THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

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.	:

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

Volume 2

Friday, May 20, 2022

The World Bank Group

The hearing in the above-entitled matter came on at 10:40 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

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT NUNES PINTO: Okay. So, now formally, good morning to everybody. It's a pleasure to be here for this second day of hearing in Case ICSID ARB/19/34.

I would like to welcome again all--both Parties, their Counsel, and also all those who are attending this session via Zoom. We're mostly welcome. And I'm sure that we'll have the same quality of audio and video for you as we had yesterday.

Before we start, I'll ask Claimant first if you have any housekeeping matters that you would be willing to address to the Tribunal.

MR. SILLS: We don't at this time, Mr. President.

PRESIDENT NUNES PINTO: Okay. Thank you.

DR. FRUTOS-PETERSON: We don't have anything else.

PRESIDENT NUNES PINTO: You don't either.

DR. FRUTOS-PETERSON: Thank you.

PRESIDENT NUNES PINTO: Okay. And the

Tribunal has no matters to address to you either.

So, let's get started. Then we have 60 minutes for Respondent's Closing Arguments. The floor is yours.

RESPONDENT'S CLOSING ARGUMENT

MS. ORDOÑEZ: Mr. Chair, and Arbitrators Beechey and Kohen.

Perhaps the most distinguishing feature in Claimants' case, as presented yesterday, is the allegation that somehow, after two rounds of written submissions and a two-day hearing in Washington, D.C., this is not the moment for the Parties to fully argue the proof and for the Tribunal to definitively decide on Colombia's preliminary objections.

The opposite is true. You have all the elements necessary to render a final decision. To say it clearly, by express mandate of the Treaty and of the Tribunal, this is the right moment.

According to Article 10.20.4, and I quote: "A Tribunal shall address and decide, as a preliminary question, any objection by the Respondent that, as a matter of law, a claim submitted is not a claim for

which an award in favor of the Claimant may be made under Article 10.26."

Moreover, as provided in Sections 14.7 and 14.8 of Procedural Order Number 1, this is the moment to decide on Respondent's objections to the admissibility and jurisdiction, including our objection that the Services Contract does not amount to a protected investment because there is no investment risk under the Treaty and the ICSID Convention.

Yesterday Claimants made an interpretation of domestic law that I take issue with.

First, while Article 10.28 of the TPA defines "national authority" as an authority of the central level of government, Claimants denied the relevance of our domestic law, which clearly and expressly provides that Refinería de Cartagena Reficar is a decentralized entity, not an entity of the central government and, therefore, not a national authority under the Treaty.

The consequence of such disregard is not negligible. Indeed, consulting our domestic law on

this matter has a result that the Service Agreement entered into by Reficar and the joint venture is not and cannot be an investment agreement.

Second, while Article 10.5.2(a) refers in English to "administrative adjudicatory proceedings," and in the Spanish text to "procedimiento contencioso administrativo," both of which are equally authentic, Claimants propose to deny the meaning of this term in Spanish and under Colombian law, the only sphere where it could be applied.

The position advanced by Claimants is nonsensical. In particular, although Claimants admit that the term "administrative adjudicatory proceedings" is not a defined term in the U.S. legislation, they argue that it is English language and the legislation which must be consulted--and the U.S. legislation which must be consulted to provide meaning to the term simply because the Treaty was drafted only in English.

Do we really need to remind our colleagues that the Colombia-USA TPA is authentic in both English and Spanish?

Be that as it may, this certainly warrants a decision by the Tribunal reminding Claimants about the proper application of the general rule of interpretation, this time including the relevance of Article 33 of the Vienna Convention on the Law of Treaties.

With this, I conclude. Ms. Frutos-Peterson from Curtis will continue our Closing Arguments.

DR. FRUTOS-PETERSON: Thank you, Ana María.

Mr. President, Members of the Tribunal, I don't think that I'm going to make use of the full hour we have been allocated for Closing Arguments. So, that is a good news, I think, for everybody to make it for lunch at the regular time.

Yesterday, Claimants' Opening Statement was mostly devoted to address the standards of interpretation of Colombia's supposed breaches of the Treaty.

They barely spent time dealing with jurisdictional questions, and they did not address Respondent's main preliminary objection based on Article 10.20.4 of the Treaty, which is that their

claim is not ripe because of the time--because at the time they filed their Notice of Arbitration, there was no measure capable of constituting a Treaty breach and no loss or damage arising out of that breach.

Claimants deliberately adopted this strategy because they want to create the impression that there might be--there might be a violation of a Treaty standard in this case. They are desperately trying to push this case into the merits.

But the reality is that Claimants prematurely initiated this Arbitration as an attempt to prevent CGR from finding them fiscally liable. That is why they rushed and submitted this claim, even though there was no measure capable of constituting a Treaty breach and no loss resulting from that breach. That was their strategy decision.

Claimants also revealed yesterday that if they are able to overcome Respondent's preliminary objection, they--objections, they will supplement and amend their claim.

The Indictment Order was merely the pretext to initiate this case. But, unfortunately for

Claimants, they overlooked the requirements set forth in the Treaty to initiate a valid claim to arbitration and to engage Colombia's consent under the Treaty.

I would like to make one last preliminary comment concerning Colombia's Article 10.20.4 objection. Respondent has already explained in detail why Claimants' factual allegations are not capable of constituting a prima facie breach of any of the substantive obligations of the Treaty.

We're not going to address those points again in this Closing Presentation, but we would like to refer the Tribunal to our submissions and to yesterday's Opening Statement.

Claimant wants this Tribunal to believe that Respondent had the intention on converting this preliminary phase into a mini trial without the possibility of submitting evidence. That is completely false.

Respondent's position is that, taking the factual allegations made by the Claimants in the Notice of Arbitration as true, as well as the uncontroverted facts, there could not have been a

prima facie breach of any of the Treaty obligations.

Such legal determination is not a complex exercise, as Claimants argued.

Claimants also suggested yesterday that they did not have to show, even prima facie, that there were other remedies available in Colombia and that their pleading that those remedies were futile or manifestly ineffective was sufficient at this stage.

But as the Tribunal said in the Corona v. Dominican Republic, when deciding an objection under a provisional--when deciding an objection under a provision identical to Article 10.20.5 of the Treaty, and I quote: "Based on the Claimants' allegations and the evidence submitted by the Parties in this arbitration, it has not been shown that taking a further step in the domestic legal system of the Dominican Republic will have been futile or manifestly ineffective."

The same is true here where Claimants have not shown why those available remedies would be futile or manifestly ineffective. Taking their word for it is not enough, even at this preliminary stage.

In these concluding remarks, we're only going to address some important issues that are worth highlighting, given what we have heard yesterday.

First, let's talk about the evidentiary standard. Yesterday, once again, Claimants conflate the standard applicable to an objection under Article 10.20.4 of the Treaty and the standard applicable to jurisdictional objections raised by Colombia as a preliminary question.

Claimants want that a presumption of truthfulness be applied to all of their allegations. But let's be clear about the relevant standards.

With respect to the standard applicable to an objection under Article 10.20.4, it only applies to factual allegations made by Claimants in the Notice of Arbitration. It does not apply to legal allegations or even to mixed questions of law/facts, as Claimants call them.

The Parties are in agreement as to the relevant facts that occurred until the Notice of Arbitration was filed. You can see that by comparing in Slide 38 of Claimants' Opening Presentation and

Slide 7 of Respondent's Opening Presentation.

Thus, it is up to the Tribunal to decide whether, taking into account those facts, Claimants' claim is a claim for which an award in their favor may be made.

Claimants argued yesterday that when Colombia proposed to treat jurisdictional objections as a preliminary question, together with its objections under Article 10.20.4, it meant that Colombia somehow agreed to treat those objections under the same standard. That is not true.

Yesterday Claimants pointed to a different paragraph of Respondent's October 9, 2020, letter. Dealing with jurisdictional objections as a preliminary question simply means that those objections are heard and decided before going into the merits of the case. That's what "preliminary" means.

The text of Article 10.20.4 states very clear that those jurisdictional objections could be decided by the Tribunal together with a preliminary objection under Article 10.20.4.

The jurisdictional objections raised by

Colombia are not intertwined with the merits. They are very specific objections that deal with the jurisdiction ratione materiae, ratione personae, and ratione voluntatis of this Tribunal.

They are mostly legal in nature and involve simple questions of fact. That is the reason why Colombia, in furtherance of the procedural efficiency, proposed to deal with those jurisdictional objections in this preliminary phase, together with the objections under Article 10.20.4 of the Treaty.

The Tribunal concurred with Colombia's position on exercising its powers--and exercising its powers under Article 10.20.4 of the Treaty, and it decided to hear those objections in this preliminary phase.

Claimants make it seem as if Colombia tricked them. Apparently, they were not aware that the standard applicable to Colombia's jurisdictional objection was different from the standard applicable to Article 10.20.4's objection.

That is, frankly, nonsensical. Claimants are sophisticated players represented by very

experienced counsel, which know full well that--what it means to deal with jurisdictional objections in a preliminary matter--in a preliminary phase.

As the Tribunal in Kappes v. Guatemala held, which is also consistent with the opinions of the United States in its non-disputing Party submission, the fact that jurisdictional objections are decided as a preliminary question together with an objection under Article 10.20.4 does not mean that a presumption of truthfulness applied to the facts related to those jurisdictional objections.

There is nothing in the text of the Treaty to suggest such a proposition. What Claimants are really trying to do is to overcome the lack of evidence in support of the facts on which the jurisdiction of this Tribunal is based by arguing that their factual allegations benefit from a presumption of truthfulness and that they don't have to prove anything at this stage.

That is wrong as a matter of law. Claimants have the burden of proving all the facts on which the jurisdiction of this Tribunal is based, and this

was--and this was the time to do it.

The preliminary phase lasted almost two years and consisted of two rounds of full briefing, where each Party submitted multiple exhibits and legal authorities, and, of course, a two-day hearing.

Claimants had plenty opportunity to submit all of the evidence they wanted to prove the jurisdiction of this Tribunal and to defeat the jurisdictional objections raised by Respondent. Even Claimants conceded yesterday that they have the burden of proving the facts upon which the jurisdiction of this Tribunal is based.

It was Claimants who decided not to submit additional evidence to prove their case on jurisdiction. But that was their own strategy. There would not be a miscarriage of justice here.

These Claimants are not particularly shy when it comes to submitting evidence. It should be recalled that they submitted four Witness Statements together with their Application on Provisional Measures.

