are ongoing and the
16 invocation by Colombia is indeed for the protection of
17 its Essential Security Interests in the form of fight
18 against money-laundering and narco-traffic, so that is
19 what we have said, and that's in my Slide 69. Our
20 position is that we seek through the proceedings to
21 fight organized crime, money-laundering and
22 drug-trafficking. So, it's not the law itself. It's

1 the fact that the proceedings that are ongoing are to
2 ensure that there is no money-laundering to the
3 benefit of narco-traffickers and organized crime.

4 This is the purpose, this is the Essential
5 Security that Colombia is trying to safeguard. And
6 your task, should you be in that further alternative,
7 is to look at whether that's a plausible explanation
8 about the proceeding itself and that protection of the
9 fight against organized crime. That's the
10 international level, which is completely different
11 from the domestic level, which is in the realm of the
12 domestic courts, which again Newport has taken the
13 full advantage of, before the domestic courts.

14 I hope that I have addressed all of the
15 questions that were asked of me, but, of course, I'm
16 in your hands if I haven't.

17 Thank you, Mr. President.

18 PRESIDENT SACHS: Thank you very much.

19 I again turn to my two colleagues. Do you
20 have questions?

21 ARBITRATOR PONCET: I don't have any
22 questions, Mr. Chairman. Thank you.

1 ARBITRATOR PEREZCANO: I do have one, Chair.

2 PRESIDENT SACHS: Yes, please.

3 ARBITRATOR PEREZCANO: Ms. Banifatemi
4 referred to it in her Opening Submissions and again in
5 her Closing Submissions, to the ongoing judicial
6 proceedings, the Asset Forfeiture Proceedings. She
7 referred to an appeal by Newport having filed, if I
8 heard her correctly, I think, in May last year, so I
9 assume it must have taken place sort of
10 contemporaneously when we met for our Hearing.

11 The prior appeal, the one that was resolved,
12 that admitted Newport as an afectado, and which was
13 issued, the Decision was issued in April 2022, so just
14 before our Hearing, that, when the appeal was filed,
15 it was admitted in the efecto suspensivo, meaning that
16 the proceedings before the Judge of First Instance
17 were suspended.

18 So, my question, given that this has come up
19 and in light of Mr. Moloo's comment that nothing has
20 happened since, what is--was the Appeal filed in May
21 last year also in the efecto suspensivo? Are the
22 proceedings before the First Instance Judge currently

1 suspended? Are they ongoing? What's the status? If
2 Ms. Banifatemi can tell me, or perhaps Ms. Ordóñez,
3 who is a representative within the Government,
4 probably knows. Thank you.

5 MS. BANIFATEMI: Thank you.

6 Professor Perezcano, would you allow me one minute
7 just to consult internally?

8 ARBITRATOR PEREZCANO: Yes, of course.

9 MS. BANIFATEMI: Thank you so much.

10 (Pause.)

11 MS. BANIFATEMI: Professor Perezcano, thank
12 you for your patience.

13 Mr. Giovanni Vega Barbosa will respond to
14 this question on behalf of Colombia. Thank you.

15 MR. VEGA BARBOSA: Thank you, Yas.

16 As for the clarity of the Tribunal, Ms. Ana
17 María Ordóñez referred to an appeal that was raised by
18 Newport in mid-2022, not May, we saw the record and it
19 is indeed written that the appeal was filed in May
20 2022, but it was presented in July 2022, it was a
21 Request for Annulment of the whole Asset Forfeiture
22 Proceeding, which was denied in First Instance by the

1 Asset Forfeiture Court and then referred with a
2 devolutive effect to the Special Chamber of Asset
3 Forfeiture of the Tribunal Superior de Bogotá.

4 The Decision is currently pending by the
5 Tribunal Superior de Bogotá which, as you know, is the
6 Court of Last Instance for matters concerning Asset
7 Forfeiture in Colombia.

8 ARBITRATOR PEREZCANO: So, just to be clear,
9 the underlying procedures are not suspended?

10 MR. VEGA-BARBOSA: No, it was--the request
11 was rendered with the devolutive effect, but no
12 decision has been made so far as to the request for
13 the total annulment of the proceedings. Yes, that's
14 correct.

