

BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES

ICSID Case No. ARB/19/6

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 In the Matter of Arbitration Between: :
 :
 ANGEL SAMUEL SEDA AND OTHERS, :
 :
 Claimants, :
 :
 and :
 :
 REPUBLIC OF COLOMBIA, :
 :
 Respondent. :

-----x Volume 1

HEARING ON NEW EVIDENCE AND ORAL CLOSING SUBMISSIONS

Monday, October 3, 2022

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

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

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President of the Tribunal

PROF. HUGO PEREZCANO DÍAZ
Co-Arbitrator

DR. CHARLES PONCET
Co-Arbitrator

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P R O C E E D I N G S

PRESIDENT SACHS: Welcome to this Closing
Argument Hearing.

We should first see whether the list of
participants corresponds to the persons being present
here or connected. I will start with the Claimant.
Could you please confirm that all counsel and Party
representatives included in the List of Participants
are indeed present or connected?

MR. MOLOO: Yes, Mr. President.

PRESIDENT SACHS: Thank you.

And the same for the Respondent?

MS. BANIFATEMI: Yes, Mr. President. I'm
happy to introduce the members of our team if the
Panel would like to know who is who. I'm in your
hands. Everybody is president.

PRESIDENT SACHS: Why not, yes. We have the
pressure to see, I think, most of you if not all at
the previous hearing.

MS. BANIFATEMI: Thank you. To my right you
have already met with Ms. Ana María Ordoñez, who's the
Director of Agencia Nacional de Defensa Jurídica del

1 Estado. From the same body you have MR. Giovanni
2 Vega-Barbosa.

3 And maybe people can raise their hand as I
4 give their name.

5 We also have from the--well, we have the
6 Director del Cuerpo Técnico de Investigaciones de la
7 Fiscalía General de la Nación, Dr. Alberto Quintero.

8 And we have Ms. Sandra Montezuma, who is the
9 Asesora de la Dirección de Asuntos Jurídicos, Fiscalía
10 General de la Nación, so this is the Prosecutor's
11 team. And also Mr. Andrés Felipe Tinoco, also from
12 the same body.

13 And we have not in the room Ms. Martha Lucía
14 Zamora, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

19 On the counsel team you have myself from
20 Gaillard Banifatemi Shelbaya Disputes. You have
21 Ms. Ximena Herrera.

22 You can raise your hand.

1 You know her.

2 Ms. Pilar Alvarez, Yael Ribco Borman, and
3 Ms. Carolina Barros, and we have also Jad Markbaoui,
4 and Cesar Rodriguez.

5 Thank you very much.

6 PRESIDENT SACHS: Thank you very much.

7 Now I turn again to the Claimant to present
8 your team, please.

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

10 Representing the Claimants we have the
11 principal Claimant, Mr. Seda, who you are all familiar
12 with. We may have other Claimants join us at various
13 points in time today, but given the time difference, I
14 don't think they're on quite yet. I think it's
15 3:00 a.m. where most of them are.

16 To my right we have Ms. Annie Champion;
17 myself, Rahim Moloo; Ms. Marryum Kahloon; Ms. Ankita
18 Ritwik; and Mr. Pierre Amarilglio from Tenor Capital.
19 And I do have two of any colleagues in New York,
20 despite the hour in New York, joining us: Ms. Nika
21 Madyoon and Mr. Ben Harris.

22 PRESIDENT SACHS: As you said, this might be

1 the hour, indeed.

2 SECRETARY MARZAL: Excuse me, Mr. President.

3 Here, the Secretary. Can I confirm that Codian

4 MSE--because there is somebody waiting in the Zoom

5 waiting room--are your associates?

6 MR. MOLOO: That's our conference room in

7 New York.

8 SECRETARY MARZAL: Perfect, thank you.

9 PRESIDENT SACHS: Sara, could you check with
10 the Non-Disputing Party, whether they are connected?

11 SECRETARY MARZAL: Yes, we have one
12 Non-Disputing Party connected already, Mr. Alvaro
13 Posada; I believe I'm correct.

14 Alvaro Peralta, sorry. Correction.

15 PRESIDENT SACHS: Okay. Very good.

16 Housekeeping. Claimant, any housekeeping
17 matters from your side?

18 MR. MOLOO: No, Mr. President.

19 PRESIDENT SACHS: Thank you.

20 Respondent?

21 MS. BANIFATEMI: We do, Mr. President.

22 With permission from the Tribunal, we would

1 like to address the issue of the rebuttal evidence
2 that was excluded from the record. We understand, and
3 you have, of course, at email of 26 September where we
4 mentioned that we were proceeding with this Hearing
5 under protest and with/reserve provisional rights. It
6 is a very important and serious matter for the State
7 of Colombia; therefore, Ms. Ordoñez will give you a
8 statement on behalf of Colombia in this regard and put
9 forward our position in this regard, if you allow us.

10 PRESIDENT SACHS: Okay.

11 MS. BANIFATEMI: Thank you.

12 MR. MOLOO: Sorry, Mr. President. I wasn't
13 under the impression that we would be dealing with
14 this Application first thing this morning. I had
15 thought that we would deliver our Closing Submissions
16 and then address the Tribunal on the issue of the
17 evidence, but we're in the Tribunal's hands.

18 PRESIDENT SACHS: No, let's proceed in that
19 order.

20 And please, so the floor is yours.

21 MS. ORDÓÑEZ: Thank you, Mr. President.

22 Dear Mr. President and Members of the

1 Tribunal, as the Director of the International
2 Litigation at the National Agency for the Legal
3 Defense of Colombia, it is my duty to highlight before
4 this Tribunal some crucial considerations regarding
5 the evidence that has been excluded from the file. As
6 a sovereign State's representative, I will address you
7 in Spanish.

8 (Pause.)

9 MS. ORDÓÑEZ: After nearly four years since
10 the Arbitration was started, there have been--

11 THE INTERPRETER: Sorry, interruption. Is
12 there a problem? The English channel is working?

13 (Pause.)

14 MS. ORDÓÑEZ: Okay. It's been nearly four
15 years since the receipt of this Request for
16 Arbitration, and there have been several rounds of
17 written submissions and a one-week hearing in
18 Washington, D.C. After that, we had the expectation
19 of submitting to you our Closing Arguments with the
20 whole information that the State of Colombia has made
21 the effort to collect so that all of you, Members of
22 this Tribunal, should have all the evidence necessary

1 to adopt a fair decision, taking into consideration
2 all the evidence that we have made available to you.

3 Tribunal, if something will prove the
4 99 percent success rate of the Colombian State as
5 Defendant in international investment disputes, it is
6 that Colombia is a State that respects the rights of
7 foreign investors and of investment arbitration as an
8 alternative mechanism, which is exceptional and
9 specialized for the resolution of disputes. It is
10 precisely for this reason that, in compliance with
11 definite Procedural Orders issued by this Tribunal, ■

12 ■
13 ■
14 ■
15 Arbitrators, you have a very big
16 responsibility ■

17 ■
18 ■
19 ■
20 ■
21 In times of crisis within the settlement
22 system for investor-State disputes, the evidence that

1

[REDACTED]

█

[REDACTED]

10

In order to refute the statement of Fanny

11

Giraldo. Procedural Order 11 recalls that the

12

admission of Mrs. Giraldo's statement was permitted

13

since Colombia would have the possibility to rebut it

14

and should have the last word on merit. And,

15

therefore, we spared no effort to collect evidence

16

that would allow us, in view of this Hearing, to rebut

17

her allegations by Fanny Giraldo. [REDACTED]

█

[REDACTED]

█

[REDACTED]

█

[REDACTED]

█

[REDACTED]

█

[REDACTED]

1 Procedural Order No. 11 explains, and is the
2 *raison d'être*, and I must say the unprecedented
3 sacrifice made by the Colombian State in making
4 available to the Tribunal and the Applicants
5 information and documentation that compromises its
6 highest interest, including safety and integrity of
7 all members of the delegation of Colombia and also
8 lawyers.

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 As an additional show of good faith and in
22 view of the consultation for the Parties for the

1 possible reconsideration of Decisions of 22 and
2 26 September, we are also accompanied today by
3 Mr. Alberto Acevedo, Director of the Technical
4 Investigation Courts of the Attorney General's Office.
5 Mr. Acevedo has suspended his work in relation to the
6 most important criminal investigations within the
7 State of Colombia with the purpose of resolving any
8 doubts that the Tribunal might have or the counsel of
9 the other Party in relation to [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
13 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

17 Thank you very much.

18 PRESIDENT SACHS: Thank you very much. Any
19 comments at this stage from the Claimant?

20 MR. MOLOO: At this stage, Mr. President,
21 perhaps I can just make one offer, which is, if this
22 is really all about C-450, which is Ms. Giraldo's

1 letter, claimants offer to retract that from the
2 record, if that would deal with all of their concerns.

3 PRESIDENT SACHS: Okay. That is noted. Do
4 you want immediately to react, or later?

5 MS. BANIFATEMI: Of course. This is not
6 acceptable because it has been on record, it has been
7 viewed by the Tribunal. The Tribunal has already seen
8 that evidence, to the contrary of our rebuttal
9 evidence which the Tribunal had not seen, so it's very
10 easy now, if they're troubled by that evidence, which
11 actually is really very interesting for us, it's their
12 option, but we cannot accept that our due-process
13 rights which have been breached be resolved by the
14 withdrawal of a belated evidence they put and which
15 triggered all of this and all of this effort that
16 Colombia has gone through, as Ms. Ordoñez has just
17 explained.

18 PRESIDENT SACHS: Okay. So, your positions
19 are noted. You said this is the comment that--the
20 first comment that you have, but you will be given the
21 floor, of course, to comment in more detail at the
22 appropriate point of time either today or tomorrow.

1 And the Tribunal will, in any event, get back to the
2 issue in the course of this Hearing.

3 So, we now give the floor to the Claimant.

4 MR. MOLOO: Thank you, Mr. President. If
5 you'll just give us a moment, we'll pass out the hard
6 copies.

7 (Pause.)

8 MR. MOLOO: We could mail it to you
9 afterwards.

10 (Comments often microphone.)

