THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

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In the Matter of Arbitration between:

AMEC FOSTER WHEELER USA CORPORATION (USA) and PROCESS CONSULTANTS, INC. and JOINT VENTURE FOSTER WHEELER USA CORPORATION and PROCESS CONSULTANTS INC. (USA),

Claimants,

and

THE REPUBLIC OF COLOMBIA,

Respondent.

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VIDEOCONFERENCE: HEARING ON PRELIMINARY OBJECTIONS
ICSID CASE NO. ARB/19/34

Volume 1

Thursday, May 19, 2022

The World Bank Group

The hearing in the above-entitled matter came on at 9:06 a.m. before:

MR. JOSÉ EMILIO NUNES PINTO, President

MR. JOHN BEECHEY, Arbitrator

PROF. MARCELO G. KOHEN, Arbitrator

ALSO PRESENT:

ICSID Secretariat:

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Secretary to the Tribunal

Court Reporter:

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1 P R O C E E D I N G S

2 PRESIDENT NUNES PINTO: Okay. Good morning.
3 My name is José Emilio Pinto. I am the Tribunal
4 Chair. Some of you know me by Zoom. But this is--for
5 us, it's very, very important to be back. We are
6 extremely happy to be back in person after so many
7 years using the platforms. I'm not blaming the
8 platforms. They were extremely useful. But it's much
9 better when you're sitting in the same room.

10 So, in the name of my Co-Arbitrators,
11 Marcelo Kohen and John Beechey, and my own name, I
12 would like to welcome you to this Hearing, one of the
13 very first in-person.

14 Also, I would like to welcome those who are
15 attending this hearing remotely, especially the
16 Non-Disputing Party representatives. Marisa confirmed
17 that they are online.

18 So, again, it's an enormous pleasure. It's
19 great to be back. And we have to work. We have lots
20 of tasks for the day today, for tomorrow.

21 But first of all, I would like to ask you to
22 be very kind and introduce your colleagues who are

1 attending this Hearing here at the ICSID premises in
2 D.C.
3 Claimants first.
4 MR. SILLS: Thank you, Mr. President.
5 On behalf of the Claimants, I'm Robert Sills
6 of Pillsbury Winthrop Shaw Pittman. With me are my
7 colleagues. On my left, Mr. Richard Deutsch, also
8 with Pillsbury. To my right, Mr. Charles Conrad of
9 our firm; Ms. Kristina Fridman, Pillsbury;
10 Ms. Elizabeth Dye, Mr. Derek Soller, and Mr. Martin
11 Ruiz Garcia.
12 PRESIDENT NUNES PINTO: Thank you.
13 Respondent, please.
14 MS. FRUTOS-PETERSON: Good morning,
15 everybody. It's a pleasure being here in person.
16 This is our first hearing in person, so we're really
17 happy that--thank you to the Tribunal for making it
18 happen.
19 So, I'm Claudia Frutos-Peterson, a partner
20 with Curtis, Mallet-Prevost, Colt & Mosle, on behalf
21 of the Republic of Colombia. And I'm here with the
22 Curtis team and the [Agencia Nacional de Defensa

1 Jurídica del Estado, República de Colombia].
2 To my right is Ana María Ordoñez, the
3 director. And then to my left I have Fernando Tupa
4 from Curtis, Elisa Botero from Curtis, Elizabeth Prado
5 from the Agencia, Giovanny Vega from the Agencia.
6 And, of course, we have our terrific team of
7 associates attending online, and they are all--their
8 names are in the List of Participants.
9 Thank you so much.
10 PRESIDENT NUNES PINTO: Thank you very much.
11 DR. FRUTOS-PETERSON: And I'm sorry,
12 Mr. President. I forgot to introduce you to my two
13 colleagues in the back, Jackie Messemer and Gabriela
14 Sadler.
15 Thank you.
16 PRESIDENT NUNES PINTO: Thank you. You are
17 all mostly welcome.
18 I would like to remind you that one of--this
19 was highlighted by Marisa Planells Valero to you--but
20 I would like to highlight [to] you that should you,
21 for any reason, have any confidential matters to be
22 addressed during the Hearing, please let the Tribunal

1 know before you start so that we can decide and
2 disconnect the remote attendants. Okay?
3 So, unless you have any matters that you
4 would like to address to the Tribunal, I think we're
5 ready to start.
6 Mr. Sills, any matters?
7 MR. SILLS: We have no housekeeping matters,
8 Mr. President.
9 PRESIDENT NUNES PINTO: Thank you.
10 DR. FRUTOS-PETERSON: We don't have any
11 matters pending. Thank you, Mr. President.
12 PRESIDENT NUNES PINTO: So, we start--we
13 have 90 minutes now, to 10:40--10:30/10:40, for the
14 Opening Presentation by Respondent.
15 So, I think we can get started. And the
16 floor is yours.
17 OPENING STATEMENT BY COUNSEL FOR RESPONDENT
18 MS. ORDOÑEZ: Thank you, Mr. President.
19 Good morning, Mr. Chairman and Members of
20 the Tribunal. Let me start by making some clear
21 general remarks that are fundamental for the position
22 of the Republic of Colombia.

1 We signed the Treaty with the United States
2 of America, convinced of the benefits it would bring
3 to our bilateral relations. It provides investors
4 with the exceptional and rare opportunity to sue the
5 State directly before investment tribunals like this
6 one.
7 This exceptional and expensive recourse to
8 international adjudication should not be taken
9 lightly. Colombia and the United States consented to
10 accept claims from investors of the other party only
11 when requirements of the consent are met.
12 My mission today is to introduce Colombia's
13 preliminary objections in the case brought by
14 Claimants on 6 December 2019. I would kindly ask the
15 Members of the Tribunal to keep this date in your
16 minds.
17 Because Colombia invoked Article 10.20.4 of
18 the Treaty, the first task of the Tribunal is to
19 decide whether, as a matter of law, the claim brought
20 is a claim for which an award in their favor may be
21 made.
22 As a matter of law, and accepting all facts

1 in the Notice of Arbitration as true, the claim
2 submitted is not a claim for which an award in favor
3 of the Claimants may be made under Article 10.20.4
4 because, first, on 6 December 2019, when the Notice of
5 Arbitration was submitted, there was no State measure
6 capable of breaching a substantive obligation of the
7 Treaty or an investment agreement. Accordingly, there
8 was no compensable loss or damage Claimant[s] could
9 have incurred by reason of, or arising out of a breach
10 that did not exist.
11 While 6 December 2019, is the critical date
12 in the assessment of jurisdiction, as of today, there
13 is still no measure capable of breaching the
14 substantive obligations of the Treaty or an investment
15 agreement, and Claimants have incurred no loss or
16 damage by reason [of], or arising out of, a breach.
17 The second task of the Tribunal is to decide
18 on the other five independent objections Colombia has
19 raised against the jurisdiction of the Tribunal,
20 including the allegation that there is simply no
21 protected investment in this case. Some of these
22 objections were even raised by the State before the

1 case was registered.
2 As the Tribunal can see, our agenda for the
3 next two days is very busy and concerned with critical
4 objections against its jurisdiction. This arbitration
5 is novel for Colombia, since it is the first time it
6 raises an objection according to Article 10.20.4 of
7 the Treaty, and very much looks forward to learning
8 from the decision of the Tribunal in this respect.
9 Now, Claimants have taken issue with
10 Colombia's preliminary objections not only in this one
11 but in its previous cases. Awarding attorneys' fees
12 and costs is requested by Claimants as the proper way
13 to discourage Colombia from raising preliminary
14 objections in the future.
15 As the Head of the International Litigation
16 Division of the Republic of Colombia, it is my duty to
17 address this allegation, which is both unfair and very
18 inaccurate.
19 First, I would like to recall my colleagues
20 that raising preliminary objections is a valid action
21 under international law, and an expression of respect
22 for the peaceful settlement of disputes.

1 Colombia has consistently appeared before
2 international investment tribunals to honor its
3 international obligations, but this does not entail a
4 duty to refrain from vindicating the limits of its
5 consent to the international jurisdiction.
6 As far as investment arbitration is
7 concerned, during the past five years under my
8 direction, Colombia's practice has been characterized
9 by a sincere respect and trust in investment
10 arbitration. As a State committed to the rule of law,
11 the terms of our treaties, in their interaction with
12 other relevant rules of international law, have guided
13 each and every aspect of our actions.
14 Precisely because of that, and contrary to
15 the positions advanced by Claimants, Colombia has been
16 successful when raising preliminary objections,
17 including under this Treaty.
18 The present case is not an exception to
19 Colombia's professionalism in approaching each step of
20 the arbitral process. On the contrary, given the
21 serious and numerous pathologies in the Claimants'
22 case, it was foreseeable, not to say mandatory, for

1 Colombia to raise each and every single one of the
2 preliminary objections it raised in these proceedings.
3 As you can see, the time and costs using
4 these proceedings are not Colombia's fault, but the
5 result of a Notice of Arbitration that was both
6 premature, and a reflection of serious breaches to the
7 conditions of our narrow consent to investor-State
8 arbitration.
9 Let me finish with a brief general reference
10 to the various agreements reached between Colombia and
11 the United States of America regarding the
12 interpretation of the TPA.
13 Claimants have taken serious issue with
14 Colombia's reliance on non-disputing party
15 submissions, and have argued that the NDP submission
16 should be ascribed no legal value. In Claimants'
17 view, such agreements should be given no weight under
18 the general rule of interpretation, given a supposed
19 bias by the non-disputing party.
20 Apart from the fact that the Vienna
21 Convention Article 31(3)(a) is explicit to the effect
22 that subsequent agreements between State Parties to a

1 treaty are part of the general rule of interpretation,
2 Claimants' proposal leads to an unacceptable paradox:
3 in this case, the more agreement would mean the less
4 law. No law actually.
5 In the Claimants' case, despite having the
6 highest possible degree of agreement regarding certain
7 provisions in this TPA, such agreement would produce
8 no law in the relationships between the Parties. We
9 truly hope the Tribunal does not support this
10 problematic proposition.
11 With this, I conclude the introductory
12 statement of the Republic of Colombia and kindly ask
13 Mr. Chairman to give the floor to Ms. Claudia
14 Frutos-Peterson from Curtis to continue with our
15 presentation.
16 Thank you for your attention.
17 DR. FRUTOS-PETERSON: Thank you, Ana.
18 Good morning, Members of the Tribunal and
19 everyone else in attendance.
20 Claimants have put [themselves] in an
21 untenable position. They decided to launch a claim
22 against Respondent preemptively, before Colombia has

1 taken any measure that could constitute a breach and
2 having suffered no loss or damage as a result.
3 Their intentions in bringing a claim
4 prematurely are plain. They hope that an
5 international arbitration will dissuade Colombia's
6 authorities, and specifically the CGR, from exercising
7 their constitutional and legal powers.
8 Permitting such an abusive claim to proceed
9 to the merits would not only undermine the legitimacy
10 of investor-State arbitration, but directly contravene
11 principles of law and the express language of the
12 Treaty.
13 It is a well-settled principle that damage
14 is an essential element of a cause of action. In this
15 case, that principle is even more relevant because the
16 two Contracting States expressly agreed that a claim
17 cannot be submitted to arbitration under the Treaty if
18 the claimant has not suffered a loss or damage.
19 That is a hurdle that Claimants cannot
20 escape in this case, with the inevitable consequences
21 that their claim is doomed from the start and must be
22 dismissed in its entirety.

1 The premature nature of Claimants' claims is
2 only the first of many reasons why the Tribunal should
3 dismiss this case.
4 Respondent will go over each one of those
5 reasons later in this Opening Presentation. But
6 before proceeding any further, let us briefly recap
7 the relevant facts for the preliminary objections
8 raised by Colombia.
9 Claimants [sic] FPJVC, which I will refer to
10 as the "Joint Venture," has a contractual association
11 form--it is a contractual association formed by the
12 two other Claimants, Foster Wheeler and Process
13 Consultants, entered into a contract with Reficar to
14 provide consulting services in respect of the
15 management of a project to expand and modernize a
16 refining complex in Cartagena, Colombia.
17 Pursuant to that Services Contract, Reficar
18 reimbursed the Joint Venture for all its costs and
19 expenses in performing the consultant services, and
20 paid the Joint Venture a fixed rate for each manhour
21 worked by the personnel assigned to perform the
22 services, as well as a fixed profit for manhour.

1 The compensation structure set forth in the
2 Contract ensured that the Joint Venture recovered all
3 resources it used to provide the service to Reficar
4 and guaranteed a return linked to the number of hours
5 worked, not to the success or to the failure of the
6 refining project.
7 The works for the expansion and
8 modernization of the refinery were completed after
9 years of delays and billions of dollars in cost
10 overruns, leading the CGR, the Colombian State organ
11 tasked with overseeing and controlling expenditures of
12 public funds, to initiate a fiscal liability
13 proceeding to determine whether there had been an
14 economic damage to the State and, if so, determine the
15 amount of such damage and identify those responsible
16 for causing it.
17 The CGR's investigation led it to formally
18 indict Claimants Foster Wheeler and Process
19 Consultants, as well as other Colombian and foreign
20 juridical and natural persons and fiscal--with fiscal
21 liability.
22 The Indictment Order or, as Claimants call

1 it, the "CGR Charges," was an administrative act of
2 mere procedural character marking the start of one of
3 the mid-stages of the Fiscal Liability Proceeding.
4 The Indictment Order charged 14 individuals
5 and five juridical entities, including Foster Wheeler
6 and Process Consultants, with joint and several
7 liability for the economic damage to the State in
8 connection with the refinery Project.
9 We must stop the story here. This is the
10 moment when the Claimants decided to submit their
11 claim to arbitration despite the fact that the
12 Indictment Order was not a final act, not even at the
13 administrative level, and that--and that at that point
14 in time, Claimants have suffered no loss or damage as
15 a result of Colombia's supposed breaches.
16 As we will discuss in more detail later,
17 this factual snapshot is crucial because determining
18 the ripeness of Claimants' claim turns on whether
19 Respondent has breached an obligation and Claimants
20 had suffered a damage arising out of that supposed
21 breach by the time Claimants filed their Notice of
22 Arbitration.

1 Claimants' prayer for relief in the Notice
2 of Arbitration is reflective of the fact that their
3 claim was not ripe when they brought this case.
4 Because there was no measure capable of constituting a
5 breach and Claimants had suffered no damage arising
6 out of Respondent's supposed breaches, their prayer
7 for relief is forward-looking and completely
8 speculative.
9 They essentially asked the Tribunal for
10 compensation for supposed reputational damages for an
11 offsetting award in an amount equivalent to the total
12 amount of damages established in an eventual ruling
13 with fiscal liability and for an injunction barring
14 the CGR from ever seizing the assets.
15 But under Article 10.26 of the Treaty, the
16 Tribunal cannot award moral or hypothetical damages or
17 grant injunctive relief, to say nothing of the fact
18 that compensating Claimants in an amount equal to the
19 Ruling with Fiscal Liability will give them a huge
20 windfall given that they have not paid a single penny
21 towards satisfying that ruling.
22 It really is astonishing that not only do

1 they not seek compensation for actual damages, but
2 want to make a profit at the expenses of Colombia.
3 As the Tribunal is aware, on April 26, 2021,
4 the CGR ultimately issued a Ruling with Fiscal
5 Liability finding Claimants, as well as other
6 14 fiscal--another 14 others fiscally liable for the
7 damage caused to the Colombian State.
8 The Ruling, which Claimants refer to as the
9 "CGR Decision," came out roughly a year and a half
10 after Claimants submitted their claim to arbitration.
11 That, however, did not resolve Claimants'
12 predicament. Even today, two years after bringing
13 this claim against Colombia, there is still no measure
14 capable of constituting an international wrongful act
15 and [no resulting damages] for Claimants.
16 The truth is, rather than [aid] Claimants'
17 case, what has happened since they submitted the
18 Notice of Arbitration helps defeat it. After bringing
19 their claim, they initiated two acciones de tutela and
20 filed an appeal against the Ruling with Fiscal
21 Liability, materially violating the waiver requirement
22 in Article 10.18.2 of the Treaty.

1 The recent initiation of a conciliation
2 procedure against the CGR is an additional material
3 violation of the waiver. And if Claimants file an
4 annulment action against the Ruling with Fiscal
5 Liability before the court of the administrative
6 adjudicatory jurisdiction, as they have already said
7 they will do if the conciliation fails, then that will
8 constitute a further breach of the waiver for a grand
9 total of five material violations of the waiver.
10 At this point, it is obvious that Claimants'
11 so-called waiver is worthless and has no real effect.
12 Claimants thought they could fulfill the requirement
13 in Article 10.18.2 of the Treaty and engage Colombia's
14 consent to arbitration by playing lip service.
15 In the Notice of Arbitration, they included
16 a waiver saying they will waive their right to
17 initiate or continue local proceedings with respect to
18 the measures alleged to constitute a breach. But they
19 also included a reservation that empties that waiver
20 completely.
21 And on top of that, they have acted, since
22 the outset of these proceedings, as if no waiver

1 existed at all, with the excuse that they are only
2 acting defensively. The waiver, under the Treaty, is
3 categorical and contains no such carve-out.
4 Realizing that the breach of the waiver is
5 deadly to their claim and seeking to continue their
6 participation in local proceedings, in their
7 observations to the U.S. non-disputing party
8 submissions, Claimants now argue that the measure
9 alleged to constitute a breach of the Treaty is the
10 Indictment Order, and not the Ruling with Fiscal
11 Liability or the Fiscal Liability Proceedings more
12 generally.
13 They believe this distinction saves their
14 case because the local proceedings they have initiated
15 and continued refer to the Ruling and the Fiscal
16 Liability Proceedings and not to the Indictment Order,
17 meaning that under their flawed logic, there will be
18 no violation of the waiver.
19 But this belated distinction doesn't aid
20 their case. In the course of these proceedings,
21 Claimants have continuously argued that the action of
22 the CGR during the Fiscal Liability Proceedings since

1 the initiation of the investigation through the
2 Indictment Order and up to the Ruling with Fiscal
3 Liability have violated the Treaty.
4 For example, in their Application for
5 Provisional Measures, Claimants argued that the CGR
6 Decision - and the CGR proceeding as a whole - render
7 Claimants' contractual rights meaningless and violate
8 Claimants' right to fair and equitable treatment.
9 Those are, according to the Claimants, the
10 measure at issue in this case. And so, each one of
11 those actions they initiate or continue locally with
12 respect to the Fiscal Liability Proceedings constitute
13 a violation of the waiver.
14 The maturity of the claim is another issue
15 altogether. As we have already explained, when
16 Claimants initiated this arbitration, which is when
17 the maturity of the claim must be assessed, the Fiscal
18 Liability Proceedings had barely just begun. It is
19 obvious that no breach of an investment treaty, let
20 alone damages, could exist by the mere commencement of
21 an administrative proceeding against an alleged
22 investor.

1 Before addressing each of Respondent's
2 preliminary objections, let us briefly discuss the
3 scope and significance of the non-disputing party
4 submission of the United States, commenting on the
5 meaning of various provisions of the Treaty relevant
6 to deciding those preliminary objections.
7 The Tribunal has before it the common and
8 consistent positions of both Contracting Parties to
9 the Treaty on the interpretation of the provisions at
10 issue in this case.
11 The non-disputing party submission filed by
12 the United States, coupled with Colombia's pleadings,
13 is a subsequent agreement between the parties
14 regarding the interpretation of the treaty or the
15 application of these provisions under Article 31(3)(a)
16 of the Vienna Convention of the Law of the Treaties.
17 Simply put, a subsequent agreement is a
18 consensus between the parties to a treaty, reached
19 after they enter into force, about the interpretation
20 of a treaty--of that treaty or the application of its
21 provisions.
22 Since the parties are the masters of the

1 treaty, such interpretation is, in the words of the
2 International Law Commission's commentary on the
3 Vienna Convention, "an authentic interpretation by the
4 parties which must be read into the treaty for
5 purposes of its interpretation."
6 The International Court of Justice echoed
7 the ILC, stating that "an agreement as to the
8 interpretation of a provision reached after the
9 conclusion of the treaty represents an authentic
10 interpretation by the parties which must be read into
11 the treaty for purposes of its interpretation."
12 As the ILC explained in another report, if
13 the parties to a bilateral investment treaty agree on
14 an interpretation, that interpretation prevails and in
15 itself takes on the nature of a treaty, regardless of
16 its form.
17 Such "an agreement collateral to the treaty
18 [...] must be taken into consideration in interpreting
19 the treaty."
20 The literature is consistent in establishing
21 that a subsequent agreement does not require any
22 special form or formality, a view that is shared by

1 several investment tribunals. No single common act is
2 required, as Claimants wrongfully allege.
3 In addition to being a subsequent agreement,
4 the declarations of the Contracting Parties, in this
5 case and in other cases, are also subsequent practice
6 in the application of the Treaty pursuant to
7 Article 31(3)(b) of the Vienna Convention.
8 In fact, several investment tribunals have
9 stated that the submissions of the Contracting Parties
10 constitute subsequent practice regarding the
11 interpretation of the provision of a treaty that is
12 "entitled to be accorded considerable weight."
13 Colombia and the United States have
14 consistently maintained the same positions, not only
15 in this case but also in other cases, interpreting
16 this very same Treaty or other investment treaties
17 that are similar or identically-worded.
18 The Contracting Parties to the Treaty
19 envision[ed] the participation of the non-disputing
20 State for good reason. They wanted to make sure that
21 the interpretation and application of the provisions
22 of the Treaty by the investment tribunals were

1 consistent with the understanding of both Contracting
2 Parties.
3 Claimants' sole argument against giving
4 weight to the submissions of the United States seems
5 to be that a non-disputing State party is not
6 impartial because it is concerned it will face
7 investment claims, and so it will push for a limited
8 interpretation of the Treaty provisions. That
9 argument is really nonsensical.
10 If the Contracting Parties were concerned
11 about facing investment claims, they would have not
12 concluded the Treaty in the first place. They also
13 have the authority to amend or terminate the Treaty if
14 they--if they so wished.
15 What the Contracting Parties intended to
16 achieve by allowing the participation of the
17 non-disputing State in arbitration under the Treaty
18 was to avoid interpretations of Treaty provisions that
19 do not reflect their understanding.
20 Realizing that the United States'
21 non-disputing party submission in the case and in
22 other cases are damaging to their claim, Claimants try

1 to undermine the importance by claiming that
2 Colombia's preliminary objections are almost
3 exclusively based on those submissions, implicitly
4 suggesting that they contain interpretative positions
5 that are isolated. Claimants are clearly wrong.
6   Respondent's preliminary objections are
7 based on the plain language of the Treaty, supported
8 by the U.S. non-disputing party submission on the
9 interpretation of the Treaty and by more than
10 300 legal authorities.
11   In short, as much as Claimant disliked the
12 submissions of the United States and the consensus
13 reached by the Contracting Parties regarding the
14 interpretation of the provisions of the Treaty, they
15 constitute an authentic interpretation that has
16 binding force.
17   Let us now turn to Respondent's objections.
18 Respondent has put forth two different categories of
19 preliminary objections.
20   On the one hand, Respondent has raised an
21 objection under Article 10.20.4 of the Treaty that, as
22 a matter of law, the claim submitted by Claimants is

1 not a claim for which an award may be made in their
2 favor.
3 That is because Claimants failed to comply
4 with the conditions set forth in Article 10.16.1 of
5 the Treaty for the submission of a claim to
6 arbitration and because the relief they seek is not a
7 relief that the Tribunal can grant under Article 10.26
8 of the Treaty.
9 In addition, Respondent raised
10 five jurisdictional objections that the Tribunal
11 decided to hear as a preliminary matter in conjunction
12 with Respondent's 10.20.4 objection.
13 First, Respondent raised an objection that
14 the Tribunal lacks jurisdiction ratione materiae
15 because Claimants do not have a protected investment
16 under either the Treaty or the ICSID Convention, given
17 that the contract they entered into is a pure
18 commercial contract for the provision of services.
19 Second, Respondent raised an objection that
20 the Tribunal lacks jurisdiction ratione personae over
21 Claimant FPJVC, the Joint Venture, because that
22 Claimant doesn't qualify as a "juridical person" under

1 Article 25(2)(b) of the ICSID Convention.
2 Third, Respondent raised an objection that
3 the Tribunal lacks jurisdiction ratione voluntatis
4 with respect to Claimants Foster Wheeler and Process
5 Consultants because such Claimants did not file a
6 Notice of Intent as required under Article 10.16(2) of
7 the Treaty.
8 Fourth, Respondent raised an objection that
9 the Tribunal lacks jurisdiction ratione voluntatis
10 with respect to the claims for breach of the Treaty's
11 FET obligation because Foster Wheeler and Process
12 Consultants made allegations to the same effect before
13 Colombian courts and, pursuant to Annex 10-G of the
14 Treaty, such an election shall be definite
15 And finally, Respondent raised an objection
16 that the Tribunal lacks jurisdiction ratione
17 voluntatis because Claimants did not submit a valid
18 and effective waiver pursuant to Article 10.18.2(b) of
19 the Treaty and because they have acted inconsistently
20 with that waiver in at least four instances.
21 As I said, they have filed two acciones de
22 tutela before Colombian courts, an appeal against the

1 Ruling with Fiscal Liability before the Fiscal Chamber
2 of the CGR, and just recently they initiated a
3 conciliation procedure before the Procuraduría, which
4 is a procedural pre-condition for initiating an
5 annulment action before Colombian courts against the
6 Ruling with Fiscal Liability.
7 Members of the Tribunal, drawing a
8 distinction between the two categories of preliminary
9 objections raised by Respondent is crucial because the
10 treatment of the facts and the standard applicable to
11 each category is entirely different.
12 To rule on Respondent's 10.20.4 objection,
13 the Tribunal must look to Claimants' Notice of
14 Arbitration and decide whether the claim thereby
15 submitted is a claim for which an award can be made in
16 Claimants' favor, assuming as true their factual
17 allegations in that Notice of Arbitration.
18 To rule on Respondent's other jurisdictional
19 and admissibility objections, the Tribunal must look
20 at the facts, make any relevant factual
21 determinations, and decide each objection, taking into
22 account that Claimants have the burden of proving all

1 facts supporting their case on jurisdiction.
2 In their written and oral submissions,
3 Claimants consistently ignore this key distinction and
4 conflate the two standards. They want this Tribunal
5 to take them at their word, presuming as true every
6 single one of their allegations, both factual and
7 legal. Unfortunately for Claimants, that is not how
8 things work.
9 We will discuss each standard separately
10 later in this Opening Presentation before addressing
11 each category of preliminary objections. But I want
12 to leave you with one final thought before we move on.
13 Claimants have employed a truly questionable strategy
14 in these proceedings, constantly undermining
15 Respondent's due process rights and increasing the
16 cost of defending this case.
17 First, Claimants have made a habit of
18 speaking out of turn and out of scope. The record is
19 full with instances where Claimants exceeded the
20 bounds of the relevant submissions, trying to
21 impermissibly include through the back door additional
22 arguments or responses to Colombia's positions. Most

1 noteworthy is Claimants' Request for Provisional
2 Measures and an Emergency Temporary Relief, a 64-page
3 document accompanied by four witness statements and 79
4 exhibits, which was plainly a memorial on the merits
5 poorly disguised as an application for interim
6 measures. Just a few weeks ago, Claimants took
7 advantage of the opportunity to provide comments on
8 the U.S. submission to come up with new arguments in
9 an attempt to fix their flawed claim.
10 Second, Claimants have made arguments that
11 fly in the face of the language of the Treaty and
12 continuously shifted their positions as they go along.
13 Two examples easily come to mind. Claimants filed a
14 Request for Provisional Measures seeking to enjoin the
15 application of the same measure alleged to constitute
16 a breach of this Treaty, directly contradicting
17 Article 10.20.8 of the Treaty.
18 In fact, their shifting stance as to the
19 measures alleged to constitute a breach, which we
20 discussed earlier, is a prime example of how Claimants
21 have moved the goalposts at every turn in this case.
22 Another example is their expropriation

1 claim, which has changed significantly since the case
2 has started. They started out claiming that Colombia
3 had expropriated two specific clauses of the Services
4 Contract. After Respondent explained why such an
5 expropriation claim could not be succeeded, Claimants
6 now offer a very different formulation.
7 In fact, Respondent will not be at all
8 surprised if this afternoon, during their Opening
9 Statements, Claimants offer a completely new theory of
10 the case, raising entirely new arguments for the first
11 time since this arbitration started.
12 If that were to happen, and Respondent,
13 unfortunately, thinks that it will happen, Colombia's
14 due process right will be severely impaired.
15 Logically, Colombia can only defend against Claimants'
16 claims as they originally pleaded them. And while
17 their tactics are disruptive and violate Colombia's
18 rights of defense, they only reveal that their case is
19 flawed and bound to fail.
20 This claim should not have started in the
21 first place, and has certainly gone far enough.
22 Colombia requests that the Tribunal uphold

1 Respondent's preliminary objections and dismiss this
2 case in its entirety.
3 I will now address Colombia's 10.20.4
4 objection.
5 Article 10.20.4 of the Treaty provides that
6 the Tribunal shall address "as a preliminary question
7 any objection by the respondent that, as a matter of
8 law, a claim submitted is not a claim for which an
9 award in favor of the claimant may be made under
10 Article 10.26."
11 This preliminary objection is intended to
12 dismiss, at an early stage of the arbitral
13 proceedings, legally defective claims such as the one
14 filed by Claimants. Before we discuss why Claimants'
15 claim is not a claim for which the Tribunal can make
16 an award in their favor, let's look into the standard
17 applicable to deciding on Respondent's 10.20.4
18 objection.
19 Article 10.20.4(c) states that "in deciding
20 an objection under this paragraph, the tribunal shall
21 assume to be true claimant's factual allegations in
22 support of any claim in the notice of arbitration."

1 The first thing to note about this standard
2 is that the presumption of truthfulness in
3 Article 10.20.4(c) only applies to Claimants' factual
4 allegations. It doesn't apply to Claimants' legal
5 allegations or conclusions that are unsupported by
6 factual allegations.
7 This is a hotly debated issue between the
8 Parties because Claimants want the Tribunal to take
9 every single line of argument as a factual allegation.
10 But not every allegation made by Claimant is a factual
11 allegation that the Tribunal must accept as true.
12 Claimants' attempt to unduly expand the
13 limited scope of this presumption of truthfulness must
14 fail. Let's look at a couple of examples. Claimants
15 state, and I quote: "FPJVC was not a fiscal manager
16 under Law 610, and there is no colorable basis upon
17 which it could be asserted to be one."
18 This is not a factual allegation. Whether
19 FPJVC qualifies as a fiscal manager is a legal
20 allegation that the Tribunal must not and cannot
21 accept as true. I will give you another example.
22 Claimants' state that if the [investigated] party is

1 not a fiscal manager, the CGR does not have
2 jurisdiction to initiate a fiscal liability
3 proceeding.
4 That is also not a factual allegation but a
5 legal allegation. Let us see one example of a true
6 factual allegation made by Claimants. Claimants state
7 that "CB&I eventually completed the Project in
8 July 2016 according to specifications, but at a total
9 cost of about US$6.1 billion - nearly three years late
10 and more than double its original estimated cost."
11 Now, that is a factual allegation. It is an
12 allegation about a fact, about an event or thing that
13 may have existed or occurred.
14 Under Paragraph C, only the factual
15 allegations in the Notice of Arbitration benefit from
16 a presumption of truthfulness. As the tribunal in
17 *Pac Rim v. El Salvador* correctly pointed out, the
18 presumption of truthfulness is limited to the factual
19 allegations raised by Claimants in their Notice of
20 Arbitration and does not extend to factual allegations
21 made elsewhere.
22 Claimants, of course, rally against this

1 rule, accusing Respondent of being formalistic and
2 arguing that it is an "accepted principle that a
3 tribunal should take account of developments since the
4 case was commenced."
5 But Claimants conflate what are clearly two
6 separate issues. The presumption of truthfulness in
7 Paragraph C applies only to factual allegations in the
8 Notice of Arbitration because it is the notice that
9 Claimants submit their claim and, thus, it is where
10 the Tribunal must turn to decide, over an objection,
11 that a claim submitted is not a claim for which an
12 award in favor of the claimants may be made.
13 A separate issue is whether developments
14 after the submission of the claim can be considered by
15 the Tribunal in deciding the merits. The issue is
16 currently not before--that issue is currently not
17 before this Tribunal. In addition, Respondent is not
18 saying that Claimants may not offer clarifications
19 after filing the Notice of Arbitration, but those
20 supplemental facts do not benefit from a presumption
21 of truthfulness.
22 Finally, in deciding Respondent's

1 Article 10.20.4 objection, the Tribunal may consider
2 other relevant facts that are not in dispute between
3 the Parties.
4 The United States shares this interpretation
5 of Article 10.20.4(c). In the Rejoinder, Claimants
6 argue that in order to uphold Respondent's 10.20.4
7 objection, the Tribunal has to find that Claimants'
8 claims are certain to fail. But that standard is
9 nowhere in the text of Article 10.20.4. In fact, the
10 reality is that the tribunal in *Corona vs. Dominican*
11 *Republic* dismissed a claim involving a factual pattern
12 very similar to this case where the claimant was
13 challenging an administrative act that had not yet
14 been subject to judicial review.
15 The *Corona* tribunal dismissed the claim
16 under a provision identical to Article 10.20.5 of the
17 Treaty, which is a more limited review mechanism than
18 Article 10.20.4 due to its expedited nature.
19 What the Tribunal needs to do here is to
20 determine whether the claim presented by Claimants in
21 the Notice of Arbitration is a claim that as a matter
22 of law can end with an award in their favor.

