BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/19/6

In the Matter of Arbitration Between: :

ANGEL SAMUEL SEDA AND OTHERS,

Claimants,

and

REPUBLIC OF COLOMBIA,

Respondent.

VIDEOCONFERENCE: HEARING ON U.S. TREATY PRACTICE ON ESSENTIAL SECURITY INTEREST EXCEPTIONS

Wednesday, April 26, 2023

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

> PROF. DR. KLAUS SACHS President of the Tribunal

PROF. HUGO PEREZCANO DÍAZ Co-Arbitrator

DR. CHARLES PONCET Co-Arbitrator

ALSO PRESENT:

MS. SARA MARZAL YETANO Secretary to the Tribunal

MR. MARCUS WEILER
Assistant to the Tribunal

Realtime Stenographers:

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

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

Interpreters:

MR. JESUS GETAN BORNN

MS. AMALIA THALER - de KLEMM

MS. MONIQUE FERNANDEZ B.

APPEARANCES:

On behalf of the Claimants:

MR. RAHIM MOLOO

MS. ANNE CHAMPION

MS. MARRYUM KAHLOON

MR. BEN HARRIS

MS. NIKA MADYOON

Gibson, Dunn & Crutcher, LLP

200 Park Avenue

New York, New York 10166-0193

United States of America

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

United States of America

Party Representatives:

MR. ANGEL SEDA

MR. STEPHEN BOBECK

MR. JUSTIN CARUSO

MR. MONTE ADCOCK

MR. PIERRE AMARILGLIO

APPEARANCES: (Continued)

Attending on behalf of the Respondent:

MS. MARTHA LUCÍA ZAMORA

MS. ANA MARÍA ORDÓÑEZ PUENTES

MR. GIOVANNY ANDRÉS VEGA BARBOSA

Agencia Nacional de Defensa

Jurídica del Estado

Carrera 7 No. 75-66 - 2do y 3er piso

Bogotá

Colombia

MS. SANDRA MONTEZUMA

Asesora en el Despacho del Vicefiscal, Fiscalía General de la Nación

MS. TATIANA GARCÍA

Directora de Asuntos Internacionales, Fiscalía General de la Nación

DR. YAS BANIFATEMI

MS. XIMENA HERRERA

MS. YAEL RIBCO BORMAN

MS. PILAR ALVAREZ

MS. CAROLINA BARROS

MR. CÉSAR RODRÍGUEZ

Gaillard Banifatemi Shelbaya Disputes

22 rue de Londres, 75009 Paris

France

APPEARANCES: (Continued)

On behalf of the United States of America:

MS. LISA J. GROSH

Assistant Legal Adviser

MR. DAVID BIGGE

MR. JOHN DALEY

MS. JULIA BROWER

MR. JOHN DALEY

Office of the Legal Adviser

United States Department of State

Washington, D.C. 20520

United States of America

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Respondent or Claimants' room.

SECRETARY MARZAL: So, good morning,

everyone. There is a meeting room connected named

"Codian MSE 8510." We've allowed it to enter the

hearing room, but we would need to know if this is

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

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

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

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

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

- 1 of Colombia, ICSID Case No. ARB/19/6.
- I have in front of me the List of
- 3 | Participants. The Tribunal is complete. Sara is
- 4 present. I hope that the Court Reporters, David and
- 5 Dante, are with us, and also the Interpreters.
- 6 May I ask, first, the Claimants to confirm
- 7 that all the participants listed on the List of
- 8 Participants that was circulated are connected,
- 9 including the Party representatives.
- 10 Mr. Moloo?
- MR. MOLOO: Yes, Mr. President. I believe
- 12 everybody who we indicated would be participating is
- 13 on currently.
- 14 PRESIDENT SACHS: Very good. And, for the
- 15 Respondent, Ms. Banifatemi, the same question.
- MS. BANIFATEMI: Good afternoon,
- 17 Mr. President and Members of the Tribunal. I confirm
- 18 | that we are all here, not everybody is necessarily
- 19 online, but those who were expected to be, are, so we
- 20 can proceed.
- 21 PRESIDENT SACHS: Fine. So, we can proceed,
- 22 and the Agenda provides for housekeeping issues to be

1 | addressed first.

2 Are there any housekeeping issues that we

3 | should talk about?

4 Mr. Moloo.

5 MR. MOLOO: None from Claimants. Thank you,

6 Mr. President.

7 PRESIDENT SACHS: From the Respondent?

MS. BANIFATEMI: None, Mr. President. Thank

9 you.

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10 PRESIDENT SACHS: Thank you very much.

Now, we would start with the U.S.

12 | submission, and I therefore turn to the

13 | representatives of the U.S. Are they connected?

MS. GROSH: Yes, Mr. President. My name is

15 Lisa Grosh, I'm the assistant Legal Advisor for

16 | international claims and investment disputes within

17 | the Legal Advisor's Office of the State Department. I

18 | think I'm joined by some of my colleagues, Mr. Daley,

19 Mr. Peralta. I don't know if others have joined as

20 well.

21 PRESIDENT SACHS: Okay. So, you are

22 complete to proceed, even if some of your colleagues

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1 | are still missing?
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- MS. GROSH: Yes, Mr. President. I am.
- 3 PRESIDENT SACHS: Very good.
- 4 MS. GROSH: I will be presenting today.
- 5 PRESIDENT SACHS: You have seen the Agenda.
- 6 We will start with the U.S. submission, and the floor
- 7 is yours.
- 8 ORAL SUBMISSION BY COUNSEL FOR THE UNITED STATES
- 9 MS. GROSH: Thank you, Mr. President and
- 10 Members of the Tribunal. We appreciate this
- 11 opportunity for the United States to provide an
- 12 additional oral submission in this case pursuant to
- 13 Article 10.20(2) of the United States-Colombia Trade
- 14 Promotion Agreement, or the "TPA," as we all refer to
- 15 | it. I will make a brief submission addressing
- 16 questions of treaty interpretation arising out of the
- 17 Claimants' and the Respondent's Submissions dated
- 18 | December 21, 2022.
- 19 And, as is always the case with our
- 20 non-disputing Party Submissions, the United States
- 21 does not take a position here on how the
- 22 | interpretations offered apply to the facts of this

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

Given the narrow scope of today's Hearing, I will confine my remarks to the Essential Security

Interest Exception in Article 22.2(b). However, the

United States stands by its prior position on the

weight due to the views of the TPA Parties on matters

addressed in Non-Disputing Party Submissions under

Article 10.22.

So, whether the Tribunal considers the concordant interpretations presented by the TPA

Parties as a subsequent agreement under Article

31(3)(a) of the Vienna Convention on the Law of

Treaties, or as subsequent practice under Article

31(3)(b), or both of these provisions, the Tribunal

must take the TPA Parties' common understanding of the provisions of their Treaty into account.

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

1 non-binding but nevertheless authentic means of

- 2 | interpretation of TPA provisions through their
- 3 submission to investor-State tribunals or to preclude
- 4 | a tribunal from giving such submissions the weight to
- 5 which they would otherwise be entitled.
- 6 So, with that, Mr. President, I will make
- 7 three points on the Essential Security Interest
- 8 Exception in Article 22.2(b), and the U.S. treaty
- 9 practice on similarly worded Essential Security
- 10 Exceptions.
- 11 First, the United States reiterates that the
- 12 language of Article 22.2(b) and similarly worded
- 13 exceptions in other U.S. treaties is clear. The
- 14 Exception is self-judging, and once invoked, a
- 15 tribunal must find that the Exception applies.
- 16 Now, as I had previously explained in our
- 17 First Submission, this follows from the ordinary
- 18 | meaning of Article 22.2's use of the phrase "it
- 19 considers". And this is further clarified by the
- 20 language in Footnote 2 that, "for a greater
- 21 | certainty, " if a party invokes Article 22.2, "the
- 22 Tribunal or panel hearing the matter shall find that

the Exception applies."

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

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

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

1 | of Chapter 10," with respect to such a measure. And,

2 | for that reason, such a Claimant also cannot establish

3 that it has, again, per Article 16.1, and I quote,

4 "incurred loss or damage by reason of or rising out of

5 | that breach," with respect to such a measure.

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

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

In short, because the Article 22.2(b)

Exception excludes certain measures from TPA

obligations, there can be no finding of liability and

no order of reparations with respect to those

Measures. The TPA Parties did not take on an

obligation to pay compensation for measures that they

consider necessary for the protection of their own

Essential Security Interests.

So, against this backdrop, there was no need

1 for explicit language in provisions like

- 2 | Article 22.2(b) stating that, once invoked, a tribunal
- 3 cannot find the relevant measure in breach of any
- 4 | Chapter 10 obligation or order any compensation.
- 5 Now, I would also like to note that
- 6 | Claimants' argument also fails to grapple with the
- 7 | fact that Article 10.26 clearly deprives a Chapter 10
- 8 tribunal of authority to order that any measure,
- 9 essential or otherwise, be withdrawn.
- 10 Claimants' argument that the text of the
- 11 | Singapore-India Comprehensive Economic Cooperation
- 12 Agreement contains the type of language that the
- 13 United States and Colombia should have included in the
- 14 TPA, if they desired to prevent any finding of
- 15 liability or order compensation, is misplaced in our
- 16 view. That Agreement, to which the United States
- 17 | obviously is not a party, has no bearing whatsoever on
- 18 | the U.S. treaty practice.
- Those are my first two points.
- 20 Third and finally, I wish to address the
- 21 | Claimants' argument that Colombia's invocation of
- 22 Article 22.2(b) is subject to review by this Tribunal

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

Indeed, the words "that it considers" in

Article 22.2(b), as well as the text of Footnote 2,

make clear that it is not for a Tribunal to determine

whether the Exception has been invoked in good faith.

Instead, it is solely for the State Parties to the TPA

to ensure that the provision is invoked in good faith.

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

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

1 PRESIDENT SACHS: Thank you very much. 2 I turn to my two colleagues to ask whether 3 they have questions to the U.S. representative. 4 ARBITRATOR PONCET: I have one, if I may, 5 Mr. President. 6 PRESIDENT SACHS: Yes, Mr. Poncet. 7 ARBITRATOR PONCET: Ms. Grosh, can you hear 8 me? 9 MS. GROSH: Yes, I can. 10 ARBITRATOR PONCET: Charles Poncet, one of 11 the three arbitrators in this Panel. 12 I would like to continue your line of 13 thought with regard to the third point you made. 14 said there is absolutely no room in the language of 15 the Treaty for any interpretation by the Arbitral 16 Tribunal which, hypothetically--I'm not saying, of 17 course, that this would apply in this case, it's 18 purely hypothetically, but if by hypothesis, an 19 arbitral tribunal were to be convinced that the 20 Exception that Article 22.2(b) is invoked purely in an 21 arbitrary and capricious manner simply to prevent an 22 investor from seeking justice, you made the point that

1 the Arbitral Tribunal had no authority to review that

and in fact, it would be for the States themselves.

Does that mean that the investor, then,
would have to go to its State--in this case, the

5 United States--to seek the application of the

6 provisions of the Treaty that provide for arbitration

7 between States, or does that mean that the Investor is

8 simply left to forget about any possibility of

9 | international-law remedy? What is the consequence of

10 your--I'm sorry for being a little long-winded--but

11 what is the consequence of your statement that it is

12 for the States and for the States only to resolve the

13 | matter?

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MS. GROSH: Thank you, Mr. Poncet.

So, yes, our view is that the Essential

16 Security Interest Provision is completely self-judging

17 and there is no room for the Tribunal--for a

18 | Chapter 10 Tribunal--

19 (Overlapping speakers.)

MS. GROSH: I just wanted to restate the

21 underlying proposition there.

And so, as I understand your question,

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

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

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

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

MS. GROSH: Yes, that's what essentially my

third point was, is that we expect—the United States expects all of its treaty partners, and here Colombia

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

ARBITRATOR PONCET: You would agree with me, wouldn't you, that in the hypothetical situation of a bad-faith invocation of Article 22.2(b) or the equivalent in another BIT, this would leave the Investor with very, very little protection, indeed.

It would be completely dependent on the finding of its own State—in this case, the United States—that there was a breach of the general duty of good faith, and if the State—if the Investor's State—in our case, the United States—says, no, no, we don't think it was in bad faith, that's the end of the story.

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

- completely take that out of the Treaty, then yes, the
 Investor has limited avenues in terms of how it could
 pursue its interests.
 - ARBITRATOR PONCET: And one last question, with the President's permission, what is your position as to whether or not the Essential Security Provision can be waived, whether implicitly or explicitly?
 - MS. GROSH: Our view would not be that the Essential Security Exception could be waived.
 - There is no provision in the Treaty for that. The Treaty language is clear. It is for one of the Parties to invoke it, if it considers that the Measure is necessary in its Essential Security Interest.
- 15 ARBITRATOR PONCET: Thank you.
- 16 ARBITRATOR PEREZCANO: No questions from me
 17 at this point, Mr. President. Thank you.
- 18 PRESIDENT SACHS: Right.

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

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

Convention. Could you elaborate on this.

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

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

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

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

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

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

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

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

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

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

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

PRESIDENT SACHS: Okay. Thank you.

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

Claimant?

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

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1 PRESIDENT SACHS: It certainly is.
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- 2 Respondent?
- 3 MS. BANIFATEMI: No questions,
- 4 Mr. President. Thank you very much.
- 5 PRESIDENT SACHS: Thank you.
- Then we thank the U.S. representatives for their intervention, their submission and their answers
- 8 to the questions put by the Tribunal.
- 9 We have now, on our Agenda, a break of 15
- 10 minutes, I think we could skip that or shorten it at
- 11 least.
- Mr. Moloo, are you ready to proceed with
- 13 your Opening Presentation, or do you need five
- 14 minutes? Or even more? The break has been put on the
- 15 Agenda, so it's up to you to tell us whether--how much
- 16 | time you need.
- 17 MR. MOLOO: Just five minutes,
- 18 Mr. President, because we will be circulating our
- 19 presentation, so just to allow us to circulate that
- 20 and to allow all of you to--
- 21 (Overlapping speakers.)
- MR. MOLOO: --download it if you so wish, so

1 | five minutes is more than sufficient.

2 PRESIDENT SACHS: Very good. Thank you.

3 (Brief recess.)

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

OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

MR. MOLOO: Thank you very much,

Mr. President and Members of the Tribunal, for indulging us with a Third Hearing. You must be sick of hearing from us by now, but hopefully we can keep your attention for another 90 minutes this morning or afternoon, as the case may be.

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

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

1	lefta number of the folks who Colombia has
2	identified as taking these Measures to protect society
3	against. These are the folks who they allege are
4	people that society needs to be protected from and,
5	therefore, that's why they say they've taken the
6	actions they've taken.
7	They don't say that about anybody on the
8	right: Newport; the Unit Buyers; Corficolombiana, one
9	of the most respected financial institutions in
10	Colombia; the Claimants; the workers on site, who lost
11	their jobs, the 700 workers who were sent home; and,
12	obviously, the various other investors. There were a
13	number of domestic investors too, who are not
14	represented and present before you in this case.
15	But, if you look at the Measures that were
16	taken by Colombia in this case, they didn't go after
17	any of the proceeds that any of the people on the left
18	received. To our knowledge, none of thethey say
	Because, the Asset Forfeiture

Did they go after Did they go

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Law authorizes them to do that.

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

To be honest, there is no evidence that

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

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

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

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

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

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

And, he says that "the purpose of the Asset Forfeiture Law was to attack illegal activities such as drug trafficking and, consequently, obtain social and economic stability in the country." And, he also explains that, under Article 27, it says that there are certain fundamental guarantees, certain governing standards, that supersede everything else in the Act, and one of those governing standards and fundamental quarantees that was meant to "prevail over any other provision in the Code"--that's his language--was that the "right to property lawfully obtained in good faith without fault" must be protected. "Due-process" rights must be protected. The "presumption of good faith" must be recognized. Those are all within the governing standards and fundamental guarantees that prevail over any other provision of the Code, according to the father of the Asset Forfeiture Law. Dr. Wilson Martínez, who had a role in authoring the most recent iteration of the law from

2014, he explains in his testimony that one of the

reasons for the updating of the Law was to clarify the

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nature of the scope of, and "expressly recognize and

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

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

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

1 | considered predominant over all other rules in the

2 | Code..." "...any reasonable doubt as to good faith

3 must be interpreted in his/her favor."

4 Prior slide, Slide 8.

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

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

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

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

Precautionary Measures, that's how the

Property was taken in the first place, the invocation

of Article 87. And, the very last sentence in

Article 87 makes it crystal-clear that, in invoking

Precautionary Measures in any case--"in any case, the

rights of third parties acting in good faith without

fault must be safeguarded."

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

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

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

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purpose of the Law? What is the purpose of the Law?

That's the first question.

We will go to the next slide.

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

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

- 2 That's the purpose of the Law.
- 3 Colombia flipped it. They got it wrong.
- 4 They affected the rights of the people on the right,
- 5 and they haven't gone after the people on the left.
- 6 They completely reversed what they were supposed to
- 7 do. The purpose of the Law is protect against--and
- 8 | let's just assume that they're all narco-traffickers,
- 9 criminal charges haven't been brought against
- but let's just assume that these are the
- 11 people that Colombia wants to protect against. No
- 12 charges brought. We know that there is nothing in the
- 13 record that suggests that we have gone after their
- 14 property in relation to the Meritage. Their proceeds
- 15 from the Maritage, nobody has seized that. Ivan López
- 16 still has a number of his properties, his
- 17 | sister-in-law has the Sister Property still, nothing
- 18 has happened there.
- 19 All of the people on the right, the people
- 20 who acted in good faith, their rights have been
- 21 eviscerated.
- The Tribunal's second question: "What is

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

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

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

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

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We will find out what it

says it could not have because there is something

is, but it wasn't the invocation of the Asset

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special about

Forfeiture Law itself because they invoked that at the outset. So, maybe there is something special about

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don't know, but if their goal was to protect society against the scourge of narco-trafficking, I'm not sure why they didn't invoke it at the outset.

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

they found out that

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

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

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

parties because taking property from good-faith third 1 2 parties does not advance that Essential Security 3 Interest. It cannot. How does it? I still have not heard any reason as to how taking and affecting the 4 5 rights of good-faith third parties can possibly be 6 related to an Essential Security Interest. It cannot. 7 They're not saying that taking property from good-faith third parties is their Essential Security 8 9 Interest. Affecting the rights of good-faith third parties is not the Essential Security Interest. 10 11 And, it seemed at the Hearing, when, 12 Mr. President, you asked a question of Ms. Banifatemi, 13 that she initially appeared to agree to this 14 proposition. When asked, the Law contains this 15 Exception, that a bona fide purchaser cannot be 16 subject to the Forfeiture Proceeding, so isn't the 17 expression of the national interest contained in that 18 law with that exception? So, in other words, isn't 19 this good faith--and I don't want to be putting words 20 in the Tribunal's mouth, but as I understood this

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question, it was really asking a similar question to

the one that is posed before this Hearing which is,

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- 1 | isn't there this good-faith exception built into this
- 2 | Essential Security Interest? Because, that's also in
- 3 the Law.
- And, Ms. Banifatemi, interestingly,
- 5 answered--and this seems to confirm our
- 6 | position--"well, it's the whole purpose of the Asset
- 7 Forfeiture Proceeding to determine whether someone
- 8 bona fide without fault third party." "It's the whole
- 9 purpose," she says.
- 10 And then, Ms. Banifatemi expounded and said,
- 11 "but you have to go through the motion," and "the
- 12 Courts are currently seized with the matter." And,
- 13 | that's what they're saying. The courts are seized,
- 14 "the Courts are making determination as to whether
- 15 Newport, which is now an affected party, and it was
- 16 | before, it is again, it can make submissions, it can
- 17 | make its view known, and that will be determined."
- 18 | That, now that the courts are seized of the matter, we
- 19 were told, that we will now see whether they are a
- 20 good-faith third party.
- 21 Well, spoiler alert. You were told last
- 22 | year that within a year you would know the answer.

Well, not an email or a letter or anything has gone
out to Newport setting dates for submissions, let
alone a determination of the question. It is now a

4 | year later. Not one step has been taken in that

5 proceeding to determine whether or not Newport is a

6 good-faith third party. They are still waiting.

7 Seven years later, after Precautionary Measures were

8 taken.

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

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

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

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

1 | the rights of good-faith third parties because taking

- 2 | property and interests in property from good-faith
- 3 third parties cannot possibly advance that objective
- 4 of protecting society against narco-trafficking.
- 5 So, in our submission, taking what I have
- 6 just told you, the Essential Security Exception does
- 7 not and cannot apply here. And, here, I want to
- 8 address what Colombia has said and what you have heard
- 9 from the U.S. Government as to this particular
- 10 Essential Security Exception.
- We can go to Slide 24.
- There is not one tribunal, that I know of,
- 13 that has taken the interpretation that Colombia and
- 14 | the U.S. Government has advanced in this Arbitration,
- 15 that this Tribunal can't touch it.
- 16 In fact, if you look at--and this is a case
- 17 | that is often cited for self-judging Essential
- 18 | Security clauses -- and, actually, I'm just going to go,
- 19 | if we can, to Slide 26 for a moment just to show you
- 20 | the provision that's in the GATT that we're going to
- 21 be looking at.
- In Article XXI of GATT, it is a self-judging

1 | provision. It says, "nothing in this Agreement shall

- 2 | be construed..." "...to prevent any Contracting Party
- 3 | from taking any action which it considers," that's the
- 4 language that the U.S. says is the magic words,
- 5 "necessary for the protection of its essential
- 6 | security interest." So, that's the provision that
- 7 | these WTO tribunals are interpreting. And, in
- 8 | interpreting this self-judging clause, Article XXI of
- 9 | the GATT--we can go back to Slide 24 now--this is what
- 10 WTO panels have said. They have said applying
- 11 | Article 26 of the Vienna Convention on the Law of
- 12 Treaties, which says every treaty and forces binding
- 13 upon the Parties to it, and must be performed by them
- 14 in good faith, and in applying that, they say, there
- 15 is a two-pronged test.
- 16 The first prong, it says, at 7.132, it "does
- 17 | not mean that a Member is free to elevate any concern
- 18 to that of an 'essential security interest'. Rather,
- 19 the discretion of a Member to designate particular
- 20 | concerns as 'essential security interests' is limited
- 21 by its obligation to interpret and apply
- 22 Article XXI(b)(iii) of the GATT 1994 in good faith."

1 And, they talked about it as being a general principle

2 | of law as codified in Article 26 of the Vienna

3 Convention. You can see that in 7.132.

And, they say "the obligation of good faith requires that Members not use the exceptions..."

"...as a means to circumvent their obligations under the GATT 1994." I think that goes to the answer the question that Dr. Poncet asked earlier of the United

9 States. You can't use this good-faith exception to

10 circumvent your obligations.

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

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

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

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

dispute resolution mechanism and the protections

contained in Article 10, and it is an obligation on

the State, therefore—and this is Article 26, it says

"these obligations," and these obligations are to

investors, must be performed by them in good faith.

That is the obligation. It is an obligation vis-à-vis

investors and it must be performed by them in good

faith.

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

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

1 | television, so that folks in Saudi Arabia could not

2 watch this television channel that was owned by

3 Qataris, and the name of that channel was BN.

called it, conveniently, "beoutQ."

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And then, there was a Saudi Arabian channel that took the place of this Qatari channel, they

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

And, as such, the Panel found that there was

- 1 | no good-faith invocation of the Measure, and so they
- 2 applied this test, in applying a self-judging
- 3 | Essential Security clause, the Panel in that case
- 4 | found that there was no rational connection between
- 5 | the Measure and the Essential Security Interest, and
- 6 so it does not pass the good-faith test.
- 7 And, again, there is no Tribunal, no panel,
- 8 | nothing in the record that I'm aware of, where the
- 9 interpretation that's being espoused by Colombia and
- 10 | the United States has been adopted by any
- 11 international tribunal. Rather, there are the
- 12 examples that we have put in the record, two of which
- 13 I have just taken you to.
- And, in fact, for that precise reason, when
- 15 | Colombia invoked the Essential Security Interest in
- 16 their Rejoinder, quess what they did? They accepted
- 17 | the good-faith test. At Paragraph 55 of the
- 18 Rejoinder, this is-this is before we raised it,
- 19 before we raised the good-faith test, they raised it.
- 20 They said "we are invoking the Essential Security
- 21 Interest." And, as to the definition of Colombia's
- 22 own Essential Security Interest, it is generally

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

proceeding.

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

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

Security Interest as not including a good-faith exception, I would say that the first prong they failed. They have not defined their Essential Security Interest in good faith because they -- in order to define it in good faith, you must recognize the same exception that is within the law, the Asset It is not a good-faith definition to Forfeiture Law. say that we want to stop narco-trafficking but we are going to ignore the protection of good-faith third That, in my view, is not a good-faith definition of the interest, that first prong of the test, because it doesn't advance the objective. You must recognize the rights of good-faith third parties. The law itself, domestic law itself, the domestic law that they're invoking, itself recognizes good-faith third parties and the rights of them. So, the definition of the interest must take into account the rights of good-faith third parties. If we go to the next slide, the second

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concern I have with respect to the definition of the Interest is, why was it not an interest with respect to--in the Counter-Memorial? Why did they not

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

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

1 there is no rational connection between the Measure 2 and the Essential Security Interest. 3 They say in their Opening, they said, these proceedings, the Measures at question, the Measures 4 5 that we allege are in breach, the Asset Forfeiture 6 Proceedings -- they say, these proceedings were not 7 started because of But, 8 is the reason for their invocation of the Essential 9 Security Interest. That's why they said they could 10 only do it in the Rejoinder. But, they're at the same

time saying it was not the reason for the Measure.

How can the Measure be rationally connected to an

Essential Security Interest that they have not yet

defined at the time they take the Measure? It can't

be.

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

In the Opening, Ms. Herrera again said:

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But, that wasn't

the reason for the Measure.

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

purpose.

We had already taken the Measure.

We've already taken the Measure. Then, how could it be rationally connected to the Essential Security

Interest you later find out about? It can't be.

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

And, again, in their Closing, they said they

only found out about all of this because of the

Arbitration, so how could it possibly be the case that
they took the Measure for an Essential Security

purpose? They could not have.

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And, the Nicaragua v. USA Case at the ICJ, I think, is instructive here because -- and this was not a self-judging clause but it goes to the temporal issue, the question of the connection between the Measure and the Essential Security identified. And, in that case, the ICJ found the same thing, they say that the Measure, in order for it to be taken for an Essential Security purpose--I think this is an obvious proposition, but -- it has to have been taken for that Essential Security purpose at the time that you took the Measure. And, they looked at the chronological sequence of events in Nicaragua v. the U.S., and they said it wasn't. It wasn't taken for an Essential Security purpose because the Measure itself was invoked for a different purpose, not the Essential Security purpose that was then later identified. And, I come back to the chart that I started

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with: It cannot be -- it cannot be -- that there is a

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

Well, take the money. That's

- 11 what you do. You take the money
- 12 That's what the law says you do. You take the
- 13 Property from those who you're trying to protect
- 14 society against, not good-faith third parties.
- And, they haven't taken the money;
- 16 otherwise, I'm sure there would be some sort of
- 17 evidence in the record from Colombia that they have.
- 18 | There isn't. There's not one shred of paper to say
- 19 they've gone after the proceeds. So, as far as we
- 20 know,
 - So, how is that plausible--how
- 22 can they establish that plausible connection between

1 the Measure they took affecting the rights of

2 good-faith third parties and not those who they are

3 trying to protect society against?

Now, the U.S., this morning, talked about the fact that the Essential Security Provision doesn't allow for compensation. This is a completely separate point. I think we prevail just on what I just told you, that this Essential Security Exception has not been invoked in good faith and, therefore, we're out of it. It doesn't even apply here. But if the Tribunal was to find it does apply, we would say you need to look at, what does the application of it mean? And the application of it, in our submission, simply means that it allows a party to apply a measure that

17 It can apply a measure.

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

it considers necessary for the protection of its own

Essential Security Interest. It means what it says.

1 restitution. So, it is the withdrawal of the Measure.