Nothing prevented Claimants from submitting Witness Statements or any other evidence they wished to defeat the jurisdictional objections raised by Respondent.

In particular, Claimants complained that there was no document production phase during this preliminary stage. Well, the jurisdictional objections raised by Colombia involve mostly legal questions and involve simple facts, and that all the relevant documents related to those objections have been submitted by the Parties into the record of this case. It is not clear why a document production phase would be necessary to deal with those objections.

In any event, Procedural Order Number 1 allowed Claimants to request documents if exceptional circumstances existed, but Claimants never made any such request.

Now it is too late for Claimants to comply--to complain. They had almost two years to prove the jurisdiction of this Tribunal, and they failed to do so.

One minor comment on the non-disputing Party

submission of the United States. Yesterday Claimants remarked that the U.S. submissions "is an amicus submission" and that it's "entitled to the weight that its logic and reasoning and authority cited carries."

Claimants are wrong.

First, Article 10.28 of the Treaty defines a "non-disputing Party" as "a Party"--meaning Colombia and the United States--"that is not a Party to an investment dispute."

Moreover, Article 10.20.2 and 10.20.3 of the Treaty clearly distinguish non-disputing party submissions, on the one side, and amicus curiae submissions from a person or entity that is not a disputing Party, on the other side. The same distinction is found in Article 10.20.2 and 10.20.3 of CAFTA and DR-CAFTA, among other treaties.

As much as Claimants would like to undermine the importance of the U.S. submission, the statements of both Parties constitute a subsequent agreement on the interpretation of the Treaty under the terms of Article 31(3)(a) of the Vienna Convention.

Now, let's move to discuss the issue of

ripeness within the context of Article 10.16.1 of the Treaty.

Claimants face a catch-22 with respect to the measure alleged to constitute a breach of the substantive obligations of the Treaty.

If the measure is the Fiscal Liability Proceeding as a whole and the Ruling with Fiscal Liability, then they have clearly violated the waiver in Article 10.18.2 by initiating two "acciones de tutela," filing an appeal against the ruling, and initiating a conciliation proceeding with respect to that Ruling.

If the measure is the Indictment Order, they have two issues. The first issue is one of ripeness. The Indictment Order is an administrative act of mere procedural character that did not define any legal situation, and for that reason there is no recourse against it. In Spanish we say "un acto de mero trámite."

The second issue is that if the measure is--if the measure is the Indictment Order, then the waiver they included in the Notice of Arbitration

concerns the Indictment Order only.

That means that they cannot discuss in this Arbitration any supposed breaches or damages arising out of the Fiscal Liability Proceeding or the Ruling because they have not submitted a waiver with respect to those measures.

Claimants know that they have a problem because both options are fatal to their case. That is why they have gone back and forth between the Indictment Order and the Ruling.

They ultimately picked their poison in the comments to the U.S. submission where they say, and I quote: "Colombia, through the CGR, improperly brought a Fiscal Liability Proceeding against Claimants, and subsequent charges on June 5, 2018."

Yesterday, they committed to that strategy saying that the measure is Indictment Order and that they never said that the measure was the Ruling.

Mr. Sills even said that when he pointed out to the CGR Decision as the challenged measure, he was responding to a question asked by the Tribunal at the Interim Measures Hearing, not to a question on what

measure Claimants were challenging in this arbitration.

We disagree completely. Let's review the transcript of the Hearing on Provisional Measures.

Mr. Beechey asked: "To be absolutely clear, what do you say is the Measure alleged to constitute a breach referred to in Article 10.16?"

Mr. Sills responded: "The CGR Decision."

It's not that. But I don't want to get caught up in back-and-forth. Let's just take the Indictment Order, which was when they decided to submit their Notice of Arbitration.

Yesterday Mr. Beechey said: "It is right to say that on the basis of the request, the Claimants have not already put forward, as of December 2019, matters which are now in front of us and which then we might properly be in a position to debate."

"What had actually crystallized at that time?" he asked.

The answer, Members of the Tribunal, is nothing. Nothing had crystallized at that moment. By December 2019, there was no measure capable of

constituting a prima facie breach of the Treaty and no prima facie damage resulting from that breach. Those are the two requirements in Article 10.16.1 to submit a valid claim to arbitration.

Is the Indictment Order a measure capable of constituting a prima facie breach of the Treaty? No, it's not.

As we have said, it is an act of mere procedural character that does not define any legal situation, so it cannot possibly breach Colombia's international obligations under the Treaty.

Did the Indictment Order cause a prima facie loss or damage to Claimants? No. Let's look at the damages claimed by Claimants in the Notice of Arbitration.

They claim two types of supposed damages, a harm to Claimants' reputation and credit and the legal fees and costs they have incurred in the Fiscal Liability Proceeding.

None of these types of damages prima facie arise out of or result from the Indictment Order. By their own submission, Claimants were never charged

with corruption or fraud in Colombia. So, what harm to reputation are we talking about here?

Any harm to the reputation comes from the investigations against Foster Wheeler in the United States, in the UK and other jurisdictions. Those investigations have been widely reported in global media. Those investigations are actually criminal in nature as opposed to the Fiscal Liability Proceedings, which is not criminal.

As to the fees, there is no causal link with Colombia's supposed breaches, as explained by the Tribunal in Chevron. Yesterday we heard Mr. Sills dismiss Chevron saying that Respondent had misread that case. But as the Tribunal can see clearly on this Slide, Chevron is directly on point.

In the Notice of Arbitration, Claimants requested an offsetting award in the amount of an eventual Ruling with Fiscal Liability. After Colombia unveiled the absurdity of that request because it would not--it would grant them a windfall of $900 million, Claimants reformulated the request. Now they seem to be asking the Tribunal a sort of

declaratory award that triggers if and when they actually suffer a loss.

Yesterday Mr. Sills said: "An award could be entered and stayed subject to the stay being vacated only if Colombia, as it apparently intends to do, finds and seizes assets and sells them or converts financial assets to its own use."

Besides proving our point that any damages are purely speculative and hypothetical, the Tribunal cannot grant this relief. Under Article 10.26, the Tribunal can only grant monetary damages and restitution.

Claimants offsetting award theory is based on the Glencore award where the Tribunal granted such relief. We heard them mention this case again yesterday. Claimants want to convince you that you can do the same here but, we submit to you that you cannot.

There is a crucial factual difference. Glencore paid the ruling with fiscal liability and, thus, they had a loss that the Glencore Tribunal could be offset--could--that the Glencore Tribunal could be

offset.

Claimants have made no such payment either voluntarily or forcefully. They haven't paid a single penny in satisfaction of this Ruling.

I'm going to briefly give the floor to my colleague Elisa Botero, who will address Respondent's ratione materiae objection. Because we will be discussing specific provisions of the Services Contract and Claimants asked that those provisions be kept confidential, we ask the Tribunal to adopt the necessary precautions right now.

To be clear, the Services Contract is public because the fiscal liability file, including the Contract--and that is why it became public. But we want to be courteous to our colleagues. So, if we need to treat this in a confidential setting, we are ready to do that. Thank you.

THE SECRETARY: Thank you. Just give us one minute.

(Pause in the proceedings.)

(End of open session. Attorneys' Eyes Only information follows.)