1 The simple answer to that question is no.
2 As a matter of law, Claimants' claim is not a claim
3 for which an award may be made in their favor for two
4 reasons. First, because Claimants failed to comply
5 with the conditions set forth in Article 10.16.1 of
6 the Treaty for the submission of a claim to
7 arbitration and, second, because the relief they seek
8 is not a relief that the Tribunal can grant under
9 Article 10.26 of the Treaty.
10 We will review each of these reasons
11 separately. Let's start with the first of those
12 reasons. Under Article 10.16.1 of the Treaty, in
13 order for an investor, either on its own or on
14 behalf--on its own behalf or on behalf of an
15 enterprise that [it] owns or controls directly or
16 indirectly to submit a claim to arbitration under the
17 Treaty, two requirements need to be met. (A) that
18 there be a breach of a substantive obligation under
19 the Treaty or an investment authorization or
20 investment agreement; and (B) that the claimant or
21 enterprise has incurred loss or damage by reason of,
22 or arising out of, such breach.

1 Failure to comply with these essential
2 requirements affects not only the admissibility of the
3 claim submitted to arbitration, but also the consent
4 itself since Article 10.17.1 of the
5 Treaty--since--since, according to Article 10.17.1 of
6 the Treaty, the Contracting Parties only consent to
7 the submission of a claim to arbitration under
8 Section--under that Section in accordance with this
9 Agreement.
10 That was expressly acknowledged by the
11 tribunal in *UPS vs. Canada*, when they were
12 interpreting a very identical provision.
13 Whether the requirements of Article 10.16.1
14 of the Treaty for submitting a valid claim to
15 arbitration are met and, by extension, whether a claim
16 is ripe, must be assessed at the time the claim is
17 submitted to arbitration.
18 That was the holding in *Glamis v. the U.S.*,
19 where the tribunal interpreted a provision of NAFTA
20 that is almost identical to Article 10.16.1 of the
21 Treaty. That is also the position of the United
22 States in various of the non-disputing party

1 submissions and, in fact, in the submissions that the
2 United States made in this case. It clearly says so.
3 I quote: "The breach and loss must have
4 already occurred prior to the submission of a claim to
5 arbitration." And they continue saying: "No claim
6 based solely on speculation as to future breaches or
7 future loss may be submitted."
8 That is why events or damages that occur
9 after the initiation of the arbitration are not
10 relevant to determine whether the requirements of
11 Article 10.16.1 of the Treaty are met. In their
12 Rejoinder, Claimants argue that the Tribunal should
13 take account of developments since the case was
14 commenced. That is totally incorrect.
15 As the tribunal in *Glamis* put it, the issue
16 of ripeness turns on the determination of whether the
17 challenged measure had effected harm by the time
18 Claimants submitted its claim to arbitration.
19 Therefore, in determining the ripeness of Claimants'
20 claim, the Tribunal must look at the facts as they
21 stood at the time Claimants filed their Notice of
22 Arbitration.

1 Claimants take issue with the actions of the
2 CGR within the context of the Fiscal Liability
3 Proceedings. So what had happened in the Fiscal
4 Liability Proceedings when Claimants submitted their
5 claim to arbitration? Let's look.
6 On your screen--on your screen, we are
7 displaying a timeline [of] the main dates and events
8 of the dispute. In the middle is the filing of the
9 Notice of Arbitration on December 6, 2019, which is
10 the key date for purposes of determining whether
11 Claimants complied with the requirement of
12 Article 10.16.1 of the Treaty.
13 The facts to your right of the screen, which
14 occurred after Claimants filed a Notice of
15 Arbitration, are wholly irrelevant to the question of
16 ripeness.
17 Assuming as true Claimants' factual
18 allegations in the Notice of Arbitration, the Tribunal
19 must answer two key questions. One, by December 6,
20 2019, was there a prima facie breach of a substantial
21 obligation under the Treaty or of an investment
22 authorization or investment agreement?

1 And, two, by December 6, 2019, had Claimants
2 incurred a prima facie loss or damage by reason of, or
3 arising out, of such a breach?
4 The answer to both questions is a resounding
5 "no." By the time Claimants submitted the Notice of
6 Arbitration, there was no measure capable of
7 constituting a prima facie breach, and Claimants have
8 suffered no prima facie loss or damage as a result.
9 Today, more than two years after this case started,
10 the situation is still the same. There is no measure
11 capable of constituting a breach and no associated
12 loss. The claim is still not ripe.
13 Let's start with the measure under this
14 article. Why do we say that Claimants' claim is
15 premature? Because when Claimants initiated this
16 arbitration, there was no measure capable of
17 constituting a breach of a substantive obligation of
18 the Treaty and causing damage to Claimants.
19 At the time the Notice of Arbitration was
20 filed, the Fiscal Liability Proceeding was mid-way and
21 the CGR had not made--had made no final determination
22 on Claimants' potential fiscal liability.

1 When the Claimants decided to initiate this
2 arbitration, the CGR had merely issued the Indictment
3 Order or the CGR Charges, to take Claimants'
4 terminology.
5 As Respondent has explained repeatedly, an
6 indictment order is an administrative act whereby the
7 CGR identifies the allegedly fiscally liable parties
8 kicking off an evidentiary period during which the CGR
9 will gather the evidence necessary to rule on the
10 fiscal liability of the parties named in such
11 Indictment Order.
12 Because the Indictment Order is not an
13 administrative act--it is an administrative act of
14 mere procedural nature that does not define any legal
15 situation, it cannot possibly breach Colombia's
16 international obligation under the Treaty.
17 The Ruling with Fiscal Liability is also not
18 a measure capable of constituting a breach of
19 Colombia's substantive obligation. It was rendered
20 well after Claimants initiated this arbitration and,
21 thus, cannot be taken into account in deciding whether
22 Claimants' claim was ripe when commenced.

1 But even if the Tribunal were to take the
2 Ruling into account, such Ruling cannot constitute a
3 breach of the Treaty because it is also an
4 administrative decision that is subject to judicial
5 review, and such review has yet to take place.
6 As the United States rightly observes in its
7 submission, and I quote: "It is well-established that
8 the international responsibility of States may not be
9 invoked with respect to non-final judicial acts."
10 "[N]on-final judicial acts cannot be the basis for
11 claims under" the Treaty. Indeed, not every
12 mistake by an authority can [give] rise to an
13 international wrongful act resulting in State
14 responsibility. A State cannot possibly ensure the
15 legality and adequacy of every one of the decisions
16 taken by authorities at every level. But States,
17 including Colombia, have mechanisms in place to
18 correct those mistakes. And until those mechanisms
19 are allowed to operate, and if they ultimately fail,
20 it cannot be said that there has been an act of a
21 State capable of triggering international
22 responsibility.

1 In this case, taking Claimants' factual
2 allegations as true, there was not even a final
3 administrative decision rendered by Colombia's
4 authorities at the time that this arbitration was
5 initiated. Thus, it is impossible for a treaty breach
6 to have existed at that time. Even now that there is
7 a Ruling with Fiscal Liability, which is final at the
8 administrative level, there is still no measure
9 capable of constituting a breach of Colombia's
10 obligations under the Treaty because the Ruling with
11 Fiscal Liability is subject to judicial review.
12 Claimants take issue with Respondent's
13 position alleging that Colombia is reading an
14 exhaustion of local remedies into the Treaty that the
15 Treaty doesn't contain. But Claimants' argument is a
16 red herring. The fact that the Treaty doesn't
17 procedurally require the exhaustion of local remedies
18 before initiating a treaty claim doesn't mean that
19 exhausting local remedies is not [substantively]
20 required in order to find that there is a violation of
21 certain obligations of the Treaty.
22 It is simply not possible that a State could

1 be found internationally liable by an international
2 tribunal when domestic courts have not yet been able
3 to review an administrative decision, let alone when
4 there was no definite administrative ruling when
5 Claimants filed their claim.
6 As the United States correctly points out in
7 the submission, there has to be a "final act that is
8 sufficiently definite to implicate a state
9 responsibility." In this respect, this case is
10 analogous to *Corona v. Dominican Republic* where the
11 tribunal found that a treaty breach could not exist
12 before the claimant pursued judicial remedies under
13 domestic law.
14 As the tribunal held in *Corona*, "[w]hen a
15 claim is successfully made out international law, it
16 is because the International Court or Tribunal accepts
17 that the Respondent's legal system as a whole has
18 failed to accord justice to the Claimant."
19 The premature nature of Claimants' claims
20 dooms their case. Arbitral tribunals have
21 consistently rejected [claims] for alleged breaches of
22 treaty obligations when such claims have been raised

1 prematurely.

2 Claimants were not able to distinguish any
3 of the numerous decisions cited by Colombia in these
4 proceedings. As the Tribunal reasoned in *Achmea v.*
5 *Slovakia II*, a tribunal should not "engage in a
6 speculative exercise, looking into the future to
7 examine a State conduct that has not yet
8 materialized."

9 In short, since there was no measure capable
10 of constituting a breach of any of the substantive
11 obligations of the Treaty at the time Claimants filed
12 the Notice of Arbitration, Claimants' claims are
13 premature and could not be brought under
14 Article 10.16.1 of the Treaty.

15 Let us now turn to the two specific
16 requirements under Article 10.16.1. I want to start
17 with the second one. For an investor to submit a
18 claim to arbitration under the Treaty, Claimants must
19 have incurred loss or damage at the time that the
20 Notice of Arbitration was filed by reason of, or
21 arising out of, the supposed breach of the Treaty or
22 investment agreement.

1 This express requirement reflects a
2 well-settled principle of law that damage is a key
3 element of cause of action and standing to bring a
4 claim. This position is shared by the United States,
5 who in this non-disputing party submission in this
6 case has stated that "there can be no claim under
7 Article 10.16.1 until an investor has suffered harm
8 from an alleged breach."
9 Again, this is--the issue is one of
10 ripeness. The Contracting Parties to the Treaty
11 wanted to make sure that claims that had not yet
12 ripened because no damage had occurred could not
13 proceed to arbitration. Well, on December 6, 2019,
14 when Claimants filed the Notice of Arbitration,
15 Claimants had not incurred a prima facie loss or
16 damage as a result of Colombia's supposed breach of
17 the Treaty.
18 Let us look again to our timeline. Even
19 taking Claimants' factual allegations as true, none of
20 the actions of the CGR before the Notice of
21 Arbitration has caused harm to Claimants. And how
22 could they, given that the Indictment Order is an

1 administrative act of mere procedural character?
2 That's where the analysis should stop because, as we
3 have stated, the maturity of a claim is assessed at
4 the time Claimants initiated arbitration.
5 But even if the Tribunal were to look beyond
6 December 6, 2019, the conclusions would be the same.
7 The Ruling with Fiscal Liability has not caused a
8 prima facie harm on Claimants, and any potential harm
9 it may cause is completely hypothetical and
10 speculative. That is because of the joint and several
11 nature of the payment obligation in that Ruling, and
12 the huge difficulties faced by the CGR in attempting
13 to collect payment from fiscally liable persons who,
14 like Claimants, have no assets in Colombia.
15 Claimants know full well that they have not
16 suffered any damages, and that without damages they
17 have no claim under Article 10.16.1. That is why they
18 have tried desperately to fill in that gap, by arguing
19 that they have suffered reputational damages and by
20 trying to manufacture new categories of damages; that
21 is, their legal fees and costs in defending themselves
22 in the Fiscal Liability Proceedings.

1 On the one hand, Claimants assert that they
2 have suffered reputational damages, but have offered
3 no facts in support of the assertion. What is more,
4 Claimants have not shown prima facie that the
5 reputational damages they claim arise out of
6 [Colombia's] supposed breaches of the Treaty.
7 In fact, Colombia has shown the opposite:
8 that any reputational damages that Claimants may have
9 suffered do not stem from Claimants' involvement in
10 the Fiscal Liability Proceeding, which is not even
11 criminal in nature, but from the more serious
12 investigations of corruptions and bribery that Foster
13 Wheeler and Claimants' parent companies have been
14 involved in in very jurisdictional across --various
15 jurisdictions across the globe.
16 Claimants themselves admit in the Rejoinder
17 that they were never charged with corruption or fraud
18 in Colombia. Claimants brush aside the investigations
19 to their parent companies calling them irrelevant
20 because the entities implicated in those cases are not
21 parties to this case. That argument cannot be taken
22 seriously since many investigations have named

1 specifically branches of Amec Foster Wheeler.
2 On the other hand, their legal fees and
3 costs in defending themselves in the Fiscal Liability
4 Proceedings are not considered damages. Under
5 Colombian law, attorneys' fees and legal costs are
6 ordinary legal burdens to be borne by Claimants as
7 part of their costs of doing business in Colombia, not
8 compensable damages. If legal fees and costs were
9 considered compensable damages and the State were to
10 be--and the State were to reimburse every person it
11 investigates for the legal fees and costs, the State
12 could never launch an investigation.
13 Moreover, as explained by the *Chevron v.
14 Ecuador* tribunal, legal costs incurred in local
15 proceedings would have been incurred in any event,
16 regardless of the alleged breach of the treaty, but,
17 thus, there cannot be a causal link between those
18 legal costs and the alleged breach of the treaty.
19 In any event, Claimants cannot seriously
20 think that they can comply with the ripeness
21 requirement in Article 10.16.1 by invoking their legal
22 fees and costs in the Fiscal Liability Proceedings as

1 damages arising out of Colombia's supposed breaches of
2 the Treaty.
3 A simple hypothetical reveals that
4 Claimants' characterizations of their legal fees and
5 costs as damages is merely pre-textual, designed to
6 artificially check the box of Article 10.16.1.
7 Let's imagine a scenario where the CGR has
8 started investigating Claimants, but ultimately
9 decided not to charge them with fiscal liability.
10 Would Claimants start an international arbitration
11 seeking to recover – [as] damages - the legal fees and
12 costs associated with their involvement in the
13 preliminary investigation or even though--even though
14 they emerged victorious from that investigation? Of
15 course they wouldn't.
16 Claimants also argue that they satisfied the
17 second requirement in Article 10.16.1 because this is
18 a case of future damages and the tribunal in *Mobil v.*
19 *Canada* made clear that future damages come within
20 NAFTA Article 1116, which is essentially similar to
21 Article 10.16.1 of the Treaty.
22 In its Reply, Respondent extensively

1 addressed the discussion in *Mobil* and show why it
2 doesn't assist Claimants in this case. Essentially,
3 in *Mobil*, the *Mobil* tribunal defined future damages as
4 damages crystallizing and becoming payable sometime in
5 the future that result from a breach that began in the
6 past and continued.
7 We have a totally different scenario in this
8 case. Claimants have no future damages, no breach has
9 occurred, and so no resulting damages have begun.
10 Their damages are purely hypothetical. There is
11 absolutely no certainty that there will be--that they
12 will pay a single cent, either voluntarily or
13 forcibly, in satisfaction of the Ruling with Fiscal
14 Liability.
15 One final thought on the lack of loss [or]
16 damage in this case. Claimants believe that because
17 Article 10.20.4(c) provides that the Tribunal must
18 assume as true their factual allegations, then, to
19 satisfy the requirements in Article 10.16.1, it is
20 enough for them to simply state that they have
21 suffered loss.
22 To accept Claimants' position will be

1 depriving Article 10.16.1 of meaning because a
2 claimant could simply state--could simply satisfy the
3 requirements set forth in that Article by alleging
4 that there is a breach, there is a damage, and that
5 there is costs--a causal link between the two.
6 The Tribunal must make its own prima facie
7 determination on whether damages exist, and cannot
8 simply take Claimants' allegations that they have
9 suffered reputational damages as true.
10 That's not a factual allegation. It's a
11 mere conclusion unsupported by any relevant factual
12 allegations that doesn't benefit from a presumption of
13 truthfulness.
14 Mr. President, if you consider it
15 appropriate, we can now make a break and then continue
16 with our Opening Presentation.
17 Thank you very much.
18 PRESIDENT NUNES PINTO: Okay. Thank you,
19 Mrs. Frutos-Peterson.
20 We have scheduled a 30-minute break. So we
21 will be back at 10:40. Okay?
22 (Brief recess.)

1 PRESIDENT NUNES PINTO: So, you can start,
2 Ms. Ordoñez.
3 DR. FRUTOS-PETERSON: Yes, we can--we can
4 start. Thank you.
5 PRESIDENT NUNES PINTO: Okay. So, you still
6 have one hour and 20 minutes. Oh, sorry.
7 MR. SILLS: I apologize. Before we begin,
8 we have a small housekeeping matter. Over the break,
9 we noticed that the copy of this presentation provided
10 electronically to us on the ICSID file-sharing
11 platform contains what appears to be a series of notes
12 at the end that are not in the printed copy and are
13 not in what's being displayed on the screen here. I
14 assume those are private.
15 DR. FRUTOS-PETERSON: They were not intended
16 to be shared.
17 MR. SILLS: And I wanted to assure you that
18 we have not read them in any way. But I think it
19 would be appropriate if a clean copy were to be
20 provided and substituted.
21 DR. FRUTOS-PETERSON: Well, Bob, thank you.
22 Thank you so much. We apologize for that. And, of

1 course, thank you for letting us know.
2 So, yes, we will ask our team, probably they
3 are listening to us, to remove that presentation from
4 the box. Or maybe, Marisa, you could--yeah, you can
5 delete it.
6 THE SECRETARY: I can delete it now.
7 DR. FRUTOS-PETERSON: Yes. And we can go
8 ahead and upload it. Thank you so much.
9 Thank you. Appreciate it.
10 PRESIDENT NUNES PINTO: Thank you.
11 Well, you still have one hour and 20 minutes
12 to complete your presentation.
13 DR. FRUTOS-PETERSON: Thank you,
14 Mr. President. Mr. Fernando Tupa will continue with
15 our Opening.
16 PRESIDENT NUNES PINTO: Okay.
17 MR. TUPA: Good morning, Members of the
18 Tribunal. I will now address the absence of a prima
19 facie breach in this case, as well as the rest of
20 Respondent's arguments under Article 10.20.4.
21 I want to go back to the two requirements
22 under Article 10.16.1 of the Treaty. We have covered

1 the second requirement. Now let's look at the first.
2 The first requirement under Article 10.16.1
3 is that there would be a breach of a substantive
4 obligation of the treaty, an investment authorization,
5 or an investment agreement at the time of submission
6 of the claim.
7 On the date of the Notice of Arbitration,
8 assuming as true all the factual allegations put
9 forward by Claimants in such notice, there could not
10 have been such a breach. Let's discuss the potential
11 breach of the Treaty's substantive obligations first.
12 Claimants have failed to establish in their
13 Notice of Arbitration that their claims constitute a
14 prima facie violation of the Treaty's substantive
15 obligations. Claimants complain about Colombia's
16 prima facie analysis as a matter of principle,
17 suggesting that Respondent is asking this Tribunal to
18 evaluate the claims on the merits or turn these
19 objections into a mini trial.
20 To be clear, Colombia is not asking this
21 Tribunal to evaluate the merits of Claimants' claims
22 or to make any factual determinations about contested

1 issues, as they wrongly suggest. Rather, Colombia
2 requests that the Tribunal analyze whether Claimants'
3 claims are legally defective.
4 Respondent is calling on this Tribunal to
5 determine whether, assuming as true the factual
6 allegations in their Notice of Arbitration, there
7 could potentially be a breach of a substantive
8 obligation of the Treaty at the time Claimants
9 initiated this arbitration.
10 If the answer is no, then the Tribunal
11 should uphold Respondent's 10.20.4 objection and
12 reject the claim in its entirety due to Claimants'
13 failure to comply with the requirements in
14 Article 10.16.1.
15 Obviously, in order to determine whether a
16 particular set of facts are capable of constituting a
17 breach of a treaty provision, the Tribunal will first
18 have to analyze the meaning and scope of these
19 provisions. There is nothing impermissible about this
20 type of review. It is an exercise that is perfectly
21 within the scope of review allowed under
22 Article 10.20.4 of the Treaty.

1 As the tribunal in *Corona v. Dominican*
2 Republic observed, an expedited procedure does not
3 preclude a claimant--does not preclude a
4 tribunal--sorry--from considering an issue going to
5 the substance of a case if the tribunal finds that it
6 is appropriate to consider such an issue based on the
7 facts as pleaded by the Claimant, and, in particular,
8 when its task is to interpret legal provisions.
9 Simply put, Colombia submits that Claimants'
10 claims, even if the factual allegations advanced in
11 their Notice of Arbitration were true, are not capable
12 of constituting a breach of the Treaty.
13 Besides taking issue with Respondent's prima
14 facie analysis generally, Claimants also dispute
15 Respondent's prima facie analysis of their specific
16 claims. According to Claimants' flawed logic, they
17 have made a prima facie case of breach because they
18 have claimed a breach and Respondent has failed to
19 prove that there was no breach.
20 But that's not how this works. A claimant
21 has to formulate claims that are legally plausible on
22 first impression, that pass muster on a prima facie

1 basis. In other words, the question is: Taking
2 Claimants' factual allegations as true, have they made
3 a case for a breach of the Treaty's obligations?
4 The answer is no, as we have demonstrated in
5 our submissions and we will show now.
6 Let's start with their claim of breach of
7 FET. Claimants have not established a prima facie
8 breach of the FET obligation for several reasons.
9 The first of those reasons is that
10 Article 10.5 of the Treaty only applies to
11 investments, not to investors. And all of Claimants'
12 claims pertain to alleged actions by Colombia that
13 affected investors.
14 Article 10.5.1 of the Treaty unequivocally
15 provides that: "Each party shall accord to covered
16 investments treatment in accordance with customary
17 international law, including fair and equitable
18 treatment and full protection and security."
19 The text of this provision is clear and
20 unambiguous. The protection is only granted to
21 covered investments, which is a defined term in the
22 Treaty, not to investors.

1 The language of this provision stands in
2 stark contrast with the language contained in the
3 national treatment and MFN obligations under the
4 Treaty, which protect both investors and covered
5 investments.
6 An interpretation of the FET provision in
7 accordance with Article 31 of the Vienna Convention,
8 namely, pursuant to the ordinary meaning of its terms
9 in their context, does not leave room for any other
10 interpretation.
11 Respondent submits that to read into the
12 provision terms that it does not contain would be no
13 longer to interpret it but, instead, to rewrite it,
14 which the Tribunal cannot and should not do.
15 That this provision only protects
16 investments is also the understanding of the United
17 States, the other Contracting Party to the Treaty. In
18 its non-disputing party submissions interpreting the
19 meaning of this very same treaty provision, the U.S.
20 has repeatedly held that "Article 10.5 requires the
21 Parties to accord 'fair and equitable treatment' and
22 'full protection and security' only to covered

1 investments, not to investors."
2 What's more, the law firm representing
3 Claimants advanced the exact same argument when they
4 were representing Mexico in another investment
5 arbitration case. In *Lion v. Mexico*, the respondent
6 argued that Article 1105 of NAFTA, which is identical
7 to the provision at issue here, "extends protection to
8 investments, but not to investors."
9 In certain cases, the difference may be
10 immaterial since the alleged measure could affect both
11 the investment and the investor. However, in this
12 case, none of the allegations made by Claimants in
13 their Notice of Arbitration are related in any way to
14 a Services Contract, what Claimants' claim as their
15 covered investment, but, rather, to actions that could
16 have only affected the investors.
17 Thus, even if Claimants' factual allegations
18 were true, the FET standard could not have been
19 breached since Colombia's alleged actions could only
20 have affected the investor, not the investment.
21 Claimants concede that the FET standard
22 under the Treaty is limited to the minimum standard of

1 treatment under customary international law.
2 However, the Parties do not agree on whether
3 the minimum standard has evolved since *Neer*, and, in
4 particular, on whether the minimum standard includes
5 the concept of legitimate expectations, which clearly
6 it does not, as the International Court of Justice
7 confirmed in the landmark case *Bolivia vs. Chile*.
8 But the Tribunal doesn't need to get caught
9 up in this discussion about the standard since
10 Claimants' claim does not even meet their own version
11 of the standard.
12 For instance, in order to consider whether
13 legitimate expectations exist, those purported
14 expectations must be objectively analyzed at the time
15 of making the investment, must be reasonable, and must
16 be based on specific promises to the investor.
17 Claimants do not even allege in their Notice
18 of Arbitration that there was a specific promise made
19 by the government official at the time of making their
20 investment upon which they relied in making said
21 investment.
22 Thus, none of the factual allegations made

1 by Claimants could have violated any alleged
2 legitimate expectations.
3 With the exception of a denial of justice
4 claim, which we will address next, Claimants have not
5 identified any other theory or element of FET that
6 might have been breached in this case.
7 None of Claimants' factual allegations could
8 arguably constitute a violation of the minimum
9 standard of treatment, in particular when no judicial
10 action has been initiated to challenge the
11 administrative decision of the CGR, which, as
12 indicated, did not even exist at the time this
13 arbitration was commenced.
14 As to Claimants' denial of justice claim, it
15 cannot be seriously argued that a denial of justice
16 existed when the Notice of Arbitration was filed.
17 At that time, an administrative adjudicatory
18 judicial proceeding had not even been commenced, and
19 there was merely a procedural administrative act—in an
20 administrative proceeding that was just at its initial
21 stage.
22 Article 10.5.2(a) of the Treaty expressly

1 provides that the FET obligation includes "the
2 obligation not to deny justice in criminal, civil, or
3 administrative adjudicatory proceedings." The wording
4 of this provision could not be clearer.
5 The denial of justice protection only
6 applies when there is an "administrative adjudicatory
7 proceeding," which is a proceeding of a judicial
8 nature before courts with administrative adjudicatory
9 jurisdiction.
10 Thus, the obligation not to deny justice is
11 limited in scope to judicial proceedings and does not
12 extend to administrative proceedings.
13 The Fiscal Liability Proceeding initiated by
14 the CGR is merely an administrative proceeding, not an
15 administrative adjudicatory proceeding.
16 In the Rejoinder, Claimants incorrectly
17 allege that the term "administrative adjudicatory
18 proceeding," or "procedimiento contencioso
19 administrativo" in Spanish, includes not only judicial
20 proceedings, but also administrative proceedings.
21 That argument is, frankly, absurd. The
22 terms "procedimiento contencioso administrativo" in

1 Spanish, or "administrative adjudicatory proceeding"
2 in English, encompass judicial proceedings only.
3 That is precisely why the Treaty uses the
4 terminology "administrative adjudicatory proceeding"
5 or "procedimiento contencioso administrativo" and not
6 simply "administrative proceeding" or "procedimiento
7 administrativo."
8 Other provisions of the Treaty, which are
9 part of the context in which the ordinary meaning of
10 the terms of this provision have to be interpreted,
11 also confirm this rather straightforward
12 interpretation.
13 Whenever the Contracting Parties wanted to
14 cover purely administrative proceedings, they used the
15 terms "administrative proceeding" or "administrative
16 process," as they did, for instance, in
17 Articles 10.8.4 and 10.9.3(b)(ii) of the Treaty.
18 Therefore, if the terms "administrative
19 adjudicatory proceedings" or "procedimiento
20 contencioso administrativo" in Article 10.5.2(a) of
21 the Treaty are construed pursuant to the Vienna
22 Convention, it should be concluded that both the

1 English and Spanish versions of the Treaty have the
2 same meaning and do not cover purely administrative
3 proceedings.
4 As Claimants rightly point out, the Spanish
5 and English versions of the Treaty are equally
6 authoritative. And according to Article 33(3) of the
7 Vienna Convention, both are presumed to have the same
8 meaning.
9 In any event, we should not get entangled in
10 this linguistical discussion since a denial of justice
11 requires, by definition, a final decision of the
12 judicial branch of the State, and the standard to be
13 met is extremely high.
14 The fact that there is still multiple
15 judicial remedies available to challenge the Ruling
16 with Fiscal Liability is, by itself, sufficient to
17 show that Claimants have not made a prima facie case
18 of denial of justice.
19 Claimants also take issue with the fact that
20 Colombia challenges their bold assertion of futility
21 regarding further Colombian proceedings. But the
22 allegation of futility is not a factual allegation.

1 It is a mere conclusion that is not supported by any
2 factual allegation, and which does not benefit from
3 the presumption of truthfulness.
4 Claimants have not explained why the
5 judicial review of an administrative decision would be
6 futile. In fact, in its Memorial, Respondent showed
7 that rulings with fiscal liability have been
8 overturned in the past, both at the administrative and
9 judicial level. It is worth recalling that Claimants
10 have not even filed yet an action challenging the
11 decision of the CGR in Colombian courts.
12 In sum, even if Claimants' factual
13 allegations were true, there could not have been a
14 denial of justice or any other type of FET breach at
15 the time that they filed their Notice of Arbitration
16 since there was not even a final administrative
17 decision in place, let alone a judicial decision of a
18 Colombian court with administrative adjudicatory
19 jurisdiction.
20 Claimants have also not established a prima
21 facie expropriation case. In their Notice of
22 Arbitration, Claimants alleged that by initiating the

1 Fiscal Liability Proceeding, [Colombia] expropriated
2 two of their rights under the Services Contract--their
3 alleged investment in this case--
4
5
6
7
8 As Respondent explained in its pleadings,
9 which is consistent with what many investment
10 tribunals have held, it is not possible to expropriate
11 two discrete rights that are not capable of being
12 economically exploited independently and separately
13 from the purported investment, the Services Contract.
14 In fact, it is a basic principle that an
15 investment must be viewed as a whole for purposes of
16 determining whether an expropriation occurred.
17 Article 10.7 of the Treaty expressly
18 provides that "[n]o Party may expropriate or
19 nationalize a covered investment either directly or
20 indirectly through measures equivalent to
21 expropriation or nationalization."
22 That is why the tribunal in *Grand River v.*

1 *the U.S.* stated that "[a]n act of expropriation must
2 involve 'the [investment] of an investor, not part of
3 an investment,'" a notion that was also confirmed by
4 one of the cases cited by Claimants, *Koch v.*
5 *Venezuela*, where the tribunal graphically held that an
6 "investment 'cannot be sliced off and isolated, like a
7 piece of sausage.'"
8 Notably, as the original expropriation claim
9 was patently flawed, Claimants have now radically
10 changed their argument in their Rejoinder, and say
11 that they have broadly alleged that Colombia has
12 expropriated its investment, which consists not merely
13 of the Services Contract, and that Colombia indirectly
14 expropriated that investment by imposing a groundless
15 penalty far exceeding the revenues realized.
16 Well, that was certainly not the claim that
17 Claimants made in their Notice of Arbitration, which
18 is the claim that the Tribunal should consider for
19 purposes of Article 10.20.4--Article 10.20.4
20 objection.
21 But it doesn't matter. This new formulation
22 of the expropriation claim still fails.

1 First, besides those two purported
2 contractual rights, which, in any event, are still in
3 effect, Claimants did not make any factual allegation
4 in their Notice of Arbitration that the Services
5 Contract was affected as a whole by any action of the
6 CGR or any other Colombian authority, or that any
7 other unspecified investment made by Claimants,
8 different from the Services Contract, was somehow
9 affected.
10 The Services Contract was performed and
11 Claimants have been paid for the consulting services
12 they provided.
13 Second, Claimants' allegation that the
14 imposition of a penalty resulted in an indirect
15 expropriation of their investment is an irrelevant
16 argument. The Ruling with Fiscal Liability did not
17 exist at the time that Claimants filed their Notice of
18 Arbitration.
19 And even if it were to be taken into
20 account, Claimants have never paid a dime of such
21 penalty. So, they could not claim that any revenues
22 were taken from them.

1 In any event, the two contractual provisions
2 that Claimants originally alleged were expropriated
3 have nothing to do with the actions of the CGR or
4 Claimants' fiscal liability. Those provisions bind
5 the Joint Venture and Reficar only, as parties to the
6 Services Contract.
7 In sum, both Claimants' original and their
8 new expropriation claim are not capable of
9 constituting a prima facie breach of the Treaty.
10 Claimants have also failed to establish a
11 prima facie breach of the national treatment
12 obligation under the Treaty. The Fiscal Liability
13 Proceeding involved both nationals and foreigners,
14 and, thus, there is no action or measure that has
15 prima facie favored nationals over non-nationals.
16 There seems to be no dispute in this case
17 about the scope of the national treatment obligation,
18 which is set forth in Article 10.3 of the Treaty, and
19 which protects investors of the other Contracting
20 Party against nationality-based discrimination. The
21 dispute lies on the application of this standard.
22 Claimants' claim for violation of the

1 national treatment obligation is entirely based on the
2 fact that the CGR did not charge the members of
3 Ecopetrol's Board of Directors with fiscal liability,
4 while it did charge Foster Wheeler and Process
5 Consultants, despite the fact that both were,
6 according to Claimants, in like circumstances.
7 Claimants allege that "they were 'in like
8 circumstances' to the Ecopetrol Board of Directors
9 because they were both involved in the Project and
10 indicted in the CGR proceedings."
11 Likewise, Claimants allege that the CGR
12 treated Claimants less favorably because they
13 dismissed the Ecopetrol Board of Directors as not
14 being fiscal managers, although they had actual
15 decision-making authority over the Project, but
16 refused to dismiss Claimants from the proceedings,
17 though Claimants were not fiscal managers.
18 The assessment that they were in like
19 circumstances is not a factual allegation benefiting
20 from a presumption of truthfulness, but a legal
21 conclusion.
22 What are Claimants' true factual allegations

1 and the uncontroverted facts related to this standard?
2 One, the CGR charged both nationals and
3 foreigners, including natural persons such as the
4 members of the Board of Directors and certain
5 administrators of Reficar, and juridical persons, such
6 as CB&I, with fiscal liability.
7 Two, the CGR dismissed charges against both
8 nationals and foreigners, such as CB&I N.V.
9 Three, the CGR issued precautionary measures
10 against Colombian nationals but did not issue
11 precautionary measures against Claimants.
12 Based on those facts, there is no prima
13 facie case of nationality-based discrimination. And
14 so Claimants have failed to establish a prima facie
15 breach of the national treatment obligation under the
16 Treaty.
17 Claimants have also failed to establish a
18 prima facie breach of the most favored nation
19 treatment obligation under the Treaty.
20 Claimants are not alleging here that there
21 was another foreign investor that received a better
22 treatment but are merely trying to use the MFN clause

1 of the Treaty to import an umbrella clause, which does
2 not exist in the Treaty, from the Switzerland-Colombia
3 BIT.
4 Claimants attempt to use the Treaty's MFN
5 provision to import an umbrella clause must fail.
6 First, Article 10.4 of the Treaty, the MFN clause,
7 merely requires a comparison of factual situations of
8 treatment actually granted under similar
9 circumstances.
10 That was the conclusion arrived by the
11 tribunal in *Ickale v. Turkmenistan* when it had to
12 interpret a similarly-worded clause, reasoning that
13 "given the limitation of the scope of application of
14 the MFN clause to 'similar situations,' it cannot be
15 read, in good faith, to refer to standards of
16 treatment--standards of investment protection included
17 in other investment treaties between a State party and
18 a third State."
19 Colombia submits that this is the correct
20 interpretation of Article 10.4 of the Treaty.
21 In response, Claimants argue that
22 Respondent's interpretation is prohibitively narrow.