- 2 | If you take a property, it's to give back the
- 3 Property. That's the primary remedy. Article 35 of
- 4 | the Articles of State Responsibility say that. And
- 5 damages is only--it's a backup remedy. Compensation
- 6 is insofar as such damages is not made good by
- 7 restitution or restitution is materially impossible,
- 8 then compensation is the fallback.
- 9 But the primary remedy if I take property is
- 10 | to give back the property. As under international
- 11 law, that is the primary remedy. And by the way,
- 12 | that's not just the Articles of State Responsibility.
- 13 | The TPA in this case also says that. And you have to
- 14 remember, Article 22, the Exception that we're talking
- 15 about, applies equally to the Investment protections
- 16 and the trade protections.
- 17 And, if we go to the next slide, what you
- 18 | can see is Article 10.26 that governs this Tribunal,
- 19 says "where tribunals make a Final Award against a
- 20 respondent, it can award monetary damages and it can
- 21 order restitution of property." The TPA authorizes
- 22 the Tribunal to do that.

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

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

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

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

1 | Security Provision is properly invoked--and we don't

- 2 think it has been for the reasons I've already
- 3 said--then all it does is it says, it takes away
- 4 Article 10.26.b. It takes away the remedy of
- 5 | withdrawing the Measure, but it keeps the compensation
- 6 obligation.

7 And by the way, this is exactly what the Eco

- 8 Oro versus Colombia Tribunal decided. And it decided
- 9 this in the face of non-party submissions from the
- 10 other Treaty Party, Canada in that case--now, this was
- 11 | not a self-judging provision, but that's irrelevant to
- 12 | the question that I'm addressing which is the remedy.
- 13 | If it is properly invoked, whether self-judging or the
- 14 Tribunal decides it applies in the non-self-judging
- 15 | context, what does it mean?
- 16 What is the implication of the application
- of that Essential Security Protection, the Eco Oro
- 18 versus Colombia Tribunal interpreting very similar
- 19 language, said, if we find that it applies -- and again,
- 20 because it was Essential Security, not
- 21 | self-judging--they would have had to find that it
- 22 applies. But if they found it applies, what's the

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

when they're trying to do something different, when they're trying to preclude a claim. For example, on Slide 40, you have a number of examples: No claim may be submitted to arbitration. That's what they say when they don't want a claim to be submitted to arbitration. They use very different language. You can see that, and that's, for example, in the statute of limitations provision, where they say three years have elapsed. They say in that case no claim may be submitted to arbitration. And I have given you some other examples here.

1 But it's very clear that when they mean no 2 claim, non-justiciable, they use different language. 3 And just to give you an example of an Essential Security Use Provision that uses very different 4 5 language, is the India-Singapore Comprehensive 6 Economic Cooperation Agreement. And the U.S. said 7 this morning, but we're not a party to that Treaty. 8 Right. But the point here is when Parties want to use 9 more express language and say, for example, that 10 something is non-justiciable, they say it. 11 treaty provision actually says, we mean it's 12 non-justiciable. 13 So, if the Parties--if the U.S. and Colombia 14 want to amend the Treaty, they are welcome to do so. 15 But they have not amended the Treaty, and it is this 16 Tribunal's authority, this Tribunal's sole authority, 17 to interpret the Treaty. And that's what other 18 tribunals have said. In the Infinito Gold versus 19 Costa Rica Tribunal, the Sempra versus Argentina Case, 20 for example, in the Infinito Gold versus Costa Rica

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non-party submissions, if it was considered to now be

Case they said even if there was some by these

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

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

- 1 opportunities for sustainable economic alternatives to
- 2 drug-crop production. That is the object and purpose
- 3 of this Treaty. And in interpreting this Treaty,
- 4 | including the Essential Security Provision, this
- 5 | Tribunal must have in mind this object and purpose of
- 6 | the Treaty. To promote economic development, to move
- 7 on from drug-crop production. That's, indeed, one of
- 8 the very objectives of the Treaty.
- 9 Let me pause there, and subject to any
- 10 questions, I'm going to turn the floor over to my
- 11 partner, Ms. Champion.
- 12 PRESIDENT SACHS: Before you start, are
- 13 | there questions at this point in time from my two
- 14 | colleagues?
- ARBITRATOR PEREZCANO: Not at this time from
- 16 me, Mr. Chairman.
- 17 PRESIDENT SACHS: Thank you.
- 18 MS. CHAMPION: Good morning. We thank the
- 19 Tribunal for its time today.
- I'm going to just cover how the new evidence
- 21 | that the Parties have submitted in this case has no
- 22 impact on Newport's good faith.

I want to remind the Court of the applicable standard. A decision of the Colombian Constitutional Court that was issued after Claimants filed their Memorial but before Respondent filed its

Counter-Memorial, and this decision tells us a lot about what is required and what is not required to meet the bar of good faith without fault.

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

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

2.2

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

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

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

Now, again, at the outset of the Merits

Hearing in this case, Newport was finally recognized

by the Colombian courts as an affected party, and the

Colombian court based that determination on the 2012

Sales-Purchase Agreement which it said: "Newport is

entitled to participate in the case, given that it has

a pecuniary right with respect to the affected

properties." That's based on the Sales-Purchase

Agreement. That Agreement is signed, then diligence

is done on the property.

As this Tribunal already knows, it's been covered exhaustively, that diligence was extensive.

It included diligence on the title, a corporate study of the seller, Corficolombiana was hired, ran its own SARLAFT process, made its submission to the Attorney

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

2.2

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

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

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

"Absolutely not." The President further inquired:

"Okay, if I want to resell the property in the year thereafter, so the new circumstance has arisen, and I want to sell my property, and now it is known that there was an origin at the origin an illicit circumstance. Would I be able to sell the Property to somebody else? Would that somebody else be a good faith purchaser? Because he would know, wouldn't he? Probably he would know of the illicit origin."

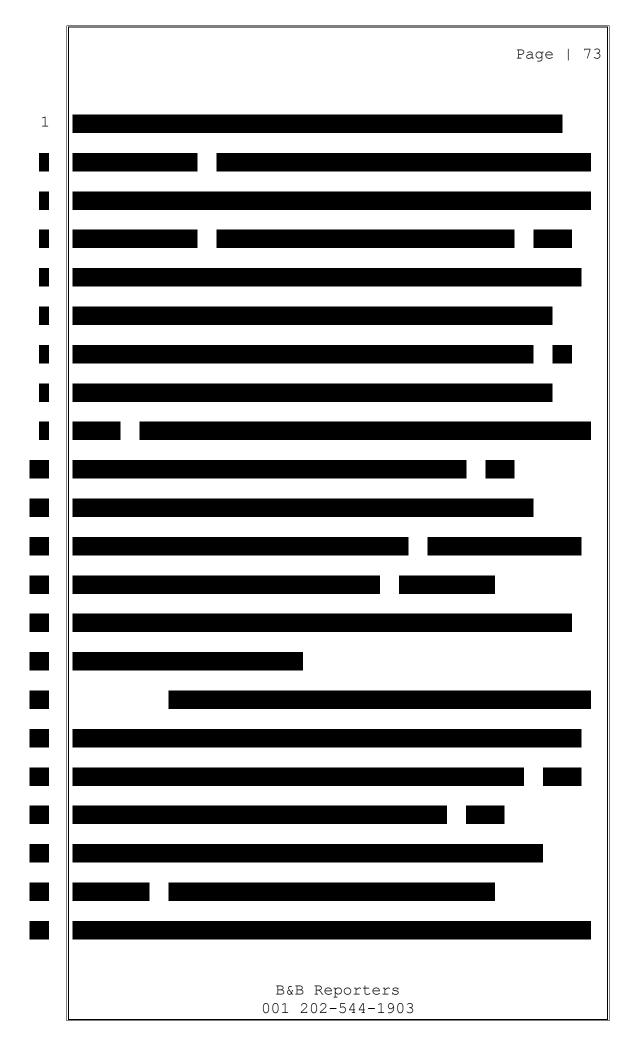
you can sell it." Claimants were entitled to rely on the diligence that they had done even after Iván López surfaced. Again, I know the Court is already familiar with this. I'm not going to go over it in detail.

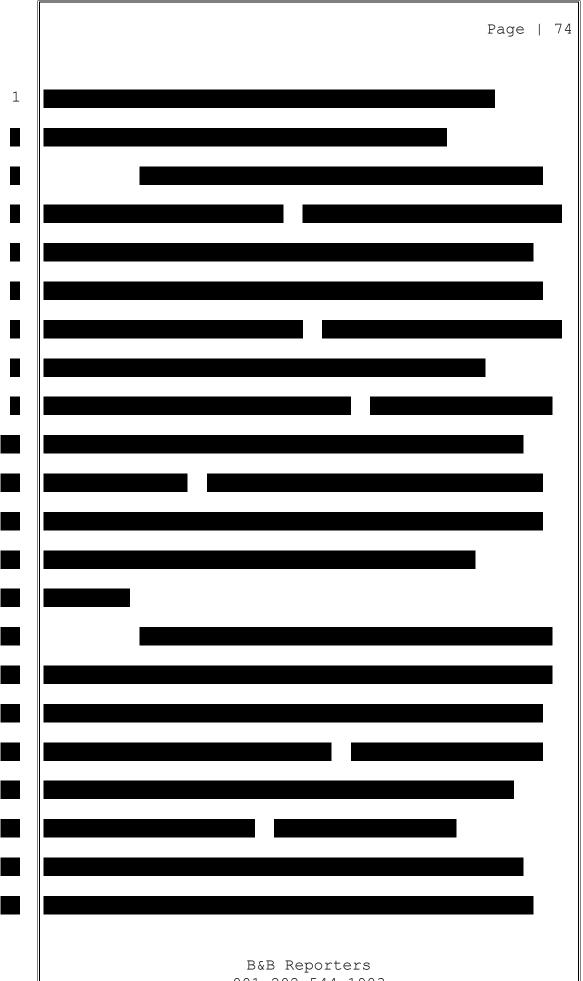
The key thing is that that diligence, even though it was into the Seller as well into La Palma, it did not surface

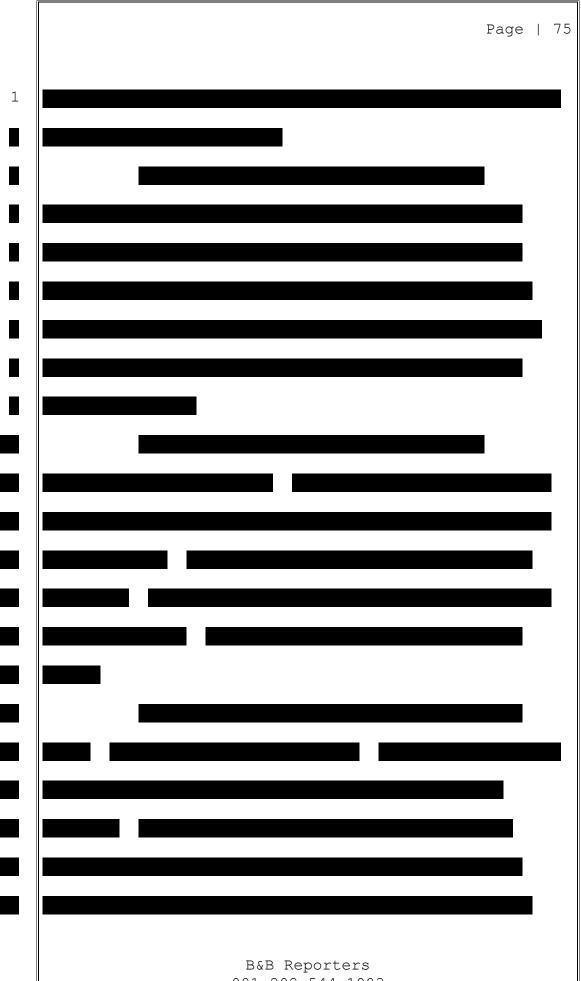
Dr. Reyes, again, was unequivocal.

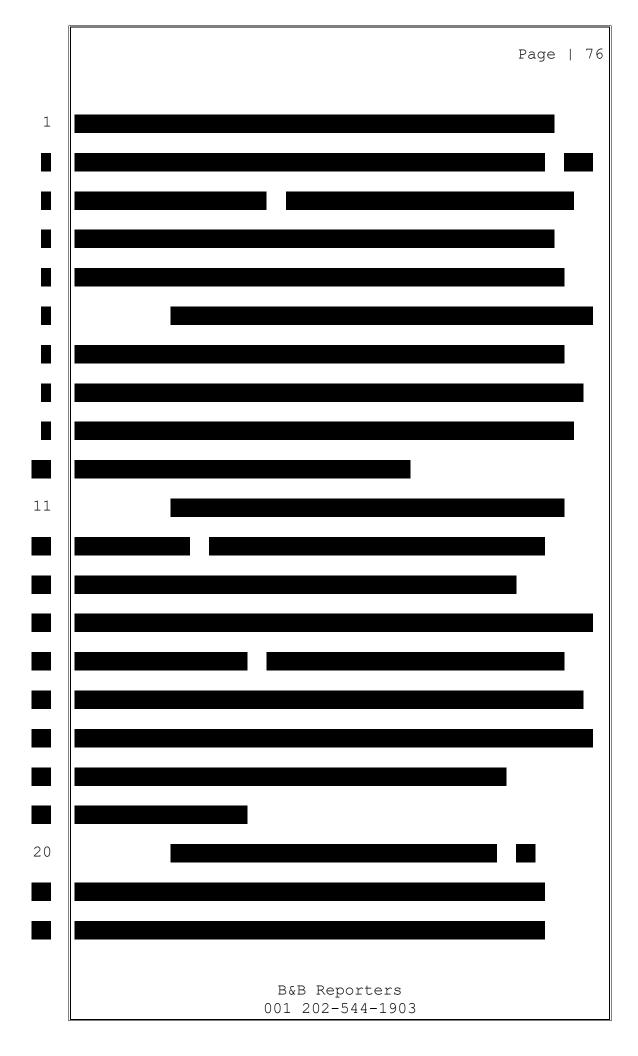
And this is important because Colombia does not really question the adequacy of Claimants' due

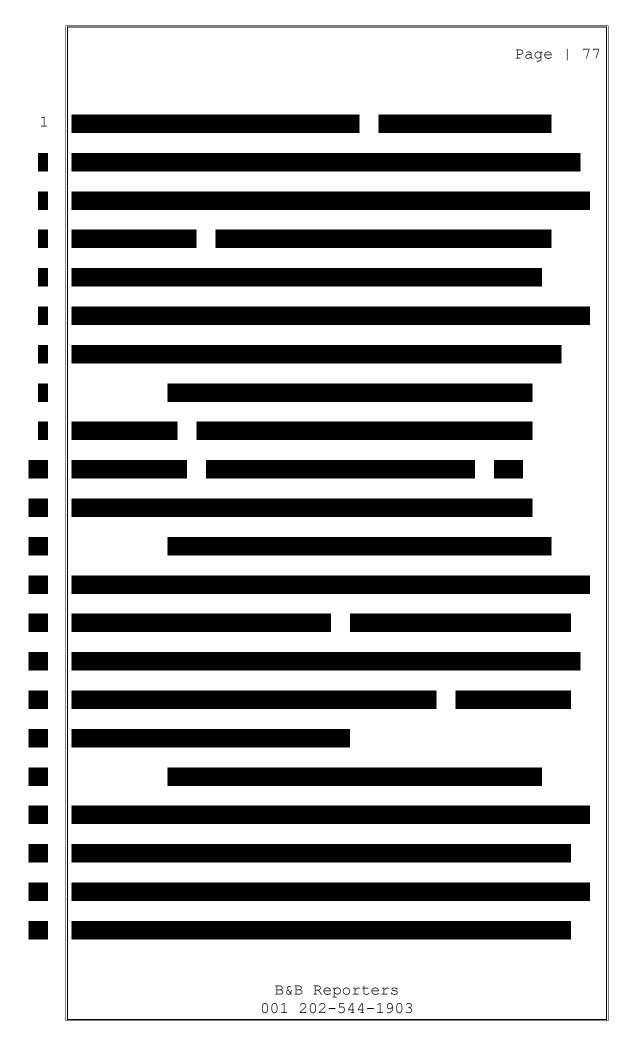
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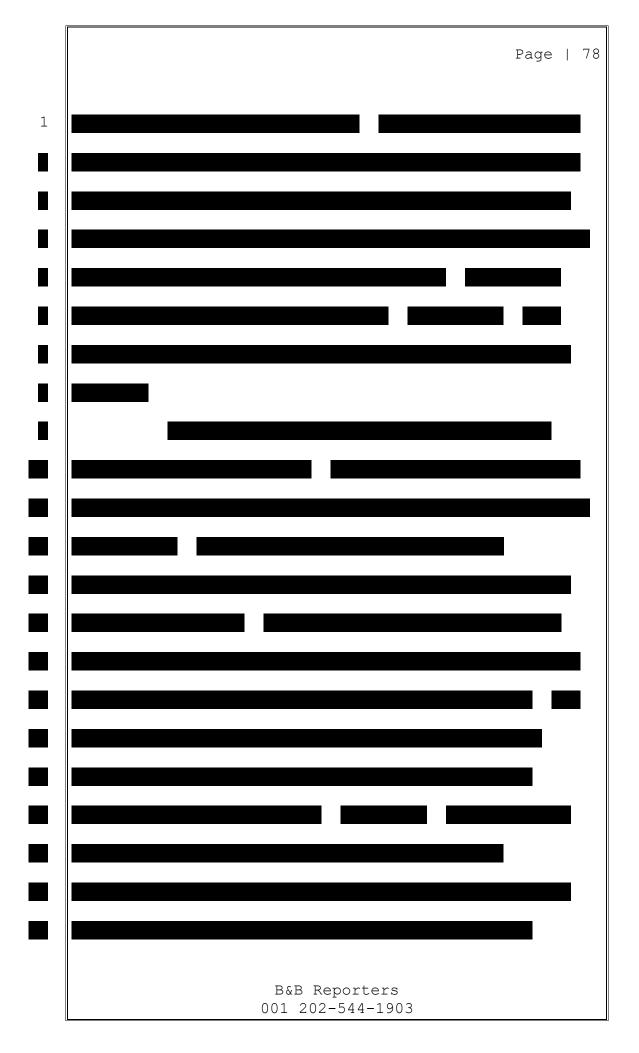


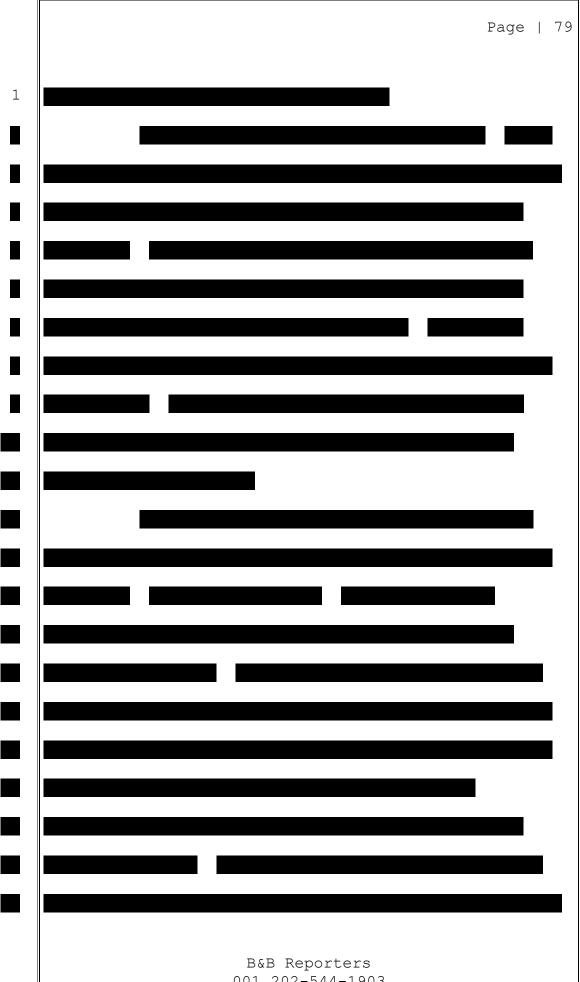


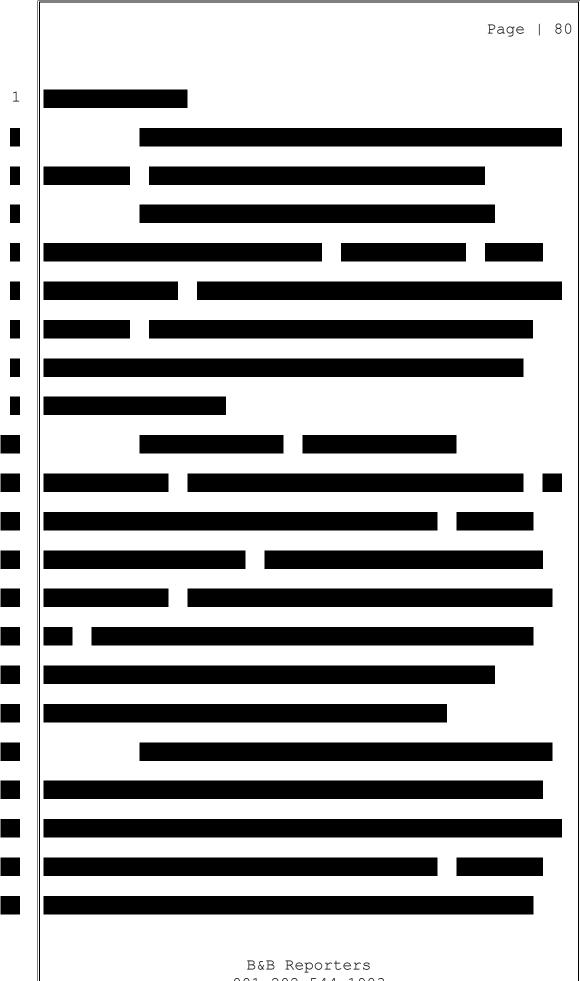


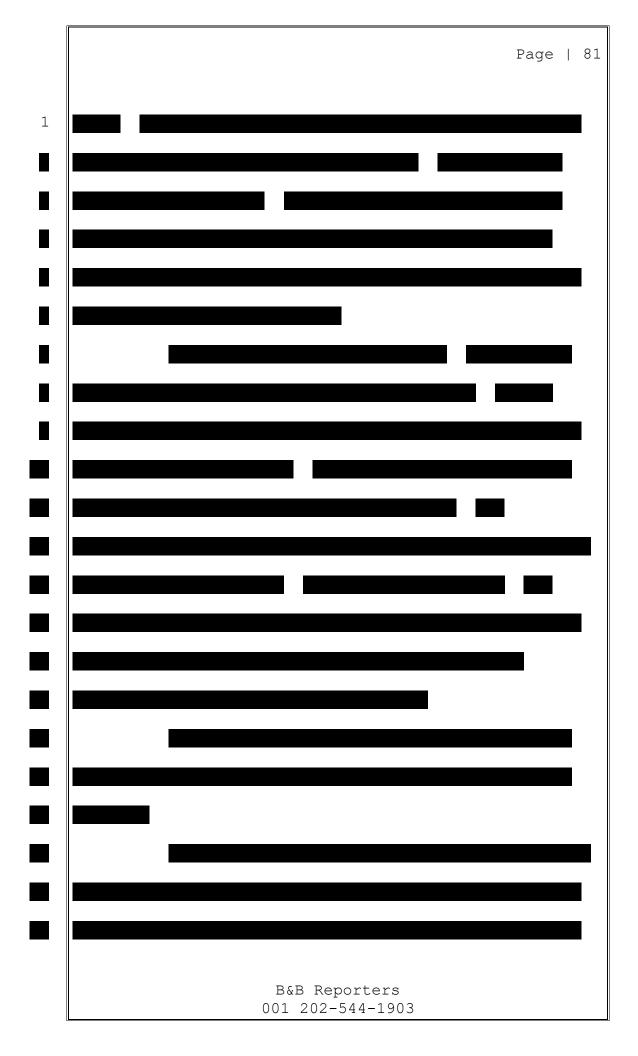












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Mr. Seda was

6 cleared by an OFAC inquiry into his Colombian
7 businesses. Now, again, as set forth in Mr. Seda's

8 original Witness Statement, on 14th of February 2018,

9 agents from the FBI appeared at my home in the United

10 States while I was away and questioned the mother of

11 my children, as well as our secretary and housekeeper.

12 They said they were conducting a search based on a

13 newly published list by OFAC.

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I reached out to the FBI later, they informed me that the Fiscalía had sent them an alert that I was related to various Colombian drug traffickers listed in the new OFAC List. OFAC officials, thereafter, sent me several requests for information.

He had to hire attorneys and a team from

Page | 83

1 Kroll at his own expense to respond to OFAC's detailed

2 | requests, OFAC took no action. And again, Mr. Seda

3 was told that this inquiry was prompted by a tip from

4 Colombian Authorities.

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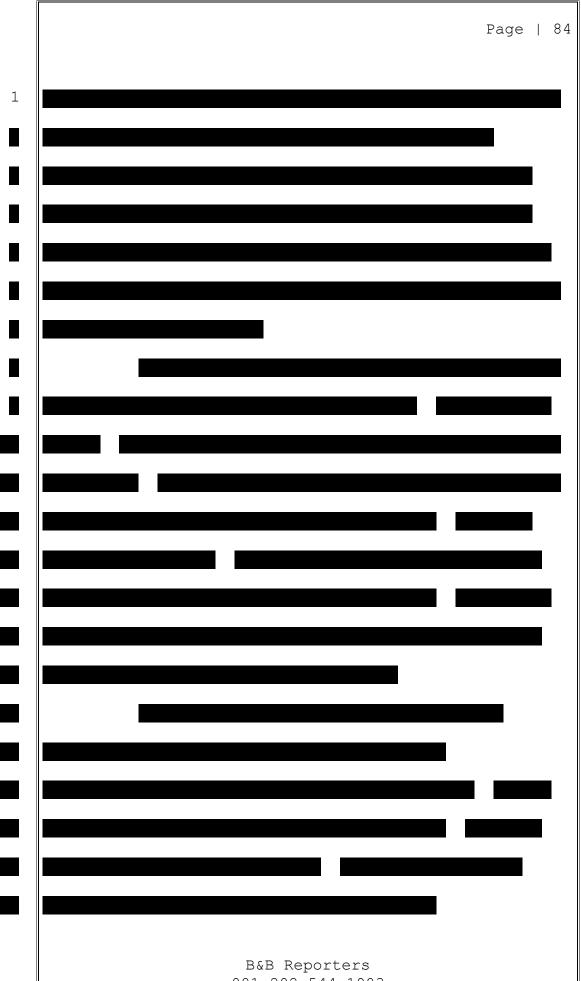
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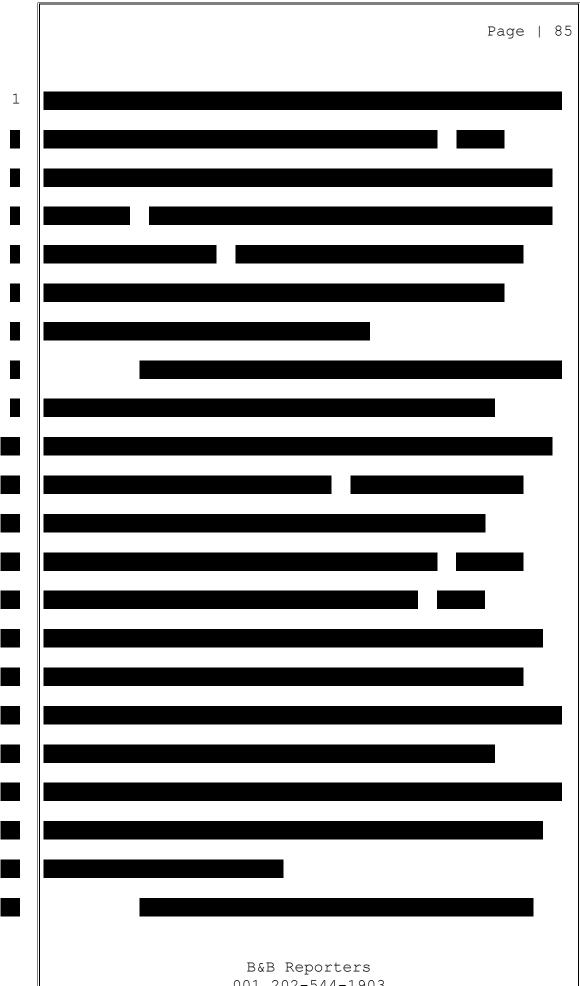
5 Nothing happened as a result of that

6 | inquiry. OFAC looked at the records for all of

7 Mr. Seda's Colombian businesses, not just the

Meritage: Luxé, everything.