CONFIDENTIAL SESSION

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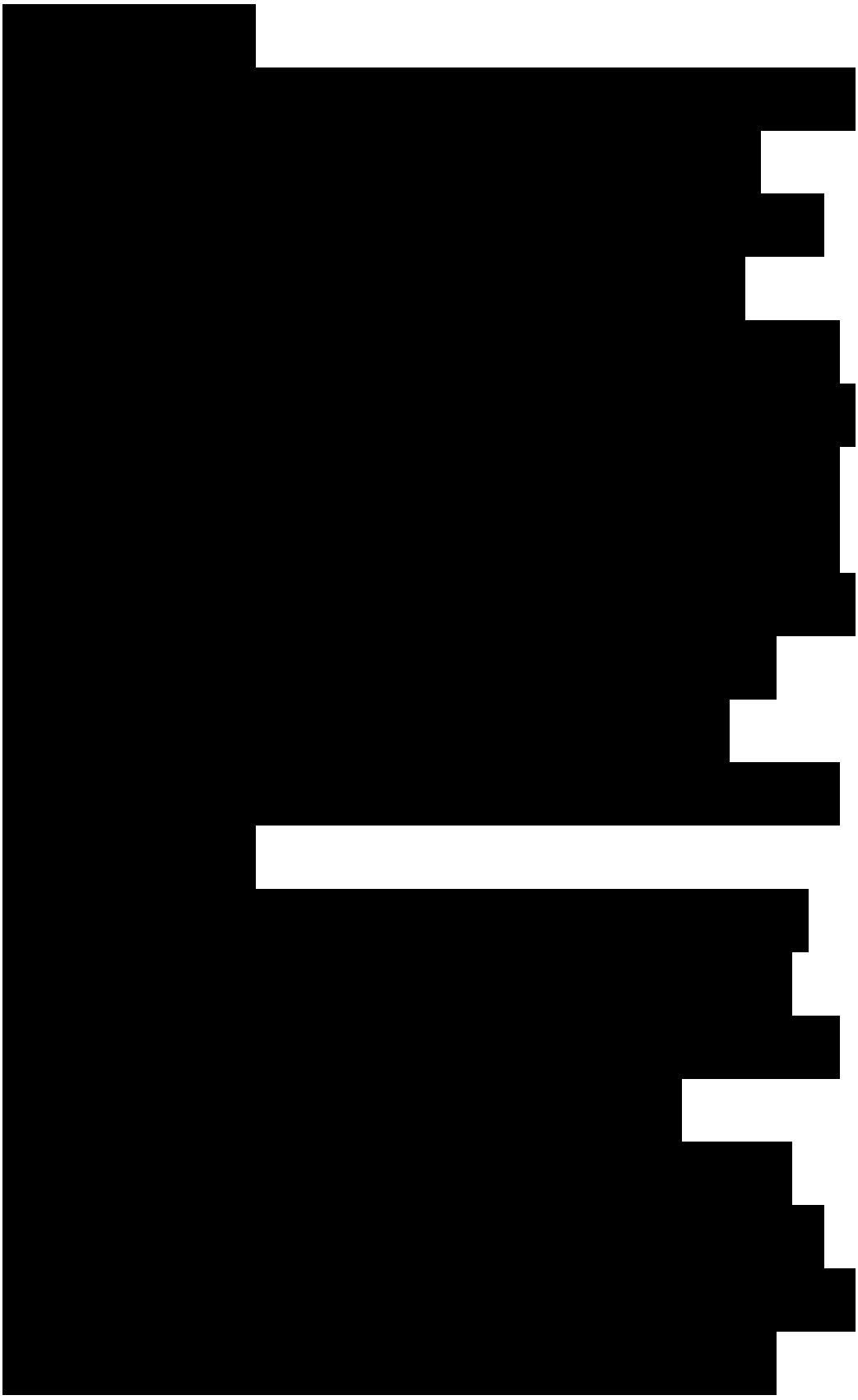
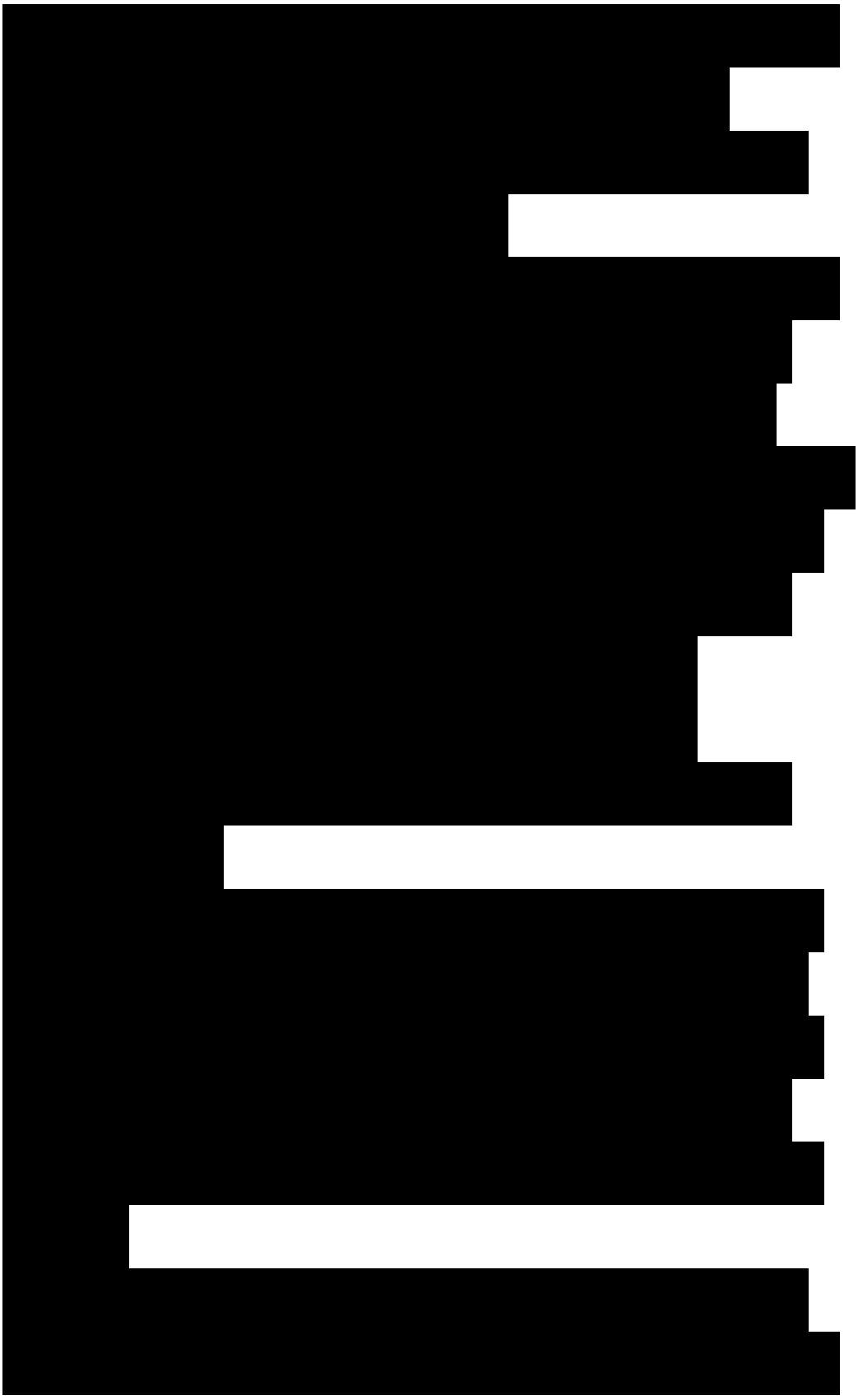
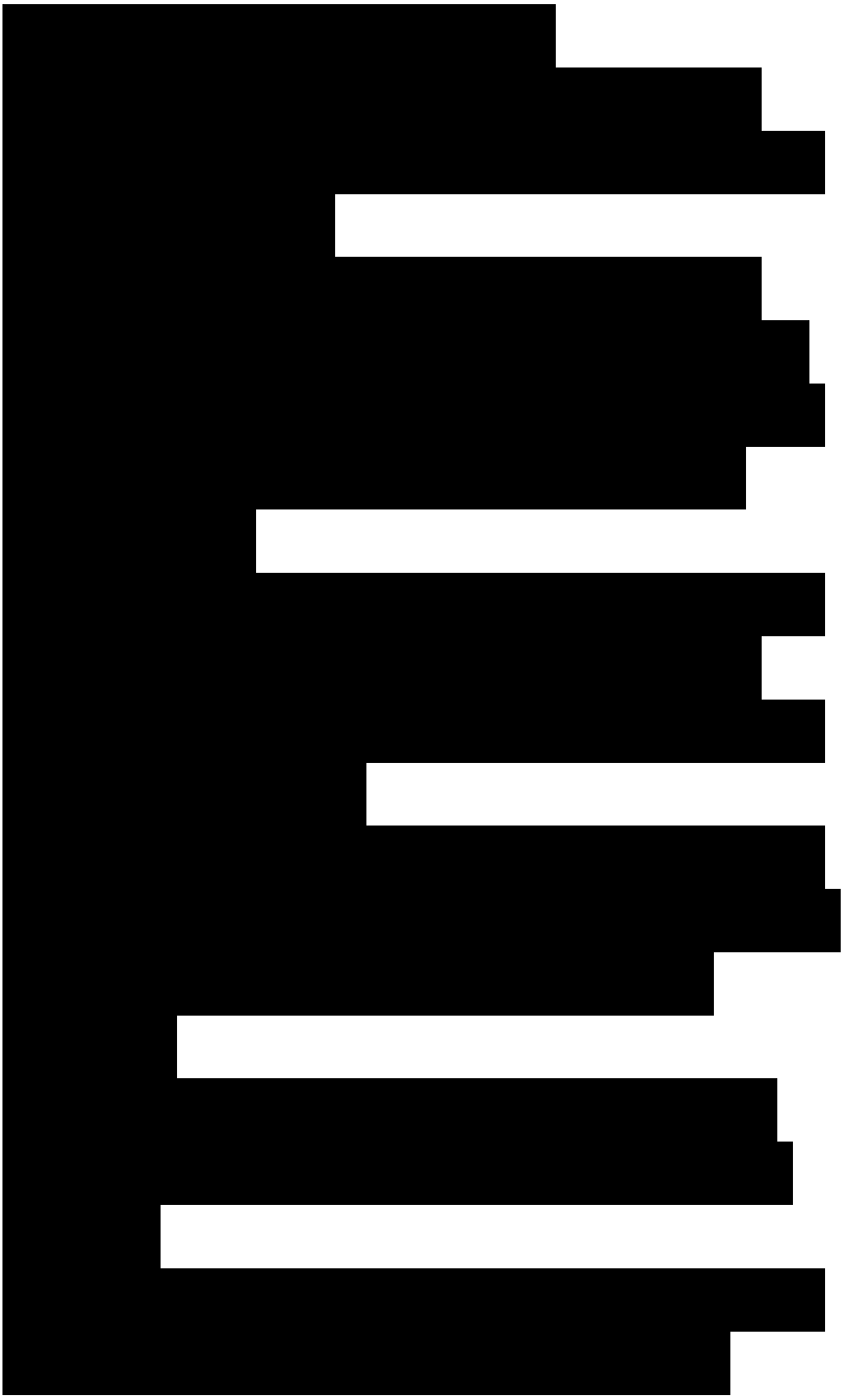






(Attorneys' Eyes Only session ends at 11:18 a.m.)

OPEN SESSION

(Pause in the proceedings.)

THE SECRETARY: We can proceed.

DR. FRUTOS-PETERSON: Thank you. Finally, we have a few comments regarding the waiver. Claimants have no real defense to Respondent's waiver objection. They know full well that they violated the formal and material waiver of the Treaty.

As to the formal waiver, Claimants argued that they complied in the Notice of Arbitration with Article 10.18.2(b) of the Treaty because they used the same language but only added a sentence, and I quote: "for avoidance of doubt."

Well, that sentence that they added precisely leaves the waiver devoid of any practical effect. They want to be able to defend themselves in the Fiscal Liability Proceeding and any related proceedings which, in effect, means to initiate and continue local proceedings with respect to the same measure, the Fiscal Liability Proceeding, which is being discussed here.

With respect to the material waiver,

Claimants insist that defending--Claimants insist that defending themselves is not a violation of the waiver, but nowhere in the Treaty is there an exception for defensive actions. The only exception to the waiver requirement is provided for in Article 10.18.3 of the Treaty which is restrictively limited to injunction relief, and Claimants are not alleging anymore that the local proceedings are covered by that exception. Claimants' interpretation defeats the purpose of the U-turn structure of the Treaty. No U-turn. I'm sorry. The purpose of the "no U-turn" structure of the Treaty.

Professor Kohen asked an important question to Claimants yesterday about the difference between the rights that they are defended in local proceedings and--

ARBITRATOR BEECHEY: Sorry, Dr. Frutos-Peterson. Just to be clear, in the English transcript, it is showing "U-turn." You mean unitary, do you?

DR. FRUTOS-PETERSON: Well, I refer to the terminology known--to the term known as "no U-turn."

"No U-turn" exception under the Treaty. Structure.

ARBITRATOR BEECHEY: Structure. Okay. I understand.

DR. FRUTOS-PETERSON: Yeah. "No U-turn" structure. Yeah.

Is that okay, Mr. Beechey?

ARBITRATOR BEECHEY: Yes.

DR. FRUTOS-PETERSON: Thank you.

I will start again, if you don't mind.

Yesterday Professor Kohen asked an important question to Claimants about the difference between the rights that are defended in local proceedings and the rights invoked in this Arbitration. Claimants answered that the sources of those rights were different since their local proceedings were based on alleged violations of Colombian law, whereas in this Arbitration is based on alleged violations of the Treaty.