1 But that is not what the same law firm representing
2 Claimants thought when they were representing Mexico
3 in another investment case in which they cited with
4 approval the *Ickale* case, and alleged that there was a
5 categorical impossibility of using the MFN clause to
6 import standards of treatment from other treaties.
7 Obviously, that interpretation does not suit their
8 needs now.
9 In this case, Claimants do not allege that
10 there was another foreign investor that received a
11 better treatment and, thus, no prima facie breach of
12 the MFN clause could have possibly existed.
13 Second, even if an importation of an
14 umbrella clause from another investment treaty were to
15 be theoretically allowed through Article 10.4 of the
16 Treaty, there are several reasons why such importation
17 would not be possible in this case, which are
18 explained in detail in our pleadings.
19 But what is most striking about Claimants'
20 argument is that even if the MFN clause were to be
21 applied in the way Claimants propose, importing from
22 the Colombia-Switzerland BIT a right to submit a claim

1 to arbitration for breach of an umbrella clause would
2 be inconceivable due to the fact that such right does
3 not exist in the Colombia-Switzerland BIT.
4 This was expressly confirmed by the tribunal
5 in *Glencore v. Colombia*, one of Claimants' favorite
6 cases.
7 It is quite telling that Claimants barely
8 mentioned the Switzerland-Colombia BIT in their
9 Rejoinder, and now put all their eggs in a different
10 basket, the Japan-Colombia BIT, which, by the way, was
11 not mentioned by Claimants in their Notice of
12 Arbitration.
13 However, this new argument makes no real
14 difference since none of Colombia's treaties provide
15 consent to arbitrate claims under an umbrella clause.
16 Claimants are wrong when they state that the
17 Colombia-Japan BIT allows for arbitration of umbrella
18 clause claims. The text of the relevant provision
19 establishes that the Contracting Parties' consent to
20 the submission of investment disputes, except for
21 disputes with regard to the umbrella clause.
22 Faced with this clear impossibility,

1 Claimants say that what they are trying to do is to
2 import a substantive standard of protection without
3 incorporating the dispute resolution provision of the
4 Colombia-Japan BIT.
5 But that argument overlooks the basic
6 operation of an MFN clause. What Claimants are trying
7 to achieve is contrary to the very definition of the
8 most favored nation obligation.
9 The MFN obligation contained in Article 10.4
10 of the Treaty only guarantees that U.S. investors will
11 receive a treatment not less favorable than that
12 accorded, in like circumstances, to Swiss or Japanese
13 investors.
14 It does not guarantee a more favorable
15 treatment, which is what Claimants want here. Such an
16 application of the MFN clause would be contrary to the
17 nature, content, and spirit of this Treaty obligation.
18 In sum, no prima facie breach of the MFN
19 obligation under the Treaty could have possibly
20 existed here.
21 Claimants have not only failed to make a
22 prima facie case of breach of the substantive

1 obligations of the Treaty, they also--they have also
2 not raised a valid claim for a prima facie breach of
3 an investment agreement.
4 Claimants seem to believe that merely
5 alleging that the CGR, through the Fiscal Liability
6 Proceeding, has deprived them of the protections under
7 the Services Contract constitute a prima facie breach
8 of an investment agreement. However, this allegation
9 is fundamentally flawed. As a preliminary matter,
10 there could not have been a breach of an investment
11 agreement in this case because there is no investment
12 agreement at all.
13 "Investment Agreement" is a defined term in
14 the Treaty, and Article 10.28 states that it
15 corresponds to a "written agreement between a national
16 authority of a Party and a covered investment or an
17 investor of another Party, on which the covered
18 investment or the investor relies in establishing or
19 acquiring a covered investment other than the written
20 agreement itself."
21 According to Claimants' Notice of
22 Arbitration, the Services Contract is their alleged

1 investment. But the Services Contract cannot
2 simultaneously be the written agreement and the
3 covered investment, as the text of the Treaty
4 literally makes clear.
5 That is also confirmed by Vandevelde in his
6 often-cited treatise where he clarifies that "the
7 investment established in reliance on the written
8 agreement cannot be the written agreement itself."
9 Claimants do not even attempt to deal with this
10 threshold issue.
11 Although this by itself should be
12 dispositive of Claimants' claim for breach of an
13 investment agreement, the Services Contract is also
14 not an investment agreement within the meaning of the
15 Treaty because it did not involve a national authority
16 of a Party, as such term is defined in Article 10.28
17 of the Treaty.
18 Article 10.28 of the Treaty defines a
19 "national authority" as an "authority at the central
20 level of government." Reficar, which is the party to
21 the Services Contract, is not a national authority of
22 Colombia. Under Colombian law, Reficar is a mixed

1 capital company that carries out commercial activities
2 belonging to the decentralized level of the Colombian
3 Government.
4 Reficar's decentralized character is further
5 confirmed by Annex 9.1 of the Colombia-U.S. TPA on
6 government procurement, which contains a list of
7 central level of government entities that does not
8 include Reficar or its parent company, Ecopetrol.
9 This decentralized status was recognized by
10 Claimants themselves in the Acción de Tutela 2018 that
11 they initiated before Colombian courts.
12 Claimants alleged that Reficar is a national
13 authority, and hope that the Tribunal will take that
14 supposed factual allegation as true.
15 But asserting that Reficar is a national
16 authority of Colombia is not a factual allegation, it
17 is a legal allegation as to the application of--to
18 Reficar of the term "national authority of a Party,"
19 which is defined in the Treaty. As a legal
20 allegation, it does not benefit from a presumption of
21 truthfulness.
22 In any event, even if an investment

1 agreement did exist in this case, Claimants'
2 allegation for breach of an investment agreement is
3 confusing and impossible to understand. Claimants
4 have been changing and adjusting their arguments on
5 this issue throughout their pleadings and, to this
6 date, it is not clear what exactly Claimants are
7 claiming with respect to an alleged breach of an
8 investment agreement.
9 The Fiscal Liability Proceeding concerns
10 Claimants' fiscal liability, not their contractual
11 liability. Thus, no prima facie breach of an
12 investment agreement was advanced by Claimants.
13 So, to recap, Claimants have failed to
14 satisfy the two requirements set forth in Article
15 10.16.1 to submit a claim to arbitration and, thus,
16 their claim is premature. At the time of the Notice
17 of Arbitration, there was no prima facie breach of the
18 Treaty or an investment agreement, and no prima facie
19 loss or damage to Claimants resulting from that
20 alleged breach. For that reason, as a matter of law,
21 Claimants' claim is not a claim for which an award may
22 be made in their favor.

1 As we mentioned earlier, there is a second
2 reason why, as a matter of law, Claimants' claim is
3 not a claim for which an award can be made in their
4 favor. Let's move on now to that second reason, which
5 is that the Tribunal is not empowered under
6 Article 10.26 of the Treaty to grant any of the forms
7 of relief requested by Claimants.
8 First, Claimants seek an award of moral
9 damages, but the Tribunal does not--sorry--but the
10 Treaty does not grant the Tribunal authority to award
11 non-monetary or punitive damages.
12 A tribunal constituted under the Treaty can
13 only issue an award subject to the limitations and
14 exclusions provided in Article 10.26. Article 10.26.1
15 of the Treaty provides that a tribunal is only
16 empowered to award "monetary damages," or "daños
17 pecuniarios" in the Spanish version, and Article
18 10.26.3 provides that "[a] tribunal may not award
19 punitive damages."
20 Moral damages are generally viewed as
21 non-monetary or non-pecuniary damages or as punitive
22 damages. However, the discussion as to whether moral

1 damages are punitive damages or non-monetary damages
2 is irrelevant here and purely academic.
3 The Treaty prohibits the award of both
4 punitive damages and non-monetary damages, making it
5 impossible for the Tribunal to grant moral damages to
6 Claimants however characterized. Thus, the Tribunal
7 does not have the power to grant the moral damages
8 that Claimants request here.
9 In addition, Claimants requested in its
10 Notice of Arbitration that the Tribunal enjoin any
11 attempt by the CGR or any other Colombian organ to
12 seize any of Colombia's--any of Claimants' assets, in
13 Colombia or elsewhere. Colombia explained that
14 Article 10.26 of the Treaty does not permit the
15 granting of non-monetary orders or injunctions such as
16 those sought by Claimants here.
17 Moreover, Article 10.20.8 of the Treaty
18 provides that the Tribunal may not enjoin the
19 application of a measure alleged to constitute a
20 breach of the Treaty. In their subsequent pleadings,
21 Claimants were silent on this point, implicitly
22 conceding that the Tribunal does not have the power to

1 grant the form of relief originally requested.
2 The third form of relief requested by
3 Claimants in this case is the issuance of an
4 offsetting award equivalent to the amount of the
5 Ruling with Fiscal Liability, which this Tribunal also
6 does not have the authority to grant since it is not
7 empowered to award hypothetical damages or to make
8 declaratory awards.
9 Claimants have not made any payment of any
10 amount of the fiscal liability determined in the
11 Ruling with Fiscal Liability, either voluntarily or
12 forcibly, so there is no actual monetary damage that
13 could be offset by the Tribunal in an award. What's
14 more, when this arbitration was initiated, there was
15 not even a ruling with fiscal liability.
16 In their Provisional Measures Application,
17 Claimants themselves acknowledged that they have not
18 yet suffered any damage. They acknowledge it yet
19 again in their recent letter opposing Respondent's
20 request to include a new document into the record.
21 The prayer for relief in the Conciliation
22 Request is a further recognition that Claimants'

1 damages in the Fiscal Liability Proceeding are purely
2 hypothetical, and that they will only suffer actual
3 damages if they make any payments in satisfaction of
4 the Ruling with Fiscal Liability.
5 Until Claimants actually make a payment to
6 satisfy the Ruling with Fiscal Liability, their
7 damages will be merely hypothetical for three main
8 reasons.
9 One, the Ruling establishes the joint and
10 several liability of Foster Wheeler and Process
11 Consultants and the other fiscally liable parties and,
12 thus, it is impossible to know whether Claimants will
13 ever have to make any full or partial payment.
14 Two, the Ruling with Fiscal Liability is
15 subject to several judicial remedies, and could
16 eventually be declared null and void. And, three,
17 since the forced collection against Foster Wheeler and
18 Process Consultants faces enormous legal and practical
19 hurdles, it is possible that none of Claimants' assets
20 be identified, seized, and much less auctioned.
21 Claimants have not even attempted to provide
22 a substantive response to any of these threshold

1 arguments raised by Colombia. It is, frankly,
2 astonishing that, not having paid a single penny to
3 satisfy the amount of the Ruling with Fiscal
4 Liability, Claimants are seeking more than 900 million
5 in damages.
6 Claimants now say that they're only seeking
7 a compensation payment to be made for any assets
8 seized by Colombia, and that they are not seeking a
9 windfall because they are not asking for any recovery
10 in excess of the assets actually seized.
11 Well, it's undisputed that Colombia has not
12 seized, much less auctioned, any of Claimants' assets
13 and, thus, any offsetting award would be compensating
14 merely hypothetical damages and would be granting
15 Claimants a windfall.
16 As much as Claimants like to assimilate this
17 case to *Glencore vs. Colombia*, they are worlds apart.
18 In *Glencore*, the claimant voluntarily paid the ruling
19 with fiscal liability, a fact which has been
20 acknowledged by Claimants themselves. In this case,
21 Claimants have made no payment whatsoever to satisfy
22 the Ruling with Fiscal Liability.

1 Contrary to what Claimants contend, this is
2 not a question reserved for the Hearing on the merits.
3 Claimants are requesting a form of relief that this
4 Tribunal does not have the authority to grant and,
5 thus, their claim is legally defective. It is
6 nonsensical to argue that the claim has to be fully
7 aired when the form of relief requested by Claimants
8 cannot be granted by this Tribunal.
9 In sum, Claimants' claim is legally
10 defective and, thus, it is not a claim for which an
11 award in favor of Claimants may be made under the
12 Treaty. Claimants did not comply with the
13 requirements of Article 10.16.1 of the Treaty, and the
14 relief they request is not a relief that the Tribunal
15 can award under Article 10.26.
16 For those reasons, the claim submitted to
17 arbitration by Claimants should be dismissed under
18 Article 10.20.4 of the Treaty.
19 This concludes our presentation on the
20 preliminary objection under Article 10.20.4 of the
21 Treaty. My colleague, Elisa Botero, will now address
22 Colombia's jurisdictional objections.

1 Thank you.

2 MS. BOTERO: Thank you, Fernando.

3 Good morning, Members of the Tribunal. In
4 addition to Colombia's objection under Article 10.20.4
5 of the Treaty, Respondent has raised five
6 jurisdictional objections that should lead the
7 Tribunal to fully dismiss this case.

8 Before we address each one, let's discuss
9 the standard applicable to deciding those objections.

10 As we explained earlier in this
11 presentation, Claimants lump all of Colombia's
12 preliminary objections together hoping that the
13 Tribunal will treat them all the same. But,
14 unfortunately for Claimants, the presumption of
15 truthfulness in Subparagraph (c) is only applicable to
16 decide 10.20.4 objections.

17 In the words of the United States,
18 "[s]ubparagraph (c) does not address, and does not
19 govern, other preliminary objections, such as an
20 objection to competence, which the tribunal may
21 already have authority to consider." Such
22 interpretation was upheld by the tribunal in *Kappes v.*

1 *Guatemala*, which stated that "[u]nlike objections
2 under Article 10.20.4, jurisdictional objections do
3 not require a tribunal to assume as true all facts
4 alleged in the notice of arbitration."
5 Rather, as the U.S. observed in its
6 non-disputing party submission in *Seo Jin Hae v.*
7 *Korea*, which concerned an identical provision to
8 Article 10.20.4 of the Treaty, the burden is on
9 claimant to prove the necessary and relevant facts to
10 establish that a tribunal is competent to hear a
11 claim.
12 The fact that the Tribunal is to decide on
13 Respondent's jurisdictional objections as a
14 preliminary question, together with an objection under
15 Article 10.20.4 of the Treaty, does not alter that
16 burden. Claimants attempt to avoid this burden by
17 arguing that they are not required to present evidence
18 at this preliminary stage of the proceeding. In their
19 latest pleading commenting on the U.S. submission,
20 Claimants go as far as to say that the Parties
21 supposedly agreed that all of Respondent's objections,
22 including its jurisdictional objections, "would be

1 heard preliminarily without requiring an evidentiary
2 submission."
3 This is absurd. First, Respondent never
4 agreed to such a thing. Respondent simply requested
5 that its jurisdictional objections be heard and
6 decided as a preliminary question together with its
7 objection under Article 10.20.4 of the Treaty, as the
8 Treaty expressly allows.
9 But more importantly, hearing jurisdictional
10 objections at a preliminary phase doesn't mean that
11 Claimants are exempt from proving the necessary facts
12 to establish jurisdiction. It just means that
13 this--that the jurisdiction of this Tribunal is
14 established before going into the merits. The
15 evidence on jurisdiction is being heard now. This is
16 what we have been doing for the past two years.
17 During those two years, Claimants had plenty
18 opportunity to satisfy their burden of proof on
19 jurisdiction. In addition to their Notice of
20 Arbitration, which was accompanied by multiple
21 exhibits and legal authorities, Claimants had two full
22 rounds of written submissions as well as various other

1 opportunities to submit additional evidence. Despite
2 that, Claimants have failed to prove the facts on
3 which the jurisdiction of this Tribunal is based.
4 Let's now analyze each of Claimants'
5 five--sorry--Colombia's five jurisdictional objections
6 that the Tribunal will decide as a preliminary
7 question.
8 Colombia's first objection is that the
9 Tribunal lacks jurisdiction ratione materiae because
10 the Services Contract does not constitute a protected
11 "investment" under the Treaty and the ICSID
12 Convention.
13 Article 10.28 of the Treaty defines
14 "investment" generally as every asset that has the
15 characteristics of an investment, including such
16 characteristics as a commitment of capital or other
17 resources, the expectation of gain or profit, or the
18 assumption of risk.
19 Article 10.28 goes on to list several
20 examples of the forms that an investment may take,
21 including, under Subparagraph (e), different types of
22 contracts such as construction, management, and other

1 similar contracts.

2 However, that enumeration of assets is not

3 dispositive. To qualify for protection under the

4 Treaty, an asset, including a construction,

5 management, and other similar contract, must have the

6 characteristics of an investment. Ordinary commercial

7 contracts are excluded from the definition of

8 investment because they do not possess the

9 characteristics of an investment.

10 This interpretation follows from a plain

11 reading of Article 10.28 and is also the

12 interpretation of both Contracting Parties to the

13 Treaty.

14 In its non-disputing party submission in

15 this case, the United States made it clear that

16 "[o]rdinary commercial contracts for the sale of goods

17 or services typically do not fall within" the

18 definition of "investment."

19 Under the so-called double-barrel test, for

20 a tribunal constituted under the ICSID Convention to

21 have jurisdiction ratione materiae over a claim, the

22 asset must not only qualify as an investment under the

1 Treaty, but it must also be objectively considered an
2 investment under the terms of the ICSID Convention.
3 Article 25 of the ICSID Convention provides
4 that the jurisdiction of the Centre only extends to
5 disputes of a legal nature "arising directly out of an
6 investment."
7 Many ICSID tribunals have held that there is
8 an objective notion of what constitutes an investment
9 under the ICSID Convention. Under the test first
10 developed by *Salini v. Morocco*, the assumption of risk
11 is one of the essential elements of what constitutes
12 an investment under the Convention. Commentators and
13 tribunals agree that ordinary commercial contracts are
14 outside the scope of the Centre's jurisdiction.
15 Thus, the assumption of risk--of an
16 investment risk or operational risk is one of the main
17 characteristics of an investment under both the ICSID
18 Convention and the Treaty. It represents the
19 uncertainty faced by an investor regarding the return
20 it will receive on its investment, including whether
21 or not it will recover, in whole or in part, the
22 capital invested. This type of risk must be

1 distinguished from generic risks inherent to any
2 economic activity and from simple commercial risks
3 inherent to any contract, including the risk of
4 non-payment.
5 As the tribunal in *Romak v. Uzbekistan*
6 reasoned, "all economic activity entails a certain
7 degree of risk. But "an 'investment risk' entails a
8 different kind of alea, a situation in which the
9 investor cannot be sure of a return on his investment,
10 [or] may not know the amount he will end up spending,
11 even if all relevant counterparties discharge their
12 contractual obligations. Where there is 'risk' of
13 this sort, the investor simply cannot predict the
14 outcome of the transaction."
15 Similarly, the tribunal in *Posštová v.*
16 *Greece* explained that an investment risk entails an
17 operational risk and not a commercial risk, a risk
18 inherent in the investment operation in which the
19 profits are not ascertained but depend on the success
20 or failure of the economic venture concerned.
21 Claimants have two main criticisms to
22 Colombia's position. First, they argue without

1 providing any support that the double keyhole approach
2 to ICSID jurisdiction does not apply and that,
3 therefore, they need only comply with the definition
4 in the Treaty to gain access to the Centre. Claimants
5 cannot simply ignore decades of ICSID jurisprudence on
6 this issue.
7 Claimants' second criticism has to do with
8 the definition of "investment" in Article 10.28 of the
9 Treaty. Claimants insist that the assumption of risk
10 is not a necessary requirement for the existence of a
11 covered investment, emphasizing the word "or" in the
12 chapeau of the definition of "investment" in Article
13 10.28.
14 That argument is not only contrary to the
15 express language of the Treaty, but also to the very
16 notion of investment itself. The assumption of an
17 investment risk is the fundamental feature of an
18 investment. It is what distinguishes an investment
19 from an ordinary commercial contract.
20 If a certain business operation entails a
21 commitment of capital and an expectation of profit,
22 but the party who committed that capital and expected

1 a profit is not at risk of losing it and turning no
2 profit, then there is no investment risk. That
3 business operation is likely an ordinary commercial
4 contract but not an investment.
5 The fact that the Treaty uses the [words]
6 "or" and "including" when listing the characteristics
7 of an investment does not mean that the listed
8 characteristics are not essential characteristics of
9 an investment. It simply means that there are other
10 characteristics in addition to those listed. That
11 reading of the definition of "investment" is shared by
12 the United States.
13 Let's turn now to the facts. The question
14 before this Tribunal is simple. Is the Services
15 Contract an investment?
16 The answer to that question is no. The
17 Services Contract between the Joint Venture and
18 Reficar is, on its face, an ordinary commercial
19 contract for the sale of consulting services that did
20 not entail any investment risk. An analysis of the
21 relevant contractual provisions inexorably leads to
22 this conclusion. For one, the stated purpose of the

1 contract is to provide "consulting services for the
2 management of the Project," which included, among
3 other services, the supervision and control of the
4 detailed engineering and of materials and equipment
5 procurement for the Project.
6 The Contract is an agreement for the
7 provision of services, as Claimants themselves have
8 recognized countless times. Claimants insist that the
9 Services Contract is "a management or construction
10 contract" falling within the scope of Subparagraph
11 (e), deceitfully equating management and construction,
12 but the fact that the Services Contract is related to
13 the provision of consulting services in connection
14 with the construction and expansion of an oil refinery
15 does not transform that contract into a construction
16 contract.
17 And even if it did, a construction contract
18 is also not necessarily an investment. Regardless of
19 how a contract is named, only contracts that have the
20 objective characteristics of an investment qualify for
21 protection under the Treaty. In any event, the
22 discussion about which is the best way to call the

1 Services Contract does not have any practical
2 significance.
3 As the U.S. stated in its submission in this
4 case, "[t]he determination as to whether a particular
5 instrument has the characteristics of an investment is
6 a case-by-case inquiry involving an examination of the
7 nature and extent of any rights conferred under the
8 State's domestic law."
9 And there is no question in this case that
10 the nature and the extent of the rights conferred
11 under the Services Contract is that of an ordinary
12 contract for the provision of consulting services.
13 In addition to the purpose of the Services
14 Contract, the provisions concerning compensation also
15 show that Claimants did not bear any investment risk.
16 The remuneration structure in the Services Contract
17 guaranteed Claimants the recovery of all the resources
18 they allocated to the performance of their obligations
19 under the Contract, as well as a profit.
20 To recap what Colombia explained at length
21 in its Memorial on Objections to Jurisdiction, via the
22 different components of the remuneration structure,

1 the Joint Venture recouped salary costs for all
2 personnel assigned to the performance of the services,
3 whether foreign, expat, or local; non-salary costs for
4 all personnel, including administrative overhead,
5 taxes and bonuses; direct costs associated with all
6 personnel, including computer equipment, office
7 leases, domestic and international call charges,
8 office furniture and relocation expenses; the cost of
9 equipment, tools, materials and software the Joint
10 Venture deemed necessary for the correct performance
11 of the services in Colombia, and I could go on.
12 Besides recouping on all its costs, the
13 Joint Venture charged a fixed fee for each hour worked
14 by its personnel assigned to the Services Contract.
15 In fact, as of the day of Respondent's Memorial, the
16 Joint Venture had received over US$14 million in fixed
17 fees from Reficar. That fee was a 100 percent profit
18 since the Joint Venture recovered its costs
19 through--all its costs through the other components of
20 the remuneration. In addition, by virtue of the tax
21 gross up, the Joint Venture received Reficar's
22 payments in full, without any decrease for tax

1 withheld at source.

2 What's noteworthy is that Claimants recouped
3 their costs and earned a profit regardless of the
4 outcome of the refinery project.

5 Moreover, the Joint Venture received payment
6 for its services on a month-to-month basis, as it was
7 performing those services and had a right to
8 unilaterally terminate the Services Contract in case
9 of non-payment of invoices.

10 There was no investment risk and, therefore,
11 no investment, because the remuneration structure
12 provided for in the Services Contract ensured that the
13 Joint Venture was never at risk of losing the
14 resources it was allocating to the performance of that
15 Contract and had no uncertainty about the minimum
16 return it would obtain.

17 Claimants never disputed Colombia's
18 description of the relevant provisions of the Services
19 Contract. In two rounds of pleading, they outright
20 refused to engage with the text of the Contract
21 because they are fully aware that it supports
22 Respondent's position.

1 Unable to deal with the nature and the terms
2 of the Services Contract, Claimants resort to all sort
3 of creative arguments to save their case, none of
4 which assist them.
5 First, Claimants allege the Services
6 Contract did entail risk, such as the risk of
7 non-payment and termination, among others, and that
8 the fact that there is a dispute here constitutes
9 evidence of risk. However, as we've explained, every
10 economic transaction entails some sort of risk, but
11 not every risk is an investment risk.
12 In fact, as a paper cited by Claimants
13 themselves explain, not every business dispute is an
14 investment dispute because not every economic activity
15 constitutes an investment.
16 Second, in their Rejoinder, Claimants assert
17 that they specifically faced an investment risk as set
18 forth in *Romak*. That argument is, frankly, absurd.
19 Claimants were assured a return on their investment
20 because under the Services Contract they received a
21 profit per manhour.
22 Maybe they were not sure how much they would

1 ultimately end up spending, but they were certainly
2 sure that they would recoup every single penny of
3 those expenditures. Whether they would be paid or not
4 is a quintessential commercial risk, but that
5 commercial risk in this case was practically
6 non-existent because Claimants invoice monthly and had
7 a right to terminate for non-payment of invoices.
8   There is no such thing here as the "outcome
9 of the transaction." They were hired to provide a
10 consulting service, and for that they recouped their
11 costs and were paid a fee. As simple as that.
12   In the comments to the U.S. non-disputing
13 party submission, Claimants raised for the first time
14 an additional reason why they believe the Services
15 Contract entailed risk. They point to the bonuses
16 provided in the Services Contract as additional
17 evidence of risk.
18   However, as Respondent explained in its
19 Memorial, those bonuses were mere commercial
20 incentives that did not alter the remuneration
21 structure which guarantees Claimants their costs plus
22 a profit, as we've just reviewed.

1 Third, Claimants argue that the Services
2 Contract is not their only relevant investment in
3 Colombia, pointing to the amounts of time, capital,
4 personnel, and labor they devoted to performing the
5 services. But all those resources are not separate
6 "investments" unrelated to the Services Contract.
7 Rather, those are the resources that the Joint Venture
8 employed to comply with its obligations under the
9 Services Contract.
10 Four, Claimants argue that they have a long
11 history of investment in Colombia. That fact, whether
12 true or not, is irrelevant. The Tribunal has to
13 decide whether the Services Contract is a covered
14 investment under the Treaty and the ICSID Convention,
15 not whether Claimants' supposed prior investments
16 qualify for protection.
17 Finally, Claimants contend that their
18 supposed investments should be considered as a whole,
19 looking at the totality of the project. That is
20 wrong. Claimants' purported investment was the
21 Services Contract, not any other contract within the
22 framework of the Project.

1 In conclusion, the Services Contract does
2 not qualify as a covered investment under the Treaty
3 and the ICSID Convention because there was no
4 assumption of an investment risk, which is a
5 quintessential characteristic of an investment, and,
6 thus, this Tribunal lacks jurisdiction ratione
7 materiae over the present dispute.
8 Let's move on to Respondent's second
9 jurisdictional objection. Respondent has raised an
10 objection that the Tribunal lacks jurisdiction ratione
11 personae over the claims of Claimant FPJVC, a
12 contractual joint venture, because FPJVC is not a
13 juridical person and, therefore, it does not qualify
14 as a "national of another Contracting State" under
15 Article 25 of the ICSID Convention.
16 This objection is rather straightforward.
17 In order to qualify as a "national of another
18 Contracting State" under Article 25 of the ICSID
19 Convention, a claimant needs to be a natural or a
20 juridical person.
21 According to Professor Schreuer, legal
22 personality is a requirement for the application of

1 Article 25(2)(b), and a mere association of
2 individuals or of juridical persons does not qualify
3 as a juridical person under the ICSID Convention.
4 Several ICSID tribunals have held that
5 unincorporated joint ventures are not juridical
6 persons because they lack legal personality. In
7 *Impregilo v. Pakistan*, the tribunal reasoned that the
8 claimant, a contractual joint venture, was not a
9 juridical person and had "no separate legal
10 personality" because it was "nothing more than a
11 contractual relationship between different entities,"
12 holding that it had no jurisdiction ratione personae,
13 because the claimant failed to meet the requirements
14 of Article 25 of the ICSID Convention.
15 Foster Wheeler and Process Consultants
16 expressly agreed in the Joint Venture Agreement they
17 executed that FPJVC would be an unincorporated entity.
18 Under New York law, the law under which Claimant FPJVC
19 was formed, a contractual joint venture is recognized
20 as a partnership for a limited purpose and, therefore,
21 does not have a legal personality separate and
22 independent from that of its members, Foster Wheeler

1 and Process Consultants.
2 Because FPJVC is not a juridical person
3 under New York law, it is also not a "national of
4 another Contracting State" under Article 25 of the
5 ICSID Convention.
6 In their Rejoinder, Claimants insist that
7 the Tribunal does have jurisdiction ratione personae
8 over FPJVC, raising three arguments, all flawed.
9 First, Claimants argue that the Tribunal has
10 jurisdiction because the Treaty expressly references
11 joint ventures within the definition of an "investor
12 of a party."
13 However, under the double-barrel test, an
14 ICSID Tribunal must be satisfied that a claimant meets
15 both the criteria set forth in the relevant treaty and
16 the ICSID Convention in order to exercise
17 jurisdiction.
18 Claimants draw the Tribunal's attention to
19 the Treaty but ignore the ICSID Convention altogether,
20 ignoring the multitude of ICSID cases recognizing the
21 existence of the double-barrel test.
22 The issue here is not whether FPJVC is an

1 investor within the meaning of the Treaty, but whether
2 it qualifies as a "national of another Contracting
3 State" for purposes of Article 25 of the ICSID
4 Convention.
5 As Professor Schreuer stated in his
6 well-known treatise, some bilateral investment
7 treaties include associations without legal
8 personality in their definitions of investor. But for
9 purposes of the ICSID Convention, the quality of legal
10 personality is inherent in the concept of juridical
11 person and is part of the objective requirements for
12 jurisdiction of ICSID.
13 Second, Claimants allege that contractual
14 joint ventures qualify as juridical persons under New
15 York law. That is simply wrong. Both Parties agree
16 that New York law governs this question and that under
17 New York law, a contractual joint venture is treated
18 as a partnership for limited purposes. However, the
19 Parties disagree on whether a partnership is a
20 juridical person under New York law.
21 Respondent has shown that, under New York
22 law, a partnership is not a juridical person because

1 it does not have a legal personality separate and
2 independent from that of its members.
3 Claimants argue that a partnership is a
4 juridical person because it can sue and be sued in its
5 own name, hold property, and hold a nationality.
6 Claimants are wrong in all three respects.
7 The New York Court of Appeals, the highest
8 court in the State of New York, has stated that
9 although persons conducting a business as a
10 partnership may be sued in the partnership name,
11 unlike a corporation, a partnership is not a separate
12 entity.
13 Claimants' own legal authority confirms
14 this. And while partnerships can hold property in
15 their name, the members of the partnership maintain a
16 direct interest in that property, which goes to show
17 that the partnership is not a distinct legal entity
18 separate from its members.
19 As to nationality, the Third Restatement on
20 Foreign Relations defeats Claimants' argument, stating
21 that "under common law systems a partnership is not an
22 entity having nationality."

1 Finally, Claimants contend that Colombia
2 considered Claimant FPJVC a sufficient juridical
3 entity capable of entering into the Services Contract.
4 That is irrelevant to the issue of whether FPJVC is a
5 juridical person under the ICSID Convention. In any
6 case, as a matter of Colombian law, a joint venture,
7 or "consorcio" in Spanish, has the capacity to enter
8 into contracts with public entities but is not a legal
9 person.
10 In short, Claimant FPJVC is merely a
11 contractual joint venture which does not have legal
12 personality separate and independent from that of its
13 members. Because it is not a juridical person under
14 New York law, FPJVC does not qualify as a "national of
15 another Contracting State" under Article 25 of the
16 ICSID Convention, and so this Tribunal does not have
17 jurisdiction ratione personae over the claims of that
18 Claimant.
19 Colombia's third objection is that the
20 Tribunal lacks jurisdiction ratione voluntatis over
21 the claims of Claimants Foster Wheeler and Process
22 Consultants because they did not send a notice of

1 intent before initiating this arbitration, as
2 expressly required by the Treaty.
3 Article 10.17 of the Treaty provides that
4 "[e]ach Party consents to the submission of a claim to
5 arbitration under this Section in accordance with this
6 [Treaty]," while Article 10.16.2 provides that "[a]t
7 least 90 days before submitting any claim to
8 arbitration under this Section, a claimant shall
9 deliver to the respondent a written notice of its
10 intention to submit the claim to arbitration."
11 Delivery of a notice of intent by the
12 claimant is, thus, a precondition to the respondent
13 State's consent to international arbitration. Note
14 that the text of Article 10.16.2 refers to "a
15 claimant", in the singular, signaling that each and
16 every claimant must deliver a Notice of Intent before
17 submitting a claim to arbitration.
18 The United States agrees with this
19 interpretation. In its non-disputing party submission
20 in this case, the U.S. stated that "[p]ursuant to
21 Article 10.17, the Parties to the Treaty did not
22 provide unconditional consent to arbitration under any

1 and all circumstances", and that "[a] disputing
2 investor that does not deliver a notice of intent
3 [...] fails to engage the respondent's consent to
4 arbitrate."
5 Very well. Of the three Claimants in this
6 case, only the Joint Venture sent a Notice of Intent
7 prior to submitting the Notice of Arbitration.
8 Claimants Foster Wheeler and Process
9 Consultants did not send a Notice of Intent, which
10 means they failed to engage Colombia's consent to
11 arbitration under the Treaty, depriving the Tribunal
12 of jurisdiction ratione voluntatis over their claims.
13 Claimants argue that the Notice of Intent submitted by
14 the Joint Venture provided notice for all three
15 Claimants, because the Joint Venture comprises
16 Claimants Foster Wheeler and Process Consultants.
17 They are wrong. The Notice of Intent only
18 identified the Joint Venture as the investor claimant
19 under the Treaty and was submitted by the Joint
20 Venture on its own behalf, not on behalf of Foster
21 Wheeler and Process Consultants.
22 That position is further confirmed by the

1 Notice of Arbitration in this case, which states that
2 each of the Claimants qualified as a separate
3 enterprise and investor under the Treaty, meaning that
4 each should have notified its own intention to submit
5 a claim to arbitration.
6 The fact that the joint venture is a
7 contractual joint venture comprised by Foster Wheeler
8 and Process Consultants is irrelevant. If the three
9 Claimants want to submit a claim against Colombia
10 under the Treaty, then each Claimant must comply with
11 the requirement of Article 10.16.2. Foster Wheeler
12 and Process Consultants cannot benefit from the Notice
13 of Intent submitted by the Joint Venture on its own
14 behalf.
15 Claimants' try to lessen the importance of
16 the requirement in Article 10.16.2, arguing that a
17 formal defect in the Notice of Intent is not enough to
18 destroy jurisdiction. Claimants are wrong.
19 As a precondition to the State's consent to
20 international arbitration, the delivery of a Notice of
21 Intent is a mandatory procedural requirement, the
22 non-compliance of which "a tribunal cannot simply

1 overlook."