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

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

I turn it back over to my colleague,

1 Mr. Moloo, unless the Tribunal has questions.

2 PRESIDENT SACHS: I don't think we have 3 questions at this point of time, so we would ask

4 Mr. Moloo to proceed.

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

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

The first claim,

Now, one of the things they say in their

Post-Closing Submission is, well, they're not in like

circumstances because are not involved.

So, their case is completely shifted as we know;

right? It's no longer about the Lópezes, it's about

. And so, they're saying well,

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weren't involved in the Sister Property, but we have

to remember that the Measure, they themselves have 1 2 admitted, the Measure was not taken because of The Measure was taken because of the 4 Lópezes. And so, if you're going to take a measure 5 with respect to the Lópezes, you have to have also taken that Measure with respect to other properties 6 7 that are similarly situated, including the Sister 8 Property, and nothing has happened with respect to 9 them. 10 In fact, at the Hearing, it was made clear, 11 everybody knew, and And so, in 20 fact, I would say that it would be even more likely 21 that you would want to go after the Sister Property 22 because it would certainly be tainted if the Meritage

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

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

So, again, the

The FET claim is likewise not affected in

national-treatment claim is not affected in any way by any of this new evidence.

any way. In fact, if this case is now all about , there's been no question whatsoever that I

have seen as to whether or not Newport did adequate

. Nobody is saying, 1 diligence with respect to 2 oh, Nobody is saying any of that. In fact, if 6 this is actually about , I would say that 7 the diligence and the fact that we wrote specifically 8 to the Fiscalía and asked, tell us, is there anything 9 with respect to All of the recent 11 evidence that's been submitted simply does not impact 12 in any way the FET claim with respect to the 13 good-faith third party status of Newport. It doesn't 17 change the basis of the original application of the 18 Asset Forfeiture Law. And as Ms. Champion will speak 19 to, it, in fact, reinforces the corrupt scheme that 20 was actually in place here. 21 If we go to Slide 89. In fact, you will 22 recall, Members of the Tribunal, that not only does it

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not affect the good-faith third party status, but
there was no inquiry into the good-faith third party
status at the outset. When I cross-examined Mr. Caro
about that, he confirmed that there was no inquiry
into Newport's good-faith status at the time that they
were doing the investigation. Because he said we
didn't need to look into them, we just needed to look
into Corficolombiana because Newport was tied to
Corficolombiana, but he confirmed that there was no

finding with respect to Newport at all.

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

1 | would estimate one year.

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

And in Colombia's opening, Ms. Banifatemi said, the courts are making a determination as to whether Newport, which is now an affected party, whether it will be considered to be a good-faith third

party. And here we are a year later, and not one step, not one step, not an email setting dates has taken place.

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

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

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

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

1 have been the right course of conduct. And Colombia

2 can still do that. They can still do that. They

3 could take assets of those of whom they are concerned,

4 but not the assets of third party good-faith

5 purchasers.

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Annie?

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

1	Mr.	Seda	during	the	course	of	this	very	arbitration.
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2 Colombia has no explanation for this.

Again, Mr. Seda's unrebutted testimony that he was approached by individuals claiming to be from the Attorney General's Office, even before Asset Forfeiture Proceedings were begun, unrebutted by Colombia. They conceded that they do not know whether there was a shakedown against Mr. Seda.

Documentary evidence, communications, documenting the extortionate demands made to Mr. Seda by Mr. López, whose attorneys claim to be able to influence the Asset Forfeiture Proceedings.

Unrebutted.

Newspapers reporting corruption of

Prosecutors involved in the seizure of the Meritage

Project. Numerous investigations of these

Prosecutors. El Espectador reported on this,

1 According to the press and the charges against her, 2 she, along with drug lord Carlos Ramón Zapata and one 3 officer and two non-commissioned officers of the National Police, located people with pending 4 5 proceedings at the Attorney General's office, 6 identified them and extorted them for large sums of 7 money in exchange for various forms of favorable 8 treatment. Again, this scheme centers on El Médico, 9 Carlos Ramón Zapata, an informant for the Attorney 10 General's Office. 11

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If you go to the next slide.

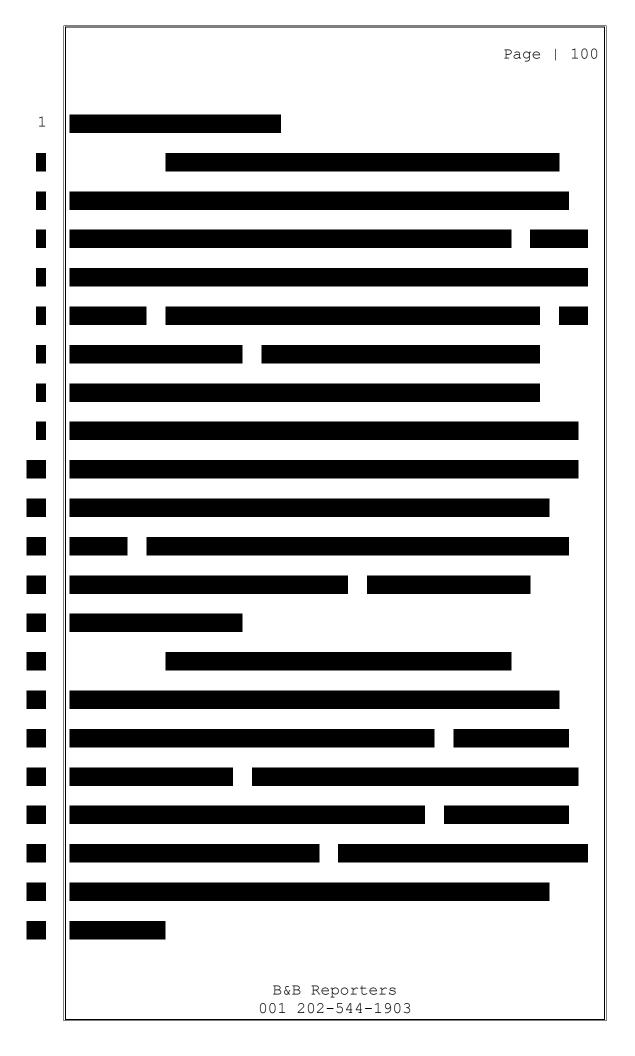
The meetings arranged by Carlos Ramón Zapata had another purpose and modus operandi. To give it the appearance of legality, they arranged for two Prosecutors, Daniel Hernández and Daniel Cardona, to receive the former drug lord's complaints, claims an investigator in the case. Again, this is exactly what they told Mr. Seda. We want Mr. Cardona and Mr. Hernández to take your statement.

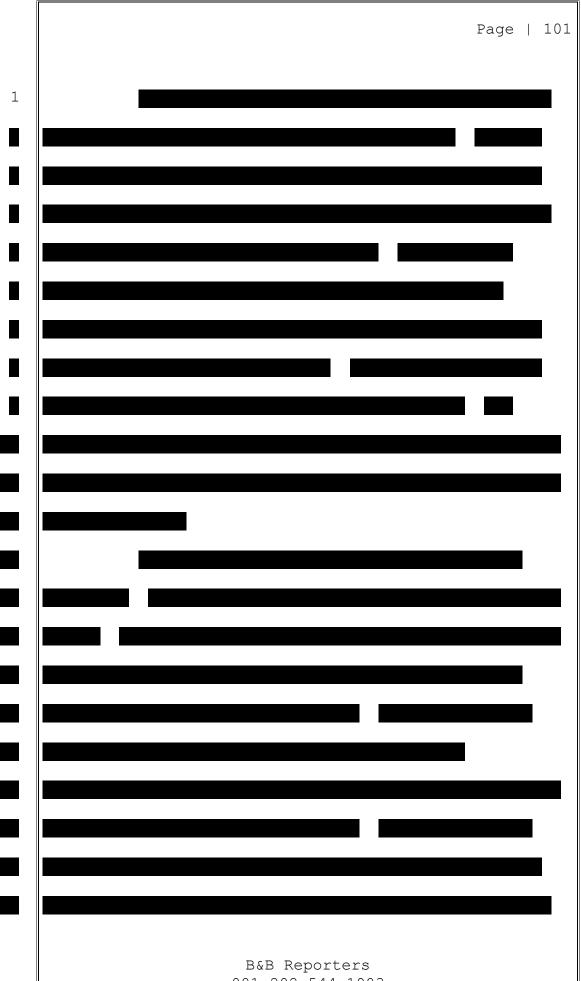
Now, naturally, as any, you know, rational person would, Mr. Seda wanted his attorney present at those meetings. I attended one of those meetings. I met Mr. Cardona. They assured us that they wanted to hear Angel's testimony, that they wanted to take a statement from him. They assured us that they wanted to help us resolve the case.

Importantly, Colombian officials were aware of these meetings at the time they were happening. At Ms. Noguera's urging, Mr. Seda reached out to Colombian Officials about a potential settlement.

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

1 mentioned Mr. Seda's meetings with Ms. Noguera and 2 Mr. Hernández, they are both mentioned. And those 3 communications were forwarded to Colombia's very counsel in this case. So, all of this was known to 4 5 Colombia at the time it's occurring. 6 So, Colombia's attempts to turn this into 7 something that was somehow improper on Mr. Seda's 8 part, are truly laughable, okay?





flags, the blazing red flags, which indicate that

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

So, again, I just want to return to the red

But I want to note also that this

demonstrates Colombia's violation of its obligation to

accord fair and equitable treatment to the Claimants

under Article 10.5. If the Asset Forfeiture

Proceeding can be resolved with a bribe, if an asset

seizure is undertaken for a corrupt purpose and can be

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1 resolved with a bribe, then there can be no Essential

- 2 | Security Interest related to that proceeding. A
- 3 | corrupt purpose cannot correspond to an Essential
- 4 | Security Interest.
- 5 And with that, we will conclude.
- 6 MS. BANIFATEMI: Mr. President, if I may, I
- 7 did not wish to interrupt Ms. Champion whilst she was
- 8 arguing, but we do take issue on record, that three
- 9 times, and she knows better, she's providing testimony
- 10 based on her attendance of a meeting. She's not a
- 11 | witness here, she's counsel. So, we take issue with
- 12 that. And I just want to put that on record. Thank
- 13 you.
- 14 PRESIDENT SACHS: Yes, thank you. It's been
- 15 put on record.
- 16 Do you mind, do colleagues have guestions to
- 17 Claimants' counsel at this point of time?
- ARBITRATOR PONCET: I don't have any,
- 19 Mr. President.
- 20 PRESIDENT SACHS: Thank you.
- 21 ARBITRATOR PEREZCANO: I don't have any
- 22 questions. I do have a request, though. The

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1 presentation that was sent to us by email, roughly

- 2 | around Slide 50, the bottom of all the slides is cut
- 3 off. So, we lose all the references to the record, so
- 4 the Claimants can redo it and re-send the PDF with the
- 5 | slides complete because otherwise some of them on the
- 6 margins have the references, but, you know, the bottom
- 7 blue footer with all the references is lost as of
- 8 Slide 50 or thereabouts.
- 9 MS. CHAMPION: We will address that right
- 10 away. Apologies for that.
- 11 ARBITRATOR PEREZCANO: And if you can
- 12 | re-send it, I mean, just now, so that we can have it
- 13 | and we can continue to work on it, so don't wait until
- 14 | the Hearing is over. That's my request. Thank you.
- MS. CHAMPION: Understood.
- 16 PRESIDENT SACHS: Thank you. Same here, and
- 17 | we will now have the break of 15 minutes.
- 18 MS. BANIFATEMI: Mr. President, may we just
- 19 have the time count, just to know where we stand?
- 20 PRESIDENT SACHS: I think there was five or
- 21 | 10 minutes in excess. Sara, was that the case?
- 22 SECRETARY MARZAL: Yes, Claimants have 23

- 1 minutes left.
- 2 PRESIDENT SACHS: Okay, so seven minutes
- 3 over budget.
- 4 All right. So, let's have a 15 minutes'
- 5 | break, meaning we will resume at 37. Right? Thank
- 6 you very much.
- 7 (Recess.)
- MR. MOLOO: Mr. President, you were on mute,
- 9 I believe.
- 10 PRESIDENT SACHS: Okay. But, can you hear
- 11 me now?
- MR. MOLOO: Yes, we can.
- PRESIDENT SACHS: Okay. I presume we are
- 14 all back, and we will now give the floor to the
- 15 Respondent.
- Ms. Banifatemi.
- MR. MOLOO: Mr. President, if I may before,
- 18 | just so I'm not interrupting Ms. Banifatemi, just our
- 19 quick scan of the slides that were sent. It does
- 20 appear that there are some Exhibits that the Tribunal
- 21 excluded--did not allow inclusion on to the record
- 22 | that are nonetheless in the slide deck that Respondent

1	has sent, and we would ask that that be removed. I							
2	think it is highly prejudicial to be addressing							
3	Exhibits that are not in the record and that the							
4	Tribunal expressly did not permit into the record in							
5	the slides.							
6	PRESIDENT SACHS: Can we hear the Respondent							
7	on this?							
8	MS. BANIFATEMI: Thank you, Mr. President.							
9	I fail to see what Mr. Moloo is referring							
10	to. We only referred to existing evidence on the							
11	record.							
12	(Overlapping speakers.)							
13	MR. MOLOO: At Slide 30, for example, and I							
14	think there is even a note saying that that							
15								
16	MS. HERRERA: They also quoted from our							
17	MS. BANIFATEMI:							
18								
19								
20	. Just bear with us, Mr. Moloo, we							
21	will explain our case and the Tribunal will decide.							
22	MR. MOLOO: Mr. President, I'm in your							

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

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

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

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

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

As regards Slide 30, I want to just say

As regards Slide 30, I want to just say right away there is a reference to our Post-Closing Submission on the right side, and that is our Post-Closing Submission. This is what is on the record, and we're flagging the fact that that would have shown to this Tribunal the evidence that we were going to rely on,

14 It's as simple as that.

that was excluded.

MR. MOLOO: Mr. President, if I may, I did raise it now so that I would not have to interrupt

Ms. Banifatemi, but if you look at the bottom right box, Paragraph 117, you will see an underlined quotation and a bold of

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we would have--we could have, it's very easy to address but we didn't because that specific quote

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

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

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

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So, there is a whole

issue of due process here, but as far as we're concerned, this is just a citation from our

5 Post-Closing Submission.

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

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

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

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

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

all we're doing.

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

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

Page | 112

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

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

MR. MOLOO: Correct.

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

All right. Let's now proceed, please.

MS. BANIFATEMI: Thank you, Mr. President.

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

1	OPENING STATEMENT BY COUNSEL FOR RESPONDENT
2	MS. ORDÓÑEZ: Thank you, yes.
3	Mr. President, Members of the Tribunal, good
4	morning and good afternoon to everyone. As the
5	Tribunal may recall, at the start of the Closing
6	Hearing in October 2022, I explained the unprecedented
7	efforts made by the Colombian State to make available
8	to the Tribunal the evidence
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12	and that touches upon Colombia's
13	highest security interests.
14	Faced with the strength of the evidence
15	which confirms that the Meritage Project has been used
16	the
17	Claimants seem to have made the strategic decision not
18	to genuinely engage with the contents of
19	However, at the end of the day, it is not
20	the Tribunal's task to determine whether the Meritage
21	Project was or not
22	All it needs to do is recognize the

1 exceptional circumstances of this case, which raises

2 | Colombia's Essential Security Interests. The

3 consequence of this situation is that the Tribunal

4 | shall refrain from intervening in such delicate

5 matters.

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

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

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

Page | 115

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

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5 In particular, the evidence obtained and

6 which has been made available to the Tribunal, shows

7 | that the Meritage Case involves Colombia's Essential

8 | Security Interests. It is on this basis that, on

16 February 2022, acting in good faith, Colombia

10 invoked the Essential Security Exception in

11 Article 22.2(b) of the TPA. As Colombia has shown,

12 and the United States has confirmed, once the

13 Essential Security Exception in Article 22.2(b) of the

14 | TPA is invoked, the Tribunal is deprived of the power

15 to adjudicate the dispute. This has been purposefully

16 | negotiated by the Contracting Parties, and it remains

17 their understanding now.

18 Conversely, the Claimants' position poses a

19 serious threat to the very basis and limits of

20 Colombia's consent and to its sovereignty. We

21 | respectfully request this Tribunal, whose power to

22 adjudicate is based on the TPA, not to turn a blind

1 eye to the Contracting Parties' agreement and its

2 | limitations, as reflected in Article 22.2(b) of the

3 TPA. There should be no serious concern that we

4 | invoked the Essential Security Exception in absolute

5 good faith, once the fundamental factual basis for

6 such invocation were made available.

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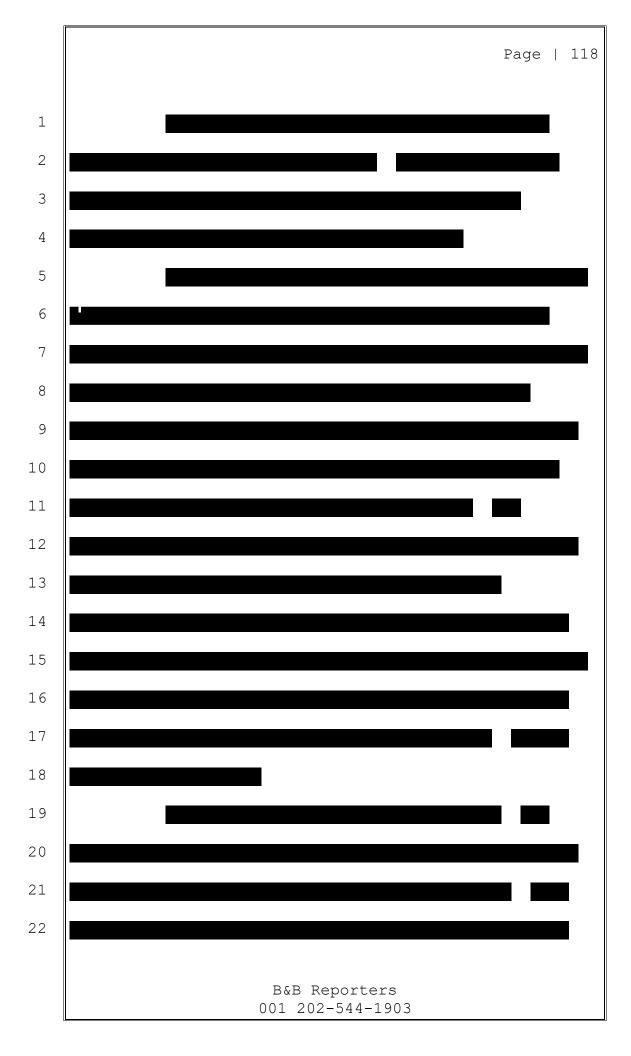
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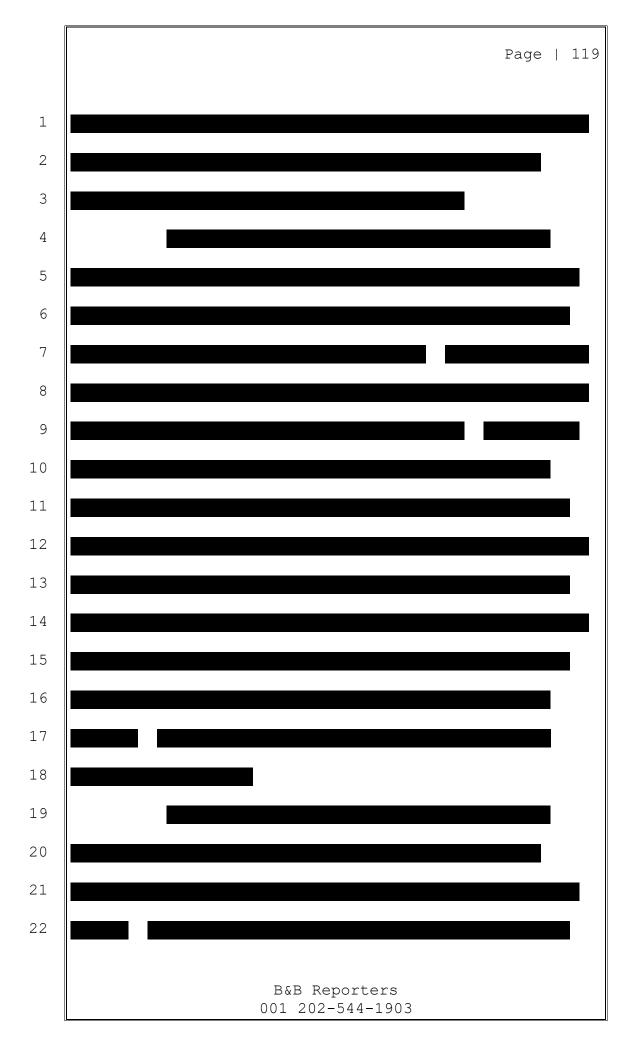
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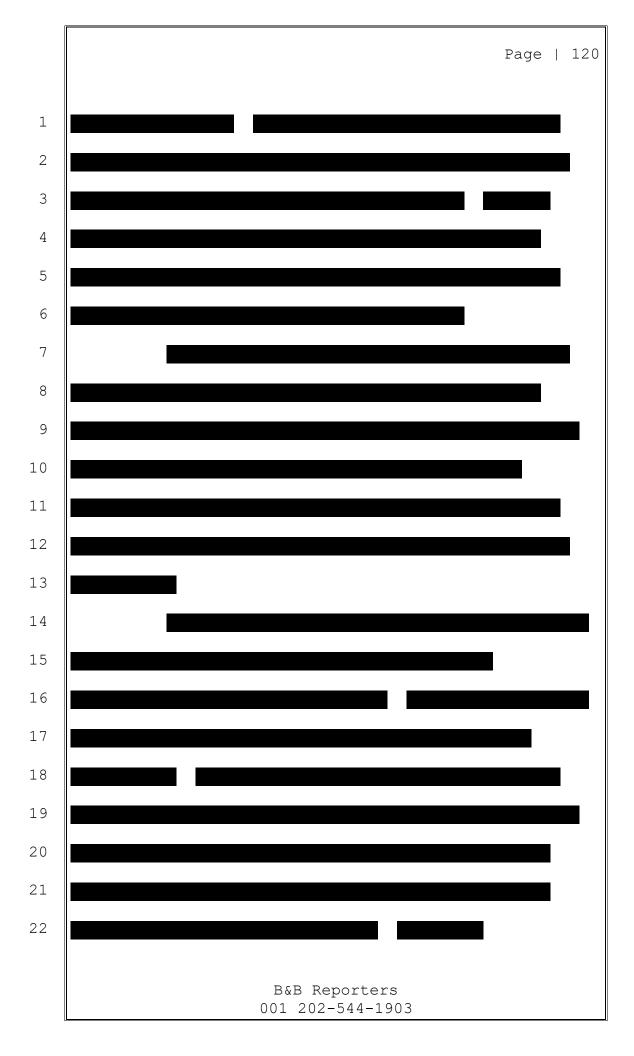
Importantly, out of 21 investment arbitrations filed against Colombia since 2016, this is the first time we invoke the Essential Security Exception.

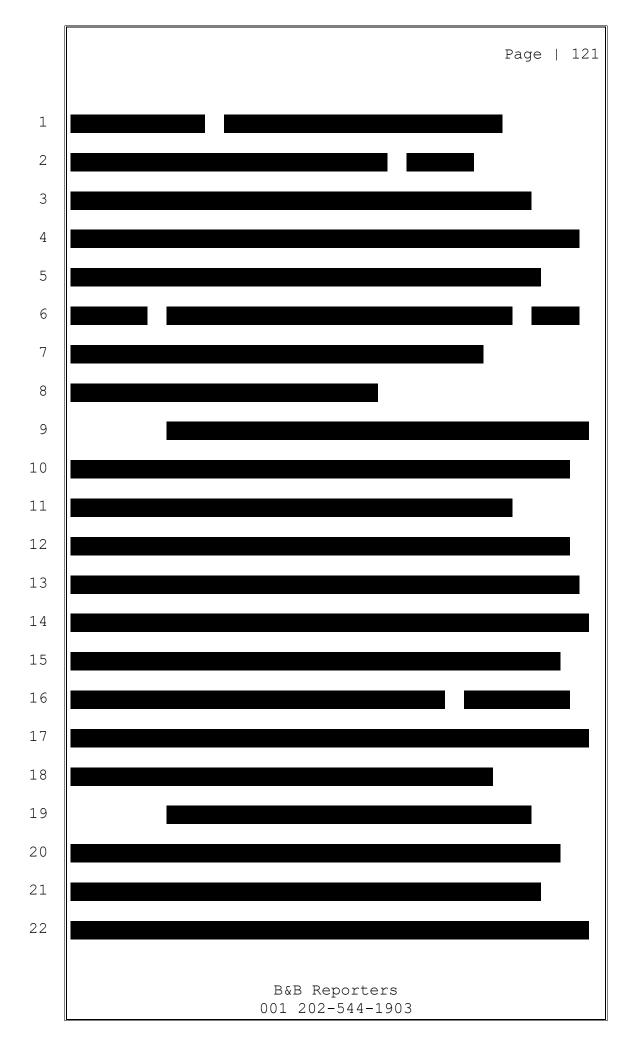
Mr. President, Members of the Tribunal, as a representative of the State of Colombia, I am here to reiterate Colombia's commitment to fight against organized crime and money-laundering. As a member of the international community, however, Colombia requires the assistance of other international actors,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

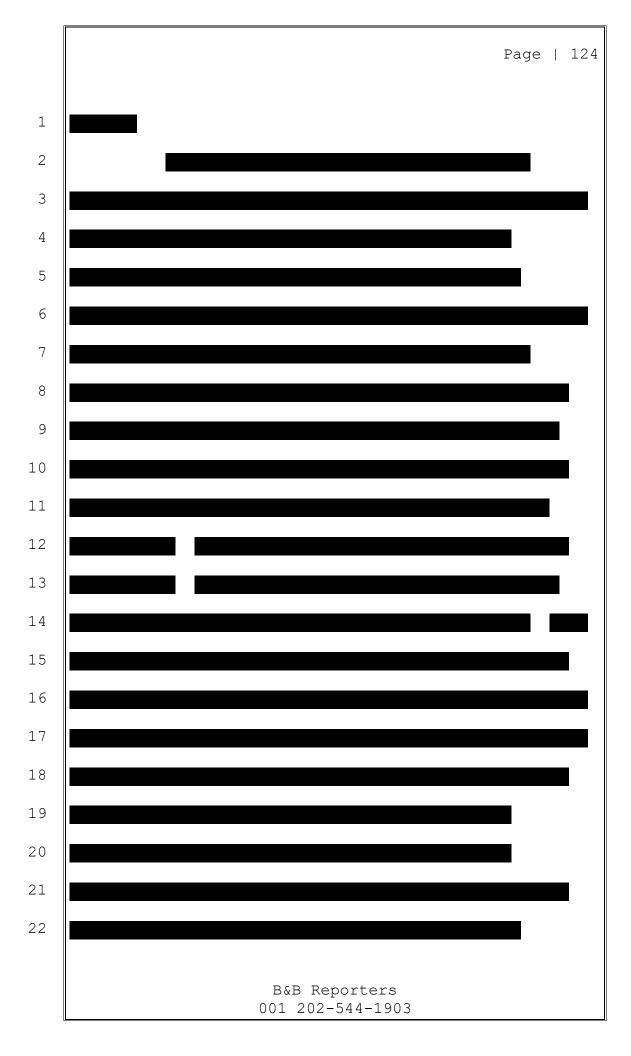
- 1 money-laundering, but ultimately undermine Colombia's
- 2 sovereignty. We trust this Tribunal not to uphold
- 3 this.
- 4 Thank you for your attention.
- 5 MS. BANIFATEMI: Mr. President, I think
- 6 you're on mute.
- 7 PRESIDENT SACHS: Yes. Thank you very much.
- 8 We will now hear Ms. Banifatemi.
- 9 MS. BANIFATEMI: Thank you, Mr. President.
- 10 Moving to the next slide on our
- 11 presentation, this is the Table of Contents, unlike
- 12 | the Claimants, we have truly endeavored to address the
- 13 scope and only the scope of the present hearing, which
- 14 is and the
- 15 Tribunal's questions and the U.S. practice on
- 16 Essential Security.
- I will address some further preliminary
- 18 remarks for a few minutes and then my partner,
- 19 Ms. Ximena Herrera, will address
- 20 and the Claimant's attempt to discredit Colombia's
- 21 witnesses, and then I will revert to the TPA and the
- 22 question of Essential Security.