11 MR. MOLOO: No, understood. Totally
12 understood.

13 (Pause.)

14 MS. BANIFATEMI: Before we start, if I may,
15 Mr. President, I just see there are almost 300 slides.
16 In three hours, I don't know if my friend and
17 colleague will go through this, but if this is--I hope
18 this is not a new submission because we really made
19 the effort following the Tribunal's instruction to
20 hold to the three hours, and to summarize and wrap up
21 our case, and we hope that all of these slides will be
22 addressed by Claimant.

1 PRESIDENT SACHS: We will see, having seen
2 and heard counsel from Claimant in action, I would
3 think that they will make it for the three hours.

4 MR. MOLOO: I hope that's not a comment on
5 how quickly we speak, but we do hope to do get through
6 these slides. I think we now have the screen up. The
7 Tribunal has what they need in front of them? Okay.

8 CLOSING ARGUMENT BY COUNSEL FOR CLAIMANTS

9 MR. MOLOO: Thank you very much, Members of
10 the Tribunal, for your time here today.

11 It's been over two years since we started
12 this Arbitration, and we're here before today to tell
13 you many of the things that you've heard from us
14 before. And the reason why I say that is because our
15 case really hasn't changed since we filed this
16 Arbitration, and so many of the things you'll hear
17 from Ms. Champion and myself today are things that you
18 heard at the Opening in May. And that's because
19 everything that happened in the Hearing confirms the
20 narrative that Claimants have put before you because
21 it's the truth. Because what has happened here is
22 quite clearly a breach of the TPA, and our purpose

1 here today is to show you, to walk you through some of
2 that evidence we heard back in May and show how that
3 confirms the case theory that we've advanced right
4 from the outset.

5 In contrast, I have to admit I'm not really
6 sure what we're going to hear from Respondents this
7 afternoon because we have seen shifting sands over the
8 last couple of years. Initially--and I think still
9 today--their position has been that none of this is
10 about the wrongdoing of Claimants; you'll see
11 statements in the record to that effect. And then, we
12 had a belated Essential Security objection. And even
13 now in the letters that are being exchanged
14 subsequently, you see mentions of illegality. I don't
15 know if there's going to be a new illegality defense
16 this afternoon, I actually am not sure. In preparing
17 for this submission, I asked myself always, well, what
18 are the main arguments so I can help this Tribunal
19 deal with the issues that are before them, and I'm not
20 sure what we're going to hear this afternoon.

21 It's a rare situation where I'm usually
22 surprised but one thing I have not been surprised

1 way this case has evolved.

2 But in preparing for this Closing
3 Submission, I went back to where we started when we
4 were first looking at this case, and when one--as
5 anybody does, and that's the Treaty, and I started
6 from Page 1 of the Treaty. And it struck me--and I
7 know we've seen some of this language, but it really
8 did strike me, when you look at the second, third, and
9 fourth preambulatory clauses and what they say because
10 it's a unique treaty in that sense. The U.S. and
11 Colombia came together to promote broad-based economic
12 development in order to reduce poverty and generate
13 opportunities for sustainable economic alternatives to
14 drug-crop production. Nobody is denying the history
15 of Colombia, but what they wanted to do is they wanted
16 to transition away from that history into a different
17 future that promoted economic development, to reduce
18 poverty, to generate legitimate business opportunities
19 for people of Colombia. They wanted to create new
20 employment opportunities and improve labor conditions
21 and living standards and establish clear and mutually
22 advantageous rules governing their trade.

1 And that is precisely what the investors
2 here came into Colombia to do. They came in and this
3 is a situation where they had a successful investment.
4 They built a hotel that was one of the most successful
5 hotels in Medellín. It created jobs, it brought
6 tourism to Medellín, and they were expanding that
7 property development business to different areas of
8 the country creating jobs, creating job opportunities,
9 and achieving these objectives that Colombia and the
10 U.S. sought to accomplish.

11 And you guys have all seen--everybody in
12 this room, Members of the Tribunal, you've seen the
13 pictures of the Charlee hotel. I hope that one day,
14 you'll have the opportunity to visit because it is a
15 beautiful hotel, and it is one of the few luxury
16 hotels in Medellín. It has an amazing roof deck that
17 oversees all of Medellín, it, you know, has a gorgeous
18 restaurant on the main floor and on the rooftop, and
19 it is by all measures, and the experts on Colombia's
20 side agree, a resounding success.

21 And its recognition has gone well beyond
22 Medellín. Worldwide acclaim.

1 If we go to the next slide.

2 2012, Condé Nast, Hot List; 2015, Spotlight
3 in the New York Times: If you're spending 36 hours in
4 Medellín, what do you do? Well, one of the few things
5 they talked about is this hotel, The Charlee Hotel.
6 In Vogue Travel, 21 reasons the cool kids of Colombia
7 flock to Medellín. I'm not a cool kid and I even
8 stayed at The Charlee Hotel for obvious reasons, but I
9 can tell you, that's where the cool kids do hang out.

10 It is by all measures a wildly successful
11 investment in the country.

12 And Mr. Seda and the Royal Property Group
13 expanded on the success, and what you see here on
14 Slide 7 are not renderings. These are actual pictures
15 of the Luxé by Charlee, which is about an
16 hour-and-a-half away from Medellín, where they built
17 several properties, and there was going to be a hotel
18 that was the sort of pivotal project or property in
19 the middle of this Luxé by Charlee development. And
20 that was the next project that they sold out just as
21 quickly, and people live in some of these houses. The
22 problem is, the hotel is in complete disrepair. It's

1 75 percent done, but at the time of these Measures,
2 that's when it came to an end, and I'll come on to
3 that and I'll explain that.

4 And then, next, was obviously the Meritage;
5 and, in 2012, Mr. Seda identified 56 hectares property
6 between the airport and Medellín, and for a variety of
7 reasons, saw that this was going to be a really
8 interesting investment opportunity. It's a perfectly
9 placed land just off the highway, a number of
10 investments are being made in this area, the Avianca
11 headquarters--you may know Avianca, one of the leading
12 airlines in Latin America. Thousands of new employees
13 were coming not too far away from where the Meritage
14 Property is. They were going to need housing. It was
15 going to be a hub--56 hectares. That's like a
16 subdivision of a city. That's what was being
17 developed at the Meritage. That's--and these are
18 renderings here, but that's what it would have looked
19 like if it was going to have been done.

20 And it was the best-selling project in the
21 Province of Antioquia, and this is not contested. In
22 Mr. Seda's Witness Statement, he talks about the fact

1 that in August 2016, they had pre sold--they had
2 already sold Phase 1, 152 units sold, \$34.2 million at
3 the time. They expected to start construction on
4 Phases 2 and 3 at the end of August 2016, and at the
5 time that these Measures were adopted, there were 700
6 people that were benefiting from this investment.

7 If we go back to the Preamble--you don't
8 need to change slides--but just to remind you, one of
9 the key objectives was to promote broad-based economic
10 development, to create new employment opportunities.
11 There were 700 people working on the site at the time
12 that these Measures were taken.

13 I feel bad for the Claimants. I
14 legitimately do for obvious reasons, but I feel bad
15 for the people of Colombia, these people who were
16 working on sight, who lost their job as a result of
17 these Measures. The development that this Treaty
18 sought to engender, to foster, it didn't come to be
19 because of these Measures, and that's why this is such
20 a sad story.

21 And when we think about what was the reason
22 for this Measure, how did this all come to be? Well,

1 it all came to be because of the decision of one
2 Prosecutor. One Prosecutor pushed that first domino
3 that had all--that has us all here before you. And
4 you heard from that Prosecutor, Ms. Ardila Polo, and
5 in her cross-examination, she accepted that it all was
6 her. Ms. Champion asked her: "So, the decisions you
7 made in your cases were your own?"

8 "My own. My own." She said it twice.

9 "Just to wrap up the Precautionary Measures,
10 the decision to impose those were entirely yours, to
11 invoke those Precautionary Measures?"

12 And she said: "Correct. Just mine."

13 Didn't go before a court. There was no--this was an
14 administrative decision by one Prosecutor.

15 And Ms. Champion said: "Just to reiterate
16 that last question, the decision to impose the
17 Precautionary Measures was entirely up to you;
18 correct?"

19 And she says: "And that is correct."

20 One rogue Prosecutor pushed that first
21 domino and all of the following dominoes that we will
22 talk about today then fell.

1 And Mr. López Montoya, who you didn't hear
2 from in May, but I do think it's important to remind
3 you of his testimony. He talks about what happened on
4 August 3rd, 2016, because he was the Representative of
5 Royal Realty, he was the VP of construction, who was
6 on-site when Ms. Ardila Polo showed up on that site.
7 And if you read his testimony, it is--it reminds you
8 of a classic expropriation. All of the cases that we
9 learn about, you know, back in the Sixties and even
10 earlier, about expropriation, he says the person
11 informed me that several police trucks from the
12 technical investigation team of the Office of the
13 Fiscalía had arrived at the Meritage Lot. That's what
14 you think about; right? The police trucks role in.
15 He told me something to the effect of the Prosecutors
16 will arrive soon, and you should talk to them and see
17 if you could resolve the situation. Of course, there
18 was no resolving the situation immediately that day,
19 as we now look back in hindsight we see, but
20 Ms. Ardila Polo showed up, and she introduced herself,
21 and she put the padlock on the door. And from that
22 day forward, everyone went home, and that was it.

1 August 3rd, 2016.

2 We didn't know it at the time, but that then
3 crystallized into a breach, we say, in January 2017,
4 when she issued the Determination of Claim. But she
5 put the padlock on the door for the first time on
6 August 3rd, 2016, and then said it's final as of
7 January 2017.

8 And, unfortunately, you saw the renderings,
9 but this is what the property looks like about three
10 years ago. These pictures are about three years old
11 now, and unfortunately now the conditions are even
12 worse, but you can see the degradation that happens to
13 a site when you just it leave it in disrepair. But
14 you can see there were substantial construction works
15 going on. There were several buildings that were
16 mid-construction when that padlock was put on the
17 door. I've been here. I've seen--and in fact, I
18 think Ms. Champion took these pictures. 700 people
19 working on-site.