2 Several investment tribunals have held that

3 pre-conditions and formalities, such as the Notice of

4 Intent, required under Article 10.16.2 of the Treaty,

5 are not "merely procedural niceties," but perform a

6 substantial function.

7 These tribunals have noted that such

8 pre-conditions constitute "a fundamental requirement

9 that a Claimant must comply with compulsorily, before

10 submitting a request for arbitration," and that their

11 omission "constitutes a grave noncompliance" that

12 prevents a Tribunal from exercising jurisdiction.

13 Notably, Claimants' position here is

14 completely at odds with the position that their

15 Counsel put forth in an investment arbitration where

16 they acted on behalf of Mexico.

17 In that case, Pillsbury argued that the

18 failure by a claimant to comply with the requirement

19 to deliver a Notice of Intent under NAFTA, which is

20 virtually identical to the requirement under this

21 Treaty, meant that the submission was null ab initio

22 and that, therefore, there was no consent under NAFTA.

1 Claimants also attempt to minimize their
2 non-compliance with Article 10.16.2, by arguing that
3 Colombia suffered no prejudice as a result of
4 Claimants Foster Wheeler and Process Consultants'
5 failure to deliver a Notice of Intent. Whether
6 Respondent suffer or not a prejudice is beside the
7 point. A claimant must comply with any and all formal
8 requirements and pre-conditions to "perfect" the
9 respondent's State consent to arbitration.
10 Those pre-conditions have been included in
11 investment treaties for good reason and constitute an
12 important safeguard, especially because we're dealing
13 here with a waiver of the State's sovereignty.
14 Claimants' attempt to shift the burden of
15 proof to Respondent should fail. There's nothing that
16 Colombia needs to prove. The Treaty is clear as to
17 the requirements to State consent to arbitration, and
18 it's for Claimants to comply with those requirements.
19 Finally, Claimants contend that Colombia
20 contradicts itself by arguing at the same time that
21 the Joint Venture is not a juridical person separate
22 from its members, and that the Joint Venture delivered

1 the Notice of Intent on its own behalf.

2 There is no such contradiction. Those are

3 two separate and distinct issues. Each individual

4 Claimant, including the Joint Venture, must qualify as

5 a "national of another Contracting State" under

6 Article 25 of the ICSID Convention, and each

7 individual Claimant, including Foster Wheeler and

8 Process Consultants, has to comply with the compulsory

9 requirement in Article 10.16.2 of the Treaty of

10 delivering a Notice of Intent.

11 It is Claimants' position that it's patently

12 contradictory. Claimants say that the Joint Venture

13 is an investor under the Treaty, that is advancing a

14 claim on its own behalf, but they argue that Foster

15 Wheeler and Process Consultants should benefit from

16 the Notice of Intent sent by the Joint Venture because

17 they are members of that joint venture.

18 Claimants cannot have it both ways. In

19 conclusion, the Tribunal lacks jurisdiction ratione

20 voluntatis over the claims of the two Claimants,

21 Foster Wheeler and Process Consultants, due to the

22 failure to deliver a Notice of Intent prior to

1 submitting their Notice of Arbitration in this case.
2 Colombia's fourth objection is that this
3 Tribunal lacks jurisdiction over Claimants' claims for
4 breach of FET because Claimants elected to submit
5 their FET claim to Colombian courts when they
6 initiated an acción de tutela alleging such breach.
7 Paragraph 1 of Annex 10-G of the Treaty
8 states that if an investor of the United States has
9 "alleged" a breach of an obligation under Section A in
10 proceedings before a court or administrative tribunal
11 of Colombia, then such U.S. investor may not "submit"
12 that claim to arbitration under the Treaty.
13 Notice the verb usage. If the claimant has
14 "alleged" a particular claim of breach before
15 Colombian courts, it cannot "submit" that claim to
16 arbitration.
17 The ordinary meaning of the word
18 "allege"--in Spanish "alegar"--is clear and leaves no
19 room for ambiguity. The specific terms used in this
20 provision were chosen carefully and are not a mere
21 drafting error. That's evident when one compares
22 Annex 10-G with Article 10.18.4 of the Treaty.

1 The electa una via provision contained in
2 that Article, which applies to breaches of investment
3 authorizations and investment agreements, uses the
4 verb "submit," while Annex 10-G--which only applies to
5 U.S. investors with respect to breaches of the
6 substantive obligations--uses the verb "alleged."
7 This difference between the two electa una
8 via provisions can also be found in other treaties
9 entered by the United States, such as the Trade
10 Promotion Agreement with Chile, the CAFTA-DR, and the
11 Uruguay-U.S. BIT.
12 In this case, it is undisputed that Foster
13 Wheeler and Process Consultants alleged a violation of
14 the Treaty's FET provision in the Acción de Tutela
15 they initiated in 2018 before Colombian courts.
16 Under Annex 10-G, alleging that violation
17 prevents them from bringing a claim for breach of FET
18 before this Tribunal. Turning a blind eye to the text
19 of the Treaty, Claimants argue that there are no
20 material differences between Article 10.18.4 and
21 Annex 10-G of the Treaty, and that Annex 10-G of the
22 Treaty really means "submit" rather than "allege,"

1 pointing to Paragraph 2 of Annex 10-G in support of
2 that position.
3 The second paragraph of Annex 10-G only
4 provides a clarification that the election is definite
5 but does not modify or override the language of the
6 operative part of the provision contained in the first
7 paragraph, which is clear and unambiguous. There is
8 no reason to depart from the ordinary meanings of the
9 terms of the provision, which says what it says, and
10 it says "alleged."
11 Claimants' interpretation is contrary to the
12 Vienna Convention. Not only does it ignore the
13 Treaty's express language but also defeats the object
14 and purpose of Annex 10-G, which is to avoid the
15 duplication of claims and proceedings.
16 In conclusion, since Claimants alleged a
17 breach of the Treaty's FET provision in Colombian
18 courts, that election was definite and they cannot
19 make the same claim before this Tribunal.
20 Finally, Colombia objects to the
21 jurisdiction ratione voluntatis of this Tribunal
22 because Claimants have not made a valid waiver, either

1 formal or material, under Article 10.18.2(b) of the
2 Treaty.
3 Article 10.18.2(b) of the Treaty explicitly
4 provides that in order to submit a claim to
5 arbitration, the notice of arbitration must be
6 accompanied by a written waiver "to initiate or
7 continue before any administrative tribunal or court
8 [...,] or other dispute settlement procedures, any
9 proceeding with respect to any measure alleged to
10 constitute a breach" of the Treaty.
11 Only a waiver pursuant to Article 10.18.2(b)
12 of the Treaty is an effective waiver capable of
13 perfecting the offer of consent made by the
14 Contracting Parties. To be effective, a waiver must
15 comply with both formal and material requirements.
16 As the U.S. observes in its non-disputing
17 party submission, "[i]f all formal and material
18 requirements under Article 10.18.2(b) are not met, the
19 waiver is ineffective and will not engage the
20 respondent State's consent to arbitration [and] the
21 Tribunal's jurisdiction ab initio under the
22 Agreement." In other words, "[a]n effective waiver is

1 therefore a precondition to the Parties' consent to
2 arbitrate claims."
3 Let's review Claimants' formal waiver in
4 their Notice for Arbitration. As you can see in the
5 slide, Claimants added the text highlighted in yellow
6 to the waiver. This waiver is without prejudice of
7 Claimants' right to defend themselves in the fiscal
8 liability and any related proceedings, including any
9 appeals.
10 Claimants' broad reservation of rights is
11 impermissible under the Treaty because it renders the
12 purported waiver meaningless and ineffective. To be
13 effective, a waiver must be explicit and categorical,
14 leaving no doubt that Claimants will cease pursuing
15 and will not pursue proceedings in a local forum with
16 respect to the measures at issue in this arbitration.
17 In its non-disputing party submission, the
18 United States explained that the waiver provision,
19 which is a "no U-turn provision," requires an investor
20 to definitely and irrevocably waive all rights to
21 pursue claims in another forum once claims are
22 submitted to arbitration with respect to a measure

1 alleged to have breached the Agreement.
2 Claimants are simply not allowed to qualify
3 their waiver however they like, as they did here. The
4 tribunal in *Renco v. Peru* explicitly stated that
5 "waivers qualified in any way are impermissible" and
6 that a reservation is not permitted since it
7 "undermines the object and purpose" of the waiver
8 provision and is "incompatible with the 'no U-turn'
9 structure."
10 The U.S. has echoed this view in its
11 submission in this case, stating that a waiver
12 containing any conditions, qualifications, or
13 reservations will not meet the formal requirements and
14 will be ineffective. Leaving aside the formal
15 requirements, Claimants have also failed to materially
16 comply with the waiver requirement.
17 As the Tribunal in *Commerce Group v.*
18 *El Salvador* noted, a waiver must be more than just
19 words; it must accomplish its intended effect and
20 assure materially that no other legal proceedings are
21 initiated or continued. Claimants have violated the
22 waiver four times already and they threaten with a

1 fifth violation.
2 Claimants violated the waiver twice by
3 initiating an acción de tutela on April 23rd, 2021,
4 and another one on April 28 of that same year. The
5 third violation came when Claimants filed an
6 administrative appeal against their ruling with fiscal
7 liability, seeking to reverse it.
8 The fourth violation is more recent.
9 Claimants initiated a conciliation proceeding against
10 the CGR before the Procuraduría or PGN, while also
11 threatening an additional violation: filing an
12 annulment action against the fiscal liability
13 proceeding before the courts of the administrative
14 adjudicatory jurisdiction.
15 As a matter of principle, Claimants contend
16 that reserving the right to defend themselves in the
17 fiscal liability proceedings and other related
18 proceedings is not contrary to the requirements of the
19 waiver, and that the waiver requires Claimants not to
20 act offensively but does not prevent them from
21 mounting a defense.
22 Claimants are wrong on both counts.

1 Claimants' all too convenient interpretation empties
2 the waiver of any practical effect. In Claimants'
3 view, nothing bars them from continuing to file
4 appeals and judicial remedies to reverse the ruling
5 with fiscal liability while pursuing, at the same
6 time, this arbitration challenging the same measure.
7 Simply put, Claimants are trying to get two
8 bites at the apple. Moreover, Claimants' artificial
9 distinction between defensive and offensive actions is
10 nowhere to be found in the provision itself. The
11 waiver bars Claimants from continuing any local
12 proceedings concerning the same measures alleged to
13 constitute a breach.
14 Let's be clear. To defend is to continue.
15 Because defending continues to give impetus, or in
16 Spanish "impulso procesal," to a proceeding that may
17 otherwise end or wrap up.
18 Let's turn now to the violations of the
19 waiver. Claimants argue that the two acciones de
20 tutelas as well as the appeal are not violations of
21 Article 10.18.2(b) because they fall within the scope
22 of the carve-out set out in Article 10.18.3 of the

1 Treaty. But that's incorrect. Article 10.18.3
2 provides that a claimant may initiate or continue an
3 action that seeks interim injunctive relief and does
4 not involve the payment of monetary damages before a
5 judicial or administrative tribunal of the respondent,
6 provided that the action is brought for the sole
7 purpose of preserving the claimant's or the
8 enterprise's rights and interests during the pendency
9 of the arbitration.
10 As the U.S. observed in its submission in
11 this case, the exception in Article 10.18.3 applies in
12 very narrow circumstances. It certainly doesn't apply
13 here. None of Claimants' actions sought entering
14 injunctive relief, and none of these actions, if
15 successful, would have the effect of preserving
16 Claimants' rights at stake while this arbitration is
17 ongoing.
18 That is probably why Claimants initially
19 invoked this provision in their Counter-Memorial but
20 abandoned that argument in their Rejoinder. The
21 conciliation request is an additional violation of the
22 waiver. Initiating a conciliation is initiating a

1 dispute settlement procedure within the meaning of
2 Article 10.18.2(b) with respect to the same measure at
3 issue here.
4 In their May 9th letter, Claimants argue
5 that the reference to dispute settlement procedures in
6 Article 10.18.2(b) encompasses proceedings before a
7 third party with adjudicatory power but excludes
8 dispute settlement mechanisms before a third party
9 without adjudicatory power, like the conciliation
10 initiated by Claimants before the PGN. This
11 distinction Claimants want to draw is artificial.
12 From a policy perspective, the point of the
13 waiver in Article 10.18.2(b) is to prevent the
14 Respondent from having to defend itself in different
15 fora. The conciliation before the PGN defeats that
16 purpose because it opens an additional dispute
17 settlement forum, regardless of the fact that the PGN
18 lacks adjudicatory power.
19 Finally, if Claimants ultimately decide to
20 file an annulment action, they will violate the waiver
21 for a fifth time. Quite ironically, given that this
22 case is based on pure speculation of future breaches

1 and future losses, Claimants argue that Respondent
2 cannot rely on a future event to support its claim of
3 violation of the waiver because they haven't filed an
4 annulment action yet.
5 The only reason why Colombia is mentioning a
6 potential breach of the waiver is because if and when
7 Claimants file their annulment action, this Hearing
8 will be long past us, and with it Respondent's
9 opportunity to argue before this Tribunal.
10 It is important to highlight at this point
11 that the Treaty does not require Claimants to abandon
12 all their proceedings before administrative and
13 judicial tribunals with respect to the same measure.
14 It only requires Claimants to do so in the event that
15 they wish to submit a claim to arbitration.
16 In other words, what the Treaty's "no
17 U-turn" structure does not allow is for Claimants to
18 continue their proceedings in Colombia and at the same
19 time submitting a claim to arbitration before this
20 Tribunal, [challenging] the same measure alleged to
21 constitute a breach.
22 In their pleading commenting on the U.S.

1 submission, Claimants tried to save their waiver by
2 arguing that the measures [about] which they complain
3 in the Notice of Arbitration was the Indictment Order,
4 and that the waiver they submitted referred only to
5 that Indictment Order.
6 According to their flawed logic, the
7 tutelas, the appeal, the conciliation request, and an
8 eventual annulment action against a ruling with fiscal
9 liability do not violate the waiver because they do
10 not refer to the Indictment Order but to the fiscal
11 liability proceeding in general and to the ruling.
12 This is a clever argument. But the problem
13 is that it's inconsistent with what Claimants have
14 been arguing in this case since day one.
15 The measure they rally against is the fiscal
16 liability proceeding as a whole, including the ruling.
17 Because they clearly intend to continue with local
18 proceedings, Claimants now argue that they retain
19 their rights to initiate or continue proceedings that
20 challenge the ruling with fiscal liability until that
21 ruling itself becomes the subject of a claim under
22 Article 10.16.

1 Are they telling us now that the only
2 supposed breaches at issue in this case arise from the
3 Indictment Order and nothing else? Because that would
4 mean that any discussion regarding other aspects of
5 the fiscal liability proceeding and the ruling with
6 fiscal liability would be outside the scope of this
7 Tribunal's jurisdiction. Ironically, this last-minute
8 argument actually shows that Claimants know full well
9 that they violated the waiver.
10 To conclude, Claimants reservation of rights
11 is incompatible with the formal waiver requirement
12 contained in Article 10.18.2(b) of the Treaty.
13 Moreover, Claimants' initiation and continuation of
14 administrative, judicial, and dispute settlement
15 procedures in Colombia, including the recent
16 commencement of the conciliation proceeding, is
17 equally inconsistent with the material waiver
18 requirement of the Treaty.
19 Thus, there is no consent to submit this
20 dispute to arbitration, and the Tribunal lacks
21 jurisdiction ratione voluntatis over Claimants'
22 Claims.

1 I now turn it over to Dr. Frutos-Peterson to
2 conclude our presentation.
3 DR. FRUTOS-PETERSON: Thank you, Elisa.
4 Dear Members of the Tribunal, as Ms. Ordoñez
5 said during her preliminary remarks, this is a novel
6 case for Colombia since it is the first time it raises
7 an objection according to Article 10.20.4 of the
8 Treaty.
9 But we submit to you, very respectfully,
10 that this is a simple case because we have shown you
11 that there is no breach, no damage--two essential
12 requirements under the Treaty. Thus, Claimants' claim
13 is not ripe, not at the time Claimants submitted a
14 Notice of Arbitration, not even as of today, at this
15 precise moment. What is more, there is no investment
16 and there is no consent to international arbitration.
17 Colombia respectfully requests that you,
18 one, uphold Respondent's preliminary objections under
19 Article 10.20.4 of the Treaty and dismiss the claims
20 submitted by Claimants; two, uphold Respondent's five
21 jurisdictional objections; and, three, order Claimants
22 to pay all costs and expenses in this arbitration,

1 including Respondent's attorneys' fees together with
2 interest thereon.
3 This concludes, Members of the Tribunal, the
4 presentation of Colombia. Thank you so much for your
5 time and attention.
6 PRESIDENT NUNES PINTO: Thank you very much,
7 Ms. Frutos-Peterson. We are done. You have exceeded
8 ten minutes of your time. No?
9 THE SECRETARY: They have seven minutes left
10 on the time.
11 PRESIDENT NUNES PINTO: Oh, really? I'm
12 sorry.
13 DR. FRUTOS-PETERSON: We were counting.
14 PRESIDENT NUNES PINTO: Problem with my
15 watch. My apologies.
16 So, now we have the break for lunch. One
17 hour. And we will be back at 10 past 1:00. Thank
18 you.
19 (Whereupon, at 12:08 p.m., the Hearing was
20 adjourned until 1:10 p.m. the same day.)
21 AFTERNOON SESSION
22 PRESIDENT NUNES PINTO: Okay. Can we

1 resume? Both sides?

2 Okay.

3 So, let's get started. Now we have the

4 Opening Presentation of Claimants. We will go through

5 2:30, then we have a break around 2:30, in the

6 vicinity of, and then you'll have an additional

7 60 minutes to go.

8 MR. SILLS: Perfect.

9 PRESIDENT NUNES PINTO: Okay?

10 MR. SILLS: Thank you, Mr. President.

11 PRESIDENT NUNES PINTO: So, the floor is

12 yours.

13 OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

14 MR. SILLS: Thank you, Mr. President.

15 Slide 2, please.

16 Is that better?

17 THE SECRETARY: Yes.

18 MR. SILLS: I was trying not to yell.

19 (Comments off microphone.)

20 MR. SILLS: Now that we've got the technical

21 issues out of the way.

22 So, thank you, Mr. President. The slide

1 before us describes how we will address the opening
2 issues, addressing the case as pleaded and addressing
3 the issues in the context of the case as pleaded.
4 We begin by discussing the standard of
5 review for this proceeding, in accordance with the
6 rules and in accordance with the agreement of the
7 Parties.
8 We briefly address the question of the
9 non-party submission of the United States. And we
10 will address--and I'll actually ask my colleague,
11 Mr. Conrad, to address the factual background here
12 because that's the necessary context, and I have to
13 say, with all respect, what we didn't hear about this
14 morning for this case and this application.
15 We'll describe the violations of the TPA as
16 pleaded, address the question of our damages, address
17 the various jurisdictional objections that have been
18 made, and then conclude, hopefully on time,
19 Mr. President.
20 So, if we could have Slide 4, please.
21 Mr. Conrad will describe this in more detail, but the
22 procedural history here, very briefly, is this. In

1 2009, Reficar, a wholly-owned subsidiary of Ecopetrol,
2 which, in turn, is owned by the Ministry of Finance of
3 the Republic of Colombia, and FPJVC, not the
4 individual members, entered into a contract to provide
5 specified services in connection with the upgrading
6 and modernization of a refinery in Cartagena,
7 Colombia.
8 But very shortly after that contract was
9 entered into, Reficar, exercising its rights under an
10 express term of that contract, radically changed the
11 scope of the joint venture's work and, in effect, as
12 we will describe, made FPJVC essentially a provider of
13 personnel to what Reficar referred to as an integrated
14 project management team and critically deprived FPJVC
15 of any authority over the expenditure of public funds
16 either to prevent the expenditure or to authorize the
17 expenditure.
18 FPJVC completed its work under the contract.
19 It invoiced for that work. Each of those invoices was
20 paid by Reficar without objection. Nonetheless, the
21 CGR then went and initiated fiscal liability
22 proceedings against the Claimants and a host of

1 others, arguing that FPJVC--actually, the members of
2 FPJVC were fiscal managers, which is a specific
3 defined term under the Colombian statute, Law 610,
4 that creates the CGR and under which the CGR operates.
5 And that requires that a fiscal manager have
6 authority, as we have repeatedly pleaded and as we
7 have shown, over the expenditure of public funds, and
8 that it--in order to incur liability, that it must act
9 with, at a minimum, gross negligence. Although the
10 claim, despite its language, essentially asserts a
11 breach of contract at most, against--against the
12 Claimants.
13 The Claimants did give notice. The record
14 shows that Colombia ignored that notice of an intent
15 to bring a claim, refused to engage at all.
16 After the cooling-off period had expired,
17 the Claimants reached out again to Colombia, pointing
18 out that they now were free to bring a claim but,
19 again, inviting Colombia to meet and attempt to
20 resolve this matter.
21 And this time Colombia did respond, and
22 representatives of the Claimants, both counsel and

1 business personnel, traveled to Bogota and met with
2 ANDJE, the governmental agency represented here today
3 which has authority over investor-State claims in
4 Colombia. Those discussions were fruitless. And
5 after those discussions failed, this arbitration was
6 initiated.
7 Slide 5, please.
8 So, the TPA itself addresses the question of
9 preliminary questions. The language is before us.
10 And I don't think it's seriously disputed
11 that--perhaps not disputed at all, that wasn't
12 entirely clear to me from this morning's
13 presentation--that on preliminary questions, the
14 allegations of the Request for Arbitration are to be
15 taken as true and that preliminary questions are not
16 intended to resolve factual disputes.
17 They're not intended to resolve mixed
18 questions of fact and law, virtually all of the issues
19 that were highlighted this morning, or complex
20 questions of law. It's, in effect, intended to weed
21 out claims that clearly show, on their face, that they
22 don't come within the terms of the Treaty.

1 Next slide, please.
2 And the Tribunal will recall the discussions
3 leading up to Procedural Order Number 1. I don't
4 think we have to spend a great deal of time talking
5 about who said what about this. The procedural order
6 does speak for itself.
7 But this is what Colombia said about how we
8 came to be here, and that is that the Tribunal--the
9 only point at issue is whether the Tribunal will
10 establish a calendar to hear solely Respondent's
11 Article 10.20.4 objection as a preliminary matter or
12 whether it will establish a calendar to hear both
13 Respondent's Article 10.20.4 and Respondent's other
14 jurisdictional and/or admissibility objections as
15 preliminary questions.
16 THE TECHNICIAN: Excuse me. I'm sorry to
17 interrupt. We can't see the slides on the screen.
18 MR. SILLS: Going on. Next slide, please.
19 As reflected in Procedural Order Number 1,
20 that it was without prejudice to its objections to
21 jurisdiction and/or admissibility.
22 On the next slide, Number 8, we highlight

1 the particular provisions of PO Number 1 that govern
2 this proceeding.
3 And the Tribunal will recall that we had
4 actually proposed--we, the Claimants' counsel, had
5 proposed a jurisdictional phase in which, as in any
6 jurisdictional phase, there would be a full
7 development of the factual record, because
8 jurisdiction typically turns on questions of fact or
9 mixed questions of fact and law.
10 And that was actually objected to by
11 Colombia, saying there was no need for disclosure
12 because these would only be questions of law. And now
13 we're told that there's a burden of proof on facts on
14 Claimants when that is the exact opposite of what was
15 agreed. This was going to be done as a consolidated
16 preliminary matter addressed to questions of law
17 raised by the RFA.
18 And I should say at the outset that all the
19 cases that were referred to this morning about
20 jurisdictional dismissals were in jurisdictional
21 phases of cases. The Tribunal certainly knows that
22 it's not at all uncommon in investor-State claims for

1 there to be a separate jurisdictional phase in advance
2 of a hearing on the merits, and sometimes those do
3 result in jurisdictional dismissals.
4 What wasn't provided, because so far as I
5 know, it doesn't exist, is a jurisdictional dismissal
6 in effect on briefing an oral argument addressed to a
7 pleading, and certainly none was cited to us this
8 morning.
9 So, it is true that as the Claimants, we
10 bear the burden of proof ultimately to show
11 jurisdiction. We don't--couldn't contradict that.
12 But that is on a full record. The case was not
13 bifurcated into a jurisdictional and a merits phase.
14 The case was not trifurcated into a preliminary
15 objections, jurisdictional, and a merits phase.
16 It was on the request of the Respondent, set
17 up as preliminary questions, and if they failed on
18 those--as they should, as they will--that there would
19 be a merits phase, at which they will be free to raise
20 any and all jurisdictional objections that they choose
21 to raise.
22 But that will be on a full record with the

1 benefit of disclosure, with the benefit of witness
2 testimony, with the benefit of a full developed
3 record, as should be the case for any attempt to
4 terminate a case.
5 Slide 10, please. And Slide 11. There we
6 are.
7 So, this is the language of the Treaty
8 regarding a hearing on preliminary questions.
9 Claimants' factual allegations in support of any claim
10 in the Notice of Arbitration must be assumed to be
11 true, although we heard repeated challenges this
12 morning to the truth of those various allegations.
13 And I'll turn to some of those later in our
14 presentation. But...
15 Next slide, please.
16 This is not an evidentiary hearing, although
17 Colombia has repeatedly attempted to turn it into one.
18 Here on Slide 12 is an example. Two examples.
19 "Claimants"—we—"have not proved"—proved—
20 "that there is a lack of effective or sufficient means
21 or remedies against the ruling with fiscal liability,
22 or that such remedies are futile, ineffective or

1 improbable."

2 Well, that's because we haven't had a

3 hearing yet on that. But we pleaded that because—

4 particularly in light of the extraordinary delays, a

5 decade or more, that plagued the Colombian judicial

6 system. And we're not just making this up.

7 As the Tribunal will recall from the Hearing

8 on Interim Measures, the former chief legal officer of

9 the CGR provided a witness statement detailing exactly

10 the difficulties that we would encounter in seeking

11 relief.

12 But the allegation here, it's a well-founded

13 allegation. It is either a question of fact or a

14 mixed question of fact and law. It is not a question

15 of law, as was asserted this morning.

16 Similarly, we hear that Claimants—in

17 Paragraph 204 of the Reply that was filed by

18 Respondent: "Claimants assert they have suffered

19 reputational damage as a result of the alleged

20 violations perpetrated by Colombia"—indeed we do, and

21 indeed we did—"but they have failed to prove, even

22 prima facie, the existence of such damage."

1 If this were an evidentiary hearing, we
2 would call witnesses precisely to that effect. But
3 that is not how this was set up. That is not how this
4 part of the proceeding is organized. And it is
5 inappropriate to suddenly shift gears and assert that
6 there's an obligation to come forward and prove these
7 allegations on a hearing intended and designed to hear
8 preliminary questions.
9 And so, on the next slide, 13, we cite from
10 the decision in *Pac Rim v. El Salvador*, a widely cited
11 case in which the Tribunal will recall Mr. Veeder sat
12 as the President of the Tribunal.
13 And he, in turn, citing Professor Schreuer
14 and his commentary on the ICSID Convention, states
15 that—talking about—saying: "No proof is required at
16 this stage. On most points, a mere assertion in the
17 request will suffice, and the information thus given
18 may be developed at a later stage. By assertion, the
19 Tribunal assumes these authors to mean an appropriate
20 statement specifying the factual and legal bases of
21 the claim, without evidential proof."
22 The following slide, Number 14, discussing

1 CAFTA, which in this respect is materially identical
2 to the Colombia-U.S. TPA, makes the important point,
3 which I think has been alighted by Colombia, that the
4 procedure under 10.20.4 is clearly intended to avoid
5 the time and cost of a trial and not to replicate it.
6 "There can be no evidence from the
7 Respondent contradicting the assumed facts alleged in
8 the Notice of Arbitration, and it should not
9 ordinarily be necessary to address at length complex
10 issues of law, still less legal issues dependent on
11 complex questions of fact, or mixed questions of fact
12 and law."
13 But that sort of mini trial in advance of
14 the development of the record is precisely what
15 Colombia is attempting to create here.
16 From the *Kappes* case in the next slide,
17 cited this morning by Colombia, it makes it clear that
18 if there were any deficiencies identified, we can, in
19 fact, clarify and submit them. And I should say at
20 the outset, you know, as the case goes forward, we
21 will, of course, amend it because there is now an
22 award of the Tribunal, which we were told at the

1 hearing on interim measures they intend to enforce and
2 are making efforts to enforce, depending on the
3 exchange rate in effect, somewhere between USD
4 750 million and USD 900 million. So, of course, we
5 will address that as the case moves forward.
6 But the point here is that by making this
7 application on preliminary questions, Colombia, in
8 effect, froze the case in time because that
9 application, as we were told this morning, properly
10 so, is addressed to the RFA as pleaded. And that will
11 withstand this application, as we will show.
12 But that doesn't mean that that is the case
13 that will ultimately be heard by the Tribunal.
14 Everybody knows that as circumstances develop, cases
15 change, claims are amended, supplemented. And,
16 obviously, it's a very significant development.
17 And I should say at the outset there was a
18 lot of discussion about how this is something—somehow
19 a moving target, and there was a quote put on the
20 screen, and that the measure being challenged was the
21 CGR Decision in response to a question asked by the
22 Tribunal at the Interim Measures Hearing.

1 Well, that was at the Interim Measures
2 Hearing. And the question was what measure were we
3 challenging there. The question—and I answered it, at
4 least as I understood it and as the record shows was
5 the case in context, was not what is the measure being
6 challenged in the RFA.
7 There's no contradiction there. The case is
8 not a moving target. The case is as pleaded, and it's
9 as pleaded precisely because Colombia chose to make
10 this application prematurely.
11 If they wanted to raise these questions,
12 which are questions of fact or mixed questions of fact
13 and law, they should have done it in an appropriate
14 way, either seeking a separate jurisdictional phase,
15 which they expressly disclaimed in the negotiations
16 leading up to—or the discussions leading up to the
17 issuance of PO Number 1, or applied for that. By
18 agreeing to treat everything, in their words, as
19 preliminary questions--whether they are preliminary
20 questions within the meaning of the Treaty or could
21 otherwise be considered on a factual record--the
22 decision was made to put them in that particular

1 procedural context governed by PO Number 1, and they
2 should be held to the bargain that they made.
3 And along those lines, again, as *Pac Rim*
4 makes clear in Slide 16 and 17--if we could have--oh,
5 we do have them up.
6 The Tribunal should not take a formalistic
7 view of a pleading. This isn't some 18th century
8 common law court where exact wording is the sine qua
9 non of jurisdiction or on the merits. Particularly in
10 considering preliminary objections, it is not
11 appropriate to take a strictly formal and formalistic
12 view.
13 So, as Slide 18 makes clear, the burden of
14 proof--the Respondent attempts to place the burden of
15 proof at this stage of the case on Claimants, but
16 they're conflating the ultimate burden of proof in the
17 case, which we don't dispute rests on the Claimants.
18 The Claimants, as Claimants, must prove each and every
19 element of their claim.
20 Could we have Slide 19, please.
21 So, 17, 18, and 19 consist of quotes from
22 the papers submitted by Colombia, all attempting to

1 raise factual issues, all suggesting that there's a
2 burden of proof on the facts at this stage in the case
3 upon Claimants.
4 That's not the law. It's not Procedural
5 Order Number 1. And it would be, I have to say, a
6 miscarriage of justice to suddenly switch ground at
7 this point in these proceedings and assert that
8 Claimants bear some kind of burden, let alone the
9 final and ultimate burden of proof on these factual
10 issues.
11 If we could have Slide 21, please.
12 This is a quote from the *Pac Rim* decision
13 making it clear that the burden of proof at this stage
14 of the proceedings rests on the Respondent to show
15 clearly and convincingly, to a certainty in the words
16 of some tribunals, that there is no case. And that
17 they cannot show.
18 We also refer to *Bridgestone v. Panama* where
19 the Tribunal stated: "At all times during the
20 exercise under CAFTA Articles 10.20.4 and 10.20.5, the
21 burden of persuading the Tribunal to grant the
22 preliminary objection must rest on the party making

1 that objection."
2 And indeed, in our field, in international
3 arbitration, the burden of proof is always on the
4 party asserting a fact, a claim, or a defense. And
5 that is Colombia at this stage.
6 If we could have Slide 22, please.
7 Specifically with respect to the burden of
8 proof on jurisdictional objections about which we
9 heard so much this morning, Colombia cites a line of
10 cases. But all of those cases arose in the context of
11 decisions on jurisdiction in the jurisdictional phase
12 of the case, not on preliminary questions, whether
13 under Article 10.20.4 or under ICSID Rule 41.
14 And as I've already noted, that is not the
15 position that Colombia took in the discussions leading
16 up to Procedural Order Number 1, and it is
17 certainly--had it been the position, we would have
18 objected as strenuously as possible to having a
19 hearing on the merits, some sort of mini trial or
20 preliminary trial before the record was developed.
21 Could we have Slide 23, please.
22 And this, again, is from the Respondent's

1 saying: "It is worth noting that Respondent's
2 position is that document production"--which, of
3 course, would be necessary to a hearing on the merits,
4 on the facts---"will not be required during the
5 preliminary phase because the issues discussed will
6 turn mostly to legal questions."
7 And if we could have Slide 24, please.
8 This is how the Tribunal resolved that issue
9 and ordered that the case proceed, and those are the
10 paragraphs that bring us here today.
11 And if we could have Slide 26.
12 It's, again, from two decisions, *RSM vs.*
13 *Granada* and, again, the *Pac Rim* decision, both by
14 distinguished tribunals. Under ICSID Rule 41(5), an
15 alternative source--it's already here--a tribunal
16 should only dismiss if it finds that the claimants are
17 certain to fail.
18 ARBITRATOR BEECHEY: Mr. Sills, for the
19 record, you said Slide 26. You mean 25, don't you?
20 MR. SILLS: I did. Thank you. Thank you,
21 Mr. Beechey. I'm getting ahead of myself.
22 ARBITRATOR BEECHEY: Don't worry. I'm

1 listening.
2 MR. SILLS: Let me turn very briefly to the
3 question of the non-disputing party submission about
4 which we heard so much this morning.
5 First, as it always does when it makes a
6 non-disputing party submission, the United States
7 expressly disclaimed expressing a view on the merits
8 of the case. And it is concerned largely with
9 theoretical and somewhat abstract questions of law,
10 largely referring to the Treaty itself and to the
11 views of the United States on that Treaty.
12 But if we could have Slide 28, please.
13 Colombia takes the view that this
14 non-disputing party submission is arguably more
15 important than other arbitral decisions or
16 jurisprudence and actually claims that it represents
17 subsequent agreement or subsequent practice under
18 Article 31 of the Vienna Convention.
19 This morning's transcript shows that that
20 non-disputing party submission shows, quoting from the
21 transcript, "the highest possible degree of
22 agreement."

