

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. :

-----x Volume 2

HEARING ON NEW EVIDENCE AND ORAL CLOSING SUBMISSIONS

Tuesday, October 4, 2022

Hotel Le Royal Monceau
Hearing Room: Louis Duhayon,
Andre Junot & Pierre Bermond
37 Avenue Hoche
Paris, France

The Hearing in the above-entitled matter
came on at 9:30 a.m. before:

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President of the Tribunal

PROF. HUGO PEREZCANO DÍAZ
Co-Arbitrator

DR. CHARLES PONCET
Co-Arbitrator

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P R O C E E D I N G S

PRESIDENT SACHS: Good morning, ladies and gentlemen. Are we ready to proceed, and are there any housekeeping matters?

I ask you, Mr. Moloo, first.

MR. MOLOO: None. From us. Thank you.

PRESIDENT SACHS: Okay.

MS. BANIFATEMI: Nothing from else, Mr. President. Thank you.

PRESIDENT SACHS: We will hear Claimants' rebuttal, 30 minutes.

MR. MOLOO: If I could ask for a moment.

(Pause.)

REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANTS

MR. MOLOO: Thank you, Mr. President.

It is always most important to make sure that David is ready in the first instance.

Members of the Tribunal, thank you very much for your time over the course of the last several years that we've been before you. I suspect that today will be the last time I address you in person, so I wanted to start with that. Thanks.

1 And we appreciate the attention you've given
2 us over the last several years because, as you know,
3 we think this is a very important case. We do agree
4 with Respondent on that premise. It's an important
5 case for many reasons. And it is kind of like what
6 Ms. Banifatemi said yesterday: It has been two
7 completely different narratives, two ships passing
8 through some body of water without seeing each other
9 in the middle of the night.

10 And here is the narrative that Colombia has
11 given to us over the last few weeks and months. If we
12 look at the first slide. We heard yesterday in the
13 Closing, in the particular region where the Claimants
14 have invested that most of the land in Antioquia,
15 where Medellín is largely in the hands of narcos, and
16 their blessing, to put it that way, too, if there's
17 entry into the market--that's another barrier to
18 entry--you need the blessings of the narcos to do
19 business in Medellín.

20 We also heard the only legitimate
21 expectation, obviously Mr. Seda and his acolytes
22 should have been that by allegedly investing in

1 Colombia, they are investing in one of the worst
2 regions and the most dangerous regions. That's the
3 narrative we have from that side. You come into
4 Medellín, you come into Colombia and it's not just a
5 sign on the Meritage Lot that says "Do not buy here."
6 It's a sign at the airport when you get off the plane.

7 One of the worst regions. You need the
8 blessings of the narcos to do business here. Do not
9 buy here. Do not do business here. That's their
10 narrative. You should know better. And if you do
11 diligence on the title and you didn't find anything,
12 too bad so sad because someone at some point in time
13 you are in Medellín. You should know better. Narcos
14 are involved everywhere. It's a barrier to entry to
15 do business here. You've got to get the blessings of
16 the narcos. That's their narrative.

17 No amount of diligence is ever enough
18 because someone at some point in time [REDACTED]
19 [REDACTED] and figure out that back in the 1990s
20 a narco was involved and behind the front buyer and
21 you didn't figure that out. Sorry. You should have
22 Google-searched we heard yesterday. You should have

1 gone around and asked folks. I don't know what the
2 standard is. I don't know what the standard is,
3 according to Colombia.

4 And what we've told you is a different
5 narrative. We've told you there is a standard. It's
6 clear. It's not Google-searching, go to the ends of
7 the Earth and you can't do business here. It's
8 actually not that at all, and that's why Colombia
9 entered into this Treaty.

10 And if you go to the next slide, you can see
11 on the Preamble: The Parties expressly said that at
12 the beginning of the treaty, the first page. The goal
13 was to attract investment, to move on, to offer
14 alternatives to the drug-crop production. How do you
15 do that if you have a big sign on the door that says
16 "Do not come in," do not do--"do not invest here."

17 What we heard yesterday, I find it honestly
18 shocking that the representatives of the Government of
19 Colombia are telling an international tribunal, that
20 they are investing in the one of the worst
21 regions--that's a quote--the most dangerous regions.
22 That's the legitimate expectation you should have.

1 No, that's not. The purpose of this Treaty.
2 Everybody knew. We don't deny that there is a history
3 of drug-trafficking in Colombia. What we're saying is
4 the way forward is to attract investment, to allow
5 folks to come in and give them some legal security
6 when they come in so that they can invest and make
7 some money, yes. It's not a bad thing to make some
8 money. It's not a casino. You come in, you invest,
9 you take risk, you make money, and in the process you
10 develop that economy. That is what the purpose of
11 these treaties are. Those are the two ships passing
12 through the night.

13 And if I were to pick a narrative--you know
14 which one I'd pick. It's not the one that says "Do
15 not do business here." It's the one that says "We
16 have had a troubled past, but we want to invite
17 investment so we can transition to a better future."
18 That's the ship that I want to be on, and I hope the
19 Tribunal is with me.

20 It's also the ship that the Constitutional
21 Court of Colombia appears to want to be on because, in
22 August 2020, the Constitutional Court--it's the

1 highest court in the country that resolves
2 constitutional matters--said this: Before them was
3 the question of what does it mean to do to be a
4 good-faith buyer? And they said: "In a scenario such
5 as this, people in legal commerce would be
6 obliged"--because this is what was being
7 proposed--"they'd be obliged not only to study the
8 titles to the assets, not only the titles to the
9 assets but also to perform meticulous investigations
10 into the legal past of the sellers, into the legal
11 disputes that may have been involved in different
12 jurisdictions, and into investigations and inquiries
13 carried out by Prosecutors' office in which they could
14 be involved and even into opinions about the sellers
15 in their communicates and on social media." That's
16 the Google standard. They're saying that's what's
17 being proposed here. But that doesn't work. That's
18 what the Court said. They said: "The State has not
19 determined one aggravating factor of all of this is
20 that normally the transfer of assets from lawful
21 sources to third parties in lawful destinations and
22 are acquired in good faith by persons who have

1 profited from illegal activities occurs when the State
2 has not determined the existence of illegal activities
3 or the participation of such individuals in these
4 activities itself."

5 And if you were to adopt this approach, they
6 say it makes legal trade difficult or impossible and
7 also imposes unreasonable and unsustainable burden on
8 individuals which go far beyond the duties of the
9 legislator can constitutionally impose on them. As a
10 matter of Colombian Constitutional Law, they said, we
11 can't impose this high burden. That would make
12 commerce impossible. So that's the boat that the
13 Constitutional Court appears to be on, too.

14 I see that the signal is lost.

15 (Pause.)

16 MR. MOLOO: Gentlemen, you have it in front
17 of you so I can continue, okay.

18 And so in response to all of this, what is
19 the primary defense that we see now over the last few
20 months from Colombia.

21 (Comment off microphone.)

22 MR. MOLOO: It's fine. It's fine. It's

1 fine. Thank you.

2 What we see from Colombia is this Essential
3 Security Defense, and basically what they're saying ■

■ [REDACTED]

■ [REDACTED] That's what

6 they've tried to manufacture. And you hear all of
7 these very grandiose and if--we heard about theatrics
8 yesterday, and apparently we're the ones putting on
9 theatrics but this is what you hear from Colombia.

10 Oficina de Envigado, it's not any
11 organization, it's a major armed international
12 criminal organization historically involved with the
13 Medellín Cartagena, engaged in bloody armed conflicts
14 in drug-trafficking and money-laundering. That may be
15 true, and nobody is denying the past of Colombia.

16 [REDACTED]

17 ■ [REDACTED]

18 ■ [REDACTED]

19 [REDACTED]

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[REDACTED] But

17

yes, I don't know.

18

ARBITRATOR PONCET: You don't think it does,

19

okay.

20

MR. MOLOO: But a hundred percent--to answer

21

your question specifically, we have no idea. I mean

22

that's what's being alleged. There's no testimony or

1 anything like that.

2 ARBITRATOR PONCET: We can check [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Am I

6 right on this?

7 MR. MOLOO: I would need to go back and look

8 at the specific reference, but my point more

9 generally--

10 ARBITRATOR PONCET: I'm not saying--

11 MR. MOLOO: Yeah.

12 ARBITRATOR PONCET: Let me make this very

13 clear.

14 MR. MOLOO: Yes.

15 ARBITRATOR PONCET: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

19 MR. MOLOO: Yes.

20 ARBITRATOR PONCET: I just want to clarify

21 what the factual position is.

22 [REDACTED] [REDACTED]

1

[REDACTED]

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PRESIDENT SACHS: Okay. Please, proceed.

22

MR. MOLOO: But, of course, we didn't have

1 the opportunity to do this earlier, because these
2 arguments are all coming up post-Hearing; right? So,
3 it is what it is, but if the Tribunal is interested,
4 we are more than happy to put in that evidence that
5 supports what I just told you, Mr. President.

6 [REDACTED]
7 [REDACTED] And then,
8 we have the Essential Security Provision that they're
9 relying upon: "Nothing in this Agreement shall be
10 construed to preclude a party from applying measures
11 that it considers necessary for protection of its own
12 Essential Security interests."

13 And then they say, but you have to look at
14 the footnote. And the footnote says the Tribunal or
15 panel hearing the matter shall find the exception
16 applies, if it's invoked. But there's two questions
17 here. The first is: Does the Essential Security
18 Exception apply? And they're saying that's a
19 self-judging question. I actually don't care as much
20 about that question.

21 The second question is--but I'm going to
22 come to it. I will come on to it. For present

1 purposes, the second question is: If it applies, what
2 does that mean? What does that mean if it applies?

3 And the footnote doesn't tell you what
4 it--what happens if it applies, but what it does not
5 say--it does not say if the exception applies, a
6 tribunal shall not have jurisdiction or you don't get
7 access to dispute resolution. It doesn't say that at
8 all. All--it actually says it confirms the opposite.
9 The Tribunal shall find that the exception applies.

10 But the question you have to ask yourself is
11 if it applies, then what? And that's the question
12 that the Eco Oro Tribunal answered.

13 But before I get to that, I do want to point
14 to this next slide. They say there's a subsequent
15 agreement, but--and they say it's non-justiciable.
16 What is non-justiciable? What is non-justiciable,
17 because they put the red--we added the blue box, by
18 the way. The red box is what they've added. They're
19 saying that Colombia and the United States agree that
20 this question is non-justiciable. But if you look at
21 what is non--what comes just before that, Colombia
22 says the present dispute is non-justiciable. That's

1 not what the United States says. They say the
2 indication is non-justiciable. That's the first
3 question. Colombia is focused on the second question.
4 So, they do not agree about what is non-justiciable.

5 Colombia would--wants to you adopt the
6 position that this dispute is non-justiciable. You
7 don't have the right to decide this matter. You have
8 no jurisdiction, we're out if we invoke this. The
9 United States is saying the invocation of this
10 exception is non-justiciable. Those are different
11 things. And if you look at--on the next slide, they
12 referred to the U.S. delegation round, look at what
13 the U.S. says. There is a general concern that the
14 general exception should not be abused. They should
15 not be abused. This is a strong exception in cases of
16 matters that have to be dealt with national security.
17 The invocation of that exception is not subject to
18 court review.

19 But the question is: Once you invoke it,
20 then what? And that's where Eco Oro said, well, the
21 "then what" is you get to adopt your measures, but it
22 does not mean you're exempt from the compensation

1 obligation. So, they say, but Eco Oro was not
2 self-judging, but that doesn't matter because we're in
3 the second question now; right? And the Tribunal at
4 Eco Oro was saying, okay, let's say it applies. Let's
5 say this exception applies, but then what? If it
6 applies, then what? And what they're saying in that
7 case, very similar type of language for an exception
8 provision, and it doesn't really matter what the
9 exception is, whether it's Essential Security or
10 environment, but what happens then? They're saying it
11 does not escape the--it just means that you can keep
12 your measure whether it's to protect the environment
13 or the Essential Security or the health of your
14 population. Whatever it is, you can keep that Measure
15 in place. But if you've breached the Treaty, you
16 still have to compensate. So, you don't get
17 restitution, you don't get your property back, but you
18 still have to compensate.

19 ARBITRATOR PONCET: So, to compensate--the
20 duty to compensate, in that reading of 22.2, would not
21 come from the Measure itself but from the fact that
22 hypothetically it would have been applied in a

1 discriminatory manner, it would not be consistent with
2 fair and equitable treatment; is that what you're
3 saying?

4 MR. MOLOO: That's correct.

5 ARBITRATOR PONCET: How about indirect
6 expropriation?

7 MR. MOLOO: Yeah, likewise.

8 ARBITRATOR PONCET: So, if the Measure is
9 not subject to review, but it can constitute indirect
10 expropriation, doesn't that make the Measure
11 effectively subject to review?

12 MR. MOLOO: Because an indirect
13 expropriation is only unlawful if it doesn't meet the
14 four criteria, one of them being a compensation
15 requirement.

16 For unlawful expropriation, where there is
17 no compensation paid; right? The remedy under
18 customary international law, under Chorzów Factory, is
19 restitution. You get your property back. If there's
20 an unlawful expropriation that I was not compensated
21 for, what happens under customary international law?
22 The default is I get my property back. If I got paid

1 compensation, it's not unlawful. If I got paid
2 fair-market-value compensation, I have no claim before
3 you gentlemen.

4 ARBITRATOR PONCET: But if the invocation of
5 the exception, which is not subject to judicial review
6 even by itself, if that invocation results in the
7 Measure being excluded, carved out of the remedies of
8 the Treaty, normally afforded by the Treaty, how is it
9 that the Treaty sort of comes back by the back door
10 through--

11 MR. MOLOO: Yeah, let me clarify. It's a
12 good question.

13 ARBITRATOR PONCET: Please do, because--

14 MR. MOLOO: Yeah, it's not all of the
15 remedies. It's one very specific remedy. If we go to
16 Article 22.2, which is on Slide 11, it specifically
17 says this--nothing in this Agreement shall be
18 construed to preclude a party from applying the
19 Measures. That's it, so it doesn't exclude the
20 compensation remedy. It just says you can apply the
21 Measure, and so what Eco Oro said was--they said, what
22 does that mean? So. Let's look at the Eco Oro

1 Decision.

2 ARBITRATOR PONCET: So, the Measure, you can
3 apply them anyway, then if you apply them even without
4 22.2, the point is if you apply measures that are
5 inconsistent with the Treaty, you end up being
6 sanctioned under the Treaty, and you have to pay
7 compensation.

8 MR. MOLOO: You have to pay compensation but
9 you don't have to withdraw the Measure.

10 So, what's important--

11 ARBITRATOR PONCET: But you don't anyway, do
12 you? I mean, if a State expropriates unlawfully, it
13 doesn't have to give the property back. It should,
14 but if it doesn't, it's going to pay up.

15 MR. MOLOO: Well, as a matter of
16 customary--under the Articles of State Responsibility,
17 generally, there are some exceptions for restitution;
18 right? One of them being if it's impossible to give
19 the property back. But the primary remedy is
20 restitution.

21 But I think it's important to remember that
22 this Article 22 does not only apply to investment; it

1 applies to trade; right?