20 And now, when you drive from Medellín's
21 airport to Medellín, everybody drives by this. You
22 can't escape this eyesore, and this sad story is for

1 everybody who visits Medellín. All the citizens of
2 Medellín see it on a regular basis. They have a
3 visual reminder because this is what they see.

4 And immediately thereafter, after
5 August 3rd, you can see on August 4th, August 6th, the
6 leading newspapers, these are the headlines: "Seizure
7 of land plots where an exclusive project is being
8 built in Medellín." The narco property in Antioquia
9 that entangles a model complaint uncovered problems at
10 the Meritage Plot. That's the headlines. "Widely
11 reported, closely watched project." Given its
12 enormous size, it's not surprising, but when these are
13 the headlines, what do you expect is going to happen
14 if you're a property developer? You think everybody
15 is going to run to you and say, "oh, when's your next
16 project happening?" Obviously not. What happens is:
17 That project is dead. The Contractors have to be sent
18 home, the banks come calling--and you can see on the
19 next slide, we have Mr. Seda and Mr. López Montoya's
20 testimony, the banks accelerated the debt. They
21 pulled the additional financing, not just from this
22 project but from other projects. The Unit Buyers come

1 knocking and saying, hey, we've put deposits, give us
2 back our money.

3 They sue Newport, and Newport and Royal
4 Property is entangled in this litigation, in
5 litigation and arbitrations in-country for the next 74
6 months up until to this day. That's what happens.
7 That's what happens when someone goes and puts the
8 padlock on the door and says--and there is a sign,
9 nobody--do not buy here. That's the sign. They
10 actually--it's not metaphorical. They put that sign
11 on the property. And at this time--and I showed you a
12 bit of this excerpt, but I think there was some sound
13 difficulties, so we'll try it without sound this time.
14 And instead of hearing nice music, you'll have to hear
15 my voice. I apologize for that.

16 But at the time, they had promotional videos
17 of Luxé going because it was nearly done. These are
18 actual--again, not rendering, this is actually Luxé.
19 Those are actual houses on the Luxé property
20 overlooking the lake in Guatapé. They were four
21 months away from the hotel being complete. They had
22 hired staff, they were already booking events, there's

1 a restaurant on the lake. Again, I've, you know,
2 visited it, but it's--you can see, that's the
3 restaurant right there.

4 And it oversees--it looks at this, the
5 Piedra del Peñol. Sorry, I'm--I apologize to all the
6 Colombians in the room. But they all know that it is
7 a very prominent tourist attraction, that I've been
8 to, in Colombia, and that's the view in Guatapé from
9 the Luxé property. They had hired staff, and it was a
10 truly--going to be a magnificent resort location, but
11 the hotel--and the hotel was 75 percent done. It was
12 four months away from being completed. But what
13 happened was, unfortunately, the financing was pulled
14 because the bank said we can't do business with you.
15 We're scared to do business with you.

16 Several other projects in the works: Tierra
17 Bomba, 450 Heights, Santa Fe. In Santa Fe, for
18 example, they had bought the land, they had the City
19 Planning Director's endorsement in writing. There was
20 a--there were dozens of people working at the Royal
21 Property Group on all of these projects. That was
22 what the Royal Property Group did. They had all of

1 these property development projects. You can't view
2 this as just the Meritage. It was a stream of
3 projects that they had in their portfolio that were at
4 various different stages of development. Luxé being
5 nearly completed, Meritage as we know, you know,
6 Contractors on-site, pre-sales of Phase 1 done, and
7 all of these different projects were at different
8 stages of development.

9 But this was a property development company
10 that had several projects in their pipeline that all
11 dried up because you need financing. And as you've
12 heard from Colombia, if there's--if you're tainted,
13 someone--apparently, you're supposed to Google them
14 and you're supposed to find as much information as you
15 can. If this is what people are hearing about why
16 Meritage was pulled, can you imagine any bank, anybody
17 wanting to do business with the Royal Property Group
18 when those are the headlines? Of course not.

19 And ultimately, it resulted in the taking of
20 a \$255 million business that we are here today in
21 front of you. The Claim--I can tell you: The
22 Claimants would much rather have preferred to be doing

1 what they do in their daily lives--building
2 projects--but they can't do that anymore, and that's
3 why we're here in front of you asking for
4 compensation.

5 And so, what are the breaches of the Treaty?
6 On 19, 20, and 21, you have provisions that I'm sure
7 you've all looked at: 10.7, expropriation; 10.3,
8 national treatment; and 10.5, talking about the
9 minimum standard of treatment, in particular, the fair
10 and equitable treatment and protection--and full
11 protection and security. Those are there for your
12 reference, and we'll obviously go through each one in
13 more detail.

14 The first one I want to start with is
15 expropriation because whatever this is under Colombian
16 law, and I'm on Slide 24 for your reference, whatever
17 this is under Colombian law, I keep coming back to--as
18 a matter of international law, this is actually a
19 simple expropriation case. This is a taking. They
20 came in to the property and they took the Project.
21 It's as simple as that. It's an outright taking of
22 the Project. And, of course, this Treaty covers both

1 indirect and direct expropriations, but in my mind,
2 this is clearly a taking as a matter of international
3 law.

4 The question becomes: Are there any
5 exceptions from the obligation to pay compensation for
6 a taking as a matter of international law? And I
7 would suggest that there are very limited exceptions
8 under international law, and that if it was done in
9 the exercise of the police power, so there's a police
10 power--limited "police power" exception. But any
11 public purpose is not a police power, and I'll come on
12 to that.

13 But I think it's hard to contest the fact
14 that there was a taking and what was taken. Well,
15 there's two main things that were taken in our
16 submissions: The first is the indirect interest that
17 Newport had in the contract rights to develop and
18 profit from the Meritage Project; and the second is
19 the indirect interest that Royal Realty, who is the
20 management company, had in the Contract--in its
21 management contracts. Those were the two things that
22 were taken from the Meritage Claimants.

1 And what was the thing that took them?

2 Well, there's two things that we say effectuated that
3 taking. It began with the Certificate of Real
4 Property Seizure, which was July 22nd, 2016. Now,
5 you'll remember this was signed on July 22nd, 2016.
6 Ms. Ardila Polo did not show up to the property until
7 August 3rd. Ms. Champion's going to talk to you about
8 the interesting things that happened between July 22nd
9 and August 3rd. Some of the Tribunal members may
10 remember that, but that Certificate of Real Property
11 Seizure was actually signed on July 22nd, 2016.
12 Ms. Ardila Polo shows up to the property on
13 August 3rd, puts the padlock on the door, and then
14 says, yes, indeed, we are moving forward with this
15 Asset Forfeiture Proceeding on January 25th, 2017.
16 You can see that date on the Resolution for
17 Determination of the Claims. And that's the date on
18 which this crystalizes. It's--at that point, it's
19 stuck in the court system, and you can't get out.

20 Before that, there was a chance that the
21 Claimants could have gotten back their property and
22 they tried, they really wanted to. They took all the

1 diligence they did and they wanted to get this
2 property back but that was the point of no return, in
3 our submission.

4 And how--we've heard this question of: How
5 long is long enough to be in expropriation? And
6 there's case law on this, and we took you to some of
7 this in the Opening, but I've given you two examples
8 here: Wena Hotels, one year was enough, it just can't
9 be an ephemeral taking. And in the Azurix Case, they
10 talk about, in Middle East Cement, how there was a
11 suspension for four months. In S.D. Myers, there was
12 a measure that lasted three months but in each of
13 those cases, the question was: Is this long enough
14 where basically you can't go back and do your project?
15 You've lost your project. And 74 months later, here
16 we sit, still no access to the property.

17 And by the way, the property is on an early
18 sale list. It's currently for sale, that is a taking.

19 You can't go back and build this project.
20 Nobody can go back and build this project today. The
21 financing's not going to be there. The buildings are
22 in disrepair. A taking had been effectuated,

1 certainly here if there was an expropriation in Wena
2 Hotels and all of those cases represent--reflected in
3 Azurix, certainly 74 months is long enough.

4 We've shown you the pictures but I think
5 it's important to note the land was previously
6 authorized for early disposal on 4th December 2018.
7 It was removed on 2nd July 2019, but as of July 1st,
8 2021, the land is back on the authorized for early
9 disposal list, and that's, for the record, C-435,
10 reflects that it's on the early sale list, so they're
11 selling the property. So, in our submission, there
12 has been a taking.

13 And in our submission, it's an unlawful
14 taking and, therefore, a breach of the TPA because it
15 was done in a discriminatory manner, or in an
16 arbitrary way, without due process, and no
17 compensation was paid, and it was not done to protect
18 a legitimate public-welfare objective. We're going to
19 talk about all of those when we talk about the FET
20 breaches, but for purposes of establishing that it was
21 an unlawful expropriation, all I need to confirm for
22 you three gentlemen is that there was no compensation

1 paid and there's no dispute about that. And on the
2 next slide, you can see ConocoPhillips versus
3 Venezuela, they confirmed that if there is no
4 compensation paid, that is sufficient for it to be an
5 unlawful expropriation.

6 And in Colombia's Rejoinder, they say no
7 compensation was or is due to the Claimants, so they
8 don't dispute--nobody disputes that compensation has
9 not been paid for this taking; and, for that reason,
10 we say it's an unlawful expropriation.

11 So, what, under international law, is the
12 potential excuse that one can give to escape this
13 compensation obligation? Well, the TPA gives us a
14 clue at Annex 10-B. It says: "Except in rare
15 circumstances, non-discriminatory regulatory actions
16 by a party that are designed and applied to protect
17 legitimate public-welfare objectives, such as public
18 health, safety, and environment, do not constitute
19 indirect expropriations."

20 Now, what does this cover? We've seen
21 contexts in which these types of provisions have been
22 discussed. Generally speaking, they apply obviously

1 to a non-discriminatory measure, but when is it
2 non-discriminatory? It's generally a regulation
3 that's adopted for a general regulation, a general
4 application. So, for example, the Methanex versus
5 U.S. Case, where--which I'm sure you will all be
6 familiar with, where it's the banning of a toxic
7 substance, for example, to prevent environmental
8 damage or, you know, a cancer-causing agent, for
9 example, a general application, let's ban the
10 substance. That's the kind of police power that is
11 protected and usually then exempts you from the
12 compensation obligation.

