

THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

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 In the Matter of Arbitration between: :
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 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 PROVISIONAL MEASURES

Volume 1

Thursday, November 4, 2021

The World Bank Group

The hearing in the above-entitled matter
came on at 9:24 a.m. (EDT) before:

MR. JOSÉ EMILIO NUNES PINTO, President

MR. JOHN BEECHEY, Arbitrator

PROF. MARCELO G. KOHEN, Arbitrator

ALSO PRESENT:

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P R O C E E D I N G S

1
2 PRESIDENT NUNES: Good morning or good
3 afternoon to everybody. This is the Hearing on
4 Provisional Measures in case ICSID ARB/19/34.

5 Before we move on, I would like to ask
6 Claimants' representation to introduce itself, please.

7 MR. SILLS: Thank you, Mr. President, and
8 our apologies for these technical difficulties. I am
9 Robert Sills with the Pillsbury firm on behalf of
10 Claimants, the other active participant--

11 (Sound interference.)

12 MR. SILLS: Next time we're going to make
13 sure to have a teenager in the room, and this will all
14 go well.

15 With me is my colleague, Charles Conrad. He
16 and I will be making the presentation today. Also
17 with us in the room, hearing room, our colleagues
18 Richard Deutsche, Kristina Fridman, Derek Soller, and
19 Catalina Niño of our client. Participating remotely
20 is Mr. Timothy Langdan--excuse me, lost my voice for a
21 minute--Mr. Timothy Langdan, who is an attorney with
22 Wood Group.

1 ARBITRATOR BEECHEY: Lost the sound.

2 MR. SILLS: We went on mute. Do you want us
3 to go ahead and proceed with our argument or would you
4 like to introduce the other side?

5 PRESIDENT NUNES: Sorry?

6 MR. SILLS: Can you hear us?

7 PRESIDENT NUNES: Yes. Are you done?

8 MR. SILLS: We are. We've introduced our
9 entire team here.

10 PRESIDENT NUNES: Thank you.

11 Now, Respondent's team could be introduced,
12 please.

13 DR. FRUTOS-PETERSON: Good morning, Members
14 of the Tribunal. My name is Claudia Frutos-Peterson
15 from Curtis, Mallet-Prevost, Colt & Mosle representing
16 the Respondent together with the Agencia Nacional de
17 Defense Juridica del Estado de Colombia. This morning
18 here with all of you we have Ana María Ordoñez,
19 Elizabeth Prado, Juan Sebastian [Rivera], all of them
20 from the Agencia Nacional de Defense Juridica del
21 Estado. And from Curtis I also have my colleagues
22 Elisa Botero, Fernando Tupa, Maria Paulina Santacruz

1 [and] Juan Jorge.

2 Thank you, Mr. President.

3 PRESIDENT NUNES: Thank you very much.

4 Do you have any matters that you would like
5 to draw the attention of the Tribunal? Or we can move
6 on?

7 MR. SILLS: Mr. President, Robert Sills on
8 the behalf of the Claimants. Of the hour that's been
9 allocated, I would ask the Tribunal's leave to reserve
10 15 minutes for rebuttal and take 45 minutes for our
11 principal presentation and have that 15 minutes, and,
12 of course, we would have no objection if Respondent
13 was likewise--excuse me--likewise to reserve time.

14 PRESIDENT NUNES: Mrs. Frutos-Peterson?

15 DR. FRUTOS-PETERSON: Thank you,
16 Mr. President. We were not planning to do rebuttals.
17 You know, that was not on the Schedule that the
18 Tribunal circulated. We would not mind. So, I think
19 our presentation is around 45 minutes. So, we can
20 reserve the other 15 minutes for rebuttals. We might
21 go slightly over the 45 minutes, but if that's okay
22 with Claimants, then we can proceed under those bases.

1 PRESIDENT NUNES: Okay. I assume that my
2 colleagues are in agreement? John?

3 ARBITRATOR BEECHEY: Yes.

4 PRESIDENT NUNES: Marcelo?

5 ARBITRATOR KOHEN: Yes.

6 PRESIDENT NUNES: Okay. So, we can move on
7 and get started.

8 Claimants' oral presentation. We did
9 receive your presentation this morning, an hour ago,
10 and I hope Respondent did too.

11 DR. FRUTOS-PETERSON: I'm sorry to
12 interrupt, Mr. President. We understood the
13 instructions that we will circulate 30 minutes before
14 we present, that's our--we were assuming--

15 PRESIDENT NUNES: That's 30 minutes, yes,
16 sure. But since we had this almost 30-minute delay
17 starting, it became one hour, okay.

18 DR. FRUTOS-PETERSON: Okay. Thank you,
19 Mr. President.

20 PRESIDENT NUNES: So, Claimants, the floor
21 is yours.

22 OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

1 MR. SILLS: Thank you, very much,
2 Mr. President. And, again our apologies for these
3 difficulties.

4 Before I begin, could I invite the Tribunal
5 to interrupt our presentation at any point with
6 questions. We'd much prefer to address matters on the
7 Tribunal's mind than make a speech, and so we would
8 welcome interruptions and questions and points of
9 clarification.

10 With that, the first question really is what
11 precisely is the situation with regard to Colombia's
12 efforts to locate, seize and sell assets of the
13 Claimants?

14 The first position that was taken--if we
15 could have that next slide, please--was set out in
16 Colombia's Rejoinder on the application for emergency
17 relief, and we highlighted the key points in the slide
18 that's now before us, and as you can see, putting to
19 one side the personal attacks on the style with which
20 we've made our presentation, Colombia took an
21 essentially unequivocal position in those papers that
22 they were powerless to conduct a worldwide search for

1 assets, seize assets, and sell those assets. And that
2 was a principal--I should say the principal--basis
3 upon which they argued that emergency relief,
4 immediate relief should not be granted.

5 And the Tribunal, of course, denied that
6 application, our application. I would imagine, in
7 significance part, based on the representations that
8 were made in that Rejoinder as to the extent of
9 Colombia's legal powers and the limitation on those
10 powers.

11 The next point where Colombia took a
12 position, and a radically different position on its
13 powers, came in their answer on the Application that
14 brings us here today. And that was a radically
15 different story. Having prevailed upon their position
16 that there was no need for emergency relief because we
17 were engaged in what they called an "exercise in
18 creative writing" by suggesting that Colombia was
19 about to embark on a worldwide campaign to seize
20 assets, Colombia then took the position--now takes
21 the position--that, even though the CGR will renew its
22 search for assets, such a search is likely to be

1 unsuccessful. Well, that, I think, has to do with the
2 efforts that they're making as opposed to the power to
3 take such steps.

4 And they go on to say that even if the CGR
5 manages to attach any of Claimants' assets, either in
6 Colombia or abroad, well, again that goes to the
7 representation they're getting to the efforts that
8 they are making, and not to the powers that they
9 denied having just a few weeks ago. If we could have
10 the next slide, please, in what they say is: "The
11 unlikely event that the CGR is able to identify assets
12 owned by Claimants in a foreign jurisdiction,
13 attaching such assets is entirely another matter." It
14 doesn't say they can't do it. Again, they're saying
15 that they will have difficulties in doing that. And I
16 will note that they don't deny that these would be
17 entirely separate proceedings in other jurisdictions,
18 and that's where the bulk of the Claimants' assets
19 are.

20 Now, attached to the Witness Statement of
21 Mr. Torrente, who in the course of his career was the
22 Chief Legal Officer of the CGR--if we could have that

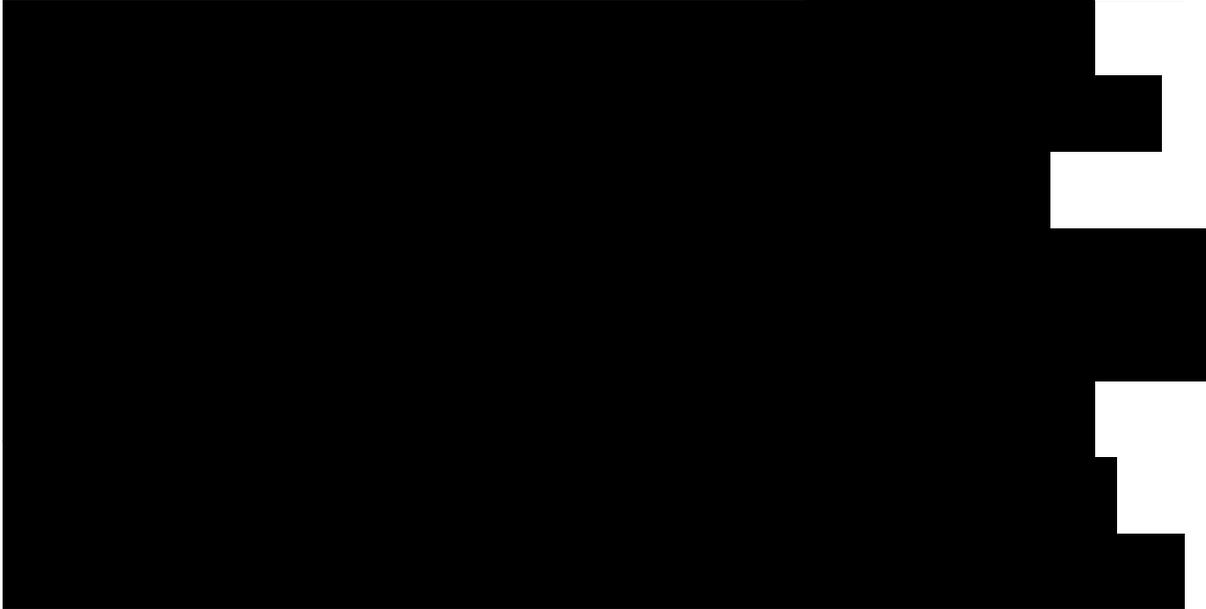
1 slide--there is a slide presentation made by the CGR
2 in public talking about the success they've had in
3 searching for and seizing assets around the world.
4 The entire presentation is attached to his Witness
5 Statement, but we highlight here two slides, one, two
6 case studies showing success in searching for and
7 reaching assets outside of Colombia; and then a chart
8 on the next page, summarizing their efforts and their
9 success.

10 We also attach as part of our presentation
11 circulated this morning an English-language version of
12 an essentially similar presentation given to the
13 United Nations or an office of the United Nations, by
14 the CGR showing in graphic form the experiences that
15 Colombia's had in seeking out assets and, for example,
16 on the left, freezing authorization of the stocks
17 mentioned.

18 So, we have three different versions here.
19 Now, what's at stake--and the value of the Claim has,
20 as set out by Colombia, has jumped around a bit--the
21 current--the current value is roughly USD 800 million,
22 although there are representations in Colombia's

1 papers that the amount approaches USD 1 billion, and
2 that USD 800 million is derived by taking the Award in
3 Colombian pesos and converting them at the current
4 Rate of Exchange into U.S. dollars. Whether it's the
5 number in the CGR Award or whether it's the number in
6 Colombia's papers, the amount of money involved is
7 enormous. Now, we venture to say it's the largest
8 Award ever rendered by the CGR by a very substantial
9 margin.

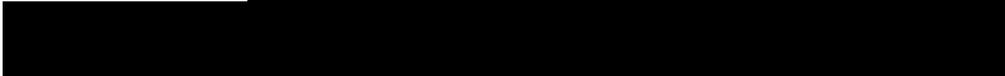
10 And so, Colombia has obvious incentives to
11 go around the world looking for assets, seize those
12 assets, and convert them into cash. 



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21 Now, Colombia's answer, in sharp
22 contradiction to the papers that they submitted on the

1 Emergency Application--in the slide that's before us
2 now--admits that they're attempting to collect assets.
3 They say that the proceedings are underway. They say
4 that they will renew their search for assets during
5 the Forced Collection Proceeding, and they've
6 described how they would go about engaging counsel in
7 other countries and commencing proceedings before the
8 judicial or quasi-judicial agencies of those countries
9 in order to seize assets. And so, this chart
10 summarizes Colombia's description of its own avenues
11 for relief and the steps it is taking.

12 So, the need for relief here is very clear:
13 If Colombia is allowed to go around the world looking
14 for, attaching, seizing and selling the assets of
15 Claimants, 

16 
17 
18 And what's more, it is--(sneezes), excuse
19 me--let me strike that. I apologize.

20 It has been a commonplace in investor-State
21 disputes, at least since Electricity Company of Sofia,
22 that a Tribunal has power to enjoin enforcement of an

1 underlying award. That case, of course, was decided
2 in 1939. In our papers we cite a host of claims, some
3 very celebrated--Chevron versus Ecuador, Merck versus
4 Ecuador--granting precisely the relief we seek here.

5 So, what are the standards for seeking and
6 obtaining such relief? We have to make a prima facie
7 showing of jurisdiction. We have pleaded our claim.
8 We have clearly established in our pleading that we
9 are an investor with an investment; that our rights to
10 fair and equitable treatment, due process, and
11 National Treatment have been violated.

12 Now, Colombia claims, at the same time that
13 they say the merits should not be gone into, that they
14 can somehow show that those were not true, but the
15 convention, of course, is to accept those well-pleaded
16 allegations. And here, they're more than well
17 pleaded, they're backed by substantial evidence.
18 Colombia will have its opportunity on their
19 application for a preliminary decision on preliminary
20 questions, and once, as we expect it will be, that's
21 denied, at the Hearing on the Merits, but that's a
22 question for another day.

1 Have we shown a right to relief? We have.
2 First, to protect the Tribunal's jurisdiction, its
3 exclusive jurisdiction, and our right to an exclusive
4 remedy.

5 The proceedings that Colombia is threatening
6 to bring around the world, those parallel proceedings
7 before the courts of other countries will cover much
8 of the same ground that this Arbitration does, and so
9 we rely on cases such as the Tokios Tokelés,
10 Burlington Resources versus Ecuador, Plama versus
11 Bulgaria, all of which have established that
12 Provisional Measures are appropriate to preserve the
13 exclusivity of ICSID Arbitration to the exclusion of
14 local administrative or judicial remedies as
15 prescribed in Article 26.

16 Similarly, in the CSOB Case cited in our
17 papers, the Tribunal ordered the Slovak Republic to
18 suspend pending bankruptcy proceedings because those
19 proceedings might include determinations relating to
20 claims under a contract between CSOB and the Slovak
21 Republic and thus might deal with matters under
22 consideration by the Tribunal in the instant

1 arbitration. And since we haven't yet seen those
2 proceedings brought by Colombia that they threaten to
3 bring, we don't know precisely what the contours of
4 those would be, but they would surely include matters
5 that are squarely before this Tribunal.

6 Now, Colombia argues that Article 26 is
7 irrelevant because the exclusivity of the remedy
8 relates only to the investment dispute. That's just
9 not true. In the cases I have just referred to--and
10 the other cases cited in our papers--make it very
11 clear that parallel proceedings raising essentially
12 identical or overlapping claims are covered.

13 Second, we're entitled to preserve the
14 status quo. The status quo right now is that there is
15 an award, no assets have yet been seized. As assets
16 are identified and seized, the status quo will change.
17 The office of an injunction against enforcement, and
18 an injunction against--an anti-suit injunction against
19 the bringing of parallel proceedings, is precisely to
20 preserve that status quo. And one would think that if
21 we were to wait until Colombia had succeeded in its
22 campaign of identifying and seizing assets, that we

1 would then be told that the status quo required that
2 that seizure be left in place. The closest parallel
3 is the case they rely on so heavily, IBT, where the
4 bonds had been drawn down, and hence we were told--and
5 the Tribunal there found--that it would disturb the
6 status quo to restore them.

7 So, Colombia's analysis is that, any claim
8 here is either too early because they haven't yet
9 succeeded or presumably too late because they have.