2 ARBITRATOR PONCET: Right.

3 MR. MOLOO: Which--and the remedy in trade
4 context as well is withdrawal of the Measure; right?
5 If I have an embargo on certain--the importation of
6 products; right? The remedy in the trade context is I
7 have to lift my embargo. What this is saying is, no,
8 you don't have to lift the embargo. There may be
9 other remedies involved--available, but the remedy of
10 withdrawal of the Measure, whether it's under the
11 investment-treaty context or under the trade context,
12 is not available, and that's exactly what the Eco Oro
13 Tribunal said.

14 They said Colombia also provided no
15 justification as to why it is necessary for the
16 protection of the environment--that's the measure--the
17 purpose there--not to offer compensation to an
18 investor for any loss suffered as a result of the
19 Measures taken by Colombia to protect the environment,
20 nor explained how such a construction would support
21 the protection of investment in addition to the
22 protection of the environment.

1 So, they were looking at, okay, how do
2 we--you allow, in that case, the State to protect the
3 environment, here it's Essential Security Interest,
4 but also achieve the objective of protecting
5 investments? And they're saying you allow for the
6 compensation obligation.

7 And they specifically said in that case,
8 accordingly, the Tribunal does not find that, in that
9 case, Article 2201(3), it's a similar FTA situation
10 there--

11 ARBITRATOR PONCET: At the risk of being
12 hand drawn and quartered by environmentalists, do you,
13 and do we have to draw a difference between protecting
14 the environment and Essential Security Interest, or is
15 it the same thing? Does it boil down to the same
16 thing?

17 MR. MOLOO: In the context of the way these
18 treaties are structured, it's essentially the same
19 thing because what States basically did was they
20 carved out--they said there are certain things that
21 are really important to us, and if they put
22 environment--they have, you can see, it says for the

1 protection of human, animal, and plant health, parties
2 understand to include environmental measures necessary
3 to protect human, animal, or plant life and health, to
4 ensure compliance with their laws. These were
5 all--there was a list of things, for the conservation
6 of living or non-living inexhaustible natural
7 resources. They can put whatever they want in the
8 exceptions.

9 And in the trade context, you know, in GATT,
10 Article 20, it's similar; right? They've got a list
11 of exceptions.

12 So, this is a thing that one finds,
13 Exception Clauses in treaties.

14 PRESIDENT SACHS: May I ask, when you
15 compare the Canada-Colombia FTA, in the introductory
16 sentence, there's a "subject to" half sentence, which
17 is not in Article 22 of our Treaty. They may be
18 subject to the requirement that such measures are not
19 applied in a manner that constitute arbitrary or
20 unjustified discrimination between investments or
21 between investors.

22 So, what does it mean for the interpretation

1 of Article 22 that there is not such a "subject to"
2 language?

3 MR. MOLOO: That, in my reading of the Eco
4 Oro Decision, does not factor into the Tribunal's
5 Decision because they're--they--what the first part of
6 that sentence says is, "are not applied in a manner
7 that is constituted arbitrary or unjustified
8 discrimination"; right? So, it's just talking about
9 those two things.

10 But in the Eco Oro Decision, they're
11 not--they don't just say, okay, we're just going to
12 assess whether or not your conduct was arbitrary or
13 unjustifiable discrimination. They talk about
14 breaches of FET, they talk about breaches of the other
15 provisions of the Treaty. So, they're not just saying
16 you're limited now to the question of arbitrary or
17 unjustified discrimination, that's not what they did.
18 So, if that had a bearing on their analysis, then
19 presumably they would have said, okay, you're then
20 limited to whatever this Clause says, but they said,
21 no, no. What this is saying is, you can adopt your
22 measure, but it doesn't exempt you for the

1 compensation obligation with respect to breaches of
2 the Treaty.

3 PRESIDENT SACHS: Okay.

4 (Pause.)

5 ARBITRATOR PEREZCANO: If I may?

6 PRESIDENT SACHS: Please.

7 ARBITRATOR PEREZCANO: Now, Article 22
8 is--sorry. I had it here, and I just--so,
9 Article--actually, the whole of Chapter 22 are
10 exceptions, and you're saying that what the exceptions
11 mean is that if they applied, then the country, the
12 State, gets to keep the Measures no more. So, what
13 are the "exceptions to," then? Why are they
14 exceptions? Exceptions to what?

15 I mean, I understand, sort of, your
16 argument--and this is my understanding; you may
17 correct me if I'm wrong--when you look at the
18 expropriation provision, the fact that an
19 expropriation is done, as it must be, for a public
20 purpose, and it can be, you know, the greatest
21 purpose. The Santa Elena Case comes to mind, was to
22 protect, if I recall correctly, turtles. So,

1 that's--you know, it's a perfectly valid public
2 purpose, and it's good for the environment, and it's
3 good for the turtle, and the turtle is in
4 conservation.

5 So, the fact that that is the object of the
6 Measure doesn't exclude compensation if it's an
7 expropriation, even if it is to protect the turtles,
8 then that requires compensation.

9 So, I understand, you know, sort of, in that
10 context that expropriation would be required, but if
11 it is an exception to the Treaty, you're saying that
12 in the trade context, the--it's just--you know, the
13 remedy is you get to keep the Measure. I would
14 disagree with that characterization. If it falls
15 under the exception, then there is no wrongfulness in
16 terms of the ILC Articles. If there is no--if the
17 exception applies, although there might be a prima
18 facie violation, it is covered by the exception, so
19 there is no international unlawfulness. And if there
20 is no international unlawfulness, why--what would be
21 compensated? That's what I don't understand.

22 Now, just to take it back to the trade

1 context, what happens in the trade context ultimately,
2 because there is no international police, a country
3 always gets to keep the Measure if it wants to--not
4 without consequences, but if it wants to.

5 MR. MOLOO: Counter-measures. Right.

6 ARBITRATOR PEREZCANO: And there are several
7 countries that have gone down that road, and then the
8 remedy is counter-measures.

9 MR. MOLOO: Correct.

10 ARBITRATOR PEREZCANO: Whether regulated
11 counter-measures has, you know, suspension of
12 concessions or other obligations or counter-measures
13 under the ILC Articles. That's a remedy. If it falls
14 under the exception, it's not that the State gets to
15 keep the Measures. There is no basis for
16 counter-measures, for the other remedy in case the
17 State, a sovereign, decides I'm going to keep the
18 Measures in any event.

19 So, again, if it falls under the
20 exception--if it doesn't exclude compensation, then
21 what's the purpose of the exception to begin with?

22 MR. MOLOO: So, I understand your question,

1 and I think it's really important to look at the
2 treaty language because the treaty language does not
3 preclude a wrongful action. It does not say that if
4 this exception applies, there is no breach of the
5 Treaty.

6 There are treaties that exclude the
7 Tribunal's ability to decide a matter generally, like
8 there are other treaties that have language that
9 reflect more along the lines of what you're
10 suggesting, Mr. Perezcano, but this Treaty does not do
11 that. All this Treaty says is that if the exception
12 applies, it means that it doesn't preclude the Party
13 from adopting the Measure. So, I would say in the
14 trade context--

15 ARBITRATOR PEREZCANO: But, again, what's it
16 an exception to?

17 MR. MOLOO: To--so, let me use your example
18 of the trade context. My suggestion--my
19 interpretation would be that the State does--I accept
20 that sometimes States don't withdraw their measure,
21 but that is the primary remedy. This is just--this is
22 saying you don't have to. You don't have to withdraw

1 your measure. It's not--when the WTO--when a tribunal
2 says, a trade Tribunal says you must withdraw your
3 measure, that is what they're being ordered to do.
4 Here, that cannot be the remedy that a tribunal
5 orders.

6 ARBITRATOR PEREZCANO: The remedy to one--if
7 the exception applies, there's no remedy--

8 MR. MOLOO: The exception does not apply to
9 the breach. It applies to the remedy of applying the
10 Measure.

11 ARBITRATOR PEREZCANO: Can you--

12 MR. MOLOO: It doesn't say "breach." It
13 says to preclude a party from applying the Measure.
14 So, this is precisely the language--

15 ARBITRATOR PEREZCANO: Well, I don't
16 think--I mean, I haven't looked recently at the whole
17 of Chapter 22, but I don't think that any of those
18 Articles say "in case of breach, then the exception
19 applies." That would be an odd formulation for
20 exceptions. I don't think we'll find--I haven't seen
21 any treaty where that language would come up. I think
22 exceptions are drafted generally as they are here in

1 Chapter 22.

2 ARBITRATOR PONCET: That's not what it says.

3 MR. MOLOO: I think--they're--I mean, you're
4 right that exceptions often appear this way, and
5 in--so in the trade context, for example, I don't
6 think it would be right to say that a State--so, if a
7 State adopts a measure to protect in Santa Elena--it
8 was leatherback--versus Costa Rica, it was leatherback
9 turtles, I think it was a property development on the
10 beach--and if they're going to protect leatherback
11 turtles on the beach or in the trade context, if they,
12 you know, prevent the--you know, they say, we're not
13 going to import--we're going to apply
14 tariffs--right?--to a particular product. They're
15 allowed to do that if an exception applies. But does
16 that mean that the foreign State has no remedy, that
17 they--that their goods are now subject to a tariff,
18 but they have to let in the other country's products
19 tariff-free? Is that what it means? That to me would
20 be undermining the purpose of the trade agreement;
21 right?

22 So, I think it would--in the trade context,

1 what I would say what the answer would be is, okay,
2 you can keep your tariff because the remedy cannot be
3 that you have to withdraw your tariff but that doesn't
4 mean I don't get to put in a counter-measure. I get
5 to put up a tariff, too.

6 So, what Eco Oro is saying is you have to
7 look at the purpose from the perspective of what is
8 the exception trying to do? It is trying to
9 protect--it is allowing the State to apply its
10 exception, whether it's to protect leatherback turtles
11 or an Essential Security Interests, or the public
12 health--right?--but you also have to protect
13 investors' investments. That's another goal of the
14 Treaty.

15 And as the United States said, it was--they
16 wanted to make sure that this exception didn't
17 undermine the--you know, basically a gaping loophole
18 for the investor protections. That every time a case
19 comes up they just say, oh, we put our hands up, we
20 say this exception applies. We're out, basically,
21 "get out of jail free" card; right? To avoid that,
22 tribunals like Eco Oro have said, well fine, you can

1 adopt your measure, you can--in the trade context--you
2 can put up your tariffs, but that doesn't mean that
3 the other side doesn't have a remedy. That remedy
4 just can't be--the remedy ordered just can't be
5 "withdraw your measure."

6 So, that's one of our four submissions on
7 Essential Security and I do encourage the Tribunal to
8 read the Eco Oro Decision, because it was under the
9 Canada-Colombia FTA, so also involving Colombia, which
10 has--it was an Article 22--there was an exceptions
11 provision like this. There's a debate about whether
12 this one was self-judging and that one is not, but I
13 don't think that affects this analysis that we're
14 undertaking right now, which is what is the
15 consequence of it applying, whether self-judging or
16 not. And the Tribunal went through, you know, and
17 considered Canada's Non-Disputing Party submissions.
18 Canada came in and they said, this is what it means,
19 and much like the U.S. has done here, and the Eco Oro
20 Tribunal went through that in some detail, and I think
21 it's a helpful analysis. So, I do encourage the
22 Tribunal to read the Eco Oro Decision. I have no

1 doubt they will.

2 But I think another important point here,
3 with respect to the Essential Security Provision, is
4 the timing of when it is that the Essential Security
5 Interest must come up. Because from the language of
6 the provision itself, it is clear that the Essential
7 Security Interest to be protected must be known at the
8 time that the Measure is adopted. You can't say, I'm
9 adopting this Measure. I am going to take your
10 property from the beach--as in Santa Elena and Costa
11 Rica--I'm not going to let you develop your tourist
12 development in the beach. When there are no--there's
13 no concern about leatherback turtles on the beach.
14 And then, 10 years later, say, oh, now there are
15 leatherback turtles, so what I did 10 years ago, I'm
16 going to rely on something that happens 10 years later
17 to justify an action I took 10 years ago. You can't
18 do that. The Essential Security Interest must be
19 known and must be the reason why you adopted the
20 Measure in the first place.

21 ARBITRATOR PONCET: If I adopt as a State, I
22 adopt an Asset Forfeiture Law that aims at assisting

1 me in the fight against organized crime, and
2 particularly a type of organized crime that puts into
3 a question the very existence of my State, isn't
4 that--isn't any measure adopted in the context of this
5 asset forfeiture, by definition, something that
6 relates to an Essential Security Interest, and do I
7 really have to invoke it before I take the Measure or
8 even afterwards, actually?

9 MR. MOLOO: That's not Colombia's case.
10 Colombia's case is, they did not have--they didn't
11 know about their Essential Security purpose until the
12 Rejoinder, and that's why they brought it up late.

13 If you look at our Opening slides--I don't
14 know if you--

15 ARBITRATOR PONCET: Yeah, I've got them.

16 MR. MOLOO: --have them, but this might be
17 of assistance.

18 ARBITRATOR PONCET: Which one?

19 MR. MOLOO: It's the--

20 PRESIDENT SACHS: I think we are aware of
21 the document.

22 MR. MOLOO: Yeah, it's the--yes, we can get

1 it for you, the specific reference, but basically
2 they've said that they didn't have this Essential
3 Security purpose and they didn't know about it up
4 until the--before the Rejoinder. So, it is not--their
5 case is not that any application of the Asset
6 Forfeiture Law is--you know, would implicate the
7 Essential Security Provision.

8 ARBITRATOR PONCET: I'm aware of that, but
9 isn't that a possible line of approach to the problem?

10 MR. MOLOO: If it was legitimate--I mean,
11 we'll get on to the good-faith application, but I
12 don't think they can just wave their hand and say this
13 is for Essential Security, and so, Tribunal, you have
14 no more job here; right? Because it would just not be
15 a good-faith application of the provision, and I'll
16 come on to that too, but I don't think they can just
17 wave their hand up in the air and say, we show up to
18 this Tribunal, we're invoking this exception, you're
19 out.

20 Because then, what's the point of the
21 Treaty? We might as well rip up the Treaty, because
22 every time they get sued, they'll show up and say I'm

1 out, Essential Security. That's what will happen.

2 And if you look at the Nicaragua versus U.S.
3 Case, that case involved a treaty that had a
4 non-precluded measures clause, and we can see
5 it--oh--you can see--here's the Slide 234 of the
6 Opening in Colombia's Post-Hearing Brief. It has
7 evoked the Essential Security Exception in good faith
8 and that it was not in a position to invoke it prior
9 to the Rejoinder. The Respondent did not and could
10 not raise the exception at the inception of the
11 proceedings. [REDACTED]

[REDACTED]
[REDACTED] They're not basing it on anything that we do
14 under the Asset Forfeiture Law is--implicates the
15 Essential Security Provision. That's not their case.

16 ARBITRATOR PONCET: Okay.

17 MR. MOLOO: But I think even then they can't
18 just say, oh, because this is done under the Essential
19 Security, the Asset Forfeiture Law, you know, we're
20 home free; right? So, I think that is--is a critical
21 point. If you look at the Nicaragua v. U.S. Case,
22 they specifically dealt with this question of timing,

1 at what point in time do I need to invoke the
2 Essential Security? Do I need to know my Essential
3 Security concern? And there they specifically said,
4 it must have been at the time the Measure is taken.
5 That's what the ICJ says in the Nicaragua v. U.S.
6 case, which makes sense.