13 This is not a general application regulatory
14 measure. This is a targeted measure at one particular
15 investment, and for reasons we'll come on to, it's not
16 non-discriminatory; it is discriminatory, in fact.
17 There's some guidance in the case law on what is a
18 police power. So, for example, in the Magyar versus
19 Hungary Case, a case which Respondent also adopts in
20 defining the police powers, they talk about two
21 different narrow sets of circumstances. The first is
22 Measures of police powers that are aimed at enforcing

1 existing regulations against an Investor's own
2 wrongdoing, where the Investor is committing some
3 illegal act or something like that; or the second
4 group, which is abating risks, again, to the public
5 health, environment or public order.

6 And they concede, Colombia does--and I
7 mentioned this earlier--that it's not the first prong.
8 There is no wrongdoing of the Investor at issue here.
9 They say that in the Rejoinder. They say: "While it
10 is true that the Asset Forfeiture Proceedings were not
11 initiated in connection with any 'wrongdoing' of which
12 Mr. Seda was personally accused and not against any of
13 the Claimants." They accept it. They're saying there
14 is no wrongdoing of Mr. Seda or any of the Claimants.
15 They talk about several irregularities in the chain of
16 title. They're saying no wrongdoing on behalf of
17 Mr. Seda. We're not accusing Mr. Seda of anything.
18 Now, that's changed, as we know, but in the Rejoinder,
19 as recently as the Rejoinder, they said no wrongdoing
20 of any of the Claimants here.

21

■

[REDACTED]

15 But, to exercise your police powers, as a
16 matter of international law, the Measures you take
17 must be proportionate to the public--the threat to the
18 public order and must be taken with due process. That
19 is, as a matter of international law, in the Bahgat
20 versus Egypt Case, that's just one example of cases
21 where they've said it has to be proportionate. If
22 there is a threat to public order, the action you take

1 to deal with that threat has to be proportionate.

2 We would submit that coming in and just
3 seizing the property before even assessing good faith,
4 that is not a proportionate measure to deal with--even
5 assuming that there is a legitimate public order
6 threat here.

7 What would have been the proportionate
8 measure here? It would have been, let's go after the
9 assets of the people who we say have done something
10 wrong. Let's go after Iván López's assets. That
11 would have been--if you want to protect the society
12 against the illicit activity of Iván López, go after
13 his assets. You don't need to go and prematurely
14 seize this property.

15 And I thought this was telling. They said,
16 Day 1 of the Transcript, at 269; counsel for Colombia
17 said: "The Colombian courts are seized of the matter,
18 so let the Courts decide. And at the end of the day,
19 it may well be that Newport will be recognized as a
20 bona fide without fault third party, in which case the
21 precautionary measures will be lifted. Newport will
22 be entitled to dispose of the land at that point in

1 time." What they're saying is you may get the
2 property back, but is that a proportionate measure to
3 the threat that they've identified, shoot first, ask
4 questions later? No. We say that is not
5 proportionate and, therefore, they don't come within
6 the exception to the compensation obligation as a
7 matter of international law.

8 And when you see what Dr. Wilson Martínez
9 has said, for example, in his Second Report, he says
10 what would have made sense, what would have been the
11 proportionate thing to do, the proportionate thing to
12 do as a matter of even Colombian law would have been
13 to go after those who were laundering money, those who
14 you know were engaged in criminal activity. That
15 would have been much less infringing on the investor's
16 rights. That would have been, perhaps, a
17 proportionate conduct. But to prematurely go and
18 seize the Meritage Project was not proportionate.

19 Moving to the second argument:

20 Discrimination.

21 The standard for discriminatory conduct,
22 whether it's a breach of national treatment, fair and

1 equitable treatment or as a matter of expropriation,
2 you know, not being something that was discriminatory,
3 the standards are largely the same in all of those
4 cases. And Claimants and Colombia generally agree on
5 what that standard is, and that is, when you have
6 similar cases that are treated differently without
7 reasonable justification, you can see that's the
8 standard that both Parties agreed to in their
9 submissions.

10 And you have to think about the comparators
11 in a fact-specific and context-specific assessment.
12 There is no rigid test or anything like that. You
13 need to look at the facts of the case, and all that
14 this next slide does is tell you that.

15 And, in Colombia's opening submission, they
16 tell you what that like circumstances are; what are
17 those similar cases. And in their Opening
18 Submissions--this is from one of their slides--they
19 said at Slide 192, it's assets affected by comparable
20 wrongful conduct. So you're looking at the asset and
21 you're saying, let me look at other cases in which
22 similar wrongful conduct is infecting those assets.

1 That's the wrongful conduct that they're saying
2 affected this asset and let's see what are the other
3 similar cases that have been affected by that same
4 alleged wrongful conduct.

5 I do want to make one point--it's on this
6 next slide-- [REDACTED]

7 [REDACTED] That's in their Opening
8 Submissions. [REDACTED]

9 [REDACTED] [REDACTED]
10 [REDACTED] They were started
11 because Iván López.

12 And when we talk about Essential Security
13 we'll come back to this because now all of a sudden

14 [REDACTED]
15 [REDACTED]

16 [REDACTED] And Colombia in its Opening Submissions
17 admits that. [REDACTED]

18 [REDACTED]
19 [REDACTED]

20 So, who are the relevant comparator groups
21 that have been affected by the same sort of alleged
22 wrongful conduct taking them at their word?

1 We would submit there are three: The Sister
2 Property which we've talked a lot about, other López
3 Vanegas properties, and other persons with a prior
4 interest in the Meritage Property, and I will go
5 through each of these briefly.

6 We've all become very familiar with this
7 diagram. It's only twice in this deck, I promise you,
8 I'm pretty sure. Here is the first time. And I think
9 it's important to start with this point: At the very
10 outset here, in 1994, that first gray hexagon, that is
11 a property that is co-owned--co-owned--by Iván
12 López--by what they say is a front-buyer for Iván
13 López, Sierralta López. Iván López, importantly, was
14 never on title, by the way. Iván López's name was
15 never directly on title. That's an important point.
16 But they're saying Sierralta López is a front-buyer
17 for Iván López. That's their case.

18 And Entrelagos Orozco is the front-buyer for
19 Jaime Orozco, who is his half-brother. But that
20 property, it's not like it's subdivided into
21 three-fourths and one-fourth. It's co-owned, jointly
22 owned by both of them, and then it gets split into Lot

1 A and Lot B. Lot A and Lot B are each--you can see
2 there's a 75 percent and 25 percent. They're both
3 still co-owned. Lot A is co-owned by the front-buyer
4 for Iván López allegedly. And Lot B is 75 percent
5 co-owned by Iván López. So the entire property is
6 allegedly infected by this wrongdoing that they're
7 saying; right?

8 And everything that goes forward is then a
9 reconsolidation of, and a division of, that property
10 that was co-owned, the entire property, including the
11 Sister Property, which is Lot A2, you can see it on
12 the bottom in the blue, Lot A2 was at one point owned
13 75 percent by Iván López. It was then owned by the
14 Fruit Seller. It was then owned by the Engineer. All
15 of those things that they talk about in the
16 Provisional Measures application, in the
17 Requerimiento, in the Determination of Claim, they all
18 equally affected both the Meritage Property and Lot
19 A2.

20 And when asking Ms. Ardila Polo about how
21 does she come to this? What investigation did she do
22 when she was looking at the Meritage Property? And

1 she said she had two title studies. And she refers to
2 those two title studies. She said she had one title
3 study from Otero & Palacio. That title study is on
4 the Meritage Property, okay?

5 And this is important: And they had a title
6 study from Gúzman Monroy. Now, where did they get
7 that title study from? Gúzman Monroy is actually a
8 title study on the Sister Property. Gúzman Monroy
9 must have been given to her by Iván López because our
10 folks didn't have the title study by Gúzman and
11 Monroy, but she has two title studies that she had
12 looked at when reviewing the Meritage and the Sister
13 Property.

14 And since then we've been able to get a copy
15 of the Gúzman and Monroy title study, and it is at
16 C-30bis. And the Gúzman and Monroy title study on the
17 Sister Property gives a favorable opinion, so she's
18 got one title study on the Sister Property that says
19 favorable opinion, and she has the Otero & Palacio
20 title study. And guess what that--on the Meritage
21 Property--and guess what that gives? A favorable
22 opinion.

1 Two title studies, one for the Sister
2 Property, one for the Meritage, both favorable
3 opinions, and she goes after the Meritage Property and
4 leaves the Sister Property, so she assumed that oh
5 well, this favorable property, this favorable opinion,
6 means they must be good-faith buyers. And whatever
7 conclusion she came to, the Meritage was entitled to
8 that same conclusion, if that's what she based her
9 assessment on.

10 And they've confirmed at the Hearing, if
11 there was any doubt, that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

18 When I asked Mr. Caro on cross-examination
19 about the Sister Property, he said: "With respect to
20 that property, no Asset Forfeiture Proceeding has been
21 initiated in respect of that lot." To this day,
22 whatever--if they're still doing investigations,

1

[REDACTED]

█

[REDACTED]

1

[REDACTED]

18 That's the testimony you heard, no evidence,
19 not even minimum evidence that there's any basis to
20 act against that 25 percent and I want to go back to
21 46. I told you it was only there twice but--

22 ARBITRATOR PONCET: Sorry, sorry to

1 interrupt for a second. You're not questioning as
2 such the fact that a prosecutor may do this in this
3 case and that in that case. The point you're making
4 is that by joining this difference of treatment in
5 your view with regard to the two plots or the two
6 divisions, then it becomes discriminatory under the
7 Treaty, but you're not asking us to review what the
8 Prosecutor did; right? I mean, I'm slightly leading
9 but--

10 (Overlapping speakers.)