10 Now, we have to show urgency. We have shown
11 urgency. Urgency in this context doesn't mean the
12 house is on fire. That's the urgency required for an
13 Emergency Application, which this Tribunal--and the
14 Tribunal denied relief there on grounds that there was
15 no immediate threat. The urgency in this context is
16 different. It simply means relief that cannot await
17 the outcome of the Award on the Merits.

18 So, what would happen absent relief here if
19 Colombia succeeds in the efforts they admit they're
20 making? We have sought an offsetting Award based on
21 what I have to say are almost grotesque violations of
22 due process by the CGR. Whatever they awarded against

1 us should be the subject of an offsetting award, just
2 as was the case in the Glencore matter, where, of
3 course, annulment has recently been denied. But if
4 Colombia succeeds in finding and seizing and selling
5 assets

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11 That can't be repaired at that point, so
12 what would happen is that the dispute would vastly
13 expand. Classic example of the aggravation of the
14 dispute between the Parties. A Merits Award is years
15 away, not only because of the pace at which ICSID
16 proceedings typically move, but because of the
17 interposition of Preliminary Objections down to and
18 including a claim that a joint venture, which is a
19 person--an entity capable of suing and being sued
20 under the law that created it, somehow lacks the
21 ability to bring a claim, but those will take time,
22 and the entire proceeding, of course, is frozen while

1 those Preliminary Objections are continued.

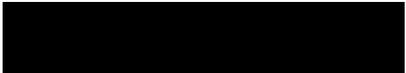
2 Urgency is addressed again in cases we have
3 cited and discussed: Burlington Resources, in the
4 Biwater Gauff Case. The rights that we seek preserved
5 here may be effectively destroyed or seriously
6 prejudiced if they're not preserved now pending a
7 final decision.

8 So, we've met the test of necessity, we've
9 met the test of urgency.

10 And finally--and I will turn to their
11 principal treaty-based argument in a moment--that the
12 requested measures are proportional. The Measures we
13 request [REDACTED]

14 [REDACTED] If Colombia were to prevail, if
15 we were not to succeed on the merits, the Claimants
16 will be there, and Colombia can precede at that point
17 to attempt to collect the Award.

18 The harm to Colombia is a matter of waiting,
19 assuming for the moment that their claim has
20 merit--their position has merit--and they can be made
21 whole with interest. The disproportionate risk is
22 that absent this relief, [REDACTED]

1 
2 Now, the principal argument that Colombia
3 makes under the Treaty is a claim that Section 10.20.8
4 somehow bars the relief that's sought here, and they
5 rely on the second sentence of that provision.

6 Could we have that language up?

7 For the convenience of the Tribunal, we put
8 the relevant language on this slide.

9 And so their defense turns almost entirely,
10 putting to one side their denial that the ordinary
11 standards have been met, on the meaning of the phrase
12 "application of a measure alleged to constitute a
13 breach referred to in Article 10.16."

14 So, the enforcement measures that Colombia
15 proposes to take, threatens to take, and according to
16 their most recent submission is in the process of
17 taking, are not applications of a measure alleged to
18 constitute a breach. The breach--the Measures alleged
19 to constitute a breach here and that do constitute a
20 breach are the procedures by which the CGR reached the
21 conclusion that it did and stripped our client of its
22 rights to due process, fair and equitable treatment,

1 to National Treatment.

2 So, for example, at the very outset of this
3 proceeding, one of the Measures we challenged is the
4 assertion that the Claimants were fiscal managers,
5 which, under the Organic Law of the CGR, Law 610,
6 requires that they have the ability to authorize or
7 prevent the expenditure of public funds. And the
8 record is absolutely clear that the Claimants did not
9 have such power, were not within the jurisdiction of
10 the CGR, and that they had a reasonable expectation
11 that they would not be called before the CGR-- let
12 alone subjected to a joint and several award of
13 hundreds of millions of dollars on a theory that there
14 was some sort of promise that this project would be
15 brought in at an estimate provided by another of the
16 respondents.

17 But putting those merits to one side, if we
18 had appeared before the Tribunal at that point and had
19 asked, in effect, for an order directing Colombia to
20 dismiss the case because our client--our clients were
21 not fiscal managers, that would come within the terms
22 of 10.20.8. Let me go to the end of the proceeding.

1 After the CGR rendered its initial decision, some
2 6,000 pages, an internal review, an internal appeal,
3 actually, was provided for in the CGR rules, and we
4 availed ourselves of that opportunity.

5 But the CGR allowed all of five days-- later
6 extended to 12 days because they neglected to serve
7 the entire award on our clients and on the other
8 respondents. It's an insult to due process to suggest
9 that a party should have five days to review a
10 6,000-page award, marshal its proof, put in its
11 papers, and present that appeal. And we requested an
12 extension of time from the CGR and were summarily
13 turned down.

14 If we had come to the Tribunal at that point
15 and asked for interim relief, directing the CGR to
16 afford a minimally reasonable time to present such an
17 appeal in the interest of due process, again, we do
18 not dispute that that would have constituted an
19 injunction against the application of a measure
20 alleged to constitute a breach.

21 But this is not that. The CGR case is over,
22 and Colombia is now embarked on a new campaign to

1 locate assets, seize those assets, and convert those
2 assets, and that is not a measure alleged to
3 constitute a breach.

4 Colombia, in effect, is arguing that
5 application of a measure alleged to constitute a
6 breach is something like arising out of or relating to
7 a breach. There is no limiting principle, there is
8 nothing in the text, and there is nothing in the
9 ordinary English meaning of the word "application"
10 that would call for such a conclusion.

11 What's more, Colombia's own submission here
12 makes it clear that the enforcement efforts that they
13 are now undertaking do not constitute the same
14 proceeding.

15 This is a slide, a graph, presented by
16 Colombia in its papers describing the enforcement
17 efforts that they are undertaking or will undertake.
18 And the dotted line that goes across the center was
19 put there by Colombia with an arrow on top of the line
20 pointing upwards saying "Fiscal Liability Proceeding,"
21 which is now concluded, and an arrow pointing
22 downwards, under the line that they put on that chart,

1 that they presented to this Tribunal, saying "Forced
2 Collection Proceedings".

3 The two are separate and distinct, and this
4 chart makes it absolutely clear that both the figure
5 of speech and the chart we have before you, a line is
6 drawn under the final ruling of the CGR, and we're now
7 embarked--Colombia has now embarked on a new and
8 different phase of its--under which they seek to seize
9 assets, first in the Forced Collection Proceeding that
10 they described, and obviously any efforts to identify
11 assets--identify assets and seize them in other
12 jurisdictions--would obviously come below that line.
13 And I don't think there can be any serious arguments
14 that an anti-suit injunction against proceedings in
15 other countries that would involve precisely the same
16 issues of which this Tribunal has exclusive
17 jurisdiction are precluded--or I should say simply do
18 not fall within the scope of 10.20.8. There is no
19 bar.

20 Now, this is not the only point in the
21 Treaty at which the phrase "measure alleged to
22 constitute a breach" occurs. It also occurs in

1 Section 10.18--if you could put that up, please--and
2 the text of that section is before us now.

3 Now, there are two critical points to see
4 here. The first is that the language here used is
5 broader. This is the "fork in the road" provision.
6 And by initiating arbitration, the Claimants waived
7 their "right to initiate or to continue before any
8 administrative tribunal or court under the law of any
9 Party, or other dispute settlement procedures [and
10 arbitration], any proceeding with respect to any
11 measure alleged to constitute a breach". "With
12 respect to" is broader than "application of," although
13 the two concepts are conflated in Colombia's analysis.

14 An ordinary canon of construction is that
15 when the drafters of the Treaty use different
16 language, they mean different things. If the drafters
17 of the Treaty had sought to ban anything having any
18 connection, however remote, with a challenged measure,
19 they would have said so.

20 But in addition, if you go back to
21 Colombia's papers, Colombia expressly says in its
22 current submission that Claimants have the right to

1 seek a stay of enforcement before the Contentious
2 Administrative Tribunal in Colombia, a Colombian
3 court. But if their construction of 10.20.8 were
4 correct, that would be a proceeding with respect to a
5 measure. By conceding that Claimants have the right
6 to bring a proceeding in Colombia before the Colombian
7 courts to stay enforcement, they are agreeing that
8 that is not a proceeding, in the words of Section
9 10.18, "with respect to any measure alleged to
10 constitute a breach" because if it were, it would come
11 within the waiver in the "fork in the road" provision.
12 And if it's not a proceeding "with respect to any
13 measure alleged to constitute a breach," then it
14 cannot possibly come within the application of any
15 measure alleged to constitute a breach because that
16 is, by definition, narrower. Everyone who does this
17 work understands that "with respect to" is as broad as
18 possible, and the greater includes the lesser.

19 So, both the way in which Colombia has
20 suggested that there is an alternative remedy in the
21 Colombian courts, and the wording of this section
22 itself make it clear, that the chart they provided is

1 correct; that the line they drew is correctly drawn;
2 that the arrows they put on to indicate what was done
3 and what was to be done are correct; and that the
4 enforcement campaign that they're waging is not--does
5 not come within the terms of Article 10.20.8.

6 Now, there is a lot of talk in the papers
7 that Colombia has submitted about how difficult it is
8 to accomplish what they're trying to accomplish, and
9 the limited success they've had to date.

10 Now, we know that over a year ago Colombia
11 approached authorities in the United States and the
12 United Kingdom looking for assets, and we know from
13 the papers they've submitted in opposition to this
14 application that they're now doing or about to do that
15 same thing, although they don't disclose which
16 jurisdictions they're going to.

17 But the fact they haven't had much success,
18 or any success, to date is hardly a reason to deny
19 relief now. If anything, the fact that they say it's
20 extremely difficult and that they may not succeed is
21 an argument for granting approval because it lessens
22 the harm, and it--you know, to the extent

1 proportionality were even in question, something they
2 say they were going to have great difficulty doing,
3 shouldn't really cause them much difficulty.

4 But it doesn't really matter whether they're
5 good at their work or not. The fact is that they are
6 trying. The fact is they may well succeed. The fact is
7 that there are extremely serious challenges to this
8 Award from its very inception to its very conclusion.
9 It's been riddled with due-process violations. It
10 turns upon the retroactive application of a statute
11 broadening the definition of "fiscal manager," enacted
12 long after we raised claims. One might even think
13 that the new statute was aimed specifically at the
14 Claimants here.

15 This Tribunal has exclusive jurisdiction of
16 those claims. It ought to be allowed to do its work.
17 It ought to continue. And it ought to continue free
18 of Colombia's effort to avoid a decision on the merits
19 by seizing assets and [REDACTED]
20 [REDACTED]

21 Mr. President, unless the Tribunal has any
22 questions at this point, that concludes our Opening

1 Statement, and with the Tribunal's indulgence, we will
2 reserve the balance of our time for rebuttal.

3 PRESIDENT NUNES: Thank you very much for
4 your presentation.

5 Let me ask my colleagues, although we have
6 time allocated for questions at the end of the
7 Hearing, would you by any chance be willing to ask any
8 questions now? John?

9 ARBITRATOR BEECHEY: Nothing from me at this
10 point, Mr. President.

11 PRESIDENT NUNES: Thank you.
12 Marcelo?

13 ARBITRATOR KOHEN: The same on my side. No
14 questions for the time being.

15 PRESIDENT NUNES: Okay. So, according to
16 our schedule, we have now a break of 30 minutes. My
17 question is: Do we need to break that long, or could
18 we cut by one half?

19 MR. SILLS: That's fine with us. 15 minutes
20 is fine with us, Mr. President.

21 It is fine with us, but the half hour was
22 really for the benefit--well, it benefits both

1 Parties, but it's principally for the benefit, I would
2 think, of Colombia, and I would leave it to them
3 whether to ask for the whole half hour or not.

4 PRESIDENT NUNES: Absolutely. That's why
5 I'm turning to Mrs. Frutos-Peterson.

6 DR. FRUTOS-PETERSON: Mr. President, 15
7 minutes will be okay as a break.

8 I didn't want to interrupt. This is on a
9 different topic. I didn't want to interrupt counsel
10 when he was making his presentation, but I couldn't--I
11 couldn't identify the sources for the slide that they
12 shared with us. I think it's Slide 10 of the
13 presentation. I don't--I couldn't identify if that
14 information was on the record already, and I just
15 wanted to ask counsel if they can provide the
16 authority, the exhibit number.

17 MR. SILLS: It is not yet--well, it is in
18 the record now. It was not in the record before.
19 It's--as you can see, it's almost entirely an English
20 language summary of the Spanish language document
21 which is in the record and which is attached to
22 Mr. Torrente's Witness Statement, but I don't think

1 there's any--

2 DR. FRUTOS-PETERSON: No, that's fine. I
3 was just trying to identify the exhibit number.

4 MR. SILLS: It does not have an existing
5 exhibit number, and I think, for good order's sake, we
6 should assign it one. But, as I say, it's
7 substantially similar, although not identical to the
8 Spanish-language presentation that already has an
9 exhibit number but I think--

10 (Overlapping speakers.)

11 MR. SILLS: We're happy to provide a link.
12 We found it online, Claudia, and so we are happy to
13 share it with you here shortly; like in the break
14 we're happy to do that.

15 DR. FRUTOS-PETERSON: Yeah, I mean,
16 Mr. President, I was just curious because evidently
17 that is not on the record already, and this is the
18 first time that we see it, so, we feel like we should
19 object to that because we--it has not been discussed
20 on the papers. So I will be under your instructions,
21 but we feel uncomfortable to have something that has
22 not been part of the record.

1 (Overlapping speakers.)

2 MR. SILLS: We can--I'm sorry.

3 PRESIDENT NUNES: Go ahead. No, go ahead.

4 MR. SILLS: We can address that later, but
5 we have not had an opportunity to address on papers
6 Colombia's presentation. Colombia has made two
7 presentations in opposition to our single Application
8 for Emergency Relief first, and then for Interim
9 Measures. And I don't know of any rule that says we
10 can't bring additional materials in what's effectively
11 a rebuttal. But if Colombia is going to move to
12 strike that exhibit, then I suppose we will deal with
13 that on papers and at an appropriate time. I'm not
14 quite sure why because it doesn't say anything that's
15 different from the Spanish-language document that we
16 already did present, but we can deal with that if and
17 when Colombia decides to move to strike.

18 DR. FRUTOS-PETERSON: Mr. President, I
19 think, just to move on, if that's appropriate for the
20 Tribunal, I just feel like at this point I haven't
21 reviewed that, so Colombia could reserve the right to
22 come back on this, if that's okay with you. I don't

1 want to be causing too much trouble, but I do feel
2 that we have--we need to review that information
3 because it's not part of the record.

4 PRESIDENT NUNES: Okay. So, thank you. We
5 will take a 15-minute break. We will be back at 10:28
6 in the West, 11:28 for me, but in the afternoon for
7 the Parties, for my colleagues. Okay?

8 DR. FRUTOS-PETERSON: Perfect. Thank you.

9 PRESIDENT NUNES: So, we stay connected
10 here; is that correct, Marisa?

11 SECRETARY PLANELLS-VALERO: Mr. President,
12 we will send everyone to their breakout rooms.

13 PRESIDENT NUNES: Even if we leave, we stay
14 there connected?

15 SECRETARY PLANELLS-VALERO: Yes.

16 PRESIDENT NUNES: Okay, thank you.

17 SECRETARY PLANELLS-VALERO: Perfect. Thank
18 you.

19 (Recess.)

20 PRESIDENT NUNES: Mrs. Frutos-Peterson,
21 before we move on with the Respondent's presentation,
22 I would like to let you know that, during the break,

1 the Tribunal reviewed this matter raised by you with
2 respect to the document that was part of Claimants'
3 presentation. What I decide to do is, not to put any
4 pressure at this point in time, is to leave this point
5 open and give you, Respondent, until 11 November to
6 comment on the document and come back to us and let us
7 know if the translation is accurate, and if there is
8 something else which was not in the case already.