7 If you're going to apply an Essential
8 Security exception, if you're going to take a measure
9 to protect your Essential Security, if I'm going to
10 take a measure to protect my society, I have to know
11 that I'm taking that measure for that purpose. I
12 can't take a measure and then 10 years later try and
13 post hoc justify it. That's not what the Essential
14 Security Provision is there for.

15 And it does relate to the good-faith
16 invocation of this provision. And if you go to the
17 next slide, there was a question that was put to
18 counsel for Respondent: What is their position? Can
19 you just invoke it? I think Dr. Pérez--Dr. Poncet,
20 you asked counsel for Colombia yesterday that
21 question. Can I just invoke it at any point in time?
22 And I wasn't quite sure what the answer was yesterday,

1 but I will tell you what the answer was in Colombia's
2 Rejoinder, and it's up here--sorry, we can go back to
3 our Slide 15. It is the Respondent's submission that
4 the Tribunal's scope for review of Colombia's
5 invocation of the exception is strictly circumscribed
6 to an examination of whether the exception of
7 Essential Security has been invoked in good faith.

8 So, they accepted in their Rejoinder that
9 this Tribunal has the authority, the jurisdiction, to
10 assess whether or not it was invoked in good faith.
11 That is accepted in their Rejoinder.

12 And both Parties cite to the Russia Measures
13 concerning traffic and transit case with respect to
14 what this standard is, and there's two aspects to that
15 standard. The first is the definition of the
16 Essential Security Interest in and of itself. And I
17 would say if they could not define the Essential
18 Security Interest at the time that they invoked the
19 Measure, that is not a good faith indication or
20 defining of the Essential Security Interest.

21 But the second is the Measure at issue must
22 meet a minimum requirement of plausibility in relation

1 to the preferred Essential Security Interest. And so
2 it must be connected, there must be a connection
3 between the Essential Security Interest that's being
4 invoked and the Measure that's being adopted. And
5 what we would submit is if you're going after
6 good-faith third parties, which the Asset Forfeiture
7 Law itself protects, then by taking a property from a
8 good-faith third party that is not a good-faith
9 invocation of an Essential Security Provision.

10 So, it's twofold. There's the question of
11 timing. At the time that I took the Measure, did I
12 know, was I doing it for that reason? And they
13 themselves have said no, we didn't know at that time.
14 We didn't know until the Rejoinder.

15 And the second is: Are the two connected?
16 Was this Essential Security Interest met by invoking
17 the Measure? And we would submit if you are taking a
18 property or an asset or an investment of a third-party
19 good-faith purchaser, which the law that you're
20 invoking itself protects, then that is not a
21 good-faith indication of the Essential Security
22 protection, and that is something that Colombia and us

1 accept you are able to look at.

2 You know, I did say at the beginning of
3 yesterday I wasn't sure what we were going to hear
4 yesterday afternoon, whether we might hear a new
5 objection and sure enough, we did. We heard an
6 illegality objection for the first time yesterday.
7 Closing Submissions, here's the slide, the first
8 slide, ICSID Article Rule 41(2). That should set off
9 alarm bells. Because when was the last time we saw
10 that? The last time we saw that was when we saw their
11 late admission of the Essential Security defense. And
12 it says the Tribunal may on its own initiative
13 consider, at any stage. Apparently after the Merits
14 Hearing, at the Closing Submissions you can now
15 consider this brand new defense of what? Of
16 illegality, that the investment has been made
17 illegally. They were telling you throughout the
18 submissions that there's been no wrongdoing by the
19 Claimants. That's a direct quote from them. You saw
20 that yesterday. We put up that quote. They said
21 Claimants have done nothing wrong here. It's not the
22 Claimants' wrongdoing; we're going after the asset.

1 But now they're saying that the Investment was made
2 illegally.

3 Well, I don't think I need to say much more
4 than to say that is clearly out of time, and if the
5 Tribunal is going to consider it, we would reserve our
6 rights. But, you know, if you open one door, and if
7 you let them go through that door, the Respondent is
8 going to look for another door. And we're going to be
9 walking through doors forever. We're never going to
10 finish this proceeding because every time we show up
11 before you gentlemen or have another pleading, there's
12 a new argument, a new defense.

13 Now, Members of the Tribunal, I know there's
14 been a lot of questions, I want to be helpful to you,
15 but I also am cognizant of time. So, now is an
16 appropriate--I don't think we need to take a break
17 right now, but I just want to make sure from a time
18 perspective how you want us to proceed.

19 SECRETARY MARZAL: Well, you have five
20 minutes-and-a-half remaining, and the Tribunal has
21 spent 25 minutes in questions.

22 MR. MOLOO: I know we have separate time

1 reserved this afternoon for questions, but I'm in your
2 hands, Ms. Banifatemi. I want to be helpful to the
3 Tribunal. If they're going to continue to interject
4 with questions I'm happy to continuing answering
5 questions, and likewise with you this afternoon.

6 PRESIDENT SACHS: Why don't you go through
7 the remaining part of your rebuttal, and we will then
8 have the break.

9 MR. MOLOO: Okay.

10 MS. BANIFATEMI: That's perfect,
11 Mr. President, and I note that the Tribunal had
12 reserved one-and-a-half hours, so whether or not the
13 Tribunal asks these questions now or later, that
14 doesn't make much of a difference. So, we're
15 completely in your hands.

16 MR. MOLOO: Thank you. And obviously we
17 will proceed in the same way with you. Thank you,
18 Ms. Banifatemi.

19 If there are no more questions on Essential
20 Security for the moment, and I'm happy to take any, I
21 will move to discrimination.

22 Now, we've talked obviously a lot about

1 discrimination in this case; and, in my mind, I have
2 not seen a clearer case--you know, one of the key
3 questions in discrimination cases oftentimes are there
4 like circumstances, are there similar cases. It is
5 almost impossible in my mind to view a case where that
6 is--cannot be in question because you literally have a
7 Sister Property with the same alleged deficiencies in
8 the history of title, and the two are treated
9 differently. And one of the questions that was asked
10 by President Sachs yesterday was--and I think this is
11 an important point, so I wanted to clarify it--is--let
12 me take a step back. We talked about these two
13 studies that they had, that Ms. Ardila Polo had when
14 she was making her assessment. And we said when she
15 made her assessment she had one on the Sister Property
16 and one on the Meritage, and she took action against
17 the Meritage and not the Sister Property.

18 And one of the questions, Mr. President, you
19 asked, which was a good question, did Ms. Ardila
20 already have in hand the legal opinions to the title
21 search at the time. And then the question was, at the
22 time of the Precautionary Measures. And President

1 Sachs you said yes. And Ms. Herrera said no, she did
2 not have them at that time.

3 But on cross-examination she answered this
4 very question, but she answered it differently.

5 Ms. Champion said, you had these two title studies,
6 including the title studies performed by the two law
7 firms, Otero & Palacio, that's the Meritage one, and
8 Gúzman Monroy. Sorry, Ms. Ardila said that she had
9 those two. She says I have the Otero & Palacio and
10 the Gúzman Monroy. And Ms. Champion asked to clarify,
11 at what point in time did you have these studies? So
12 you had the Otero & Palacio title study before you
13 imposed Precautionary Measures? And she said:

14 "That's right."

15 So, she was talking about these two title
16 studies, having them before she imposed Precautionary
17 Measures.

18 So, the answer to your question, according
19 to Ms. Ardila Polo, did she have these two title
20 studies before she imposed Precautionary Measures?

21 The answer is yes, she did.

22 PRESIDENT SACHS: That could also be an

1 element of relevance in regard of Article 118
2 concerning the initial phase where it says in Number 5
3 that the authority must search for elements of good
4 faith. So, if they had in hand this opinion that
5 would show that the Investor made inquiries as to the
6 titles?

7 MR. MOLOO: She was not--she didn't do this
8 because she asked for them.

9 PRESIDENT SACHS: Well, she had this in
10 hand. This was the point.

11 MR. MOLOO: We can give you the reference,
12 but it was handed to her in the file, so she had a
13 file that was--that had certain information. But
14 there is no evidence in the record at all that she
15 actually assessed good-faith status at all. She had
16 them at the time, but there is no evidence in the
17 record that she actually made--did anything with them,
18 assessed whether or not there was good-faith status of
19 anybody.

20 But what she did do, is having these two in
21 hand, she treated one property differently than the
22 other is the point that I'm making. But I think it is

1 important to note that just because she was handed
2 something--her obligation is not just to have it in
3 her hand; it's to do something with it. And all the
4 evidence in the record suggests that she did not make
5 an assessment of good faith.

6 Because, by the way, if she had made an
7 assessment of good faith, then she made a different
8 determination with respect to the Sister Lot, and a
9 different determination with respect to the Meritage.
10 That is the definition of discrimination.

11 So, if she did do an assessment, the
12 question, that one, that begs is, why did she come to
13 a different conclusion then, with respect to the
14 Sister Property and the Meritage? So, either she
15 didn't do the assessment or she did the assessment,
16 and both of them said clean title, and she gave one
17 the benefit of that clean title and the other one not.
18 So, whether she did it or not, I think there is a
19 breach of the Treaty.

20 ARBITRATOR PONCET: And your explanation for
21 that differential treatment is corruption?

22 MR. MOLOO: Well, discriminatory intent is

1 not necessary to determine. This Tribunal need not
2 speculate as to why. You don't need to find that
3 there was corruption in order to find that there was
4 discrimination.

5 ARBITRATOR PONCET: That's a very serious
6 allegation; of course?

7 MR. MOLOO: And we take it very seriously
8 when we make the allegation, absolutely, but for
9 purposes of this Tribunal making a determination, to
10 find that there was discrimination, one need not find
11 that there was corruption. You just need to find that
12 there was differential treatment of similar cases.
13 And there was no rational justification for that.

14 If you're looking for an explanation, which
15 would be an independent breach of the FET standard,
16 we've given you what we think that explanation is, but
17 one need not make a determination with respect to
18 corruption to find that there was discriminatory
19 treatment.

20 ARBITRATOR PONCET: But you are saying that
21 the--I will reserve that question for later. I don't
22 want to keep interrupting.

1

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

█

[REDACTED] So, there is no

17

rational explanation for why you treat these

18

differently.

19

And then we say well, why do you treat all

20

the other Iván López properties differently? And they

21

say, well, because you have to look after 1994 because

22

he probably started drug-dealing around 1994, and

1 that's the date that we look at. So, how—and so they
2 look at--they give a couple of examples, but how does
3 that explain that, in 2007--2007--look at this
4 Transaction. Report of the Judicial Police from
5 May 2016. Look who owns this property. Iván López
6 Vanegas is on the title. By the way, remember, on the
7 Meritage Property, Iván López's name was never on the
8 title of that property. It was owned through a
9 front-buyer, an alleged front-buyer, a company called
10 "Sierralta." This is directly owned by Iván López.

11 And in 2007, while he is in jail in the
12 United States, if you would have done a Google search,
13 that's what you would have found. The property gets
14 transferred to a fiduciary that's owned by the State
15 in 2007, and that property was transferred to a
16 fiduciary, because now you know the structure, this is
17 the way it's done in Colombia, because it was going to
18 be developed for condominiums. That's on the next
19 slide. You can see it was for the purposes of the
20 establishment of condominiums, it was a development.

21 ARBITRATOR PONCET: And that's not in the
22 framework of any Asset Forfeitures; right? Is it?

1 MR. MOLOO: There's no evidence in the
2 record at all--

3 ARBITRATOR PONCET: You could see it's done
4 in other countries, Italy is the first example that
5 comes to mind, of course, where assets are forfeited
6 in the context of drug-trafficking, and I will then
7 turn over to fiduciary company's management. This is
8 not what we're talking about here, huh?

9 MR. MOLOO: No, absolutely. It's for the
10 purposes of establishing condominiums, as you can see
11 on the next slide. So, it is not done in the context
12 of an Asset Forfeiture, correct.

13 And if you look on the next slide, you can
14 see a number of other transactions. These were the 47
15 that were sent to--on the list, the 47 that were sent
16 to Ardila Polo that had she looked at them--she was
17 looking at 1994 is the date. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 [REDACTED] [REDACTED]

2 [REDACTED] She went after the Meritage where Iván
3 López was not directly on title, and it was an
4 acquisition in 1994.

5 Why did she not go after any of these other
6 properties? The 1994 cut-off date, which is
7 completely arbitrary, by the way, there is no rational
8 explanation for that 1994 date except the fact that
9 that's when the Meritage Property was acquired by
10 Sierralta. Why didn't she go after any of these other
11 ones? There is no rational explanation.

12 So, vis-à-vis all of these comparator
13 groups, there is rampant discrimination, [REDACTED]

14 [REDACTED]

15 [REDACTED] [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 But another thing that this tells you is
21 something very important: If fiduciaries and banks
22 are not catching Iván López, then clearly diligent

1 folks in similarly--in fact, who have more onerous
2 requirements are not finding anything, when they're
3 searching for Iván López directly.

4 And you've seen the Experts have talked
5 about this "common error" doctrine. That is the
6 definition of a common error. If everybody is making
7 the same mistakes, fiduciaries, banks, everybody,
8 nobody's finding anything when they're doing whatever
9 you have to do, Google search or whatever it is that
10 you have to do.

11 PRESIDENT SACHS: I'm sorry, Mr. Moloo, we
12 have to stick to our timetable in some way. Strictly
13 speaking, your time is over, considering even the
14 questions of the Tribunal, so make a short note to go
15 through the rest.

16 MR. MOLOO: I will go through them
17 relatively quickly, Mr. President. Thank you.

18 Let me turn to FET, the
19 fair-and-equitable-treatment standard. What we have
20 for you here is, in this section, every provision that
21 we could find in the Asset Forfeiture Law that refers
22 to good-faith status, so for your reference it's

1 there.

2 The first provision deals--and they're not
3 in order, but they're all there--deals with Affected
4 Persons. These are the folks who have a vested
5 interest. They are the ones whose good faith status
6 matters. That's Article 30.

7 We asked the question: What is the relevant
8 date at which good faith must be assessed. And
9 Dr. Medellín and Dr. Martínez have both answered that
10 question as saying October 2013.

11 And why do they say October 2013? I think
12 that's an important question. It's because
13 October 17th is when this pre-sales Trust Agreement
14 was signed. And on Slide 27, you can see that
15 Agreement, and that Agreement makes it clear, sorry,
16 it's the Administration and Payment Trust. Both of
17 these agreements were signed on that date. And the
18 Administration and Payment Trust makes it clear that,
19 as of that date, the Contract is irrevocable, and the
20 Trustor may only modify it or change the use of the
21 assets in Trust with prior written approval of the
22 purchasing beneficiaries. The purchasing

1 beneficiaries are the Unit Buyers.

2 So that matters; right? Because as of that
3 date, you're now selling units to Unit Buyers, so as
4 of that date it's irrevocable. You can't, it's the
5 point of no return, so that makes sense. Your good
6 faith should be assessed as of that date because as of
7 that point, you can't give it back. You're now
8 selling to Unit Buyers. So, if you discover something
9 at some later point in time, you're stuck, you're
10 stuck. You now have obligations.

11 So, that's why Dr. Medellín and Dr. Martínez
12 say that's the date because that's the point at which
13 you have vested acquired rights, and it's the point of
14 no return. It's an irrevocable obligations at that
15 point.