11 ARBITRATOR PONCET: I just wanted to make
12 sure that I understood your question.

13 MR. MOLOO: I'm just saying--

14 ARBITRATOR PONCET: Up to a point my
15 question is a leading one. But I just want to make
16 sure that I understood the point you're making.
17 You're not asking this Tribunal to review or to assess
18 the actions of the Prosecutor as such, but only to the
19 extent that joining them together leads you to the
20 conclusion which we will share or not that this
21 constitutes discriminatory treatment under the Treaty;
22 right?

1 MR. MOLOO: For purposes of assessing the
2 discriminatory conduct, that's absolutely right. You
3 do not need to review whether or not they made the
4 right decision. All you need to come to the
5 conclusion of is, were there similarly situated cases
6 that were treated differently, and was there a
7 reasonable justification for that. And we say there
8 were similar situated cases, for the reasons that I've
9 explained, that were treated differently: One, asset
10 forfeiture was commenced. The other one has been left
11 as is and has not been taken to this date. And there
12 is no rational justification for that differential
13 treatment. That's correct. We're not asking you to
14 say should they have acted against the other property
15 or not? That you do not need to come to a conclusion
16 about to assess whether or not there has been
17 discriminatory treatment.

18 But one important fact here, if you look at
19 the reconsolidation with the Engineer, at that point
20 it is in the hands of José Ignacio
21 Cardona--right?--who is said to be Perra Loca or the
22 front-buyer, sorry, for Perra Loca. It then gets

1 divided and is repurchased by Entrelagos Orozco. You
2 can see on the blue, the green square there. So, he
3 rebuys this property from José Ignacio Cardona. So,
4 he acquired A2 from the Engineer. And if anybody
5 knows about this history of title, it's the guy who is
6 the half-brother of the alleged narco-trafficker;
7 right? So, how can you possibly say that we have no
8 evidence that his 25 percent was not infected? He
9 repurchased it from the Engineer who they said was the
10 front-buyer for Perra Loca.

11 So, I just don't understand that
12 explanation.

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 Slide 53 was in the Determination of Claim,
22 January 25th, 2017. That's the document that we say

1 crystallizes this breach; right? And in the sworn
2 declaration of José Ignacio Cardona, who is the
3 Engineer, they get a testimony from him. And he says:
4 "Following that meeting from Mr. Jaime Orozco, he
5 contacted me to make a proposal by which he wanted to
6 undertake parceling of the lot. He told me they
7 wanted to avoid being involved in those proceedings.
8 And so he says that I should reconsolidate and all the
9 rest and then I deliver to Ms. Tatiana Gil, under
10 orders from Mr. Jaime Orozco, the 83.9 percent."

11 That's his testimony, that actually the
12 person orchestrating all of this is Mr. Jaime Orozco.
13 Ms. Ardila Polo knew this at the time of the
14 Determination of Claim, that's actually in the
15 Determination of Claim. She has this testimony. How
16 can she possibly have testified to you what she
17 testified in May? I have no evidence that Mr. Jaime
18 Orozco had done anything wrong, that he was involved
19 in any illicit activity. She was told by the
20 Engineer. She wrote it down. She drafted the
21 Determination of Claim, that Mr. Jaime Orozco was the
22 one who was organizing all of this.

1 And now, I'll go back to 52, Ms. Champion
2 asked her about this: "All of that activity is
3 directed by Jaime Orozco; correct?"

4 And she said, yeah, "based on the
5 information given by the Engineer, José Luis Cardona
6 Rodríguez, yes, that is the information he offered."

7 It seems like she's giving him a presumption
8 of good faith, that well beyond a presumption of good
9 faith that was certainly not granted to my clients.
10 If there was one of these properties that you should
11 have gone after, it was the Sister Property, not the
12 Meritage.

13 What other reason did we get for why they
14 haven't gone after the Meritage? Well, if we go to
15 54, this question was put to counsel for Colombia.
16 Lot A2, which is the Sister Lot--54--oh sorry, for
17 some reason it's in the hard copies but not on the
18 screen.

19 It says--this is a quote from Colombia's
20 opening: [REDACTED]

[REDACTED]

[REDACTED]

1

[REDACTED]

█

[REDACTED]

15

[REDACTED]

16

When should you--when do you assess a breach? The

17

time, it's too late--even if they do take it tomorrow,

18

it's too late to say oh, well, we didn't treat them

19

discriminatorily. Because you have to assess that

20

question of was there a breach when the breach

21

crystallized. And you have some sources there.

22

[REDACTED]

1

[REDACTED]

█

[REDACTED]

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[REDACTED]

On the next page, we have the Quartier apartments which was under development, because one of the things they said was well, this one was under development so that's what made it unique. The Quartier Property Iván López purchased in the Eighties and then he transferred it in 1994 to none other than Promotora Sierra Alta, which presumably is also a front-buyer for Iván López. And then Promotora Sierra Alta sold it in 1997.

There was property being built on the Quartier developments. Did you go after that one?

No, they didn't go after that one.

[REDACTED]

1

[REDACTED]

2

[REDACTED]

3

[REDACTED]

4

[REDACTED] various

5

other banks and fiduciaries did business in that

6

particular property. Personally owned by Iván López

7

in 2007. In early 2009, Scotiabank Colpatría, one of

8

the largest banks acquires a mortgage on that

9

property. They would have done some diligence.

10

Another fiduciary sold property owned by

11

Mr. López, August 2019. During the pendency of this

12

proceeding, banks, Banco de Bogotá, one of the largest

13

banks in Colombia, is doing business on properties in

14

which Iván López has previously been an owner.

15

[REDACTED]

1 others say the right thing to do is to actually go
2 back and trace the history back and figure out who was
3 not a good-faith buyer? That's the person whose
4 assets I'm going to go after, but they haven't gone
5 after anybody else in the chain of title.

6 And just on the next slide there you have a
7 couple of cases, discriminatory intent is not
8 necessary. We don't need to show why there is a
9 discriminatory conduct. That intention is irrelevant
10 to assessing discriminatory conduct. We have some
11 explanations to offer you in a bit, but it's
12 unnecessary for your finding.

13 And so Colombia, we submit, has
14 discriminated against the Meritage Claimants as
15 compared to the three comparator groups by applying a
16 different standard for what constitutes an alleged
17 illicit origin, and by failing to consider the
18 Meritage Claimants' good faith prior to seizing the
19 Meritage Property, which appears to be what they are
20 doing with respect to the other comparative groups.

21 [REDACTED]

[REDACTED]

1 [REDACTED] But they're
2 assessing perhaps good faith, but we were entitled to
3 that same treatment. And that's a breach of the
4 national treatment protection, that's a breach of the
5 FET protection, and that makes the expropriation
6 unlawful for yet another reason.

7 So, they say, well, how can this be
8 justified; right? Is one question that this Tribunal
9 might ask. Is there a reasonable justification? And
10 we would submit that there is not, but the two
11 explanations you have been given are we have to
12 prioritize because there is limited resources, and in
13 this case there is some urgency because this is a
14 development in progress. But neither one of those
15 hold any water.

16 Why? Because no Additional Resources were
17 needed to investigate the Sister Property. They've
18 effectively already done that research because they
19 shared a history of title, so there was no additional
20 investigation that was needed. There was no
21 additional resources. It doesn't explain why no
22 action has been taken since then. It doesn't explain

1 why they did not consider Newport's status as a
2 good-faith buyer before they took any action. ■

■ [REDACTED]
■ [REDACTED]

13 So, quite frankly, those excuses don't hold
14 any water. And we've showed you--by the way, it
15 doesn't explain why they haven't gone after other
16 properties that are in development that share the same
17 alleged wrongful conduct.

18 That differential treatment, that's enough
19 for you to say there's been a breach here, you can
20 find that there's an expropriation and no
21 compensation, and we can all go home. You can find
22 there's been discrimination, we can all go home.

1 Well, not all go home, we still need to deal with the
2 issue of damages. But you don't need to deal with any
3 of the other breaches. But there are several other
4 breaches and so, I would be remiss not to go through
5 at least a couple of them.

6 We submit that Colombia has initiated these
7 Asset Forfeiture Proceedings without due process.
8 You've seen many of these provisions--and I've got
9 them here for your reference--but there are a few
10 provisions that the Assess Forfeiture Law that are
11 really important to assess this due-process standard,
12 a breach of the due-process standard. Good faith is
13 presumed in all legal action or transactions. There
14 is a presumption of good faith.

15 And when does this good-faith assessment
16 need to be done? Well, Article 118 says that it needs
17 to be done at this initial stage--right?--before a
18 Determination of Claim. One of the purposes of the
19 initial stage you can see on 118 is: "5, search for
20 and collect the proof which makes it possible to
21 reasonably conclude that there is no good faith
22 without fault." That's the first thing you do during

1 the initial stage, according to the Asset Forfeiture
2 Law.

3 The provision on Precautionary Measures,
4 Article 87. The purpose of Precautionary Measures,
5 the very purpose, that last sentence says: "In any
6 case," if you're taking Precautionary Measures, "in
7 any case, the rights of third parties acting in good
8 faith without fault must be safeguarded." When you're
9 taking Precautionary Measures, you must safeguard
10 Parties acting in good faith.

11 And by the way, if you do take Precautionary
12 Measures, how long can they last before you issue a
13 Determination of Claim? Six months. So, that initial
14 phase has to be done by that point, at which point you
15 must certainly have assessed good faith.

16 152. Whose burden of proof is it? Who does
17 this investigation? Is it the courts? No, it's not
18 the courts. It's the Office of the Attorney General
19 of Colombia has the burden to identify, locate, gather
20 and file the elements of proof which show the
21 existence of some grounds set forth in the law for the
22 Declaration of Forfeiture and that the affected person

1 is not a bona fide owner of rights without fault.
2 That is an obligation on the Attorney General to do,
3 according to the Asset Forfeiture Law.