9 So, are you okay with that, the November
10 date, is that date okay for you?

11 MRS. FRUTOS-PETERSON: That's a very good
12 solution, Mr. President. Thank you very much, so we
13 take note of that, and we will proceed accordingly.

14 PRESIDENT NUNES: We will, for the time
15 being, the matter will remain open, so that you will
16 have time to take a look and come back to us. Okay?
17 And to the counter-party for sure.

18 MRS. FRUTOS-PETERSON: Yes, will do, sir.
19 Thank you.

20 PRESIDENT NUNES: Okay. Who will make the
21 presentation?

22 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

1 MRS. FRUTOS-PETERSON: Thank you,
2 Mr. President. We will divide our presentation, you
3 know, in three parts. Ms. Ordoñez will start,
4 following by me, and then Elisa Botero at the end, but
5 okay, Ana, do you want to start?

6 MS. ORDOÑEZ: Thank you, Claudia.

7 Dear Mr. President and Members of the
8 Tribunal, good morning.

9 We are here today to hear Claimants' request
10 for the recommendation of Provisional Measures against
11 the Republic of Colombia. As we have done
12 consistently in all investment cases against the
13 State, we appear before this investor-State
14 Arbitration Tribunal under the full conviction that
15 the decision rendered must properly consult and apply
16 the terms of the relevant treaty.

17 Colombia does not contest the general power
18 of ICSID tribunals to order Interim Measures of
19 protection. Nevertheless, Article 47 of the ICSID
20 Convention clearly provides that this general power
21 can be limited through agreement of the Parties. This
22 is precisely what happened in the case at hand.

1 Claimants initiated this arbitration by consenting to
2 all the conditions established in Chapter 11 of the
3 Treaty, which includes the provision in the second
4 sentence of Article 10.20.8. This provision clearly
5 provides that a "tribunal may not order attachments or
6 enjoin the application of a measure alleged to
7 constitute a breach referred to in Article 10.16."

8 Claimants are seeking an order preventing
9 Colombia from taking steps to enforce the disputed
10 Ruling with Fiscal Liability of the CGR until this
11 arbitration has concluded; that is, they are seeking a
12 provisional measure to prevent the enforcement of the
13 Measure allegedly constituting a breach of the Treaty.

14 As we have already established in the
15 various rounds of written submissions preceding this
16 Hearing, this is a fatal defect in Claimants' request
17 for the Provisional Measures.

18 The request for Provisional Measures was
19 made after Colombia invoked Article 10.20.4 of the
20 Treaty, to ask the Tribunal to hear and consider as a
21 preliminary matter the objection that, as a matter of
22 law, the Claim submitted by Claimants is not a claim

1 in respect of which the Tribunal may issue an award in
2 favor of the Claimants pursuant to Article 10.26 of
3 the Treaty.

4 Back on August 24, 2020, we argued that the
5 Tribunal could not decide over this dispute, among
6 other reasons, because Claimants had not suffered any
7 loss or damage by reason of or arising out of a breach
8 of a substantive obligation of the Treaty or an
9 investment agreement.

10 In other words, we argue that Claimants did
11 not comply with the requirements established in
12 Article 10.16.1 of the Treaty for submitting a claim
13 to arbitration. Respondent developed this objection
14 in its Memorial on Preliminary Objection.

15 Before the time scheduled for the submission
16 of their Counter-Memorial on Preliminary Objections,
17 Claimants filed their Requests for Provisional
18 Measures, including the clear admission that they had
19 not yet suffered any loss or damage and accordingly
20 that they had made recourse to arbitration without
21 meeting the necessary conditions of consent to this
22 form of dispute settlement.

1 As both Parties have recognized, it is
2 well-established that a tribunal may grant Provisional
3 Measures when there is a prima facie basis for
4 jurisdiction. In this case, Claimants have also
5 failed to meet such prima facie basis.

6 The lack of prima facie jurisdiction and the
7 clear language of the second sentence of Article
8 10.20.8 of the Treaty, among other reasons, leads to
9 the conclusion that this Tribunal is not authorized to
10 order the Provisional Measures requested by the
11 Claimants.

12 In light of the above, we respectfully ask
13 the Tribunal to dismiss Claimants' request and, given
14 the frivolous nature of Claimants' Provisional
15 Measures Application, we also respectfully request
16 that the Tribunal order Claimants to pay all costs and
17 expenses related to it, including Respondent's
18 attorney's fees.

19 I will now give the floor to Ms. Claudia
20 Frutos-Peterson from Curtis who will lead Respondent's
21 oral presentation on Claimants' application on
22 Provisional Measures.

1 Thank you.

2 MRS. FRUTOS-PETERSON: Thank you, Ana.

3 Well, again, good morning and good afternoon
4 to Members of the Tribunal and to everyone else
5 present at the Hearing.

6 In their submissions on Provisional
7 Measures, Claimants had made every attempt to distract
8 the Tribunal from the single issue it must examine in
9 deciding Claimants' application: Whether the Request
10 for Provisional Measures falls within the scope of the
11 second sentence of Article 10.20.8 of the Treaty,
12 which explicitly bars this Tribunal from granting any
13 interim relief that enjoins the application of a
14 measure alleged to constitute a breach of the Treaty.

15 Claimants try to avoid that express
16 prohibition by focusing on Article 47 of the ICSID
17 Convention and on the first sentence of Article
18 10.20.8 of the Treaty, both of which, in general
19 terms, grant tribunals authority to order Provisional
20 Measures to preserve the rights of a disputing party.

21 As Respondent has repeatedly made clear,
22 that authority is not called into question here. As a

1 general matter, Colombia acknowledges that this
2 Tribunal has the power to order interim relief.
3 Colombia also acknowledges that Interim Measures may
4 be appropriate to preserve party's procedural rights
5 to ensure--or to ensure that the Tribunal's
6 jurisdiction is made fully effective.

7 But if that is the case, what is then the
8 issue here? The issue is whether Claimants'
9 Provisional Measures Request falls within the scope of
10 the prohibition set forth in the second sentence of
11 Article 10.20.8 of the Treaty. Why? Because if it
12 does, regardless of any general authority, the
13 Tribunal is expressly forbidden from granting it.

14 Correctly framing the discussion immediately
15 reveals that Claimants' arguments and the Authorities
16 they cite in support of the Provisional Measures
17 Applications are wholly irrelevant.

18 Claimants cite to a number of cases that
19 supposedly stand for the proposition that Article 47
20 of the ICSID Convention grants ICSID tribunals broad
21 authority to recommend Interim Measures. While the
22 cases that interpret and implement Article 47 can be

1 instructional in confirming an ICSID tribunal's
2 general authority towards the Provisional Measures,
3 they have no bearing in determining the scope of
4 Article 10.20.8 of the Treaty.

5 Claimants also cite to several cases where
6 investor-State tribunals granted interim relief,
7 including cases where tribunals issued anti-suit
8 injunctions, asking this Tribunal to grant the same
9 relief here. Those cases are completely inapplicable
10 because none of them--none of those tribunals was
11 dealing with a provision like Article 10.20.8 of the
12 Treaty, which bars Tribunals from issuing certain
13 types of Provisional Measures. In addition, some of
14 the decisions on Provisional Measures cited by the
15 Claimants were rendered under the UNCITRAL Arbitration
16 Rules, not the ICSID Convention, which only highlights
17 their irrelevance to this case.

18 There are, however, three cases directly on
19 point where tribunals constituted under treaties with
20 provisions identical to Article 10.20.8 rejected
21 Interim Measures Applications based on the prohibition
22 in the second sentence of that Article. Those cases

1 are IBT versus Panama, Feldman versus Mexico, and Pope
2 & Talbot versus Canada.

3 But let us leave those cases aside for a
4 moment to focus on Article 10.20.8 of the Treaty.

5 Article 10.20.8 reads as follows, and I
6 quote: "A tribunal may order an interim measure of
7 protection to preserve the rights of a disputing
8 Party, or to ensure that the Tribunal's jurisdiction
9 is made fully effective, including an order to
10 preserve evidence in the possession or control of a
11 disputing party or to protect the Tribunal's
12 jurisdictions."

13 Then comes the second sentence, which
14 states, and I quote: "A tribunal may not order
15 attachment or enjoin the application of a measure
16 alleged to constitute a breach referred to in Article
17 10.16."

18 The first sentence allows tribunals to order
19 interim measures of protections aimed at preserving
20 procedural rights and ensuring that the Tribunal's
21 jurisdiction is effective. However, the second
22 sentence bans the Tribunal from ordering a particular

1 type of interim measures; that is, those aimed at
2 enjoining the application of the Measures supposedly
3 in breach of the Treaty.

4 The United States and Colombia had a clear
5 intention behind the express prohibition in the second
6 sentence of Article 10.20.8 of the Treaty: to prevent
7 arbitral tribunals from directly interfering with or
8 invalidating their sovereign acts.

9 That is the same rationale behind
10 Article 10.26 of the Treaty which limits the types of
11 reliefs a tribunal may award to monetary damages and
12 restitution of property exclusively.

13 Indeed, according to Kenneth Vandavelde, who
14 led treaty negotiations for the United States and
15 wrote on the most prominent books on the matter,
16 Article 10.26, and I quote, "responds to concerns
17 raised by critics that investor-State arbitral
18 tribunals will have the power to invalidate U.S. law
19 or overrule the decisions of U.S. courts."

20 Article 10.20.8 and Article 10.26, which
21 come directly from the U.S. Model BIT and are included
22 in identical terms in other treaties executed by the

1 United States, including NAFTA and the Panama U.S.
2 Trade Promotion Agreement, short-circuit any attempt
3 by investors to use the arbitral process as a means to
4 freeze the State's regulatory and sanctioning
5 processes, or as a shield from the consequences of a
6 State's measures that would otherwise be applicable.

7 Commenting on the text of NAFTA, Meg Kinnear
8 and Andrea Bjorklund, stated in no uncertain terms
9 that, and I quote: "A tribunal cannot order a Party
10 to amend or withdraw the challenged measure on either
11 an interim or final basis."

12 In practical terms this means the Treaty
13 allows the United States and Colombia to implement and
14 maintain a challenged measure even if a tribunal
15 ultimately determines that such measure constituted a
16 breach of the substantive rights set forth in
17 Chapter 10. In the words of Professor Gabrielle
18 Kaufmann-Kohler and her co-authors, and I quote:
19 "NAFTA Article 1134 [. . .] provides for interim
20 relief to preserve the rights of a disputing party.
21 However, in contrast to the ICSID system, it makes it
22 clear that the rights in dispute cannot be the subject

1 matter of the provisional measures. The reason for
2 this appears to be that Article 1134 and 1135 permit a
3 State to implement and maintain a measure even if it
4 breaches substantive rights contained in Chapter 11A."

5 Let's turn now to the prohibition in Article
6 10.20.8 on how it applies to the facts of this case.

7 Article 10.20.8 grants this Tribunal
8 authority to order Provisional Measure so long as
9 those measures do not impede or suspend the

10 application of the Measure at issue in the

11 Arbitration. According to the IBT Tribunal, that
12 determination is, in fact--is a fact--is fact

13 specific. The Tribunal must look into, and I quote:

14 "The interim relief requested, the measure alleged to
15 constitute a breach, and how close or remote is the
16 causal link between the measure alleged to constitute
17 a breach and the act sought to be enjoined."

18 The first step in the analysis asks that we
19 look into the interim relief sought. Claimants here
20 request an order for Provisional Measures enjoining
21 Colombia from enforcing what Claimants refer to as the
22 "CGR Decision" and Respondent refers to as the "Ruling

1 with Fiscal Liability" until the Tribunal renders a
2 final award on the merits. Plainly, Claimants seek to
3 stop the enforcement of the Ruling with Fiscal
4 Liability.

5 The next question the Tribunal must answer
6 is: What is the Measure that Claimants allege
7 constitutes a breach of the Treaty? The answer,
8 Members of the Tribunal, is very simple: Claimants
9 alleged that Colombia violated the Treaty by
10 initiating Fiscal Liability Proceedings against Foster
11 Wheeler and Process Consultants, conducting such
12 proceedings in the way that it did, and imposing joint
13 and several liability upon them.

14 On your screen, you will see a summary in
15 Claimants' own words of Respondent's supposed breaches
16 of the Treaty.

17 All those supposed breaches occurred within
18 the context of the Fiscal Liability Proceeding and
19 allegedly crystallized in the Ruling with Fiscal
20 Liability which found 12 natural and four judicial
21 persons, including Foster Wheeler and Process
22 Consultants, jointly and severally liable in the

1 amount of USD 997 million. Thus, according to
2 Claimants, the Measure at issue in this Arbitration is
3 the Fiscal Liability Proceedings.

4 Finally, the Tribunal must examine how close
5 or remote is the causal link between the Measure
6 alleged to constitute a breach of the Treaty and the
7 Act sought to be enjoined by the Provisional Measures?
8 In other words, would the Provisional Measure
9 requested enjoin the application of the Measure
10 alleged to constitute a breach of the Treaty? The
11 answer in this case is a resounding "yes."

12 Because the purpose of the Fiscal Liability
13 Proceeding is to determine whether public servants and
14 private parties have caused damage to the State
15 through the mismanagement of public resources and to
16 seek compensation from those responsible, applying or
17 implementing the Fiscal Liability Proceeding means
18 seeking satisfaction from the fiscally liable Parties,
19 including Foster Wheeler and Process Consultants, of
20 the amounts set forth in the Ruling with Fiscal
21 Liability.

22 This analysis, Members of the Tribunal,

1 leads to one unavoidable conclusion: That Claimants'
2 Provisional Measures Request must be rejected because
3 it falls squarely within the scope of the provisions
4 set forth in the second sentence of Article 10.20.8.

5 Claimants themselves acknowledged this
6 throughout their submissions on Provisional Measures.
7 On your screens, you are seeing a quote from the
8 Claimants' letter of September 15th where Claimants
9 admit they are seeking an order preventing Colombia
10 from enforcing the CGR Decision while the Arbitration
11 challenging the CGR Decision is heard.

12 In the Reply on the Emergency Application,
13 Claimants again submitted that they are seeking to
14 enjoin the enforcement of the CGR Decision; that is,
15 the Ruling with Fiscal Liability, because, and I
16 quote: "A worldwide campaign of litigation by
17 [Colombia] while the CGR Decision is being challenged
18 in this arbitration will aggravate this dispute."

19 But even beyond Claimants' explicit
20 submissions, their submissions are riddled with
21 references that confirm that the Ruling with Fiscal
22 Liability is inexorably linked to the Fiscal Liability

1 Proceedings they allege violated their rights under
2 the Treaty, and that stopping the enforcement of the
3 Ruling with Fiscal Liability will enjoin the
4 application of the Fiscal Liability Proceedings in
5 violation of Article 10.20.8 of the Treaty. On your
6 screen, we're going to show you some selected quotes
7 from Claimants' submissions that confirm that the only
8 thing Claimants are seeking here is to prevent the
9 application of the Measure Claimants allege constitute
10 a breach of the Treaty. I will give you a moment to
11 read for [yourselves].

12 (Pause.)