But that distinction, we submit to you, is totally irrelevant. For purposes of Article 10.18.2 of the Treaty, what matters is whether Claimants

initiated or continued any proceedings with respect to the same--with respect to any measures alleged to constitute a breach of the Treaty.

And the actions that Claimants initiated and continued before the local courts are, without no doubt, proceedings with respect to the same measure regardless of the fact whether they are based on Colombian law.

The recent Conciliation Request is yet another violation of the waiver. Claimants want to explain away their Conciliation Request, and yesterday even suggested that it should be equated to an informal settlement lunch meeting.

From a cursory review of the Conciliation Request, it is evident that it triggers a formal conciliation procedure, which is an essential prerequisite to a requirement to subsequently file an annulment action.

The language of Article 10.18.2(b) is plain. Any dispute settlement procedure with respect to the same measure violates the waiver. A conciliation procedure is undoubtedly a dispute settlement

procedure under the ordinary meaning of this term. Claimants' artificial distinctions between a dispute settlement procedure and a dispute settlement mechanism or between procedures with adjudicatory powers and procedures without adjudicatory powers are nowhere found in the Treaty.

In short, Claimants' interpretations and artificial distinctions only serve to underscore that Claimants formally and materially violated the waiver.

To conclude, we believe that you have all the necessary evidence in front of you to resolve Respondent's preliminary objections. We are providing you with this chart that you can see in this Slide. This chart summarizes our preliminary objections and contains the questions that we believe could guide you when deciding our objections.

Colombia respectfully requests that the Tribunal uphold Respondent's preliminary objections and dismiss this case in its entirety, ordering Claimants to pay all costs and expenses of this Arbitration, including Respondent's attorneys' fees together with interest thereon.

We thank the Tribunal for your attention. This concludes Respondent's closing remarks. Thank you.

PRESIDENT NUNES PINTO: Okay. Mrs. Frutos-Peterson, you still have time left. Do you want to add something else, or you are done?

DR. FRUTOS-PETERSON: No, I am done. Thank you so much, and thank you for your patience this morning.

PRESIDENT NUNES PINTO: Thank you.

So, we now have a 15-minute break, as we have scheduled, and we will be back at quarter to 12:00.

(Brief recess.)

PRESIDENT NUNES PINTO: Okay. I hope you have had the opportunity to relax a bit. Relaxation, as Mr. Sills said yesterday, we are always prepared for relaxation.

So, let's resume the session. Now the floor is with Claimants.

CLAIMANTS' CLOSING ARGUMENT

MR. SILLS: Thank you, Mr. President.

Mr. President, we're going to spend our time today addressing some of the questions that were raised yesterday in more detail and attempting, in the brief time we have available, to address some of the new matters that were just raised.

And I'd like to start with the question of risk that was so much a focus of yesterday's presentation and so much a focus of Colombia's presentation this morning.

What the record shows is that PCIB, which was the local branch of Process Consultants, one of the two members of the joint venture, was a local office registered with the Colombian authorities, a taxpayer in Colombia. And the fact that there was a tax gross-up is irrelevant. What's significant is that PCIB was a local taxpayer, which is, of course, one of the indicia of local presence, which, in turn, rolls up into an element of investment.

There were over 700 personnel at that office in Colombia doing the on-shore work, engineering work, supervisory work, administrative work, in order to perform these services over a period of many years on

this mega--literally, a megaproject for which billions of dollars were spent.

Claimants did invest significant amounts of time, capital, personnel, and labor in Colombia in order to perform under this Contract and to assist in building out the refinery.

It took place from November 2009 until December 2018, a time span of over nine years, during which this was being performed. And, of course, duration is another of the indicia of investment.

And as we will describe in just a moment, there was, in fact, operational risk. There was, in fact, investment risk. And there was not a guaranteed profit. No matter how many times it is asserted, it is simply not true.

But I'd like to back up for a moment--next Slide, please--to the heavy reliance on Salini in Colombia's presentation.

The Treaty here does not make risk a condition precedent to having an investment. It's expressly listed in the Treaty as one of a number of factors, and it's listed disjunctively.

If the drafters of the Treaty had intended to make risk the sine qua non of investment, it would have been very easy to do so. But instead, they chose, as drafters, to take what I suppose could be called a holistic approach; that is, to look at multiple factors and weigh them in the context, of course, of a full evidentiary presentation of both sides to determine where along the spectrum from a simple sales contract, a contract to sell a hundred widgets in Colombia, as opposed to what everyone would agree would be an investment, building a widget factory in Colombia in order to sell widgets to the Colombian market.

Now, Salini does say that the assumption of risk is one of the essential elements of what constitutes an investment under the Convention. Now, Salini is itself--to the extent Salini says that that's a necessary element--although the literal language quoted by the Respondents doesn't actually say that--that would definitely be a minority view.

The double keyhole approach--I think it was called "the double-barreled approach" in yesterday's

presentation by Colombia--is itself a controversial and minority view because the ICSID Convention does not define "investment."

And the drafters of the Convention, again, could have defined "investment," just as they could have defined "juridical person," and chose not to.

And so the argument being advanced here by Colombia is that there is a separate, more restrictive meaning of "investment" under the ICSID Convention, so that if my clients had elected to bring this as an UNCITRAL case rather than an ICSID case, this would not apply at all, presumably in their view. Only then the language of the Treaty would govern.

And that assuming that there is a double keyhole, Salini, which is itself controversial, supplies the test, and that Salini stands for the proposition that risk is a necessary component of an investment. That's a lot of hurdles to jump over.

We think that it's the language of the Treaty that brings us here that controls, with its list of factors of which risk is definitely an element, but not the only element and not the critical

element.

And looking at the language of the Treaty quoted in the green balloon on the right, it talks about the "characteristics of an investment," including--which is, of course, expansive--"such characteristics as the commitment of capital or other resources"--which we've shown here took place--"the expectation of gain or profit"--which we have shown and we will address in more detail because so much has been made of that by Colombia--"or the assumption of risk." The language couldn't be clearer.

So, yesterday we heard--and the precise language from the transcript is up on the screen--that this is a jurisdictional question that can be decided just by looking at the Contract.

Well, that's not true under the language of the Treaty. And we heard yesterday and we heard today that this was, in effect, a guaranteed Contract, that it could not fail, and that all costs would be covered plus a profit.

And so yesterday's transcript shows Colombia's position was: "They"--referring to my

clients--"got every penny they charged, they got it back, and we move on."

But that is not the case. The Contract to which Colombia's counsel directed our attention is directly to the contrary. And I'll ask Mr. Conrad to address that in detail at this point.

MR. CONRAD: Thank you, Mr. Sills.

Thank you, Mr. Sills. And I wanted just to alert the Tribunal that the next few Slides are going to be confidential, just as Colombia afforded that courtesy to us earlier this morning in their presentation.

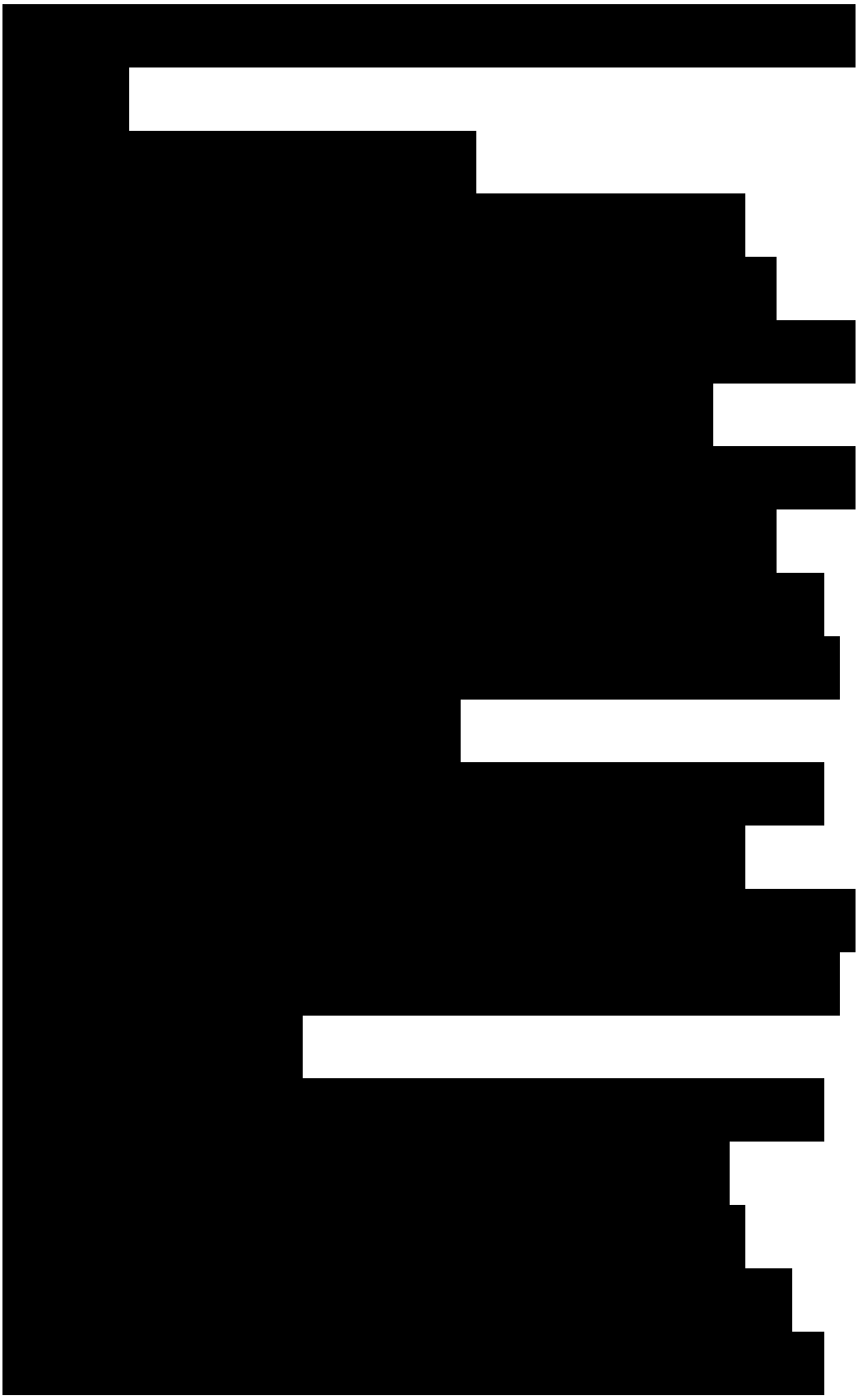
PRESIDENT NUNES PINTO: Hold on for a second, please, until we put the protection in place.