16 Article 3, which is at the very beginning of
17 the Asset Forfeiture Law, makes it crystal-clear,
18 Asset Forfeiture shall have as its limit--its
19 limit--the right to ownership legally obtained in good
20 faith without fault. So, they say, you know, it
21 doesn't go after people. It goes after the asset. We
22 agree. It goes after the asset. But there is a limit

1 to going after that asset. You can only go after the
2 asset insofar as it does not affect the rights of
3 good-faith third parties. So, it is an act, if you're
4 going after the asset, yes. But you can't go after
5 the asset when it affects the right of an affected
6 party who is a good-faith third party.

7 There is a presumption of good faith, that's
8 Article 7.

9 Whose burden of proof is it? It's the
10 Attorney General's burden of proof to assess good
11 faith. And they say, oh, but this is their burden of
12 proof in court. But it's like any Prosecutor's burden
13 of proof; right? You don't bring the action to court
14 unless you feel like you can meet the burden of proof
15 that's on you--right?--the standard of proof. And so,
16 the burden of proof is on the Attorney General.

17 That's not in dispute.

18 At what point in time in this proceeding do
19 they have to assess good faith? This is Article
20 118(5) that, President Sachs, you were asking about.
21 They must search for and collect--they must search for
22 and collect the proof. They didn't search for and

1 collect the proof. They had these title studies and
2 treated two differently, but they didn't go and search
3 for any--they had nothing else, that we know of. They
4 didn't ask certainly Newport about any of the steps
5 that they had taken during the initial stage, and what
6 is that initial stage? It's the point up to the
7 Provisional Determination. That's the Determination
8 of Claim, which happened January 25th. That's usually
9 the initial stage.

10 But there is an exception, and that is when
11 Precautionary Measures are taken. Precautionary
12 Measures may be taken urgently during the initial
13 stage, but even then Article 87 makes case, makes
14 clear that when you're taking early Precautionary
15 Measures, you must still do so. In any case, the
16 rights of third parties acting in good faith without
17 fault must be safeguarded.

18 And Dr. Medellín explains this. He says the
19 imposition of Precautionary Measures requires the
20 greatest care, given that their duration, depending
21 upon the duration of the Asset Forfeiture Proceeding
22 might extend over time generating possible harm to

1 persons who are able to demonstrate their status as
2 good-faith third parties without fault. If we end up
3 getting stuck in an Asset Forfeiture Proceeding that's
4 six years long, that's what he's talking about. You
5 have to assess their good faith and protect their
6 interests because otherwise you get stuck in this
7 proceeding, and that's it. You're stuck.

8 ARBITRATOR PONCET: Sorry to interrupt
9 again, but it's not fully clear to me what happened in
10 this case at the expiration of the six-month period
11 which is now--which is quoted on your--of your Article
12 89, which is quoted in your Slide No. 32.

13 MR. MOLOO: They issued--

14 ARBITRATOR PONCET: Go ahead.

15 MR. MOLOO: They issued a Determination of
16 Claim saying that Asset Forfeiture should take place.
17 That's what the Attorney General's Office decided.

18 ARBITRATOR PONCET: And then?

19 MR. MOLOO: And then it went into a court
20 process where it is currently stuck.

21 ARBITRATOR PONCET: So other than the
22 judicial determination that the Measure was, in

1 principle, justified, there is nothing, is what you're
2 saying?

3 MR. MOLOO: It was a prosecutorial decision.

4 ARBITRATOR PONCET: Okay.

5 MR. MOLOO: That Determination of Claim is
6 made by the Attorney General's Office. The
7 Determination of Claim was filed by Ardila Polo. It
8 was an administrative act. And then the next step is
9 the Requerimiento, which was--Ardila Polo was
10 unceremoniously fired or moved or whatever, between
11 the Determination of Claim and the Requerimiento.
12 They were documents that were issued about one month
13 apart. Dr. Caro was asked about this on
14 cross-examination, he basically copy-pasted the
15 Determination of Claim and adopted it as the
16 Requerimiento. He said, out of 120 cases--you may
17 remember this from the cross-examination.

18 ARBITRATOR PONCET: Yeah, yeah.

19 MR. MOLOO: And as soon as he got hired, he
20 basically said, oh, I just ignored my 120 cases and
21 for one month straight I did nothing but do this
22 Requerimiento. That's what he said in

1 cross-examination.

2 ARBITRATOR PONCET: So, after the six-month
3 period, and to this very day, we have an Asset
4 Forfeiture Procedure that is in limbo.

5 MR. MOLOO: Correct.

6 And just in 2022, the affected-party status
7 of Newport has now been recognized, and what have we
8 been told? We have been told well, now we'll wait and
9 see how long it takes, but now they may be recognized
10 at some point. And their good-faith status may
11 be--the Courts because the prosecutors didn't do it,
12 now the courts might do it, and what happens then?
13 They get the property back? But that's still a breach
14 of international law because it's too little too late.

15 It's not--this claim is not premature
16 because that investment is dead. It is gone. All of
17 the other projects are done. And that's why
18 Dr. Medellín says what he says. You have to take the
19 greatest care before you do this. You have to assess
20 good-faith party at the early stage because of this.
21 Because it can get stuck because of their duration in
22 these Asset Forfeiture Proceedings for years.

1 And I asked Mr. Caro before he did the
2 Requerimiento, did he assess good faith. So I asked
3 him, did you do this during the initial stage; right?
4 Because this is what he's required to do. Did you
5 assess Newport's good faith? And in cross-examination
6 he said, he assessed Corficolombiana's good faith but
7 not Newport's, is what he basically said.

8 What is the good-faith standard? What must
9 you do? We've talked to you about the Constitutional
10 Court Decision. I won't go into that in any more
11 detail, but it's not the Google-search standard that
12 you heard on the other side.

13 And you have the slide from yesterday
14 saying, well, if they would have searched for Iván
15 López, even though he wasn't on title, to be clear,
16 what was Iván López? He was a legal representative at
17 one point in time. This is important to know, of
18 Sierralta. At the time they did the search, he was
19 not the legal representative of Sierralta. The legal
20 representative--that's why he didn't turn up. That's
21 why he wasn't on the list. The legal representative
22 at the time they wrote to the Attorney General's

1 Office and said, please search all of these people,
2 was Sebastian López, his son, and they did search
3 Sebastian López. But Iván López was a legal
4 representative at an earlier point in time. So,
5 apparently, you're supposed to search all the owners,
6 all the current legal representatives, and all of the
7 prior legal representatives is what you're supposed to
8 do. You're supposed to Google-search all of them.

9 Mr. President, do you have a question?

10 PRESIDENT SACHS: No, no.

11 MR. MOLOO: And the Google-search standard I
12 don't think I need to deal with in any further detail,
13 but obviously there would be a whole bunch of mischief
14 that would happen, commerce would come to a halt. If
15 this Tribunal finds that the standard is anything
16 other than what the Constitutional Court decided, then
17 it would be havoc, I will say, in Colombia because
18 business will come to a halt. No one will buy and
19 sell property if this Tribunal finds that that's the
20 standard.

21 You see that Dr. Martínez and if you look at
22 Medellín's Second Report at Paragraph 70 also

1 confirmed that the standard is what this
2 Constitutional Court Decision says it is. And instead
3 on Slide 40, you can see--sorry, 39, you see what
4 standard they would like to rely upon on Colombia, and
5 they rely on a case from the Court of Antioquia
6 district but I think it's important to recognize that
7 this is not an Asset Forfeiture Proceeding case. This
8 is a case under the Victims Land Restitution Law.

9 So, to be clear, this case that they rely on
10 on that slide is not an Asset Forfeiture Law case. It
11 is a Victims Land Restitution law case and therefore
12 does not apply.

13 You're well-aware of the--and by the way,
14 it's also not the Constitutional Court, which is the
15 highest Constitutional Court of the country. It's a
16 lower court.

17 You're well-aware of the diligence that was
18 done, but there is only one point that I wanted to
19 emphasize. They say, oh, the Orteo Palacio, they only
20 did a civil title study. They also did a corporate
21 study, and Ms. Champion took you through that
22 yesterday, on their counter-party, on La Palma. So,

1 it's not just a title study that they did; they did a
2 corporate study, and Ms. Champion gave you that
3 citation yesterday.

4 Dr. Medellín and Dr. Martínez both looked at
5 this case, and they said, as the father of the Asset
6 Forfeiture Law and the one who drafted this law, they
7 looked at it and they said, would these--would
8 this--would Newport have qualified as a good-faith
9 purchaser? And the answer for both of them
10 independently was yes, based on what I have seen was
11 done in this case, I think that sufficient steps were
12 taken to make them good-faith third-party purchasers.

13 At any point in time, the Attorney General's
14 Office has the right to withdraw an action against a
15 good-faith party without fault. That's 124,
16 Paragraph 4. But they haven't done that in this case.

17 And I think this last section that I wanted
18 to take you to is important, which is Article 16.
19 Forfeiture shall be declared under the following
20 circumstances. 10 is particularly interesting here.
21 Yes, forfeiture goes against assets, but even assets
22 of legal origin can be taken when--assets of legal

1 origin whose value is equivalent to any assets
2 described in the preceding numbers, can be subject of
3 Asset Forfeiture when? Whenever the action is
4 inadmissible due to the recognition of the rights of a
5 third party against acting in good faith without
6 fault. What does that mean? It means that if I were
7 to act against an asset that would affect the rights
8 of a third party--good-faith third party without
9 fault, I can't act against that property. Instead, I
10 go against the property of the wrongdoer's licit
11 property, their lawful property. I can go against
12 that property because what I can't do under any
13 circumstances is affect the rights of a good-faith
14 third party.

15 And that's what Article 16(10) allows them
16 to do. It allows them to go against lawfully obtained
17 property of a wrongdoer if going against the illicit
18 property would affect adversely the rights of
19 good-faith third-party purchasers. And that's exactly
20 what Dr. Martínez and Dr. Medellín talk about in their
21 Report. That's what should have been done in this
22 case. If they identify a good-faith third party

1 that's being affected here in Newport--and by the way,
2 the Unit Buyers--but if there is a third party whose
3 rights are being affected, if I go after this
4 particular asset, what I do instead is [REDACTED]
5 [REDACTED] or Iván López's other assets,
6 that's what you're supposed to do. So you don't under
7 any circumstances affect a good-faith third-party
8 purchaser.

9 Sorry, did you have a question, Dr. Poncet?

10 ARBITRATOR PONCET: I was mumbling to myself
11 that this is very similar to the Italian provision.

12 MR. MOLOO: And many jurisdictions have
13 something similar. Even though it's against the
14 asset, you can't go after the asset if it affects the
15 rights of good-faith third parties, you can then go
16 after other assets.

17 What I want to end on if--in just a couple
18 of minutes because I don't think there was any real
19 rebuttal to our damages case in this case, quite
20 frankly, is a few of the points that were made at the
21 end of yesterday. The first thing I wanted to address
22 is that--this causation question. There is more than

1 enough documentary evidence I think that this has
2 affected Luxé and other properties. They say very
3 carefully in their Closing Presentation: There is no
4 documentary evidence that Colpatria pulled their funds
5 from Luxé. But Mr. López Montoya and Mr. Seda
6 confirmed this in their testimony, and Mr. Seda was
7 not questioned about it, and Mr. López Montoya, who is
8 the VP of Construction, and obviously very
9 well-positioned to be able to answer this question,
10 testified to this. There is no--nothing in the record
11 that questions that evidence.

12 They talk about, oh, well, Paladin was still
13 interested, and they refer to a couple of emails, and
14 you can see they refer to C-379. They said Paladin
15 was still interested. But let's look at that email.
16 It's right there.

17 Paladin writes to Mr. Seda on August 8th,
18 2007--2016, 5 days after the Asset Forfeiture of the
19 seizure, I should say, of the Meritage, and he said:
20 Understood, we would have to wait until the Meritage
21 issue is resolved to move forward--that's with respect
22 to the Luxé, he's talking about his investment in the

1 Luxé--but I do not see a problem with continuing the
2 relationship and learning more about Luxé in the
3 meanwhile. But he's making clear, yes, he's still
4 saying okay, we'll still talk, let's see what happens,
5 but we're going to have to wait to see that this
6 Meritage issue is resolved.

7 So, it is misleading, quite frankly, when
8 they say the Claimants tried to obtain alternative
9 financing or tried to sell the Project. And emails
10 from Paladin if you look at them, you'll see that, in
11 fact, there were third parties that were still
12 interested. Well, no, they're saying, okay, let's
13 carry on the conversation but we have to wait for this
14 Meritage issue to be resolved before we invest in
15 Luxé. That's what that email actually says.

16 DCF is appropriate here, and even if you
17 applied the Rusoro test that they put up. All of
18 these, I explained to you yesterday, are satisfied.
19 You have to look at this enterprise as a business, not
20 just the Meritage Projects in isolation. This is the
21 Royal Realty Property Group. Had dozens of employees
22 that worked on all of these projects. They were

1 working on Luxé, on The Charlee Hotel, Mr. López
2 Montoya, Mr. Seda, it was the same people that were
3 working on this--it was a business. It was not just
4 one--you can't look at it as just one project that was
5 affected here. It was an entire business that was
6 adversely affected. And that enterprise had a history
7 of financial performance because of The Charlee. This
8 is unlike other--there is a track record here. Are
9 there reliable projections through Business Plans?

10 Yes, BRG relies on those Business Plans.

11 If you go through each and every one of
12 these, we have satisfied all of them, and Rusoro says
13 you don't even need to satisfy all of them, but I
14 think we satisfy each and every one of them.

15 And like I said, this is unlike--real estate
16 property development cases are unlike mining and other
17 cases where there's all of this--all of this
18 uncertainty. Real estate has inherent value. Once
19 you have the Contract locked in, once you have
20 financing in place, this project is a go. You
21 pre-sell the Units. You pre-sell them.

22 The last point I wish to make is just to

1 deal with these concerns that they have that we're
2 pursuing actions in domestic courts. Well, there
3 are--we can assure you just like they have in other
4 cases, that we can provide whatever undertaking this
5 Tribunal requires that we will not double-recover. As
6 a matter of international law, there are certain
7 rights that obviously our clients have, and those are
8 the ones that are being pursued before this Tribunal,
9 and that's perfectly acceptable and other tribunals
10 have dealt with similar situations.

11 And this whole idea that money, if you Award
12 the clients--the Claimants money that it's going to
13 flow to criminal organizations? That's not going to
14 happen. This structure is no longer. This project is
15 not being built. [REDACTED]

16 This is damages, what's being claimed here is damages
17 to the Claimants. This money is going to go to the
18 Claimants--and there is obviously a third-party funder
19 who also gets some money--but no money is going to any
20 criminal organization in Colombia. And if the
21 Tribunal would need an undertaking, I doubt they
22 would, but obviously a similar undertaking could be

1 provided.

2 Members of the Tribunal, I appreciate your
3 indulgence this morning. Those are my submissions,
4 subject to any other questions.