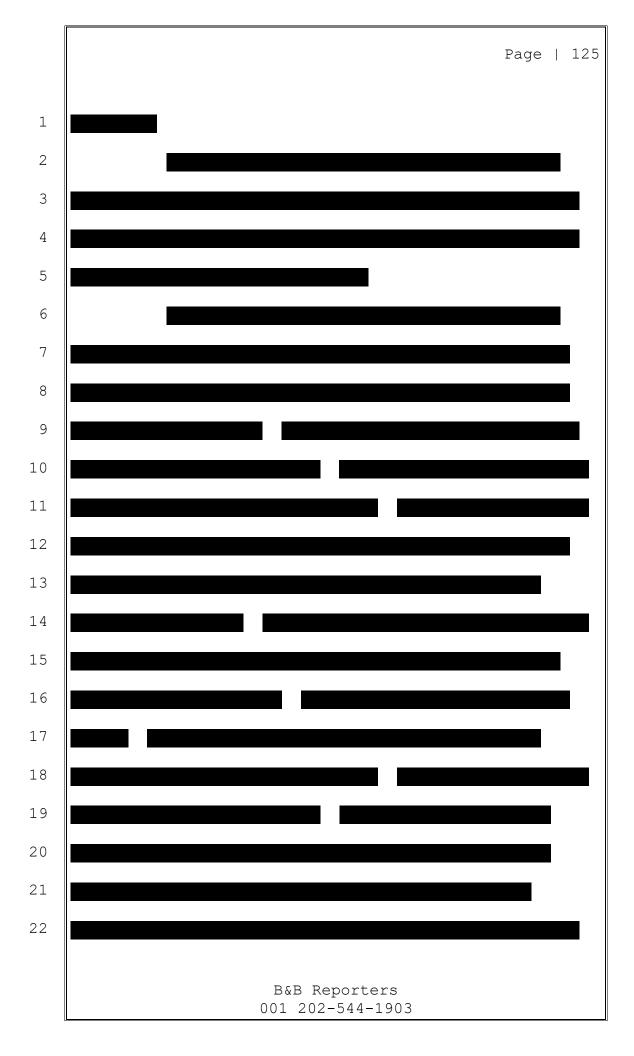


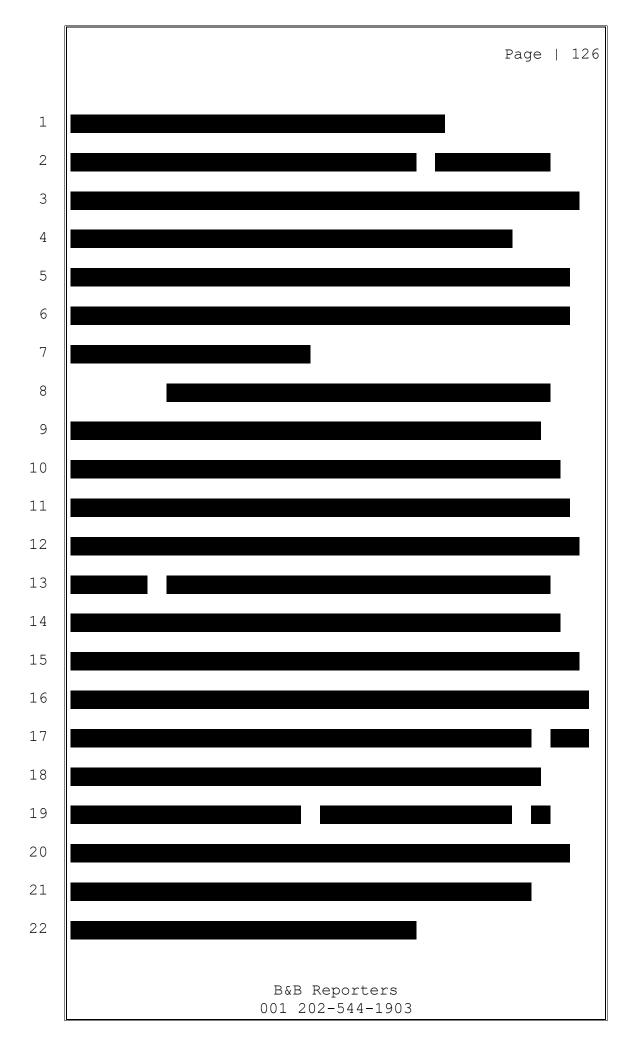


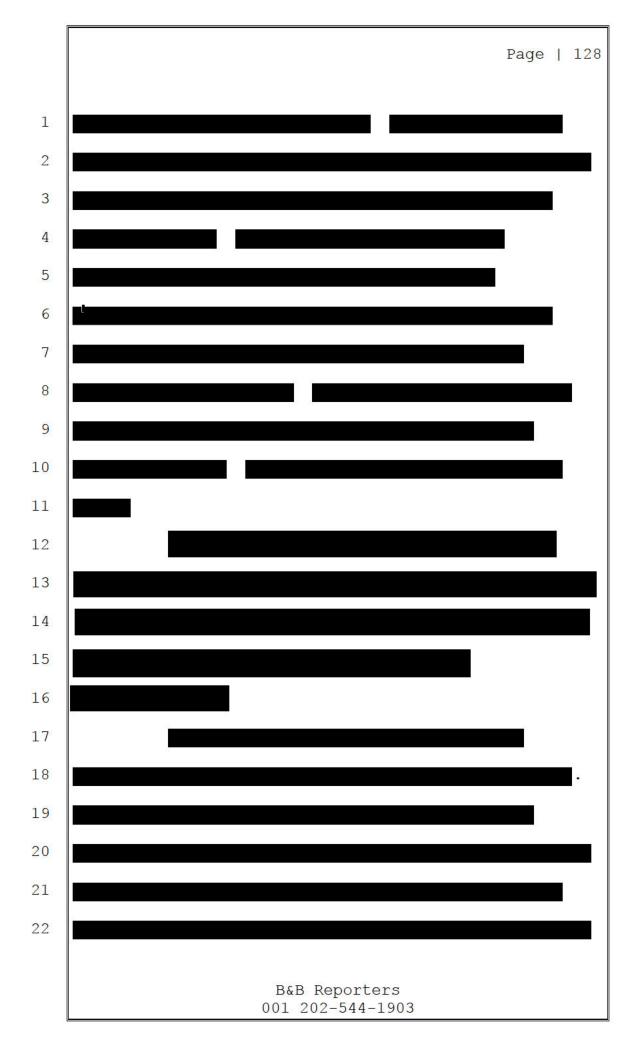


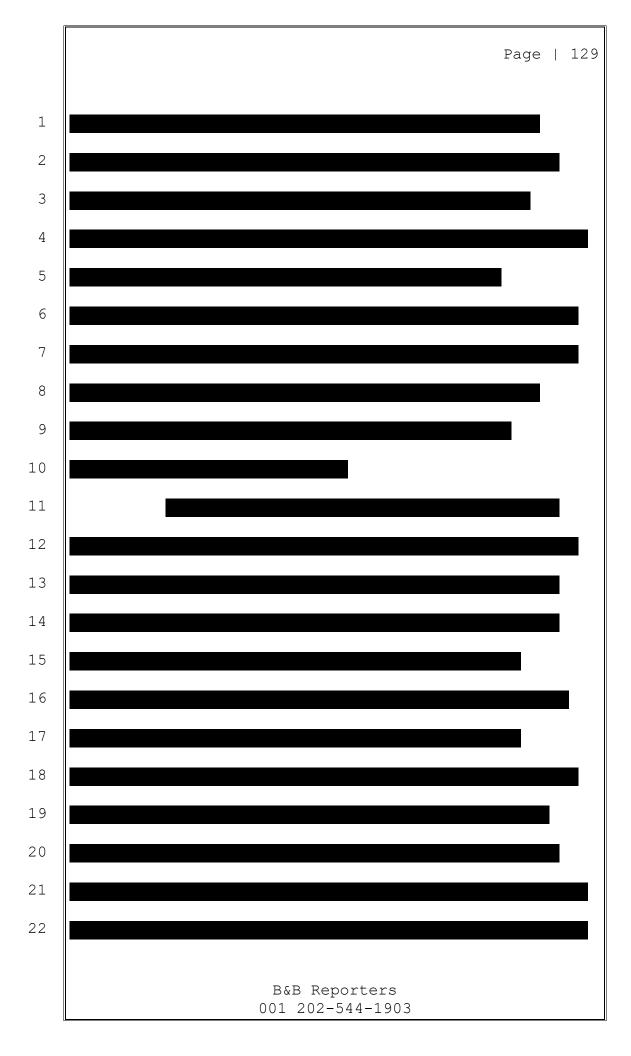


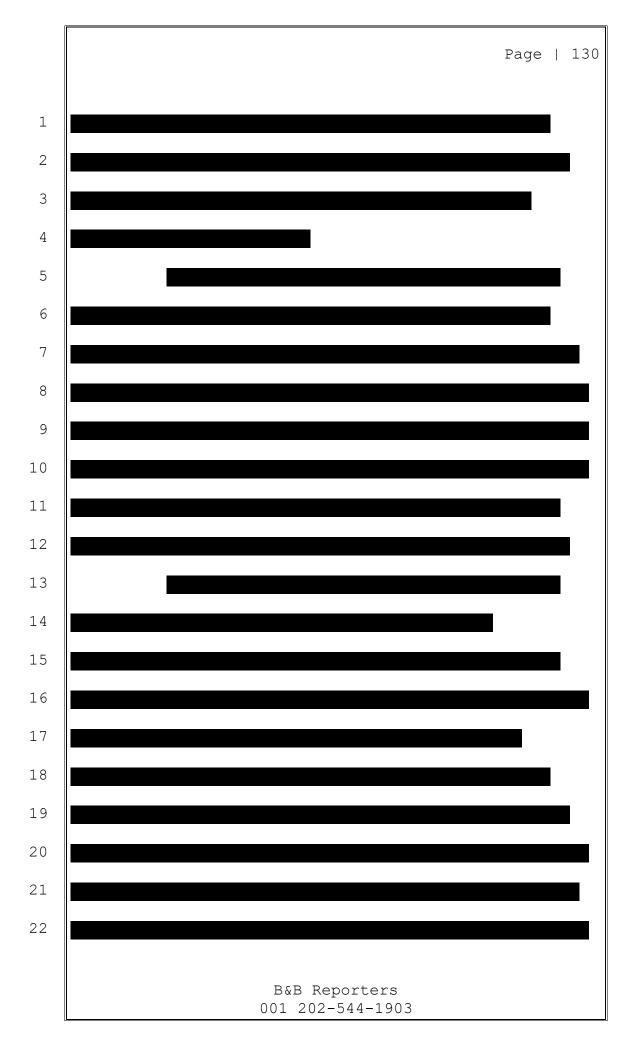


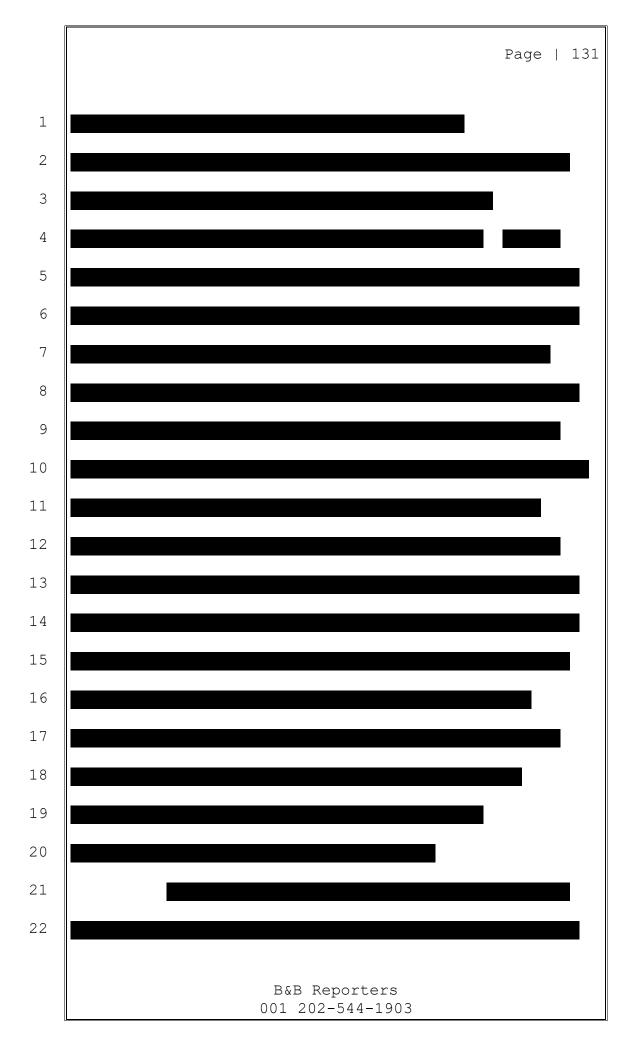


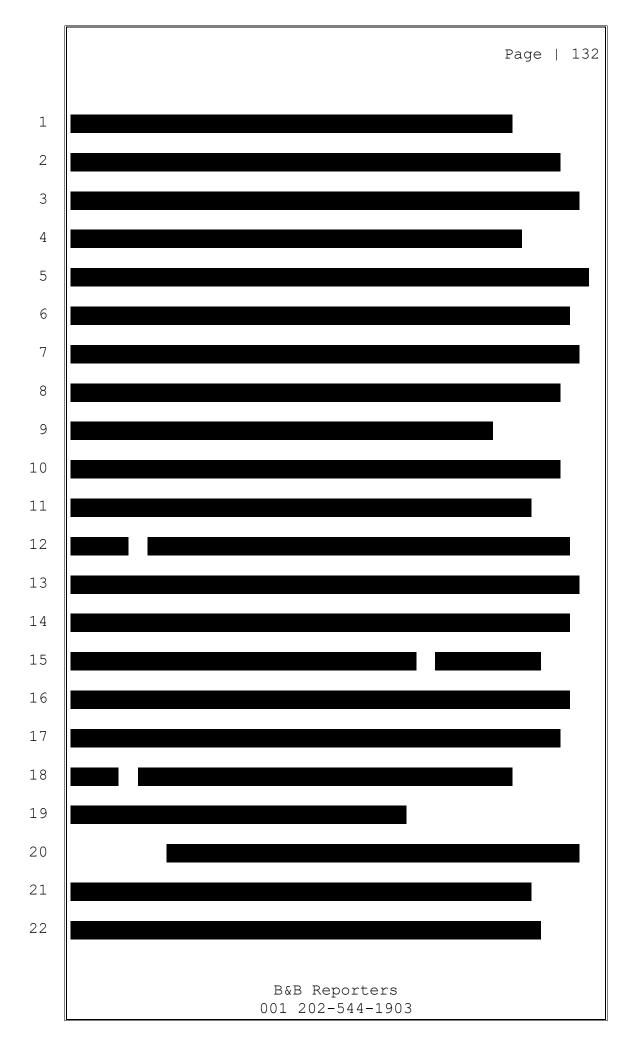


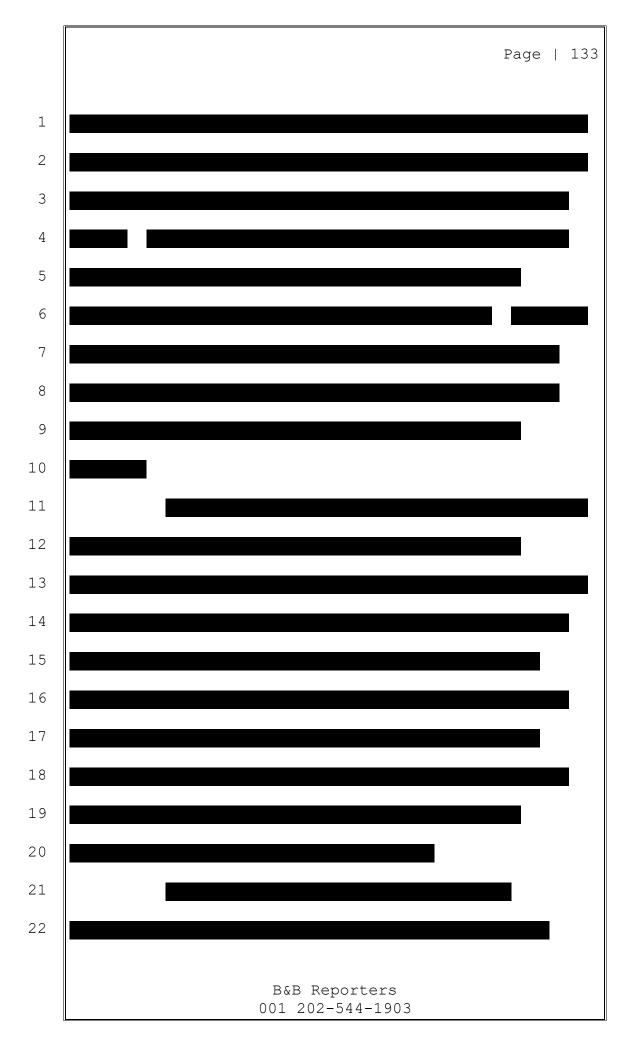


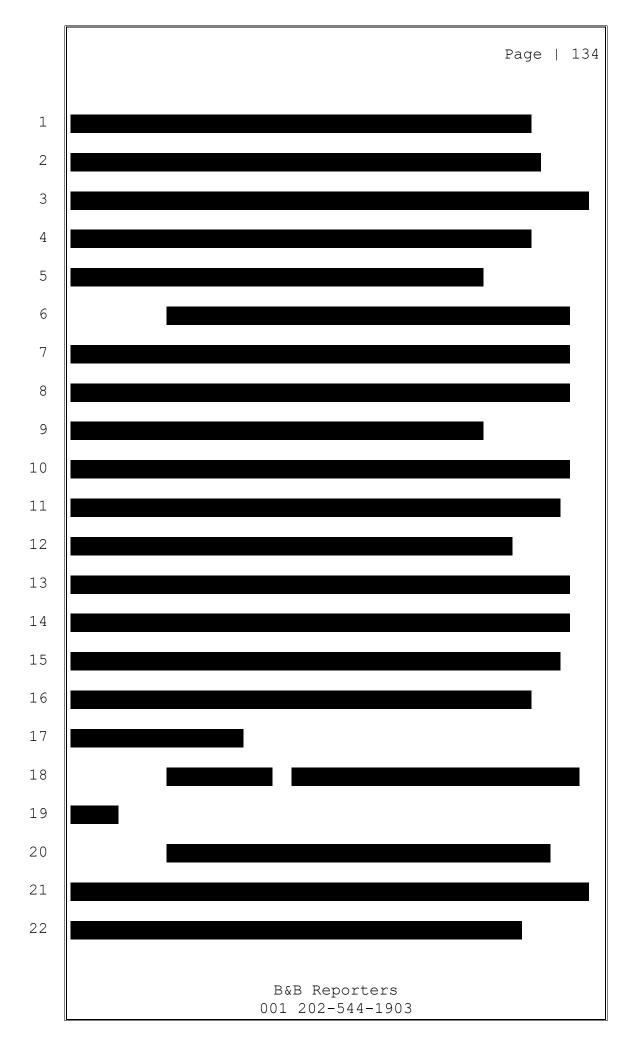


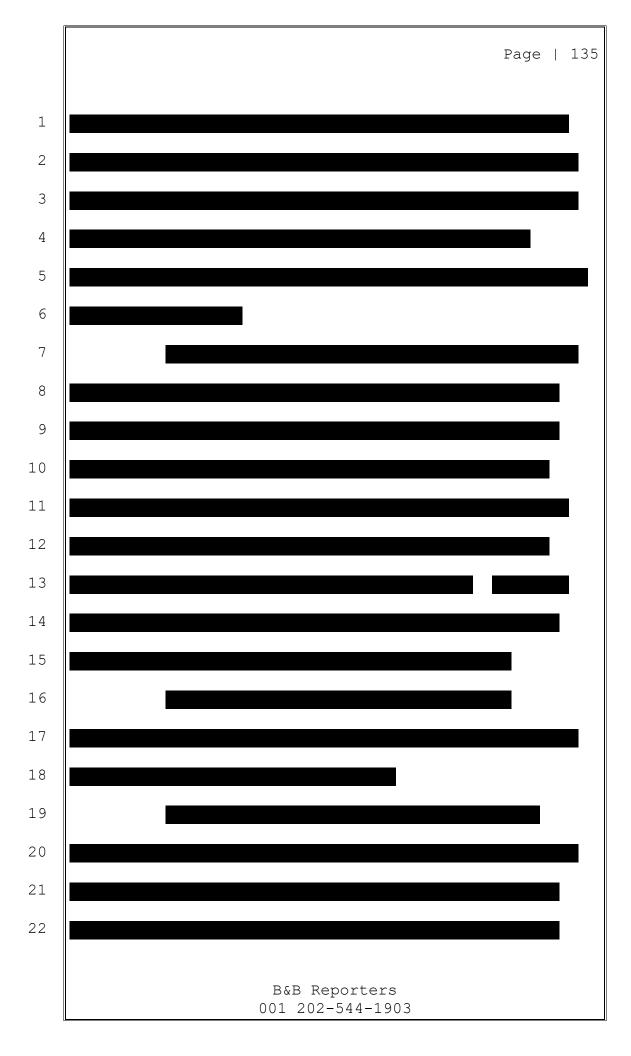


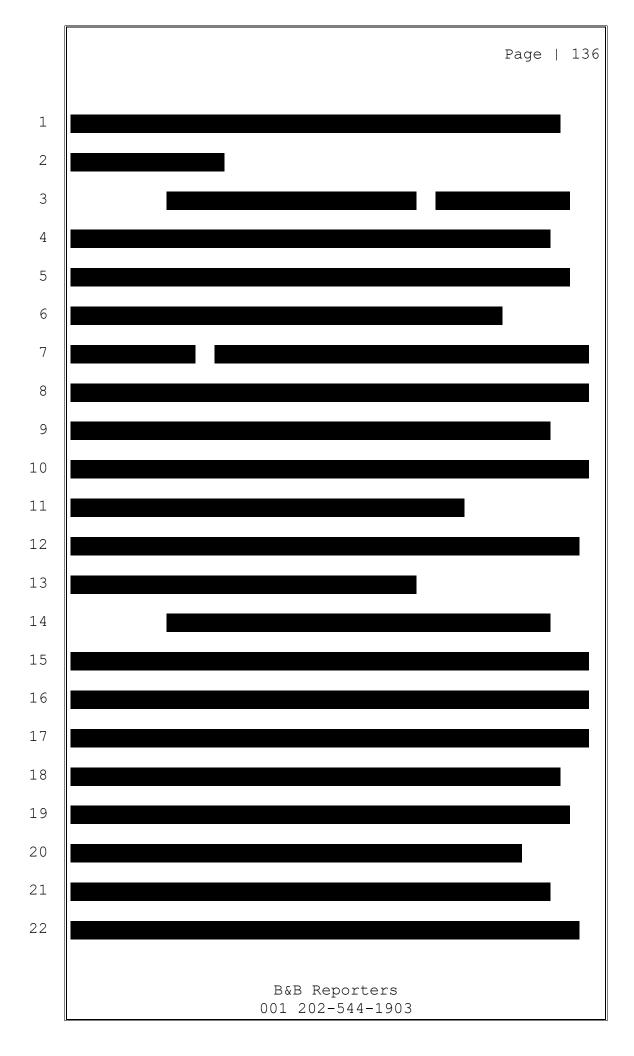


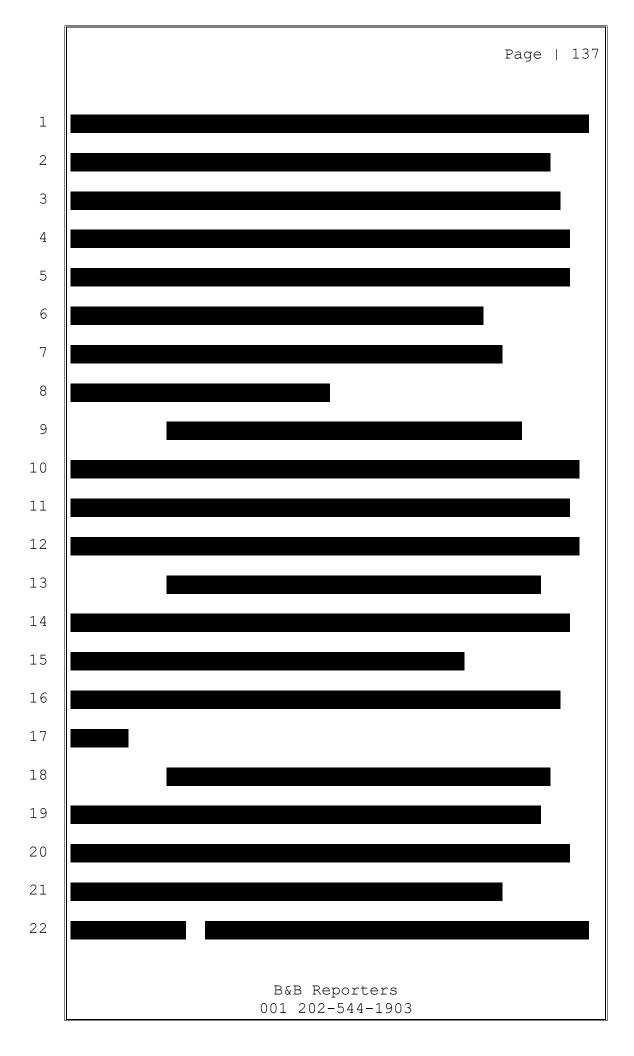


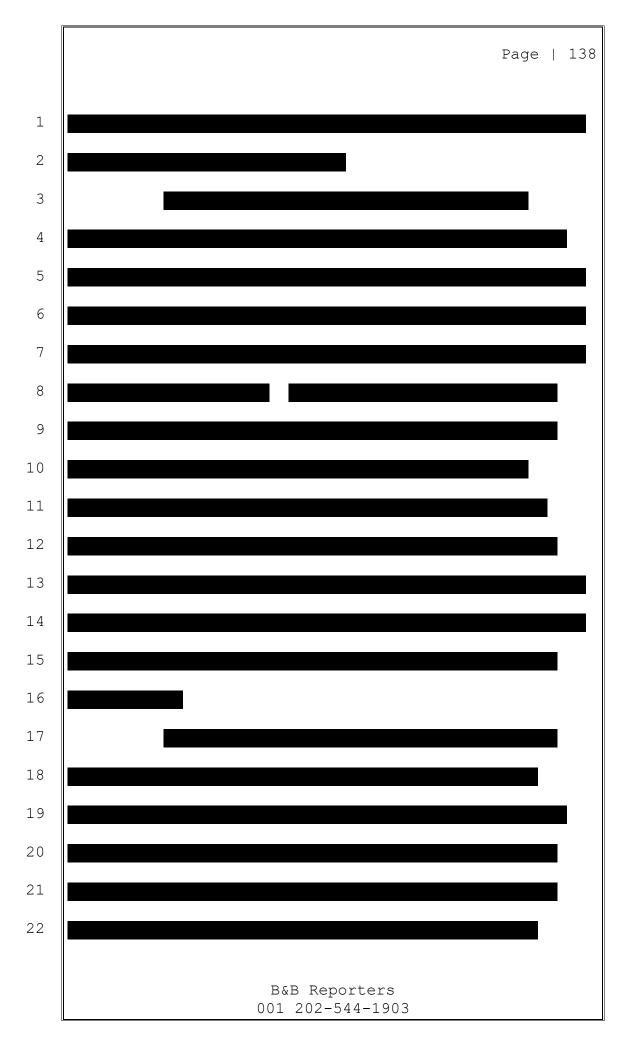


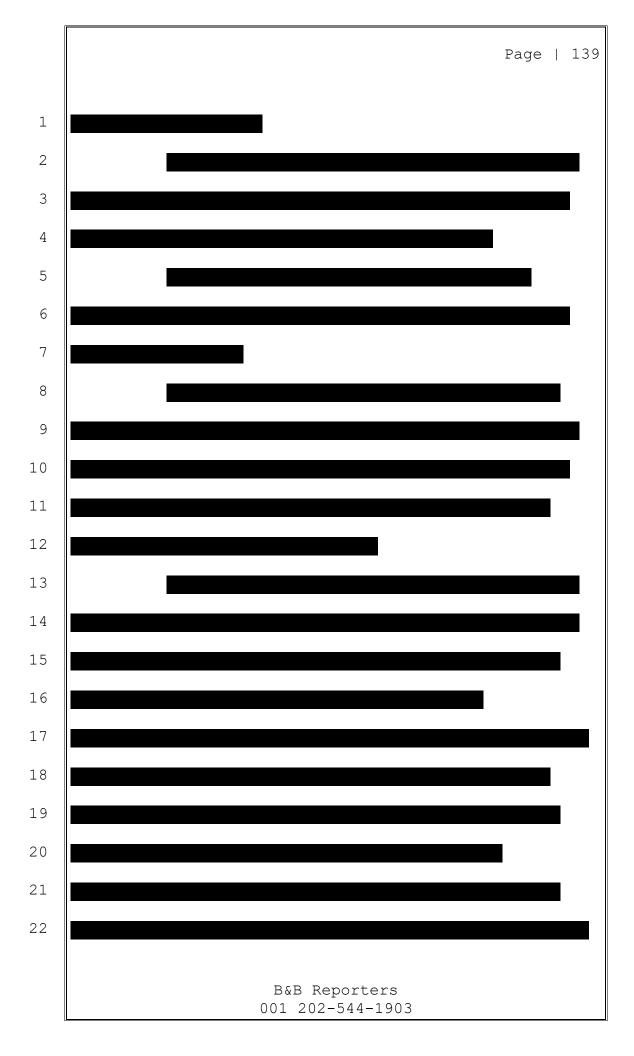


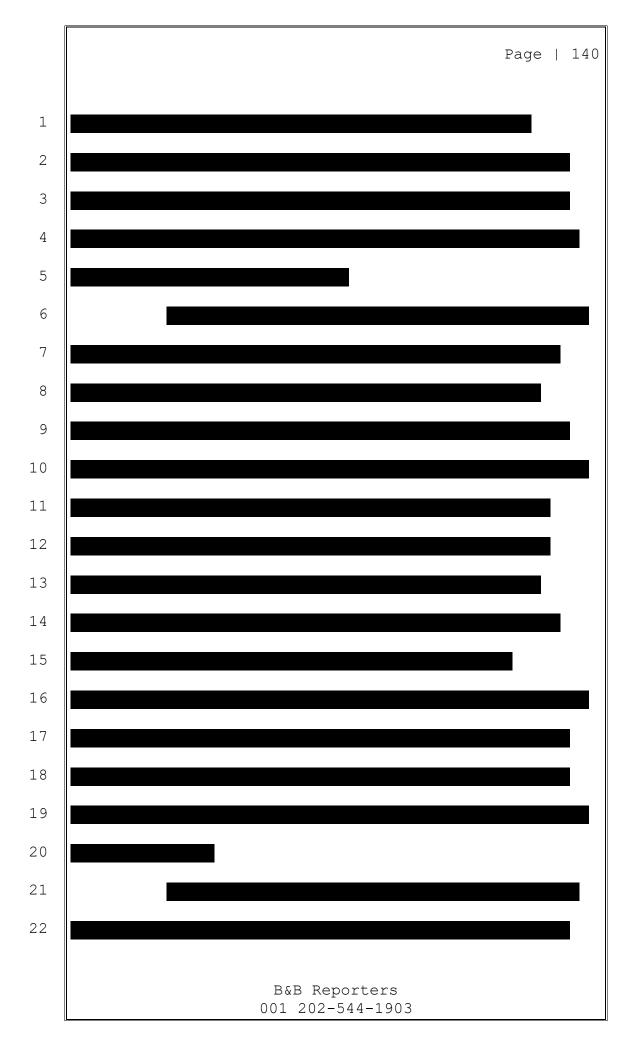


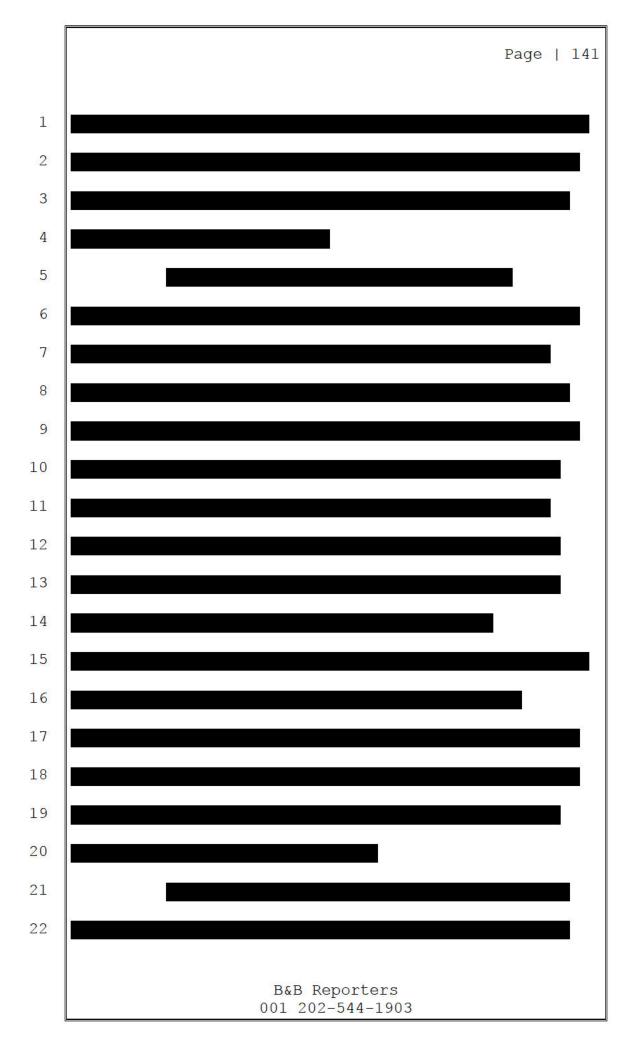


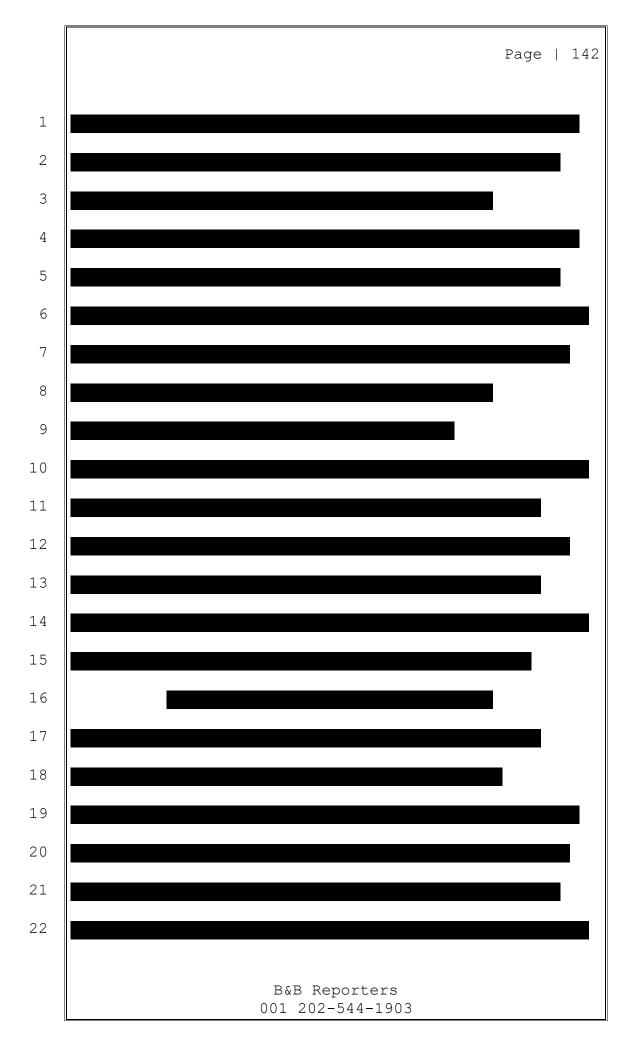


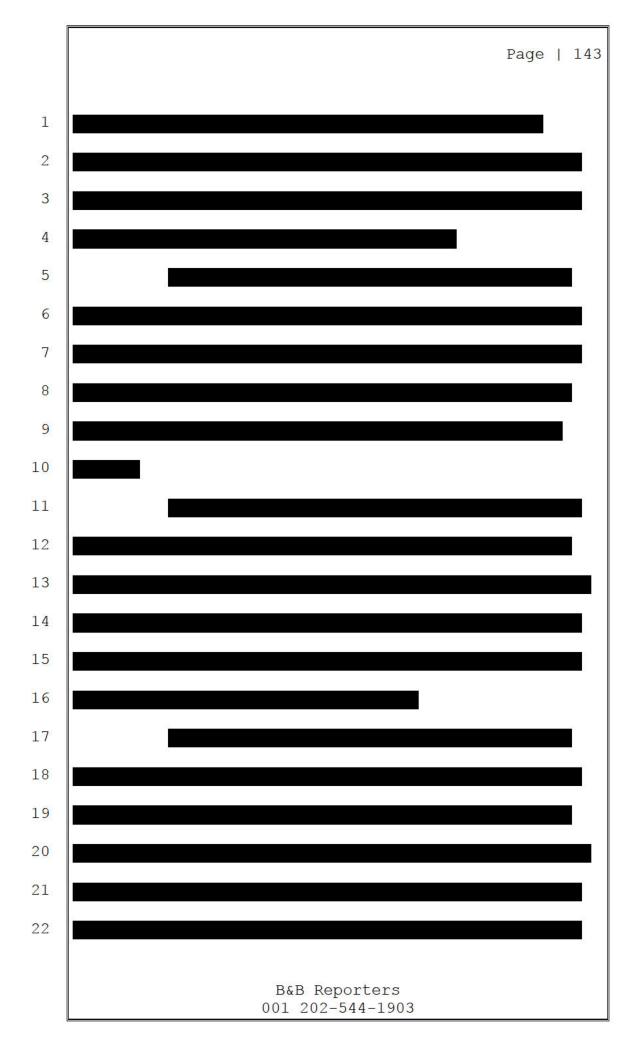


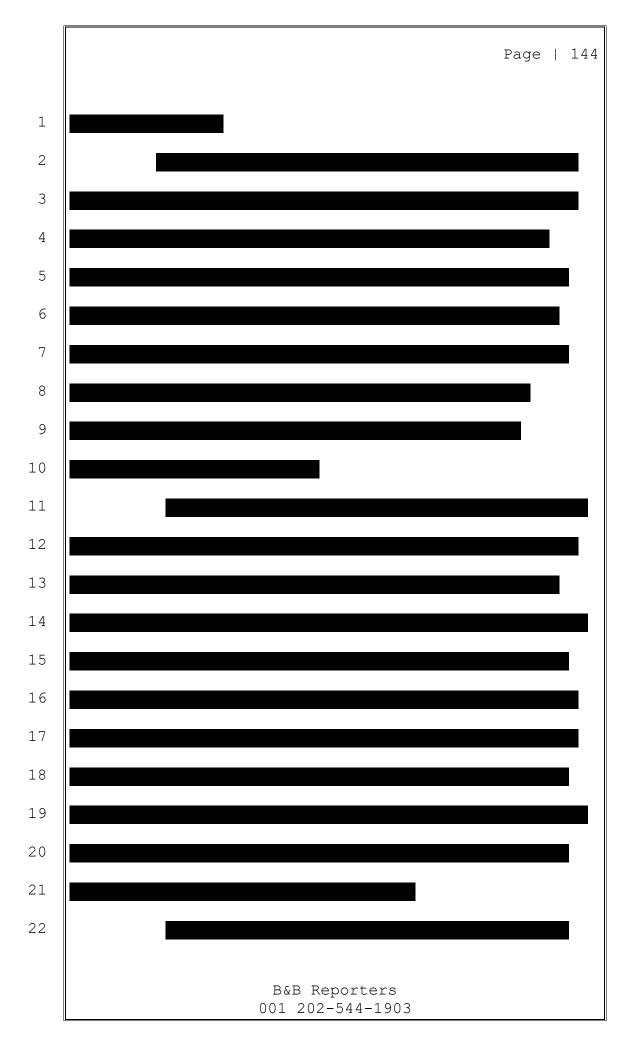


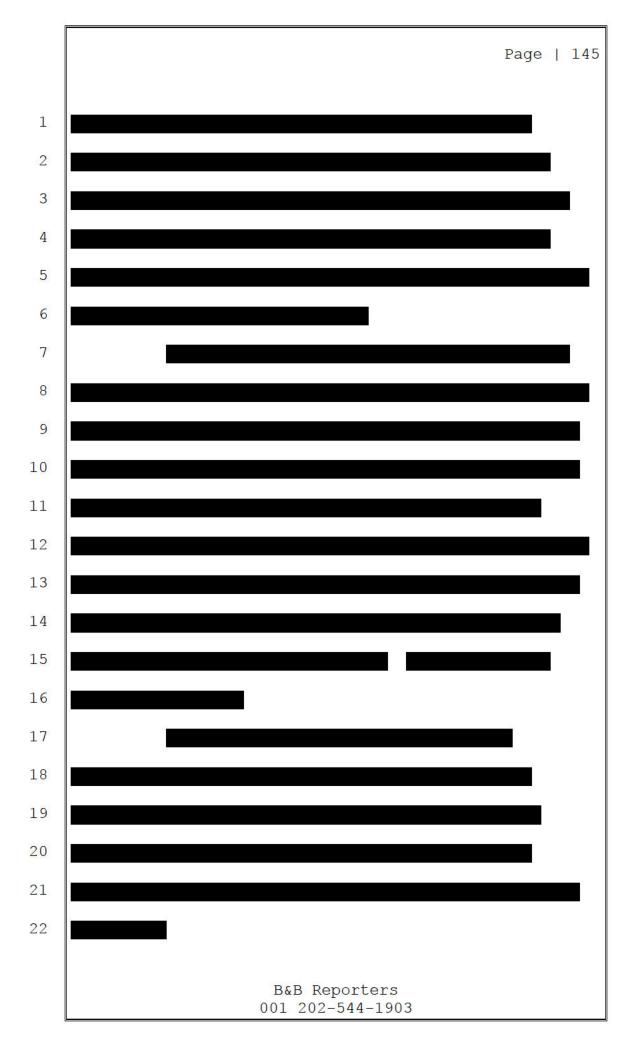


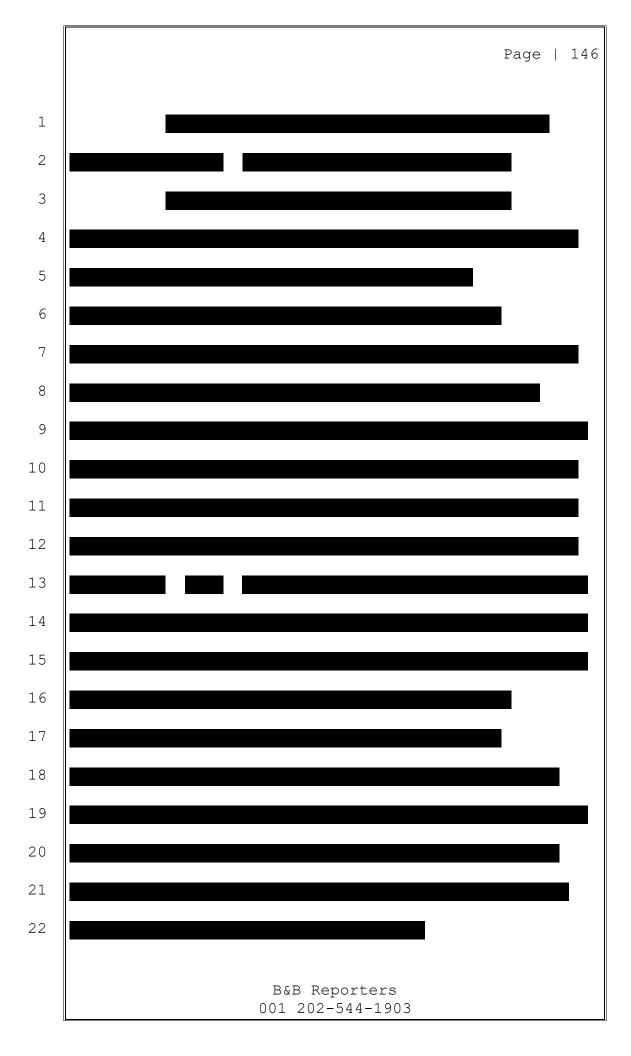


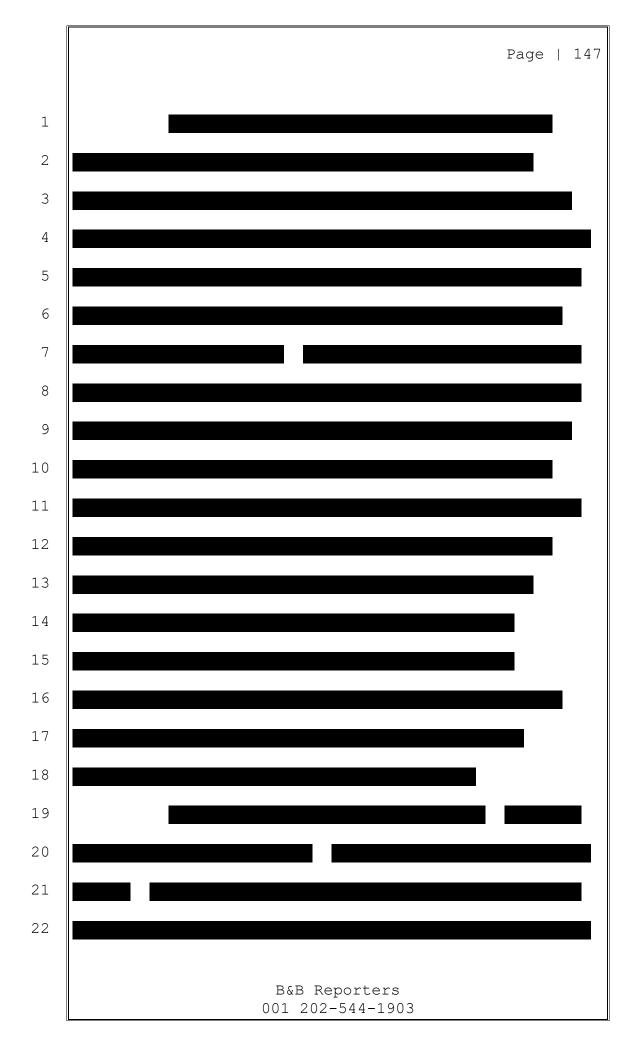


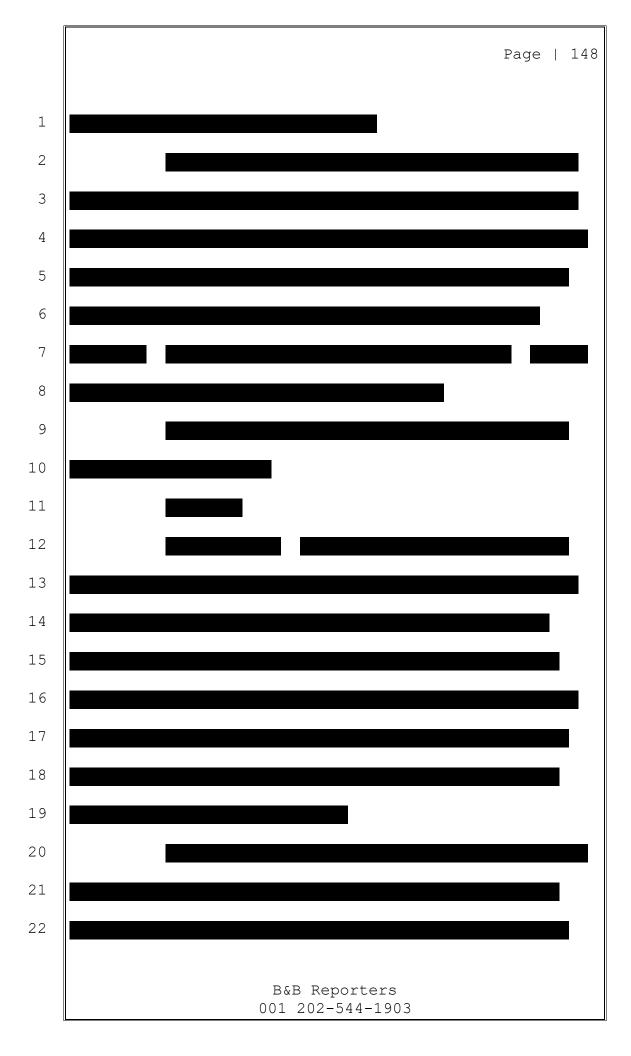


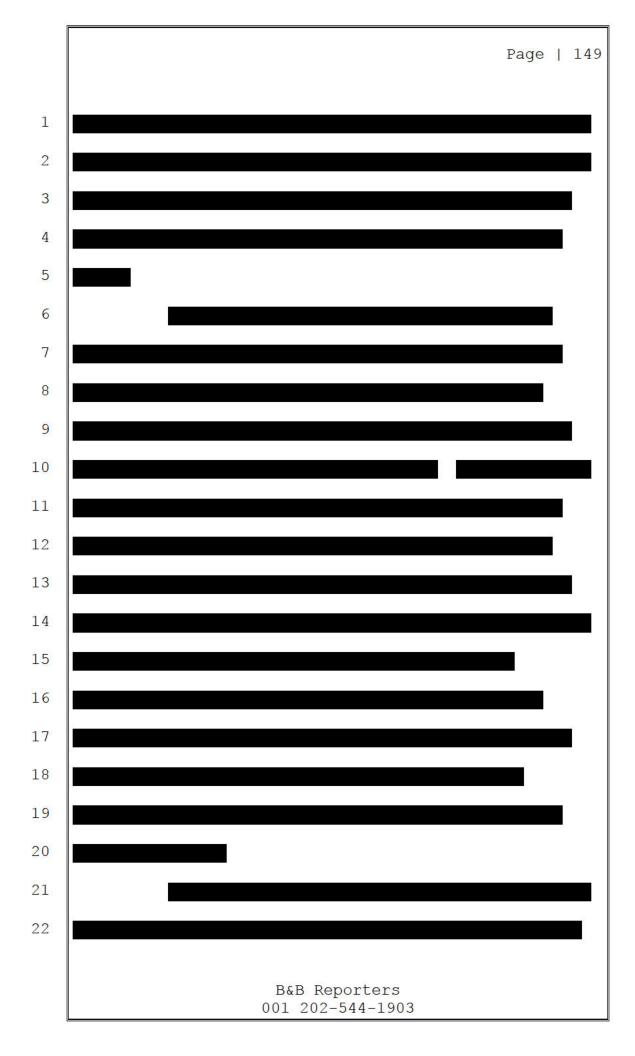


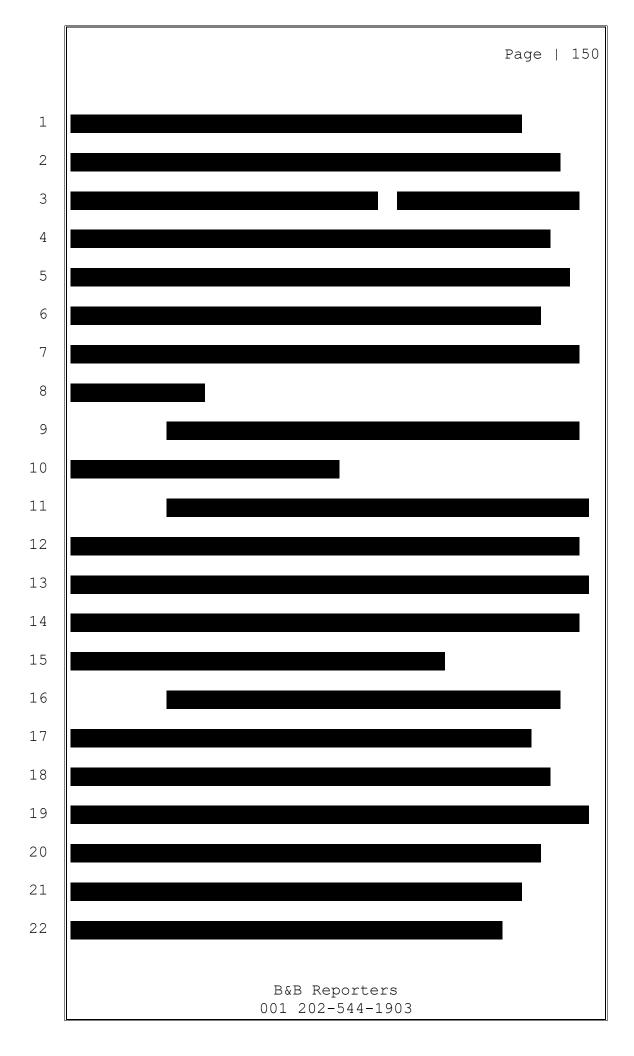


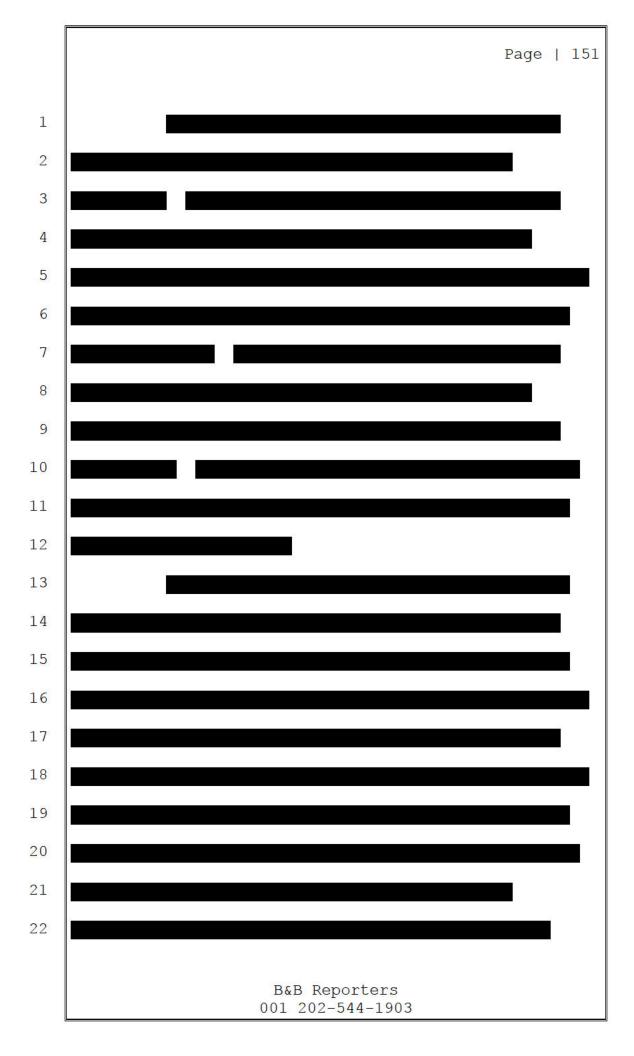


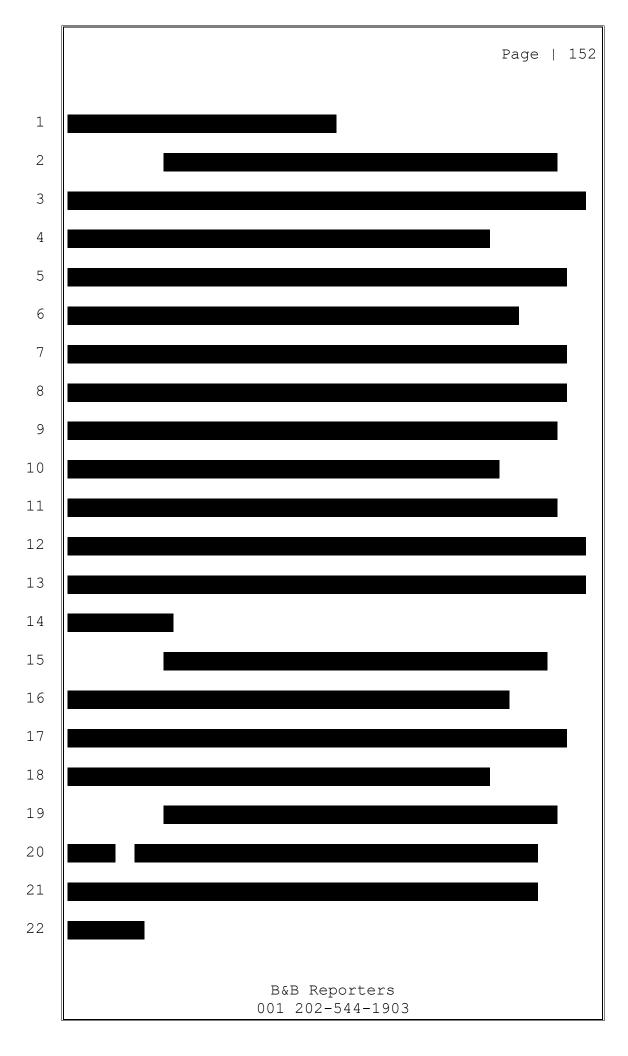


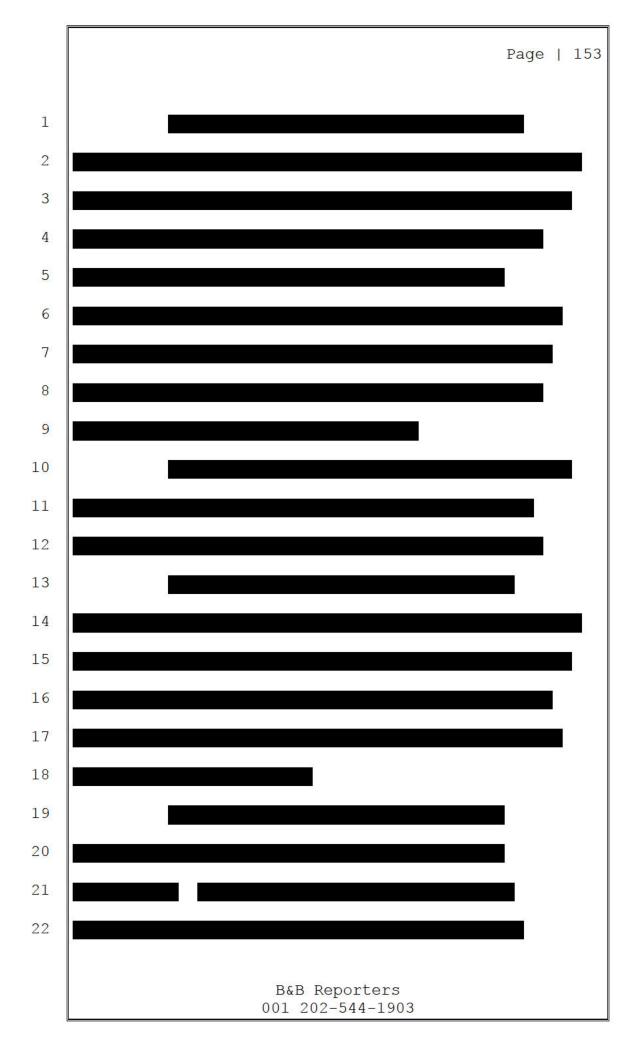


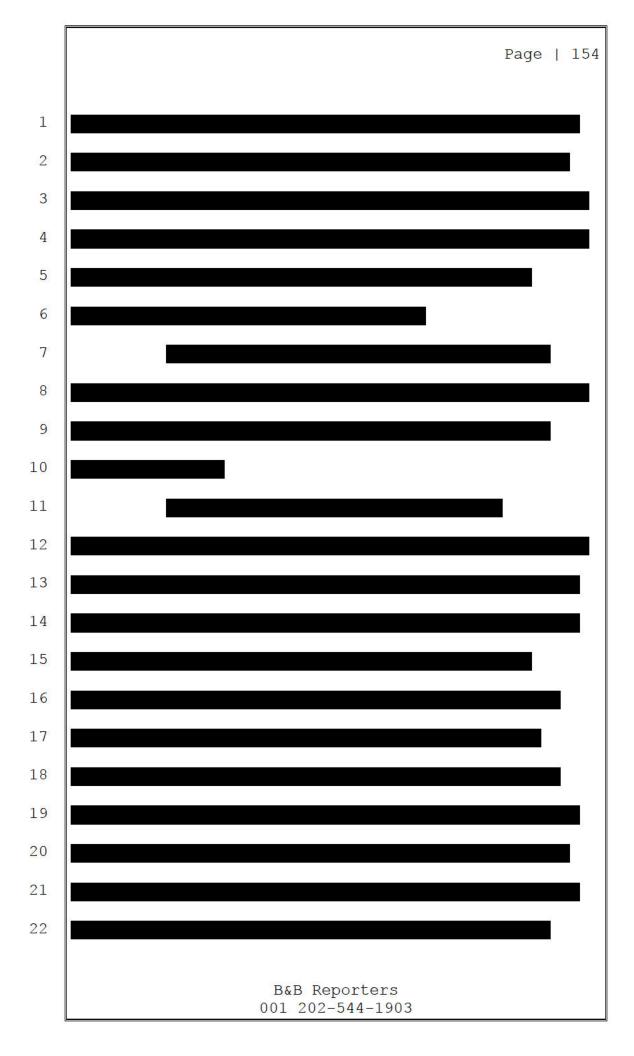


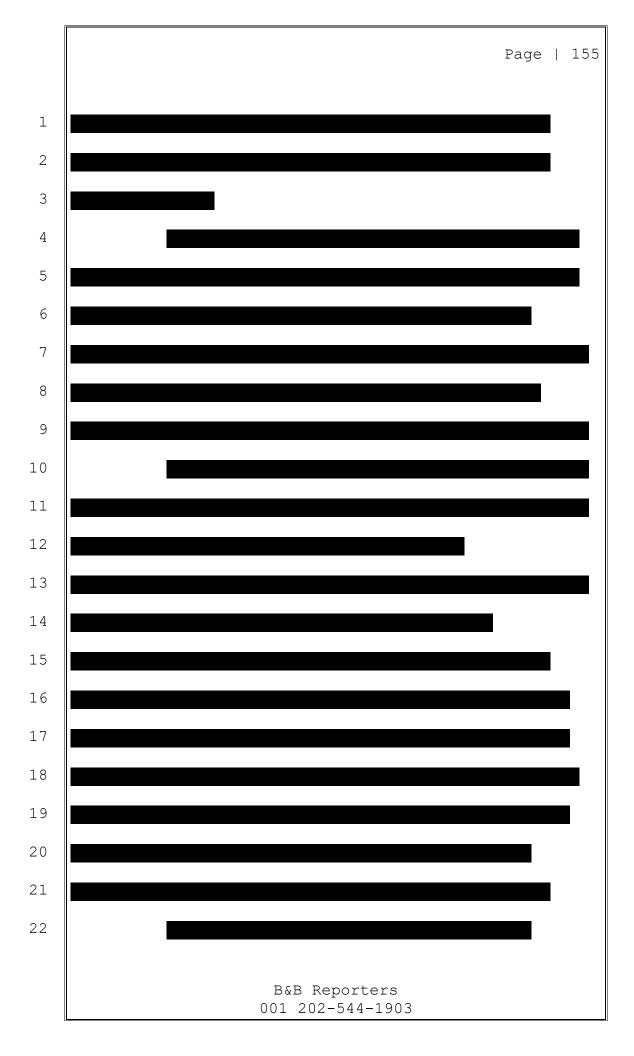


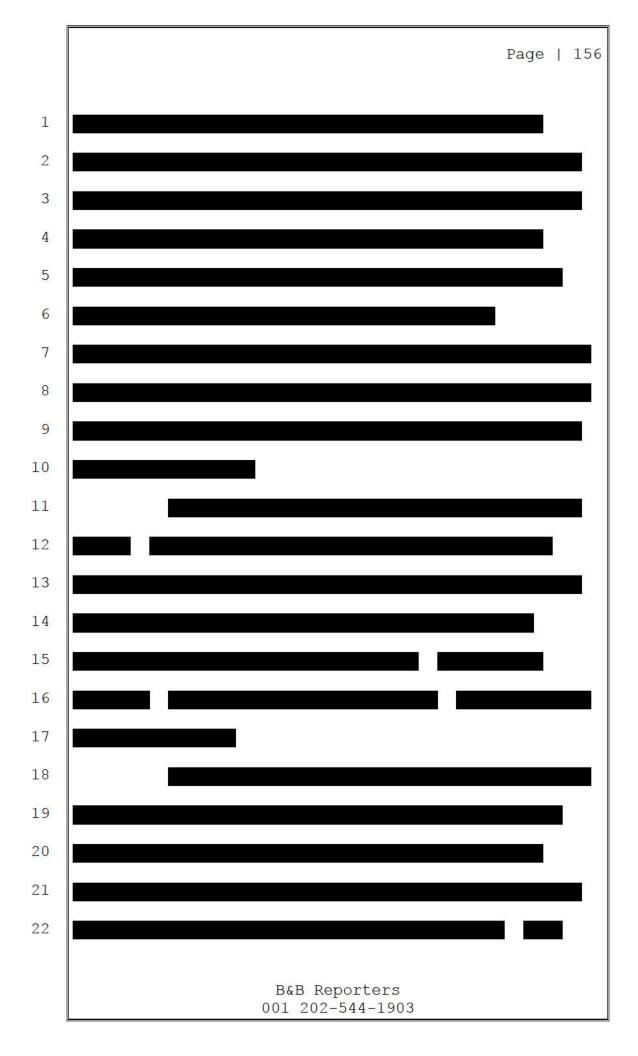












1 | them, the Tribunal is going to have their last

2 | impression of what they say, we refer you to Page 43

3 where we have all the points in which we have rebutted

4 | what the Claimants say--what the Claimants are saying

5 | in the Post-Closing Submission, and now again, where

6 to find our rebuttal.

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7 Thank you very much.

PRESIDENT SACHS: You may proceed.

9 MS. BANIFATEMI: Thank you.

So, I'm moving to Section 4, and I will be

11 devoting most of my time to this, addressing the

12 Tribunal's questions in relation to the Essential

13 | Security and the U.S. treaty practice which was part

14 of the scope of this hearing.

Moving to Slide 45, this is the outline that

16 I will address. The first point I would like to

17 address, of course, is the U.S. treaty practice, and

18 | the long-standing treaty practice, which confirms that

19 Colombia's invocation of Article 22.2(b) of the TPA is

20 non-justiciable and that therefore the Tribunal lacks

21 | the power to adjudicate it.

It was really interesting that Mr. Moloo

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

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

- 1 basis of the ICJ decisions, in the Nicaragua and the
- 2 | Iran Oil Platforms cases. You see it just refers to
- 3 "necessary," the Measures that are necessary to
- 4 | fulfill the obligations of the Party. And you have the
- 5 same thing in the U.S.-Argentina BIT of 1991, which
- 6 also refers to measures necessary.
- 7 So, this does not mean that in the U.S.
- 8 | treaty practice this was not self-judging. It was
- 9 always and has always been self-judging in the U.S.
- 10 | treaty practice. Simply, it was implicit. And then you
- 11 see on next slide what happened in the ICJ Case. On
- 12 | the left side, you have the Nicaragua Case where the
- 13 | Court said--and said that it had jurisdiction to
- 14 determine whether the Measures fall within the
- 15 Exception because a contrario, from the fact that the
- 16 | text of Article XXI of the Treaty does not employ the
- wording, and you see that further down, it considers
- 18 | necessary for the protection of the Essential Security
- 19 Interest.
- So, to the extent that the ICJ says: I'm
- 21 going to determine whether this is properly invoked
- 22 | because I don't see the words "it considers,"

1 | therefore, it's not self-judging, and having confirmed

- 2 | that, you see on the right side in the Oil Platforms
- 3 Case, that the ICJ said there is no reason to vary its
- 4 | conclusions from the Nicaragua Case, then it shows
- 5 that the ICJ wanted to see the word "it considers" in
- 6 order to say, I recognize that this is self-judging.
- 7 So, then you see what happens, that's on
- 8 | Slide 49, that's the U.S. Model BIT of 2004, you see
- 9 that the U.S. introduces the word "it considers,"
- 10 "measures that it considers necessary for the
- 11 fulfillment of its obligations", et cetera. So, this
- 12 comes after the ICJ's decisions and makes explicit and
- 13 quite clear that this provision is self-judging, and,
- 14 therefore, it's enough for the State to say that it
- 15 considers necessary for the Measures to be excluded
- 16 from any consideration by any tribunal.
- Now, next slide, you see, and that goes to
- 18 the efforts made by the U.S. at your request to
- 19 provide a number of treaties.
- 20 First of all, there is a number of FTAs that
- 21 | the U.S. provided. You see that the wording of
- 22 security exceptions in FTAs concluded between the U.S.

1 and 18 other countries is very similar to the wording

2 of Article 22.2(b) of the TPA. And you have that, of

3 | course, in the submissions by the U.S.

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

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

and consistent language adopted after the decisions,

including the Models adopted by the U.S.

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

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4 It's a belt and suspender

5 approach, frankly, where Colombia and the U.S. include

6 | an Interpretive Note for future tribunals, which the

7 U.S. Model does not have, by the way, to leave no

8 doubt that the common intention of the Parties is that

9 invocation of Article 22.2(b) renders the dispute

10 non-justiciable. So, this is the only addition, and so

11 you are bound, of course, by that addition because

12 | it's an interpretive note for Tribunals, and you see

13 | "for greater certainty, if a party invokes Article

14 22.2, the Tribunal or Panel hearing the matter shall

15 | find that the Exception applies".

On the next page, 54, this is from the U.S.'

oral submission of May 2022, and you will recall--and

18 we heard the same thing, frankly, today, once--I

19 quote: "Once a State party to the TPA raises the

20 Exception, it's invocation is non-justiciable."

21 And here they refer to Footnote 2, and they

22 say that it is prefaced by the phrase "for greater

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

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

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mean."

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

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

1 | Colombia has raised, has invoked, the Exception, in

- 2 good faith. There is no contradiction here. It's
- 3 simply a statement by Colombia and a confirmation by
- 4 | Colombia that it's not playing with this provision,
- 5 that it has raised, and it has invoked in quite good
- 6 faith the Exception that exists in 22.2(b).
- 7 The second point, Mr. Moloo, again, went
- 8 back to the fact, and frankly, he says read the
- 9 language. Yes, read the language. It says nowhere
- 10 that you can determine the merits of the dispute once
- 11 the Exception has been invoked.
- 12 And you heard earlier, the U.S.
- 13 representative saying that precisely this is a
- 14 derogation. The provision that you have in front of