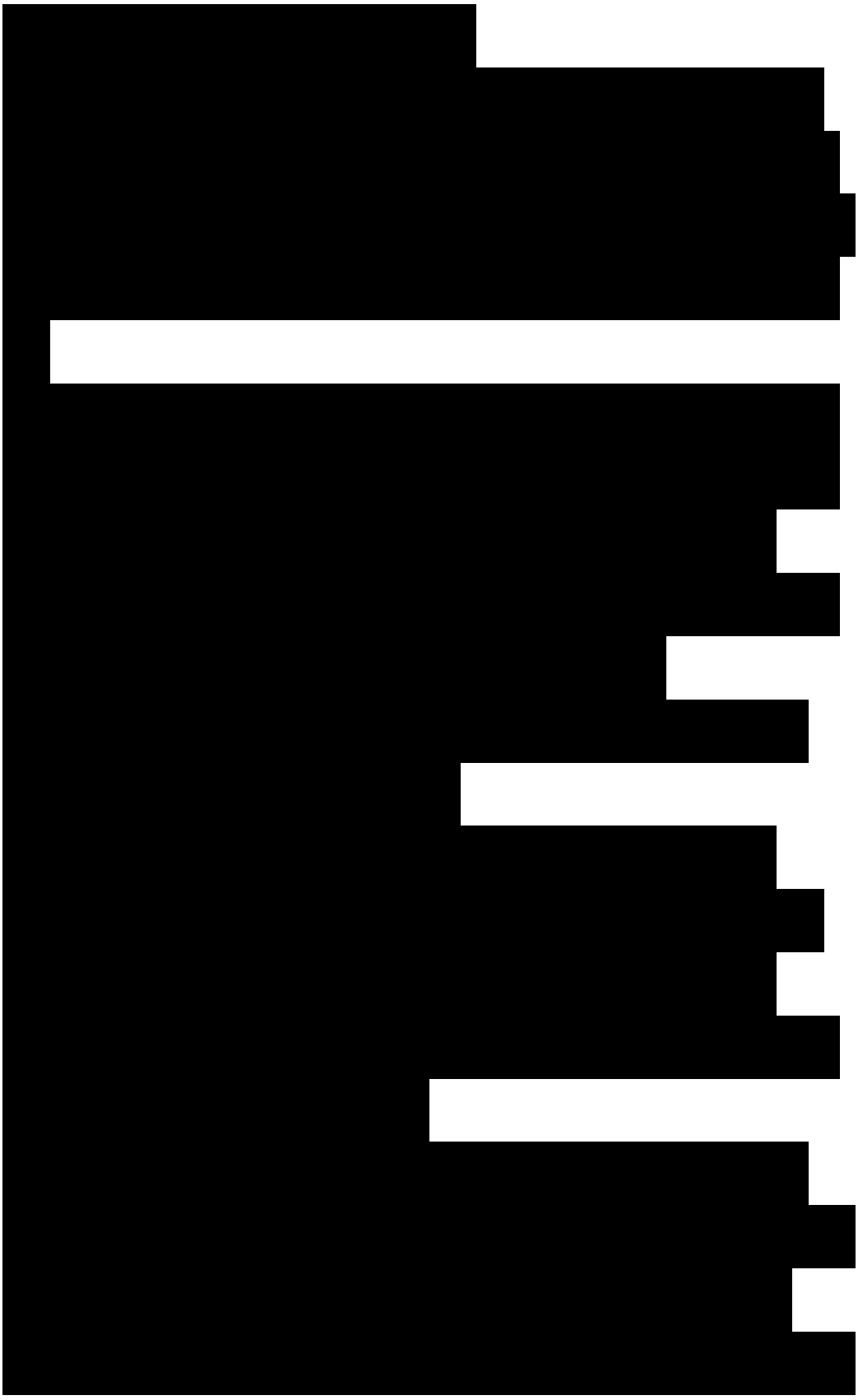
(Pause in the proceedings.)

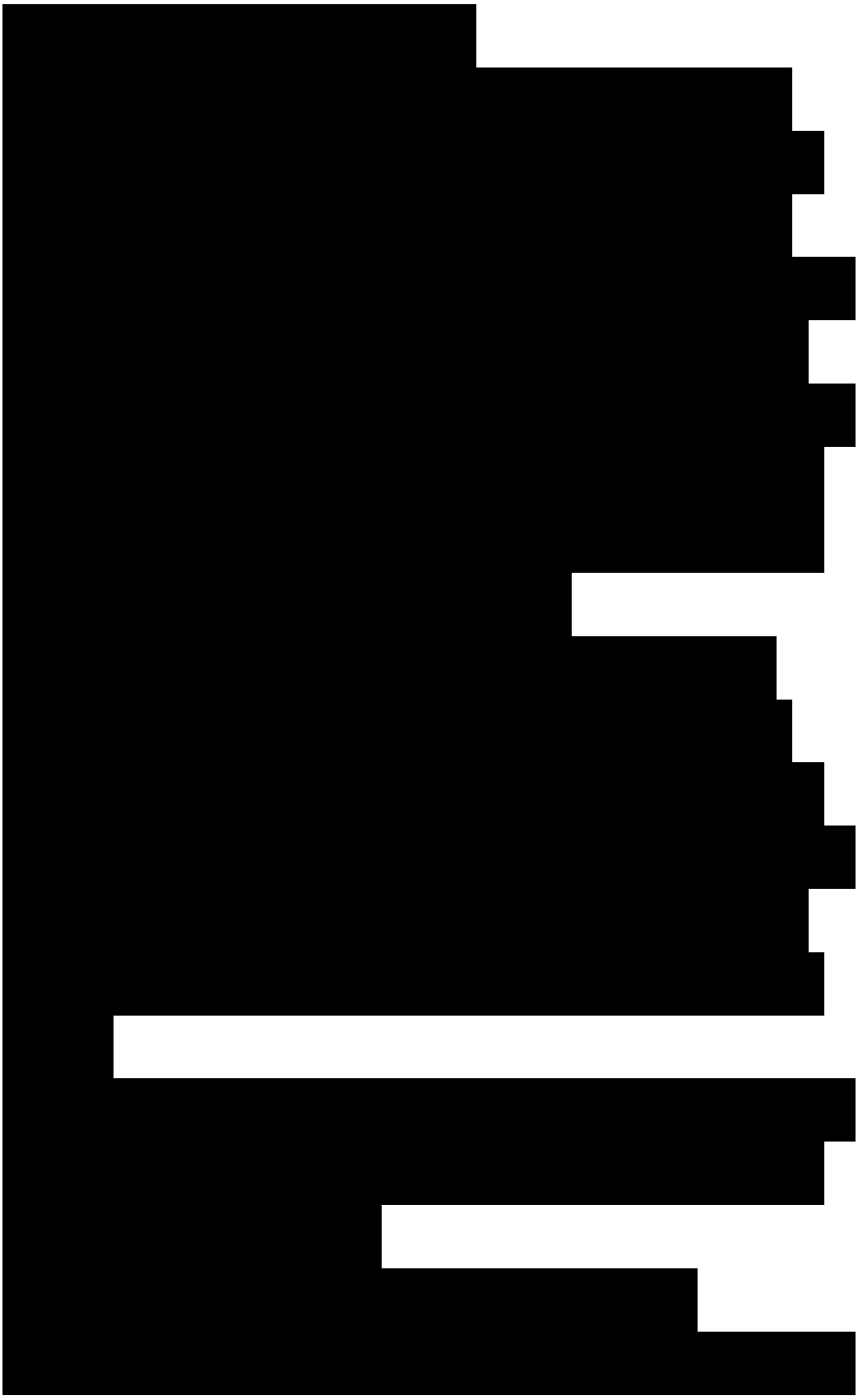
(End of open session. Attorneys' Eyes Only information follows.)