15 ARBITRATOR PEREZCANO: Thank you.

16 PRESIDENT SACHS: And, from my
17 understanding, by "underlying proceeding," are you
18 referring, Hugo, to the proceeding in which recently,
19 in 2022, Newport was recognized as being an
20 Intervening Party?

21 (Overlapping speakers.)

22 ARBITRATOR PEREZCANO: I'm sorry, my

1 question really was, in the prior appeal that was
2 decided in April 2022, the effect--when the Appeal was
3 filed--and I forget exactly when it was, 2018 or 2019,
4 whenever it was, the effect of Newport filing the
5 appeal was to suspend the whole Asset Forfeiture
6 Proceedings until the decision was rendered in
7 April 2022, so my question was with this new appeal,
8 whether the Asset Forfeiture Proceedings were again
9 suspended or they are ongoing, and I understood
10 Mr. Giovanni Vega to have said no, they did not
11 suspend the proceedings. They continue.

12 MR. VEGA-BARBOSA: Yes, the Judge of First
13 Instance granted the request for appeal with the
14 devolutive effect, not with the suspensive effect.
15 But, if I may add, this is not a request for an
16 afectado to be recognized, this is a request for the
17 annulment of the Asset Forfeiture Proceedings. And,
18 in response to Professor Sachs, yes, it refers to the
19 same Asset Forfeiture Proceeding which is the subject
20 matter of this arbitration.

21 PRESIDENT SACHS: Right. But forgive me,
22 but I want to have a clear picture. My understanding

1 was that the proceedings before the Colombian court
2 concerned the question whether the Asset Forfeiture
3 Law was applied correctly in this case or incorrectly,
4 meaning that the good-faith acquisition was the
5 subject matter. Is my understanding correct, that
6 this proceeding, the one on the good-faith issue, is
7 still ongoing? And it has now been clarified in
8 April 2022 that Newport has a role in these
9 proceedings, namely as an intervening party.

10 And so, what is the interaction between
11 these proceedings and the appeal that you mentioned,
12 the appeal which I understand was lodged by Newport in
13 order to annul the whole Asset Forfeiture? So, this
14 is not clear to me how they interrelate.

15 MR. VEGA BARBOSA: May I respond?

16 PRESIDENT SACHS: Yes, please.

17 MR. VEGA BARBOSA: Yes, the whole purpose of
18 these proceedings is to determine whether Newport is a
19 qualified good-faith buyer; and, for those purposes,
20 Newport has standing to prove its qualified good-faith
21 status since the moment it was recognized as an
22 afectado.

1 In that process, or in that proceeding, we
2 are at this very moment in the evidence or evidentiary
3 stage of the proceedings. Because of a request by--or
4 upon a request by Prosecutor Caro to introduce
5 supervening evidence into the proceedings, or on the
6 occasion of that request, Newport filed a request for
7 the nullity of the whole proceedings. That is, the
8 same proceedings in which they are requesting to be
9 recognized as qualified good-faith buyers.

10 PRESIDENT SACHS: I understand.

11 And those new elements, are those the ones
12 that came out later, namely [REDACTED]

13 MR. VEGA BARBOSA: If I may, Mr. President,
14 their particular request or evidentiary requests that
15 are pending right now concerned, indeed, [REDACTED]
16 [REDACTED] which were
17 requested by Mr. Caro, and a request by Mr. Caro to
18 also include supervening evidence that came to his
19 knowledge concerning a declaration by [REDACTED] and
20 other persons involved with the Meritage Case; and the
21 decision regarding those pieces of evidence, as far as
22 we know. But, if we are allowed, we are more than

1 happy to confirm this to the Tribunal afterwards, but
2 as far as we know, this is evidence that was granted
3 by the Judge of First Instance, and it was on the
4 basis of the decisions made on these new pieces of
5 evidence that the request for nullity was filed by
6 Newport in mid-2022.

7 PRESIDENT SACHS: Thank you.

8 And I now give the floor to the Claimants to
9 comment, to confirm or correct or complement what was
10 just said.

11 MR. MOLOO: Mr. President, my understanding
12 is that the underlying proceedings with respect to the
13 determination of Newport's good faith have not been
14 paused, so I think that we share that understanding.
15 They have not been paused formally, I should say, but
16 no progress has been made in those proceedings, to our
17 knowledge.