13 MRS. FRUTOS-PETERSON: In an attempt to
14 confuse the issue, Claimants essentially argue that
15 the interim relief they are requesting is not
16 prohibited because the Interim Measures sought are
17 aimed at enjoining the enforcement of the collection
18 proceeding which is separate--is a separate measure to
19 the Fiscal Liability Proceeding and the Ruling, and
20 Claimants have not claimed that the collection
21 proceedings has breached the Treaty. Claimants are
22 mistaken. The collection proceeding is not a separate

1 and distinct forum from the Fiscal Liability
2 Proceeding and the Ruling that resulted from it.
3 Quite the contrary. Enforcing the Ruling with Fiscal
4 Liability is the reason why there will be a collection
5 proceeding in the first place. Without a Ruling of
6 Fiscal Liability, there will be no amount to collect
7 and nobody responsible for paying it. We just heard
8 Claimants talking about this collection process this
9 morning and making some reference to it to try to
10 present it as a different stage. We will hear later
11 how that is not a different process, so everything is
12 part of the same process about the execution of the
13 Decision, or the Ruling as we call it.

14 Granting Claimants' Provisional Measure
15 application will run afoul the prohibition in Article
16 10.20.8 of the Treaty because enjoining enforcement of
17 the Ruling with Fiscal Liability will prevent Colombia
18 from achieving the purpose of the Fiscal Liability
19 Proceeding, the Measures supposedly constituting a
20 breach of the Treaty. Put differently, if the
21 Tribunal halts enforcement of the Ruling with Fiscal
22 Liability, it will deprive the Fiscal Liability

1 Proceedings of any effect because the only way to
2 apply the Fiscal Liability Proceeding, once it has
3 resulted in a ruling, is to collect the amount set
4 forth therein.

5 The three cases on which Respondent relies
6 all rejected Provisional Measures requests which
7 sought to enjoin the application of the Measure at
8 issue in the arbitration on the basis of provisions
9 identical to Article 10.20.8 of the Treaty. Claimants
10 tried but failed to distinguish these cases on the
11 facts arguing, among other things, that they didn't
12 deal with anti-suit relief and that the claimants in
13 those cases sought to change, rather than maintain,
14 the status quo. Claimants are grasping at straws.

15 In Pope & Talbot, the claimant argue that
16 Canada had violated its obligations under NAFTA by
17 entering into an agreement with the United States
18 setting a new discretionary yearly quota for lumber
19 exports. The claimant sought provisional measures
20 enjoining Canada from decreasing its own annual
21 softwood lumber allocation in accordance with the
22 United States and Canada Soft Lumber Agreement. The

1 Pope & Talbot Tribunal rejected claimants' provisional
2 measure request finding that Article 1134 of NAFTA,
3 which is identical to Article 10.20.8 of the Treaty,
4 did not confer jurisdiction on the tribunal to enjoin
5 the application of a measure.

6 In Feldman, the claimant complained that
7 certain tax measures enacted by Mexico that impacted
8 the revenues of its subsidiary's cigarette export
9 business breached its substantive rights under NAFTA.
10 The claimant requested interim measures ordering
11 Mexico to cease and desist from any interference with
12 its assets and revenues or the assets and revenues of
13 its Mexican subsidiary. The Feldman tribunal denied
14 the claimants' provisional measures request as that
15 would be inconsistent with the limits imposed by NAFTA
16 in Article 1134, since such an order enjoining any
17 impact that the tax measures had on the revenue of the
18 business would entail an injunction on the application
19 of the measure alleged to be a breach of the treaty.

20 More recently, in IBT, the claimants argued
21 that Panama had breached the U.S.-Panama TPA when the
22 Ministry of Government issued an Administrative

1 Resolution terminating a construction contract
2 executed by claimants due to contract breaches and
3 disqualifying claimants from entering into contracts
4 with Panama for a period of three years. Following
5 the issuance of the Administrative Resolution, Panama
6 took steps to execute the Performance Bond and backed
7 the Construction Contract. In the arbitration, the
8 claimants requested an order from the tribunal
9 enjoining such execution as well as the three-year
10 disqualification. The IBT tribunal rejected
11 claimants' provisional measure request because the
12 execution of the Performance Bond and the
13 disqualification were both effects of the Resolution
14 terminating the contract and, therefore, suspending
15 the former would mean necessarily paralyzing the
16 application of the latter in violation of the explicit
17 prohibition of the treaty.

18 Similarly, this Tribunal is bound by the
19 language of the Treaty and must reject Claimants'
20 Application for Provisional Measures because halting
21 the enforcement of the Ruling with Fiscal Liability
22 will enjoin the application of the Fiscal Liability

1 Proceeding and prevent it from producing effect.

2 There is one more thing the Tribunal should
3 consider in determining whether it is bound by the
4 prohibition in Article 10.20.8 of the Treaty. If the
5 Tribunal were to enjoin the enforcement of the Ruling
6 with Fiscal Liability, it will tacitly recognize that
7 the Ruling with Fiscal Liability is not the Measure at
8 issue in this Arbitration, and thus Claimants will be
9 prevented from alleging in the Arbitration that the
10 Ruling with Fiscal Liability constitutes a violation
11 of the Treaty and claim damages associated with the
12 supposed breach.

13 Even if the Tribunal were to conclude that
14 the limitations in Article 10.20.8 of the Treaty does
15 not preclude it from granting Claimants' Provisional
16 Measure Request, such a request still fails because
17 Claimants have not satisfied the burden of proving
18 that there is an absolute need of urgency to prevent
19 an irreparable harm warranting the imposition of such
20 measure.

21 Under Article 47 of the ICSID Convention,
22 Provisional Measures are an extraordinary remedy

1 reserved for limited cases of absolute necessity and
2 urgency. ICSID tribunals are called to exercise
3 self-restraint in recommending them.

4 In their submissions, Claimants placed
5 particular emphasis on the rights the Provisional
6 Measures they request are aimed at protecting.
7 According to Claimants, interim relief is warranted
8 here both to protect the Tribunal's exclusive
9 jurisdiction under Article 26 of the ICSID Convention
10 as well as the right to the preservation of the status
11 quo and non-aggravation of the dispute.

12 Let's focus first on Claimants' arguments
13 based on Article 26 of the ICSID Convention, which
14 they believe might save their application for
15 Provisional Measures. According to Claimants, the
16 enforcement of the Ruling with Fiscal Liability
17 threatens this Tribunal's jurisdiction and thus must
18 be enjoined. Claimants' argument is a red herring.
19 Article 26 of the ICSID Convention is completely
20 irrelevant to the issue at hand. The Fiscal Liability
21 Proceeding in Colombia which was initiated before this
22 Arbitration started and was actually the reason

1 prompting Claimants' claim does not involve the
2 settlement of an investment dispute. It seeks to
3 establish Fiscal Liability under Colombian law and to
4 compensate the State for any resulting damages
5 suffered. Article 26 of the ICSID Convention only
6 protects the exclusive jurisdiction of an ICSID
7 tribunal to settle investment disputes. The Fiscal
8 Liability Proceeding is not an investment
9 dispute-settlement proceeding.

10 Claimants' interest in preserving the status
11 quo is not genuine, as the Provisional Measures they
12 result actually seek to alter it. As of now,
13 Claimants have been found to be fiscally liable
14 pursuant to Colombian law. According to such law, the
15 next phase in the Fiscal Liability Proceeding is the
16 collection of the amount established in the Ruling
17 with Fiscal Liability. To halt the CGR's enforcement
18 effort, which is what Claimants are requesting here,
19 will change the ordinary course of the Fiscal
20 Liability Proceeding and alter the status quo.

21 That being said, the discussion about
22 whether the Provisional Measures Applications seek to

1 maintain or alter the status quo is moot because in
2 either case, the requirements for ordering interim
3 relief are not met in this case.

4 I will now give the floor to my colleague,
5 Elisa Botero, who will address the Tribunal on the
6 requirements that Claimants need to show in order to
7 obtain the Provisional Measures that they are seeking.

8 MS. BOTERO: Thank you, Claudia.

9 Both Parties largely agree that to obtain
10 the interim injunctive relief Claimants seek, they
11 must satisfy five cumulative requirements: Claimants
12 must first show that the Provisional Measures
13 requested are necessary and urgent to prevent an
14 irreparable harm. Claimants must also make a showing
15 that the Tribunal has prima facie jurisdiction over
16 the dispute, and that there is a prima facie case on
17 the merits. Claimants must demonstrate that granting
18 the Provisional Measures outweighs the prejudice that
19 such measures would inflict upon Respondent or third
20 parties. And finally, Claimants must prove that
21 granting the Provisional Measures would not cause the
22 Tribunal to pre-judge the merits of the disputes.

1 None of these five requirements are met in this case.

2 First, Claimants will not suffer an
3 irreparable harm if the injunctive relief they request
4 is not granted and thus there is no absolute urgency
5 or necessity in their Provisional Measures
6 Application.

7 Claimants argue that the Provisional
8 Measures they request are necessary because, if
9 Colombia pursues enforcement of the Ruling with Fiscal
10 Liability and embarks on a worldwide litigation
11 campaign against Foster Wheeler and Process
12 Consultants, [REDACTED]

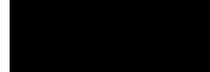
13 [REDACTED] They also claim Interim
14 Measures are urgent because proceedings to enforce the
15 Ruling with Fiscal Liability have already begun.

16 However, as Respondent has repeatedly shown in its
17 submissions, the CGR's collection efforts pose no real
18 threat to Claimants' assets, [REDACTED]

19 [REDACTED]
20 The Tribunal already reached this conclusion
21 in its Decision on the Emergency Application finding
22 that, and I quote, "Claimants had failed to make a

1 showing of the heightened level of urgency required to
2 grant the emergency temporary relief that they had
3 requested, and in particular, Claimants had not
4 provided evidence that any of their assets are
5 currently under threat of harm." The Tribunal should
6 reach the same conclusion here.

7 The CGR has so far been unsuccessful in
8 locating assets of Claimants in Colombia that can be
9 attached and sold off in satisfaction of the amount of
10 the Ruling with Fiscal Liability. In his statement,
11 Mr. Thomas Grell, the President of Foster Wheeler,

12 
13  Because no assets have been found, the CGR
14 has not decreed any precautionary measures against
15 Claimants despite having authority to do so. And even
16 though as part of the collection proceeding, the CGR
17 will renew its search for assets domestically, unless
18 Claimants have acquired new assets, such search
19 efforts will likely prove unsuccessful.

20 The situation with respect to Claimants'
21 assets abroad is no different. In the four years
22 since the Fiscal Liability Proceeding was initiated,

1 the CGR has failed to identify any assets of Claimants
2 outside of Colombia that could eventually be seized
3 and sold to satisfy the amount of the Ruling with
4 Fiscal Liability. During the Collection Proceeding,
5 the CGR will continue searching for assets, however,
6 experience thus far in the past four years shows that
7 those efforts will continue to be unsuccessful. And
8 even if the CGR was able to locate any assets,
9 attaching those assets is another matter entirely as
10 the CGR relies on cooperation mechanisms that are
11 ill-suited for such purpose in most cases. There is
12 currently no attachment proceeding abroad either
13 upcoming or ongoing.

14 As such, none of Claimants' assets are in
15 any threat of harm. Not a single asset. 



16
17
18
19 The worldwide campaign of litigation that
20 Claimants believe threatens them is an absolute
21 fantasy. The CGR must carry out any collection
22 efforts of the Ruling with Fiscal Liability in

1 accordance with the provisions set forth in the
2 relevant Colombian laws and regulations and simply
3 does not have authority to embark on a worldwide
4 litigation campaign against Claimants.

5 Even if the CGR manages to attach any of
6 Claimants' assets, either in Colombia or abroad,
7 during the forced collection proceeding, it may only
8 auction those assets after the courts of the
9 administrative, adjudicatory jurisdiction rule on any
10 annulment actions initiated by Claimants against the
11 Ruling with Fiscal Liability. Claimants' Witness
12 Statement--Claimants' Witness, sorry, Mr. Cesar
13 Torrente--

14 REALTIME STENOGRAPHER: Could you slow down
15 just a little bit, please. Thank you.

16 MS. BOTERO: Yes.

17 Claimants' Witness, Mr. Cesar Torrente,
18 acknowledged as much in his First Witness Statement
19 declaring that, and I quote, "the CGR will have to
20 wait for a final judicial decision in order to sell
21 and/or liquidate FPJVC's assets." According to
22 Claimants' own witness, a judicial decision would take

1 between five to 12 years, which means that the
2 eventual sale of any assets is by no means imminent.

3 If all that weren't enough, the collection
4 efforts are in their early stages, and even though the
5 Ruling with Fiscal Liability has become final at the
6 administrative level, Claimants have recourse under
7 Colombian law to challenge it and to seek a stay of
8 enforcement. On your screen, we have included a
9 flowchart in which you can see all the different
10 steps, both at the administrative and judicial levels,
11 following a final Ruling with Fiscal Liability. The
12 purple star marks where we are right now. The CGR
13 recently issued voluntary collection notices. The
14 Forced Collection Proceeding will only start after the
15 completion of the voluntary collection stage which may
16 last up to three months. As you can see, the Forced
17 Collection Proceeding has many steps, including
18 several opportunities for a debtor to resist
19 enforcement.

20 In this morning's presentation, Claimants
21 included a screen-shot of a diagram that was included
22 in Respondent's Memorial on Preliminary Objections.

1 Claimants focused on a dotted line in that graphic to
2 argue that the collection proceeding is a separate
3 proceeding from the Fiscal Liability Proceeding. As
4 we already mentioned, the collection proceeding is
5 merely a stage, or as Mr. Sills called it this
6 morning, a "phase" of the Fiscal Liability Proceeding.
7 Respondent explained this very clearly in Paragraph 89
8 of its Memorial on Preliminary Objections, which I
9 would like to quote for you, and here I'm quoting:
10 "Broadly speaking, the Fiscal Liability Proceeding
11 consists of five stages: (a) the preliminary
12 investigation, (b) the initiation stage, (c) the
13 indictment stage, (d) the ruling and administrative
14 remedy stage and with respect to Rulings with Fiscal
15 Liability, (e) the judicial control stage and the
16 Forced Collection stage."

17 Let's not get caught up in semantics. The
18 reason why we call it "Forced Collection Proceeding"
19 is because the name of the phase in Spanish is
20 "procedimiento de cobro coactivo."

21 Back to the slide on your screen, I want to
22 point you to the green box on the right-hand side

1 which represents the judicial control of the Ruling
2 with Fiscal Liability which will proceed in parallel
3 before the courts of the administrative, adjudicatory
4 jurisdiction. Only after the courts of the
5 administrative adjudicatory jurisdiction have finally
6 ruled on any annulment actions against the Ruling or
7 the Resolution ordering the auction and sale, will the
8 CGR proceed to sell any assets that have been
9 attached. As we've said, final judicial decisions may
10 take five years or more.

11 During the annulment action, Claimants may
12 request a stay of the Forced Collection Proceeding as
13 a precautionary measure. Contrary to Claimants'
14 allegations, such stay would not require Foster
15 Wheeler or Process Consultants to offer a bond. The
16 alleged harm Claimants seek to prevent with their
17 Provisional Measures Application is by no means
18 imminent or real, making the Provisional Measures
19 neither urgent nor necessary. The Tribunal cannot
20 grant the extraordinary relief that is Provisional
21 Measures based on mere conjectures of hypothetical
22 harm.

1 As the Tribunal in Occidental indicated, and
2 I quote: "Provisional Measures are not meant to
3 protect against any potential or hypothetical harm
4 susceptible to result from uncertain actions. Rather,
5 they are meant to protect the requesting Party from
6 imminent harm."

7 Claimants have also failed to meet their
8 burden of proof of showing that there is a prima facie
9 basis for the Tribunal's jurisdiction. To satisfy
10 this requirement and establish the Tribunal's prima
11 facie jurisdiction, Claimants must do more than simply
12 bring proceedings against Colombia. As Respondent
13 explained in detail in its Memorial on Preliminary
14 Objections, the Tribunal does not have jurisdiction
15 over this case.