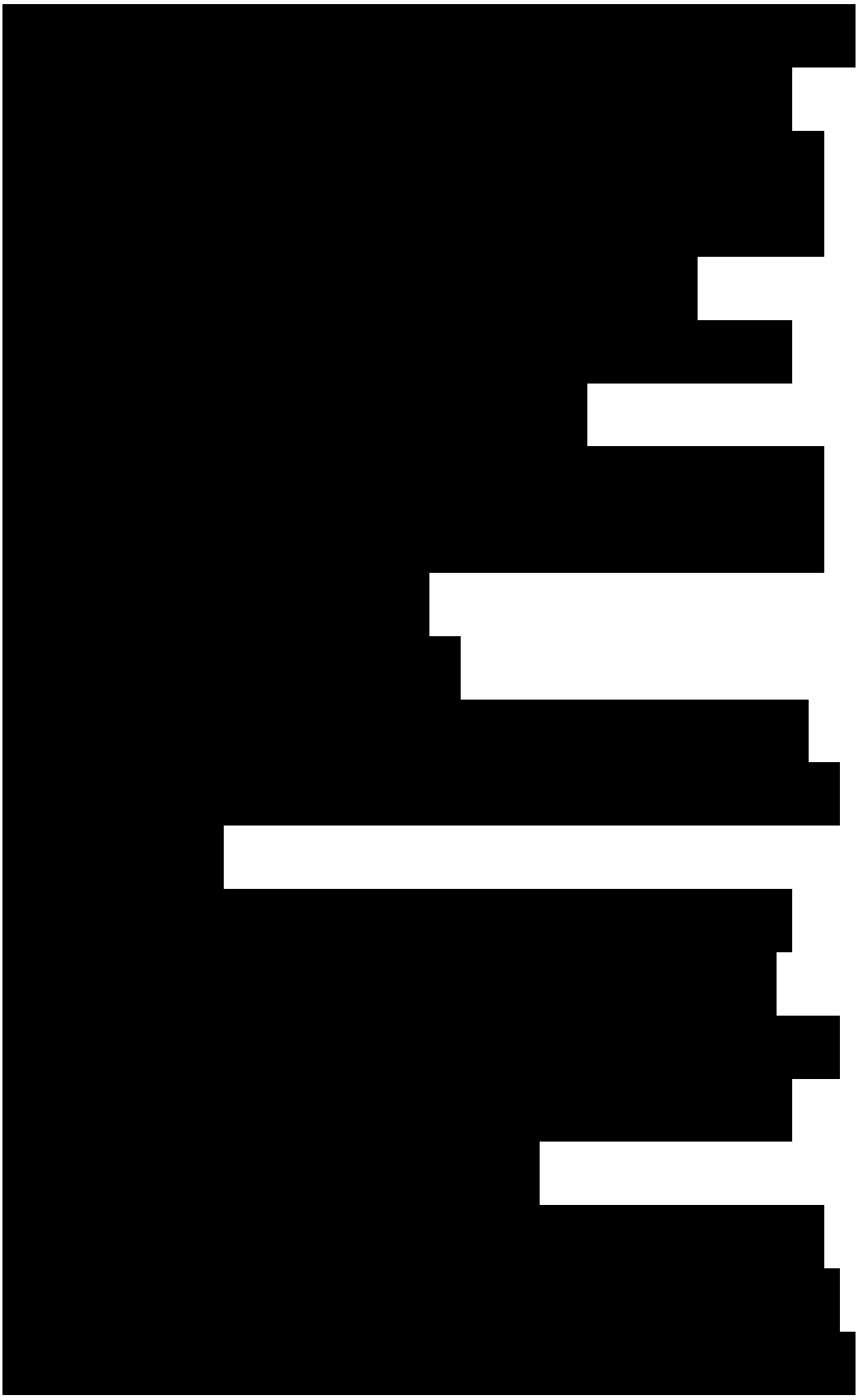
CONFIDENTIAL SESSION

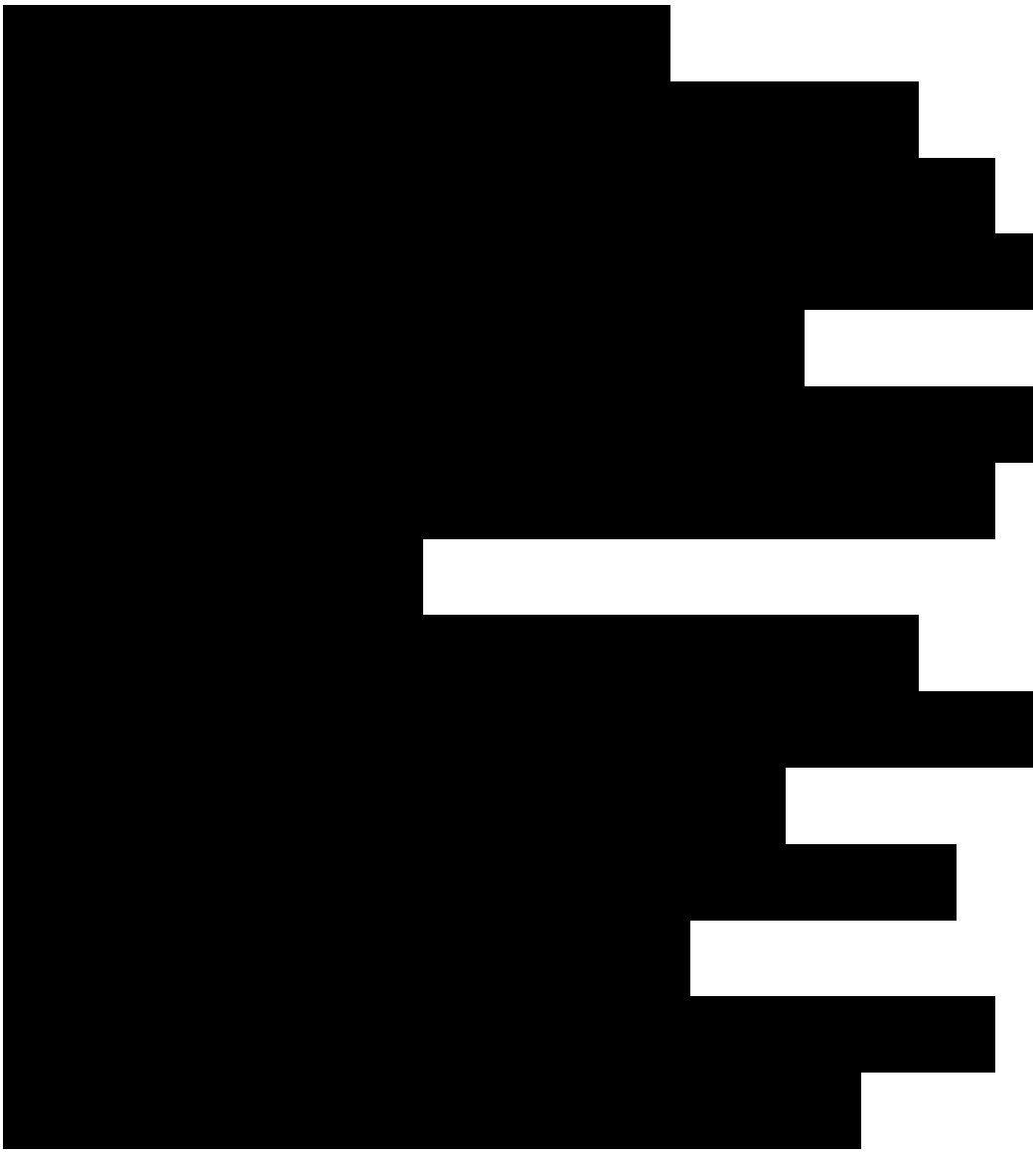
[redacted]











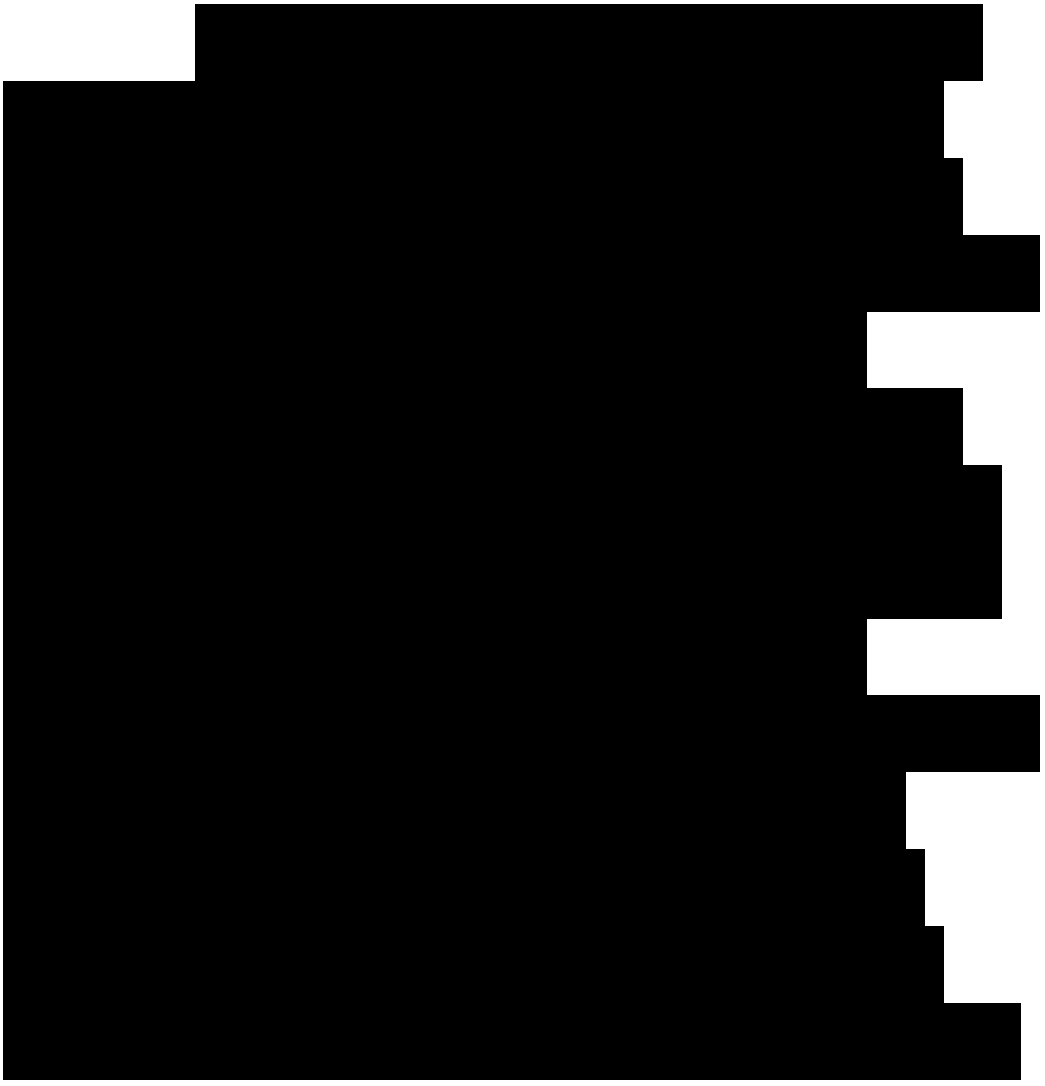
(Attorneys' Eyes Only session ends at 12:01 p.m.)

OPEN SESSION

THE SECRETARY: Okay. You can proceed.

MR. SILLS: Thank you.

And so, Members of the Tribunal, to summarize very briefly, investment risk can come in different forms. It can be from uncertain demand for a product. It can be from uncertain pricing for a product.



[redacted]

And so, to the extent risk is a requirement of an investment--although, as I say, it's not under the Treaty. And it's not under the majority of cases that we cited.

But to the extent there is a double keyhole, to the extent that Salini supplies the rule there, to the extent that Salini actually requires, as a condition, that there be risk, that was satisfied here.

[redacted] It wasn't that. It was never that. It was never intended to be that.

Could we have Slide 9, please.

So, yesterday Colombia argued that simple contracts for sale/simple contracts for the provision of services are not investments.

And the general proposition is true. The contract it's held in, which it's in Colombia, is not

an investment in Colombia. We don't dispute that.

But because of the requirement of the Treaty to look at various factors, you have to look at the particular cases that are being cited, which are radically different and easily distinguishable from the case that's before the Tribunal here.

Very briefly, they relied on Romak v. Uzbekistan, a supply agreement to deliver up to 50,000 tons of wheat for a five-month period in 1996, for which there was no payment. That's a simple short-term contract to supply here wheat instead of widgets.

We would agree that's not an investment. But that has nothing to do with this case involving 700 employees and a permanent establishment over a period--a working period of nine years.

The same is true for the Nova Scotia v. Bolivia case cited by Colombia. Again, a simple contract to deliver goods over a short period of time in exchange for money. That is not an investment, again, because it's a simple sale of goods.