5 PRESIDENT SACHS: Thank you very much,
6 Mr. Moloo.

7 Now, in terms of time budget, Sara.

8 SECRETARY MARZAL: Would you like me to tell
9 the additional minutes that they spent?

10 PRESIDENT SACHS: Yes.

11 SECRETARY MARZAL: 19 minutes.

12 PRESIDENT SACHS: So 49. Instead of 30, 49?

13 SECRETARY MARZAL: Um-hmm.

14 PRESIDENT SACHS: So, the same budget is, of
15 course, available to the Respondent.

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

17 And before we depart for the break, my
18 partner has a question for Mr. Moloo.

19 MS. HERRERA: Thank you.

20 Mr. Moloo, you made a reference when you
21 were showing us the titles that you stated that--you
22 say that Ms. Ardila Polo had received, and you say we

1 can give you the reference, I would be grateful if you
2 can give me the reference.

3 MR. MOLOO: Understood.

4 MS. HERRERA: Thank you.

5 MS. CHAMPION: I'll send you the page number
6 of the cross. I think she said she--

7 MS. HERRERA: I didn't mean of the cross,
8 because that's in--clearly you put it in the bundle.
9 But Mr. Moloo said--

10 MR. MOLOO: It's in the cross, where she
11 answered the question. We will give it to you.

12 MS. HERRERA: No, no, not the question. You
13 say we can show you the reference to the--where you
14 take the basis that she got it, and when she got it.

15 MS. CHAMPION: She said in her testimony
16 that she received it from the Organized Crime
17 Prosecutor.

18 (Comment off microphone.)

19 MR. MOLOO: We can give you the reference.

20 MS. HERRERA: Thank you.

21 MS. CHAMPION: But if you look at that page
22 of testimony, it's clear. I think she got it from -

1 what's her name?- María Isabel Correa Torres, I
2 believe.

3 MS. HERRERA: If you send it, that's great.
4 Thank you. Thank you, again.

5 PRESIDENT SACHS: Now it's five past 11:00.
6 Can we resume--we said that we would give you some
7 more time, so a longer tea break, let's say 11:45?
8 Would that be all right?

9 MS. BANIFATEMI: It's 11:09 by my watch.

10 PRESIDENT SACHS: Yes.

11 MS. BANIFATEMI: I had noted, Mr. President,
12 you would give us 45 minutes. So, if the Tribunal
13 agrees, we're now at 11:10, 5 to 12:00.

14 PRESIDENT SACHS: 5 to 12:00, yes.

15 MS. BANIFATEMI: 5 to 12:00. Thank you.

16 (Recess.)

17 PRESIDENT SACHS: Okay.

18 MR. MOLOO: Mr. President, there were two
19 questions that I wanted to come back on, one from
20 Dr. Poncet and one from Professor Perezcano, if I may.

21 I see there are technical difficulties. I
22 will give them a moment.

1 (Pause.)

2 MR. MOLOO: Shall I proceed, or shall we
3 wait?

4 (Pause.)

5 PRESIDENT SACHS: Please proceed now.

6 MR. MOLOO: Thank you.

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 But what he did mention is that the only
17 requests that were ever made to La Palma around the
18 same time as this, after the asset seizure were
19 pursuant to promise of purchase agreement,
20 specifically Clause 3, which says it "agrees to
21 transfer title to the Real Property covered by this
22 Contract free of mortgages, civil claims, seizures,

1 conditions subsequent, pending lawsuits, ground rent,
2 any encumbrance or limitation of ownership, and it
3 shall defend title in those cases where it is required
4 under the law."

5 There are two letters in the record at
6 C-419, and I have copies, if the Tribunal would find
7 it helpful, and C-418.

8 C-418 is November 23rd, 2016, and C-419 is
9 March 6, 2017. And that second letter actually quotes
10 the provision I just read, where Mr. Seda is writing
11 to Fanny Giraldo at La Palma, asking them to cover the
12 fees to defend the title in actions, and I can provide
13 these, if they're--if the Tribunal would want copies
14 of each.

15 PRESIDENT SACHS: If they're on the record,
16 that's fine.

17 MR. MOLOO: They're on the record, yes,
18 C-418 and C-419.

19 So, to the extent there are any requests
20 being made to defend title, you can see the formal
21 letters where--from Mr. Seda to Fanny Giraldo at La
22 Palma. But obviously for the avoidance of any doubt,

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The second point was Professor Perezcano, in response to your question about the scope of the Essential Security Exception and whether it covers breaches or just precludes this Tribunal from saying the Measure cannot be withdrawn. We do address this in some detail in our submissions, but there is one specific Treaty that I wanted to bring to your attention, which is at CL-210, and it's the India-Singapore Investment Treaty, and that provision is different from ours in an important way. It's basically phrased like a denial-of-benefits clause. It says: "Nothing in this chapter shall be construed to require a party to accord the benefits of this chapter to an investor that is an enterprise of the other party where a party adopts or maintains measures in any legislation or regulations which it considers necessary for the protection of its Essential Security Interests with respect to a non-party..."

1 But that one clearly says that "nothing in
2 this chapter should be construed to require a party to
3 accord the benefits of this chapter" in that
4 circumstance, and this Tribunal will be well familiar
5 with denial-of-benefits clauses where that's where
6 they're saying you don't get the protection of the
7 Treaty. You don't get access to arbitration. You
8 don't get protection of the treaty. What I think is
9 important is our Treaty, the one that's at issue here,
10 also has denial-of-benefits provisions. It has
11 denial-of-benefits provisions at 10.12, and it
12 specifically says: "A party may deny the benefits of
13 this chapter to an investor of another party that is
14 an enterprise of such other party where they don't
15 maintain diplomatic relations or adopts or maintains
16 measures with respect to the non-party or a person of
17 that non-party that prohibits transactions with the
18 enterprise that would be violated or circumvented if
19 the benefits of the chapter were accorded to the
20 enterprise or to its investments." So, for example,
21 maybe if one was on an OFAC List or something like
22 that, then there is a denial of benefits.

1 So, they did deny benefits of the
2 protections of the Treaty in certain limited
3 circumstances but not in the circumstances at issue in
4 this case.

5 Those were two points I wanted to address.

6 PRESIDENT SACHS: We will now give the floor
7 to the Respondent.

8 REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

9 MS. BANIFATEMI: Thank you very much, Mr.
10 President.

11 One housekeeping matter is that we are going
12 to distribute some slides.

13 Is it coming or...it was sent by email
14 apparently, okay. So you have received them by email
15 and one of my colleagues will bring paper copies just
16 in a few minutes for your convenience.

17 Another housekeeping matter is that simply a
18 number of comments by my colleague and friend on the
19 other side related to the Treaty in response to the
20 Tribunal, so I will try to fit everything in the time
21 that I have, but I don't rule out that I may need a
22 bit more time because these are Tribunal questions, if

1 you allow me, so if the Tribunal has just a bit of
2 indulgence on the 49 minutes because we do have a lot
3 to say.

4 PRESIDENT SACHS: Yes, we'll have some
5 indulgence, but please do not go much longer.

6 MS. BANIFATEMI: I do not intend to abuse
7 the Tribunal's indulgence, absolutely.

8 CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

9 MS. BANIFATEMI: Thank you. So, without
10 further ado, I will start--and I will go through
11 Mr. Moloo's presentation point by point. So, since
12 being a rebuttal, I will follow the same sequence.
13 And for some of my comments, I will refer back to what
14 my partner Ms. Herrera had said because sometimes
15 these concern asset forfeiture proceedings and she
16 will address those more in-depth.

17 In fact, the slides would have been helpful
18 now because--yes, you can see them on screen, so
19 that's perfect.

20 So the first point made by Mr. Moloo was
21 that the narrative by Colombia is that we are
22 essentially saying "do not invest in Medellín because

1 it's a very dangerous region." That's not the point,
2 with respect. The point is that when you do attempt
3 to invest in a region which is plagued by violence and
4 by organized crime, the least you should do is that
5 you should engage in due diligence and to know where
6 you're going essentially. So it doesn't mean that you
7 cannot but you know where you're going and you know
8 where you're putting your steps.

9 On the exact due diligence--and my colleague
10 is now distributing the paper copies--on the due
11 diligence itself, Ms. Herrera will go through that,
12 but I wanted to just give you a sense of what we're
13 talking about here. If you go to Slide 3 of our
14 presentation, you'll see that many Asset Forfeiture
15 Proceedings were initiated against lots in Antioquia,
16 which is also in the same region, and you have here an
17 excerpt from our Rejoinder where you see that, for
18 example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

22 So, what we're saying is that it's not only

1 the Meritage. It's also other places and lots and
2 regions.

3 Next slide on Slide 4, you see that--and
4 this is all in on the record, we actually discussed
5 them at the May Hearing--

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20 So, all of this shows one thing which is
21 that this is indeed a very dangerous, violent region.
22 So, if you pretend to go there and invest, the least

1 when--you're an indeed good-faith buyer or a
2 good-faith investor, what the least you should do is
3 do a due diligence properly, and Ms. Herrera will come
4 back to the due diligence that actually was done by
5 Mr. Seda.

6 But what you see here--and that's the
7 last--Slide 6 is an excerpt of my cross-examination of
8 Mr. Seda, and you see what he said. He said that, you
9 know, when I asked him about this and I asked him
10 about the danger in the region, he said "it's a
11 strategy. Does it always have to be danger? It could
12 be other variables, et cetera.

13 There are some unattractive. You see
14 promise. You see that there's something that can be
15 made out of it. You're a first arrival. You come in
16 and you create attractive development and usually
17 other people follow. It was our strategy." If it's a
18 strategy he has to live by the strategy and by what he
19 did.

20 So the next slides are the actual due
21 diligence, which I will not go through right now.
22 Ms. Herrera will actually develop this further, so I

1 want to just stop here on the point which is a
2 narrative. A narrative is if you go to a very
3 dangerous region plagued by organized crime and the
4 Cartel of Medellín, you know what you're doing. It's
5 your duty to engage on that.

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16 On the point--I think there was a point made
17 by--again the dangerous region. So this has been
18 accepted by Mr. Seda. The additional point I wanted
19 to make is about the Preamble. There was a point made
20 about the Preamble. It cannot be said in this
21 Tribunal. I would be very surprised if this Tribunal
22 says, given the Preamble that we have, that it says

1 that one of the purposes of the Treaty is to allow
2 narco trafficking and corruption. It says the exact
3 contrary. It says "prevent and combat corruption,"
4 So, that is the Preamble and that is the intention of
5 the parties by entering into this Treaty. It's not
6 the contrary.

7 And when I discussed casino, I discussed it
8 in the sense that Mr. Seda allegedly invests less than
9 2 million with a number of other people, but he
10 expects 255 million from this Tribunal and only--and
11 then he expects everything else in Colombia as well
12 because he has the other remedies. Now they say, Oh,
13 we can take an undertaking. But that undertaking will
14 not resolve the problem of the multiple bites at the
15 apple and certainly not the problem of Colombia
16 currently being the subject of a number of actions by
17 the Unit buyers against it, so that cannot be
18 resolved.

19 There was a point made by Mr. Moloo about
20 the Colombian courts and a decision on Slide 6. This
21 relates actually--and the only point I will make now
22 is that when you read Slide 6 of Mr. Moloo, it says:

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So, you have to go back, as usual, given the

1 misrepresentations to the actual record and what was
2 discussed at the time a statement was made. And, of
3 course, this has nothing to do with the point that I
4 will now make.

5 [REDACTED]

6 [REDACTED]

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9 [REDACTED]

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This is an interview by, I understand, a famous radio journalist on W Radio 5 August, and you see that he says in the passage in yellow, "they are certain that people were the owners of those like the ones--he's talking about the Meritage here because the article discusses Mr. Vanegas, López Vanegas, coming and asking Mr. Seda for the land because he says "it's mine." So, the journalist asked "they are certain that some people were the owners of those, like the ones I'm going to mention: The López brothers, they belong--this land would have been taken over by people who were linked to the Oficina de Envigado, such as Rogelio and Daniel." Rogelio is the big boss of the cartel--okay?--none less than that. "Then it passed in the hands of Perra Loca; then to Mr. Juan Guillermo Arango, known as Gurú; and then to Javier García, known as Maracuyá."

He's--the journalist asks him, and we really

1 don't have an answer to that. And then, I encourage
2 you to read the full Exhibits R-30. There may be--we
3 will double-check that because the--when I looked at
4 earlier today, I looked at Page 2, it says,
5 "journalist" and answer, it says, "journalist." So,
6 we will need to--we will come back to the Tribunal if
7 the Transcript is not accurate, but you see that,
8 here, there is no real answer. And then, you see the
9 answer, "yes, sir, in relation to our knowledge on
10 this subject?" "Yes, we did have knowledge on this
11 subject." Actually, you need to read the entirety of
12 the passage in R-30. He says--the journalist says,
13 well, I imagine you didn't know about all this, and
14 Mr. Seda says in--that's where he says what he says
15 here "in relation to our knowledge on the subject,
16 yes, we did have knowledge on the subject." He says,
17 "we did have knowledge on the subject", which
18 presented to us the--remember, that was a foreign
19 company.

20 And then, he goes on about the due diligence
21 that he engaged in, and he says that the only thing we
22 can do are the studies required by law that the

1 studies--it's not in your slide. I'm just reading
2 from Exhibit R-30.

3 (Comment off microphone.)

4 MS. BANIFATEMI: If you--I don't know if we
5 can flag R-30 or not, but I'm reading from Page 2 of
6 R-30 in the English version.

7 So, then I just continue reading for purpose
8 of time. He refers to title studies, and as you know,
9 by the way, that the title studies only look at the
10 nominees--now you know that--so, it's not enough. And
11 he says, well--he says--he brags about having hired
12 the regarded firm called "Otero & Palacio," and we now
13 know that Otero & Palacio did only a 10-year study
14 when we know that Asset Forfeiture Proceedings do not
15 have a statute of limitation.

16 And then he says, I quote: "They do a study
17 that uses not only the lists, like the Clinton lists,
18 and ask people recognize but they also use tools, like
19 Google," so he admits that Google can be a basis to do
20 search, and hooks for any links not only to people on
21 the property list, but also to relatives, siblings,
22 known husbands and wives. So, any links that these

1 people have are shown on any news. One thing you're
2 commenting on is that these properties were passed
3 from hand to hand with certain people. We did a
4 thorough investigation; it doesn't show any of these
5 things.

6 And so, what this shows is that he accepts
7 that you have to do a thorough investigation, so he
8 says he didn't know at the time, but even assuming,
9 even assuming in 2014 he didn't know about all of
10 these people, which Ms. Herrera will show, he knew or
11 should have known before that.

12 Let's assume in 2014 he hears from the
13 journalist, well, [REDACTED]

14 [REDACTED] The least he
15 should have done then would have been to say, okay,
16 maybe my investigation was not thorough. Maybe, I
17 want to go back and do a double-check, which he didn't
18 do.

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And Slide 35, you see that--and actually, that's the right order chronologically. So, on 2 June, Mr. Seda volunteers to facilitate and pressure for a transaction between Iván López and the previous owners. You see that from a chain and that you may remember this was also discussed in the May Hearing, Exhibit 162 between Mr. Victor Mosquera, the lawyer, and Mr. Seda. And Mr. Seda says, this is something

1 that has to be solved by the previous owners, whoever
2 they may be, who sold the Lot, but what we can do
3 this, negotiate and facilitate a transaction and
4 pressure from our end for the hassles they can cause.