16 First, Claimants did not comply with the
17 requirements established in Article 10.16.1 of the
18 Treaty for submitting a claim to arbitration
19 thereunder: There is no breach of a substantive
20 obligation of the Treaty, and an investment--or an
21 Investment Agreement, and Claimants have not incurred
22 any loss or damage for a reason of or arousing out

1 of--arising out of that breach. In fact, the
2 Provisional Measures Application highlights the
3 absence of an actual loss or damage arising out of the
4 Fiscal Liability Proceeding, as the interim relief
5 Claimants seek is aimed at preventing the supposed
6 loss or damage that could stem from the enforcement of
7 the Ruling with Fiscal Liability.

8 Second, Claimants do not have a qualifying
9 investment under the Treaty and the ICSID Convention
10 because a Services Contract, as an ordinary commercial
11 contract, does not qualify as an investment under
12 Article 25 of the ICSID Convention.

13 Third, Claimants--Claimant FPJVC does not
14 qualify as a national of another Contracting State
15 under the ICSID Convention because FPJVC is not a
16 juridical person.

17 Fourth, Claimants Foster Wheeler and Process
18 Consultants did not send a Notice of Intent to submit
19 the present dispute to arbitration in violation of
20 Article 10.16.2 of the Treaty.

21 Fifth, Claimants did not formally or
22 materially comply with the waiver requirement to

1 submit a claim to arbitration under the Treaty.

2 Claimants have also not made a showing of a
3 prima facie case on the merits, which is a requirement
4 to obtain interim relief. In its October 28
5 submission, Colombia analyzed each of Claimants'
6 claims. To summarize, Claimants' FET claim is
7 baseless because, one, the Treaty's FET standard only
8 protects Investments and not investors, and all of
9 Claimants' Claims are based on alleged acts,
10 omissions, and conduct by Colombia that would have
11 affected only investors.

12 Two, under the Treaty, the FET standard is
13 limited to the minimum standard of treatment under
14 customary international law, and none of Claimants'
15 allegations are capable of violating the minimum
16 standard of treatment.

17 And three, there cannot be a denial of
18 justice because Colombian courts haven't had yet the
19 opportunity to review the Ruling with Fiscal
20 Liability.

21 Claimants have also not made a prima facie
22 case of expropriation because the two contractual

1 rights that they were supposedly deprived of are not
2 capable of being economically exploited independently
3 and separately from the rest of the Services Contract,
4 and thus cannot be expropriated.

5 Claimants' claim that Respondent violated
6 the national-treatment obligation is also bound to
7 fail because the Indictment Order as well as the
8 Ruling with Fiscal Liability that was issued after
9 this Arbitration was initiated, involved both
10 nationals and foreigners, and the challenged measure
11 on its face does not appear to favor nationals over
12 non-nationals.

13 Claimants have not made a prima facie case
14 of violation of the most-favored-nation clause. The
15 MFN obligation is a standard of treatment. And
16 Claimants have failed to show prima facie an actual
17 factual scenario in which third country investors were
18 accorded more favorable treatment in like
19 circumstances than U.S. investors like Claimants.
20 Even arguendo, if the MFN provision of the Treaty
21 would allow the importation of more favorable
22 provisions from other treaties, Claimants' attempt to

1 import an umbrella clause from the
2 Colombia-Switzerland BIT would still fail. The
3 Colombia-Switzerland BIT does have an umbrella clause
4 but expressly indicates that the Contracting Parties
5 do not consent to arbitrate disputes under that
6 umbrella clause. Therefore, importing the umbrella
7 clause, as Claimant requests, would put them in a
8 better position than Swiss investors, distorting the
9 purpose of the most-favored-nation obligation.

10 Finally, there could not have been a breach
11 of an Investment Agreement as Claimants also
12 confusingly argue since the Treaty does not grant the
13 Tribunal jurisdiction to hear alleged contractual
14 breaches, and in any case no investment agreement
15 prima facie exists.

16 In addition, Respondent does not
17 want--sorry. Respondent does want to stress the fact
18 that Claimants have not established that they have a
19 right to the relief they seek. Claimants ask that the
20 Tribunal award them moral damages, injunctive relief,
21 and an offsetting Award, but as Respondent explained
22 in depth in its Memorial on Preliminary Objections,

1 under Article 10.26 of the Treaty, this Tribunal may
2 only order that Colombia compensate monetary damages.

3 Claimants have also not satisfied the
4 fourth requirement for obtaining interim relief. Not
5 only would the Provisional Measures requested
6 prejudice Respondent by impinging on its sovereign
7 right and its obligation to enforce its own laws, but
8 would also affect third parties, namely the other 14
9 fiscally liable Parties under the Ruling with Fiscal
10 Liability which, as we have explained, are jointly and
11 severally liable alongside Foster Wheeler and Process
12 Consultants. Issuing the Provisional Measures
13 requested by Claimants would mean that the enforcement
14 of the Ruling with Fiscal Liability would be limited
15 to the remaining fiscally liable Parties excluding
16 Claimants affecting those third parties.

17 Lastly, granting the Provisional Measures
18 Application would cause the Tribunal to pre-judge the
19 merits. The interim relief they seek is exactly the
20 same as the relief they requested in their Notice of
21 Arbitration, an injunction preventing the CGR from
22 enforcing the Ruling with Fiscal Liability. With

1 their Provisional Measures Application, Claimants are
2 plainly seeking to obtain the ultimate relief they are
3 pursuing without having to prove their case on the
4 merits. Granting the Provisional Measures requested
5 would award Claimants the ultimate relief they seek in
6 the Arbitration effectively pre-judging the merits of
7 this case.

8 Actually, Colombia wonders if having the
9 Tribunal pre-judge the merits of the dispute is not
10 what Claimants wanted all along. Their Provisional
11 Measures Application of September 2 is a poorly
12 disguised Memorial on the Merits, Witness Statements
13 and all. Claimants devoted half of their initial
14 submission to discussing in detail the alleged
15 breaches of the Treaty by Respondent. Claimants even
16 attached the expert testimony of Mr. Colin Johnson,
17 who acted as their independent expert witness in the
18 Fiscal Liability Proceeding, and use his testimony
19 here to criticize the damage calculation methodology
20 employed by the CGR. The Tribunal cannot allow such a
21 blatant attempt to circumvent its Decision to
22 bifurcate the proceedings and rule on Respondent's

1 preliminary objections as a preliminary question.

2 In conclusion, Claimants' Provisional
3 Measures Request must fail because Article 10.20.8 of
4 the Treaty prohibits the Tribunal from granting
5 interim relief enjoining the application of a measure
6 alleged to be in breach of a treaty. But even in the
7 unlikely event that the Tribunal were to somehow
8 conclude that the prohibition in Article 10.20.8 does
9 not apply in this case, Claimants' Provisional
10 Measures Application must be rejected because
11 Claimants have failed to prove each one of the five
12 cumulative requirements for granting Provisional
13 Measures. Provisional Measures under the ICSID
14 Convention are reserved for situations where there is
15 an absolute necessity and urgency to prevent
16 irreparable harm. There is nothing in this case to
17 warrant such an extraordinary remedy.

18 One final thought on costs. Claimants have
19 made a completely frivolous application patently
20 outside the scope of the Tribunal's authority under
21 Article 10.20.8 of the Treaty. They have forced
22 Colombia to spend two entire months responding to

1 their submissions on emergency and interim relief,
2 even though the Provisional Measures they seek are not
3 only baseless, given the clear language of the Treaty,
4 but also unwarranted under the circumstances of this
5 case. Colombia has had to review Claimants' extensive
6 submissions, exhibits on Legal Authorities, as well as
7 four Witness Statements, write a handful of letters on
8 procedural and substantive matters, file three full
9 pleadings on Provisional Measures and prepare a
10 hearing on Claimants' application for interim relief.
11 The time Colombia has spent in this futile matter has
12 deprived Respondent of precious time to prepare its
13 Reply on Preliminary Objections which is due in only
14 five weeks. Claimants submitted their
15 Counter-Memorial on Preliminary Objections on
16 October 14, which means that, for the past three
17 weeks, Respondent's team has not only--has not been
18 able to focus on its upcoming submission.

19 For these reasons and given the frivolous
20 nature of their application, Claimants should bear all
21 costs and expenses of this interim relief phase,
22 including Respondent's attorney's fees.

1 This concludes Respondent's oral argument.
2 Thank you very much.

3 PRESIDENT NUNES: Thank you, Ms. Botero.

4 Now I would like to ask my colleagues if
5 they would like to make any questions, to ask any
6 questions to the Parties now or wait until they finish
7 their--(coughing) sorry, excuse me--if we wait until
8 they finish their rebuttals.

9 ARBITRATOR KOHEN: No question,
10 Mr. President.

11 PRESIDENT NUNES: Thank you, Marcelo.
12 John?

13 ARBITRATOR BEECHEY: Not for me either,
14 Mr. President.

15 PRESIDENT NUNES: So, we have a 15-minute
16 rebuttal by Claimants.

17 REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANTS

18 MR. SILLS: Thank you. Thank you, Mr.
19 President.

20 I find it rather striking that, given
21 Colombia's position, incorrect position, that we're
22 seeking pre-judgment of the merits and that the

1 Tribunal should not delve into the merits, so much of
2 the presentation we just heard is devoted to a summary
3 of Colombia's preliminary objections, which have been
4 presented to the Tribunal, which have delayed these
5 proceeding, which we have answered, and
6 assertions--and they're only assertions--that there's
7 something materially deficient in the case we brought.
8 We will rest on our papers on that.

9 It's abundantly clear that we stated a more
10 than valid case, that what happened to our client in
11 Colombia before the CGR was an outrage to due process,
12 that it was pre-determined, and that the Award, which
13 we have just been told is USD 997 million, although
14 that's not what it says, it cannot in fairness be the
15 subject of collection proceedings.

16 I was also struck by the notion that having
17 a sovereign government chasing our clients around the
18 world, trying to collect a billion dollars from them
19 would somehow not cause any harm to our clients. 



22 I think it's also noteworthy what wasn't

1 said in this very involved presentation we just heard,
2 and that is there was no reference to any case being
3 brought outside of Colombia. The entire presentation
4 was focused on Colombia's attempt to revise the chart
5 that we showed in our presentation-- I suppose opposed
6 by changing a dotted line and two arrows to a purple
7 star-- but that both presentations, despite the slight
8 graphic change, make it abundantly clear that we're
9 talking about two separate proceedings. And we're not
10 seeking ultimate relief. If Colombia were somehow to
11 prevail on the merits in the Arbitration, it would be
12 free to go ahead and attempt to collect this Award.

13 So, the harm to Colombia is simply having to
14 wait. But what they don't say is--and they don't
15 address--is the harm that will come from what I think
16 we've just heard is a worldwide campaign that they're
17 contemplating. They say it's slow to get going, that
18 it's only underway, that it might take four or five
19 years. What they don't say is that they're not
20 trying. And the fact that they're not succeeding
21 doesn't have really anything to do with the
22 appropriateness of granting Interim Measures. And

1 those proceedings that they are threatening, that they
2 just told us they're going to be bringing, will
3 directly impinge on the jurisdiction of this Tribunal.

4 Let me give an example. [REDACTED]

5 [REDACTED] If Colombia goes to a
6 U.S. court to attempt to collect any or all of this
7 Award, our response, as one might expect, will be, in
8 significant part, that the underlying proceeding is
9 not entitled to recognition in the U.S.; that it's not
10 entitled to the benefits of comity because it is an
11 outrage to due process because our rights were not
12 protected procedurally or substantively. And that
13 will put before a U.S. court precisely the issues that
14 we have put before this Tribunal so that allowing
15 Colombia to rove around the world attempting to
16 enforce this Award in separate proceedings before the
17 national courts of the U.S., where my clients have
18 significant assets; in the UK; in Switzerland or
19 anywhere else they care to bring this campaign, will
20 directly threaten the exclusive jurisdiction of the
21 Tribunal over this dispute.

22 And there wasn't a word said about those

1 proceedings. All we heard about was the attempt to
2 revise the presentation that we showed that there are
3 two proceedings involved here. There is the Fiscal
4 Liability Proceeding, which is now concluded; and
5 there is the new Enforcement Proceeding. Within
6 Colombia, these are two separate proceedings. Outside
7 of Colombia, these are two or three or 10 or 20
8 separate proceedings. And that whirlwind of
9 litigation that is apparently coming our way absent
10 Interim Measures could be designed for only one
11 purpose, which is to create so much risk of having to
12 pay up on an unjust award that my client will be
13 forced to the table or--and [REDACTED]
14 [REDACTED] before we have had a chance to present to
15 this Tribunal our case that this proceeding, CGR
16 proceeding, violated numerous rights, substantive and
17 procedural, under the Treaty. Those aren't ripe for
18 disposition yet. Colombia is right about that, but
19 this proceeding is where those should be heard, and
20 while this proceeding is being heard, this arbitration
21 is going forward, Colombia should not be free to rove
22 around the world looking for assets [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 Now, with respect to the Claims that were
4 made in the latter part of this presentation that this
5 was no big deal, that there was no harm coming our
6 way, it is simply not the case--and Mr. Torrente's
7 Witness Statement makes it very clear--that assets
8 could be frozen under Colombian law. And it is not
9 true, as he also explains, that there would be a stay
10 of proceedings without a bond. The Application can be
11 made without a bond in Colombia for a stay--and I will
12 turn in a moment to the significance of the
13 availability of that Colombian proceeding--but
14 Colombia would be free to enforce the CGR Award in
15 Colombia, and the only way to halt the seizure and
16 sale of those assets would be by putting up a bond,
17 which I believe would have to be equal to 150 percent
18 of the amount awarded or roughly, well, using,
19 Colombia's number, about USD 1.3 billion.

20 But I think the key point here is Colombia
21 is telling two different and contradictory stories at
22 once. That there is no threat. That their campaign is,

1 if anything, just getting going. That they face these
2 barriers to success. And at the same time they demand
3 the right to go forward.

4 We invited them, before bringing these
5 proceedings, to agree to a stay and to meet with us
6 and discuss the parameters of a stay, and we were
7 simply told that Colombia would act in accordance with
8 its laws. Fair enough. And then we brought these
9 proceedings. But if they really mean what they have
10 just taken most of the morning saying, that there is
11 no threat here because there is nothing really
12 happening, let them give an undertaking that they
13 won't bring these separate proceedings and we can all
14 go home.

15 The vigor with which they assert their right
16 to bring these proceedings directly contradicts their
17 claim that there is nothing here, and they can't have
18 it both ways. If they want this right, and they're
19 going to pursue my client, then they're subject to a
20 restraint.

21 Now, with the cases they cite--and the
22 Tribunal will form its own view about the scope of

1 Article 10.20.8--each one of those cases involved the
2 core of what was challenged. The slide that was put
3 up with the quote from Mr. Vandeveld's treatise on
4 Bilateral Investment Treaties makes that point. It
5 says: "A tribunal would not have"--and that's their
6 Slide No. 8--"A tribunal would not have the authority
7 to order a host State not to enact or not to enforce a
8 law." Well, our application does not seek to have
9 Colombia enact or not enforce its law, however much of
10 an outrage to international law their conduct is. And
11 then says it's based on Article 1135 of NAFTA, and
12 says "it responds to concerns raised by critics that
13 investor-State arbitral tribunals would have the power
14 to invalidate U.S. law or overrule decisions of U.S.
15 courts." For those who follow U.S. politics, the claim
16 that ICSID tribunals are secret courts that will
17 somehow interfere in U.S. policy.