- 15 you is an exception, it's a derogation, which means
- 16 that it excludes the entirety of the Measures from the
- 17 | TPA obligations. It doesn't mean that you have the
- 18 power to go and determine whether or not the
- 19 obligations were fulfilled. It is excluding that
- 20 there are obligations in the first place. This is
- 21 what it says, and you have to read it as it says.
- So, Mr. Moloo likes to go back to TPA

1 Article 10.26, he likes to argue restitution and

2 compensation. He likes to go back to Eco Oro, even

3 though it's a completely wrongly-decided decision.

4 For that matter, if you go to CMS, CMS has the right

5 approach, that's Exhibit RL-168, and I quote from CMS.

6 | It's the same type of language, it says Article XI,

7 | which is also a type of derogation on security

interest is, I quote, "a threshold requirement: if it

9 applies, the substantive obligations under the Treaty

10 do not apply." This is what you heard earlier from the

11 U.S. as well, simply when the Exception is invoked,

12 | the underlying obligations of the TPA do not apply.

13 | Period. So, you cannot say there is a breach, you

14 cannot say whether there is compensation, and that's

15 | the end of the matter. And Eco Oro doesn't help

16 Mr. Moloo.

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Now, one final point here, and I will move on, is that the remedy exists only to the extent that the States have accepted to provide the remedy. The States here, both States have said there is an exception, which can be invoked, once it's invoked

it's self-judging, it renders the dispute and any

1 determination non-justiciable, which is that it cannot

2 | be determined by the Tribunal. There was a question

3 from Dr. Poncet earlier about what remedy exists and

4 you heard the response from the U.S. representation.

5 Simply again, what I want to add to that, is

6 that there is no absolute guarantee under

7 | international law that any investor, alleged investor,

8 | can come and use international law. No matter what

9 circumstances, no matter what the Treaty says, and

10 say: I have a right to compensation. Everything

11 depends on what the Treaty says. The remedy exists

12 only to the extent that the States have accepted the

13 remedy. In this case, the Stats have accepted the

14 remedy only to the extent that they would not invoke

15 the Exception. If they do invoke the Exception, the

16 remedy is out, the obligation is out. Simply, as

17 | simple as that.

18 So, I now move to--back to the

19 interpretation of the provision. So, here on the

20 screen you have what the U.S. said, which is that it's

21 | the practice of the U.S. and the other Party. On my

22 next slide you see that the Claimants are saying,

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1 | well, no, it's not Colombia. It's just the U.S. On
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- 2 | Slide 55. You just--this is U.S. treaty practice,
- 3 | Colombia -- actually Colombia entered into other
- 4 | treaties and they don't have that. That's just U.S.--I
- 5 mean, that's wrong.
- 6 Look at Page 56, which shows that Colombia,
- 7 of course, as a sovereign State, knows what it's
- 8 doing, when it accepts a language, it accepts the
- 9 language for a purpose. On the left side, you have the
- 10 U.S.-Colombia TPA of 2006, our Treaty, it says
- 11 specifically "it considers necessary for the
- 12 protection of its own Essential Security Interests".
- 13 It says specifically in Footnote 2 that "for greater
- 14 certainty, if a party invokes Article 22.2, the
- 15 Tribunal or Panel shall find that the exception
- 16 applies." This is what both Parties said. This is what
- 17 | you see the U.S. said, both Parties said.
- 18 When Colombia entered into the BIT with
- 19 China, they said something completely different. They
- 20 said there is an exception for public order, and
- 21 | including measures to protect the Essential Security
- 22 Interests. And then you see that there is a footnote

that says "for greater certainty, nothing shall be construed to limit the review by an arbitral tribunal of a matter when such exception is invoked." So, Colombia knows what it's doing. When Colombia wants the Tribunal to review the invocation of an exception, it says so. When Colombia does not want the Tribunal to review the invocation of an Exception, it says so. Just like the U.S., and here you have a complete understanding of both States of what exactly you have before you.

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

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

slide, if it can be of help. And today, you heard the 1 2 U.S. saying regardless of how you look at it, either 3 it is a subsequent agreement under (a) or it is a subsequent practice under (b), it is the same thing. 4 5 You are bound, and you shall take into account what 6 the U.S. referred to as "concordant interpretation," 7 and what both the U.S. and Colombia are referring to as authoritative interpretation before this Tribunal. 8 9 And we say it is a subsequent agreement between the Parties, but again you have that also during the 10 11 travaux préparatoires, throughout, the Parties, both 12 Parties have taken the same position, so what we say 13 is that the Tribunal is bound by this concordant and 14 authoritative interpretation that Article 22.2 is a 15 self-judging provision and it means simply that the 16 invocation is non-justiciable, and the Tribunal does 17 not have the power to make a determination. 18 Moving to my next point, and this is also, 19 of course, in the alternative, you may recall we 20 discussed that last year. In the alternative, if you

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determination, we say you do not have because it's

believe that you do have the power to make a

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non-justiciable. Nobody, in fact, can make a 1 2 determination. Only the States can. And each State 3 may-when invoking the exception, makes a determination for itself. Even assuming that you do not agree, you 4 5 will still say you do not have the jurisdiction to make that determination. I will not expand on this. We 6 7 argued this at length last year. This is just a reminder of what we discussed last year, and I 8 9 respectfully refer the Tribunal to our submission last year at the Closing where we took each of the 10 11 interpretation means of the Vienna Convention: 12 ordinary meaning, context, object and purpose, effet 13 utile principle, authentic interpretation, which I 14 just discussed, and the travaux préparatoires. 15 And you have, of course, each time a 16 reference to our PHB on exactly what we discuss there 17 and also a reference to our closing. 18

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

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

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

1 | terrorists. You see the 23 March 2004, Colombia's

- 2 | greatest fight against narco-trafficking and
- 3 | terrorists that threatened democracy and regional
- 4 stability can be assisted by promoting economic
- 5 development, et cetera.
- 6 After the negotiation, same thing. You see
- 7 again the U.S. saying an agreement with Colombia is an
- 8 essential component of our regional strategy to