1 One would think that the highest degree of
2 agreement would be an amendment to the Treaty. But
3 the position that Colombia advances here, that the
4 U.S. submission is binding authority here, has been
5 rejected repeatedly by ICSID and other tribunals
6 hearing investor claims.
7 If we could have Slide 30, please.
8 This is a quote from the decision of the
9 Tribunal in *Telefónica v. Argentina*. They are--these
10 non-disputing party submission are not evidence of
11 subsequent agreement. They don't evidence subsequent
12 practice.
13 They can't be evidence of subsequent
14 agreement because non-party submissions are a
15 unilateral act. A subsequent agreement requires the
16 parties to come to an agreement in a single common
17 act, an amendment to the treaty, for example.
18 And the interpretation being offered this
19 morning would simply blur the distinction under the
20 Vienna Convention under Articles 31(3)(a) and 31(3)(b)
21 of the Convention, and no case has been cited
22 endorsing the notion that a non-party submission

1 constitutes a subsequent agreement.
2 They're also not evidence of subsequent
3 practice, because subsequent practice depends not on a
4 single instance but on whether and how it's repeated.
5 And a single instance of common conduct, even if a
6 non-disputing party submission was such evidence, is
7 not dispositive for treaty interpretation, although it
8 is asserted to be.
9 But I think more important, this is an
10 amicus submission. It's an amicus submission that's
11 entitled to the weight that its logic and reasoning
12 and authority cited carries. And it's for the
13 Tribunal to decide how much weight to give to a
14 non-disputing party submission.
15 It is not true that simply by filing a
16 statement on an amicus basis to which another party
17 will agree that it suddenly becomes a binding
18 agreement. There is no authority for that. The
19 Vienna Convention, after all, says only that the
20 tribunal should take into account a non-disputing
21 party submission, not that its hands are tied or that
22 it's somehow bound.

1 Now, some treaties do have a mechanism for
2 the State Parties to the treaty--NAFTA, in its
3 original form, for example, set up a mechanism where
4 the parties, through a formal procedure, could agree
5 on a binding interpretation. But that's simply absent
6 here.
7 And I have to say, with respect to the
8 United States, the submission made here consists
9 largely of a series of ipse dixits, assertions about
10 the law without reference to the decided cases,
11 without reference, for the most part, to significant
12 jurisprudence, and taking a view that the United
13 States, for its own reasons--and as we suggest as a
14 State party, the U.S. has an interest, it's not purely
15 a disinterested party--would take.
16 But it's for the Tribunal. As all the
17 tribunals cited in our papers and in these slides have
18 dealt with non-disputing party submissions, not only
19 by the United States but by other State parties and,
20 for that matter, private parties.
21 Those submissions get the weight they
22 deserve. And it's for the Tribunal, exercising its

1 discretion and weighing those submissions against the
2 body of decided cases and against the jurisprudence
3 that everyone follows, to decide whether to give any
4 weight to that submission and, if so, how much weight
5 to give to that submission.
6 So, with that--and I do note, finally,
7 Colombia relied heavily this morning--relied heavily
8 on its papers on non-disputing party submissions, but
9 it's a closed loop. And they are presumably relying
10 on those because they cannot find decided authority in
11 their favor, because they cannot find jurisprudence
12 supporting their positions.
13 But those are amicus submissions. And as I
14 say, they are--they have the weight that they deserve,
15 and it's for this Tribunal to decide how much weight
16 to give that submission in this case, as will become
17 clear in a moment from Mr. Conrad's presentation.
18 To the extent that there are assumed facts
19 underlying the submission of the United States, they
20 are based on an incorrect reading of the record here.
21 And, in particular, the statements of the United
22 States regarding the burden of proof took no account

1 of the procedural order that actually governs here, or
2 the discussions leading up to it, and simply relied on
3 abstract statements about who bears the ultimate
4 burden of proof on jurisdictional issues, a point that
5 I don't believe is actually in dispute here.
6 With that, I'll ask Mr. Conrad to describe
7 the factual background of the dispute.
8 MR. CONRAD: Thank you, Mr. Sills, Members
9 of the Tribunal, opposing counsel.
10 I wanted to start out with a slide here that
11 goes through kind of some of the chronology of
12 Claimants' investment in Colombia.
13 This began in 1975 when Claimants started
14 first beginning--began investing in Colombia. Over
15 those years, almost 30 years--it wasn't until 2004
16 when Ecopetrol began planning this megaproject known
17 as the expansion and revamp of the Cartagena Refinery
18 in 2004.
19 Subsequently, in 2007, Ecopetrol, which
20 Mr. Sills stated earlier, 100 percent owns an entity
21 called "Reficar." And it created Reficar in 2007 for
22 this very purpose, to own this refinery and

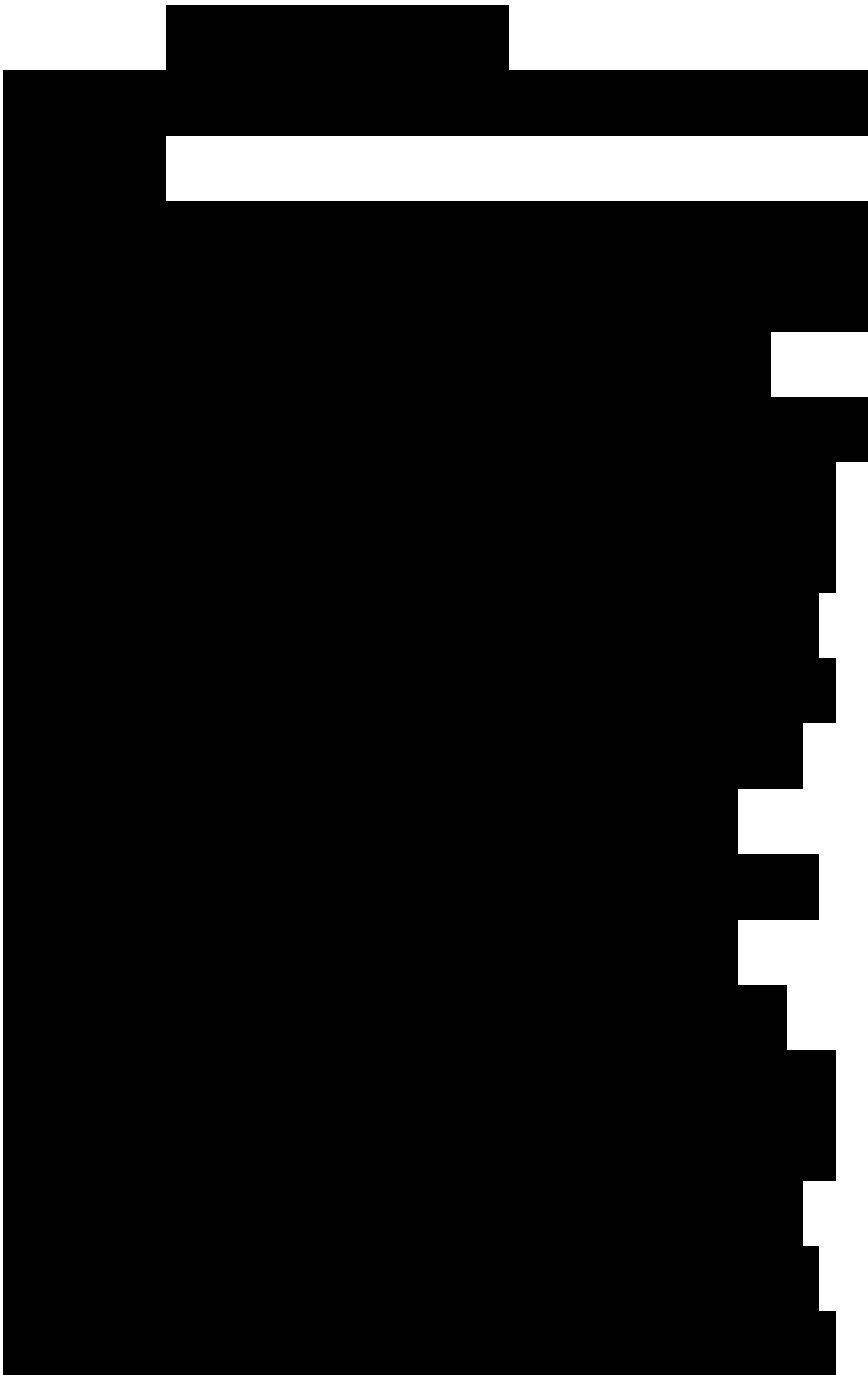
1 subsequently operate this refinery.
2 Ecopetrol is owned by Colombia of
3 88 percent--it's majority owned, 88 percent, and
4 that--those shares are actually owned by the Ministry
5 of Finance of Colombia.
6 Colombia also owns all the hydrocarbons
7 which are managed by the National Hydrocarbons Agency,
8 and Ecopetrol and Reficar carry out many of the
9 National Hydrocarbons Agency's duties.
10 In 2009, Reficar entered into a contract,
11 which we heard about this morning from Colombia's
12 counsel, which I will go into a little bit more detail
13 here during this factual background section--but
14 entered into a contract called "The Project Management
15 Consultancy Agreement or Contract" or the "PMC
16 Agreement."
17 This Contract specifically contemplated
18 project management services for the construction of a
19 megaproject refinery. I mean, this was a
20 multi-billion-dollar project upon which Ecopetrol,
21 through its wholly owned subsidiary, Reficar,
22 contracted with Foster Wheeler to provide these

1 project management services related to this
2 construction megaproject.
3 In that agreement, it contemplated
4 delegation of authority. Essentially what was
5 contemplated by the agreement, as it was signed and
6 executed back in November of 2009--there was an
7 appendix to that agreement that outlined all of the
8 specific obligations, contractually, that Reficar
9 expected Foster Wheeler to perform.
10 Many of those agreements--many of those
11 duties within that agreement contemplated that Foster
12 Wheeler would effectively serve as the owner's
13 representative, be the face of Reficar vis-à-vis
14 Chicago Bridge & Iron, who had been selected as the
15 engineering, procurement, and construction contractor
16 or, in other words, the general contractor.
17 But it was contemplated that Reficar would
18 hire a PMC. And a PMC is not unusual in megaprojects
19 such as this one, as far as the setup.
20 From 2009, again November, when the PMC
21 Contract was first signed, that agreement lasted for
22 the better part of almost a decade. It went from 2009

1 until the end of 2018. It was a long-term agreement
2 upon which Foster Wheeler was performing services.
3 Next slide, please.
4 And in our Request for Arbitration, which is
5 excerpted here on Slide 33, there were--it
6 specifically refers to additional investments that
7 Claimants made in Colombia and wasn't limited just to
8 performing this long-term Construction Project
9 Management Services Contract on behalf of Reficar. It
10 also incorporated or included specifically investing
11 significant amounts of time, capital, personnel, and
12 labor in the Colombian territory.
13 And in that regard--as we all know, there
14 are two entities that comprised the contractual joint
15 venture Amec Foster Wheeler USA and also Process
16 Consultants, Inc. Process Consultants, Inc., formed a
17 local Colombian branch called PCIB which performed the
18 local work, performed the local labor. Amec Foster
19 Wheeler performed the offshore work.
20 So there was--and Claimants have pled that
21 there was significant amount of investment locally in
22 order to perform that work; not just the work that was

1 contemplated within the Contract but, also, in order
2 to do that work, they expended significant time,
3 significant capital, hired personnel, and paid taxes
4 in Colombia.
5 Before I turn to the next slide, Tribunal,
6 the next slide contains confidential information. I
7 just wanted to advise the Tribunal.
8 THE SECRETARY: If you can give us one
9 minute.
10 MR. CONRAD: Of course.
11 (End of open session. Attorneys' Eyes Only
12 information follows.)

1 CONFIDENTIAL SESSION



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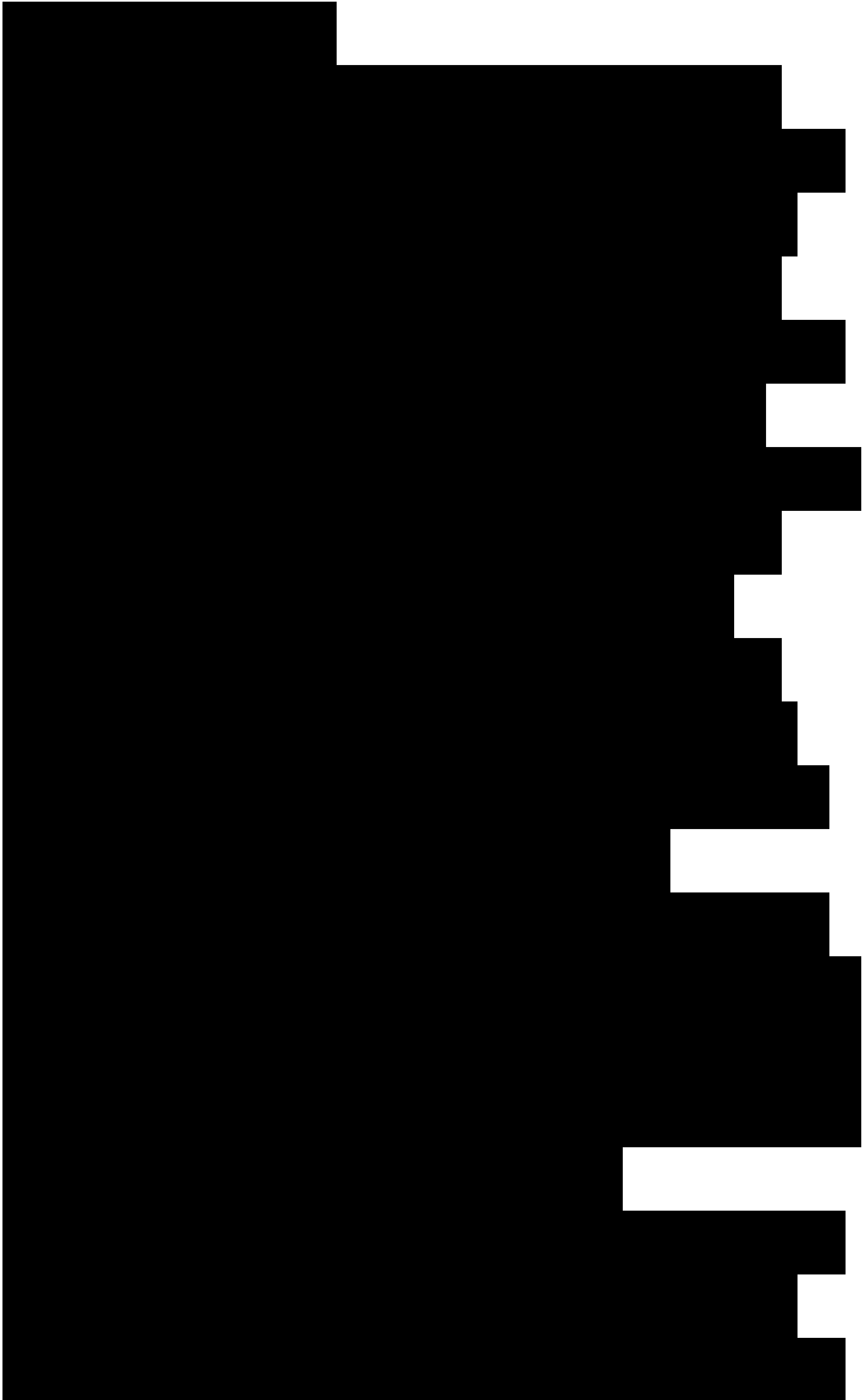

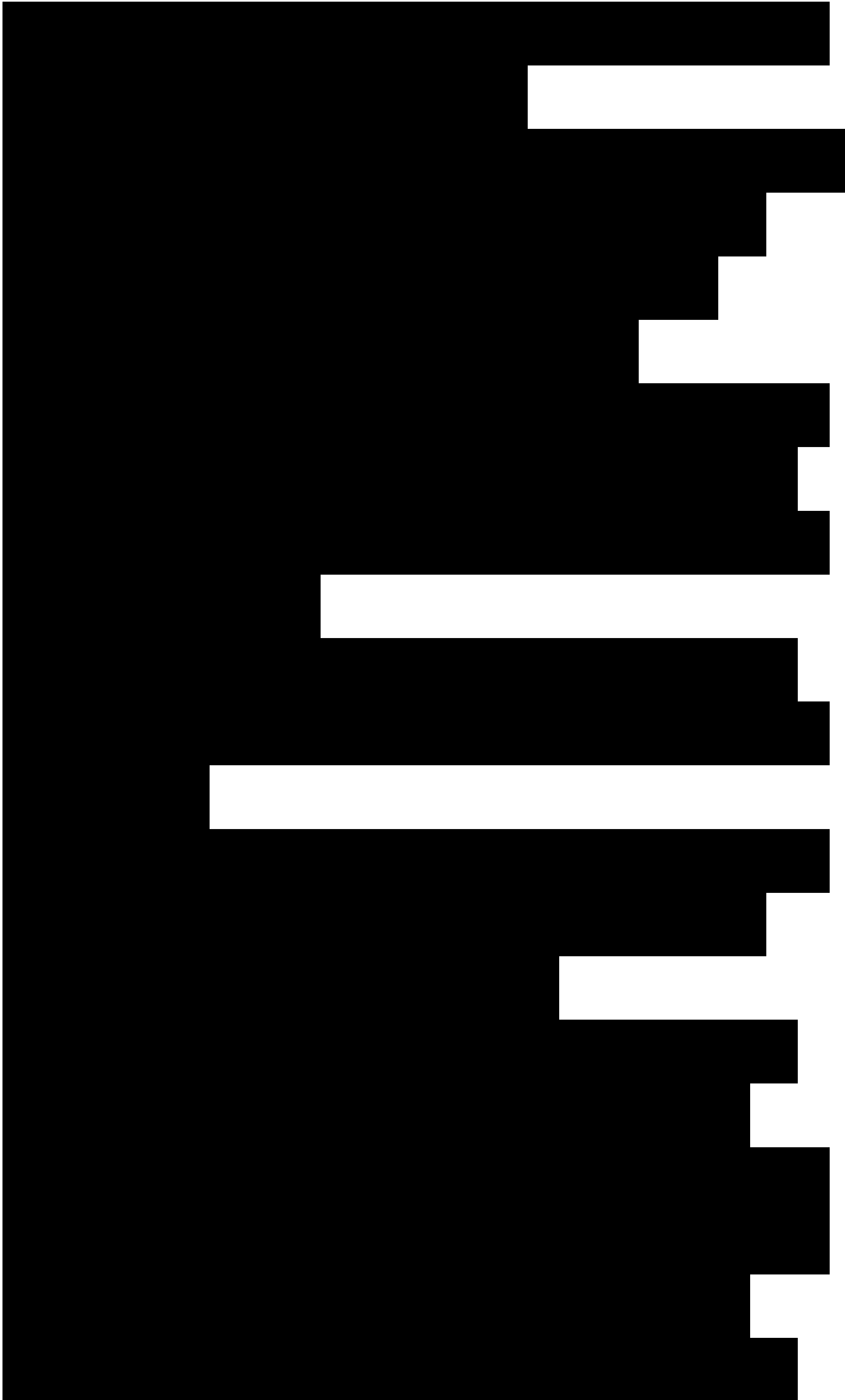

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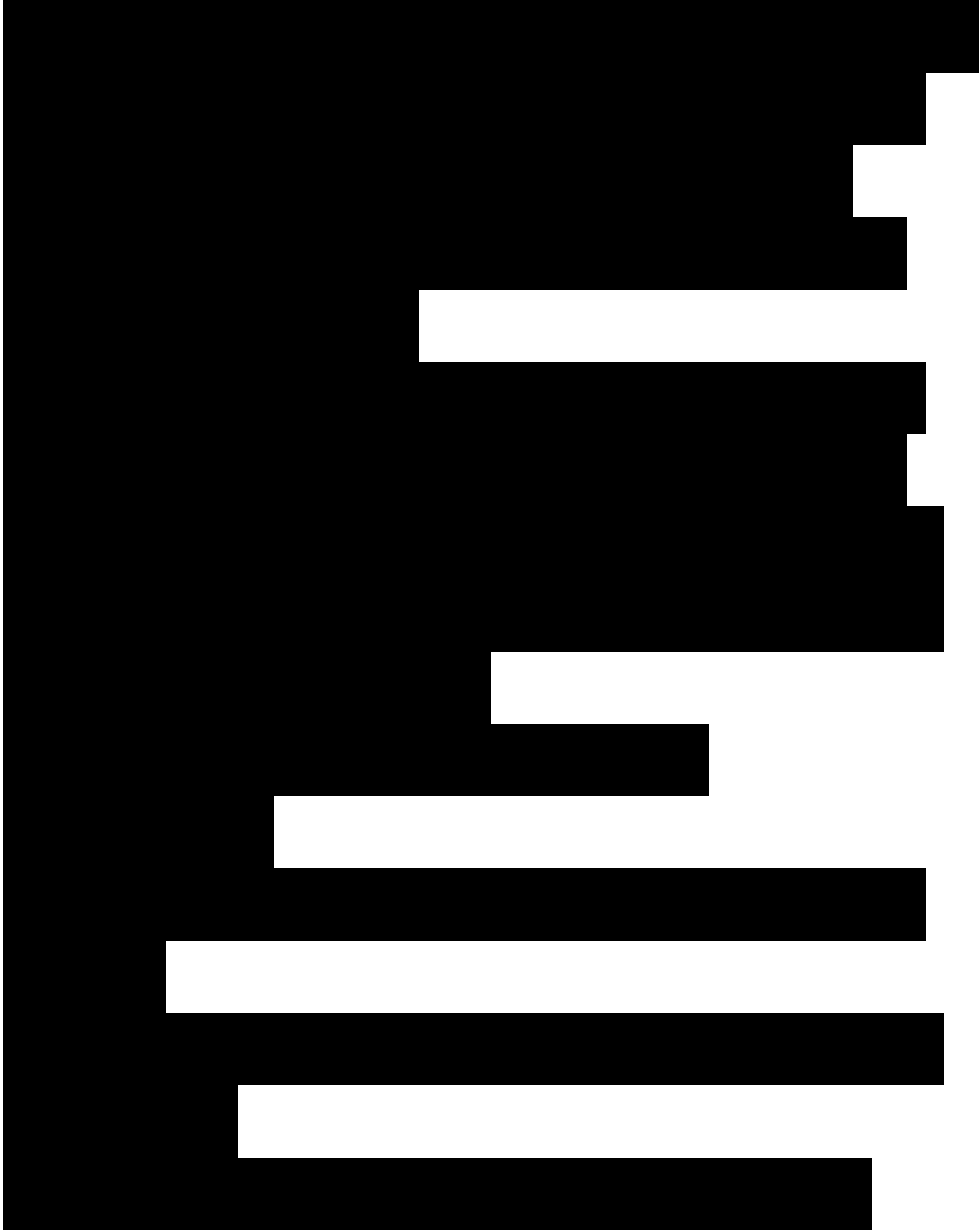

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18 (Attorneys' Eyes Only session ends at 2:00
19 p.m.)

1 OPEN SESSION

2 (Pause in the proceedings.)

3 THE SECRETARY: Okay. We can proceed.

4 MR. CONRAD: Thank you, Madam Secretary.

5 The next slide is just an excerpt of one

6 section of the PMC Contract that specifically

7 contemplates that Reficar here this last--or the

8 second paragraph that's excerpted here says that

9 Reficar may make the decision at anytime whether to

10 continue or not all or any part of the services

11 included in the offer.

12 Next slide, please.

13 As I stated earlier in November of 2009,

14 this Contract, as written and as contemplated by the

15 Claimants here who signed it and agreed to perform it

16 as written originally, changed almost within 30 days

17 of after signing it.

18 At the first kick-off meeting between

19 Reficar and FPJVC, Reficar informed FPJVC that they

20 were no longer going to be serving the role as a

21 traditional PMC. Instead, Reficar decided to create

22 what's called--what they called an "Integrated Project

1 Management Team." But really, in reality, it was
2 really just Reficar's project management team with
3 Foster Wheeler providing support.
4 On Slide 36 here is an excerpt from the
5 Jacobs Report. Jacobs is Jacobs Consultancy. It's a
6 well-known EPC contractor very similar to Foster
7 Wheeler, very similar to CB&I. It's a competitor to
8 both of those companies.
9 Jacobs was retained by Ecopetrol to serve as
10 its, basically, eyes and ears to report to Ecopetrol,
11 who was the 100 percent owner of Reficar, to basically
12 audit and supervise and check in and report to
13 Ecopetrol about the project's status.
14 In October of 2015, well after the project
15 had been, you know, started in 2010, basically at the
16 time of the project's construction completion but
17 prior to the pre-commissioning and start-up of the
18 refinery, Jacobs issues a report to Ecopetrol. This
19 is what's shown here.
20 And specifically in Paragraph 1, Jacobs
21 found that "in an integrated project management team,
22 PMT--the authority and responsibility for

1 decision-making must be delegated in specific
2 positions within the organization, and these positions
3 should not be duplicated.
4 This was not so in the Reficar project, and
5 all of the decisions had to be made by only Reficar
6 managers. [Foster Wheeler]'s team had no authority
7 and became only additional personnel in Reficar's
8 team, and many of the management functions were
9 duplicated.
10 Without having any authority, [Foster
11 Wheeler]'s personnel could only make suggestions and
12 provide tools for project management." "All of the
13 decisions had to be made by Reficar's managers."
14 Despite having received, or this report been issued in
15 October of 2015, the Comptroller General, who is the
16 most senior person within the Contraloría, orders a
17 special audit in December of 2015, just a few months
18 later. After that, in May, shockingly, the
19 Comptroller General makes public statements about
20 Foster Wheeler's management control was, quote,
21 shameful and embarrassing.
22 Thereafter, the final report on the special

1 audit was issued in November of 2016. And then on
2 March 10th, 2017, the CGR commences its fiscal
3 liability proceedings based on Law 610.
4 In this opening resolution, which is
5 March 10 on Page 37 before I move to Page 38, notably
6 the CGR--and I don't think that Colombia mentioned
7 this in their proceeding--their discussion earlier.
8 They did not charge Ecopetrol. They did not charge
9 Reficar. Who did they charge? They charged certain
10 officers and directors of Reficar. They
11 charged--excuse me. They opened an investigation with
12 respect to the directors and officers of Reficar and
13 the directors of Ecopetrol along with Foster Wheeler
14 and CB&I and several insurance companies.
15 Next slide on 38.
16 On February 2018, Claimants Foster Wheeler
17 USA and PCI submitted in English--the translation is
18 free versions. What were these free versions? These
19 were opportunities for the Claimants to explain to the
20 CGR that there is no liability here. We are not
21 fiscal managers.
22 Claimants attached the Ecopetrol Jacobs

1 Report as evidence to the fiscally--to the
2 Contraloría, along with other evidence that the
3 Claimant submitted to the Contraloría.
4 Despite that fact, on June 5th, Auto 773,
5 the charging document or, as Colombia stated in its
6 papers, the Indictment Order was issued. So despite
7 having all of that evidence and proof conclusively
8 showing that neither the Claimants or none of the
9 Claimants were fiscal managers, they charged them. In
10 that same document, they charged them with
11 $2.43 billion worth of damages.
12 The entirety of the amount earned, gross
13 revenue, was just shy of $270 million. This project
14 cost total over $8 billion. But the charge here was a
15 multiple of almost ten times what Claimants had been
16 paid on this Contract at the time of June 5th, 2018.
17 In this same document, Auto 773, the
18 Contraloría also dismissed charges against the
19 Ecopetrol Board members, finding that they didn't have
20 ultimate decision-making authority. They were not
21 fiscal managers, which is exactly the same argument
22 that the Claimants have presented to the Contraloría

1 in its free version and that the Colombian Government,
2 through Ecopetrol, had within the Jacobs Report of
3 October of 2015.
4 That decision to the final--memorializing
5 that dismissal of the Ecopetrol Board members was made
6 on August 5, 2018, as shown here on Slide 38 and Auto
7 188.
8 Thereafter, the Claimants filed a tutela
9 with--seeking, basically, whatever they could to try
10 to get--seek dismissal of the Contraloría's proceeding
11 asserting violations of Colombian law only, and it was
12 dismissed thereafter. Claimants submitted their
13 Notice of Intent in December of 2018. And as
14 Mr. Sills stated earlier, between the submitting--the
15 submittal of the Notice of Intent, there were meetings
16 taking place where Claimants sought to potentially
17 resolve pursuant to that notice and the cooling-off
18 period.
19 Those discussions were unsuccessful and
20 Claimants filed their Request for Arbitration in
21 December of 2019.
22 The last few slides here are subsequent to

1 the Request for Arbitration filing, but they deal with
2 the ongoing defense that are related to Claimants in a
3 proceeding that they didn't begin. It's a
4 proceeding--the Contraloría's Fiscal Liability
5 Proceeding, to be clear, was instituted by the
6 Colombian Government, specifically the Contraloría.
7 This was not a proceeding that the Claimants
8 instituted on their own.
9 These actions of the tutela were limited to
10 technical issues related to that defense seeking the
11 right to cross-examine technical experts on the first
12 occasion; and the other one, seeking additional time
13 to file their responsive or motion to reconsider of
14 this internal appeal within the CGR. All--again, no
15 external proceedings. No commencement of any new
16 proceedings.
17 And then ultimately on April 26 of 2021, the
18 CGR issues its decision finding Claimants, along with
19 others except for the Ecopetrol Board members who had
20 been dismissed, jointly and severally liable for, at
21 then, $811 million based on the rate of exchange. And
22 then subsequently on July 6, 2021, the CGR Decision

1 became final.

2 Where are we now? Just most recently after

3 our Provisional Measures Hearing back in November,

4 Colombia has begun its collection efforts. The

5 collection proceeding is now commenced. We received

6 notice of a persuasive collection. As Colombia

7 mentioned earlier, that's an opportunity for the

8 Claimants to voluntarily make a payment. And then

9 after that, as we described at the Provisional

10 Measures Application Hearing, there will be a forced

11 collection proceeding commencing now.

12 And so, this concludes the section on the

13 factual background. I'll now turn it back to my

14 colleague, Mr. Sills, to discuss Respondent's prima

15 facie violations objections as preliminary questions

16 to the TPA. Thank you.

17 MR. SILLS: Thank you. If we could have

18 Slide 42.

19 These are the five claims pleaded to date in

20 the RFA. And I'm going to go briefly through them in

21 turn, beginning with the violation of Article 10.5 of

22 the Treaty, the minimum standard of treatment.

1 Slide 44, please.
2 Slide 44 requires Colombia to provide
3 Claimants with fair and equitable treatment. That
4 specifically includes the customary international law
5 minimum standard of treatment of aliens as the minimum
6 standard of treatment. And it goes on, of course, to
7 provide in Paragraph 2 that FET includes the
8 obligation not to deny justice in civil, criminal, or
9 administrative adjudicatory proceedings, and then
10 makes itself subject to Annex 10-A.
11 Slide 45, please.
12 Annex 10-A states that the customary
13 international law minimum standard of treatment of
14 aliens refers to all customary international law
15 principles that protect the economic rights and
16 interests of aliens.
17 Slide 46, please.
18 The RFA pleads at least six particular
19 grounds who are concluding that the treatment of
20 Claimants fell below the minimum standard of
21 treatment.
22 Those are, first, that the CGR concluded,

1 without any possible basis, that Claimants were fiscal
2 managers and asserted jurisdiction in the fiscal
3 liability proceeding on the grounds that they were, in
4 fact, fiscal managers who would engage in gross
5 negligence.
6 Although, as we have pleaded, as Mr. Conrad
7 has just described, very early in the process, Foster
8 Wheeler, the joint venture, had been reduced to
9 providing personnel to Reficar, which determined to
10 manage its own project. And that joint venture had no
11 authority over the expenditure of funds, no ability to
12 stop the expenditure of public funds, and could not
13 possibly have acted with gross negligence.
14 Second, the CGR failed to articulate or give
15 proper notice of viable theories of liability,
16 causation, and damages. It was simply asserted in
17 this enormously long charging document that all
18 respondents were jointly and severally liable for all
19 damages. The damages, essentially, the difference
20 between the bid price as estimated by Chicago Bridge &
21 Iron, not by FPJVC, and the amounts that were
22 ultimately incurred in order to complete the project.