5 So, essentially, López Vanegas comes and
6 says, the land is mine, and then, Mr. Seda says, well,

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1 This is what we're talking about here, and
2 this is not even denied.

3 Now, one last point that I will make before
4 I pass on to my colleague, Ms. Herrera, is really on
5 the Essential Security Interest and the Treaty. This
6 is important, and part of this will also address the
7 questions from the Tribunal earlier today.

8 What I will say, and there was a lot of
9 comments about what the exception means, what we say
10 it means, and so on.

11 My first point is simply read, read the
12 actual text. I mean, it's not that difficult. Read
13 the text. Nothing in this Agreement shall be
14 construed, so nothing in this Agreement is a catch-all
15 that says that nothing in this Agreement, including
16 investor-State arbitration, including standards of
17 protection, including compensation, nothing in this
18 Agreement shall be construed to preclude the Party
19 from applying; okay?

20 So, this is also what the U.S. says. I have
21 to go back because Mr. Moloo does not respond to it.
22 He doesn't have any response to it. I have to back to

1 the U.S.' oral submission of 3 May, Page 390, where
2 they said, the Claimant yesterday said that this
3 allows a State to apply or continue to apply measures
4 it considers necessary for the protection of its own
5 Essential Security Interest but that Article 22.2(b)
6 does not address the question on liability or
7 compensation. The United States disagrees. This is
8 their own State. The United States disagrees once the
9 Essential Security Interest Exception is invoked, the
10 Tribunal may not therefore find the relevant measures
11 in breach of the Chapter 10 obligation and may not
12 consequently order the payment of any compensation in
13 connection with that Measure.

14 So, this means what it means, nothing in
15 this Agreement--preclude--shall be construed to
16 preclude a party from applying. This means that the
17 Party can apply. It can apply measures without any
18 consequence, and there is no violation. By
19 definition, there is no violation because this is an
20 exception, an exclusion, the Treaty doesn't apply,
21 period. So, you essentially are not even under the
22 realm of the protection of the--the substantive

1 protection or ISDS or compensation. Simply, the
2 States can apply measures that they consider and so
3 on, so this is applied. So, you have to interpret
4 each word for what it is.

5 So, you can--so, when Mr. Moloo says that
6 it's an invocation of the exception but--which is
7 fine, but it's not the dispute. I was not quite clear
8 about what he says. I don't want to mischaracterize
9 what he said, but what we say is very clear. Once
10 this exception is raised, this Tribunal or any
11 tribunal does not have the power to make any
12 determination of the exception; and, by definition, of
13 the dispute because the exception is raised in
14 relation to a dispute.

15 So, this is--and he says, well, forget about
16 self-judging. No, you cannot forget about
17 self-judging. There's a footnote that is there. The
18 footnote says, for greater certainty, once it's
19 raised, the exception applies. The exception applies,
20 and the Treaty itself says, "the Party from applying
21 measure," so the exception means that the Party can
22 apply measures.

1 Now, the self-judging is important because
2 it says, "it considers." He doesn't address "it
3 considers" at all. That's important, it's in your
4 Treaty. You have to give some meaning to it. It
5 considers; right? Necessary for the protection of its
6 own Essential Security Interests. So, now they
7 referred to Eco Oro--

8 ARBITRATOR PONCET: Sorry to interrupt.
9 Just a second, but you're not saying, are you, that
10 this means that as soon as the Essential Security
11 Exception is raised, there is no arbitral review
12 possible of anything? Is that what you're saying?

13 MS. BANIFATEMI: The exception--

14 ARBITRATOR PONCET: Including whether or not
15 the exception is raised in good faith by hypothesis?

16 MS. BANIFATEMI: Well, again--and this was a
17 mischaracterization by Mr. Moloo who says, we accept
18 that you can determine good faith. We do not. We
19 have three layered scenarios. Our primary position is
20 that this is not justiciable. Not justiciable is that
21 you do not have the power to make a determination once
22 the exception is invoked. This is what the U.S. says;

1 this is what Colombia says. You do not have power to
2 make any assessment, including whether this is in good
3 faith or not. I'll come back to this because other
4 Treaties are worded differently. It's very important.

5 So, this Treaty is worded in that sense. It
6 says, "it considers," and then it says in the footnote
7 "for avoidance of doubt," for greater certainty, "once
8 the Panel shall find that the exception applies";
9 okay? So, the exception applies. "The exception
10 applies" means that the Party can apply
11 measures--right?--so you cannot go beyond that, you
12 cannot make any determination. That's the meaning of
13 "self-judging."

14 If you're not with us on not justiciable,
15 which is a power to adjudicate the matter, then it's
16 you do not have jurisdiction because, again, of the
17 self-judging wording it considers necessary. You have
18 to take for granted that when the State says these
19 measures are necessary, they are necessary, and you
20 cannot determine whether the exception is invoked in
21 good faith or not, and you cannot determine the
22 validity under the Treaty of the actions. This is our

1 second position.

2 Our third position is, in the event you do
3 not find that it's not self-judging, no power, no
4 jurisdiction, in that event, third scenario, in the
5 alternative, if you were to determine whether Colombia
6 has raised it in good faith, then you should find
7 comfort--this is everything I argued yesterday--you'd
8 find comfort that Colombia has raised it in good
9 faith, timely, the Essential Security Interests are
10 fully at place, as you can see from evidence on record
11 and the facts or circumstances that we're discussing,
12 and therefore, you should give effect to this
13 invocation of the exception, which is that no
14 determination can be made of the validity of the
15 Measures, which is the Measures that are in front of
16 you under the dispute, which is that the Meritage was
17 expropriated or Mr. Seda was treated unfairly and so
18 on. You cannot determine that because the provision
19 says nothing in this Treaty--in this Agreement
20 precludes a State from taking or applying measures.

21 ARBITRATOR PONCET: So, the provision means
22 that the State is not only not precluded from applying

1 the Measures, but will escape any liability or
2 responsibility under the Treaty for the consequences
3 of these Measures, even if they are applied in the
4 discriminatory matter, violate FET, you name it?
5 That's your point; right?

6 MS. BANIFATEMI: My point, to be very
7 precise, it's--this is an exception to the
8 applicability of the Treaty, so the Treaty does not
9 apply, period. So, since it doesn't apply, period,
10 you do not even have to determine validity under
11 international law and compliance with any obligations
12 of the Treaty because the Treaty doesn't apply. It's
13 over.

14 ARBITRATOR PONCET: What would be a
15 circumstance in which the exception would be raised,
16 assuming we go to your second option. What would be a
17 set of facts under which a tribunal like this one
18 should find that the exception was not raised in good
19 faith?

20 MS. BANIFATEMI: Well, that is if you do not
21 find that it excludes your power to adjudicate--

22 ARBITRATOR PONCET: Yeah, assume that.

1 MS. BANIFATEMI: --a primary point, and your
2 jurisdiction. So, if you decide that you have
3 jurisdiction to make an assessment as to the validity
4 of the exception, then you determine whether the
5 exception was raised in good faith.

6 ARBITRATOR PONCET: Give me an example of an
7 exception not being raised in good faith in that
8 context? What would that imply? What would that
9 entail?

10 MS. BANIFATEMI: Well, I can't answer right
11 now--I mean, it's factual. It's a factual
12 circumstance.

13 ARBITRATOR PONCET: Yeah, but, I mean,
14 wouldn't that be, for instance, a situation in which
15 the admittedly essential interest of the State to
16 fight organized crime, et cetera, would be invoked
17 just as a way to escape liability for the consequences
18 of what would otherwise be a violation of fair and
19 equitable treatment. Is that a situation in which one
20 could reasonably, again by hypothesis, find that the
21 exception was not raised in good faith? In other
22 words, if you raise it, but your real intent to

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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ARBITRATOR PONCET: Let me just finish the second question so you can answer both. What do you make of that, and what do you make of the fact that after the six-month period of the attachment, so to speak, or the--the English word escapes me, (in

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second question so you can answer both. What do you

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make of that, and what do you make of the fact that

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after the six-month period of the attachment, so to

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speak, or the--the English word escapes me, (in

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French), after that six-month period, apparently we

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have an Asset Forfeiture Proceeding that seems to be

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in limbo. What do you make of that? I mean--

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MS. BANIFATEMI: So--

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ARBITRATOR PONCET: Doesn't the--and again, it's a hypothesis. I'm not saying that this is the way it is and I'm not saying that we are going one way or the other. Assuming we find that there is--this investigation should not have remained in limbo, as it apparently has, are we still in a situation where the invocation of the Measure, the invocation of the exception could be construed as being a good-faith one that really stops the power of this Tribunal to

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it's a hypothesis. I'm not saying that this is the

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way it is and I'm not saying that we are going one way

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or the other. Assuming we find that there is--this

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investigation should not have remained in limbo, as it

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apparently has, are we still in a situation where the

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invocation of the Measure, the invocation of the

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exception could be construed as being a good-faith one

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that really stops the power of this Tribunal to

1 investigate anything and to adjudicate anything?

2 MS. BANIFATEMI: But if you may, Dr. Poncet,
3 this is taking the Order in reverse order.

4 ARBITRATOR PONCET: Yes.

5 MS. BANIFATEMI: Because you're looking at
6 the validity under the Treaty of an action, whether or
7 not six months was enough or not enough, and
8 Ms. Herrera will actually discuss the timing of the
9 Asset Forfeiture Proceedings. So, whether or not the
10 Asset Forfeiture Proceeding and the way it unfolded
11 was in compliance with the Treaty is a matter which is
12 different from Essential Security--invocation in good
13 faith of the Essential Security. The invocation in
14 good faith of the Essential Security is [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] which excludes the application of the
19 Treaty.

20 So, if you find, as you should, if you're in
21 the third alternative, that this was invoked in good
22 faith. You should not look at the substance of the

1 case and whether or not asset forfeiture unfolded in
2 this way or that way, because that's the actual
3 merits.

4 ARBITRATOR PONCET: Yes, but in order to
5 find that it is invoked in good faith, don't we also
6 have to find that the underlying Asset Forfeiture
7 Procedure has been conducted with sufficient due
8 diligence? I confess to being somewhat perplexed--

9 MS. BANIFATEMI: No, sir.

10 ARBITRATOR PONCET: --by the fact that, you
11 know, six years after this initial Forfeiture, no
12 charges have been brought, no Decisions have been
13 issued--

14 MS. BANIFATEMI: No, sir.

15 ARBITRATOR PONCET: --nobody knows what's
16 going to happen to that land.

17 MS. BANIFATEMI: No, sir. These
18 circumstances go to the application of the Treaty to a
19 set of facts on the merits of the dispute, whether or
20 not Mr. Seda and his acolytes were treated fairly.
21 This is the substance of the dispute, the merits of
22 the dispute, and you should not get there, ever, we

1 say. Even under our third alternative, which is that
2 you determine that you have to assess and determine
3 the good-faith application and invocation of the
4 Essential Security because, if you do go there, which
5 I hope I won't because you do not have
6 jurisdiction--power and jurisdiction to do that, if
7 you go there, you will have ample evidence in front of
8 you to show that this is Essential Security. Colombia
9 is doing this to protect its Essential Security, to
10 protect, including the safeguarding of the other
11 countries than Colombia, because we're talking about
12 the influence of the cartel even beyond Colombia.

13 This is--if the fight against
14 narco-trafficking, killings, armed--dangerous armed
15 organizations, criminal organizations, and you see the
16 U.S.'s reaction. The U.S. is talking about the UN
17 Convention about fight against drug trafficking. This
18 cooperation, judicial cooperation and police
19 cooperation between the two Countries. How serious
20 should we get for you to find that this is a serious
21 Essential Security Interest?

22 So, what we're saying is that once you find

1 that--

2 (Overlapping speakers.)

3 ARBITRATOR PONCET: Hang on a second.

4 MS. BANIFATEMI: --that's the end of the
5 matter.

6 ARBITRATOR PONCET: Hang on a second.

7 Nobody is denying that it is an extremely important
8 interest of the State. And I had sufficient
9 experience with Italy to, you know, be plausible when
10 I say that I have no doubt, okay? Because I know
11 quite a few of the top Italian Magistrates who risked
12 their lives every month fighting the mafia, et cetera.
13 So, nobody is denying that.

14 The question is: If we apply your
15 scheme--your scheme. If we apply your solution, there
16 is really no room left for the hypothesis that
17 Mr. Seda is a man in good faith who acted in good
18 faith. His only recourse is the local courts, which
19 seem to be not particularly swift, put it this way.

20 MS. BANIFATEMI: That is not correct. I
21 will start with the last part. That is not correct
22 because the Asset Forfeiture Proceeding has, and

1 Ms. Herrera will address that with the timeline, there
2 is an actual timeline that you need to see because you
3 understand how it works. Mr. Seda himself, and she
4 mentioned that yesterday, Mr. Seda himself has
5 recognized that it does take time. Why? Because it's
6 an investigation. Because this is a rule of law, this
7 is a country that's governed by rule of law. They're
8 not doing this just out of their pocket. They'll
9 actually go investigate, investigation takes time.
10 So, they want to make sure that if the result is going
11 to be a good-faith third-party buyer, so that takes
12 time.

13 So--and she will address the actual timing,
14 so that's completely different, and he does have the
15 remedy. He had the remedy of the courts, first of
16 all, he has the remedy of acting against the State,
17 Article 90 of the Constitution, so there is no denial
18 of justice anywhere. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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So, this is the last part.

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Now going to your previous question. You are bound by a treaty, you are duty-bound to give meaning and effect to this Treaty. I didn't write this Treaty. The U.S. and Colombia did. And they knew what they wrote. And I went through this yesterday, both in terms of the travaux préparatoires and what they said at that time, about what they said this time. And so, it says "nothing in this Agreement shall be construed to preclude the Party from applying measures." What does that mean? It means that the Party can apply measures without any assessment because it says nothing in this Agreement. Otherwise you have had--

And let me come back to other treaties

1 because other treaties don't say that. It doesn't say
2 nothing in this Treaty except the ISDS provision,
3 except the compensation provision. It doesn't say
4 that, it says "nothing in this Treaty." And it's not
5 enough for Mr. Moloo to say, oh, I will take another
6 example, which is a denial of benefits. Denial of
7 benefits is a completely different animal. What you
8 have in front of you is this, is Essential Security,
9 and you have to look at what it says. And what it
10 says is nothing in this Agreement in itself--it
11 considers-- And I will come back to this if you allow
12 me, because that has to be given meaning--what
13 Colombia considers to be its Essential Security.
14 That's why we say you do not have the power or the
15 jurisdiction to judge because the Treaty has not given
16 you the power or the jurisdiction to judge. This is
17 what--you have--you're arbitrators, and this is the
18 integrity of the system we're talking about.
19 Ms. Ordóñez explained to you, Colombia entered into
20 these treaties with the understanding that arbitrators
21 would uphold their intention and the consent that they
22 have given and the limitations to that consent. And

1 this is the limitation. This is the Clause that says
2 the Treaty does not apply period when there is an
3 Essential Security which Colombia or the U.S.
4 considered to be essential.

5 Now, if you allow me, I do want--and this is
6 exactly in answer to your question, if you allow me to
7 go through some of my other points because they will
8 again, go to the language.