- 9 advance free trade within our hemisphere, combat
- 10 narco-trafficking. This is part of the policy
- 11 objective of the two States. And you see the Preamble,
- 12 itself, it says, generate opportunities for
- 13 sustainable economic alternatives to drug-crop
- 14 production.
- So, the preamble essentially shows, that the
- 16 | contracting parties intended the Preamble to carry the
- 17 objective of fighting against drugs. So, this is the
- 18 policy, the policy reflected in the Preamble, and
- 19 | that's as simple as that.
- 20 And if you compare the Treaty that we have
- 21 | with all of the other Treaties provided by the U.S.,
- 22 you see that there's--this Preamble is reflected in

1 | two treaties, our Treaty, with Colombia, and the

- 2 Treaty with Perú, and you see that in the Preamble in
- 3 the U.S.-Perú TPA, there's reference to generating
- 4 | opportunities for sustainable--economic alternatives
- 5 to drug-crop production. So, essentially, the
- 6 U.S.-Colombia TPA was precisely conceived to assist
- 7 | the contracting States to fight against
- 8 drug-trafficking, and the Tribunal has to take that
- 9 | objective into account when it looks at its mandate in
- 10 this case.
- 11 My third point, and that's a further
- 12 | alternative, if you were to find that you have not
- only the power to make a determination but the
- 14 jurisdiction to make a determination, and actually you
- 15 | were going to assess the invocation by Colombia of the
- 16 Essential Security Interest, we say that the
- 17 Respondent has not and cannot have breached its
- 18 obligations under the TPA.
- 19 Here, I would like to address briefly the
- 20 Tribunal questions, the three of them.
- 21 So, the first, Question No. 1.
- 22 What is the legislative purpose of the

1 | Colombian Asset Forfeiture Law? You have on the left

2 | side, the provision from the Constitution, Article 34,

3 which refers to the prohibition of confiscation with

4 the exception of what you have before you, which is

5 Asset Forfeiture, I quote, "assets acquired by illegal

6 means to the detriment of the Treasury or resulting in

7 | severe deterioration of social morals shall be subject

8 to forfeiture by judicial order." This is what we're

9 talking about.

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

And you see the second decision of 2016,

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

This was confirmed, on my next slide, by

Professor Reyes, the expert for Colombia. On your own

time you can refer to that, but if you look at the

right side of the page, you see that it's important to

keep in mind that all of this was about solving the

most complicated problems existing in the fight

against drug-trafficking because these things take

time. Right? And because the assets of the

drug-traffickers could only be seized after they had

been criminally convicted for the crimes, there was

this policy of allowing criminal proceedings which are

very long, to not allow the drug-traffickers to

benefit from that.

So, this gave, Professor Reyes says,

drug-traffickers time to create new mechanisms to

conceal their assets. This is the rationale, this is

the reason, the raison d'être, of the Asset Forfeiture

Law as explained by Professor Reyes.

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

1 experts. Here you have excerpts from both experts who

- 2 | refer to Asset Forfeiture Proceedings allowing to
- 3 attack illegal activities, such as drug-trafficking.
- 4 You see that from Professor Medellin and Mr. Wilson
- 5 Martinez said the same thing, to fight organized
- 6 crime, go after the proceeds that fund criminal
- 7 organizations.
- 8 Question 2.
- 9 What is the precise Essential Security
- 10 Interest that the Respondent is invoking? Mr. Moloo
- 11 pretends to not know what we're saying and he vaguely
- 12 referred to a number of different excerpts. It's very
- 13 | clear, Rejoinder, Respondent's Rejoinder, you have it
- 14 here, I quote: "The position of the Republic of
- 15 Colombia in this Arbitration is that it seeks, through
- 16 Asset Forfeiture Proceedings, to fight against
- 17 organized crime, money-laundering, and
- 18 drug-trafficking." This is the Essential Security
- 19 Interest invoked by Colombia, simple.
- 20 Question three.
- 21 To what extent the legislative purpose and
- 22 | the Essential Security Interest are similar? There

1 is, of course, an overlap. You see that the fight

- 2 | against organized crime, money-laundering and
- 3 drug-trafficking is the same thing as the rationale
- 4 for the law which is to protect the social morals and
- 5 | fight drug-trafficking, et cetera.
- 6 So, just one word, there is an overlap here
- 7 | in this case, the law itself is broader, as you may
- 8 | recall from Article 34 of the Constitution, it is
- 9 about the severe deterioration of social morals, and
- 10 | the detriment to the Treasury. So, there may be
- 11 | situations where Asset Forfeiture may occur which are
- 12 | not related to drug-trafficking, but the main purpose
- 13 of the law is drug-trafficking as you've seen from the
- 14 history of the Asset Forfeiture Law.
- One point here, I think that Mr. Moloo in
- 16 relation to Slide 19 referred to our invocation of the
- 17 Law being the Essential Security Interest. No, the
- 18 | Essential Security Interest that we invoked is as we
- 19 have phrased, which you see on the slide, is that,
- 20 through the Asset Forfeiture Proceedings, we are
- 21 | fighting against organized crime, money-laundering and
- 22 drug-trafficking. And that is, again, guite simple.

1 Now, moving to my next point--I'm sorry, I'm 2 trying to get rid of the echo that I have. Thank you. 3 So, my next point is, assuming that you have the power to assess Colombia's invocation of Article 4 5 22.2(b), the standard that you have to apply is a 6 prima facie test that we fulfill. So, the first point 7 is that if you look at the features of Article 22.2, they're all present here. The first is to have 8 Measures that are applied, and that's what we have. 9 We have applied Measures as part of the Asset 10 11 Forfeiture Proceedings. These are Measures that are 12 considered necessary, so Colombia considers them 13 necessary. And these are for the protection of 14 Essential Security Interests, and as you see, we have 15 said, and I will come back to this, these Measures are 16 plausibly expected to protect Colombia's Essential 17 Security Interests. And in relation to the footnote, 18 once the Exception has been invoked, the Tribunal is 19 bound by the State's determination that these, indeed, 20 are for purposes of the Essential Security Interests. 21 And this determination, you have to defer and 22 tribunals have to, at some point in time, when it's a

1 matter of sovereignty, especially when it goes to such

2 | important aspects, as criminal investigation and

3 criminal liability and fight against corruption and

4 | fight against money laundering and fight against

5 organized crime, there has to be a point where

6 tribunals have to defer to the determination by States

7 of what is necessary for the protection of that

8 | interest, and that's exactly what you see in Footnote

9 | 2, which is that once it's invoked, the Tribunal shall

10 | find that the exception applies.