1 Those damages not only were joint and
2 several, but they were grossly disproportionate to
3 Claimants' alleged harm, and there was no attempt to
4 establish a causal link between any wrongful act of
5 FPJVC or, for that matter, other defendants, and any
6 damages alleged to have resulted.
7 And, of course, the Tribunal will recall
8 that in the *Glencore* case, an irrational damage theory
9 adopted by the CGR was the basis for liability found
10 by the tribunal in that case. And Colombia also took,
11 through other agencies of the Colombian Government,
12 conflicting positions on this.
13 The Jacobs Report was specifically endorsed
14 by the PGN, and that is the Jacobs Report as
15 commissioned by Ecopetrol, the owner of Reficar, the
16 owner of the project. We pled that we were not
17 afforded an adequate opportunity to defend ourselves.
18 And, as Mr. Conrad just described, the CGR, supposedly
19 a neutral decision-maker of the Colombian Government,
20 repeatedly made inflammatory statements impugning the
21 integrity of the Claimants here, asserting that their
22 fiscal management, which didn't exist, was

1 embarrassing or shameful, publicizing, waging a
2 campaign in the press against the Claimants and
3 resulting, as we plead, in reputational harm.
4 If we could have Slide 47, please.
5 This slide puts up in graphic form
6 Colombia's objections regarding the FET claim. And as
7 we'll show in a moment, putting to one side that
8 they're entirely unfounded, they're certainly not
9 appropriate for consideration as preliminary
10 objections.
11 As I was describing before, preliminary
12 objections deal with straightforward legal questions
13 so that the Tribunal doesn't have to make factual
14 determinations or resolve complex issues of law.
15 Here, Colombia raises questions about the
16 content of the FET standard. In fact, this morning I
17 believe they made an attempt to resurrect the *Neer*
18 standard of 1923 as to the minimum standard of
19 treatment. And, thankfully, the minimum standard of
20 treatment has evolved well beyond that.
21 Mixed questions of law and fact. Choose
22 only one of many examples whether Claimants have

1 adequately exhausted local remedies on the denial of
2 justice claim or, for that matter, whether there is a
3 meaningful and effective remedy at all.
4 But to the extent the Tribunal--and these
5 should not be addressed on preliminary questions
6 because it's simply inappropriate in the procedural
7 posture, which the case is in now, to resolve those
8 questions, even to address them. But to the extent
9 the Tribunal does decide to address any of them,
10 Colombia is wrong on the law.
11 Slide 48, please.
12 The first of the objections Colombia has
13 raised that I want to address is the notion that the
14 Treaty protects investments but not investors. Now,
15 as the quoted language on Page--I'm sorry--on Slide 48
16 makes clear, the FET provision states that--it means
17 the customary international law minimum standard of
18 treatment of aliens as the minimum standard of
19 treatment.
20 Aliens are investors. Aliens are not
21 investments. And there is no way to construe the term
22 "investments" to include the term "aliens."

1 Similarly, Annex 10-A, which is a part of
2 the FET standard, as it's defined by the Treaty,
3 states that it refers to all customary international
4 law principles that protect the economic rights and
5 interests of aliens.
6 Slide 49, please.
7 This is an extract from the Decision in *Lion*
8 *v. Mexico*. We've heard a great deal this morning
9 about *Lion v. Mexico* because a colleague of mine, not
10 a member of the team on this case, was counsel for
11 Mexico in that case.
12 And the case under NAFTA is distinguishable
13 in many ways. But something we didn't hear this
14 morning is that the positions being ascribed to our
15 firm were rejected by the Tribunal in that case. And
16 I understand why an attempt was being made to suggest
17 that we were taking contrary positions. But it's
18 parties that take positions, not law firms. And the
19 fact of the matter is the NAFTA Tribunal in *Lions*
20 specifically rejected the argument that investors were
21 not protected by, essentially, similar language in
22 NAFTA. The language is here on Slide 49.

1 But this is not an anomaly. Other NAFTA
2 tribunals have rejected this precise argument and are
3 cited in our Rejoinder, Paragraph 72, that include
4 *GAMI v. Mexico*, *Chemturra v. Canada*, *Merrill & Ring v.*
5 *Canada*, and *S.D. Myers v. Canada*, each of which
6 rejected this argument.
7 And there is no case, of which I'm aware and
8 no case that's been cited, where an FET--where a claim
9 was rejected based on the notion that the Treaty
10 protects--the Treaty in question protected only
11 investments and not investors.
12 I have to say it seems like a somewhat
13 artificial distinction in any event. It's, after all,
14 investors who make investments. And the notion that
15 [investments] are protected but not the investors who
16 make those investments, I've always found difficult to
17 follow. Nonetheless, these other tribunals have
18 rejected that claim as well.
19 Could we have Slide 50, please.
20 Here on Slide 50 is a quote from the
21 Decision in *Bahgat v. Egypt*. And the Tribunal did
22 describe why they were rejecting this argument,

1 saying: "Measures against an investor or the
2 management"--or "measures deteriorating
3 circumstances"--sorry.
4 ARBITRATOR BEECHEY: You're reading it
5 right. It's rather strange English, but you're
6 reading it right.
7 MR. SILLS: That's what gave me pause there,
8 Mr. Beechey.
9 "Which were favorable for the investment,
10 may equally have a negative impact upon the
11 investment. It would reduce the effectiveness of the
12 system of investment protection system if it would
13 only prohibit limitations to the flow of capital or
14 infringements of property."
15 It probably read better in the original.
16 Turning next to the question of the
17 substantive standard itself. There was reference
18 again this morning to *Neer*. I don't think we need to
19 spend a lot of time on this. I think it's common
20 ground or, at the very least, should be common ground
21 that ever since the *Neer* case, which was decided just
22 under a hundred years ago, and involved, as I recall,

1 the failure to initiate criminal proceedings involving
2 a murder in Mexico--the standard of treatment to be
3 afforded in international law has evolved well past
4 that, in particular through a very dense network of
5 investment treaties, bilateral and multi-lateral, that
6 have come into being since then.
7 For example, in the *Azurix* case, cited on
8 Slide 51 here, the minimum requirement to satisfy the
9 standard has evolved, and the Tribunal considers that
10 its content is substantially similar, whether the
11 terms are interpreted in their ordinary meaning as
12 required by the Vienna Convention or in accordance
13 with customary international law.
14 The next Slide, Page 52, has a quote from
15 Professor Paulsson, a widely-cited article. And, in
16 fact, I don't think that the academic debate over the
17 source of the standard of treatment, whether
18 autonomous or not, really has much meaning here
19 because those have converged.
20 And looking at Slide 53, to close the loop
21 on this, in the *Eco Oro* case, one of--another case by
22 an investor against Colombia, the Tribunal said:

1 "Colombia correctly accepts that the Tribunal is not
2 rigidly bound by the standard set out in *Neer*, and it
3 is the Tribunal's view that the standard today is
4 broader than that defined in the *Neer* case."
5 And, hopefully, they will stand by that
6 position in this case.
7 Slide 54, please.
8 So, on Slide 54 is a quote from the *Waste*
9 *Management* decision, widely cited and widely followed
10 in our field. And so, what do they say?
11 "The minimum standard of treatment of fair
12 and equitable treatment is infringed by conduct
13 attributable to the State"--here the CGR--"and harmful
14 to the Claimant," which is certainly the case. Not
15 only being hauled into this proceeding and the subject
16 of serious reputational harm, both from the filing of
17 the case and then the false publicity surrounding it
18 by the Comptroller General, but now being on the
19 receiving end of an award for hundreds of millions of
20 dollars.
21 "If the conduct is arbitrary, grossly
22 unfair, unjust, or idiosyncratic"--here it is because

1 it was a proceeding seeking billions of dollars when
2 initiated and resulting in an award for hundreds of
3 millions of dollars, based on the notion that a
4 supplier of personnel having no authority over the
5 expenditure of public funds could be held to account
6 by the Comptroller General for allegedly having
7 mismanaged a project that it didn't manage in the
8 first place is discriminatory.
9 And, as I'll explain in a moment, the
10 Colombian nationals, prominent citizens, all of them
11 make up the Board of Ecopetrol who were let out of the
12 case, who were similarly situated, and had, at a
13 minimum, the same defense that the Claimants have.
14 Or involves a lack of due process leading to
15 an outcome which offends judicial propriety. And as
16 Mr. Conrad was explaining, there was first an opening
17 resolution--again, a document of enormous
18 length--asserting charges. That was addressed in
19 formal proceedings, the free versions, in which the
20 Claimants explained that they were not fiscal managers
21 and could not be thought to be fiscal managers, and
22 that the Jacobs Report of Ecopetrol had concluded they

1 were not fiscal managers.
2 And, nonetheless, unlike the Colombians who
3 were let go for not having final authority--though as
4 I'll show in a moment they did have significant
5 authority over the expenditure of public funds--the
6 Claimants were held in the case.
7 And finally, in applying this standard, it
8 is relevant that the treatment is in breach of
9 representations made by the host State which were
10 reasonably relied on.
11 And those are the representations made in
12 the Contract with Reficar, a public entity.
13 And, obviously, a limitation on liability
14 for ordinary breach of contract, which is at most what
15 was pleaded here by the CGR, limited to 10 percent of
16 the amount of the revenue derived from the Contract is
17 an extremely valuable incentive to an investor,
18 knowing that liability is capped.
19 And here that cap, assuming liability could
20 be proven at all, would amount to $25 million, which
21 is a very small fraction of the 750 or 811--the
22 figures vary because of exchange rate fluctuations

1 between the Colombian peso and the U.S. dollar. But
2 those are just grossly disproportionate.
3 In the following Slides, Number 55 quotes
4 from *Glamis Gold*. Again, addressing the question of
5 the *Neer* standard and its evolution. I don't think
6 there's any serious dispute that this is a
7 well-pleaded claim of a violation of FET. At the
8 merits, can Colombia on a full record attempt to
9 explain and justify the conduct of the CGR? Of course
10 they can.
11 At this stage of the proceedings, based on
12 their assertions that they did nothing wrong in the
13 face of these well-pleaded allegations, would it be
14 appropriate to terminate this case before any hearing
15 on the merits? It would not.
16 Mr. President, this might be an appropriate
17 time for a break.
18 PRESIDENT NUNES PINTO: Thank you. So, it's
19 2:30 p.m. So, we have our 30-minute break. We will
20 be back at 3:00 o'clock. Thank you.
21 (Brief recess.)
22 PRESIDENT NUNES PINTO: Are we ready to go

1 on?

2 So, Mr. Sills.

3 MR. SILLS: Thank you, Mr. President. So,

4 continuing with our discussion of fair and equitable

5 treatment. FET does include, contrary to what

6 Colombia has stated, legitimate expectations of the

7 Parties.

8 And we would refer to *Waste Management II*,

9 an extremely well-known and widely followed decision,

10 that explicitly includes legitimate expectations in

11 the standard and explains precisely why they should

12 be.

13 Now, Colombia relies on *Bolivia v. Chile* for

14 its argument that legitimate expectations do not form

15 part of the standard.

16 But that was a State-to-State dispute heard

17 at the ICJ. And State-to-State disputes occupy a

18 critical and important part of the public legal order,

19 but they're entirely distinct from the relationships

20 between investors of one State and another.

21 For one thing, disputes between two states

22 or between two sovereigns and the disparities that

1 lead to the treatment under treaty of investors are
2 just entirely different. The case is simply
3 inapposite.
4   And if we could have Slide 58, please.
5   And Colombia goes on to argue that even if
6 legitimate expectations are part of the FET standard,
7 as indeed they are, Claimants have not alleged
8 sufficient facts to prove a breach of legitimate
9 expectations.
10   Once again, this is a mixed question of law
11 and fact, inappropriate for a decision at this stage
12 of the case.
13   But to the extent there were any burden on
14 Claimants at this point, they have set out an adequate
15 claim of a breach of their legitimate expectations,
16 both specific assurances given in the form of the
17 Contract with its limitation on liability and its
18 other protective clauses, as well as the expectation
19 that Colombia would administer its laws in a fair and
20 even-handed and appropriate manner.
21   For example, most importantly here, that the
22 regime of fiscal control administered by the CGR would

1 be administered only against fiscal managers in a fair
2 and reasonable and impartial way.
3 And I should note here that the course of
4 conduct here by the CGR, from the opening resolution
5 itself until the decision on the merits, is an almost
6 paradigmatic example both of the frustration of that
7 reasonable expectation of due process as well as a
8 classic denial of justice.
9 The opening resolution listed 30-some
10 individual acts. The response that was filed in the
11 free version, in addition to pointing out that
12 Claimants were not fiscal managers at all, addressed
13 those acts.
14 Apparently, thinking better of the position
15 they had taken, the charging document, what's referred
16 to as "the indictment" by Colombia, went on a
17 completely different footing and shows a completely
18 different theory pointing to the change controls, the
19 change orders involved, and a joint and several theory
20 of liability.
21 Then in order to meet--and I realize this,
22 of course, couldn't have been pleaded in the RFA, but

1 it will be adduced in this case.
2 Faced with the fact that the record was
3 overwhelming that Claimants were not fiscal managers,
4 Colombia actually changed the law and then purported
5 to apply that retroactively, including consultants on
6 a vague aiding and abetting theory.
7 And then when the final decision came out,
8 it was, yet again, a complete change in legal theory
9 and in its theory of damages, which meant that as a
10 practical matter, Claimants never had an opportunity
11 to defend themselves.
12 It was like the American carnival game of
13 whack-a-mole. As soon as one of Colombia's claims had
14 been refuted, another one was floated in its place,
15 and that is the basis upon which hundreds of millions
16 of dollars are said to be owed to Colombia.
17 Now, an arbitrary administrative act
18 can--and this is a separate point or a subheading, I
19 guess, of FET--can itself breach the fair and
20 equitable treatment standard.
21 Could we have Slide 60, please.
22 Now, as a general matter, it ought to be the

1 case that arbitrary conduct by an administrative
2 agency, surely as arbitrary action by an executive
3 agency or by a Court, can trigger liability. And that
4 is indeed the case.
5 In the *TECO* case that we have--thank
6 you--the claimants argued that a tariff--an
7 administrative tariff review--administrative actions
8 breached the fair and equitable treatment standard.
9 And Guatemala argued in that case, as Colombia does
10 here, because administrative acts were subject to
11 judicial review, it couldn't breach FET. And that was
12 rejected there by the Tribunal.
13 And I mention again that it is our case that
14 there is no effective remedy in the Colombian courts
15 for administrative misconduct. And it is admitted
16 here that there was no administrative remedy for the
17 bringing of this case, the measure complained of in
18 the RFA.
19 And in *Baghat v. Egypt*, in a perhaps
20 better-drafted portion of that--of that award
21 involving a criminal case, but for legal purposes an
22 important precedent--Slide 62, please--the Tribunal

1 noted that denial of justice can include the entire
2 criminal process, including the acts of the
3 prosecution before trial, prosecutorial misconduct, or
4 malicious prosecution.
5 And as surely as bringing an unfounded
6 criminal case can cause damage in advance of a
7 criminal trial, even one in which the defendant is
8 acquitted, let alone one here where administratively
9 our clients have been condemned to pay enormous
10 damages, that single step can trigger a liability.
11 Finally, if we could have Slide 63.
12 As one element of the FET standard,
13 Claimants say that--the Claimants have not stated a
14 claim for denial of justice. Colombia argues that
15 denial requires the exhaustion of all local remedies,
16 and that exhaustion of administrative remedies is not
17 enough.
18 But the disagreement here, and what we heard
19 this morning, it really comes down to the correct
20 understanding of the term "administrative adjudicatory
21 proceeding."
22 And Colombia argued, and argued this

1 morning, that that is a term of art in Spanish that
2 refers to a particular kind of court in Colombia, one
3 charged with the review of administrative action.
4 Now, it's our position that the words mean
5 what they say, that "administrative adjudicatory
6 proceeding" refers to an administrative proceeding
7 taking place in an adjudicatory manner, because
8 administrative agencies do not always adjudicate.
9 So, in the United States, for example, the
10 Securities and Exchange Commission both has
11 proceedings before administrative law judges to
12 determine whether or not an individual or a company
13 has violated the anti-fraud provisions of U.S.
14 Securities Law, and, if so, it can impose appropriate
15 penalties, including monetary penalties or bars from
16 the securities industry.
17 But the SEC also has a rulemaking function,
18 a non-adjudicatory function, in which they might, for
19 example, amend or change or clarify the anti-fraud
20 provisions.
21 And that's the ordinary meaning of those
22 words in English. There's nothing in the Treaty/the

1 notes to the Treaty that indicates that this was meant
2 to indicate this particular kind of Colombian court,
3 and the history of the Treaty makes it clear that it
4 was not.
5 If we could have Slide 64, please.
6 This TPA had its origins with the model BIT
7 prepared and utilized by the U.S. State Department.
8 And that's the 2012 model BIT.
9 And when we look at the language of the BIT,
10 which is up here on the screen, it precisely tracks
11 the language at issue here, "administrative
12 adjudicatory proceedings." That was obviously not
13 drafted with Colombia in mind because it's a model to
14 be used by the United States as the basis for
15 investment treaties, as it clearly was here.
16 It was not drafted in Spanish. It was
17 drafted only in English. And so, it cannot be said to
18 be referring to a particular type of proceeding in
19 Colombia or countries that have similar legal systems
20 to Colombia, assuming that this would be a term of art
21 there.
22 It means what it says. It means what it

1 says. In English, the language in which it was
2 drafted, it means an administrative proceeding which
3 is adjudicatory as opposed to one which is rulemaking
4 or legislative or another area in which administrative
5 agencies act.
6 And I'll note that in--Slide 65 in the
7 *Corona Materials* case, the same claim, that
8 "administrative adjudicatory proceeding" had this
9 special term of art meaning, was rejected by the
10 tribunal.
11 Following the rules of the Vienna
12 Convention, it is correct that efforts should be made
13 to harmonize treaties that are executed in two
14 authentic languages. The only way in which to do that
15 here is to give these terms their ordinary English
16 meaning. Because this is not a term of art in
17 English. It is not a term of art in American law.
18 And, finally, I'll note that the
19 construction urged by Colombia would leave a sovereign
20 free to do whatever it wanted, free of the constraints
21 of the Treaty obligations it has before its
22 administrative agencies, so that a $10 civil dispute

1 before the Colombian courts would presumably quick
2 trigger liability under the Treaty, whereas a
3 billion-dollar dispute before an administrative agency
4 acting far beyond its bounds, according to Colombia,
5 is subject to no constraints under the Treaty at all.
6 And, again, as I said earlier with respect
7 to the availability of a judicial remedy in Colombia,
8 that is hotly disputed here. It will have to be heard
9 at the merits phase of the case.
10 Mr. Torrente's Witness Statement in the
11 interim measures case makes it clear that a nullity
12 action would take, in the first instance, many years,
13 with levels of review beyond that. Colombia is free
14 to contest that, but they are not free here to assert
15 that that's wrong and that the case should be
16 dismissed on that basis.
17 Let me turn to the question of national
18 treatment, which was also much discussed this morning.
19 If we could have Slide 71, please.
20 Now, the pleading here alleges that the
21 Board of Directors--the individuals who made up the
22 Board of Directors of Ecopetrol were treated more

1 favorably under like circumstances than were the
2 Claimants, in violation of the guarantee of
3 Article 10.3 of the Treaty.
4 Could we have Slide 73, please.
5 The--as we noted, although initially named
6 in the opening resolution, the Directors of Ecopetrol
7 made a free version submission, stating that they
8 lacked ultimate authority over the expenditure of
9 public funds and, hence, were not fiscal managers and,
10 hence, were not proper respondents in the CGR
11 proceeding.
12 And that was granted by the CGR. And those
13 individuals, all Colombian nationals, all prominent,
14 were dismissed from the case.
15 Whereas the same assertion, backed up by,
16 among other things, the Jacobs Report commissioned by
17 Ecopetrol itself, were rejected by the CGR. They were
18 in like circumstances.
19 We're told in Colombia's papers and this
20 morning that, "Well, other Colombians were charged."
21 But that is irrelevant here because they were not in
22 similar circumstances. We're told that precautionary

1 measures were not sought against the Claimants as if
2 they had somehow been treated more favorably.
3 But, again, the test is whether or not in
4 practice--and it can be de jure. It can be de facto.
5 investors are entitled to the same treatment as
6 domestic investors. And that was breached here.
7 So, the decision in *Seda*--I'm sorry. The
8 submission of the U.S. in *Seda* takes that same
9 position, that it may be de jure; it may be de facto.
10 That's in Slide 76. But here I think it's very
11 instructive to look at the submission made at the free
12 version stage by the directors of Reficar.
13 So, could we put up Slide 77, please.
14 Okay. This is the chart that was submitted
15 by counsel for the Ecopetrol directors in the free
16 versions submitted to the CGR in which the prospective
17 respondents had an opportunity to explain why they
18 should not be made actual respondents.
19 And looking at this chart, it shows the flow
20 of approval for the expenditure of funds on this
21 project. And as you can see, it ends at the Reficar
22 level in this orange box, "Aprobación Control de

1 Cambios."

2 But the step before that, the sort of dark
3 green diamond at the Ecopetrol level, that is the
4 Board of Directors of Ecopetrol. They had the
5 next-to-last step, and they could say yes or no.

6 Whereas when you look at what Ecopetrol was
7 representing--or the Ecopetrol directors were
8 representing, there is no authority to say yes or no
9 on the part of Foster Wheeler, the gray rectangle that
10 appears at the top. It simply makes recommendations
11 with no power over the expenditure of funds.

12 And then it tracks through this decision
13 tree, reaching the Board of Directors of Ecopetrol in
14 the penultimate step leading to approval by Reficar,
15 which had assumed the management of its own project,
16 as Mr. Conrad was describing this morning.

17 This document was submitted by Ecopetrol,
18 and it was included by the CGR in the charging
19 document and adopted by them.

20 If the directors of Ecopetrol, who had the
21 actual authority to say "si" or "no" under this chart
22 as to the expenditure of funds, were let out because

1 they were not fiscal managers because there was one
2 more step in the process, then it is--it cannot be
3 explained how, on a chart adopted by the CGR itself,
4 the Claimants were held in. And the only plausible
5 explanation for that is that they were not Colombian
6 and the directors of Ecopetrol were.
7 Now, there may be some answer to that,
8 although I don't know what it is. But that is a
9 question for the merits. This is a perfectly
10 well-pleaded, plausible, and, as this chart makes
11 clear, true explanation of the denial of national
12 treatment, which is a part of the FET standard that
13 governs here.
14 It cannot be resolved at this stage of the
15 proceedings and, as this chart makes clear, in all
16 likelihood, it will be resolved in favor of the
17 Claimants at the merits phase.
18 Let me turn to the question of most-favored
19 nation treatment under Article 10.4. If we could turn
20 to Slide 80, please.
21 This is the MFN clause that appears in the
22 TPA, and it's not atypical of such clauses in modern

1 treaties.

2 So, Colombia raises a host of objections

3 here, all of them rather complex and debatable issues

4 of law. First, they say the MFN clause concerns only

5 actual practice in comparison. How was a Swiss

6 investor treated, in fact, in Colombia?

7 That an MFN clause cannot import new

8 substantive protections. But as I'll discuss in a

9 moment, the TPA does include a limited umbrella clause

10 with its reference to investment agreements.

11 That umbrella clauses are contrary to public

12 policy in Colombia, but Colombia has ratified at least

13 two treaties that do have umbrella clauses, the Swiss

14 treaty and the Japanese treaty.

15 That the umbrella clauses in those treaties

16 are not subject to mandatory arbitration, but the

17 Treaty here, the TPA, makes it clear that procedural

18 provisions are not to be imported and, by necessary

19 implication, that substantive provisions are.

20 And finally, they say that--assuming that

21 the umbrella clauses are imported, that Reficar is not

22 a central--is not an agency of the Colombian

1 Government at the national level. As I'll show in a
2 moment, it is, and we have stated a prima facie claim.
3 So, Slide 82, please.
4 This is the footnote in the treaty language
5 itself that says: "For greater certainty, treatment
6 with respect to the establishment, acquisition,
7 expansion"--or so on, referring to the MFN clause
8 referred to in Paragraphs 1 and 2--"does not encompass
9 dispute resolution mechanisms that are provided for in
10 international investment treaties or trade
11 agreements."
12 Well, if the drafters excluded those
13 procedural mechanisms, it necessarily follows that
14 substantive provisions were included, as they--as they
15 generally are in this area of investment law.
16 On Slide 83, we quote from an article on
17 this point. And we don't dispute that there is a
18 dispute in the literature about the scope of MFN
19 clauses and their incorporation of umbrella clauses.
20 But, again, this is a highly complex
21 question of law, inappropriate for a decision at this
22 point. If it has to be decided or were to be decided,

1 the better view is that they are incorporated because
2 of the overriding principle that investors of varying
3 countries should be treated on an equal footing.
4 On Slide 84, along those lines, we quote
5 from the award in *Sirketi v. Turkmenistan*, taking
6 exactly that position.
7 And on the following slide, Slide 85, we
8 quote from the decision in *Bayindir v. Pakistan*, a
9 holding exactly that a more favorably substantive
10 standard of treatment is incorporated.
11 And I'll just stop to note briefly that the
12 suggestion made this morning as to the lack of
13 mandatory arbitration in the Swiss Treaty somehow
14 suggests that Colombia is free to ignore the
15 substantive provisions of the umbrella clause there.
16 I'm fairly sure that's not what they meant to say.
17 And, again, on 86 we cite from the *EDF*
18 decision, *EDF v. Argentina*, where, under the
19 Argentina-France BIT, the umbrella clause was
20 imported. And we cite further decisions there.
21 And then on Slide 88, we cite the language
22 we rely on from the Colombia-Japan Treaty and the

1 Colombia-Switzerland Treaty.

2 As *Siemens* holds, now looking at Slide 89,

3 the intended result of an MFN clause is to harmonize

4 benefits agreed with a party with those considered

5 more favorable granted to another party.

6 The Swiss Treaty grants rights under an

7 umbrella clause to Swiss investors. The Japanese

8 Treaty grants rights under an umbrella clause to

9 Japanese investors. The U.S. investors here should be

10 granted those same rights.

11 And *Siemens* goes on to hold that the

12 disadvantages of that treaty, here presumably the lack

13 of mandatory arbitration, don't travel with the

14 substantive right. And there's no reason that they

15 should because those rights are presumably going to be

16 honored by Colombia.

17 So, what is imported here? An umbrella

18 clause imports a contractual undertaking. Now, the

19 undertaking here is expressed in the Reficar FPJVC

20 Contract.

21 Bear with me one second, Mr. President.

22 Well, I'll address the question of Reficar

1 as a national authority in the next section of our
2 discussion concerning investment claims. I'm sorry.
3 Investment agreements. Let me turn to that.
4 Article 10.28, which is cited on Slide 93,
5 defines an investment agreement.
6 And so, the only point of dispute here,
7 since this was a Contract for a multi-year investment
8 in Colombia on a major project that took years,
9 involving the expenditure of billions of dollars, is
10 whether or not--first, whether or not the investment
11 consisted solely of the Contract. And Colombia keeps
12 saying that. But that is not the Claimants' position,
13 and it is not the position pleaded in the RFA.
14 As Mr. Conrad was explaining, and as cannot
15 be challenged really at this stage of the proceedings,
16 the investment was time, capital, personnel,
17 facilities, labor, invested in Colombia for years, in
18 keeping with the definition of "investment" in the TPA
19 itself, and there is no other definition of
20 "investment" in the ICSID Convention.
21 So, Colombia argues next that Reficar is not
22 a national authority of Colombia. Again, a

1 fact-specific question and a mixed question of fact
2 and law.
3 But Colombia, acting through its Ministry of
4 Finance, the owner of Ecopetrol, and, in sequence,
5 Ecopetrol's wholly owned subsidiary, Reficar, gave the
6 right to enter into contracts with the government.
7 And Ecopetrol and Reficar have the function
8 of concluding contracts for the exploration,
9 exploitation, refinement, transportation,
10 distribution, and commercialization of hydrocarbons by
11 the National Hydrocarbons Agency, as explained in our
12 Counter-Memorial at Paragraphs 108. And in Colombia,
13 all hydrocarbons are the property of the State.
14 Now, the claim was made before that Reficar
15 is not at the national level, the central level of
16 authority.
17 Could we put up the slide from their
18 presentation, please.
19 But in fact--ah, this is the slide that was
20 referred to where Reficar is referred to as a
21 decentralized entity.
22 "Decentralized entity" is a term of art in

1 Colombian law. It does not mean an entity not at the
2 central level of government. And, in fact, when you
3 read along in this slide that they relied on, it is a
4 decentralized entity at the national level.
5 The Ministry of Finance is--"decentralized"
6 can refer, as I understand it, for example, to an
7 entity not in the Capitol. It can refer to an entity
8 not literally in the center. But it does not mean not
9 at the national level, not at the central level of
10 government.
11 Because there the distinction would be
12 between a public entity owned, say, by the department
13 or by a municipality, and there were plenty of those.
14 So that an electric company owned by the City of--the
15 Municipality of Bogota would not be at the central
16 level of government.
17 But as the pleading they rely on makes
18 clear, this is a term of art, "decentralized entity at
19 the national level." It's Colombia's pleading.
20 PRESIDENT NUNES PINTO: Mr. Sills, you made
21 a reference to this slide--there was this slide. For
22 record purposes, I think it would be important to make

1 reference to the slide number. I cannot read from
2 here. 112?
3 MR. SILLS: Your eyes are better than mine,
4 Mr. Chairman.
5 PRESIDENT NUNES PINTO: Yeah, 112 from
6 Colombia's today's presentation. Okay. Just for
7 reference because we--in one week we may have
8 forgotten this. Thank you, and my apologies for
9 interrupting.
10 MR. SILLS: I'm glad to have the chance to
11 clarify. And, obviously, the chain of ownership here
12 is the Ministry of Finance, which is clearly at the
13 central level of government, which owns and has
14 delegated to [Ecopetrol] critical functions here,
15 which, in turn, owns and organized Reficar for the
16 purpose of carrying out this project. So, it is only
17 at the central level of government that these entities
18 exist and, hence, this is a Contract with an entity at
19 the central level of government.
20 I'll also note that in the ICC proceeding
21 that Reficar has commenced for unspecified contract
22 damages against FPJVC and its members, the--Reficar

1 took the position that before--Reficar simply took the
2 position that even for something that would be
3 ordinary in a commercial case as approving the
4 selection, the designation of an arbitrator to the
5 Tribunal, it needed to secure approval as a public
6 authority from the Office of the President of the
7 Republic.
8 It conducts itself as a public authority.
9 It is a public authority. The Contract with--between
10 Reficar and FPJVC is a Contract with an arm of the
11 Colombian State at the central governmental level.
12 The next claim that's made is one of
13 indirect expropriation. And Colombia argues that it's
14 not possible to expropriate specific contract
15 provisions.
16 But the charges as made, and certainly the
17 award which has now been rendered, have destroyed the
18 value of the investment, the very meaning of indirect
19 expropriation.
20 And what has happened here, Colombia entered
21 into a commercial arrangement. Colombia entered into
22 a commercial arrangement under which it was to

1 pay--ended up paying roughly $250 million for--under
2 the Contract.
3
4
5 Having received the
6 benefits of that Contract and the refinery is up and
7 running, Colombia decided to put on its sovereign hat,
8 if you will, and, exercising its government powers in
9 an entirely arbitrary and unreasonable way, sought to
10 extract and is in the process of attempting to extract
11 hundreds of millions of dollars, three times--three
12 times at least all the revenues paid under the
13 Contract and received by my clients and, if my math is
14 correct, more than a hundred times the profit.
15 That is an expropriation, to take the
16 benefit--to cause the investment to be made and then
17 to attempt to deprive my clients of the benefit of
18 that investment by the arbitrary exercise of
19 governmental power.
20 The next question raised by Colombia
21 concerns damages. Could we have Slide 103, please.
22 So, Colombia has a host of objections on this. First,

1 they say Claimants have not incurred any damages at
2 the time of the RFA.
3 But as you can see on Slide 105, Claimants
4 did allege damage in the RFA. They alleged, from the
5 making of the charge, reputational harm, which is
6 compensable, and the expenditure of attorneys' fees in
7 defending that baseless charge. Now, Colombia cites
8 to *Chevron* as saying attorneys' fees are
9 unrecoverable. But what the award in *Chevron* that
10 they quote from actually says is that there had been
11 no proof of the amount of the attorneys' fees. And
12 those were fees incurred as a result of delay.
13 The claim here is that we never should have
14 been respondents at all. And attorneys' fees are the
15 natural and probable consequence of having--of the
16 Claimants having to defend themselves, separate and
17 apart from the reputational harm.
18 Now, there is also a claim that moral
19 damages are not permitted.
20 Slide 106, please.
21 And moral damages, of course, that's simply
22 a term of art for reputational harm, and they are

1 pecuniary damages, they are compensable in money.
2 They are compensable in money for the loss of business
3 that results.
4 This is not a claim for hurt feelings. It
5 is not a claim for punitive damages. It's not a claim
6 that Colombia should somehow be punished for its
7 unconscionable conduct in waging a campaign in the
8 press when it was supposedly a neutral decision-maker.
9 Those may all be reprehensible, but that's
10 not what we are seeking here. The claim for
11 reputational harm is one that resulted in the loss of
12 business. And that is a pecuniary loss that can be
13 compensated for here.
14 Looking at Slide 106, as Professor McLachlan
15 says: "There is no controversy as to whether moral
16 damages can be obtained under classical principles of
17 public international law."
18 The next slide cites from *Desert Line v.*
19 *Yemen*, that moral damages are recoverable. The
20 International Law Commission cited at Page--I'm
21 sorry--at Slide 108. "The injury for which a
22 responsible State is obliged to make full reparations