18 We're not asking that. We're not asking for
19 an injunction against Law 610. We're not asking that
20 Colombia's Congress be directed to repeal Law 610.
21 We're not asking for an injunction that the CGR act in
22 accordance with Law 610 and not proceed against an

1 entity that's not a fiscal manager. We're not asking
2 for an order directing that the CGR recognize minimal
3 standards of due process, in terms of hearing
4 evidence, in terms of excluding evidence, in terms of
5 not following retroactive--applying retroactively a
6 statute. None of that is at issue here. What's at
7 issue is, whether or not, in the interest of fairness,
8 preserving the rights of the Parties, my clients are
9 entitled to an order stopping the enforcement through
10 separate proceedings. And if I made a slip of the
11 tongue and said phase at one point in my presentation,
12 I apologize, but there's--these are separate
13 proceedings. Their own submission makes that clear.

14 There is no reason to deny that relief.
15 There is nothing on the face of the Treaty that
16 prevents this tribunal from exercising its powers,
17 going back to Electricity Company of Sofia and
18 continuing to Merck versus Ecuador or all the cases
19 that we cited, stopping the enforcement of unjust
20 measures in take--unjust decisions taken in violation
21 of international law. That's all we ask you. We're
22 not seeking--Colombia can adopt what rules it seeks,

1 and we do not dispute that the Tribunal lacks power to
2 enjoin those rules as rules. But the Tribunal has
3 ample power to enjoin the enforcement of a judgment or
4 award following those rules in separate proceedings.

5 And I have to say changing a line to a star
6 doesn't really change anything at all. It's quite
7 clear that even on the single Colombian proceeding,
8 which was the entire subject matter of the

9 presentation we've heard, it's a separate proceeding.

10 There isn't even an attempt to argue that proceedings

11 outside of Colombia through foreign courts or, for

12 that matter, proceedings within Colombia before the

13 Colombian courts somehow are excluded from this

14 Tribunal's remedial powers by Article 10.20.8. It's

15 an exception to the general rule. The way they

16 construe it, as if anything even touching on a

17 challenged measure somehow falls within the scope of

18 the exclusion, is simply wrong. It's wrong as a

19 matter of linguistics; it's wrong as a matter of the

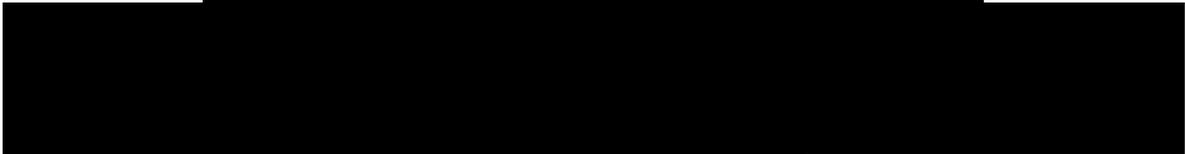
20 history of the proceeding; it's wrong as their own

21 authorities say is the purpose of the treaty

22 provision.

1 With regard to urgency, I know that--with
2 regards to urgency, it has simply a different meaning
3 here. It means relief that cannot wait until the
4 Final Decision. I mean that's clear from Perenco and
5 all the other cases we have cited. The cases they
6 rely on all involve precisely what we agree the Treaty
7 concerns, which is, in effect, a directive to change
8 the measure being challenged. What we've challenged
9 here is the CGR proceeding. What we ask be enjoined
10 are the separate proceedings that Colombia is, after
11 listening to their presentation, on the brink of
12 commencing, to enforce that before this Tribunal has a
13 chance to rule on the merits.

14 And there is a final point I would like to
15 make. The presentation conflates the auctioning of
16 seized assets from the freezing or seizure of those
17 assets. 

18 
19 
20 But again, I
21 think there is no reason to reach that because the
22 injunction against enforcement that we seek is amply,

1 comfortably within the scope of the Treaty. It's
2 amply and comfortably within the scope of the dozens
3 of cases that have granted injunctions against the
4 enforcement of administrative, tax, or judicial
5 decisions of countries that have violated their
6 international-law obligations, and the exception here
7 does not control.

8 Unless the Tribunal has any further
9 questions, that concludes our rebuttal, Mr. Chairman.

10 PRESIDENT NUNES: Thank you, Mr. Sills.

11 Mrs. Frutos-Peterson, are you ready for your
12 surrebuttal?

13 MRS. FRUTOS-PETERSON: Yes, Mr. President.
14 Thank you.

15 REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

16 MRS. FRUTOS-PETERSON: I want to start by
17 saying--I will not take too long. I think our case is
18 very clear. Our arguments are very clear not only in
19 our written submission but also in our oral argument.
20 I will just take a few ideas that I heard here today
21 from counsel for Claimant, just to clarify certain
22 points or even rebut some of the points that they are

1 making in their presentation.

2 First, I would like to start by saying that,
3 as you probably noticed, Claimants do not put any
4 efforts in trying to discuss Article 10.20.8, the
5 second sentence of the provision. And then when they
6 tried to say something about it, they are trying to
7 now indicate that what they referred to as a different
8 proceeding--we heard that a lot this morning--and I
9 think they are linking that different process to the
10 collection process.

11 So, by the way, Members of the Tribunal, if
12 you look at Claimants' Application for Provisional
13 Measures, you will see clearly that their request was
14 to enjoin the enforcement of the Decision, of the
15 Ruling with Fiscal Liability. After that, when they
16 presented their Reply to their emergency application,
17 they made a slight difference in their request. They
18 did not--they still continue to refer to the
19 enjoinder of the Decision or as we call it the Ruling
20 with Fiscal Liability, but they created this argument
21 now that it's not per se the enforcement of the
22 Decision but it's the process, it's the collection

1 process, and the collection process is different.

2 I hope that it is clear for the Members of
3 the Tribunal, in our submissions and with our oral
4 presentation today, that is not a different process as
5 they want you to believe. It is an integral part of
6 the Fiscal Liability Proceedings. It's the first
7 stage in that process.

8 I think what the confusion here or--I mean,
9 if there is any confusion or that's the argument of
10 Claimant says that they are trying to make the
11 division where there is none. If they are complaining
12 before this Tribunal about alleged violations of the
13 Fiscal Liability Proceedings, of course, the natural
14 consequence of that Fiscal Liability Proceedings is
15 the ruling, and implementing the ruling means
16 collecting--applying the Fiscal Liability Proceedings,
17 as you see it on the slide here, as we presented to
18 you today, means collecting the amount set forth in
19 the ruling.

20 So, the problem that Claimants has is that
21 it's the same Measure. And if it is the same Measure,
22 then there is a clear prohibition under the Treaty.

1 Claimants claim to you, invoking the Arbitration
2 Clause that is in the Treaty by bringing an
3 arbitration against Colombia, they are accepting all
4 the rules, all the provisions that are included in the
5 Treaty. Article 10.20.8(ii) is part of the Treaty.
6 There is no way to turn around. So the Measure that
7 they're seeking here is the effect--I'm sorry, the
8 Decision--the Decision they are trying to prevent from
9 enforcement is the natural effect, is the consequence,
10 the natural effect of the Fiscal Liability Proceeding,
11 okay?

12 Let's assume that there was not a Ruling
13 with Fiscal Liability. They will not be here;
14 correct? So, this is why it is so clear--you know, it
15 is so clear--that we're talking about the same
16 Measure.

17 Let me just go back to my notes, and I'm
18 sorry because I'm having trouble here. I don't know
19 how to get back here. Okay. Thank you.

20 So, another point that I really want to make
21 clear to the Tribunal, with all due respect,
22 Respondent is not changing its argument. Colombia has

1 been very emphatic and very consistent in our defense
2 here. Colombia's law especially set forth how the CGR
3 may go about collecting an amount in a Ruling with
4 Fiscal Liability. Under Colombian law, the CGR will
5 renew its search for assets and eventually attempt to
6 attach those assets. However, the law alone, by
7 itself, does not put Claimants in threat or harm.

8 And I want to talk about that because there
9 is no necessity and urgency to avoid an irreparable
10 harm in this case. Even assuming that Claimants can
11 escape the second part of Article 10.20.8 of the
12 Treaty, which we submit to you that they cannot
13 because we just showed you how it's exactly the same
14 Measure, but even assuming that you consider that is a
15 separate proceeding, as Claimant likes to present it
16 to you, we said that there are not--they don't comply
17 with the test for Provisional Measures, and they don't
18 comply because they like to come to you and repeat
19 again and again that there is this chasing around the
20 world, you know, to try to attach their assets around
21 the world. They haven't shown to you any single
22 processes, any single proceedings where Colombia is

1 seeking attachment of assets.

2 We have explained to you the process for the
3 enforcement collection. We have explained to you how
4 Claimants have remedies--not only administrative
5 remedies but also judicial remedies--that they can
6 access under Colombian law in order to attack, if they
7 wish, the enforced collection part of the process.
8 So, but they haven't shown you any Attachment
9 Proceedings that Colombia is now going to try to
10 attach the Claimants' assets.

11 So, we are not hiding that that is a normal
12 consequence of the process. No. It's the regular,
13 natural thing. So, if there is a ruling, the next
14 step in the ruling is to enforce that ruling, and as
15 part of the enforcement of the ruling, you will see
16 collection processes, whether domestically or
17 internationally.

18 First, Colombia will have to locate assets.

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I mean, for the past

1 four years they haven't found anything, so I honestly
2 don't think --what are we discussing here because
3 there is clearly not imminent harm for the Claimants
4 in this case.

5 I think I have covered--let me just check
6 with my colleagues, but I think I have covered all the
7 points that I really wanted to discuss in our
8 rebuttal.

9 I think there is one last point that I just
10 want to mention. They made a claim this morning--or
11 they presented to you this concern that they have
12 about the waiver, and they discussed the provision in
13 the Treaty. I don't have it in front of me, but I was
14 just looking at the waiver provision as indicated
15 by--thank you, Maria Paulina--as indicated by the
16 Treaty. I mean, they stop on the second paragraph,
17 but if they continue reading on the third paragraph,
18 you can see that "notwithstanding paragraph 2(b), the
19 claimant [...]may initiate or continue an action that
20 seeks interim [injunctive] relief and does not involve
21 the payment of monetary damages before a judicial or
22 administrative tribunal of the respondent, provided

1 that the action is brought for the sole purpose of
2 preserving the claimant's or the enterprise's rights
3 and interests during the pendency of the arbitration."

4 So, we don't see how Claimants could shield
5 themselves from saying that there will be a problem if
6 they access the administrative remedies or the
7 judicial remedies that they have under Colombian law.

8 Meaning--and I think this is where I was
9 going--meaning that they could go ahead and ask for
10 the Stay of Enforcement before Colombian courts, which
11 is--actually, we said it in our papers and in our
12 presentation today--which is also possible, you know,
13 under the annulment remedy that the Claimants will
14 have under Colombian law.

15 I think, Members of the Tribunal, those are
16 the points that I wanted to cover on rebuttal. I
17 think our submissions are very clear, and, I think,
18 you saw our presentation. If you have any questions,
19 for us, of course we are here, available to answer
20 them. Thank you so much.

21 PRESIDENT NUNES: Thank you,
22 Mrs. Frutos-Peterson, for your comments.

1 I think, in terms of presentations and
2 rebuttals, we are done.

3 Now, the last slot of our hearing today is
4 the allocation of time for questions by the Tribunal.
5 Let's start with Mr. Beechey.

6 Do you have any questions?

7 ARBITRATOR BEECHEY: If I may,
8 Mr. President.

9 QUESTIONS FROM THE TRIBUNAL

10 ARBITRATOR BEECHEY: Mr. Sills, so there is
11 absolutely no doubt about it at all, would you be kind
12 enough to look at Article 10.20.8 of the TPA? And so
13 there is absolutely no doubt about this whatever,
14 looking at the sentence which is at the heart of the
15 debate we've had today, "A tribunal may not order
16 attachment or enjoin the application," and then comes
17 "of a measure alleged to constitute a breach referred
18 to in Article 10.16."

19 To be absolutely clear, what do you say is
20 the Measure alleged to constitute a breach referred to
21 in Article 10.16?

22 MR. SILLS: The CGR Decision.

1 (Overlapping speakers.)

2 MR. SILLS: And I should say the CGR
3 proceeding that led up to it.

4 ARBITRATOR BEECHEY: Yes.

5 So, I'm correct to understand your position
6 to be that there is a very clear, bright line between
7 any interim measure which might be said to go to that
8 decision itself which you would say, as I understand
9 it's common ground, is properly the substantive
10 dispute before this Tribunal to resolve ultimately,
11 and the attempt that might be made to enforce results
12 of--enforce that decision on a wider stage? That's
13 the bright line you draw, isn't it?

14 MR. SILLS: I suppose there could be a
15 dotted line as well, but, yes, that's exactly right.

16 I'm sorry, that was a poor attempt at a
17 joke.

18 ARBITRATOR BEECHEY: That's all right.

19 MR. SILLS: Yes, that's exactly right. That
20 it's between the Measure we challenge--

21 ARBITRATOR BEECHEY: Yes.

22 MR. SILLS: --and the separate Enforcement

1 Proceedings.

2 Most strikingly, Mr. Beechey, with respect
3 to the foreign proceedings that they're threatening,
4 but with respect to any enforcement proceeding because
5 enforcement--every lawyer is different from
6 establishing liability, and there are two different
7 things, there are two different proceedings, and
8 you're exactly right, that's the line we draw, and we
9 think it is a bright line.

10 ARBITRATOR BEECHEY: All right. And it was
11 suggested a few moments ago in surrebuttal that it is
12 open to your clients to apply to the courts in
13 Colombia for some sort of stay of these Enforcement
14 Proceedings. Is that a step that is being considered,
15 contemplated? And if it has been and it's not been
16 pursued, why is that?

17 MR. SILLS: That is a misstatement of
18 Colombian law, but with the Tribunal's permission,
19 Mr. Beechey, I would ask my colleague, Mr. Conrad, to
20 address that.

21 ARBITRATOR BEECHEY: Thank you.

22 MR. CONRAD: Thank you, Mr. Beechey and

1 Members of the Tribunal, Counsel.

2 The issue is as far as timing of that is not
3 ripe quite yet. There is a proceeding or a time
4 period. We submitted as part of our jurisdiction
5 statement to the exclusive jurisdiction of the ICSID
6 Tribunal. One issue that I would tell you as far as
7 correction regarding pleadings from Colombia--and I
8 think they're in our pleadings as well-- as far as
9 that Contentious Administrative Court proceeding
10 basically seeking a nullification and a restoration of
11 rights on behalf of the respondents, and any
12 respondents are able to do it, but the only mechanism
13 and filing of that proceeding--and Colombia admits
14 this in their papers--is that it would stop an auction
15 of the assets not a seizure or freezing. And so,
16 there is no way to stop the freezing or seizing
17 without the posting of a bond, but I wanted to make
18 that point clear that it's separate and different from
19 what may be overlooked by Colombia by their
20 overemphasis only on the auction part of it, of
21 stopping that.

22 I hope that answers your question,

1 Mr. Beechey.

2 ARBITRATOR BEECHEY: Yes, it does. Thank
3 you very much.

4 One question, if I may, to
5 Ms. Frutos-Peterson: You were telling us, if I
6 understand it correctly, that there is no worldwide
7 attack, as it's being described, upon the assets of
8 Claimants--you said there is nothing here--but it is
9 clear there could be moves--and it's been said, and
10 you have told us, there has not yet been--sorry, no
11 assets have yet been found, there has been nothing so
12 far that's both in Colombia and overseas. Assume for a
13 moment it's right that it's not a question-- so much a
14 question of any ultimate nailing down of any assets
15 but in the meantime there is an opportunity for
16 freezing orders of very substantial sums. And assume
17 against you--and I ask you to accept it as an
18 assumption--that the harm that will be caused by any
19 such action could not be remedied ultimately in
20 damages were the Tribunal to determine that Colombia
21 should not have taken the steps it did, if that's
22 right and if it's accepted that the Tribunal

1 ultimately can consider the merits of the underlying
2 decision, is there any basis at all for inviting
3 Colombia to consider whether or not it would
4 voluntarily hold off until we've had an opportunity to
5 look at the merits of the underlying disputes,
6 assuming, first and foremost, assuming we have
7 jurisdiction to do so? So either until we have that
8 Decision on Jurisdiction finalized or until such time
9 as we consider the merits?