4 And Mr. Medellín and Mr. Wilson Martínez
5 confirmed--Doctors, sorry--I'm glad they're not in the
6 room; otherwise they would have corrected
7 me--Dr. Medellín and Dr. Wilson Martínez confirm what
8 I just told you; that before you take Precautionary
9 Measures, you must assess good faith so you don't harm
10 their rights. You didn't hear from Dr. Medellín,
11 unfortunately, but he was a former Minister of
12 Justice. He was the father of the Asset Forfeiture
13 Law, former Ambassador of the UK for Colombia. Highly
14 regarded. He was the legal advisor to the Attorney
15 General, in fact, on issues related to Asset
16 Forfeiture when they were implementing and enforcing
17 the 2014 Asset Forfeiture Law. So, one of the leading
18 expert and, unfortunately, you didn't have the
19 opportunity to hear from him.

20 (Phone rings.)

21 MR. MOLOO: No problem.

22 And even when you hear from--this was a

1 little bit misleading, so I just do want to correct
2 this. In Colombia's Post-Hearing Brief, they did say,
3 they said what do you see in Paragraph 175? The
4 Fiscalía was not under an obligation to confirm the
5 existence of bona fide third parties upon the adoption
6 and imposition of the Precautionary Measures. That
7 was their position in the Post-Hearing Brief, despite
8 what I just showed you. And they say: "As
9 acknowledged by the Claimant's Expert during the
10 Hearing, Asset Forfeiture Proceedings are initiated by
11 a finding that the origin of the asset is tainted by
12 illegality." And that 282 footnote, you can see
13 refers to this excerpt of the Transcript. And so, I
14 just wanted to show you that excerpt of the Transcript
15 where Dr. Martínez said: "Indeed, when carrying out
16 asset forfeiture investigation, the first thing we run
17 into are assets. The first thing that's investigated
18 is the origin, and the destination of those assets to
19 determine whether they are tainted by illegality. If
20 that is the case, they can move on with the
21 investigation; but, if not, that asset forfeiture
22 action has come to an end."

1 But if you look what he went on to say at
2 Line 12, he made clear: "When the investigator, the
3 operator, finds that the tainted asset is in the hands
4 of a third party, a good-faith third party, clearly,
5 they cannot go after that asset."

6 And so I asked Dr. Caro: "Did you assess
7 Newport's good faith? Did you at any relevant point
8 in time?" Because, in the Requerimiento that he
9 authored, nowhere in there is there a discussion about
10 Newport's good faith? And I asked him, show me where
11 it is, and he couldn't show me anything.

12 I said: "But you cannot point me to
13 anywhere in this Decision--right?--that specifically
14 discusses independently Newport's good-faith status."

15 And he said: "That's right, because Newport
16 was tied to Corficolombiana." So, he's saying we
17 assessed Corficolombiana's good faith, not Newport's
18 because we didn't need to assess Newport's because
19 Corfi and Newport are tied together.

20 And I said: "But it's not the same standard
21 for everybody. You put yourself in the position of
22 the person who's actually conducting the diligence."

1 And he said: "Of course, the standards are
2 different." And of course, Corfi and Newport are
3 different so he should have assessed Newport
4 independently. But irrespective of that, the standard
5 of a fiduciary and of Newport were different.

6 So, even tying them together, even if you
7 could tie them together, it wouldn't make sense. They
8 just did not assess Newport's good faith at all before
9 they seized the property.

10 And, in fact, then it went to the Asset
11 Forfeiture Court. The Asset Forfeiture Court said
12 initially: "No recognition of the impacted Party is
13 conferred upon Newport." That's what they initially
14 found in August 2017.

15 And it was not until April 22nd, 2022, just
16 before the hearing that the Superior Court of Bogota
17 said that it concluded: "Newport is entitled to
18 participate in the case, given that it has a pecuniary
19 right with respect to the affected properties." And
20 so, they effectively found--and they refer to
21 Article 30 here--and Article 30 talks about Affected
22 Persons, and their rights must be assessed. Their

1 good faith status must be assessed.

2 And that's why Colombia has to say the
3 following, and this is the quote, and I come back to
4 it in their Opening. Now, what they say is they
5 accept. Okay, well, the courts have found that
6 they're affected parties, now let the courts do their
7 thing. The Colombian courts are seized of the matter.
8 And our friends on the other side are not claiming the
9 judicial process in Colombia is wrong. And in fact,
10 they're very happy of the Decision in April, two weeks
11 ago, and let the courts decide. Let the courts take
12 this normal course of what an asset forfeiture
13 proceeding should be and at the end of the day, it may
14 well be that Newport is recognized as a bona fide
15 without-fault third party. The Precautionary Measures
16 will be lifted, and they'll get their asset back.
17 That's what they're saying.

18 Now--but it's too late, it's too late to
19 give it back. And by the way, from a due process
20 perspective, it's the wrong Order. You don't shoot
21 and ask questions later. You have to assess someone's
22 standing, and their rights, and assess whether or not

1 they acted in good faith beforehand, and that's
2 exactly what the case law says. In *Siag v. Egypt*,
3 they said: "It is important to note"--they're talking
4 about an Egyptian Court Decision--it ruled that "the
5 Decision to issue Resolution No. 83 before the
6 specific date was without any legal basis in all
7 respects. The Tribunal finds that Claimants
8 accordingly suffered a denial of substantive due
9 process." They assessed this context of even court
10 conduct as being potentially a breach of due-process
11 rights.

12 And when something is not carried out in
13 accordance with the domestic law, it is a breach of
14 the due-process rights, and that's what *Quiborax v.*
15 *Bolivia* said. But even more importantly, when you
16 look at *ADC v. Hungary*, what they say is "an actual
17 and substantive legal procedure for a foreign investor
18 to raise its claims against the depriving actions
19 already taken or about to be taken against it, must
20 come first." You need reasonable advanced notice, a
21 fair hearing, and an unbiased and impartial
22 adjudicator to hear your case as to whether or not you

1 are a good-faith purchaser in this case. That must
2 come first before the Measure. That's what ADC v.
3 Hungary found when it was assessing due process.

4 Similarly in Rumeli v. Kazakhstan. They
5 said in that case, the decision at hand, the Measure
6 that was taken, was made without giving Claimants a
7 real possibility to present their position. They have
8 to be given an opportunity to be heard before the
9 depriving measure takes place. That's due process.

10 You don't get surprised by someone showing up on your
11 lot and putting the padlock on the door. You should
12 have the opportunity to present your case. I'm a
13 good-faith Party, not 74 months after it's been taken
14 but before the measure is taken. That's what
15 international law requires.

16 In Deutsche Bank v. Sri Lanka, again,
17 Paragraph 487, CL-87, Deutsche Bank was not informed
18 of the case against it before the Monetary Board
19 issued its stop payment order, and it was not offered
20 the possibility to respond to the investigation
21 report. Again, another case where the Measure was
22 taken before--and before the Claimant had any

1 opportunity to be heard at all. That is not due
2 process as a matter of international law.

3 And all of those cases confirm that the
4 timing matters. The depriving measure cannot take
5 place before you have an opportunity to be heard, and
6 the Claimants are only now going to be given an
7 opportunity to be heard. They're saying, well,
8 they're going to be given an opportunity to be heard,
9 but it's the order of things. You can't be given an
10 opportunity once you've already been deprived of your
11 rights. And so, that breaches the due-process rights
12 of the Claimants.

13 The last due-process violation that I'm
14 going to address you with, and then perhaps we can
15 take a break, if the Tribunal would see it appropriate
16 to do so, is with respect to conduct that's happened
17 during the course of actually these proceedings as
18 well.

19 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] That is not due

process. And also a breach of the FET provision.

Members of the Tribunal, before we go to the next breaches, which my partner Ms. Champion will address, perhaps now is an appropriate time for a break.

PRESIDENT SACHS: Yes. We will resume at 25.

(Recess.)

PRESIDENT SACHS: So, here we go, Ms. Champion. The floor is yours.

MS. CHAMPION: Thank you. Can you hear me?

REALTIME STENOGRAPHER: Yes.

MS. CHAMPION: All right. So I will pick up

1 where Mr. Moloo left off, just finishing up due
2 process.

3 Including the grounds laid out by Mr. Moloo,
4 Colombia's--one of the issues here is Colombia's
5 shifting positions on the basis for the Asset
6 Forfeiture Proceedings. Colombian authorities did not
7 seem to take Mr. López's kidnapping complaint filed in
8 2014 very seriously.

9 Can you go to the slides?

10 (Comment off microphone.)

11 MS. CHAMPION: Oh, okay.

12 It sat on the shelf for two years until it
13 was suddenly revived and used as a basis to seize the
14 Meritage Project.

15 As you will see when Slide 96 is pulled up,
16 Colombia tries to claim here that the Asset Forfeiture
17 Proceedings were never--"never"--that's the word they
18 used--based on the kidnapping story. That's what they
19 say in their Counter-Memorial, their Post-Hearing
20 Brief, [REDACTED]

[REDACTED]

22 [REDACTED]

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Could we go to Slide 97.

In the Precautionary Measures Resolution, Ms. Ardila writes: "The reasonable grounds are supported by the evidence included in the file and would show that the assets identified with the particular lot numbers were acquired through punishable conduct such as kidnapping, threats, and personal misrepresentations, among others."

It further refers to the statements of Mr. López and determining whether they are true or not.

The court decisions also talk about the kidnapping, if we go to the next slide--or no, you're right, 98.

The Asset Forfeiture Court and the Appellate Decision on Corficolombiana's control of legality petition also talk about the kidnapping and Mr. López's statements. So, to say that the kidnapping story was not a basis for the Asset Forfeiture Proceedings is just not supported by the record.

1 The problem is that Colombia knows that
2 story is false. In their own Opening, they noted
3 that: "Per the information provided by the FBI,
4 Ms. Ardila was already aware of the divergent
5 narratives behind Sebastian López's alleged
6 kidnapping."

7 A prominent Colombian Prosecutor, Claudia
8 Carasquia (phonetic), the former Director of the
9 Organized Crime Unit in the Attorney General's Office,
10 stated on television that "the kidnapping story was a
11 fraud."

12 [REDACTED]

1

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

6

[REDACTED]

7

But that's not what happened here. As

8

Mr. Moloo has already explained, Claimant's Expert,

9

Dr. Martínez, sets forth what the State can do when

10

the assets it seeks to move against are in the hands

11

of third parties acting in good faith. It can move

12

down the chain of title and attach the assets or

13

equivalent assets or proceeds of the alleged

14

wrongdoers.