1 embraces any damage, whether material or moral, caused
2 by the intentionally [sic] wrongful act of a State.
3 Material and moral damage resulting from an
4 intentionally wrongful act will normally be
5 financially assessable and hence covered by the remedy
6 of compensation."
7 I'm sorry. I misread it. "Resulting from
8 an internationally wrongful act." Yes. Thank you.
9 As this one--as this one was, as we have shown.
10 And to close on this section, on Slide 109
11 is a quote from Colombia's recent submission in *Seda*.
12 And what do they say? "In sum, while it is undisputed
13 that the Tribunal has discretion to determine whether
14 the Claimants are entitled to moral damages and in
15 what amount, the Respondent respectfully submits that
16 the Claimants have not shown that the exceptional
17 circumstances to award"--and it goes on to say moral
18 damages are present here.
19 Well, they're telling here Colombia--not
20 Colombia's lawyers, but Colombia has taken the
21 position that moral damages cannot be recovered in
22 investment arbitration under any circumstances. We

1 heard that this morning.
2 But in the *Seda* case, they said, "Well,
3 they're available but hard to get."
4 If they're available but hard to get, that
5 can only be determined at the merits phase. It is not
6 a basis for striking the pleaded request at this
7 preliminary stage of the proceedings because there has
8 to be a showing. There is no showing here because
9 this is not a trial or a mini trial. No witnesses are
10 being called.
11 So, Colombia also argues that there cannot
12 be an offsetting award here. But that's a remedial
13 question for the end of the case, not a preliminary
14 question for the beginning of the case.
15 Of course, in *Glencore* an offsetting award
16 was granted against Colombia for the misconduct of the
17 CGR in assessing damages against Glencore on what the
18 tribunal concluded was an irrational and unsupportable
19 theory. Now, Colombia distinguishes that by saying,
20 "Well, they paid the money, and then they sued to get
21 it back."
22 That's true, but it's a distinction without

1 a difference because that has to do with the form of
2 the award. And now in the RFA, we stated that the
3 outcome of the case was predetermined, that there
4 would be a substantial award. Indeed, that has come
5 to pass.
6 As the case progresses, the events since the
7 RFA will be brought into the case. But could the
8 Tribunal craft an award that compensated an offsetting
9 award, that compensated the Claimants for the wrong
10 done to them and avoiding the kind of windfall we
11 heard about this morning? Of course it could.
12 An award could be entered and stayed subject
13 to the stay being vacated only if Colombia, as it
14 apparently intends to do, finds and seizes assets and
15 sells them or converts financial assets to its own
16 use.
17 If they don't do that, then no harm to them.
18 If they do that, it would be fine. Would that have to
19 be crafted or could that be crafted as a partial final
20 award so that the Tribunal would have continuing power
21 to police it? Yes.
22 At some point Colombia will run up against

1 its own statute of limitations and the award will no
2 longer be collectible. I believe, though, subject to
3 correction, that that period is five years.
4 But these are premature questions. I mean,
5 the scope of the relief to be granted/the precise form
6 of the decree will depend upon all the facts shown at
7 the hearing on the merits. Is this a form of relief
8 that cannot be granted? I don't think so.
9 Is it a form of relief that would be crafted
10 to avoid an imbalance between the Parties? It would.
11 It could. And I'm confident--we're confident that the
12 Tribunal could readily do that.
13 But dismissing the claim at this point, when
14 the claims will be amended, the facts will be
15 supplemented--we will show, as the case progresses,
16 that an offsetting award, as in *Glencore*, is an
17 appropriate remedy.
18 But the notion that the case should be
19 dismissed with finality at this point in time because
20 the scope of relief has not been precisely determined
21 is just wrong.
22 And in any event, there is a present live

1 claim for damages for the reputational harm suffered
2 from the bringing of the claim. I don't think it's a
3 leap of imagination to appreciate that for a company
4 engaged in the construction of projects like this
5 throughout South America and elsewhere in the world,
6 that the bringing of this charge and its publicity and
7 the publication of these defamatory statements by the
8 CGR had the capacity to and did materially harm the
9 company's business and its ability to garner similar
10 projects elsewhere.
11   Let me turn to the question raised of a
12 qualifying investment. "Investment" is broadly
13 defined under the TPA.
14   Could we have Slide 115, please.
15   And it includes turnkey construction,
16 management, production, and similar contracts. It's
17 interesting that Colombia now seeks to minimize the
18 Contract when the whole basis of the CGR proceeding
19 was that the Claimant somehow managed and mismanaged
20 this project. The two cannot both be true. But there
21 is no definition of investment in the ICSID
22 Convention. There is a broad definition in the Treaty

1 itself.
2 As Mr. Conrad explained, significant assets
3 were committed--were committed on the ground in
4 Colombia over a period of many years involving a
5 contract, not worth billions but worth to the
6 Claimants hundreds of millions of dollars in revenues.
7 That is the classic definition of an investment. With
8 regard to the claims regarding risks that were made,
9 there is risk. There was risk, as Mr. Conrad
10 explained.
11 In any event, as some tribunals have
12 held--if I could have Slide 120--and appropriately
13 held the existence of a dispute like this shows there
14 was risk. There was risk not only of non-payment,
15 there was risk of penalties. And the mere fact of
16 investing in a country--committing resources has
17 happened here--is itself evidence of investment and
18 investment risk.
19 May I have Slide 121, please.
20 So, here is a quote from the *Salini* award.
21 A construction that stretches out for many years for
22 which the total cost cannot be established with

1 certainty creates an obvious risk for the contractor.
2 In the *AMF* case, cited at Slide 122, the
3 long duration of the operation meant that a great
4 number of events and contingencies could have happened
5 to the asset while being utilized in another country,
6 including governmental actions, which is, of course,
7 what brings us here today.
8 Due to the location of the asset and
9 duration of the operation, Claimants' risk was not
10 limited to non-payment or general business risk. And
11 that is exactly the situation here.
12 And whether or not this was an investment
13 under the broad definition in the Treaty, whether or
14 not there was risk, is, again, a mixed question of law
15 and fact that cannot be decided at this stage of the
16 case. It should be heard and decided on a full
17 record.
18 Do we have the burden of proving that there
19 was an investment? Of course we do, because that's an
20 element of our claim under the Treaty.
21 Do we have the burden to prove it at this
22 point with witnesses, with documents, on a full record

1 after disclosure? We do not.
2 This is--Colombia has jumped the gun on
3 this, as it has on virtually every other question that
4 it raises. This is not the appropriate procedural
5 setting to resolve these questions. When they are
6 resolved, they will be resolved, we are confident, in
7 our favor, because the facts will support us. But
8 this is not a factual contest. This is not a hearing
9 on the facts.
10 Let me turn, because time is running short,
11 Mr. Chairman, to the question of the waiver about
12 which we heard so much this morning.
13 And on Slide 124 is the language of the
14 Treaty calling for a waiver. So--and on Slide 125 is
15 the language of the RFA which tracks exactly the
16 language of the Treaty. What is called a reservation
17 just says for the avoidance of doubt that the waiver
18 is without prejudice of Claimants' right to
19 defend--Claimants' right to defend themselves in the
20 Fiscal Liability Proceeding.
21 Colombia actually has gone so far in its
22 papers, and as they clarified in their argument this

1 morning, to suggest that in order to meet the
2 condition of the waiver, the Claimants were obligated
3 to stop defending themselves in the CGR proceeding
4 brought by Colombia and seeking at that point to
5 recover more than $2 billion from the Claimants.
6 It cannot be that simply defending oneself
7 against a legal assault by the State violates the
8 waiver. No case has ever suggested that. No award is
9 cited for this extraordinary proposition.
10 This is simply noting a right that Claimants
11 had and still have. That is the right to defend
12 themselves.
13 It is not a reservation. It's not a
14 condition. It's not an exclusion and, hence, is
15 readily distinguishable from the cases that Colombia
16 cites and relies on.
17 If we look at Slide 126, the *RDC* case that
18 they cite there, there was language going beyond the
19 exact words of the CAFTA Treaty, which is
20 substantially identical here. But, nonetheless, that
21 was held to be an effective waiver. And if Claimants
22 have the right, as they do, to defend themselves, then

1 noting that they maintain that right can't by the
2 waiver. Clients can only be required to waive the
3 rights that the TPA requires, and that is to initiate
4 or continue. And the only fair way to read that is to
5 initiate or to initiate and continue.
6 It is meant to--as Colombia points out, it's
7 meant to prevent the bringing of a second proceeding,
8 a second bite at the apple, the possibility of a
9 contradictory result. Defending oneself against
10 Colombia cannot possibly do that.
11 Now, the *Renco* case on which Colombia relies
12 so heavily was entirely different. That was a true
13 reservation of the right to initiate proceedings
14 following the waiver. That is not this case. There's
15 no reservation of the right to bring a proceeding by
16 the Claimants here.
17 So, what does Colombia point to? Colombia
18 points to the various tutelas. There were two tutelas
19 brought after the RFA was filed. As Mr. Conrad
20 explained, neither of them implicates the waiver
21 because both were on narrow, technical points having
22 to do with the proceeding--the CGR proceeding itself.

1 The first was seeking the right to
2 cross-examine an expert witness. The second sought
3 more time to respond to a filing of thousands of pages
4 by the CGR. Both were denied. Neither of them
5 implicated the waiver because neither of them sought
6 to challenge the measures complained of.
7 Now--and the *Thunderbird* case, which is
8 cited at Slide 131, makes it clear--I'm sorry. Let me
9 back up, if I could.
10 Could we have Slide 128.
11 In the RFA, it is the bringing of the fiscal
12 liability proceeding. That is the measure complained
13 of. Neither of these tutelas challenged or otherwise
14 implicated that.
15 In Claimants'--Respondent also point to what
16 they call "the appeal." But that was all part of the
17 CGR proceeding. The CGR issued, in effect, a
18 tentative decision by the Deputy Controller. Comments
19 were allowed to be made on that. Comments were filed
20 by the Claimants. They were rejected.
21 But that was simply part of the ongoing
22 defense of the CGR proceeding. All part of the same

1 proceeding, all before the same body, all part of
2 responding to Colombia's legal assault. It was not a
3 separate proceeding. It was not a proceeding
4 initiated by the Claimants. It was not a proceeding
5 continued by the Claimants except in the extraordinary
6 sense in which Colombia insists that the Claimants
7 were obligated to stop defending themselves before the
8 CGR in the CGR proceeding that the CGR had initiated.
9 Could we have Slide 132, please.
10 Now, here, Colombia addressed the purpose of
11 the "no U-turn" provision. And the clear purpose,
12 they say, of the condition is to prevent the same
13 claim from being heard simultaneously by several local
14 and international tribunals. But the claim is not
15 being heard simultaneously there.
16 And so, they turn to the conciliation
17 request filed by the Claimants, which was recently
18 admitted into the record. The conciliation request
19 doesn't violate the waiver because it is not a
20 proceeding. It is not for--it is not another dispute
21 settlement procedure. It is exactly what its name
22 suggests. It is a voluntary effort to resolve a case.

1 It is a mediation being conducted under
2 State auspices. The mediator/the conciliator has no
3 coercive power. No decision can be made other than by
4 consent of the parties. And the notion that an effort
5 to resolve a case by consent voluntarily--although the
6 CGR has rebuffed all those efforts--it somehow
7 violates the waiver provision makes absolutely no
8 sense.
9 Colombian policy and international policy
10 favor the voluntary resolution of disputes.
11 It's as if I were to write a letter to
12 Ms. Frutos-Peterson suggesting that we have lunch and
13 discuss a possible resolution of the case, and then we
14 would hear that we had violated the waiver provision
15 because that would be a settlement discussion, which
16 would be a procedure in violation of the waiver
17 provision.
18 It simply cannot be. And as for the claim
19 that a nullity action will follow, that is simply
20 unfounded. What the conciliation request actually
21 says is not that an application to nullify will
22 follow. It says it could follow. It's an available

1 remedy. There's certainly no assurance that the
2 Claimants will file such an action.
3 And the notion that a prediction about what
4 Claimants might do somehow triggers the waiver--a
5 violation of the waiver clause is just unfounded.
6 There is no nullity action. There may never be a
7 nullity action. If such an action were to be filed,
8 Colombia would be free to make its arguments. But
9 there is none. There may well be none.
10 What there is now is an effort to conciliate
11 the case, a good-faith effort to resolve this dispute
12 by consent, which is an outcome that will be favored
13 by Colombian policy and by the policy of the Treaty
14 and by international policy in general. And
15 Colombia's attempt to construct a violation of the
16 waiver clause out of that act of good faith, I think,
17 shows the extent to which they will go in attempting
18 to rid themselves of this case. It is entirely
19 unfounded and cannot possibly be the basis for seeking
20 dismissal.
21 If we could go to Slide 139, please.
22 There was a lot of discussion this morning

1 about FPJVC as a national of another State. It is a
2 contractual joint venture. It is organized under New
3 York law. It is undisputed here that under New York
4 law, a joint venture can sue and be sued in its open
5 name. It can own and possess property, both real and
6 personal. It can employ individuals.
7 What they have done is they have conflated
8 the fact that under New York law a joint venture is
9 not an organization with limited liability, with the
10 notion that it is not an entity at all. And I should
11 note, by the way, the case that is cited to the
12 Tribunal as coming from the New York Court of Appeals,
13 which is the court of last resort in New York, was
14 mis-described.
15 That is actually a decision of the Appellate
16 Division, which is the Intermediate Appellate Court in
17 New York for the Fourth Judicial Department which sits
18 in Rochester, New York, and from which an appeal can
19 be taken to the Court of Appeals by permission. It is
20 not a decision of a court of last resort.
21 But, again, this is a question of New York
22 law. It is much debated here. The Treaty itself

1 describes a joint venture as an enterprise. And an
2 enterprise, in turn, can be an investor. The ICSID
3 Convention does not define a juridical person. And,
4 rather strikingly, it was with FPJVC that Reficar, a
5 public company of Colombia, contracted.
6 So, they seem to be suggesting now that they
7 contracted with a non-existent entity. FPJVC is a
8 juridical person. There is no basis for FPJVC to be
9 dismissed from the case. It appears to be Colombia's
10 hope that they could prevail on this issue and then
11 make their argument, turn around and say, "Well, the
12 FPJVC is only its members, but because the Notice of
13 Intent was made in the name of FPJVC"--a question I'll
14 turn to in just a moment--"that that too is a
15 nullity." And they both cannot be true.
16 And the cases are cited in our papers. The
17 New York cases, they are described at Slide 145. And
18 we can skip Slide 146, which shows the signature on
19 the Contract of FPJVC, not the two Claimants.
20 At an absolute minimum, that claim, like all
21 of Colombia's other claims, is premature at this
22 point, and it is, in fact, simply wrong as a matter of

1 New York law.

2 There was a fair amount of talk this morning

3 and in the papers, and as was pointed out before,

4 indeed, in opposing registration of this claim that

5 the notice given was somehow ineffective.

6 The notice, which appears at Slide 149,

7 clearly describes the dispute, clearly describes FPJVC

8 as consisting of--as being a contractual joint venture

9 of its two members. This cannot have been a mystery

10 to Colombia, because Colombia named the two members of

11 the joint venture as respondents in the CGR case.

12 And the only fair construction of the notice

13 is that it refers to FPJVC but correctly identifies

14 all three of the Claimants. And, in fact, the point

15 of the notice is to afford an opportunity for

16 conciliation. As I described a little while ago,

17 Colombia never responded. And the notion that

18 Colombia would have responded if there had been a

19 change in the Parties identified in the "Re" line of

20 that letter, I have to say, is fanciful.

21 In any event, as the cases cited in our

22 papers and described in Slides 152--I'm sorry, in

1 Slide 152 made clear, minor discrepancies or
2 deficiencies in a Notice of Intent cannot destroy
3 jurisdiction.
4 There is--as everyone on the Tribunal knows,
5 a view that Notices of Intent are themselves
6 precatory, and that the failure to comply with them,
7 at least in technical ways, is not jurisdictional.
8 Colombia got adequate notice. They were not
9 prejudiced. Their insistence upon strict procedural
10 formality, assuming that it was violated at all, has
11 no place in a case like this.
12 Let me return, in the time I have remaining,
13 to the fork-in-the-road question addressed by Colombia
14 this morning.
15 Could we have Slide 135, please.
16 The fork-in-the-road claim that Colombia
17 makes concerns the First Tutela, which was made before
18 the RFA was filed and hence, obviously, cannot
19 implicate the waiver clause.
20 And as explained in our papers, that tutela
21 was expressly limited to claims under Colombian law.
22 It is true that it refers to rights under the Treaty

1 but reserves those rights for this proceeding. No
2 relief was sought under the Treaty in Colombian
3 law--I'm sorry--in the Colombian court, assuming that
4 the Colombian court even had jurisdiction. Consider
5 that.
6 And, again, the objection made here is not
7 substantive but technical or, I think more properly,
8 hyper-technical. The claim is that because there is a
9 non-operative reference to the rights under the
10 Treaty, in the context of a claim which by its terms
11 is limited to Colombian law. And we heard a lot about
12 the word "allege." So, the mere mention somehow
13 transforms that into a violation of the
14 fork-in-the-road claim--okay, I'm sorry--requirement
15 cannot be sustained.
16 The fork-in-the-road provision is meant to
17 prevent submitting the claims that are before the
18 Tribunal to a national court. This was the exact
19 opposite. These were claims under Colombian law
20 submitted to a Colombian court. And the fact that the
21 pleading there makes a reference to the existence of
22 international rights does not transform it into a

1 violation of the fork-in-the-road provision because it
2 disclaims seeking relief under such rights.
3 The rights that were invoked were Colombian
4 rights. There is a reservation of rights in that
5 pleading as to international rights. And the effort
6 to turn something that is in the pleading, at most,
7 for informational purposes into a waiver should be
8 rejected.
9 So, where we are is that Colombia, having
10 received the benefits of the Claimants' work, having
11 received the benefits of the Contract it entered into,
12 then turned on the Claimants and, marshaling all the
13 powers of the State, began a proceeding against the
14 Claimants seeking many times in damages the amount of
15 revenue derived by the Claimants from doing their work
16 in accordance with the Contract, as I say, which was
17 performed without objection by Reficar.
18 And that proceeding was marked by gross
19 irregularities. It is an outrage to due process. It
20 is an outrage to international law. It was a shifting
21 series of claims, all without any factual assertions
22 that would link the Claimants in any way to fiscal

1 management, on a shifting series of theories and
2 assessing liability on a joint and several basis
3 without even an attempt to ascribe any wrongful act to
4 any claimed item of damage, for which my client's
5 entire business is now at risk.
6 And the fact that Colombia has so far not
7 succeeded in its efforts to seize and sell the assets
8 of the Claimants is very cold comfort indeed to my
9 clients. This is a well-pleaded, sustainable,
10 well-supported claim of wrongdoing under the Treaty,
11 in violation of the terms that Colombia entered into
12 to protect investors from the United States. And the
13 claim should be allowed to proceed to the merits phase
14 where it can be heard on a full factual record as the
15 Parties contemplated, as the Treaty requires.
16 Thank you, Mr. President.
17 PRESIDENT NUNES PINTO: Thank you,
18 Mr. Sills. It's 4:20. We have provided for a slot
19 here of one hour--I'm sorry--for 30 minutes for the
20 U.S. to submit oral--its oral arguments. But it was
21 confirmed to us yesterday that the U.S. will not
22 submit such argument.

1 So, the next activity we have is the
2 questions from the Tribunal.
3 And I would like to consult with you if you
4 would like--would be willing to have a 15/20-minute
5 break so that we can relax a bit. Especially,
6 Claimant has just finished making a long presentation.
7 Can we come back at 4:40? Is that okay?
8 MR. SILLS: Mr. President, I'm always in
9 favor of relaxation.
10 DR. FRUTOS-PETERSON: I am not opposed to
11 that, Mr. President. But just one minor point, but
12 important point. I mean, we were happy to see that
13 Counsel finished with their presentation, but there
14 was an excess of time. I just would like to have the
15 same rule applied in case that we go over a little bit
16 on our Closing because there was a lot--
17 PRESIDENT NUNES PINTO: I was relying on
18 Marisa's computation of time. And I think they did
19 not exceed, did they?
20 THE SECRETARY: Two minutes.
21 DR. FRUTOS-PETERSON: Yes.
22 PRESIDENT NUNES PINTO: Two minutes.

1 DR. FRUTOS-PETERSON: Yeah, because our
2 accounting is different. But anyway, if it is two
3 minutes, it's two minutes.
4 PRESIDENT NUNES PINTO: Give them five.
5 Okay. Thank you. We will be here at 4:40.
6 (Brief recess.)
7 PRESIDENT NUNES PINTO: You are back, and we
8 will resume the session.
9 Okay. Now, we will have this slot for
10 questions by the Tribunal, and we'll start with
11 Mr. Beechey, who will address the questions to the
12 Parties.
13 QUESTIONS FROM THE TRIBUNAL
14 ARBITRATOR BEECHEY: Thank you,
15 Mr. President.
16 Just a couple of things from me, if I may.
17 And the first is perhaps a bit of a sidebar, but it
18 may be relevant to us.
19 At Paragraphs 72 to 74 of the Request for
20 Arbitration, there's a reference to the ICC
21 Arbitration brought by Reficar against CB&I for
22 damages for over $2.4 billion.

1 We were told that that was an arbitration
2 from which FPJVC had been excluded as a respondent,
3 and we were also told, tantalizingly, that the hearing
4 on the merits is presently scheduled to take place in
5 April 2020.
6 If that's a matter within the knowledge of
7 the Parties, might we be told how that matter now
8 stands?
9 MR. CONRAD: Mr. Beechey, this is Charles
10 Conrad on behalf of the Claimants. I can address that
11 question to the best of my abilities just because we
12 are--you're correct. Claimants are not part of that
13 proceeding. It's our understanding that that hearing
14 has concluded and is awaiting a final award.
15 ARBITRATOR BEECHEY: It's nice to know that
16 my old shop still moves to the degree of celerity.
17 So, as yet no award essentially? All right.
18 The second point is this: Picking up on
19 the discussion this morning, it was put to us that we
20 should be considering the claims as the position stood
21 at the 8th of December 2009. 2009--yeah. '19. I'm
22 sorry. I'm wishing away ten years of my life.

1 And taking that as my starting point, I'm
2 looking at the Request for Arbitration. I quite see
3 the argument that matters that occur some years down
4 the track are matters which are simply the subject of
5 speculative inquiry, as at that time, might properly
6 be said to be the subject of some objection.
7 But for this reason, I have some difficulty.
8 Because if you look at the Request for Arbitration,
9 there's a number of matters there which are clearly
10 said to be crystallized; in other words, there are
11 wrongs which are said already to be apparent as at
12 that time.
13 It's true to say that the--it's true to say
14 that the relief sought goes, among other things, but
15 principally to reputational damage and the like. And
16 it's also true to say that matters are not quantified.
17 But is it right to say that on the basis of
18 the request, the Claimants have not already put
19 forward, as at December 2019, matters which are now in
20 front of us and which then we might properly be in a
21 position to debate, because they're not matters which
22 have occurred--we're not being asked now to consider

1 matters which will have arisen later beyond the ambit
2 of the Request for Arbitration.
3 I'm sorry. It's a 50-page Request for
4 Arbitration. I'm not expecting you to read it
5 straightaway now. But it seems to me you were taking
6 a very narrow view of what had actually crystallized
7 as at that time, and I'm just inquiring of you
8 whether--given what is the content of that document
9 and the way in which the arguments have been
10 developed, are you saying to us that we shouldn't have
11 regard to any of the substantive wrongs which is said
12 to have already occurred at that point?
13 DR. FRUTOS-PETERSON: I will answer your
14 question, Mr. Beechey. But, of course, tomorrow we
15 will elaborate more on this point precisely in our
16 Closing Statements.
17 What I can tell you--I don't have the
18 Request for Arbitration in front of me, but I do
19 recall the relief that they were asking for. If I'm
20 correct, they include reputational --yes.
21 What I want to say at this point,
22 Mr. Beechey, is that the problem that we have here is

1 that--well, not our problem; I think we submit that is
2 Claimants' problem--is the language of
3 Article 10.20.4. Because that Article, of course,
4 will take you back to Article 10.16.1.
5 And if you read 10.16.1, you need to
6 establish the breach, and you need to establish harm
7 that arises from that breach. And that's why, when
8 you go back--when you go back to Article 10.20.4, it
9 gives you the standard to assess that breach under
10 Article 10.16.1.
11 And that standard is in Article 20--I'm
12 sorry--and that is, of course at [10.20.4], Paragraph
13 C, you know, where it gives you the standard to
14 assess, you know, the facts as of the time of the
15 Notice of Arbitration.
16 ARBITRATOR BEECHEY: I agree. There's a
17 difference, isn't there, between saying that as at
18 December 2019, and there is a positive case being put
19 forward on a particular ground, or particular grounds,
20 which give rise to particular relief.
21 And you're right to say that at that time,
22 there was a request for an order for damages for

1 economic and reputational harm suffered, including an
2 offsetting award and costs and attorneys' fees, but
3 also there's a declaration that there has been a
4 breach of obligations under the TPA.
5 And I think my point to you is that the
6 Request for Arbitration is not a bare document. It
7 does actually set out what is said to be breaches of
8 obligations which have already occurred as at that
9 time.
10 And then we get into an issue about the
11 merits, which is why I don't want to get into a debate
12 with you, because that--if it were right--if it were
13 right, would be the subject necessarily related to a
14 later date, but--an argument at a later date.
15 But on the face of it, I'm just pushing back
16 on the suggestion, that if you take a very narrow
17 view, are you entitled to, in fact, take such a narrow
18 view of what is said to be the position as at
19 December 2019?
20 DR. FRUTOS-PETERSON: And I think we are
21 because, as we explained in our submissions--
22 ARBITRATOR BEECHEY: Yes.

1 DR. FRUTOS-PETERSON: --and during the
2 Hearing, at that time, that moment of the Notice of
3 Arbitration, the only--
4 ARBITRATOR BEECHEY: Request for
5 Arbitration.
6 DR. FRUTOS-PETERSON: --Request for
7 Arbitration--or Notice of Arbitration, I think it's
8 called under the Treaty--the Request for
9 Arbitration--what you had is an indictment order.
10 And it is Colombia's submission. And we
11 submit to you that we have proven that, that under
12 Colombian law, an Indictment Order is a mere
13 administrative act by the authority.
14 So, if you were to agree with us, that is an
15 administrative--it's a mere administrative act, then
16 there is nothing there because--you know, so you
17 will--the ruling--even the ruling--the fiscal
18 liability proceedings hasn't even started at that
19 point, not even the ruling, of course, as a natural
20 consequence.
21 So, if you take that particular date, as we
22 show you in our timeline, nothing had happened yet.

1 So, the requirements made by the Treaty are important
2 to respect because, of course, that's the intention of
3 the Contracting States.
4 And if you don't have that breach that
5 arises out of the harm at that time, you actually do
6 not have the consent by the Contracting State, you
7 know, to submit the dispute to arbitration.
8 So, that is why we explain in our
9 submissions and during this Hearing, you know, the
10 importance and the up-to-date, but also for you to
11 understand what is the act that you had at that time.
12 And at that time, the only thing is the Indictment
13 Order, or what the Claimants call "the CGR charges."
14 ARBITRATOR BEECHEY: All right. Thank you.
15 DR. FRUTOS-PETERSON: You're welcome.
16 ARBITRATOR BEECHEY: Would you like to
17 comment on that?
18 MR. SILLS: I would, Mr. Beechey. Thank
19 you.
20 We are where we are because Colombia elected
21 to move on preliminary objections. In effect, they
22 froze the case in time. If the case had proceeded in

1 the ordinary course, we would have amended with all
2 these subsequent events, and hope to do so eventually.
3 But I think the question makes it clear that
4 at that time the RFA was filed, there was--and it
5 pleads--a crystallized actionable wrong.
6 Now, I don't want to address the merits of
7 this claim about it being an unreviewable
8 administrative act. But as we explained in the course
9 of today's proceedings and as we explained throughout,
10 this charging document didn't come from nowhere.
11 There was the opening resolution, in effect
12 the proposed charges, albeit on a completely different
13 theory, to which our clients submitted, in effect,
14 their opposition; that is, that they were not fiscal
15 managers and, hence, could not be brought into this
16 proceeding.
17 The same submission was made by the
18 Ecopetrol directors.
19 The charging document, what Colombia calls
20 "the indictment," followed there. So, there were
21 proceedings before that leading up to the charging
22 document. And the charging document, it is an act of

1 the State.
2 And the fact that as a matter of Colombian
3 law it's referred to as an administrative act, I have
4 to say, with respect, is meaningless for international
5 law purposes. It's an act of the Colombian State
6 through its instrumentality, the CGR, and it caused
7 real--I think the word is exactly right--crystallized
8 damages, as we plead here, and, particularly coupled
9 with the campaign of publicity being improperly waged
10 by the CGR around that charging document, caused
11 reputational harm.
12 And the RFA goes, in some detail, into that.
13 The fact that it hadn't been quantified at the point
14 of the RFA is something one would expect in any case
15 because quantum is dealt with later.
16 But there was real harm traceable to a
17 decision that Colombia has told us there was no
18 recourse on. There was no administrative remedy, they
19 say, for the filing of what they call a mere
20 administrative act.
21 There was that First Tutela that sought
22 relief under Colombian law, leaving our clients with

1 essentially no choice.

2 So, as at December 8th, 2019, it was a real

3 harm and, as pleaded, arising from a violation of

4 Colombia's treaty obligations to investors of the

5 United States.

6 Now, as the CGR matter has progressed, have

7 other wrongs occurred and have further and more

8 substantial damages been incurred? The answer is yes.

9 And at some point those will be put before

10 the Tribunal and, but-for the stay of proceedings that

11 resulted from the making of this application, would

12 already be before the Tribunal.

13 But I think your question highlights the

14 fact that the measure complained of the issuance of

15 what they call the indictment, and the publicity

16 caused real actionable harm, and that's before the

17 Tribunal. It's for the Tribunal to resolve on the

18 merits.

19 But the notion that no harm was pleaded is

20 just wrong, and it's belied by the record.

21 DR. FRUTOS-PETERSON: Mr. Beechey, I just

22 want to add to this exchange, because I think they

1 are--they are starting with the wrong premises.
2 When we talk about that Indictment Order,
3 you know, we describe it as an administrative
4 procedure in the whole process, and it doesn't--it's
5 not a decision. It doesn't have that nature to be
6 obligatory, because it is the initial step that will
7 actually push, you know, the process to start.
8 So, the fact is, as we demonstrated in our
9 submissions, it's not even something that you could
10 appeal, you know.
11 So, after the Indictment Order, the process
12 about an evidentiary stage starts, you know. So--and
13 then you have the following one, which is the
14 proceeding, the--well, the proceeding and then the
15 ruling.
16 And when you have a ruling, then you have a
17 right to appeal that ruling. You know, you saw our
18 big diagram. You know that now, because we also have
19 explained that process in the Hearing during
20 provisional measures.
21 But at this stage, we show you in our
22 timeline, we continue to be at the administrative

1 level. So, that is why there is a misunderstanding in
2 the conception that the Claimants are putting the case
3 forward because what we have here is not a judicial
4 decision by the State. There is no final act.
5 So, you need to wait to that to have, you
6 know, a measure, a breach, that arises--a harm arises
7 out of that breach.
8 So, as we pled in our case, you have to give
9 the opportunity to the State to correct itself if--you
10 know, if they can do that vis-à-vis that--or they will
11 correct themselves or not, you know. They might
12 decide what the CGR did, it was not proper, and then
13 they annul the whole process.
14 So, this is the--this is the situation that
15 we have.
16 ARBITRATOR BEECHEY: All right. I think we
17 better leave it there before we do start walking down
18 the line towards the merits.
19 PRESIDENT NUNES PINTO: I'll ask you if
20 you'll help me to understand. I think I'm going to
21 get lost. So, if you could walk me through the
22 administrative procedure in Colombia or correct my

1 understanding.
2 Let's take the indictment. And you use this
3 expression, but perhaps it may mean that it is
4 admissibility of the administrative procedure against
5 the Parties. Is that the spirit? Is that the
6 admissibility process or not?
7 DR. FRUTOS-PETERSON: I think it's the
8 spirit, but I will let my colleague from Colombia
9 answer that directly, because she is a Colombian
10 lawyer, and she will clarify that for you.
11 PRESIDENT NUNES PINTO: Okay. And I have
12 more questions.
13 MS. BOTERO: Thank you, Mr. President. Can
14 you hear me?
15 PRESIDENT NUNES PINTO: Yeah. Sure.
16 MS. BOTERO: All right. So, just stepping
17 back a little bit to describe what happened. The
18 fiscal liability proceeding is a proceeding of an
19 administrative nature. It means it happens before an
20 administrative authority, which is the CGR. Right?
21 So, it starts with an initiation order. And
22 that simply means that the CGR is going to look into a

1 situation that perhaps may have caused the damage to
2 the state. There is a preliminary investigation that
3 happens.
4   Then the next big step or milestone in the
5 process is the Indictment Order or, as the Claimants
6 called it, "the CGR Charges." That's still an
7 administrative act of procedural character.
8   What does it mean that it has procedural
9 character? It means that it gives impetus to the
10 process. But because it doesn't define a legal
11 situation of the Parties involved, it's just, you
12 know, a next step in the process. It's an
13 administrative act that doesn't admit any recourse.
14   It just--it's--nothing has really happened.
15 It's just the moment where the CGR decides that
16 there's enough to proceed to an evidentiary period to
17 gather more information to ultimately decide, in a
18 ruling, whether there is or not fiscal liability.
19   So, those three are the--like, the main
20 milestones of the process: the initiation, the
21 indictment, and then the ruling.
22   When Claimants initiated this claim, we

1 were--after the Indictment Order during the
2 evidentiary period. So, the only real act at that
3 point was the Indictment Order, which, as we've
4 explained, is a mere procedural act. It's not
5 defining any legal situation.
6 It's--in Spanish it's "un acto de
7 procedimiento." A procedural act or a merely
8 procedural act. That's the Spanish terminology versus
9 "un acto administrativo definitivo," which would be
10 the ruling.
11 And then just to finalize, the ruling can
12 then--because it's a definite administrative act--can
13 then be annulled in the courts. It's only the ruling
14 can go to the courts.
15 PRESIDENT NUNES PINTO: Let me ask you
16 something else. Which is the word you use in Spanish
17 for indictment?
18 MS. BOTERO: It's "auto de imputación."
19 PRESIDENT NUNES PINTO: Okay.
20 DR. FRUTOS-PETERSON: That's why I said it's
21 kind of like--
22 MS. BOTERO: "Imputa."