10 MRS. FRUTOS-PETERSON: Thank you,
11 Mr. Beechey, for your question.

12 I think a quick answer will be,
13 unfortunately, "no" because the CGR, of course, is an
14 independent, you know, agency or institution, if I can
15 call it that way, from the Government. So, as such,
16 it has an obligation as well to enforce, you know,
17 Colombian laws and its regulations. And so they
18 will--or they are now actually doing that. I mean,
19 they need to continue with the processes as, you know,
20 Colombian law indicates that they should.

21 But let's be clear here. It's not that they
22 can go around the world and chase those assets as they

1 please. There is an external process, you know, as we
2 have shown to you; you saw it in our chart.

3 And by the way, the chart that is in our
4 Reply, it also has a star. We did not change the
5 stars for the dot-dot-dot line, so you saw within that
6 chart where we are. We are in the very early stage of
7 the whole process. This could take years.

8 At some point, yes, the CGR will start
9 seeking for assets, you know, to attach them; and, if
10 they found them, they can proceed with the attachment,
11 the Authorities can determine the attachment. But as
12 my colleague Elisa Botero explained when she was
13 explaining that chart to you, you know, those assets,
14 they're not going to be auctioned, you know, until all
15 the different stages in the process, including the
16 judicial remedies that Claimants have, you know, are
17 all--are completed, and the authority, the judicial
18 authority, indicates that it is possible to auction
19 the assets.

20 You know, so I would like you to remember
21 that part because, you know, we consider that is
22 extremely important. It's extremely important because

1 even if they were to find certain assets, you know,
2 and even if they could be able to attach them, you
3 know, we are still not in a phase where those
4 attachments will be auctioned. They cannot because
5 they have to--the whole process has to follow all the
6 different stages, if I can count them, if I can say it
7 that way.

8 So--but in connection with your main
9 question, which I think it is, that if Colombia will
10 be able to stop this until you have an opportunity to
11 look into this case, I think the answer is "no." As
12 we had indicated in our pleadings, the CGR could
13 not--I mean, Colombia could not do that because we're
14 talking here about an independent agency doing this
15 work under Colombian law.

16 ARBITRATOR BEECHEY: Thank you very much.

17 Thank you, Mr. President.

18 PRESIDENT NUNES: Thank you, Mr. Beechey.

19 Professor Kohen.

20 ARBITRATOR KOHEN: Thank you, Mr. President.

21 So, I have one question for each Party, and
22 a third one for both.

1 So, for Claimants, you considered that the
2 Enforcement Proceedings are different from the Fiscal
3 Liability Proceedings, and my question is: If they
4 are separate, if the Enforcement Proceeding is
5 separate from the Fiscal Liability one, does that mean
6 that you consider the Enforcement Proceeding as
7 falling beyond the scope of your claim? That's the
8 question for the Claimants.

9 MR. SILLS: The Claim that we allege,
10 Professor Kohen, does not, on its face, include these
11 Enforcement Proceedings. I mean, are they causally
12 linked in some sense to the proceeding? Obviously so.
13 Mrs. Frutos-Peterson said they were the natural
14 consequences or the natural effect. But I think the
15 point here is that we're talking not so much about the
16 concept of whether it's part of the Claim but whether
17 or not it's the Measure--it's the application of the
18 Measure challenged because that's the treaty language
19 that Colombia relies on. So I--we wouldn't contend,
20 of course, that the Enforcement Proceeding has nothing
21 to do with the underlying proceeding because otherwise
22 there would be nothing to enforce, but that is limited

1 language, and it's limited language--it doesn't say
2 "arising out of or related to." It doesn't say
3 "related in any manner whatsoever." And you have to
4 ask: Where would it end? Would it end with these
5 Colombian proceedings? That was the focus of
6 Colombia's presentation

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11 Those are all, in some
12 sense, natural consequences.

13 So, with respect, I think that conflates two
14 issues. It certainly is a natural consequence of a
15 finding of liability that there be Enforcement
16 Proceedings, but that doesn't answer the question of
17 whether or not those Enforcement Proceedings are
18 separate or, to put it another way, a separate measure
19 that don't fall within the exception set out in
20 Section 10.20.8 to the general principle that the
21 Tribunal has power to grant Interim Measures to
22 preserve the status quo, to prevent aggravation of the

1 dispute, to preserve its exclusive jurisdiction. And
2 so the answer is no.

3 Our Claim and the basis for the ultimate
4 relief we seek, an offsetting award, similar to the
5 offsetting award that was granted in the Glencore
6 case, which also arose out of violations of
7 international-law obligations by the CGR that those
8 are--excuse me one second--that is the relief we seek.
9 We seek this relief as an incident in order to
10 preserve our right to secure that ultimate relief, the
11 offsetting award, to prevent the aggravation of
12 dispute by increasing by orders of magnitude what's at
13 stake because [REDACTED]
14 [REDACTED] is much greater and more complicated and more
15 aggravating--and aggravated.

16 I hope that answers the question, because it
17 seems to me the question before the Tribunal is
18 whether or not the separate proceedings do or do not
19 fall within the exclusion in the second sentence of
20 this treaty provision we have all been talking about,
21 which turns in significant part on what does
22 "application of a measure" mean? And in all of the

1 cases cited by Colombia, that was this harm that's
2 talked about by Professor Vandeveld. That is, the
3 law-making by a tribunal or a respondent State.
4 That's not what we are asking here. We are asking for
5 a stay of enforcement pending a decision on the
6 merits. And either way, that stay, if granted, will
7 end with the Decision on the Merits. If we prevail,
8 then we no longer need interim relief because we will
9 have succeeded defending our rights. If somehow we
10 were to fail, then Colombia will be free at that point
11 to take that award around the world and try and
12 enforce it. We don't dispute that. But in the
13 interim, the Tribunal should be allowed to do its work
14 and hear this case and make a decision as to these
15 rights.

16 And with regard to the very last point, as a
17 matter of international law, Colombia is unitary. It
18 speaks for all of its agencies, judicial,
19 administrative, or even if they're characterized as
20 independent, so there is really no question that this
21 is relief that can be granted even though it's the CGR
22 whose conduct has brought us here because the CGR's

1 conduct is Colombia's conduct for purposes of
2 international law.

3 ARBITRATOR KOHEN: Just to understand well,
4 assuming that the Contraloría General de la República
5 goes ahead with the enforcement; assuming that the
6 Decision is enforced either in Colombia or elsewhere,
7 would you include the consequences of this in your
8 final Prayer for Relief, or not?

9 MR. SILLS: If they caused damage, we would,
10 I suppose, have a separate claim for that, but it's
11 not presently before the Tribunal and whether it would
12 be in the form of a separate proceeding or not, I have
13 to say I think it's premature. But it's not part of
14 our claim now, and we're trying to avoid aggravating
15 the dispute and turning that into a claim.

16 ARBITRATOR KOHEN: Okay. Thank you.

17 Now I have a question for the Respondent.

18 So, the Respondent alleges that if the
19 Tribunal decides to indicate the Provisional Measures,
20 this would prejudice third parties. That was the
21 wording employed. My question is: Would the third
22 parties be prejudiced or rather they would benefit

1 from a Decision on Provisional Measures by this
2 Tribunal as requested by the Claimants?

3 MRS. FRUTOS-PETERSON: Thank you, Professor
4 Kohen.

5 We submit to you that there will be--there
6 will be a prejudice against the third parties,
7 and--you know, what we meant by that is, as you know,
8 the Decision, the Ruling with Fiscal Liability, was
9 rendered not only against Claimants here, you know.
10 There are in total 16 Parties. So we believe that, by
11 preventing these Parties, you know, or if you were
12 to--I really don't know how because I just heard
13 counsel for Claimant explaining, you know, the
14 literally the link between those two, but anyway,
15 assuming that we are not in the exception of Article
16 10.20.8, the prejudice will be that those Parties will
17 be subject, you know, to the processes, and these
18 Claimants were not going to be subject to those
19 processes, so that's the prejudice that we see for the
20 third parties.

21 For the State, you know, we also see a
22 prejudice. You saw it in our papers because that will

1 mean that the State, as a sovereign entity, is not
2 allowed to execute--you know, to enforce its own laws.

3 So, I hope that that answers your question,
4 Professor Kohen.

5 ARBITRATOR KOHEN: Thank you.

6 Well, I have a question for both Parties,
7 and it's related of the legal nature of the FPJVC,
8 whether it is a corporation or juridical person, or
9 "persona juridica" in Spanish, or not. I wouldn't
10 like to have a discussion here on the issues of
11 jurisdiction because the matter is also relevant for
12 jurisdiction. But with regard to the specific problem
13 of Provisional Measures, what would be the impact with
14 regard to the Provisional Measures requested by the
15 Claimants of the fact that FPJVC is or is not a
16 corporation?

17 I hope my question is clear. It's for both
18 Parties.

19 MR. SILLS: I suppose, since FPJVC is a
20 claimant, we should go first on that.

21 FPJVC is not a corporation, but it is, under
22 the law under which it was created, a juridical entity

1 capable of suing and being sued. It's a New York
2 joint venture. And under New York law--I think
3 everyone will agree governs here--I think that's
4 common ground because that's the law under which the
5 joint venture came into being.

6 A joint venture is treated as a partnership.
7 It's a partnership organized for a particular purpose.
8 And as such, it can sue and be sued. For that matter,
9 it was--it was FPJVC that executed the underlying
10 Contract so many years ago which ultimately brought us
11 all here today. But joint ventures, under New York
12 law, have legal personality; can sue and be sued. And
13 there's of course no restriction under international
14 law that I know of that only corporations and natural
15 persons can be Parties. And, in fact, the Treaty
16 here, when it defines "investor"--and we go through
17 this in our papers, Professor Kohen--specifically
18 refers to a joint venture as an entity capable of
19 acting as an investor. I mean, that's clear on the
20 face of the Treaty.

21 So, I frankly don't see if there is any
22 serious basis for advancing the Claim that the joint

1 venture, although not a corporation, is not a proper
2 party here.

3 ARBITRATOR KOHEN: My question also aims at
4 establishing the impact of potential Provisional
5 Measures or not on assets of FPJVC and the Claimants
6 in general.

7 So, what would be the impact if Provisional
8 Measures are not granted or if--are not granted? What
9 would be the impact on assets?

10 MR. SILLS: Well, the assets are the assets
11 of the members of the joint venture; and a joint
12 venture, like a partnership, is not a limited
13 liability enterprise, but that doesn't mean that it's
14 not an entity. So, absent interim measures, Colombia
15 would be pursuing--or CGR would be pursuing--the
16 assets of the two members of the joint venture. If
17 our law firm were made a respondent in a Colombian
18 Fiscal Liability Proceeding and there would be an
19 award, my assets and Mr. Conrad's assets would be at
20 risk. We're partners in the firm. But that doesn't
21 mean that the firm doesn't exist for juridical
22 purposes.

1 So, I think the answer to your question is
2 the joint venture has no assets other than the assets
3 of its two members, and so the financial impact will
4 be felt by the JV but by the joint venture through its
5 members, and its members will, of course, suffer an
6 impact from their assets being seized and so on.

7 ARBITRATOR KOHEN: Thank you.

8 Respondent, please?

9 MRS. FRUTOS-PETERSON: Thank you, Professor
10 Kohen, for your question.

11 I want to start by saying two things:
12 First, you know, the--and I also have trouble
13 remembering the acronym--FPJVC is a contractual joint
14 venture. I'm not going to comment on the personality
15 of that or of FPJVC because I think that's one of our
16 allegations, you know, on jurisdiction. You know, you
17 have all our position and objections in our Memorial,
18 and I invite the Tribunal to go there.

19 But I think to answer quickly your question,
20 Professor Kohen, is that they are not a party of the
21 Fiscal Liability Proceedings, so, you know, the only
22 party to that process, you know, is Foster Wheeler and

1 Process Consultants, and that's it. So, they are not,
2 you know--the Authorities, of course, would not have
3 any say, in case --assuming that there were assets to
4 be attached on FPJVC.

5 But as I told you--I mean, if you go to the
6 Fiscal Liability Proceedings and also, you know, the
7 ruling, you will realize that they are not named
8 there.

9 Thank you.

10 ARBITRATOR KOHEN: Thank you.

11 Mr. President, I don't have any further
12 questions.

13 PRESIDENT NUNES: Thank you, Professor
14 Kohen.

15 I have one question for Claimant here. I
16 heard your comments early this morning about the
17 status quo, but I would like if you could at this
18 point elaborate a bit and be more precise in terms of
19 the status quo that would have to be maintained, not
20 aggravated, that you have in mind with the Measures
21 requested to the Tribunal, please.

22 MR. SILLS: Mr. President, right now there

1 is the CGR Award, and we are looking at--we have been
2 told--Enforcement Proceedings, and it sounds very much
3 as if they're building up a head of steam. So, the
4 risk to my clients is freezing, the seizing, and the
5 sale of their assets, and that's what we seek to
6 prevent. And I do think that, in crafting an Order
7 for Interim Relief, the Tribunal, this Tribunal,
8 should do no more than necessary.

9 So, for example, Colombia has spoken of its
10 efforts to identify assets. We don't seek relief
11 against that because their efforts to identify assets
12 that might--again, assuming we were not to prevail in
13 the underlying arbitration-- would be available, and
14 we would agree that Colombia, if it so chooses, should
15 be free to seek to identify assets, but that's where
16 the line should be drawn because a freezing order will
17 have the same devastating impact on our clients as the
18 sale of those assets because once they're frozen,
19 they're unavailable for use in the business. I put to
20 one side the impact on other companies. I mean,
21 there--these were companies in the construction
22 business, their assets are their working capital. So,

1 for example, and only one example, when they go to
2 seek a Performance Bond in connection with either
3 bidding on a job or getting the job, if those assets
4 were frozen, no issuer will look to those assets as
5 security for a bond.

6 So, the relief we seek, to be more precise,
7 is to draw the line at Colombia's efforts to identify
8 assets in Colombia or anywhere else. We don't ask for
9 a restraint against that because the identification of
10 assets doesn't threaten irreparable harm to us. But
11 if Colombia somehow prevails, then we would agree they
12 should have the benefit of being able to search for
13 assets now. We think it will come to nothing because
14 we expect to prevail in the Arbitration, and then this
15 issue becomes mooted. But if somehow it doesn't, they
16 would--they wouldn't have to start all over again when
17 the Final Award is issued. That line should be drawn.
18 They can't freeze, they can't seize, they can't
19 attach, and they certainly cannot sell. That should
20 wait until there is a decision on the merits.

21 And, of course, they shall be enjoined from
22 any coercive or turnover or freezing proceedings

1 before the courts of any other sovereign as well.

2 PRESIDENT NUNES: Okay. Let me go back to
3 one of your points raised now in response to my
4 question.

5 Is it correct my understanding that seizing,
6 freezing, and auctioning would have, from your
7 perspective, the same negative effect on Claimants,
8 even if the assets are not auctioned?

9 MR. SILLS: Well, not the same. If it's
10 sold, it's even worse, but the same in the sense that
11 it would cause immediate and irreparable harm to the
12 business of the Claimants--I mean, if someone said to
13 any businessperson, "Would you rather have your assets
14 frozen or sold," you would probably opt for freezing
15 because they might be unfrozen at some point and you
16 could salvage some value from it. But the fact of the
17 matter here is that the freezing would be so damaging
18 that it ought to be enjoined.