9 ARBITRATOR PONCET: Sorry.

10 MS. BANIFATEMI: Not at all. It's
11 important, and I'm very happy for the questions, in
12 fact.

13 So, let's take them, the Eco Oro.

14 Mr. Moloo really likes Eco Oro, and I also
15 encourage the Tribunal to read Eco Oro, please look at
16 Slide 13 of their rebuttal this morning.

17 In fact, Mr. President, you mentioned to
18 Mr. Moloo a difference, but there's not only one
19 difference. There's a number of differences.

20 So, "for the purpose of Chapter 8 -
21 Investment", first difference. It's not "nothing in
22 this Agreement", which is nothing in this Agreement.

1 It cannot be clearer than that. It says "for the
2 purpose of Chapter 8 - Investment."

3 Then it says: "Subject to the requirement
4 that such measures are not applied in a manner that
5 constitutes arbitral or unjustifiable discrimination."

6 That means precisely what you're saying, Dr. Poncet.

7 This provision allows a tribunal to make a

8 determination as to whether the Measures constitute

9 arbitral unjustifiable discrimination. So, this does

10 give power to a tribunal to do just that and to make

11 that determination. And if you continue, it says

12 "nothing in this Agreement shall be construed to

13 prevent a party from adopting or enforcing measures

14 necessary". It doesn't say "it considers." You do

15 not have that very important language. So, you have

16 two limitations, three limitations here: It's only in

17 relation to the "Investment" chapter; it's subject to

18 a determination by the Tribunal about arbitrariness

19 and unjustifiable discrimination. It doesn't have the

20 "it considers," so it's not self-judging.

21 And the final point is that measures are

22 necessary, two, three limited grounds, including

1 environment and animal and human life and so on. So,
2 it's not the broad exclusion that you have in 22.2(b)
3 of the TPA that you have in front of you.

4 So, again, these are oranges and apples. It
5 may be an Essential Security Provision but you have to
6 interpret the language and you have to apply the
7 language. Ordinary meaning of the words. This is
8 where you start.

9 Now, they also refer to Nicaragua. I don't
10 have it in my slides, but if you allow me, I will
11 refer you back to Exhibit RL-152, which is the
12 Decision by the International Court of Justice.

13 PRESIDENT SACHS: Slide 14?

14 MS. BANIFATEMI: Slide 14. Yes, but they
15 don't have the provision that you want to say, which
16 is Paragraph 222.

17 In that case, the Measures were about
18 essentially the U.S. saying Nicaragua is a risk to my
19 security, and the Measures were armed attacks, mining
20 of ports and so on. We're talking about the U.S.
21 essentially doing all these things. So, the Court
22 says that the Court has jurisdiction to determine

1 whether measures taken by one of the Parties fall
2 within such an exception is also clear from the fact
3 that the text of Article XXI of the Treaty does not
4 employ the wording which was already to be found in
5 Article XXI of the GATT. This provision of GATT
6 contemplating the exceptions to the normal
7 implementation of general agreement stipulates that
8 the Agreement is not to be construed to prevent any
9 Contracting Party from taking any action which it
10 considers necessary for the protection of its
11 Essential Security Interests. In such fields as
12 nuclear fission, arms, et cetera, the 1956 Treaty on
13 the contrary speaks simply of necessary measures, not
14 of those considered by a party to be as such. So, the
15 ICJ makes a very clear distinction in an
16 interpretation exercise between when you have
17 necessary, which is what you have in Eco Oro, and when
18 you have measures that the State considers necessary.
19 This is very different.

20 And this, I think I also have somewhere, if
21 I have not lost, I think it's also--I don't have it
22 with me, but it's also the fact in the Russia case,

1 and I have discussed that in May, in fact. I don't
2 have it with me. But it's the same logic that you
3 have in the Russia GATT determination. RL-192 for the
4 Russia Decision.

5 Now, I'm just looking at my notes to make
6 sure that I address everything. And also the time
7 limit--there is, as you will see, Article 22.2 does
8 not have any time limit. So, it's important that when
9 you're seized at the time at which you're seized of
10 the Essential Security invocation, you recognize that
11 that has been invoked. And as we have said earlier,
12 the moment when Colombia raised and invoked the
13 Essential Security is the moment when, based on, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

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Now, one final point, I want to make sure that I have addressed everything, your question, and that is in answer to your question, Dr. Poncet, on the Treaties. So, if you--I will refer you back to our Rejoinder of 16 February 2022. These are Paragraphs 233 to--and onwards, at the very least, 235.

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And you see in Footnotes there is a reference to a number of treaties entered into by Colombia. And you will remember that this was--your question came up after I addressed yesterday the effet utile interpretation of treaties, and I said that you have to give--it has to be a purposeful interpretation, the meaning that you give this provision. And I referred--I think I may have misspoken, I said 17. In our count, I think at this time I'm right. It is 15. Generally, it's 13 different treaties and the GATT and

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1 the Canada-Colombia FTA. These are treaties to which
2 we refer, and you will see in Paragraphs 33 and 4, we
3 explain that this provision that you have in front of
4 you is exceptional, it's quite unique. And that's why
5 you have to give it the meaning that the Parties said
6 it should have, and that's why we said the authentic
7 interpretation given by the U.S. and Colombia is so
8 important to you.

9 ARBITRATOR PONCET: So, it's not found in
10 the others; right? It's similar.

11 MS. BANIFATEMI: The others are different.
12 They all are Essential Security but the difference--

13 ARBITRATOR PONCET: This is a unique
14 provision.

15 MS. BANIFATEMI: Yes. And we explain--

16 ARBITRATOR PONCET: Why does the U.S. refer
17 to the fact in one of the documents we saw--why does
18 the U.S. refer to the alleged existence of same
19 provisions in treaties signed by the United States?
20 So, you're saying it's unique to Colombia or are you
21 saying it's unique, period?

22 MS. BANIFATEMI: It's unique to the treaties

1 entered into by Colombia. I have not done the entire
2 universe of Essential Security, and I do not want to
3 speak for the U.S., of course, and since they listen
4 maybe they want to intervene on this, but we explain
5 that these treaties mostly referred to measures
6 necessary for the protection of the State's national
7 security. Just as in Eco Oro, they do not have the
8 self-judging language of "it considers," which as
9 you've seen in the Nicaragua Case and the ICJ said you
10 have to make a distinction because one is not the
11 other it considers. We couldn't determine this one,
12 the 1956 Treaty between Nicaragua and the U.S. does
13 not have that, therefore we can make a determination.
14 That's what the ICJ says.

15 I want to finish perhaps--I really hope that
16 I have said everything I wanted to say.

17 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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I do want to take--before I pass it on to

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Ms. Herrera, I do want to take issue with no

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wrongdoing, and maybe answer to one of your questions,

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Dr. Poncet.

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When we said there was no wrongdoing, this

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is in relation to the beginning of the Asset

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Forfeiture Proceedings. Why? Because it looks at the

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asset. It doesn't look at Mr. Seda. So, you cannot

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say that Mr. Seda was discriminated against because

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the Asset Forfeiture Proceeding looks at the assets

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and just follows the trace of the asset. So,

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Mr. Seda, of course, he was not looked at for

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wrongdoing. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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So, I will stop here, because again, for

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lack of time, and Ms. Herrera will continue with the

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Asset Forfeiture and the discrimination and the

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merits.

1 Thank you.

2 PRESIDENT SACHS: In the interest of time,
3 please concentrate on what is really new because we
4 went through all this yesterday already.

5 MS. HERRERA: Yes, Mr. President. Just one
6 thing, may I know how much time we have left?

7 ARBITRATOR PONCET: Five minutes.

8 MS. HERRERA: Seriously? I take your word.

9 SECRETARY MARZAL: 49 minutes that you had,
10 you only have one minute left, but--

11 MS. BANIFATEMI: There was some--and I was.

12 SECRETARY MARZAL: Yes, and I was counting
13 it. I counted 16 minutes of questions and answers.
14 At some point--

15 (Comments off microphone.)

16 PRESIDENT SACHS: Can we say 10 minutes? Is
17 that all right? Try your best, please.

18 MS. BANIFATEMI: We have at least 16.

19 PRESIDENT SACHS: No, no, no, the 16 minutes
20 were deducted.

21 MS. HERRERA: Okay. I will go to the point.

22 MS. BANIFATEMI: This is actually important

1 so.

2 MS. HERRERA: You have here the due
3 diligence. I won't repeat about why the type of
4 studies are not sufficient but I want to bring your
5 attention to several points.

6 If you see in Point 10.

7 PRESIDENT SACHS: Which slide?

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 have the request made by Mr. Sintura, again to the
18 Fiscalía, asking, look at the list. We have discussed
19 that Mr. Iván López could have been found and was
20 there, and all that, but I want to call your attention
21 to the language that Mr. Sintura employs here. And he
22 says, Corficolombiana wants to verify blah blah blah,

1 criminal measure against any the following individuals
2 that hold positions of Managers, Assistant Managers,
3 legal representatives, members of the Board of
4 Directors, shareholders of the legal entities
5 mentioned, blah, blah.

6 And we're told, and that's something that
7 Mr. Moloo said in May, it says, well, you know, it was
8 only here, you don't have Mr. Iván López because this
9 only looks as to the date of this petition who were
10 the legal representatives, and I will say this is very
11 peculiar.

12 PRESIDENT SACHS: You said this yesterday
13 already.

14 MS. HERRERA: Yes, but I'm saying this is
15 peculiar. And I will submit, I will say you will have
16 a much clearer picture of why is Mr. Sintura doing
17 this, and we haven't been presented that was excluded.

18 MS. BANIFATEMI: May I?

19 MS. HERRERA: Yes.

20 MS. BANIFATEMI: As Ms. Herrera is looking
21 for it, I would like to draw the Tribunal's attention
22 to Slide 20 which is a good summary of every point in

1 under pressure. I mean, you made your points, but
2 stick to the 10 minutes.

3 MS. BANIFATEMI: Just as Ms. Herrera is
4 doing that, I do want to make the point that we tried,
5 given the Tribunal's questions yesterday, we wanted to
6 give a timeline, and this also goes to Dr. Poncet's
7 question of the Asset Forfeiture Proceeding because it
8 clarifies a lot of the questions that you had.

9 MS. HERRERA: So, if I can refer you to
10 Page 60, and that has to do with the Asset Forfeiture
11 Proceeding, and you heard again, that the view that
12 they weren't complied with, but you have the timeline
13 of how it worked, and again, I will limit my comments
14 to specific points.

15 You can see on 63 exactly the evidence that
16 Prosecutor Ardila had at any given time. I wanted to
17 make a point about, the point that my colleagues made
18 this morning, about Ms. Ardila having the information
19 regarding the two title studies regarding the two,
20 what they call, the Sister Property, by the time she
21 imposed the Precautionary Measures. And whilst it's
22 true that Ms. Ardila said that, and I understand in

1 the middle of cross-examination, she might have said
2 that. If you look, and this is C-024bis,
3 that's--excuse me, I think I have it there. Don't I
4 have it there in the slide?

5 PRESIDENT SACHS: So, you say C--

6 MS. HERRERA: Sorry, if you look at the page
7 in the Requerimiento, which is later on, as Mr. Caro
8 said, but you will see he's listing the sequence of
9 information and when it was acquired, you have
10 Page 77.

11 ARBITRATOR PONCET: Which slide are you on?

12 MS. HERRERA: Sorry, page 77.

13 ARBITRATOR PONCET: Okay.

14 MS. HERRERA: You will have seen, it says
15 Point 60, when Ms. Ardila actually received the
16 information from the criminal court in, excuse me, the
17 Attorney General's Office in Medellín [REDACTED]

[REDACTED]
19 Sorry, the information she received, this information
20 of the title, she received in March 27, 2017. So, it
21 was not her memory may have failed her. It was not
22 before the Precautionary Measures. And that goes to

1 the whole argument of discrimination, which I will
2 quickly--

3 PRESIDENT SACHS: I'm sorry, I didn't quite
4 follow. I mean, did you refer to the allegation or
5 what we discussed this morning, that she had at her
6 disposal the two legal opinions before she issued the
7 determination?

8 MS. HERRERA: The--

9 PRESIDENT SACHS: The Requerimiento.

10 MS. HERRERA: No, the Measures.

11 PRESIDENT SACHS: The Measures, okay.

12 So, are you saying that this is not correct?

13 MS. HERRERA: That's not correct. That was
14 my response, it wasn't correct. And when you look
15 back at the--

16 PRESIDENT SACHS: At what?

17 MS. HERRERA: At the document of the
18 Requerimiento, which lists the order in which the
19 Prosecutors received all the information, you will see
20 when it was received in the record, so there was--

21 PRESIDENT SACHS: Could you point us to the
22 document?

1 MS. HERRERA: Yes. That's C-024bis, that's
2 part of the record--or part of the file of the Asset
3 Forfeiture Proceeding.

4 PRESIDENT SACHS: Um-hmm.

5 MS. HERRERA: And if you look now at the
6 slide on--

7 ARBITRATOR PONCET: C-24?

8 MS. HERRERA: That's correct, bis. And
9 that's Page SP-0118, and the specific paragraph is 60
10 in that document.

11 So, again, you have all the explanations and
12 we will go back as to the valuation of good faith, et
13 cetera. You have it there.

14 One point--

15 ARBITRATOR PONCET: C-24bis, on which page?

16 MS. HERRERA: SP-0118.

17 ARBITRATOR PONCET: We're talking about
18 C-024bis; right?

19 MS. HERRERA: Correct.

20 ARBITRATOR PONCET: And what page are you?

21 MS. HERRERA: You mean on the presentation?

22 ARBITRATOR PONCET: On the document?

1 C-024bis.

2 MS. HERRERA: At Page SP-0118.

3 ARBITRATOR PONCET: SP-0?

4 MS. HERRERA: 118.

5 ARBITRATOR PONCET: Okay, that would have
6 been simpler.

7 MS. HERRERA: Sorry.

8 PRESIDENT SACHS: Can we perhaps put it on
9 the screen?

10 MS. HERRERA: Can you project it?

11 ARBITRATOR PONCET: I hate to say this, but
12 this was not in the Hearing Bundle; right? Because
13 there it starts at 0151. I'm looking at C-024bis, and
14 it stops at 0151, SP-0151.

15 (Comment off microphone.)

16 MS. BANIFATEMI: Yes, 0118.

17 MR. MOLOO: C-124bis, 124bis; right?

18 MS. BANIFATEMI: C-024bis, Page SP-0118.

19 ARBITRATOR PONCET: Okay, now we've got it.

20 MS. RIBCO: It's Page 118 of the PDF. It's
21 on the screen now.

22 ARBITRATOR PONCET: Where do we find these

1 studies now?

2 MS. HERRERA: 60, Paragraph 60 on the top,
3 and they say dated at the top it received this.

4 PRESIDENT SACHS: It does not indicate the
5 date at which the study was received by the author of
6 this document?

7 MS. HERRERA: It says we have the Report,
8 and this Report contains the expansion of the
9 complaint of Mr. Iván López Vanegas on February and
10 the study of the transfers of the--Guzman & Monroy
11 because Guzman & Monroy is the one relating to
12 the--what they call the Sister Property.

13 PRESIDENT SACHS: Yes, but there is no date
14 indicated at which they received this.

15 Your point was that, she received the
16 documents only later and not as she said earlier, but
17 I don't see a date here that would confirm this.

18 MS. HERRERA: The way I read it is in
19 March 27, 2017, she receives further information which
20 includes this study.