1 (Overlapping speakers.)

2 PRESIDENT NUNES PINTO: Okay. As they say,

3 charging.

4 MS. BOTERO: It's charging. Charging, yes.

5 PRESIDENT NUNES PINTO: Okay.

6 DR. FRUTOS-PETERSON: That's why I said to

7 your question originally, yes, it's kind of like the

8 admissibility kind of thing. That, yes, let's look

9 into that.

10 PRESIDENT NUNES PINTO: Yeah. It's a mix of

11 everything.

12 MS. BOTERO: So, I think your question is

13 pertinent. Let me use the words in Spanish.

14 It's "auto de apertura," is what we call the

15 opening order, initiation order. "Auto de imputación"

16 would be what we call the Indictment Order; they call

17 the CGR Charges.

18 And then "fallo con responsabilidad fiscal"

19 is what we call the Ruling with Fiscal Liability and

20 they call the CGR Decision. Those are the three main.

21 PRESIDENT NUNES PINTO: Yeah. We are

22 neighbors, so there is not much difference between

1 your system and ours in Brazil.
2 Okay.
3 MR. SILLS: Mr. President, could we comment
4 on that?
5 PRESIDENT NUNES PINTO: Yeah. Absolutely.
6 MR. SILLS: Thank you. So, the description
7 we've just heard of Colombian administrative process,
8 assuming it's accurate, is not the relevant inquiry
9 here.
10 For one thing, there was a decision, as was
11 just described. There was the opening resolution.
12 There was the submission of the free versions, and
13 there was a decision.
14 The decision was that the Ecopetrol
15 directors, who were named in the opening resolution,
16 were dismissed from the proceeding based on their
17 claim that they were not fiscal managers.
18 My clients were not, although they had at
19 least an equally strong claim for that and made that
20 same submission.
21 So, there was a decision. The fact that
22 Colombian law characterizes this as a non-final

1 administrative decision doesn't mean it wasn't an act
2 of the Colombian State that caused real harm and real
3 damage to our clients. And that's the essence here.
4 The fact--and the fact that there was--as we
5 were just told, no recourse, only highlights the fact
6 that it was an act causing damage that could not be
7 remediated.
8 And the discussion about waiting for the
9 ultimate award and then pursuing this remedy, which we
10 say is illusory in the Colombian courts because it
11 would take so very long, as Mr. Torrente explained,
12 really has to do only with a denial of justice claim
13 because that's where that kind of exhaustion
14 requirement applies.
15 But here it's the--it's the issuance of this
16 groundless claim and then the publicity around it by a
17 supposedly neutral decision-maker that caused the real
18 damage.
19 And that's not damage that could have been
20 remediated by going on for years and seeking what we
21 were just told was the possible favorable decision of
22 the CGR--which, of course, never happened--or then

1 spending years in the Colombian courts pursuing an
2 illusory remedy.
3 The harm, as Mr. Beechey's first question to
4 the Respondent, I think, brought out, was that there
5 was a real, definite, crystallized act at that time in
6 a well-pleaded--and I don't mean to suggest that
7 Mr. Beechey said it was well-pleaded--but a pleaded
8 claim, and I would say a well-pleaded claim, of damage
9 from that act of the State at that time, in violation
10 of its treaty obligations.
11 Now, they can dispute that on the merits,
12 but that is not an appropriate preliminary objection,
13 and it's not an appropriate objection to raise in any
14 context at this stage of these proceedings.
15 PRESIDENT NUNES PINTO: Thank you. Okay.
16 Five minutes.
17 DR. FRUTOS-PETERSON: No, less than that.
18 If we are switching, then, the case to that, you know,
19 to that point, to the Indictment Order, I mean, we
20 would just--we were all here. We heard their case.
21 And they are, of course--all their--all their claims
22 and explanations are based on the Proceeding on Fiscal

1 Liability and the Ruling.
2 So, are they telling us now that that's not
3 their case and we should not focus in on that?
4 Because then, to me, it's a real problem under the
5 Treaty then.
6 PRESIDENT NUNES PINTO: Mr. Sills.
7 MR. SILLS: If I understand the question
8 correctly, we aren't switching anything. The pleading
9 that was submitted on December 8 spoke to the CGR
10 proceeding as it was then.
11 Colombia elected to challenge that
12 proceeding and obtain a stay of all other proceedings
13 while these preliminary objections, and I guess we
14 could call them--well, where all of their objections
15 would be heard on a preliminary basis. So, the case
16 did not move forward.
17 Everybody in the room knows that the case
18 did move forward, that there was a Ruling, that the
19 Ruling, we say--and I think with complete
20 justification--suffers from extremely grave legal
21 problems and caused further damage to our client. And
22 in the ordinary course, there would have been an

1 amendment to the pleading at this stage.
2 Once we're past these objections, there will
3 be an amendment, and the case will consider additional
4 facts. The record will expand. The measures being
5 challenged will be added to.
6 I think that's hard to dispute. But, yes it
7 is--and we've been consistent on this since this was
8 filed. There is no switch. We challenged what had
9 happened at the time. The RFA does speak as of
10 December 8th, 2019. And that's what was challenged by
11 Colombia.
12 But will there--you know, will this be the
13 shape of the case for all time? No, because the
14 case--the CGR case has moved on with what I have to
15 say is this absurd decision imposing $750 million in
16 damage jointly and severally, without even purporting
17 to link any act or omission of my clients to any item
18 of damage, and then hanging the label "gross
19 negligence" on it when what they're talking about
20 might be generously construed as a simple breach of
21 contract. But that's all for the future.
22 I think that the key point is Colombia

1 jumped the gun. They've chosen to attack the pleading
2 as it was then, and we are defending it as it was
3 then.
4 And once we're past this, of course, we'll
5 amend the case. We're not going to go forward on a
6 pleading--I wouldn't say it's been overtaken by the
7 event because the reputational harm remains, and it
8 will remain an element of our claim, but there will be
9 other elements of the claim.
10 And it's hardly a surprise to anyone in this
11 room that claims are expanded and amended and
12 supplemented as time moves on and as the case moves
13 forward.
14 PRESIDENT NUNES PINTO: Thank you. Can we
15 move on? So I'll turn now to Professor Kohen, his
16 questions.
17 ARBITRATOR KOHEN: Thank you, Mr. President.
18 Allow me to make a linguistic comment first.
19 Because in the first Procedural Order, it was
20 mentioned that English and Spanish are the procedural
21 languages of the arbitration and have equal dignity.
22 Nevertheless, the same Procedural Order indicated that

1 the hearings would be mainly occurring in English. So
2 this is the reason why I'm prevented from using my
3 mother tongue.
4 I have, I believe, very, very concrete and
5 specific questions, some are more related to Claimants
6 and others to Respondent, but obviously both I expect
7 comments from both sides for all the questions.
8 I would like to start with the submission by
9 the non-disputed party and the attitude adopted by
10 both sides on this. I think we noticed that both
11 Colombia and the United States are adopting similar
12 interpretations of the Treaty now. My question is--my
13 first question with regard to this is, when Colombia
14 and the U.S. concluded the Treaty, did they have
15 another interpretation in mind? Did they have a
16 different intention when they concluded the Treaty of
17 that they invoke today?
18 Yes, please.
19 MR. SILLS: Professor Kohen, and I should
20 preface this by saying the linguistic provisions of
21 the Procedural Order were the subject of extensive
22 discussions among the Parties and, of course, with the

1 Tribunal.
2 Everyone would, of course, prefer the
3 language in which he is most comfortable. I can tell
4 you, as a native English speaker, your English suffers
5 from no disabilities.
6 But I--that was the deal the Parties made,
7 that written submissions could be made in Spanish and
8 these proceedings would be in English in part because
9 everyone in the room speaks English and not everyone
10 in the room speaks Spanish.
11 But no disrespect was meant to Spanish in
12 any sense. And I know you know that, but it's worth
13 saying.
14 ARBITRATOR KOHEN: It's just an invitation
15 to improve language skills. That's all.
16 MR. SILLS: I heard a rumor that Americans
17 are lagging in that regard.
18 But, Professor Kohen, with respect to the
19 question you pose, I don't think we can get into the
20 minds of the drafters of the Treaty. And what the
21 Vienna Convention teaches us is that the best
22 indication of what the drafters meant is the language

1 they used. I think that's common ground.
2 And sometimes the drafters of any
3 instrument, a treaty, a contract, come to regret what
4 they said, think there was a drafting gap, hadn't
5 considered a particular issue, and they would wish to
6 change it.
7 The mechanism for changing the Treaty is to
8 amend it. But I don't think there is any reason to
9 believe that a submission--and not really on the
10 merits because the submission of the U.S. is highly
11 abstract--somehow tells us that the Treaty means
12 something that its plain words don't indicate.
13 I mean, if the United States were to submit
14 a non-disputing party submission tomorrow that said,
15 "In our view, requests for arbitration are valid only
16 if they're printed on blue paper," and Colombia said,
17 "Yes, we agree with that," we would be subject to
18 dismissal because ours is printed on white paper.
19 The language of the Treaty sets the bounds
20 of what it means.
21 And not only that, but the way in which that
22 language has been interpreted over the years by

1 scholars, by other tribunals, how language in similar
2 treaties has been construed and none of that is in the
3 U.S. submission.
4 I have to say, with respect to the U.S., the
5 submission is largely either a recitation of what's in
6 the Treaty itself or a series of ipse dixits. And the
7 Tribunal, I suppose, could be persuaded by what the
8 U.S. submits. But it's up to the Tribunal to weigh
9 that. And the Vienna Convention doesn't say if a
10 non-disputing party/State party to a treaty makes a
11 submission, that binds the Tribunal or it binds the
12 world or it's authoritative. It says it shall be
13 taken into account. And when something is taken into
14 account, it gets the weight it deserves.
15 So can we get into the minds of the drafters
16 of the treaty and, in effect, interview them and say,
17 "What do you mean by this?" Or would you have taken a
18 position, for example, that denial of justice means a
19 different thing in an administrative and a judicial
20 context because that inquiry can't be done now.
21 But I think we can look at how that language
22 in this Treaty and other treaties has been

1 interpreted, and I think that's the appropriate
2 inquiry. So, that's a very long answer to your simple
3 question. I don't think we can get into their minds.
4 And I don't think--and, with respect, I don't think
5 that's a useful inquiry. It's what they said, not
6 what they thought, that's the relevant inquiry here.
7 ARBITRATOR KOHEN: Yeah. I know the content
8 of the Vienna Convention treaties.
9 My question was concretely whether you
10 believe that there was a change in the position. But
11 you answered my question. Maybe Respondents are
12 wanting to make a comment.
13 DR. FRUTOS-PETERSON: Thank you, Professor
14 Kohen. I just want to tell you that I keep pushing to
15 argue in Spanish. Sometimes I win the battle;
16 sometimes I don't. But it's a well point taken.
17 Thank you.
18 Regarding your question, no changes--I mean,
19 no. That's the intention of both Parties. I mean, it
20 is clear. And the United States, you know, came here
21 under the possibility that they have under the Treaty
22 confirming what they agreed with Colombia. And, you

1 know--and this is perfectly fine to do it, not only
2 under the Treaty but also under the Vienna Convention.
3 Thank you.
4 ARBITRATOR KOHEN: Okay. Thanks, both
5 Parties.
6 Yes, indeed, it is very important to
7 distinguish between interpretation of treaties and
8 modification of treaties. That's a very important
9 point that one has to take into account.
10 The Parties have, in their written comments,
11 discussed about subsequent--I can't pronounce this
12 word--practice and subsequent agreement--that's
13 better. Obviously, you have opposite views with this
14 one thing and the other.
15 My question is: In order to have a
16 subsequent agreement, is it indispensable to have a
17 single text in which the Parties say, "Our right
18 interpretation of this, the provision, is like that"?
19 Is it absolutely indispensable for a
20 subsequent agreement to be concluded in a single
21 instrument?
22 MR. SILLS: With regard to a subsequent

1 agreement, I believe the authorities do say yes. So,
2 for example, the ILC Report of 2013 says this: The
3 use in Article 31(3)(a) of the VCLT of the word
4 "agreement" presupposes a single common act by the
5 Parties by which they manifest their common
6 understanding regarding the interpretation of the
7 Treaty.
8 Now, does it have to be in a single
9 document? Could it be a simultaneous exchange of
10 documents that constitute or purport to constitute an
11 agreement?
12 I think that's a--given the practical
13 emphasis of the Vienna Convention, I suppose it could
14 be an exchange of documents. In other public law
15 areas, for example, the exchange of diplomatic notes
16 can constitute an agreement as to the meaning of the
17 treaty.
18 Again, I know this is a particular area of
19 expertise of yours, Professor Kohen.
20 But the exchange of diplomatic notes is a
21 recognized way in which some treaties can be clarified
22 or interpreted. But I think there is no case

1 suggesting that the submission, in effect an amicus
2 brief, can constitute a subsequent agreement.
3 And there as the International Law
4 Commission quote that I just read suggests, there
5 is--there's no authority for the notion that an
6 agreement can be extracted from those--you know, from
7 a submission like this.
8 Does it all have to be on one piece of
9 paper? I think the answer is no.
10 Can a contract consist of an exchange of
11 documents? Yes, it can. But this is very far afield
12 from that. So I think the abstract question is: Does
13 it have to be a single document? No.
14 But does it have to be a single transaction,
15 a single occurrence intended to definitively interpret
16 the Treaty? Yes, it does.
17 ARBITRATOR KOHEN: Thank you.
18 Any comment from the other side?
19 DR. FRUTOS-PETERSON: The answer is no. We
20 indicated that in our pleadings, and we supported it
21 with the authorities, and the explanation is there,
22 Professor.

1 Oh, I'm sorry. I was just saying that the
2 answer is no from our perspective. We pled
3 that--precisely that point because Claimants are
4 arguing the contrary. And all the explanation and
5 supporting authorities are in our submissions.
6 ARBITRATOR KOHEN: Okay. Thank you.
7 So in this same vein, do you consider that
8 the Parties of the TPA follow a distinct practice from
9 that that they invoke today?
10 Is it clear, my question? I can...
11 MR. SILLS: With apologies. I'm not quite
12 sure.
13 ARBITRATOR KOHEN: Okay. I will try to
14 explain myself better.
15 So, you have a treaty concluded by the USA
16 and Colombia, the Treaty entered into force. Was
17 there any change in the practice? Because my prior
18 question was with regard to the interpretation. Okay?
19 But my next question is with regard to the practice.
20 Did the practice of the Parties to the
21 treaty change through the years? Is it better?
22 MR. SILLS: Thank you.

1 I think the only evidence of that would be
2 claims--claims brought under the Treaty by investors
3 here. Because there is no occasion for proceedings
4 between the U.S. and Colombia. Although, you know,
5 the Treaty does have State-to-State provisions in it.
6 And so, if either Colombia or the U.S. sought a
7 definitive interpretation of the Treaty, they could
8 invoke that proceeding, that procedure, and they have
9 not done so.
10 And I think just as some treaties have a
11 very specific mechanism for States to secure
12 interpretation, as NAFTA at least did, which could be
13 invoked. But I think writing opinions is not
14 practice. Submitting amicus briefs or making amicus
15 submissions is not a practice. "Practice" refers to
16 the real-world experience of the Treaty being applied
17 to concrete situations. And--which is why I think the
18 best guide to what the Treaty means, following its
19 language, which has to be the starting point, is: How
20 have tribunals interpreted and applied the Treaty in
21 practice?
22 And here there isn't--I mean, although

1 Colombia has a robust docket of investor-State claims,
2 only a few of them involve this particular Treaty.
3 There are other treaties with a common
4 origin or a common language. The U.S.--as we
5 discussed this afternoon, one of the provisions in
6 dispute here has its origins in the United States
7 model BIT. And so, it's appropriate, I think, to look
8 to that to see what light it can shed on the meaning
9 of the treaty language there, administrative,
10 adjudicatory, and--but the fact--but a practice, I
11 think, common understanding, means: How has the
12 Treaty been dealt with in actual concrete practices,
13 disputes? And then, secondarily, how have similar or
14 identical treaties been dealt with?
15 In addition, all the non-disputing
16 submissions here that Colombia points to--some of
17 which have been rejected by the tribunals that heard
18 them--were submissions by the U.S. in cases against
19 Colombia. There's nothing ever been submitted by a
20 Colombian investor or by Colombia in a claim by a
21 Colombian investor against the United States. Insofar
22 as I'm aware, there have been no such cases.

1 So, I think when we think of a common
2 practice, the raw material of a common practice just
3 isn't here.
4 But, again, I mean, we discussed at some
5 length the decisions of tribunals either rejecting
6 essentially identical submissions by the U.S. on a
7 non-disputing party basis or accepting parts of them.
8 But the notion that that would somehow
9 establish a common practice, I think, is not correct
10 under the Vienna Convention or under the common
11 understanding of what a practice is.
12 ARBITRATOR KOHEN: Thank you. Any comment
13 from the Respondent?
14 DR. FRUTOS-PETERSON: Thank you, Professor
15 Kohen.
16 We submit that there is a common practice.
17 That practice hasn't changed. You know, we explain it
18 in our submissions, and also today you heard our
19 position in that regard.
20 So, yes, the Contracting States have been
21 consistent, you know, with the practice on these
22 provisions. No change. Thanks.

1 ARBITRATOR KOHEN: Okay. Now, I have
2 another question which probably would be better to be
3 answered by the Respondent first.
4 Is there a possibility to cure
5 jurisdictional deficiencies of the Notice of
6 Arbitration later on? Is it clear, my question?
7 DR. FRUTOS-PETERSON: The categorical answer
8 is no. I mean that you have to have the Notice of
9 Arbitration at the time that--going back to the
10 requirements of the Treaty, under that Notice of
11 Arbitration, you will have to establish, you know, the
12 breach and the harm that arises out of that breach.
13 And that is why this Treaty--as some other
14 treaties of the United States with other countries,
15 you know, such as NAFTA, they have those requirements,
16 you know, that you need to demonstrate the breach and
17 the harm that arises out of the breach by the time
18 that you submit the Notice of Arbitration.
19 ARBITRATOR KOHEN: Claimants, maybe any
20 comments?
21 MR. SILLS: I put to one side the fact that
22 we believe that the RFA does not require--it's on.

1 Assuming for the moment, Professor Kohen,
2 that there is a jurisdictional defect here, there is
3 ample authority that a jurisdictional defect can be
4 cured, and we discussed some of those cases in our
5 presentation this afternoon.
6 So, for example, in the *Kappes* case, which
7 is actually cited by Colombia here--the Tribunal
8 actually said nothing in the DR-CAFTA, which I think
9 it's common ground, is a very similar treaty to the
10 U.S.-Colombia TPA, that jurisdictional allegations
11 could be supplemented and amended. The same was--the
12 same was true of the statements of the Tribunal in *Pac*
13 *Rim*.
14 So, the answer is it's not categorical. And
15 it depends upon the particular pleading. It depends
16 on what cure might be--might be suggested. It depends
17 on whether or not there's really any point.
18 So, for example, dismissing a claim just so
19 that it could be refiled with a cured jurisdictional
20 objection would make no sense.
21 So, I think there is ample precedent for
22 taking a practical and not hyper-technical and

1 formalistic view and allowing clarification. The
2 quotes from decisions--and, again, I--that we had
3 earlier--and I apologize. I don't have the particular
4 quotations before me.
5 But I know in our presentation this
6 afternoon, we discussed a number of those cases, some
7 from very distinguished tribunals and leading
8 authorities in our field, making it clear that there
9 could be--that jurisdictional objections that were
10 determined--jurisdictional allegations that were
11 determined to be defective could be corrected,
12 supplemented, or amended.
13 And I do recall that one of those was
14 authored by Mr. Veeder. And I apologize. It's been a
15 long day, and I don't have the name of the case in
16 mind.
17 ARBITRATOR KOHEN: Thank you very much,
18 Mr. President. I wouldn't like to abuse my time, but
19 I have--yes, I can?
20 PRESIDENT NUNES PINTO: Yes.
21 ARBITRATOR KOHEN: With your permission,
22 okay. Go ahead.

1 When did the alleged investment by Claimants
2 terminated, if it finished at one moment in time? At
3 one moment in time, it finished.
4 MR. SILLS: The work on--under the Contract,
5 the investment, that work terminated in about 2018
6 when the refinery was up and running, as it is today.
7 Reficar has still not delivered the contractual
8 close-out documents that are required by the Contract,
9 but there is no ongoing work by the Claimants on.
10 But it is--I mean, the Contract is still
11 open. And since the Contract is an element of the
12 investment--I think there's no simple answer. I mean,
13 if the question is when did the actual work--the
14 compensated work stop, the answer would be 2018, or
15 perhaps early in 2019.
16 ARBITRATOR KOHEN: Any comment from the
17 Respondent's side?
18 DR. FRUTOS-PETERSON: No. We don't have any
19 further comments. Thanks.
20 ARBITRATOR KOHEN: Thank you. My last
21 question, Mr. President, will be--
22 PRESIDENT NUNES PINTO: Go on.

1 ARBITRATOR KOHEN: What is the concrete
2 difference--I would like to know the concrete
3 difference of the rights invoked by Claimants within
4 the Colombian procedures and the rights invoked here.
5 Concretely, which are the rights that are defended
6 within Colombian procedures, and the difference with
7 this--with the rights that are invoked here before
8 this arbitral tribunal?
9 MR. SILLS: Well, it's a difficult question
10 to answer briefly. But to begin with the source of
11 the rights is different. So, the Treaty, for example,
12 doesn't say due process under the Colombian
13 Constitution. One of the rights that was invoked in
14 the proceedings before the RFA was filed before--and
15 before the CGR itself.
16 So, fair and equitable treatment is just
17 different from due process under the Colombian
18 Constitution. There we referred to Colombian cases,
19 to Colombian jurisprudence, to--and, for that matter,
20 Colombian procedures.
21 So, the source of the right is different and
22 the contours of the rights are different.

1 You know, is there--does the--can the same
2 conduct violate both Colombian law and international
3 law? Of course.
4 But it's certainly the case that in the
5 First Tutela, it invoked Colombian law and rights
6 under Colombian law that are distinct from the rights
7 under international law. Does Colombian law, for
8 example, guarantee national treatment? So far as I
9 know--I'm not a Colombian lawyer--it does not.
10 There's no guarantee in Colombian law that
11 investors from other countries will be treated no less
12 well than Colombian investors, whereas that comes from
13 a bedrock principle of investment law, a guarantee of
14 national treatment.
15 And it's a--it's a broad question, Professor
16 Kohen. And we would have to lay the record and the
17 CGR Proceeding alongside the record here. But I think
18 there is a concrete example of rights that are invoked
19 in this proceeding; that is, the right to national
20 treatment that, so far as I'm aware, has no place in
21 Colombian law.
22 Colombia does not have a provision that

1 guarantees to investors from the United States or any
2 other country, so far as I'm aware, rights--the right
3 to national treatment.
4 And the Claimants were scrupulous on the
5 limited--in the limited instances where they resorted
6 to the Colombian courts to reserve their rights to
7 seek relief under international law in this
8 proceeding.
9 Is some of the conduct complained of here
10 conduct that was or could have been complained of in
11 Colombia? The answer is yes, because--but I don't
12 think it's a startling proposition to say that similar
13 wrong acts can give rise to rights under different
14 legal regimes. And that's--but some of the wrongful
15 acts are entirely distinct. And the national
16 treatment point that I just made, I think, is a good
17 example of that.
18 They're different. Are they--I don't think
19 they're at--they are different. Their sources are
20 different. The acts that create liability are
21 different. The remedies are different.
22 So, for example, could Colombia--could the

1 Colombian courts conceivably grant relief as a matter
2 of Colombian law for violation of Colombian law that
3 would go beyond the relief that the Treaty allows?
4 The answer is yes. So, the elements of a
5 claim, the proof of the claim, the relief that can be
6 granted for violation of a particular right under
7 these two different legal regimes, they are distinct.
8 ARBITRATOR KOHEN: Thank you.
9 MR. CONRAD: Professor Kohen, I'm sorry for
10 the interruption, but there's one clarification that
11 I'd like to offer on your previous question, if I may.
12 ARBITRATOR KOHEN: Of course, yes.
13 MR. CONRAD: I think your question--and just
14 to remind the Parties here present what the question
15 was that I'll be addressing on the supplementation, is
16 your question about when the investment ended or
17 terminated. I wanted to make sure that we were clear.
18 Mr. Sills was discussing the scope of work
19 of when the work on the Contract ended in 2018.
20 However, the investment that the Claimants have
21 continues.
22 And so, the investment that they made

1 regarding the office, the employees, and the
2 investment generally that they had in Colombia, the
3 local Colombian branch, if you will, that we discussed
4 in our presentation papers still exist. PCIB. I
5 mean, it's--that investment continues, and I just
6 wanted to make sure the record was clear on that
7 point, You Honor. Or--Your Honor, excuse me.
8 Professor Kohen.
9 ARBITRATOR KOHEN: Okay. So, if I
10 understand, your proposition is that it continues.
11 MR. CONRAD: Correct.
12 ARBITRATOR KOHEN: It's an ongoing
13 investment, according to you?
14 MR. CONRAD: That's correct.
15 ARBITRATOR KOHEN: Okay. I wonder whether
16 the Respondent is waiting to make a comment.
17 DR. FRUTOS-PETERSON: Well, thank you,
18 Professor Kohen. There are not assets in Colombia,
19 and they finished working under the Contract. Of
20 course, we say that that Contract is not an
21 investment. So--but in any event, the execution of
22 the Contract has ended, and there are not assets--the

1 services--I'm sorry--the performance of the services
2 have ended, and there are not assets in Colombia.
3 ARBITRATOR KOHEN: Okay.
4 MR. SILLS: And I should say this is yet
5 another disputed issue of fact that cannot be resolved
6 now. But I should note, as we mentioned earlier,
7
8
9
10
11 So, I think it's--the work has finished, the
12 refinery is there. The Contract has not been--the
13 closing documents have not been delivered by Reficar
14 as they're obligated to under the Contract, and they
15 have, in fact, commenced proceedings.
16 So, I think it's fair to say it's a mixed
17 question of law and fact whether the investment still
18 continues. We say it does. They say it doesn't. But
19 it's yet another question that can't be resolved in
20 this procedural context.
21 ARBITRATOR KOHEN: Okay. Thank you very
22 much. No further questions, Mr. President.

1 PRESIDENT NUNES PINTO: Before we close the
2 session, I have just one question. And I would like
3 to make a reference first to Claimants' Slide
4 Number 33 and also Respondent's 153. 1-5-3.
5 Basically, what we have here, it's along the
6 lines of your clarification. Respondent claims that
7 there was no investment risk and, therefore, no
8 investment. Okay? I do not want to go into the
9 details. This is something we'll decide later.
10 But in your Slide 33, the highlighted
11 portion says Claimants contracted with Reficar, a
12 Colombian-owned enterprise, to provide project
13 management services in connection with the
14 construction expansion of an oil refinery owned by
15 Colombia to supply environmentally clean motor fuels
16 to meet Colombian demand.
17 This portion is part of my question now. In
18 doing so, Claimants invested significant amounts of
19 time, capital, personnel and labor in Colombian
20 territory. This Slide is also Slide 96 in your
21 presentation, but that's the same.
22 Then I go to Slide Number 3 of Respondent,

1 which says it's a summary of the Services Contract and
2 says remuneration structure: Full reimbursement of
3 costs plus profit. Okay.
4 And the question is, how do I draw the line
5 to segregate what is investment and what is
6 reimbursement of a services contract? How? Because
7 you have just clarified that the Contract is still
8 open, it was not closed. [redacted]
9 [redacted] and you have personnel there. The
10 investment--you told us the investment is there. And
11 then Respondent says, "No, you don't have anything.
12 You don't have assets."
13 This is something that we will decide at a
14 proper time.
15 But my question is: If you've got under the
16 service contract the reimbursement of amounts plus
17 profit, or costs plus profit, how do you draw the line
18 to say that there is a portion which is investment
19 made by me? That's what you are saying.
20 And this Slide 33, which is Paragraph 29 of
21 the Request for Arbitration.
22 Do you understand my point?

1 MR. SILLS: We do. And I put to one side,
2 Mr. President, the notion that what Colombia describes
3 as investment risk is a necessary element of an
4 investment when the Treaty lists it disjunctively and
5 common practice lists it disjunctively.
6 You know, if I build a factory in Colombia
7 to provide a particular good to Colombia, and the
8 Government is the only consumer of that good, and I
9 build the factory and I hire labor and I buy raw
10 materials and I sell them to the Colombian Government
11 at an agreed price, I don't think anyone wouldn't say
12 I haven't made an investment in Colombia. Even though
13 Colombia would now say, "Well, you took no risk. You
14 know, you agreed to do this on a cost-plus basis."
15 But I think what your question highlights is
16 how fact-intensive this decision is.
17 PRESIDENT NUNES PINTO: Let me just add
18 something. I'm not looking, with this question, the
19 situation--the current situation today. As it was in
20 the past, you'll have reimbursement and investment.
21 I'm looking to that point. Yeah.
22 MR. SILLS: And I understand. But I think

1 at the one extreme, you have a simple contract to sell
2 goods or services. Is that an investment? I think
3 its common ground that it's not.
4 And at the other extreme, you acquire real
5 estate, put in an elaborate manufacturing facility and
6 hire workers and pay taxes. And everyone would agree
7 that is an investment. And there's a spectrum. And I
8 think your question asks: Where does one draw the
9 line along that spectrum?
10 And I think the answer is--and as
11 the--actually, as the explanatory notes to the Treaty
12 make clear, it's a complex question of law and fact,
13 where to draw that line. And you have to draw it with
14 reference to the particular investment.
15 But I have to say that as per Slide--was
16 this the confidential Slide--as our Slide 34 made
17 clear--
18 PRESIDENT NUNES PINTO: I did not mention it
19 for obvious reasons.
20 MR. SILLS: But we do not at all agree with
21 or endorse Colombia's graphic on Page 153 of the
22 Contract. There was--even in the terms they set out,

1 there was investment risk here.
2 And as you know, the Czech case that we
3 cited and discussed makes clear, it's somewhat
4 remarkable that Colombia--Reficar's parent, Colombia,
5 is now trying to extract from our clients 300 percent
6 of the revenues that were recognized there. To say,
7 "Well, you face no risk."
8 And any long-term investment in a foreign
9 country is an investment within the meaning of the
10 Treaty. But I think this is yet another issue because
11 where one draws the line with respect to any
12 particular investment or claimed investment is going
13 to depend on the particular facts of the investment,
14 the particular context in which it's made, the
15 agreements that govern it, the real-world experience
16 of how that investment was treated. And, it's, again,
17 a question of fact.
18 And our Slide 34--and I thank you for
19 leaving it as it is. But that Slide makes it clear
20 that there was risk.
21 We say it's more than ample risk to satisfy
22 that condition, assuming that risk is required for an

1 investment as opposed to being one of the elements
2 listed in the Treaty for an investment. Investment is
3 drafted in a very broad sense in the TPA, and that has
4 to be taken account of.
5 But it's simply Colombia's challenge to the
6 investment status of our investment is not one that
7 can be resolved at this point.
8 PRESIDENT NUNES PINTO: Thank you.
9 Any comments?
10 DR. FRUTOS-PETERSON: Well, Mr. President,
11 we submit to you that this is precisely the question
12 that this Tribunal is to decide right now. You know,
13 it's a jurisdictional question, so it is before you.
14 You can decide that question just by looking at the
15 Contract.
16 The Contract is an exhibit in the case. We
17 went through those Slides. We have explained the
18 formulation of payments, you know, to all their
19 services that they rendered under the Contract, and we
20 still don't see the investment. They got every penny
21 they charged, they got it back, and we move on.
22 So, the--anyway...

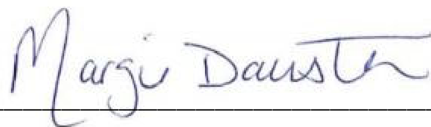
1 PRESIDENT NUNES PINTO: Yeah. I know that
2 this is something that we have to decide. But it's
3 also useful to have the Parties' views on certain
4 aspects, especially this one. Because I'm moving from
5 today's date to the past, what happened when
6 everything was active in the Contract and the joint
7 venture. That's it.
8 Okay. I have the information. I thank you
9 very much.
10 Well, this was just some questions. Any
11 more questions?
12 Any matters you would like to address before
13 we adjourn, or we can go home?
14 MR. SILLS: Nothing. Nothing for the
15 Claimants, Mr. President.
16 PRESIDENT NUNES PINTO: Okay.
17 DR. FRUTOS-PETERSON: Nothing from the
18 Respondent. Thank you.
19 PRESIDENT NUNES PINTO: Again, I would like
20 to thank you very, very much for this long day. It
21 was excellent to be back and be here in this room
22 sharing your views, our questions, your presentations

1 with those who, unfortunately, for sanitary reasons,
2 could not be here but followed us by the platform.
3 So, I thank you very, very much. I'm
4 delighted to be here. And tomorrow at 10:30 we start,
5 an hour and a half later than today, and we should be
6 closing by 1:00 o'clock. Okay.
7 (Whereupon, at 5:58 p.m. the Hearing was
8 adjourned until 10:30 a.m. the following day.)

CERTIFICATE OF REPORTER

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

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



MARGIE R. DAUSTER