The Seo Jin Hae case--and I'm sure I've

mispronounced the name there, the purchase of a single residential property to be used as a personal dwelling. Again, a single transaction, not made with the expectation of gain or profit, in a house.

If I buy a house in a country with which the United States has an investment treaty and something goes wrong with the house, the government changes the zoning, or my local taxes go up, or it turns out it can't be connected to the municipal water system, that's unfortunate. But it's not an investment because, as in this case, the house was purchased to live in, not as an investment.

In Poštová v. Greece, that was an investment in sovereign securities, sovereign debt instruments. And those are subject to special exceptions, including under this Treaty. And there's a lot of dispute over that. But, again, an investment in sovereign bonds is ordinarily not thought of that way.

In the--I couldn't even try to pronounce it--the Mauritius case, again, a single transaction with multiple bank transfers in a single property.

In Charles Eyre, there was no payment for

land. They didn't contribute to the project.

So, each one of these is readily distinguishable. You have to look at the actual facts. And the facts here are that this was a Contract with investment risk, permanent establishment, payment of local taxes, the creation of a local branch, 700 employees, over a long period of time, and has all the indicia of an investment.

Slide 12, please.

Now, there's been a lot of discussion yesterday and today about the ripeness of the claim.

Whether or not this was an appealable issue or whether or not there was judicial--administrative recourse under Colombian law is, frankly, irrelevant here.

What's important for international law purposes is that the adoption of the charging instrument following the submission of the free versions which, in turn, follow the opening resolution, was an act that caused damage.

And it caused damage by damaging the business reputation of my clients, as we plead and as

we will show at the merits phase. And there's, of course, no requirement at a preliminary stage, to plead and prove quantum.

Now, if anything, the fact that there was no recourse within the CGR is further proof that this was an act, a measure capable of causing damage.

The campaign of publicity waged by Colombia publicizing this, defaming my clients publicly--which in the natural and probable consequence, of course, was to cause governmental agencies and other potential customers around the world to refuse to do business with them--is well pleaded and is, as Mr. Beechey said yesterday, crystallized.

And it's worth remembering that this is not the first time the CGR has engaged in that kind of conduct.

In the Glencore case, the CGR, which was ultimately held to account for imposing an irrational fiscal liability on Glencore, waged a campaign in the press, publicizing, in sensational and defamatory terms, the issuance of the charges.

And so here--and I know we spent a great

deal of time on this yesterday. The CGR simply ignored the overwhelming evidence, including evidence generated for Ecopetrol itself, that the Claimants were not--could not be fiscal managers. At the same time, they accepted lesser proof that the members of the Board of Directors of Ecopetrol were not fiscal managers, again, referring to the chart we examined yesterday.

They were let out. The only plausible explanation of that is that they were let out because they were Colombian citizens, and my clients were held in because they were nationals of the United States.

And the CGR never articulated a basis for liability, causation or damages. Rather, the charges were an endlessly shifting target. As soon as my client addressed one of them, the ground would change. And if one compares the opening resolution to the charging document, it's a completely different case.

And the result of that was that my clients were forced to expend attorneys' fees in defending that case. Unlike the Chevron case, to which Colombia keeps pointing, this was the direct and natural

consequence of the bringing of these unjustified and groundless charges.

Next Slide, please.

So, it is the fact that an administrative act can constitute a breach of fair and equitable treatment.

And it's worth recalling the quotation from Professor McLachlan that's up on the screen now: "The investor may pursue a claim for breach of the treaty standards that is based directly upon allegations of administrative misconduct, irrespective of whether he has sought redress before the local courts."

Although we were told yesterday and told again today that there was no redress--no possible avenue of redress before the local courts. The suggestion was made that my client should simply wait for the outcome of the CGR Proceeding. We were told they should have been optimists--we all know how that turned out--and then seek relief in the Colombian courts. And perhaps at that time the claim would be ripe, although I'm sure we would hear at that point that there had been an election to proceed before the

Colombian courts cutting off any right of redress.

But the pleading here states that recourse to the Colombian courts, to the extent it would be required--although there is no exhaustion requirement--would be futile. And that's supported by the Witness Statement at the Interim Measures Hearing of Mr. Torrente, to which no rebuttal has been offered.

Similarly, we cite on Slide 14 the TECO case, which similarly concludes that an administrative act can give rise to liability under the FET standard. And I think it's also worth recalling that exhaustion requirements, to the extent they exist in investment law, apply only to denial of justice claims and not to other headings of FET.

Similarly, we cite from Glencore on Slide 15. The same argument made by Colombia it made here. Rejected. Rejected in that case. The fact--and we cite also from that Tribunal's discussion of Prodeco.

I've already addressed the question of futility, which is on Slide 16. We have pleaded

compliance with--that we have pursued all available and practical local remedies, to no avail. That is--that is all that is required at this stage. Colombia has presented nothing to the contrary. Though, as I say, the record here does actually support that. It's worth recalling that Mr. Torrente was formerly the Chief Legal Officer of the CGR.

Now, with regard to damages, we heard yesterday, and we heard again today, that the costs of references in the press put up by Colombia to other proceedings against other companies within Foster Wheeler affiliates--not these companies, in other countries--that that must be the cause of the reputational harm to Colombia. That is not the case. I'm sorry. The reputational harm to my clients.

Whether or not it is the unjustified acts, the campaign of publicity, the outrage to due process that's at stake here that caused damage to my clients or whether, as Colombia now suggests, it was other publicity about other cases in other countries about other companies that are affiliates of Foster Wheeler is a classic question of fact, and it cannot be

resolved on papers, and it cannot be resolved because a lawyer for Colombia asserts that that must be the reason that reputational harm was suffered by my clients.

It's a matter for evidentiary proof in an evidentiary hearing which has not been held and which this is not.

Slide 18, please.

And so, as I say, the damages were incurred before the RFA was filed. The damages were reputational harm. The damages were attorneys' fees. Whether attorneys' fees are allowable under Colombian law is irrelevant because this claim arises under international law. And as we pointed out yesterday, in a pending proceeding under this Treaty, Colombia admitted that a tribunal may award moral damages, that is to say damages for reputational harm. And, again, that is a question for evidentiary proof in an evidentiary hearing.

Can we have Slide 19, please.

When we first saw in recent filings that Colombia was actually asserting as the basis for its

waiver claim that the Claimants here were required to stop defending themselves before the CGR, we thought we must have misunderstood that. Because the suggestion that we were required to drop hands against a legal assault at the hands of Colombia seemed so extraordinary that it couldn't have possibly been what Colombia meant to say.

But yesterday's hearing and today's hearing confirmed that that is exactly the position they take. That a violation of the waiver is implicated by simply defending oneself in the face of a legal attack by the State.

There is, not surprisingly, no authority cited for that proposition because none exists. There is not an award that suggests it. There is not any scholarly writing that suggests it. And, so far as I know, this is the only time that a respondent in an investment case has actually suggested that.

So, perhaps--perhaps a hypothetical grounded in this case itself would clarify that. The charging document as originally drafted, the opening resolution, charged not only the damages that are at

issue in the current CGR Proceeding but an equally large claim or proximally equally large claim for lost profits.

And the CGR bifurcated its proceeding, went forward on the case before us, and deferred for another day the lost profits claim. But it all arises out of the same course of conduct, the same Contract, and the same allegations of fiscal mismanagement.

So, one would think that after an investment claim is brought, if Colombia decided at that point to pursue its lost profits claim, a respondent in that proceeding would be left with the choice between, in effect, defaulting in that case and admitting billions of dollars in damages or withdrawing its ICSID claim.

And that cannot possibly be right. And, in fact, the rule Colombia suggests would make it an easy tactical decision for state respondents to simply bring retaliatory actions and then argue that there had been a violation of the waiver clause by simply mounting a defense.

Now, as it happens, Colombia eventually decided not to pursue that lost profits claim perhaps

chastened by their experience.

But the fact is they could--it would have, on Colombia's untenable theory, triggered a violation of waiver, and that theory would invite retaliatory actions by state respondents.

The argument made that to defend is to continue simply makes no sense. It could be charitably called a hyper-technical argument, but it isn't supported by the language of the Treaty.

It is--the waiver is intended to prevent double-dipping, to prevent taking two chances. Pick your cliche, I suppose. Two bites at the apple. This is not that. A Party is always entitled to defend itself without risking its rights under the Treaty.

There was some further discussion this morning about the fork in the road. The language of the Treaty is here in the box on the right. The only argument that's been made for a violation of the fork-in-the-road treaty--provision--excuse me--in Colombia's papers--that was made yesterday, that was made today--has to do with the fact that the Treaty and my clients' rights under the Treaty was mentioned

in the First Tutela.

No relief was sought under the Treaty. My clients reserved their rights under the Treaty. The fact that something is mentioned does not mean that a claim was submitted, that the same alleged breach has been submitted to an administrative tribunal or court.

And then looking at Paragraph 4(b): If a Claimant elects to submit a claim of the type described in subparagraph (a), to an administrative tribunal.

To submit a claim. No claim was submitted. And their sole argument on the fork-in-the-road claim is based on the notion that merely mentioning the fact and not seeking any relief under it, in effect informing the court that there is another source of rights as to which rights are reserved, does not trigger a fork-in-the-road.

There was much talk about Annex 10-G and the use of the word "alleged." Again, this is, at best, a hyper-technical argument entirely at odds with the Treaty and its language. Because what 10-G says: "For greater certainty"--in 10-G, Paragraph

2--"if an investor of the United States elects to submit a claim of the type described in paragraph 1"--that is to say a claim under the Treaty--"to a court or administrative tribunal of a Party other than the United States, that election shall be [definitive]."

There was no such--there was no such election. And, in fact, if we could have Slide 22 up, please. In fact, the tutela court lacked jurisdiction to hear claims arising under the Treaty.

As we say here: The Colombian Constitutional Court has actually held that investment treaties do not involve fundamental constitutional rights.

Fundamental constitutional rights are the subject matter with which the tutela courts are charged. Not only was this not alleged in the pleadings before the tutela court, it could not have been alleged because it was outside the jurisdiction of that court as a matter of Colombian law.

Next Slide, please.

So, I don't want to rehearse at length the

history of how we got here. But Colombia sought to raise preliminary objections out of time. And the Tribunal will recall that there were extensive discussions, and it was decided that Colombia could raise those questions and could also raise, on a preliminary basis, its jurisdictional objections, reserving its right to make those objections at a later stage of the case on a full evidentiary record.