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

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

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

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

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

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

1 Newport is a third party bona fide holder or not

2 | because this 1) is the subject of the proceedings in

3 | Colombia, and 2) it's not the subject of whether

4 | there's a breach of international law, because this is

5 a complete different matter.

What this Tribunal needs to do, if this

Tribunal says it would like to, in fact, assess

whether Colombia has invoked the exception in good

faith, all that the Tribunal can do is to determine

the plausibility that the Measures taken by Colombia

are in response for the protection of the interests

that are at stake, which is the fight against

drug-trafficking, and I'm coming to this now.

So, going to, first, the point of timing,

Slide 74, here you have the Resolution 125 of 2016 by

the Attorney General's Office which essentially

started and initiated the proceedings, you have to see

there's reference to priority of the investigation, it

involved a criminal organization related to the

Envigado Cartel. So, at the time, when these

proceedings were initiated, the involvement of the

Oficina in the chain of ownership appeared to be

1 historic. Essentially, Iván López, there was some

2 trace of the Cartel appearing in the chain of

3 | ownership and that was part of the investigation.

4 You see on the next slide that the

5 | initiation is based on Article 25 of the Asset

6 Forfeiture Law, which refers to a cause, I quote from

7 Article 25, "the cost-benefit analysis of the

8 | forfeiture of the assets, as well as the risk which

9 such assets create for national security."

So, the Resolution relied on this provision

11 and on the national security risk that the historic

12 involvement of the Oficina with the Meritage Lot could

13 entail to Colombia. That was the initiation of the

14 proceedings.

And you see on the next slide, the actual

16 resolution of the Attorney General, and the reference

17 to Article 25 and the reference to the cost-benefit

18 | analysis and the risk that said assets may entail for

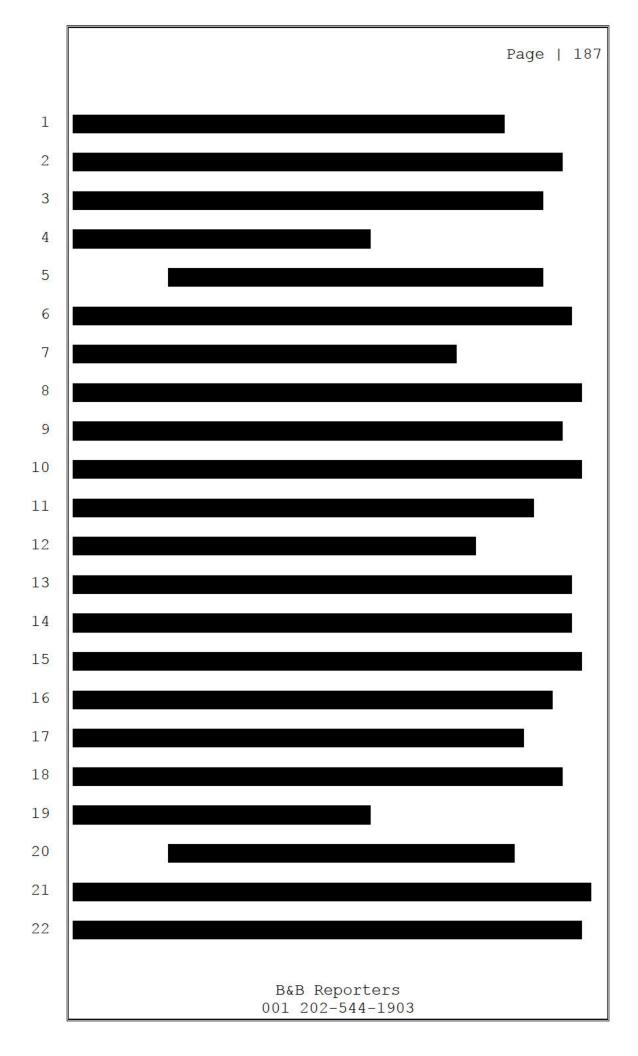
19 | national security.

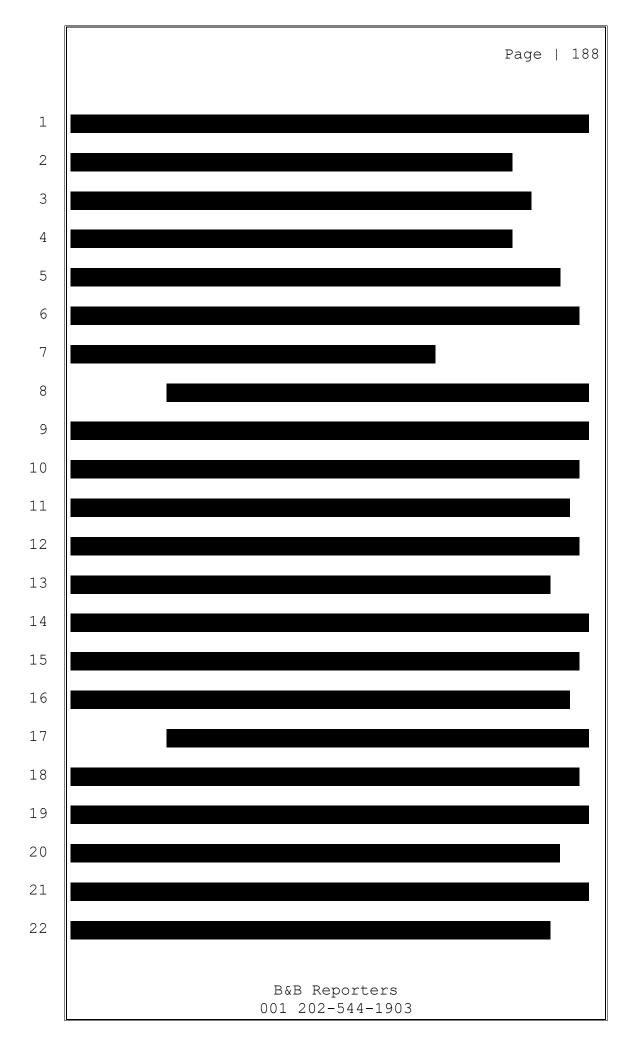
On Slide 77, you see that the Superior Court

21 of Bogotá in April 2022 essentially summarized the

22 evidence that was available to the Attorney General's

Office at the time that the proceedings were
initiated, essentially showing the historic
involvement of the Oficina, look at the box here,
which we have highlighted, I quote: "It was
established that the Envigado Cartel coerced the
owners of plots located over a large range of the
metropolitan area of Medellín, to place them in the
responsibility of agents of an undisclosed principal,
executing real estate projects of broad scope with an
appearance of legality, which constituted a method of
money-laundering. For these reason, the initiation of
investigations to clarify the origin and accusation of
the property was ordered."
So, this is the initiation. This is what
Colombia, the Attorney General's Office started
looking at the origin and acquisition of the Property.





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

1 Interests.

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

One last point, and this goes to

plausibility, they say, the Claimants, that there is

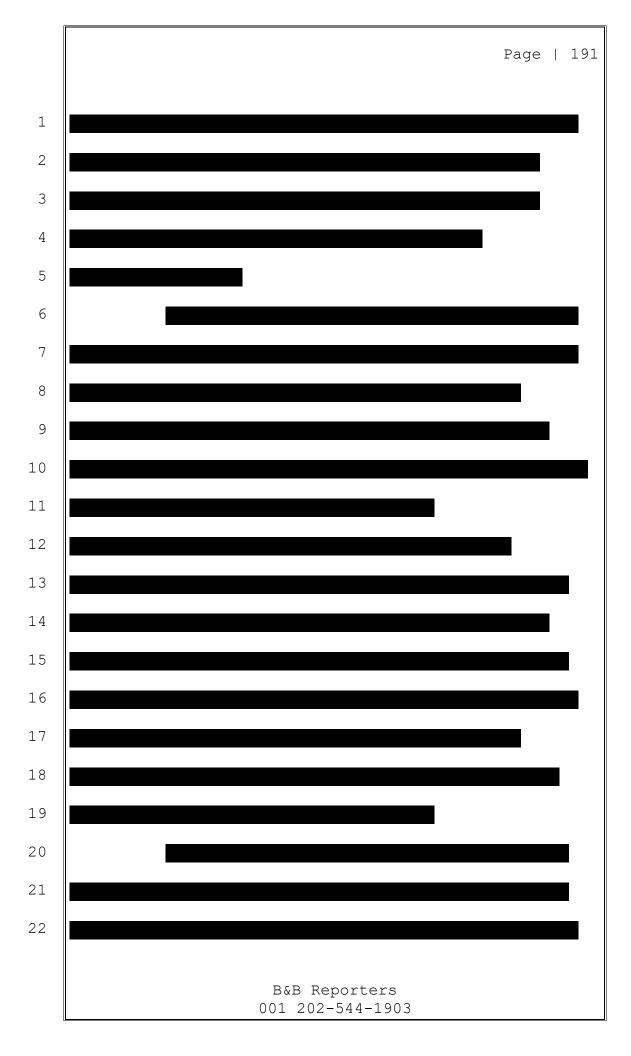
no plausible connection between the Measures and the

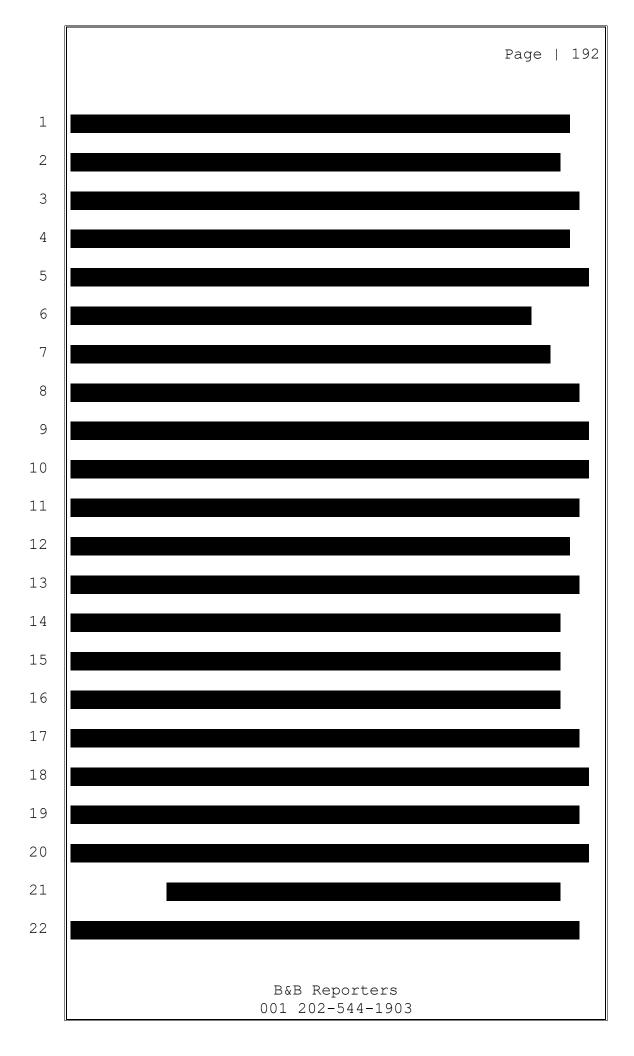
interest that's protected. Of course, Colombia's

Measures are protective of the Essential Security

Interest of fighting drug-trafficking and

money-laundering by criminal organizations





A couple of final points. This is just the standard, my next slide is the plausibility standard. This is from the WTO Russia Case, which is where you see the standard. The minimum requirement of plausibility in relation to the preferred Essential Security Interest, i.e., that they're not implausible as Measures protective of these interests. And as I've shown you, this is more than plausible that what Colombia is doing is indeed to stop the bleeding, stop

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

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

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

1 | illegality of the investment is one such objection.

- 2 We have raised it, and you have, of course, to make a
- 3 determination. Mr. Moloo himself when he writes
- 4 articles, agrees that international public policy and
- 5 | fraud should prevent the claim from proceeding.
- 6 He talked about admissibility in his
- 7 article, by the way, we say it's jurisdiction, but
- 8 nevertheless, the claims should not proceed as he
- 9 accepts in his own writings. And, of course, what we
- 10 say is that because the Investment is tainted by
- 11 | illegality and money-laundering, you do not have
- 12 jurisdiction overall.
- 13 And you have on the last slide, our Prayer
- 14 for Relief, with all of the alternatives. I will not
- 15 go through that. That's for your own time, and I thank
- 16 you very much for your patience. That completes our
- 17 submissions.
- 18 PRESIDENT SACHS: Thank you very much.
- I turn to my two colleagues. Do they have
- 20 questions at this moment?
- 21 ARBITRATOR PONCET: Just a quick question to
- 22 Professor Banifatemi, Mr. President.

1 PRESIDENT SACHS: Yes. Please go ahead.

2 ARBITRATOR PONCET: Dr. Banifatemi, turning

3 to what you just said, and again making a

4 | hypothetical, if a State were to wend all the way

5 through an arbitration to see how things are going and

6 then raise at the last minute an Essential Security

7 Defense, you are saying, aren't you, that the Arbitral

8 Tribunal will have to defer anyway, and the only

9 answer would be costs?

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

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

1 | the Treaty, and that is the limit of the protection of

- 2 | investors. It's as simple as that.
- 3 So, the answer is yes.
- 4 ARBITRATOR PONCET: I think I've gathered
- 5 | that, by now, but you haven't really answered my
- 6 question. My question was: Assuming--assume that a
- 7 State wants to see how things work out, and at the
- 8 | last minute raises the Essential Security Exception,
- 9 the only thing that an arbitral tribunal can do is
- 10 adjudicate costs, award costs because this was raised
- 11 | at the last minute, isn't it?
- MS. BANIFATEMI: The thing that the Tribunal
- 13 has to do is to take note of what the State is saying-
- 14 -
- ARBITRATOR PONCET: I understand that.
- MS. BANIFATEMI: --in relation to its
- 17 Essential Security Interest.
- 18 ARBITRATOR PONCET: I understand that, but
- 19 there is no other answer than costs.
- MS. BANIFATEMI: But it may well be that
- 21 | it's in relation to parts of the factual matrix that's
- 22 | before the Tribunal. I don't know in what

1 | circumstances the Essential Security Interest can be

- 2 | raised. In this case, what we're saying is that, in
- 3 this case, the invocation covers the entirety of the
- 4 dispute because this is about the Property and an
- 5 asset that is the object of Asset Forfeiture
- 6 Proceedings in Colombia in relation to
- 7 | narco-trafficking, and the Essential Security that we
- 8 | are pursuing is the fight against corruption, the
- 9 fight narco-trafficking, fight against
- 10 money-laundering.
- 11 ARBITRATOR PONCET: Does it make a
- 12 difference when it's raised?
- 13 MS. BANIFATEMI: No, it doesn't, and it
- 14 | shouldn't.
- 15 ARBITRATOR PONCET: In terms of costs?
- 16 MS. BANIFATEMI: It's a State's discretion.
- 17 If a State, under a treaty, has--the States
- 18 | have agreed to have that right and to exclude the
- 19 application of the Treaty, so that's the limit of the
- 20 Treaty. Either you do not have such a provision, in
- 21 | which case you do not have this problem, or you have a
- 22 provision such as the one that you have in the

1 Colombia-China BIT where the Parties said

- 2 | specifically, this does not exclude court review, in
- 3 | that case the Tribunal has the power to make a
- 4 determination or you have what you have here, which is
- 5 | self-judging. And yes, the Tribunal is bound by what
- 6 the States are saying.
- 7 ARBITRATOR PONCET: Sorry for interrupting
- 8 you again, but I think I have understood that. My
- 9 question is specifically with regard to the costs of
- 10 | the arbitration. Let's assume the Essential Security
- 11 Exception is raised at the very beginning or in the
- 12 middle or at the end of the arbitration, is there an
- 13 | impact in the way an arbitral tribunal should award
- 14 costs?
- MS. BANIFATEMI: To the extent that the
- 16 Tribunal is faced with a self-judging provision--
- 17 ARBITRATOR PONCET: But with a self-judging
- 18 provision that can be invoked early, in the middle, or
- 19 at the end of a case?
- MS. BANIFATEMI: Well, first of all, just to
- 21 be clear, we do not accept that we raised it early or
- 22 late. We raised it when the matter became clear, that

- 1 is, in relation to narco-traffickers being the
- 2 | beneficial owners of the Property that is before this
- 3 Tribunal, to be very clear. And we have said, and
- 4 that is not contradictory, that we have said that this
- 5 was raised in good faith. That is to give reassurance
- 6 to this Tribunal.
- 7 ARBITRATOR PONCET: What do you mean it's
- 8 not contradictory?
- 9 MS. BANIFATEMI: It's not contradictory with
- 10 the position that this is self-judging.
- 11 ARBITRATOR PONCET: Okay.
- 12 MS. BANIFATEMI: Now, it depends, if a State
- 13 determines at the end of the process that there is a
- 14 national security interest, addressed at that time,
- 15 how is it a matter of costs? It's a matter of the
- 16 Tribunal simply giving effect to the State's
- 17 determination that this is an Essential Security
- 18 Interest.
- 19 ARBITRATOR PONCET: Okay. But the fact that
- 20 | the security interest exception is raised does not
- 21 take away the Arbitral Tribunal--the Arbitral
- 22 Tribunal's power to adjudicate costs in the

- 1 | arbitration; right?
- 2 MS. BANIFATEMI: The general power to give
- 3 costs remains.
- 4 ARBITRATOR PONCET: In doing it, in making
- 5 this assessment, an arbitral tribunal, though, in your
- 6 view, not authorized to adjudicate whether or not the
- 7 Exception was raised properly, could still say, "I
- 8 think it would--should have been raised earlier and
- 9 | therefore I'm awarding costs."
- 10 MS. BANIFATEMI: That assumes that the
- 11 Tribunal, in fact, engages in the assessment of the
- 12 manner in which the invocation occurred.
- 13 ARBITRATOR PONCET: Not the manner, but the
- 14 timing.
- MS. BANIFATEMI: It's the same. The
- 16 circumstances in which the Exception was invoked.
- 17 Again, it's self-judging, so what we say and
- 18 | what the U.S. has said earlier today, you have heard,
- 19 is self-judging. It's a discretion of the State to
- 20 make its own--
- 21 ARBITRATOR PONCET: We have understood your
- 22 position.

MS. BANIFATEMI: By its nature it's

Essential Security. So nobody is in a better place
than the State to determine that it is Essential

Security. So, whether it's early or in the middle or
the end doesn't make any difference because that
discretion should be untouched.

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

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

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

1 only chance to obtain an award is purely in the hands

2 of the host State which can make its own decision as

3 to whether or not it's going to raise that exception,

4 | invoke that exception. There is no protection for the

5 Investor who faces or files a claim based on the

6 Treaty in which there is a provision allowing the

7 | State to raise the Essential Security Exception?

8 MS. BANIFATEMI: That is why I said earlier

that there is no absolute right of an alleged

10 | investor--

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(Overlapping speakers.)

MS. BANIFATEMI: The rights exist only to
the extent of what the States have accepted. When

14 there is an Essential Security Exception, the States

15 have accepted obligations with the possibility that,

16 in the event that there is an Essential Security

17 Interest situation, they may exclude the obligations.

So, because this is a complete derogation to

19 the application of the Treaty, there is no right for

20 the Investor, and that's a risk that the Investor

21 takes. Again, the right exists only insofar as the

22 States have accepted that right to exist. If you do

- 1 | not have that provision, there is a broader protection
- 2 | for the Investor. If you do have that protection,
- 3 | it's only to the extent--
- 4 ARBITRATOR PONCET: The provision, you mean,
- 5 yes.
- 6 MS. BANIFATEMI: Yes, the Essential Security
- 7 Provision, yes.
- 8 ARBITRATOR PONCET: Thank you very much.
- 9 MS. BANIFATEMI: Thank you, Dr. Poncet.
- 10 PRESIDENT SACHS: Mr. Moloo, you will, of
- 11 | course, have the opportunity to comment on this
- 12 exchange of arguments and questions.
- 13 We will now have another break of 15 minutes
- 14 before we have the break--
- ARBITRATOR PEREZCANO: I do have a question,
- 16 Mr. President, if I may.
- 17 PRESIDENT SACHS: Yeah. Please go ahead.
- 18 I'm sorry.
- 19 ARBITRATOR PEREZCANO: Thank you.
- Ms. Banifatemi, Mr. Moloo made the point
- 21 | earlier today that Colombia, in its Rejoinder,
- 22 accepted that the standard of review was good faith,

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

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

- 1 the position as has been expressed subsequently,
- 2 | including during the course of this Hearing?
- 3 ARBITRATOR PONCET: I think you're on mute,
- 4 Yas.
- 5 MS. BANIFATEMI: I'm sorry, if you allow me,
- 6 I would like to look at Paragraph 43 of the Rejoinder
- 7 | which I don't have in front of me because I'm not sure
- 8 that it was referred to correctly by Mr. Moloo, so,
- 9 would you allow me to come back to this after the
- 10 break?
- 11 PRESIDENT SACHS: Yes, we do allow you. I
- 12 think we need a break now, that was a question put to
- 13 you. I, myself, have another question to both of you,
- 14 | which relates to the Tribunal's Questions Number 1, 2,
- 15 and 3.
- 16 So, if I understand correctly, you seem to
- 17 | agree that the purpose, the protection purpose, of the
- 18 | law and the content of the Essential Security Interest
- 19 that has been invoked is more or less identical. You
- 20 spoke of overlap, but this is my understanding.
- Now, if this is so, could one consider that
- 22 | the State has concretized its security interest in the

field of narco-trafficking fighting through the law 1 2 and to provide it for an exception, namely the 3 good-faith acquisition? It's national law. mentioned that this has nothing to do with 4 5 international law, but my question is, is that 6 position really correct? Could one say, isn't that an 7 exception to the Exception? That is my question. don't have to answer it now, but I think the question 8 9 is clear, and the Claimant has already, to some 10 extent, commented on this question, but I just wanted 11 to make it clearer, what is in my mind at least, to 12 have your position as to this issue. 13 Thank you very much. 14 MS. BANIFATEMI: Thank you. 15 ARBITRATOR PEREZCANO: May I make a quick 16 clarification, Mr. President, before we break? 17 PRESIDENT SACHS: Yes, certainly. 18 ARBITRATOR PEREZCANO: Thank you. 19 Just to clarify my question. 20 question--my comment about what Mr. Moloo said earlier 21 today was just that he referred to it. My question

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was not about what he said earlier today. My question

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- 1 goes directly to what the Respondent said in its
- 2 Rejoinder, which I quoted from verbatim, so that's my
- 3 question.
- As a side comment, I said Mr. Moloo raised
- 5 | this point earlier today. So worry about my question
- 6 rather than how Mr. Moloo may have phrased it or not.
- 7 Thank you.
- 8 MS. BANIFATEMI: Thank you. That's
- 9 understood.
- 10 PRESIDENT SACHS: All right. So, let's have
- 11 a break now. We can continue at 5 past--in our time,
- 12 | it's 5 past 8:00, so 5 past the hour that applies to
- 13 | your time zone, if you agree.
- 14 Thank you very much.
- 15 (Recess.)
- 16 PRESIDENT SACHS: Sara, would you kindly
- 17 | inform the Parties about the time budget that is left.
- 18 SECRETARY MARZAL: Yes, I sent actually an
- 19 email with--the time is 13 minutes for Respondent, 23
- 20 for Claimants.
- 21 PRESIDENT SACHS: Yes, we will not run by
- 22 | the chess clock, but please have it in mind when

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1 making your final comments.
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- 2 So, we invite the Claimant first, Mr. Moloo.
- MR. MOLOO: Thank you, Mr. President.
- We do have a few slides that we're going to
- 5 send through, but if you can indulge me, given the
- 6 short amount of time, I will put them up on the
- 7 screen, unless you would like to wait 30 seconds for
- 8 them to come through by email.
- 9 PRESIDENT SACHS: We will wait.
- MR. MOLOO: Okay.
- 11 (Pause.)
- 12 MR. MOLOO: It's been sent, so if the
- 13 | Tribunal Members could let me know when it appears in
- 14 their in-box, I know Professor Perezcano, you prefer
- 15 to mark things up electronically, so let me know when
- 16 you receive it, and I will commence.
- 17 (Pause.)
- 18 MR. MOLOO: Dr. Poncet, are you saying you
- 19 received it? Okay.
- 20 ARBITRATOR PEREZCANO: I've got it.
- MR. MOLOO: Okay, perfect. Thank you for
- 22 your patience.

REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANTS

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

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

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

1 | that it was being raised as a jurisdictional objection

- 2 | because the Tribunal said it has discretion to deal
- 3 | with jurisdictional issues at any point in the
- 4 proceedings, again showing it was going out of its way
- 5 to hear Respondent's objection.
- Now, at that point, it was raised as a
- 7 jurisdictional objection, but it has morphed into
- 8 something that is not a jurisdictional objection, and
- 9 this is important because that's the basis on which
- 10 they sought to have it admitted late into the
- 11 proceeding. Now what they're saying is about
- 12 justiciability, which is not about jurisdiction.
- 13 | Justiciability is this Tribunal has jurisdiction, but
- 14 | it is not allowed to touch this particular issue.
- 15 That's justiciability goes to. It goes to
- 16 admissibility, not to jurisdiction. That's a merits
- defense. And, in Procedural Order No. 1, at 14.2 and
- 18 | 14.3, it was made very clear that any defenses must be
- 19 raised in the Counter-Memorial, and Article 26 of the
- 20 Rules makes it clear, if something is late, it's late.
- 21 Yet, here we are in an entirely new phase us
- 22 | having to deal with this new defense, and you have

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

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They then complain that the Transcripts that they sought to have admitted were not allowed by the Tribunal, and they said we gave them in advance to Claimants and thought it would be helpful, they said it would be helpful to them. Why did they object? The reason we objected is because the first time we saw those Transcripts were with the post-closing written submissions of Respondents. They didn't give it to us before then. That's the first time we saw There is no more written submissions to be had in this proceeding, lest we continue this proceeding longer than it has already gone for with further written submissions, so we objected on a procedural basis. We said this is a brand-new exhibit, we had never seen it. When we asked for this at the Hearing, we were told no, we're not going to give you Transcript, and then with your postOclosing submissions, you're producing these Transcripts and relying on them for the first time, making brand-new

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

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Our objection was merely a--it was a due-process objection. It was--that was submitted to the record too late.

An assessment of good faith has to happen in 2013 when they're acquiring the Property.

But even then, there is no evidence whatsoever in the record

No evidence whatsoever.

Mr. Seda was not asked about this at the Hearing.

He's the only witness we have that would have been

about this. He was not asked any questions about any

able to testify to this. He was not cross-examined

1 of this. 5 So, there is simply no evidence that 6 establishes anything that they are seeking to 7 extrapolate. 8 So, aside from the due-process issue of why 9 we objected to having the Transcripts admitted with the Post-Closing Submissions, substantively, there is 10 11 really nothing at all in there that should give rise 12 to any legitimate concern for this Tribunal, aside 13 from the timing issue of this all being 2017, once the 14 Property has already been taken, nothing--

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

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

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application of the Essential Security Provision, and

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

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

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

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

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

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

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

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

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

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

1 | that. The Panel rejected the United States's

2 submissions in this case, just like you should do in

3 this case.

So, the timing issue goes bot to the

5 | good-faith analysis because it can't be positively

6 | related, but it also goes to the very wording of the

7 provision.

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The third point I want to briefly touch on

9 is, from a substantive perspective, there is no

10 evidence at all that Mr. Seda knew

And, by the way, he wasn't aware when they took the property--he wasn't aware until this

Arbitration--and nothing in the record suggests otherwise.