19 I mean, what we're trying--by drawing this
20 line, Mr. President, what I'm attempting to do is to
21 ask for as much relief as we need and no more. So,
22 you know, in the sense that execution is worse than

1 imprisonment, it's not the same, but it's over the
2 line in terms of damage to the business.

3 And Colombia has no meaningful claim of harm
4 if they can't get a freezing order during the pendency
5 of this action. And particularly in jurisdictions
6 that grant or waive an injunction, worldwide freezing
7 orders, the impact on a business of a freezing
8 order--I don't think there is any serious debate that
9 the impact of such an order is devastating. That's why
10 the courts of jurisdictions that have followed the
11 lead of England, and are willing to grant such orders,
12 are extremely cautious in granting them and look very
13 closely at the presentations that are made. Not just
14 the duty of full and fair disclosure but at the
15 underlying merits before granting them, precisely
16 because it's such a remarkably powerful tool in the
17 hands of a creditor.

18 And it's for that reason that other
19 jurisdictions, including--well, reasons why other
20 jurisdictions severely limit that kind of relief. But
21 that is relief that's available in many jurisdictions
22 around the world, including jurisdictions in which our

1 clients have assets. And, of course, a worldwide
2 freezing order is worldwide. So, if you do it in one
3 jurisdiction, it would bind the company everywhere.

4 So, I think--and I think the experience of
5 the business community with freezing orders is that
6 they're a very powerful tool; that they have to be
7 granted very cautiously, not in all circumstances; and
8 it is precisely because of the kind of harm that we're
9 talking about that they can cause.

10 So--and I apologize for this being such a
11 long answer, but it's a very important question.
12 Yeah, we think that freezing and seizing, which would
13 be the next step, you know, asserting some kind of
14 title or ownership interest, and then auctioning and
15 having the property be put into the hands of a third
16 party, is given value for it, those are escalating
17 harms, but we think the point stopping the process is
18 at the freezing stage. But as I say, we do not ask
19 for an order that would restrain Colombia from doing
20 whatever--well, doing--Colombia from taking reasonable
21 steps to identify assets that might someday be subject
22 to further coercive process.

1 MRS. FRUTOS-PETERSON: Mr. President, may I
2 say something? It's related to that question.

3 PRESIDENT NUNES: I will turn to you, but--

4 MRS. FRUTOS-PETERSON: Yes.

5 PRESIDENT NUNES: --I have a final question.

6 MRS. FRUTOS-PETERSON: Yes, thank you.

7 PRESIDENT NUNES: A further clarification
8 from Claimant.

9 So I understand what you said, I thank you
10 for the answer, but the question is the impact--the
11 seizing and freezing has an impact on the company or
12 the Company's reputation, and also in conducting its
13 operations following those two actions by Colombia.
14 Am I right?

15 MR. SILLS: Absolutely, it would.

16 PRESIDENT NUNES: Okay.

17 MR. SILLS: Yeah, it would, sorry.

18 PRESIDENT NUNES: I would like to be
19 absolutely sure. I do not have the intention to
20 putting any words in your mouth, but my point is --I
21 will go back. When you were responding to
22 Mr. Beechey's question, you said that there was a

1 mistake by Colombia when it is stated, the
2 representatives of Colombia in this case stated, that
3 you would have access to courts in Colombia to stop
4 seizing and freezing. And your point was if there is a
5 mistake, only auctioning may be stopped by courts. I
6 would like, if you could, explain a bit briefly which
7 is the difference? I will ask the same question to
8 Mrs. Frutos-Peterson, but I would like you to be more
9 explicit and say mistake.

10 MR. SILLS: Okay.

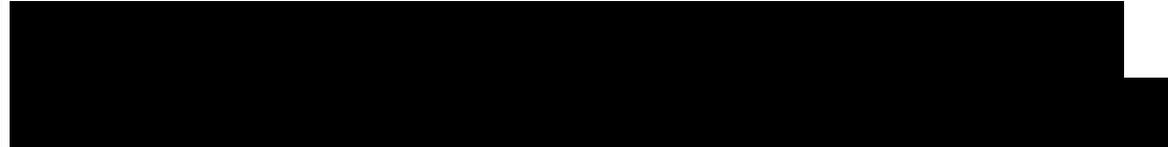
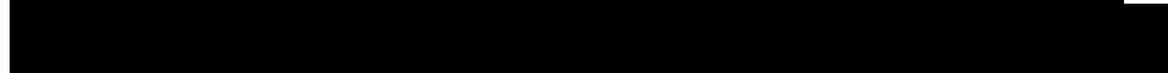
11 PRESIDENT NUNES: Why mistake?

12 MR. CONRAD: Thank you.

13 I guess the mistake--to clarify that
14 statement, Mr. President, was to state that Colombia
15 has focused on basically this alternative argument or
16 alternative forum for us to seek relief by virtue of
17 seeking a stay of enforcement by filing a nullity or
18 "restoration of rights" action. The thing that--I
19 guess it's more of an omission by Colombia. Colombia
20 is only saying--and this is our understanding as
21 well--is that the filing of that type of action,
22 again, save and accept that that's a separate

1 proceeding, obviously, than this Tribunal, is that it
2 would only have the effect of staying any type of
3 auction efforts.

4 So, if you remember that flowchart
5 that--there's two of them, one that we use, which is
6 part of Colombia's memorial on its preliminary
7 objections and one that they presented here today, at
8 the very end of that flowchart, the auction
9 proceeding, so that is the only measure or part that
10 would be enjoined by filing of a Nullity Action. It
11 will not enjoin the freezing and seizing of the assets
12 of the Claimants. That's the--I mean, when I say
13 "mistake", it's more or less an omission--and I don't
14 think Colombia disputes this because this is the
15 exact, you know, basically quoting or paraphrasing
16 what Colombia has taken --the position in their papers
17 is that this only prevents the auctioning. And again,
18 as the Tribunal and Mr. President rightly points out,

19 
20 
21 and so this is really not an option for the Claimant,
22 and this is why we are seeking the relief that we are,

1 you know, asking the Tribunal to grant the limited
2 relief here as articulated by Mr. Sills because of
3 this hole or gap.

4 MR. SILLS: And I think on that point,
5 Mr. President, it's important to realize that assuming
6 that that right is real and not illusory, that it--in
7 order to get a stay of seizing or freezing, it would
8 be necessary to post the Bond, and this is gone into
9 in some detail in Mr. Torrente's Witness Statement;
10 and, of course, his experience as Chief Legal Officer
11 there speaks for itself.

12 But the only effect of filing the proceeding
13 without giving this enormous bond would be that the
14 assets could be taken into the possession of the Court
15 or the Colombian State unavailable to anyone else and
16 held subject to auction which has, as a practical
17 matter, I think as a question for now, the same impact
18 on the Company. I put to one side whether or not we
19 would simply be back before the Tribunal, but let me
20 not start down that path.

21 But the right means very little. It's at
22 most a paper right because it doesn't give any

1 opportunity to stop the seizing or freezing of those
2 assets without posting a bond [REDACTED]

3 [REDACTED]

4 PRESIDENT NUNES: Okay. Thank you.

5 Mrs. Frutos-Peterson, would you start by
6 responding to this question which, in fact, was for
7 both of you, and then you add what you asked to.

8 MRS. FRUTOS-PETERSON: Thank you,
9 Mr. President.

10 I would just focus on the question, and I do
11 apologize because, you know, to me it's very hard to
12 think and go beyond the questions of the Tribunal on
13 this point because I see so clearly the connection,
14 you know, and the natural consequence, as I told you,
15 that the natural consequence being the ruling, okay?
16 And if they are asking, the Measure is the Fiscal
17 Liability Proceeding which leads to render a ruling,
18 to me, is exactly the same Measure.

19 But let's assume that we're not discussing
20 that, and they are answering your question in
21 connection with the remedies. It is important that
22 maybe we can share the chart that we had in our

1 presentation here again, if my colleague is ready to
2 do that, because I want you to see that--María
3 Paulina, can you do that? Oh, thank you so much. You
4 will see that we have here the Ruling with Fiscal
5 Liability, okay? And then if you go to the right side
6 of the slide, you will see that that's the annulment
7 action, it's a judicial remedy that the Parties will
8 have. I agree that if the Claimants were to proceed
9 to the annulment action, they have until January--I
10 don't know exactly the deadline, but they have a few
11 months now in order to exercise that right.

12 If they were to do that, Mr. President, it
13 is true that what we call the "Forced Collection"
14 phase, you know, of the Ruling with Fiscal Liability,
15 it will not be stopped. But, under the annulment
16 action before the court, you know, they will have the
17 possibility to apply for Provisional Measures,
18 including a provisional stay of the enforcement of the
19 Ruling with Fiscal Liability.

20 And I also ask my colleague to bring back
21 this slide to you because, as you can see here under
22 the Administrative Code, it is very clear, Article 232

1 discusses the bond, it made the express point that
2 they do not need to file the bond.

3 So, we don't understand why they get this
4 idea that there is the obligation to file the Bond.
5 The Administrative Code is extremely clear. It says
6 that no bond shall be required, so--and they do have
7 the possibility, you know, to request to the judicial
8 court within that annulment proceeding that I was just
9 showing you a Provisional Measure Request to stay the
10 enforcement of the Ruling with Fiscal Liability. And
11 as I just said, as part of that, they will not have to
12 post a bond.

13 So, I am confused because I don't understand
14 where they get that they need to introduce a bond.
15 The Administrative Code, as I showed you, is very
16 clear.

17 I hope that answers your question,
18 Mr. President. I just wanted to go back to the other
19 question that you also asked counsel for Claimant
20 because, you know, it seems to me that the way that
21 they are describing, you know, whether, you know, an
22 order to prevent the attachment, you know, etcetera,

1 etcetera, it seems to me that there is a--I don't know
2 if there is a confusion here, but let's be clear:

3 First, the CGR will have to locate assets,
4 okay? For four years they have been looking for
5 assets, and they haven't located any, okay? So, once
6 they locate assets, they will, in a particular

7 jurisdiction--

8
9
10 if CGR
11 identifies an asset, they will have to go through the
12 processes to work with those local authorities to
13 attach them.

14 So--and I wanted to bring that back to the
15 discussion, Mr. President, because, to me, it's so
16 obvious that then we're not talking about urgency and
17 necessity to avoid an irreparable harm. With all due
18 respect, the role of this Tribunal is to look at the
19 language of Article 10.20.8, in particular we submit
20 to you the second sentence, but if you disagree with
21 us that we're not under that sentence, then you have
22 to go and still apply the test, you know, in order to

1 issue a provisional measure. As a way--just taking
2 the words of the explanations of counsel for
3 Claimants, there is nothing here. There is no
4 imminent harm.

5 So, I just wanted to bring that back to the
6 discussion because I'm concerned that there is some
7 confusion of how the law works, and I want this
8 Tribunal to be very clear on how the provisions works
9 under Colombian law mainly. So, I hope that answers
10 your question, Mr. President.

11 PRESIDENT NUNES: It does.

12 So, I think we completed our duty this
13 afternoon, and unless my colleagues have any follow-up
14 questions?

15 ARBITRATOR KOHEN: No further questions,
16 Mr. President, on my side.

17 ARBITRATOR BEECHEY: Nothing from me
18 further.

19 PRESIDENT NUNES: Okay. I thank you very
20 much.

21 But before we close this Hearing, let's talk
22 about the next steps. We have agreed that, by

1 November 11th, we will get a memo or memorial by
2 Respondent with respect to the documents that were
3 included in Claimants' presentation this morning. Of
4 course, when I say "memorial", I say a brief memorial.

5 MRS. FRUTOS-PETERSON: Understood,
6 Mr. President.

7 PRESIDENT NUNES: And the other point is the
8 following: Marisa, when will we get the Transcript?

9 REALTIME STENOGRAPHER: I can say I can get
10 it to everybody today, and I will send it to ICSID.

11 PRESIDENT NUNES: Okay, David. Thanks much.

12 So, for sure, you want to take a look and
13 review the excellent work of David, but anyway, it's a
14 right you have. How long would it take for you to
15 review the Transcript?

16 MR. SILLS: Mr. President, for Claimants,
17 we'd suggest the Parties be given a week to make any
18 comments or corrections on the Transcript.

19 PRESIDENT NUNES: November 11th? The same
20 date?

21 MR. SILLS: That's fine. Assuming we get it
22 today, November 11th should be fine for Claimants.

1 MRS. FRUTOS-PETERSON: That's fine with us
2 as well. That's fine, Mr. President.

3 PRESIDENT NUNES: Okay.

4 MRS. FRUTOS-PETERSON: Mr. President, just
5 one point, in order to also prepare our short memo, I
6 will say a letter commenting on these authorities,
7 Bob, can you send us the document because we don't
8 have it? You said that you have it, and you can share
9 with us in order to look at it. Thanks.

10 MR. SILLS: We will be happy to, and I
11 assume this brief memorial concerns that just one
12 document, the English-language PowerPoint presentation
13 that we put up.

14 MRS. FRUTOS-PETERSON: That was my joke,
15 Bob, but yes, it's not going to be a memorial. We're
16 just going to look at the document and, of course,
17 express any opinions that we have. Thank you.

18 MR. SILLS: Yeah. We will send that today.

19 MRS. FRUTOS-PETERSON: Thank you.

20 PRESIDENT NUNES: Okay. Any more questions
21 or matters to be discussed before we close this
22 Hearing?

1 MR. SILLS: Bear with me one second, Mr.
2 President.

3 (Pause.)

4 MR. SILLS: No, we don't have anything
5 further, Mr. President.

6 PRESIDENT NUNES: Thank you.

7 Mrs. Frutos-Peterson?

8 MRS. FRUTOS-PETERSON: Sorry, I forgot I was
9 on mute.

10 I just wanted to--you send us also a
11 protocol about how to work out on the respective
12 redactions and stuff like that? I think you mentioned
13 November 8. If there is any problem, you know, with
14 that deadline, if that's okay, we can--the Parties can
15 work it out and then approach the Tribunal. I think
16 it's going to be fine, but I just wanted to make sure
17 that we also have that on the table.

18 PRESIDENT NUNES: You can keep us posted.

19 MRS. FRUTOS-PETERSON: Okay.

20 PRESIDENT NUNES: Thank you.

21 MRS. FRUTOS-PETERSON: Thank you so much to
22 the Tribunal and to everybody, to ICSID and, of

1 course, the Court Reporter.

2 PRESIDENT NUNES: Okay. Mr. Beechey? Any
3 comments? No?

4 ARBITRATOR BEECHEY: Nothing at all from me.
5 Thank you.

6 PRESIDENT NUNES: Professor Kohen?

7 ARBITRATOR KOHEN: Just to remember for the
8 future that there are two working languages, Spanish
9 and English--or English and Spanish, if you wish. I
10 hope that in the future both languages will be on an
11 equal footing. Thank you, Mr. President.

12 PRESIDENT NUNES: Thank you.

13 Okay. Before we close, I would like to
14 thank both Parties for the work this morning and
15 afternoon. I thank you very, very much. It was
16 extremely useful. Several points were clarified, I
17 suppose.

18 And I would like to thank the ICSID staff,
19 our Secretary, Marisa, thank you very much for your
20 invaluable help. And we will be in contact with you
21 in writing or in another meeting as soon as necessary.

22 So, have a great afternoon and evening, and

1 we will be in touch. Thank you very much.

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

3 MRS. FRUTOS-PETERSON: Thank you.

4 (Whereupon, at 12:49 p.m. (EDT), the Hearing
5 was concluded.)

CERTIFICATE OF REPORTER

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

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



DAVID A. KASDAN