And if Colombia's present submission that this is it, this is the trial, were correct, that couldn't have possibly been left in the Procedural Order. But the Tribunal knows what it ordered, and it knows why we're here today.

This is not a full evidentiary hearing. It's not on a schedule that would accompany a full evidentiary hearing. The notion that, well, we should have simply shown up with our witnesses, or I suppose that Colombia could have shown up with its witnesses, is simply--well, it's groundless.

And for Colombia to now assert that this is it on a, I have to say, groundless claim that we've been at this for two years--it's actually been seven

months since their First Memorial was filed. But the length of time is not what is critical. This is a preliminary hearing on preliminary questions.

On Page--I'm sorry--on Slide 23, we cite from the RSM Decision. Under 10.20.4, Colombia is required to prove that the claim as alleged is certain to fail, accepting all facts as true.

But if it isn't under 10.20.4, then Colombia is raising its claims under ICSID Rule 41(5). And ICSID Rule 41(5) sets essentially the same standard here.

And here is RSM's analysis about Article 41(5)'s "manifestly without legal merit" standard. It must go to jurisdiction or the merits. It must raise a legal impediment, not a factual one. And as we showed yesterday in multiple Slides, Colombia has raised or sought to raise a host of actual issues that cannot be resolved on papers and cannot be resolved at this time. And it must be established clearly and obviously, with relative ease and dispatch.

Next Slide, please.

So, looking at the quotes in the RSM Award

and from the Pac Rim Award--both, again, before distinguished panels--discussing both--in the case of Pac Rim, Article 10.20.4 under CAFTA, and in the case of RSM, Article 41(5), the standards are essentially the same.

And Colombia is represented by extremely sophisticated counsel with a leading practice in this field. And they certainly know what Rule 41(5) provides. And what it doesn't provide is for some sort of accelerated written final hearing on the merits, although that's what they're trying to turn this into at the last moment.

It would be--if that were to be the case, if this was, as they said, "it," and this were the final hearing, I have to say that would be a clear violation of due process. There was no notice that this would be that hearing because it isn't.

Under Procedural Order 41, these are all to be--I'm sorry, under Procedural Order Number 1, these are all to be considered as preliminary questions. As preliminary questions, they all fail. They all fail legally, and they all fail factually.

I can understand why Colombia would wish to short-circuit the process at this point, because my clients have been the victims of an outrage to due process before the CGR. An outrage to due process in connection with the issuance of the indictment, as they put it. Although Colombia now seems to suggest there's no right to amend or supplement. That can be--there is clearly such a right. It could be done by amending or supplementing. It could be brought--done by bringing a new case and consolidating. If it is amended, it will be a new waiver, as there always is when amendments are sought.

But those are procedural matters for the next phase of the case. There is no basis to dismiss this case at this time, and it should be allowed to proceed forward to a hearing on the merits with all appropriate procedural protections.

Thank you, Mr. Chairman.

PRESIDENT NUNES PINTO: Thank you, Mr. Sills, for your presentation.

Before we close this hearing, adjourn it, we have--and I draw your attention to Items J and K of

Procedural Order Number 1--Number 2, sorry--which deals with Post-Hearing Briefs and Statement of Costs.

Do you have it?

Yeah. What it says here is: "The Parties are willing to consider the submission of Post-Hearing Briefs to answer specific questions from the Tribunal, that the Tribunal may want the Parties to address in writing. At the conclusion of the Hearing, the Tribunal will confer with the Parties on whether such Post-Hearing Briefs will be filed, the exact length, format, and due date of Post-Hearing Briefs, if any, shall be discussed by the Tribunal and the Parties at the conclusion of the hearing."

I would like to hear what you have to say about those Post-Hearing Briefs. I do not want to influence your decision, and I'll be unable to do that, I'm sure.

But just to let you know that you keep in mind what we have in the record, the memorials, the exchange of letters, the transcript of this hearing, and your initial presentation yesterday, and this closing presentation today.

Mr. Sills, do you think we need the additional information in the form of Post-Hearing Briefs?

Yeah, if you would turn on the mic.

MR. SILLS: Could you bear with me one second, Mr. Chairman, while I confer with my colleagues.

PRESIDENT NUNES PINTO: Yes.

MR. SILLS: Mr. President, I think, as your comment suggests, there is an extensive record here. The issues have been vetted. Of course, if there is a particular question that the Tribunal feels has not been sufficiently aired, we would be pleased to respond to it in writing.

But I have to say, from Claimants' perspective, we think that these preliminary questions--and they are only preliminary questions--are ripe for a decision at this point. And if the Tribunal is of that view, we would certainly not insist on yet another round of written submissions, perhaps to be followed by a further argument.

Much that we enjoy meeting with the Tribunal and with our colleagues across the table, I think the record is sufficiently developed on these questions at this point for the Tribunal to decide.

PRESIDENT NUNES PINTO: Thank you very much.

Dr. Frutos-Peterson.

DR. FRUTOS-PETERSON: Thank you, Mr. President.

Colombia believes that you have a complete record in front of you, that all the submissions from the Parties--you know, you have received them and, as you said, we had our hearing here today. So we don't think that there is a need for Post-Hearing Briefs on the questions that you have in front of you to resolve.

Thank you.

PRESIDENT NUNES PINTO: Thank you very much.

Now, I would like to make a comment here because we had several instances since yesterday. We mentioned "ripe" and "ripeness." The only thing I can tell you is that this case is ripe for decision. So irrespective of the decision, but the case is ripe for

decision, which justifies the extensive use of the two words.

The--yeah. What is it?

The other topic is Item K, the Statement of Costs: "The Parties shall submit Statements of Costs at least 21 days after receiving the final transcripts of the hearing or submitting Post-Hearing Briefs, whichever is later. The exact length, format, and due date shall be discussed," blah, blah, blah.

Marisa, may I ask you a question? When will we get the final transcript?

THE SECRETARY: Thank you, Mr. President.

The Parties will have 30 days to submit corrections to the transcript. So taking that into account, we will send you the videos and the audio of the hearing early next week, and then you will have 30 days to submit corrections. And then, according to the PO, it will be 21 days after the corrections are submitted and the transcripts are finalized.

PRESIDENT NUNES PINTO: Okay. Now, let me ask a question of you both. For me, I'm going to wintertime shortly, so we will be working.

July/August, it's winter for us; January/February for you.

Based on what Marisa has just said, I think that we could have a due date for submission on final transcript by the beginning of July, July 1st or 2nd.

Normally when we say a date, it's a Saturday or a Sunday. Let me check here.

DR. FRUTOS-PETERSON: July 1st is a Friday.

PRESIDENT NUNES PINTO: Ah. Okay. So July 1st? Is that okay with you?

MR. SILLS: That's actually--it would be okay if ordered by the Tribunal, but that is the beginning of a holiday weekend in the U.S.

What I would--

PRESIDENT NUNES PINTO: Oh, it's the 4th of July. Yeah.

MR. SILLS: Mr. President--

PRESIDENT NUNES PINTO: I forgot.

DR. FRUTOS-PETERSON: Mr. President, I'm sorry to interrupt, but maybe we can settle on the last week of June.

MR. SILLS: What I would suggest

instead--and I'm sure we'll be able to reach agreement on this. After we discuss with our respective teams what their personal and professional calendars look like, perhaps we could simply come up with an agreed schedule to present--

PRESIDENT NUNES PINTO: Sure.

MR. SILLS: --to the Tribunal. I'm sure we'll be able to reach agreement on that.

DR. FRUTOS-PETERSON: We can do that, certainly, promising that you will have them before the 1st of July probably.

PRESIDENT NUNES PINTO: Yeah. In terms of the Statement of Costs, we are well acquainted, the way we have--you have the costs indicated. We don't need that you send us all bills and everything. If something happens--if the Counter-Party has any questions, then you can ask the Tribunal to determine--to order the submission of the supporting documents. Okay?

MR. SILLS: I'm confident there too, Mr. President. We've all been down that road, and we know what the form and the sort of work is. And I'm

confident, and I would hope that we won't have to bring any such matters to the Tribunal, as I'm sure we can work out the format. As well, we've both done this before.

PRESIDENT NUNES PINTO: Yeah. We know the good law firms. So, we are convinced that we can have your extensive experience in arbitration. It makes me extremely comfortable, and my colleagues as well. Okay?

DR. FRUTOS-PETERSON: Thank you for the confidence.

PRESIDENT NUNES PINTO: Okay. Do you have, before we close, any specific matters that you would like to discuss, or we are done?

MR. SILLS: Nothing for the Claimants, Mr. President, other than to thank the Tribunal for its time and attention and to wish those who aren't from Washington, the Tribunal, our colleagues across the room, safe travels home and a very pleasant summer for those of us--

PRESIDENT NUNES PINTO: Winter for me.

MR. SILLS: And a very pleasant winter for

those who live in the southern hemisphere.

PRESIDENT NUNES PINTO: Ms. Peterson.

DR. FRUTOS-PETERSON: For Colombia, we just want to thank the Tribunal, you know, and our colleagues, you know, for giving us the opportunity to present our case here before you. We are--we don't have anything else to add except, as did my colleague, to thank everybody involved and, you know, all the junior associates that probably are not here on both teams, that they have done a wonderful job to support us, and, of course, the Secretary and the other services behind the scenes.

Thank you.

PRESIDENT NUNES PINTO: Thank you very much.

Before we adjourn, I would like to thank both sides for their hard work, the professional approach taken throughout the time until now. And I'm sure--I'm confident that this will continue. I have no reasons not to trust.

But it was very, very important, especially because we are coming back after a long period of the Zoom hearings. We are here in person. We have some

friends and colleagues behind the screen following us by Zoom. But the fact that we are back, it's very important.

And I sincerely hope we can continue holding in-person hearings from now on. I certainly hope that COVID is controlled, since it has been a pandemic and become an endemic, and that we can live, see friends, hugs, kisses, and so on and whatnot. We missed everything during those two years.

And a special thanks to the representatives of the United States of America that submitted their written interpretation of the Treaty and for their presence during this hearing. Thank you very, very much. I look forward to seeing you very soon again.

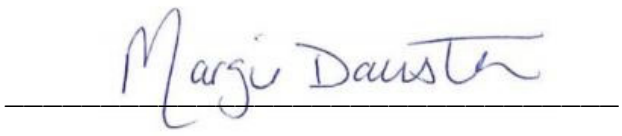
Okay. Thank you.

(Whereupon, at 12:44 p.m., the Hearing was concluded.)

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