15

Colombia sent us this demonstrative

16

yesterday that shows people they allege are the

17

wrongdoers here, [REDACTED]. You know, we're going

18

to hear a lot about [REDACTED] this afternoon, I

19

imagine. But that's not whose assets Colombia went

20

after. They went after those of the Claimants here,

21

not the assets of the alleged wrongdoers.

22

Because Colombia acted arbitrarily by

1 promising the Asset Forfeiture Proceedings on a known
2 lie and disproportionately by not pursuing the stated
3 public purpose of these measures, they violated the
4 fair-and-equitable-treatment provisions provided in
5 Article 10.5 of the TPA.

6 The Tribunal in EDF v. Romania sets forth
7 factors to consider in determining what is arbitrary.
8 These come from a noted expert on this, Professor
9 Christoph Schreuer, who has identified these factors
10 as: "A measure that inflicts damage on the Investor
11 without serving any apparent legitimate purpose."
12 That's what happened here. Again, the damage was
13 inflicted on the Claimants, on the Investors. It
14 served no purpose to inflict the damage on them. They
15 were not the alleged wrongdoers.

16 "A measure that is not based on legal
17 standards but on discretion, prejudice, or personal
18 preference." Again here, as Mr. Moloo covered,
19 Ms. Ardila's discretion appeared to govern the
20 imposition of the Precautionary Measures entirely.
21 She said it was entirely her decision.

22 "A measure taken for reasons that are

1 different from those put forward by the
2 decision-maker." We'll get to that. I think there's
3 a strong argument here that this was actually
4 motivated by a corrupt scheme that Ms. Ardila became a
5 part of.

6 And finally, "a measure taken in willful
7 disregard of due process and proper procedure."

8 Mr. Moloo has already identified some of the issues
9 relevant to that.

10 On this slide, you just see some cases that,
11 you know, that talk about the principle of
12 proportionality. What is proportionality? It looks
13 at the State's goal versus the Claimants' interest and
14 the nature of the conduct being censored.

15 Again, Colombia alleges that it's going
16 after illicit assets, assets derived from criminal
17 activity. But that's not what it's actually done
18 here. It could have traced back in the chain of
19 title, gone after the wrongdoer's assets, the payment
20 rights. They haven't done that. Instead, they've
21 gone after the Claimants' investment.

22 And the final due process ground that we

1 have is that the Asset Forfeiture Proceedings were
2 initiated as part of a corrupt scheme.

3 Notably, Colombia does not dispute, they do
4 not deny that Mr. Seda was extorted. They just say
5 they don't know if it was a negotiation or a
6 shakedown. Well, you don't negotiate to purchase
7 something that you already bought, but that is, in
8 fact, what Mr. Seda was forced to do when he was
9 approached as part of a corrupt scheme.

10 I'm going to revisit the timeline. This
11 will look familiar. We used a similar slide in our
12 Opening. We've added a few things that emerged during
13 the Hearing in this case, but the Tribunal will recall
14 that López filed his kidnapping complaint in 2014 with
15 the Organized Crime Unit, and at that time, he is
16 threatening Mr. Seda just with bad publicity; right?
17 He says, If you don't pay me, don't make a pay-off,
18 I'm going to tell everybody that I actually own the
19 land, and that--you know--they shouldn't buy in your
20 project.

21 The Organized Crime Unit refers the
22 complaint to the Asset Forfeiture Unit. It's assigned

1 to Prosecutor Number 37; that's Ms. Tovar. Ms. Tovar
2 appears to have requested that the Judicial Police do
3 some investigation, but the case remained dormant for
4 nearly two years. That changes all of a sudden in
5 April of 2016.

6 We submit it's not a coincidence that on the
7 7th of April, Mr. López represented by a new lawyer,
8 Mr. Mosquera, contacts Mr. Seda, claiming that he's
9 the rightful owner, that Mr. López is the rightful
10 owner of the Meritage Property, and demanding a
11 meeting in D.C., of all places, to explore an
12 alternative resolution.

13 Colombia would have you believe it's a
14 coincidence that the very next day, Ms. Malagón, the
15 Head of the Asset Forfeiture Unit, opens a new case
16 based on Mr. López's complaint and assigns it to
17 Prosecutor Number 44, Ms. Ardila.

18 Nowhere in the Resolution opening this new
19 investigation does Malagón acknowledge the
20 pre-existing investigation. It's simply ignored.
21 Even though from the day this investigation is opened
22 and assigned to Ms. Ardila, she has in her hands a

1 memo that Ms. Tovar had requested as part of her prior
2 investigation. [REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED] [REDACTED]

■ [REDACTED] [REDACTED]

■ [REDACTED]

■ [REDACTED]

9 That's the chart that I extensively
10 cross-examined Ms. Ardila about; and, as you will
11 recall, and as Mr. Moloo did mention, she tied herself
12 in knots trying to explain why she went after the
13 Meritage and not any of the properties in that chart,
14 and every rationale she offered simply did not hold
15 water, whether it was the time period, whether it was
16 the fact that the Lots had undergone consolidation and
17 re-subdivision; whether it was the fact that Lot
18 Numbers became extinct as a result of that process,
19 that's all true for the Meritage Lot as well. None of
20 the explanations she tried to give for why she focused
21 immediately on the Meritage held any water at all.

22 During the same time period that Ms. Ardila

1 receives this memo, Mr. Mosquera is stepping up his
2 extortion demands. He's asking Mr. Seda to confirm a
3 meeting so that they can reach a "brokered solution,"
4 and he starts to threaten legal proceedings.

5 Mr. Seda is concerned about this threat of
6 legal proceedings. He responds. He offers to meet in
7 Colombia. Mr. Mosquera declines and says, We're
8 proceeding with our defense. That defense turns out
9 to be the tutela that Mr. López filed.

10 And interestingly, in the tutela, Mr. López
11 seeks the same relief that Ms. Ardila ultimately gave
12 him when she imposed Precautionary Measures. He seeks
13 to enjoin construction and sales of the Meritage
14 Project. Well, the Asset Forfeiture Court dismissed
15 the tutela but, as noted, Ms. Ardila later gave him
16 the relief that he wanted.

17 The other concerning thing that happens in
18 this time period is that Mr. Seda is approached by
19 someone claiming to be from the Attorney General's
20 Office.

21 If we go to the next slide.

22 In mid-June. This is before Mr. Seda has

1 any clue what's going on inside the Fiscalía, and he's
2 approached by a man outside The Charlee Hotel asking
3 him to pay a COP 500 million bribe because the
4 Fiscalía is trying to help him.

5 During the same time period, Mr. Seda meets
6 with Mr. Valderrama, another representative of Mr.
7 López and Mr. Mosquera and Mr. López himself. After
8 Mr. Valderrama shows him pictures of his children in
9 an obviously threatening gesture, Mr. Seda flees the
10 meeting. During these meetings, Mr. López--or, excuse
11 me, Mr. Mosquera brags that he has influence over the
12 Attorney General's Office and specifically the Asset
13 Forfeiture Unit and Ms. Malagón and Ms. Ardila in
14 particular.

15 Again, this is while Mr. Seda has no idea
16 what's going on in the Asset Forfeiture Unit, but
17 Mr. Mosquera is saying, I can influence them, and if
18 you don't pay us about USD 20 million, that's what I'm
19 going to do, and I'll get the Project seized.

20 Mr. Seda flees that meeting. He tells them
21 he's going to report them. Mr. Valderrama immediately
22 sends him conciliatory text messages: I'm so sorry.

1 Let's restart the exchange.

2 All of this is in the record. It's all
3 corroborated by those text messages.

4 He doesn't hear from them for a while, but
5 then all of a sudden, six weeks later in late July,
6 Mr. Valderrama again texts Mr. Seda. He tells him we
7 need to speak urgently. Mr. Seda replies that he's
8 not interested and tells Mr. Valderrama that if he
9 contacts him again, he's going to call the
10 Authorities.

11 Mr. Valderrama says, I understand. The
12 negotiation Chapter is closed. Unknown to Mr. Seda,
13 but apparently not to Mr. Valderrama, just the prior
14 business day, three days before, the prior business
15 day, Ms. Ardila has signed the Precautionary Measures
16 Resolution, and she also testified at this Hearing
17 that Ms. Malagón was well-aware of that Resolution,
18 too, that it would have been reviewed as part of a
19 regular Committee that they have.

20 So, Ms. Malagón knows about it, Ms. Ardila
21 knows about it, and it seems that Mr. Mosquera,
22 Mr. López and Mr. Valderrama know that it's coming,

1 too.

2 As Mr. Moloo has already covered in detail,
3 Ms. Ardila shows up at the Lot on August 3rd. She
4 imposes the Precautionary Measures.

5 At this point, Mr. Seda is obviously
6 desperate to save his project. He decides to seek
7 help from the U.S. Embassy; and, as part of that, he
8 wants to obtain the extortion at monetary demand in
9 writing. So, he meets with Mr. Mosquera and Mr. López
10 Vanegas again, in Miami this time. Mr. Mosquera
11 reiterates his demand for around 20--USD 18 million,
12 COP 56 billion, and, you know, he even suggests that
13 Mr. Seda can pay that into a fiduciary offshore
14 account and only release it once the Precautionary
15 Measures are lifted and the Asset Forfeiture
16 Proceeding against the Meritage is dismissed with the
17 finding that Newport is a good-faith buyer.

18 Mr. Mosquera apparently feels comfortable that he has
19 the power to make that happen. Again, he brags about
20 his contacts and his influence over Ms. Malagón and
21 Ms. Ardila, and that's the deal he tries to strike
22 with Mr. Seda. That is not a deal that makes sense if

1 he's bluffing. Mr. Seda then does obtain the monetary
2 demand in writing and he, again, cuts off contact with
3 these extortionists, and report--ultimately, he does
4 report this to the Colombian Authorities, and the
5 Tribunal heard from Mr. Hernández, who was one of the
6 Prosecutors in charge of the ensuing investigation.