So, from a substantive perspective, it

doesn't change anything with respect to the good-faith 1 2 analysis. I can assure you of that at Procedural Order No. 2, the Redfern Schedules, Request 4 5 No. 53, Colombia made a request for any evidence 6 relating to third-party funders in this Arbitration, 7 and we disclosed that Tenor Capital was funding this 8 Arbitration. 9 So, unless they're accusing us as counsel of 10 like or misrepresenting or withholding information 11 from this Tribunal, there is no evidence--there is no 12 support -- for that proposition that anybody other than 13 Tenor Capital is funding this Arbitration. 14 I can tell you, as counsel, that 15 are not going to get any proceeds from this 16 arbitration. 17 And then they say, well, the thing that's 18 different, though, is were still involved 19 at the time we took the Property. They already gotten 20 some money for purchase of the Property.

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slide, the Asset Forfeiture Law itself. Let's assume

And here I want to take you to another

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1 for the sake of argument that Article 16 makes it clear that if 15 assets of legal original whose value is equivalent to 16 the assets described in the proceeding numbers 17 whenever the action is inadmissible due to recognition 18 of rights of the third party acting in good faith 19 without fault are at issue, then you go after 20 other--you go after assets of legal origin of those 21 individuals. 22 So, what does that mean? That means that,

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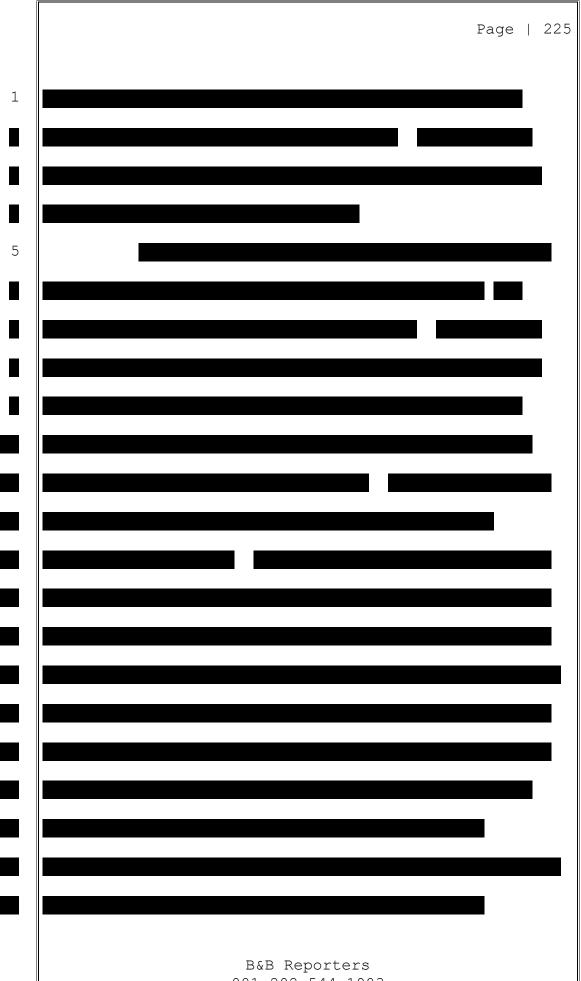
Go to the next slide. Next slide, please.

Dr. Wilson Martínez makes it clear that the correct course of action in that situation would have been to attach the payment rights, the profits of the Trustee, and to identify who was a good-faith buyer and not affect their property rights. So, there is a way to do this. You go after the Property—if there is a money—laundering cycle here, you could cut off the money—laundering cycle by taking and garnishing any of the proceeds that were going to go to illicit third parties, not—and you preserve the Property that is in the hands of the good—faith parties. That's what you're supposed to do.

So, as Dr. Martínez explains at Paragraph 35, once it had been confirmed that Newport

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

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



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The last thing I want to end on is--the last thing I want to end on is the Preamble because we heard a little bit about it from Professor Banifatemi earlier.

mention something that Professor Banifatemi mentioned.

She said again earlier today that this case is actually premature, and I showed you where something similar that was said, I think, at the Opening because Newport's good faith is going to be determined. When? When? How long do we have to wait? It cannot be that this case is premature, after the Property had been taken for seven years. If it's premature, then you know what they should do? They should never have assessed Newport's good faith because it will be forever be premature.

1 At some point it is a due-process No. 2 violation. At some point it is a de facto 3 expropriation. At some point it is a national-treatment violation when you take some 4 5 foreign investor's property but you don't take local 6 investors that are similarly situated. That point 7 passed long ago. Certainly by now, when they told you a year ago, a year from now we will know, and no 8 9 progress has been made. Certainly by now this 10 Tribunal can conclude that we're past the point of 11 return; that the due-process violations of the 12 Claimants have been violated; that there has been de 13 facto expropriation; that there is disparate treatment 14 between nationals whose property has not yet been 15 taken seven years later and whose investor's 16 properties were taken seven years ago. It cannot be 17 the case this case has been premature. There has 18 clearly been a violation that has crystallized. 19 And I end with the Preamble that Professor 20 Banifatemi took you to. This is the purpose of the 21 This is the purpose of the Treaty, outset of 22 the Treaty. The purpose of this Treaty is to promote

1 | economic development in order to reduce poverty and

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

slide, next slide.

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

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

Colombia wants you to do, and I will end on this

1 | there is one legitimate expectation that Mr. Seda

- 2 | should have had, it is that investing in Colombia,
- 3 when they're investing, they're investing in one of
- 4 | the worst regions and most dangerous regions, but then
- 5 | how do you move on from the history of
- 6 | narco-trafficking, and how do you ever develop a
- 7 legitimate business in this economy if basically what
- 8 | they're saying is no, you can't, you can't ever invest
- 9 here because of that history. That is fundamentally
- 10 | contradictory, and it cannot be what this Treaty was
- 11 meant to achieve.
- We urge the Tribunal to find for the
- 13 | Claimants not just for these Claimants but so that
- 14 other investors know if that if they come and invest
- 15 | in Colombia, they have the protection of this Treaty.
- 16 Subject to any of questions, those are our
- 17 submissions.
- 18 PRESIDENT SACHS: Thank you, Mr. Moloo.
- My two colleagues, do you have questions?
- 20 ARBITRATOR PONCET: Could I have a quick
- 21 question, Mr. President?
- 22 PRESIDENT SACHS: Yes, certainly.

ARBITRATOR PONCET: Mr. Moloo, to make sure I understand, you are, in effect, asking us, if we reached the conclusion that there is a violation of the Treaty, in particular if we reach the conclusion that

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is a fabrication, a mistake, whatever you want to call it, you are asking us, aren't you, to reach that conclusion, and then to draw from that conclusion that Article 22.2(b) can no longer be invoked. That's effectively what you're asking, isn't it?

MR. MOLOO: As part of the analysis—that's one of our arguments, Dr. Poncet, is that, in doing a good—faith analysis, you, the Tribunal, should accept that, in articulating that Essential Security

Interest, protection of narco—trafficking, the law itself acknowledges the Exception of good—faith third parties, so the Tribunal can and should assess whether or not Mr. Seda and the Investors were good—faith third parties, and that includes an assessment along the lines what you're saying.

ARBITRATOR PONCET: It also means, does it

1 | not, that we should not only reach that conclusion,

- 2 but conclude that even though Mr. Seda et al. would be
- 3 | in perfect good faith, even though the provision would
- 4 be invoked or because the provision of 22.2(b) would
- 5 be invoked despite that, that would remove the
- 6 | interpretation of 22.2(b) that your opponent suggests,
- 7 | namely a sort of you know like a red card in a
- 8 | football game; right? Once it's out, everybody stops,
- 9 and the player goes out, and must disregard that.
- MR. MOLOO: What we're saying is it's not as
- 11 simple as a red card that you can just raise and get
- 12 out of jail free for many reasons, including that the
- 13 | Essential Security Interest was not identified at the
- 14 | time that the Measure was taken, and that's what the
- 15 provision expressly requires.
- 16 ARBITRATOR PONCET: That pre-supposes, does
- 17 | it not, that we have the right, the power to assess to
- 18 | what extent the 22.2(B) Exception is raised in good
- 19 faith? Your opponent was vociferously--not
- 20 "vociferously," your opponents challenged that very
- 21 much.
- MR. MOLOO: Right.

1 So, I would say two things. Before I get to 2 good faith, just in the interpretation of the 3 provision itself--and if we could go back to 32 of that slide, they are only able to invoke this 4 5 provision if they are saying that the Measure was 6 taken to protect an Essential Security Interest. 7 They've told you that it was not taken to protect an Essential Security Interest, so this provision does 8 9 not apply, in my view, because they told you the 10 Measure was taken because of some other reason. 11 was taken because of Iván López or whatever the reason 12 was. It was not taken. I think that is undisputed. 13 The Measure was not applied to protect the Essential 14 Security Interests because the Essential Security Interests didn't appear, didn't--wasn't known until 15 16 2022. 17 So, setting aside the good faith for a 18 moment, this does not apply because there was no 19 measure that was taken to protect the Essential 20 Security Interests of Colombia. The Measure was taken 21 for some other purpose. Iván López was associated

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with the title, whatever it was, but they have told

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1 you expressly that it was not taken for the Essential

2 | Security purpose that they have now identified. So,

3 | that's one.

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tribunals.

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

ARBITRATOR PONCET: Thank you.

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

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

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

1 MS. BANIFATEMI: Yes. Thank you. 2 (Recess.) 3 PRESIDENT SACHS: We would invite the Respondent for their Rebuttal Argument. 4 5 Ms. Banifatemi, the floor is yours. MS. BANIFATEMI: Mr. President, Ms. Herrera 6 7 will say just one word before I continue. 8 MS. HERRERA: Thank you very much, 9 Mr. President. 10 REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT 11 MS. HERRERA: One quick point, on the 12 interpretation that Mr. Moloo has again put forward to 13 this Tribunal regarding the Asset Forfeiture Law and 14 in particular article 16(10) that he read about going 15 after assets of legal origin when the actual asset is 16 not available, the one of illegal origin, because the 17 action is not admissible. 18 First of all, it's not true that the opinion 19 of Mr. Martinez is unrebutted. It's not true that--I 20 actually cross-examined Mr. Martínez on that, and I

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nothing about this -- no interpretation of this Article

actually asked him about why he happened to say

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1	in his opinion that he provided for Corficolombiana in
2	2016. So, not only it was a novel interpretation,
3	also the Claimants only put it forward in their Reply.
4	Second point, please, I refer you to the
5	Report of Professor Reyes that explains very clearly,
6	Paragraphs 179 and following, how this operates,
7	Article 10. In fact, first of all, you have to have
8	the determination that there is a bona fide third
9	party, that means that there has been a judgment; and
10	then, only then, you can go towards an asset of legal
11	origin.
12	Thank you.
13	MS. BANIFATEMI: And, Mr. President, Members
14	of the Tribunal, I will address very briefly first the
15	due-process points on
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First of all, even though, in our submission, this is self-judging, so Colombia does not have to show good faith, Colombia, just to reassure the Tribunal, has confirmed that it has raised this exception in full good faith. How do you know it, by the way? You know it from the timeline that I showed you earlier.

Colombia did not raise--this is a serious matter. Colombia did not raise the Exception until it was certain and it had evidence

of the Meritage, which is the asset that is the subject of this arbitration. So, that is how seriously Colombia has taken this matter and, therefore, how much in good faith it has acted.

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

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

7 Colombia.

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And so, you do have the evidence, and you

19 have to look at that evidence and make a determination

on that basis, if you are going to look at the

21 good-faith issue where, in the alternative, of course,

22 in relation to the invocation of the exception.

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

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

The second point I want to make is that, again going to the timing--and that's also to Dr.

Poncet's question--there is no statute of limitations.

Article 22.2 doesn't say at what point in time it can be raised, in what manner. It is a full discretion of the State who makes that determination, when the State makes the determination that this is within the protection of its Essential Security Interests, so no such statute of limitations.

Now, addressing the question of Professor

1 Perezcano--and the rejoinder specifically--the

- 2 | position has evolved, but it has not evolved today.
- 3 | The position evolved last year, as you may recall the
- 4 justiciability and the fact that this is
- 5 | non-justiciable arose at the Hearing, and that's the
- 6 | time at which we argued non-justiciability as an
- 7 additional ground, and the three layers that you have,
- 8 one non-justiciable, in the alternative no
- 9 jurisdiction, in the alternative, further alternative,
- 10 raised in good faith. So, you have the three layers,
- 11 and that was last year during the Hearing, nothing new
- 12 there, so this is our position, indeed. Our position
- 13 | is that this is non-justiciable for all the reasons we
- 14 have given.
- And if you recall, at that time, it was
- 16 after we had access to the travaux préparatoires and
- 17 | that the travaux préparatoires show, indeed, that the
- 18 Parties did raise the matter as a non-justiciable
- 19 matter. So, that is the evolution of the position
- 20 last year at the Hearing after we had access to the
- 21 travaux préparatoires.
- Now, one point that Mr. Moloo made is that

1 | this is somehow a merits defense. This is not a

- 2 | merits defense. This is a defense that goes to the
- 3 | power of the Tribunal. "Non-justiciable" means that
- 4 there is no legal review by anyone, a tribunal for
- 5 that matter, of the circumstances in which the
- 6 Exception is invoked. So, that is not a merits
- 7 defense; that is a power defense. You do not have the
- 8 power. That's the first layer.
- 9 In the alternative, you don't have the
- 10 jurisdiction.
- In the third layer, it's even before merits.
- 12 In the third alternative, it's--if you would like to
- 13 determine the good faith, you have ample evidence to
- 14 | show that this is, indeed--has been raised in good
- 15 faith, and the timeline and everything else that we
- 16 said today shows that, and then you go to the merits,
- and on the merits this doesn't apply. So, it's wrong
- 18 for Mr. Moloo to confuse justiciability with the
- 19 merits issue.
- Now, on the provision itself, nothing in
- 21 | this Agreement shall be construed to preclude a Party
- 22 from applying measures. Mr. Moloo is trying to

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

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

1 | an exception that is intended to entirely exclude from

- 2 the scope of the obligations under the TPA those
- 3 Measures covered by Article 22.2(b), as there is no
- 4 | obligation under the TPA with respect to covered
- 5 | measures. A claimant cannot establish that per
- 6 Article 10.16," et cetera, and I discussed that
- 7 earlier.
- 8 So, indeed, it is a derogation, an entire
- 9 exclusion of the Treaty once the provision has been
- 10 invoked.
- Now, Mr. Moloo refers to the GATT and the
- 12 | fact that the U.S. was not following the GATT. As you
- 13 know, the GATT has a completely different provision.
- 14 It has a list of three specific circumstances.
- 15 Therefore, the Panel in the GATT decided that, on the
- 16 | very limited--very limited--standard of review, they
- 17 | will look at whether one of those circumstances is
- 18 fulfilled. You don't have that here. This is a very
- 19 | broad exclusion, which says: "Measures that it
- 20 considers necessary for the protection of its
- 21 Essential Security Interests." There is no list.
- 22 There is no specific circumstances that the Tribunal

can double-check.

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

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

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

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

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

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

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

- 1 Referring to your question, Colombia is not saying
- 2 | that the Exception is the law itself. The law--and
- 3 you will remember from Article 34 of the
- 4 | Constitution--has a much broader scope. If you look
- 5 | at Article 34, it refers to illegal means, assets
- 6 acquired by illegal means to the detriment of the
- 7 Treasury or resulting in severe deterioration of
- 8 social morals. This is the categories that are
- 9 addressed in Article 34.
- 10 So, Asset Forfeiture Proceedings can address
- 11 situations that have nothing to do with narco-traffic.
- 12 You can have a situation of an asset that is seized in
- 13 relation to, for example, prostitution of minors.
- 14 | That is social morals--that is not narco-traffic--it's
- 15 | a very serious matter as well, and that is going to
- 16 | the protection of the social morals.
- So, the scope of the law is broader than the
- 18 | narco-traffic. Historically, narco-traffic is one of
- 19 the main goals of the law but is not the only goal of
- 20 | the law. So, the law is broader.
- In this case, there is an overlap between
- 22 one of the raisons d'être, one of the rationales of

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

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

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

1 This Tribunal has no means, no power, no evidence, no

- 2 | argument--nothing before it to make that
- 3 determination. That is not the realm of this
- 4 Tribunal.
- 5 So, the Exception which is before the
- 6 domestic courts, which Newport has taken fully the
- 7 | benefit of and, as you know, now they are appealing
- 8 | before the domestic courts, they have a remedy. The
- 9 remedy is Colombian law, the remedy is before the
- 10 Colombian courts, and they will have an answer.
- 11 That's why we say it is premature. Indeed, it is
- 12 premature, and they have taken full advantage of what
- 13 | Colombian law says, and they cannot complain about
- 14 | time because these things, these matters take time.
- And this Tribunal is not called upon to make
- 16 a determination of denial of justice because justice
- 17 has not been rendered yet. Justice is ongoing in
- 18 Colombia. You have to trust the judiciary in
- 19 Colombia. You have to trust the rule of law in
- 20 Colombia, and you have to trust that Colombia is doing
- 21 | it right.
- Now, that's the domestic level. On the

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

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1 the fact that the proceedings that are ongoing are to

- 2 ensure that there is no money-laundering to the
- 3 | benefit of narco-traffickers and organized crime.

4 This is the purpose, this is the Essential

5 | Security that Colombia is trying to safeguard. And

6 your task, should you be in that further alternative,

7 | is to look at whether that's a plausible explanation

8 | about the proceeding itself and that protection of the

9 fight against organized crime. That's the

10 | international level, which is completely different

11 from the domestic level, which is in the realm of the

12 domestic courts, which again Newport has taken the

13 full advantage of, before the domestic courts.

I hope that I have addressed all of the

15 questions that were asked of me, but, of course, I'm

16 | in your hands if I haven't.

17 Thank you, Mr. President.

18 PRESIDENT SACHS: Thank you very much.

I again turn to my two colleagues. Do you

20 have questions?

21 | ARBITRATOR PONCET: I don't have any

22 questions, Mr. Chairman. Thank you.

1 ARBITRATOR PEREZCANO: I do have one, Chair.

2 PRESIDENT SACHS: Yes, please.

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

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

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

- 1 | suspended? Are they ongoing? What's the status? If
- 2 Ms. Banifatemi can tell me, or perhaps Ms. Ordóñez,
- 3 | who is a representative within the Government,
- 4 probably knows. Thank you.
- 5 MS. BANIFATEMI: Thank you.
- 6 Professor Perezcano, would you allow me one minute
- 7 just to consult internally?
- ARBITRATOR PEREZCANO: Yes, of course.
- 9 MS. BANIFATEMI: Thank you so much.
- 10 (Pause.)
- MS. BANIFATEMI: Professor Perezcano, thank
- 12 you for your patience.
- 13 Mr. Giovanny Vega Barbosa will respond to
- 14 this question on behalf of Colombia. Thank you.
- MR. VEGA BARBOSA: Thank you, Yas.
- 16 As for the clarity of the Tribunal, Ms. Ana
- 17 María Ordóñez referred to an appeal that was raised by
- 18 Newport in mid-2022, not May, we saw the record and it
- 19 is indeed written that the appeal was filed in May
- 20 2022, but it was presented in July 2022, it was a
- 21 Request for Annulment of the whole Asset Forfeiture
- 22 Proceeding, which was denied in First Instance by the

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1 | Asset Forfeiture Court and then referred with a
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- 2 devolutive effect to the Special Chamber of Asset
- 3 | Forfeiture of the Tribunal Superior de Bogotá.
- 4 The Decision is currently pending by the
- 5 Tribunal Superior de Bogotá which, as you know, is the
- 6 | Court of Last Instance for matters concerning Asset
- 7 | Forfeiture in Colombia.
- 8 ARBITRATOR PEREZCANO: So, just to be clear,
- 9 the underlying procedures are not suspended?
- MR. VEGA-BARBOSA: No, it was--the request
- 11 was rendered with the devolutive effect, but no
- 12 decision has been made so far as to the request for
- 13 the total annulment of the proceedings. Yes, that's
- 14 correct.
- 15 ARBITRATOR PEREZCANO: Thank you.
- 16 PRESIDENT SACHS: And, from my
- 17 understanding, by "underlying proceeding," are you
- 18 | referring, Hugo, to the proceeding in which recently,
- 19 in 2022, Newport was recognized as being an
- 20 Intervening Party?
- 21 (Overlapping speakers.)
- 22 ARBITRATOR PEREZCANO: I'm sorry, my

1 | question really was, in the prior appeal that was

2 decided in April 2022, the effect--when the Appeal was

3 | filed--and I forget exactly when it was, 2018 or 2019,

4 | whenever it was, the effect of Newport filing the

5 | appeal was to suspend the whole Asset Forfeiture

6 Proceedings until the decision was rendered in

7 | April 2022, so my question was with this new appeal,

8 | whether the Asset Forfeiture Proceedings were again

9 suspended or they are ongoing, and I understood

10 Mr. Giovanny Vega to have said no, they did not

11 suspend the proceedings. They continue.

12 MR. VEGA-BARBOSA: Yes, the Judge of First

13 | Instance granted the request for appeal with the

14 devolutive effect, not with the suspensive effect.

But, if I may add, this is not a request for an

16 | afectado to be recognized, this is a request for the

17 annulment of the Asset Forfeiture Proceedings. And,

18 | in response to Professor Sachs, yes, it refers to the

19 same Asset Forfeiture Proceeding which is the subject

20 matter of this arbitration.

21 PRESIDENT SACHS: Right. But forgive me,

22 | but I want to have a clear picture. My understanding

1 was that the proceedings before the Colombian court

- 2 | concerned the question whether the Asset Forfeiture
- 3 Law was applied correctly in this case or incorrectly,
- 4 | meaning that the good-faith acquisition was the
- 5 subject matter. Is my understanding correct, that
- 6 this proceeding, the one on the good-faith issue, is
- 7 still ongoing? And it has now been clarified in
- 8 April 2022 that Newport has a role in these
- 9 proceedings, namely as an intervening party.
- And so, what is the interaction between
- 11 these proceedings and the appeal that you mentioned,
- 12 the appeal which I understand was lodged by Newport in
- 13 order to annul the whole Asset Forfeiture? So, this
- 14 is not clear to me how they interrelate.
- MR. VEGA BARBOSA: May I respond?
- 16 PRESIDENT SACHS: Yes, please.
- 17 MR. VEGA BARBOSA: Yes, the whole purpose of
- 18 | these proceedings is to determine whether Newport is a
- 19 qualified good-faith buyer; and, for those purposes,
- 20 Newport has standing to prove its qualified good-faith
- 21 status since the moment it was recognized as an
- 22 afectado.

In that process, or in that proceeding, we are at this very moment in the evidence or evidentiary stage of the proceedings. Because of a request by--or upon a request by Prosecutor Caro to introduce 4 supervening evidence into the proceedings, or on the 6 occasion of that request, Newport filed a request for 7 the nullity of the whole proceedings. That is, the same proceedings in which they are requesting to be recognized as qualified good-faith buyers. PRESIDENT SACHS: I understand. 10 And those new elements, are those the ones that came out later, namely 13 MR. VEGA BARBOSA: If I may, Mr. President, their particular request or evidentiary requests that 15 are pending right now concerned, indeed, 16 which were requested by Mr. Caro, and a request by Mr. Caro to also include supervening evidence that came to his 19 knowledge concerning a declaration by other persons involved with the Meritage Case; and the decision regarding those pieces of evidence, as far as

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we know. But, if we are allowed, we are more than

- 1 happy to confirm this to the Tribunal afterwards, but
- 2 | as far as we know, this is evidence that was granted
- 3 by the Judge of First Instance, and it was on the
- 4 basis of the decisions made on these new pieces of
- 5 evidence that the request for nullity was filed by
- 6 Newport in mid-2022.
- 7 PRESIDENT SACHS: Thank you.
- 8 And I now give the floor to the Claimants to
- 9 comment, to confirm or correct or complement what was
- 10 just said.
- MR. MOLOO: Mr. President, my understanding
- 12 | is that the underlying proceedings with respect to the
- 13 determination of Newport's good faith have not been
- 14 paused, so I think that we share that understanding.
- 15 They have not been paused formally, I should say, but
- 16 no progress has been made in those proceedings, to our
- 17 knowledge.
- 18 I should also mention that Newport obviously
- 19 has not just foreign investor interest but domestic
- 20 investors, so there are additional parties that are
- 21 interested in Newport that are not before this
- 22 Tribunal, of course.

1 But, if it's helpful, because our Colombian 2 counsel is not on the line, we can provide just a very 3 short email update of what--clarification on this specific question. I'm not proposing any further 4 5 submissions or anything like that, but just a 6 clarification on this question, if it would be helpful 7 for the Tribunal. 8 PRESIDENT SACHS: I think the Tribunal would 9 welcome from both sides a very, very short update on 10 those proceedings -- no further submissions, just 11 update--confirming what you just said. Could we have 12 that within a week? 13 MR. MOLOO: Yes. No problem, Mr. President. 14 PRESIDENT SACHS: And, ideally, what I would 15 suggest is that you contact each other so that we get 16 a joint paper. 17 MR. MOLOO: We will endeavor to do so. 18 PRESIDENT SACHS: Okay. Very good. 19 Anything else, my two colleagues? Or are we 20 through with our questions? 21 ARBITRATOR PONCET: Nothing further from me,

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Mr. President.

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

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

5 This brings us to the end of this Hearing.

6 MR. MOLOO: I believe, Mr. President,

7 Dr. Poncet had a question, but I may be mistaken.

8 PRESIDENT SACHS: Oh, I'm sorry? Charles,

10 ARBITRATOR PONCET: I said no questions as

11 far as I'm concerned. Thank you.

you had a question?

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MR. MOLOO: Apologies.

13 SECRETARY MARZAL: Mr. President, Sara here,

14 just wanted to note one thing, the question of the

15 Statements of Costs, according to PO1, must be

16 discussed at the end of the Hearing. I don't know if

17 | you want to discuss this now.

18 PRESIDENT SACHS: Yes. I was going to

19 discuss this. Thank you for reminding me, Sara.

Indeed, we have to shortly discuss the

21 question of costs submissions, the deadlines and the

22 details. Have you had the chance to talk to each

- 1 other on how to handle this? Or would you prefer to
- 2 | make a joint proposal as to both the timing of such
- 3 submissions and also the level of detail that you
- 4 agree should be included in these statements?
- 5 MS. BANIFATEMI: We have not had a chance,
- 6 Mr. President, to discuss among Parties, but we are
- 7 happy to do so and revert to the Tribunal if that's of
- 8 assistance.
- 9 PRESIDENT SACHS: Mr. Moloo, would you
- 10 agree?
- MR. MOLOO: Yes, Mr. President.
- 12 PRESIDENT SACHS: Fine. So, if there is a
- 13 problem that we have to solve, then please tell us,
- 14 but otherwise we look forward to receiving your joint
- 15 proposal.
- 16 Transcript, I don't expect there to be many
- 17 problems. We already received the rough Transcript,
- 18 | but in case there is a problem, please let us know.
- 19 Otherwise, let's agree that if we don't hear from you
- 20 to the contrary, the final version of the Transcript
- 21 | will be the one that is relevant and conclusive.
- 22 Let's say, within two weeks? That's the deadline for

1 you to tell us whether there is a problem or whether

- 2 corrections need to be done, in which case we would
- 3 again invite you to liaise to come up with a joint
- 4 proposal. Is that too short?
- 5 MS. BANIFATEMI: That should be workable,
- 6 Mr. President.
- 7 PRESIDENT SACHS: Very good.
- MR. MOLOO: Likewise on our side.
- 9 PRESIDENT SACHS: Thank you very much.
- Then I'm afraid this was the last hearing in
- 11 this case. We thank you, both sides, also for this
- 12 | Hearing. We think it was helpful. You made your
- 13 positions clear in a very efficient and professional
- 14 way. Thank you.
- I also want to thank Sara for having
- 16 organized all this, and of course, David and Dante for
- 17 | their unfortunately invisible assistance, but you see
- 18 | the product, so that's good.
- And with that, we will close today's
- 20 Hearing, and we will first hear from you, and then you
- 21 will hear from us.
- MS. BANIFATEMI: Thank you, and good

1 evening.

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

3 Members of the Tribunal.

4 MS. CHAMPION: Thank you very much.

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

6 was concluded.)

CERTIFICATE OF REPORTER

David A. Kasdan, RDR-CRR, Court I, Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted under my transcription direction 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