18 I should also mention that Newport obviously
19 has not just foreign investor interest but domestic
20 investors, so there are additional parties that are
21 interested in Newport that are not before this
22 Tribunal, of course.

1 But, if it's helpful, because our Colombian
2 counsel is not on the line, we can provide just a very
3 short email update of what--clarification on this
4 specific question. I'm not proposing any further
5 submissions or anything like that, but just a
6 clarification on this question, if it would be helpful
7 for the Tribunal.

8 PRESIDENT SACHS: I think the Tribunal would
9 welcome from both sides a very, very short update on
10 those proceedings--no further submissions, just
11 update--confirming what you just said. Could we have
12 that within a week?

13 MR. MOLOO: Yes. No problem, Mr. President.

14 PRESIDENT SACHS: And, ideally, what I would
15 suggest is that you contact each other so that we get
16 a joint paper.

17 MR. MOLOO: We will endeavor to do so.

18 PRESIDENT SACHS: Okay. Very good.

19 Anything else, my two colleagues? Or are we
20 through with our questions?

21 ARBITRATOR PONCET: Nothing further from me,
22 Mr. President.

1 ARBITRATOR PEREZCANO: No further questions
2 from me. Thank you.

3 PRESIDENT SACHS: Okay. No further
4 questions from me either.

5 This brings us to the end of this Hearing.

6 MR. MOLOO: I believe, Mr. President,
7 Dr. Poncet had a question, but I may be mistaken.

8 PRESIDENT SACHS: Oh, I'm sorry? Charles,
9 you had a question?

10 ARBITRATOR PONCET: I said no questions as
11 far as I'm concerned. Thank you.

12 MR. MOLOO: Apologies.

13 SECRETARY MARZAL: Mr. President, Sara here,
14 just wanted to note one thing, the question of the
15 Statements of Costs, according to PO1, must be
16 discussed at the end of the Hearing. I don't know if
17 you want to discuss this now.

18 PRESIDENT SACHS: Yes. I was going to
19 discuss this. Thank you for reminding me, Sara.

20 Indeed, we have to shortly discuss the
21 question of costs submissions, the deadlines and the
22 details. Have you had the chance to talk to each

1 other on how to handle this? Or would you prefer to
2 make a joint proposal as to both the timing of such
3 submissions and also the level of detail that you
4 agree should be included in these statements?

5 MS. BANIFATEMI: We have not had a chance,
6 Mr. President, to discuss among Parties, but we are
7 happy to do so and revert to the Tribunal if that's of
8 assistance.

9 PRESIDENT SACHS: Mr. Moloo, would you
10 agree?

11 MR. MOLOO: Yes, Mr. President.

12 PRESIDENT SACHS: Fine. So, if there is a
13 problem that we have to solve, then please tell us,
14 but otherwise we look forward to receiving your joint
15 proposal.

16 Transcript, I don't expect there to be many
17 problems. We already received the rough Transcript,
18 but in case there is a problem, please let us know.
19 Otherwise, let's agree that if we don't hear from you
20 to the contrary, the final version of the Transcript
21 will be the one that is relevant and conclusive.
22 Let's say, within two weeks? That's the deadline for

1 you to tell us whether there is a problem or whether
2 corrections need to be done, in which case we would
3 again invite you to liaise to come up with a joint
4 proposal. Is that too short?

5 MS. BANIFATEMI: That should be workable,
6 Mr. President.

7 PRESIDENT SACHS: Very good.

8 MR. MOLOO: Likewise on our side.

9 PRESIDENT SACHS: Thank you very much.

10 Then I'm afraid this was the last hearing in
11 this case. We thank you, both sides, also for this
12 Hearing. We think it was helpful. You made your
13 positions clear in a very efficient and professional
14 way. Thank you.

15 I also want to thank Sara for having
16 organized all this, and of course, David and Dante for
17 their unfortunately invisible assistance, but you see
18 the product, so that's good.

19 And with that, we will close today's
20 Hearing, and we will first hear from you, and then you
21 will hear from us.

22 MS. BANIFATEMI: Thank you, and good

1 evening.

2 MR. MOLOO: Thank you, Mr. President, and
3 Members of the Tribunal.

4 MS. CHAMPION: Thank you very much.

5 (Whereupon, at 3:31 p.m. (EST), the Hearing
6 was concluded.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, 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.



DAVID A. KASDAN