21 PRESIDENT SACHS: Okay, we have the text
22 here and--

1 MR. MOLOO: Just to confirm, this document
2 is not authored by Ms. Ardila Polo. This is authored
3 by Dr. Caro. She authored the Determination of Claim,
4 not the Requerimiento. By this point it's Caro.

5 MS. HERRERA: It says the document received
6 in the file of the Asset Forfeiture.

7 PRESIDENT SACHS: Okay. So I think we
8 covered that.

9 Please, go ahead.

10 MS. HERRERA: On this, again, the Asset
11 Forfeiture and all the sequences, you have there one
12 point that I wanted to address, and again, that's on
13 the duration. I wanted to remind you of the--how
14 extensive this investigation is. I already referred
15 to that.

16 Before, one point, and this is not--will
17 come not as a surprise to the other Party, is that we
18 have been informed that, in fact, Newport has, as for
19 the nullity--annulment of all the process on the basis
20 that they were not included as an affected party,
21 which they were in the initial phase, that has
22 been--there has been--this is something that if you're

1 looking for it there, I don't have it. This
2 happened--

3 PRESIDENT SACHS: I'm sorry, we're not
4 following. Could you repeat what you just said? I'm
5 sorry.

6 ARBITRATOR PONCET: We're still on your
7 Slide 77 or are you talking about something completely
8 different?

9 MS. HERRERA: Don't look at the slide.

10 ARBITRATOR PONCET: So start again, please.

11 MS. HERRERA: Okay. I'm going to refer to
12 the duration of the procedure. So, under duration of
13 procedure, I wanted to remind you why it has taken so
14 long. I already addressed that later. But I wanted
15 also to update you on some developments that are known
16 to our friends on the other side, which is the fact
17 that Newport, after the Decision of the court, the
18 Superior Court--

19 PRESIDENT SACHS: The 22 April 2022
20 Decision?

21 MS. HERRERA: Was rendered, and they were
22 recognized as afectados. In the trial phase, Newport

1 asked for the annulment of all the process, saying
2 that they have not been able to present evidence in
3 the initial phase because they weren't considered
4 afectados.

5
6 But this annulment--this annulment has been
7 resolved, there has been a nullity and appeal, so I'm
8 just saying that because of the duration that it may
9 take--

10 ARBITRATOR PONCET: We have that request on
11 the record? I don't remember it.

12 MS. HERRERA: No, we don't.

13 PRESIDENT SACHS: And the Decision?

14 MS. HERRERA: And the Decision not. They
15 know it, the other Party--

16 (Comments off microphones.)

17 ARBITRATOR PONCET: With respect, you're
18 testifying to something that's not in the record;
19 right?

20 MS. HERRERA: I'm updating.

21 I'm going to move, given the time, basically
22 to the arguments quickly on discrimination. And the

1 submission of Colombia is that, the Claimants had not
2 discharged their burden of proof. The basis on which
3 the Asset Forfeiture of Meritage Lot were started are
4 several, and they're just focusing saying Iván López
5 appeared, the transformation of the process, the
6 physical and the legal transformation, [REDACTED]
[REDACTED], and if you look at the
8 grounds, there are several grounds. They have not
9 shown that any of the properties they are referring to
10 are in similar circumstances.

11 And again, they're also not showing why
12 there is no justification to treat any of those
13 properties differently, if there was. So, that goes
14 to like circumstances. I don't have the time to be
15 more specific. That goes also to the Sister Property.
16 There were many other--apart from the 25 percent not
17 coming from illicit funds, and there were several
18 other transfers, transformations that occurred in the
19 Meritage Lot that did not occur with the Sister
20 Property.

21 Now, as regards the standard of due
22 diligence, I explained at length, and it cannot be

1 denied, that the Court was not referring--and that's
2 very clear in the decision of the Constitutional
3 Court, to the scenario we are referring, which is
4 illicit--forfeiting assets of illicit origin.

5 Now, the Claimants say now, well, but, you
6 know, you have these two Articles that allow you to go
7 after some licit--excuse me--

8 PRESIDENT SACHS: You mean the Paragraphs 10
9 and 11?

10 MS. HERRERA: Correct. 16(10) and 16(11) to
11 go after licit property, that's what they should have
12 done. You may recall that Dr. Reyes makes very clear
13 this, and that's in the--at Page 1219 of hi

14 s presentation, of his cross-examination, when he
15 responds to counsel for the Claimants' question about
16 this article, and said for that to apply, for that
17 situation to apply so that you can actually have to
18 go--so that the Prosecutor has to go to a licit asset
19 because the property that should be first affected is
20 in the hands of third parties, bona fide third
21 parties. It has to be a determination by the Courts
22 that that property is in the hands of bona fide third

1 parties. This has not happened here. I refer you to
2 Transcript Day 4.

3 And given the time, I don't think that I can
4 make the other points. I don't know if Ms.--

5
6 MS. BANIFATEMI: No. Are you done? So, I
7 would also encourage here the Tribunal to look at
8 Slide 85, which is the final timeline, and the
9 previous slides as well, of course, which explains the
10 Asset Forfeiture timeline and timing because there was
11 some questions yesterday from the Tribunal, we wanted
12 to make sure that you had clarity about how the
13 process goes on and what happened in this case and
14 what were the bases on which the Prosecutors made the
15 determinations that they made.

16 Due to lack of time, we will skip the
17 damages slides, which you will have at the end, and on
18 your own time you can have a look. We did respond to
19 some of the points made by our colleagues on the other
20 side.

21 And one last point, if I may, is I want to
22 clarify something that I said in response to your

1 Whether or not the time was taken in the
2 Asset Forfeiture Proceedings and the point I think
3 that you made also in the May Hearing, which is that
4 this has taken a long time, that is the process of the
5 Asset Forfeiture Proceeding. The Asset Forfeiture
6 Proceeding was suspended for a number of years because
7 of Mr. Seda's appeal about the afectado situation.

8 So, to the extent that they're using their
9 rights to appeal the remedies that are allowed them
10 under the Asset Forfeiture Proceeding, and that
11 creates delays, that's not Colombia's doing. Colombia
12 has again, the rule of law. They seized the
13 opportunity to make appeals. If that appeal suspends
14 or makes the process longer, that's their choice. But
15 Colombia cannot be faulted for that.

16 PRESIDENT SACHS: I'm sorry to interrupt
17 you, but the appeal was made in order to give him the
18 chance to go to trial, because he needed to be
19 recognized as an affected party, and so this took so
20 long.

21 MS. BANIFATEMI: And they have been
22 recognized now.

1 PRESIDENT SACHS: Yes. This was
2 Mr. Poncet's point, six years after the start of it.

3 MS. BANIFATEMI: Yes, and that goes to the
4 merits of the dispute, which we say again, you don't
5 get to, because of the Essential Security, which is a
6 different matter. But on this, it will be for you to
7 decide, even if you were on this, you have to decide
8 as to the whole and the timeline is important, the
9 entirety of the Asset Forfeiture Proceedings and the
10 way that the investigations are going on those
11 matters.

12 PRESIDENT SACHS: Okay. Thank you very
13 much.

14 I think we should give you the floor as to
15 the point of the proceedings against Mr. Seda. I
16 think this was the moment where you expressed the
17 desire to say something, so be short.

18 MR. MOLOO: Okay, Mr. President, can I seek
19 five minutes of indulgence?

20 PRESIDENT SACHS: Yes.

21 MR. MOLOO: There are three points that I
22 want to address, one of them being the one that you've

1 just identified. But I don't want to go on forever.

2 But I think there's three clarifications.

3 PRESIDENT SACHS: I was clear: On that
4 point, please.

5 MR. MOLOO: Okay. On that specific point,
6 the point that I wanted to make is that the record

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PRESIDENT SACHS: Yes, yes, okay. Period.

I think we should have a break now also for the sake of David and his colleague. We should have a

1 lunch break because we need some time to discuss how
2 we see the further proceedings and whether we still
3 have questions. I mean, we put quite a few questions
4 already, but we have to discuss whether we have
5 further questions. So, I would propose that we meet
6 again at a quarter to 2:00, giving us a little bit
7 more than an hour--or quarter to 3:00, sorry.

8 And perhaps in the meantime, if you could
9 discuss among yourselves the further proceedings,
10 meaning whether you still want to have some time to
11 submit your cost submissions, whether you want to--the
12 right to reply to the cost submissions, and yes, these
13 are the main issues left to be discussed, I think.

14 (Pause.)

15 PRESIDENT SACHS: If you go out, let's say
16 we resume at 3:00.

17 SECRETARY MARZAL: And then we can confirm
18 with Court Interpreters--Court Reporters and
19 Interpreters.

20 (Pause.)

21 (Whereupon, at 1:39 p.m., the Hearing was
22 adjourned until 3:00 p.m., the same day.)

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AFTERNOON SESSION

PROCEDURAL DISCUSSION

PRESIDENT SACHS: So, can we resume after the break?

We wanted to discuss a few things with you, after having heard you in rebuttal.

The Tribunal has decided to reconsider the decision that was communicated to the Parties in its email of the 22nd of September as regards the documents R-305, -306, and -308. We will allow them into the record, and we will allow the Parties to make further submissions, obviously, limited to these new documents, in written submissions. We have to define the date, but obviously no new evidence and only dealing with these documents or materials.

[REDACTED]

Second, we would invite the Non-Disputing Party, the U.S., hoping that they are connected, but otherwise they will read it in the Transcript, to

1 submit similarly worded Essential Security Interests
2 exceptions in U.S. treaties. I here refer to Page 11
3 of the Respondent's Closing in which a quote from the
4 U.S. oral intervention was shown to us, which reads
5 that "Article 22.2(b) is self-judging, of course with
6 the long-standing U.S. position that similarly worded
7 Essential Security Interests exceptions in U.S.
8 agreements or treaties are to be read as self-judging.

9 "

10 We would invite the U.S. to provide the
11 Parties and the Tribunal with such treaties within a
12 deadline of 10 days, and we would allow the Parties in
13 their submissions dealing with [REDACTED]
14 to comment on these treaties and the wording
15 concerning the Essential Security Interests exception
16 in such treaties in their final submissions with a
17 page limit of 20 pages on that subject.

18 This being said, we would now like to
19 discuss with you how to [REDACTED]

20 [REDACTED] A proposal was made.

21 Ideally, we would invite the Parties to try to find a
22 common solution to this technical problem within a

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MS. BANIFATEMI: Mr. President, if I may

22

have five minutes of recess to consult with my

1 clients, that would help us.

2 PRESIDENT SACHS: Sure.

3 And maybe you also want to discuss this.

4 Let's have a 10-minute break and see you
5 again.

6 MS. BANIFATEMI: Thank you.

7 (Recess.)

8 PRESIDENT SACHS: Respondent, I think the
9 floor is now yours.

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

11 Sorry for the time. It's a very complex
12 matter, so I wanted to first take the time to get it
13 right.

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MS. BANIFATEMI: Which letter are you referring to, Mr. Moloo?

MR. MOLOO: Page 10 of the September 7th, 2022 letter.

MS. BANIFATEMI: I was not looking at the right one.

(Pause.)

MR. MOLOO: Can I shortcut this, Mr. President?

PRESIDENT SACHS: If it's a shortcut, yes.

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MS. CHAMPION: I do have a trial right after

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this.

19

MR. MOLOO: Perhaps we can take that

20

off-line with counsel.

21

MS. BANIFATEMI: I would prefer to do that

22

because I also am moving from one hearing to another,

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MR. MOLOO: I think we'll just have to take

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it up on a case-by-case basis. For example, it may

7

not--it may be that--this is very hard for me to come

8

up with an example at the moment, but it may be that

9

someone who is not specifically a speaker but may be

10

able to give some context, I think we will just have

11

to apply to the Tribunal in a particular situation.

12

The Tribunal will be able to make a decision.

13

PRESIDENT SACHS: Well, we may provide this,

14

but it will be exceptional. I mean, there must be

15

good reasons--

16

MR. MOLOO: Understood.

17

PRESIDENT SACHS: --to request this.

18

MS. BANIFATEMI: And in which case we

19

reserve our right to also provide whoever would put

20

context, because we don't know who could put context

21

on the other side, and we need to also be able to do

22

that.

1 MR. MOLOO: My only point is I don't know
2 what I don't know. We just have no idea at the
3 moment.

4 (Pause.)

5 PRESIDENT SACHS: Okay, so we would ask you
6 to, you know, to agree on a protocol with those key
7 elements and to inform the Tribunal accordingly.

8 [REDACTED]
9 [REDACTED] [REDACTED]
10 [REDACTED]
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17 MS. BANIFATEMI: A submission will take
18 time, so we will need to consult internally. Again,
19 there is--we have hearings and filings upcoming, so I
20 would prefer to revert to the Tribunal if I may after
21 we have consulted on the protocol and everything.

22 MR. MOLOO: I think that's fine.

1 The one thing I would just ask,
2 Mr. President, is I am really hesitant to have a
3 200-page brief on, you know--so page limits might be
4 appropriate.

5 PRESIDENT SACHS: Yes, we already mentioned
6 a page limit for the U.S. treaty practice, and we
7 would also foresee a page limit for [REDACTED]
8 [REDACTED] of, let's say, 30 pages, so altogether
9 50 pages.

10 And the Tribunal reserves the right to call
11 for another hearing, virtual hearing, in case that we
12 wish to hear you on the further submissions.

13 MR. MOLOO: Understood.

14 MS. BANIFATEMI: Mr. President, it must be
15 me. I'm not clear on the page limit. You said 30
16 pages, so altogether 50 pages, so it's 30 pages per
17 Party for [REDACTED].

18 PRESIDENT SACHS: Um-hmm.

19 MS. BANIFATEMI: Okay. Thank you.

20 MR. MOLOO: And I assume this would be
21 Respondent puts in whatever submission they want to
22 make [REDACTED] because we don't know what

1 submission they want to make, and then we will have an
2 opportunity to respond.

3 PRESIDENT SACHS: We said simultaneous.

4 MR. MOLOO: For [REDACTED] ?

5 PRESIDENT SACHS: Yeah.

6 MR. MOLOO: Okay.

7 [REDACTED] [REDACTED]

■ [REDACTED]

■ [REDACTED]

10 And you already had made certain points
11 which are not yet in the record. Any further
12 observation, questions, comments?

13 MR. MOLOO: On this particular issue, or
14 generally?

15 PRESIDENT SACHS: On this particular issue.

16 MR. MOLOO: No, Mr. President.

17 PRESIDENT SACHS: Generally.

18 [REDACTED] [REDACTED]

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Okay.

4

MR. MOLOO: That was my only point.

5

MS. BANIFATEMI: Nothing on our side but to

6

thank the Tribunal for its patience over these two

7

days which were long and complex X thank you to ICSID

8

and for your support and Court Reporter and

9

Interpreters.

10

PRESIDENT SACHS: It's our turn to thank

11

counsel for your very efficient and professional

12

conduct, and of course, we thank Sara from ICSID and

13

also, of course, David and Leandro for their

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extraordinary work. It was not easy. So have a nice

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afternoon, evening. And the Interpreter, yes. I'm

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sorry, I forgot the Interpreters who also did a

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terrific job, so thank you very much, and we will hear

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from you.

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MR. MOLOO: Thank you.

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(Whereupon, at 4:21 p.m., the Hearing was

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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