7 Importantly, the asset forfeiture code
8 provides Ms. Ardila with exactly the power that
9 Mr. Mosquera claims she had. In other words, she
10 could have dismissed the Asset Forfeiture Proceeding
11 at any time upon a determination that the assets in
12 question are in the name of third parties acting in
13 good faith without fault. Ms. Ardila could have made
14 that determination at any time, and she admitted that
15 on cross-examination. Perhaps that's the reason she
16 didn't address Newport's good faith. She was waiting
17 to do so until Mr. Seda paid the extortion demand.
18 She could have done so any time before January 25th,
19 and she did--but she didn't because Mr. Seda did not
20 pay.

21

■

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[REDACTED]

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[REDACTED]

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[REDACTED] [REDACTED] [REDACTED]

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[REDACTED]

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[REDACTED] And as

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Mr. Hernández testified--again, this isn't just

14

speculation--"all of this is taken from what was

15

mentioned in the investigation, be it through

16

wiretapping, statements, interviews, as part of this

17

investigation." Right? They collected all this

18

evidence, and his team prepared this chart to show the

19

scheme that they were investigating and regarding

20

which they had collected significant evidence.

21

Mr. Hernández also affirmed the accuracy of

22

two explosive reports that appeared in the Colombian

1 newspaper, El Espectador, in October of 2020. As set
2 forth in those Articles, which are C-365 and C-366:
3 "Since December 2016, suspicions on the existence of
4 an alleged cartel made up of the corrupt officials
5 within the Asset Forfeiture Unit of the Prosecutor's
6 Office have been gathering steam."

7 It goes on to describe what this
8 investigation has uncovered thus far, including,
9 again, extortion taking place in asset forfeiture
10 cases involving Ms. Malagón and Ms. Ardila, the Gran
11 Estación case is mentioned as is the Supercundi case.

12 [REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

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Colombia's counsel vociferously objected to me

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questioning her any further about the document, which

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they said was confidential; she'd never read it. I

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can't question her on this document.

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Mr. Caro backed that up. He said she

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couldn't have seen this. [REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED] Ms. Ardila

Polo writes him back: "Good morning respected Dr. Mosquera," and explains why she's not going to recognize Mr. López as an affected party, a courtesy that Newport never got.

In sum, Colombia acted arbitrarily and disproportionately when it initiated the Asset Forfeiture Proceedings in furtherance of a corrupt scheme in breach of the Fair and Equitable Treatment protection in Article 10.5 of the TPA. Again, I think it's important to take a step back. Why did all of this happen? Ms. Ardila claims--Colombia claims that

1 her investigation was into the assets of Iván López;
2 that that's what differentiated it from the prior
3 investigation, which was based, they say, on the
4 kidnapping complaint. As we've seen, the Colombian
5 courts and Prosecutors rely on the kidnapping
6 complaint in this Asset Forfeiture Proceeding, too,
7 but that's Colombia's story.

8 So, why is an asset forfeiture investigation
9 that's focused on Iván López's assets? She received a
10 list of 47 of them. Why did she zero in on the
11 Meritage? Why? Why is--why not look at those assets?
12 The assets that actually pertain to Mr. López
13 personally, which the Meritage Lot never did.

14 I would submit that corruption is the most
15 credible explanation that we have. Colombia itself
16 has endorsed what's called the red flags approach.
17 Followed by the Tribunal in Spentex, the Tribunal
18 should adopt a methodology of starting from red flags,
19 individual indicia of corruption and connecting the
20 dots to obtain a larger picture. As Colombia argued
21 there, it's practically impossible to prove
22 corruption, so tribunals should use this time-honored

1 methodology. That's the Glencore v. Colombia Case.

2 Well, there are a lot of red flags here.

3 Some of them are listed on this slide. Certainly the
4 timing and the speed of the Asset Forfeiture
5 Proceedings against the Meritage that are opened in
6 2016 closely tracks the extortionate demands made on
7 Mr. Seda.

8 Colombia did not even cross Mr. Seda on the
9 fact that he was approached on two occasions by people
10 claiming to be from the Attorney General's Office and
11 telling him to make a payoff and that would make
12 everything go away. They didn't even cross him on
13 that. There is no dispute that Mr. Seda was the
14 attempted victim of an extortion scheme.

15 Mr. Mosquera also made claims--how could he
16 have made these claims? He said I can influence
17 Ms. Malagón, I talk to her every week. She'll do what
18 I ask her to do. He specifically claimed to be able
19 to influence the people in charge of the investigation
20 and Asset Forfeiture Proceeding that resulted in the
21 imposition of Precautionary Measures on the Meritage.
22 He made an offer that could not have worked at all if

1 he was lying. He said put the money, \$20 million, in
2 an offshore account, and you can only release it once
3 I get the Asset Forfeiture Proceeding lifted. Again,
4 this offer makes no sense if he were simply bluffing.

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 And Ms. Ardila and Colombia cannot explain
17 the discriminatory treatment of the Meritage Project.
18 All of the explanations that they have offered simply
19 do not hold water. Corruption is actually the most
20 likely explanation.

21 I will now cover how the initiation of the
22 Asset Forfeiture Proceedings was unconnected to any

1 rational policy purpose because of Colombia's failure
2 to target illicit proceeds. I think this has been
3 covered, really, by the content of slides that we've
4 already covered, so I will just quickly go through it.

5 Again, Colombia claims the purpose of these
6 proceedings is to investigate and sanction members of
7 the Oficina de Envigado, which they alleged is a
8 narcotics trafficking cartel. They say that the Asset
9 Forfeiture Laws are used for the pursuit of assets
10 acquired through illicit enrichment.

11 [REDACTED]

12 [REDACTED] They could have gone after the alleged wrong
13 doers. They could have gone after Iván López and his
14 assets. The Asset Forfeiture Law even allows you to
15 seize equivalent assets. If you find that an asset
16 has been gained illicitly but it's now in the hands of
17 a good-faith party, you can go after equivalent assets
18 that belong to the person that was alleged to have
19 engaged in the wrongdoing. That's not what they did
20 here. They went after the Meritage.

21 Again, this did not meet Colombia's stated
22 policy objectives.

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[REDACTED]

If you look at these decisions, tribunals will look at, you know, at factors that Tribunals will consider to determine if a State action is arbitrary, and Tribunals have said that Measures are arbitrary if they're not reasonably related to a rational policy purpose. Again, it's hard to see what rational policy purpose was served by any of this. It's certainly not the one that Colombia identifies.

Another way in which Colombia breached the TPA was by failing to assess Newport's good faith.

What is the good-faith standard under Colombian law? Well, we have a Constitutional Court Judgment from August 2020, and this Constitutional Court Judgment talks about how, "when someone intends to acquire an asset, it is up to that person to ascertain the legal status of such asset." The asset.

1 It focuses on the asset. "In order to establish the
2 history and chain of title and tradition, but not to
3 inquire into the history or personal details of the
4 Party that transfers the respective assets to him."
5 So, again, the diligence is into the asset. Is the
6 asset free of encumbrances, liens or claims that
7 someone could make against the asset; right? The
8 statute of limitations for those claims in Colombia is
9 10 years. So, that's why, when people are acquiring
10 property in Colombia, they will do a title study that
11 looks at the asset for the last 10 years.

12 Dr. Carlos Medellín, again former Minister
13 of Justice and an Expert for Claimants in this
14 proceeding, has further explained that what good faith
15 requires is objective and diligent actions aimed at
16 verifying the conditions and possible defects of the
17 asset; right? Objective and diligent actions--not
18 perfection--that's not the standard--or as Colombia
19 seems to require a completely backwards-looking thing
20 that says, well, we found a mistake in your diligence,
21 we think you should have detected this or that,
22 therefore the diligence wasn't sufficient. That seems

1 to be the standard Colombian is applying. It's not
2 the standard. Perfection is not the standard. It
3 requires objective and diligent actions, not
4 perfection.

5 If we look further at that Constitutional
6 Court judgment, the Court explains why the standard
7 cannot be that you have to exhaustively investigate
8 not just the seller of the asset but everybody
9 backwards in the chain of title, all the other sellers
10 of this asset ever. I mean, as the Court explains,
11 this would make legal trade difficult or impossible.
12 The Court explains here that, in a scenario such as
13 this, people in legal commerce would be obliged not
14 only to study the title to assets but also to perform
15 meticulous investigations into the legal past of the
16 sellers, into any legal disputes they may be involved
17 in different jurisdictions, into the investigations
18 and inquiries carried out by the Prosecutor's Office
19 in which they could be involved, and even into
20 opinions about said sellers in their communicates and
21 on social media. Again, the Court says this is not
22 required. This is not what is required, and it's

1 commercially impractical, impractical and impossible.

2 I'm going to be very brief on these slides
3 because I think the Tribunal is fully familiar with
4 the steps that were taken here, the steps of diligence
5 that were taken here. Again, Newport hired one of
6 Colombia's largest and most trusted fiduciaries,
7 Corficolombiana. Corficolombiana asked that the
8 purchasers at Newport carry out a title search,
9 recommended a respective law firm to do that title
10 search. That was done. The title search came back
11 with a favorable opinion. No encumbrances, no reason
12 that you cannot purchase this property. The title
13 search also included a search of the OFAC and UN lists
14 for mention of the individuals and legal persons
15 appearing on Certificates of Encumbrance and Transfer
16 History, came up with nothing.

17 One of the lawyers who did that study, Anna
18 Palacio, explains the reason why they do a 10-year
19 search. As I already said, it's because it's tied to
20 the statute of limitations for claims against title.
21 It's 10 years in Colombia. That's why 10 years is the
22 industry standard.

1 They went further than that, though.
2 Despite what this Colombian Constitutional Court
3 Decision says, they did do KYC on the seller; right?
4 They did a company study of La Palma Argentina, came
5 back favorable.

6 Corficolombiana, as a regulated financial
7 institution, subject to Colombia's SARLAFT procedures,
8 that's a risk management system for money-laundering
9 and terrorism financing; right? So, Corficolombiana
10 has to have a SARLAFT procedure, it has to be approved
11 by the Government. Colombia followed that procedure
12 here. The testimony of their representative, she
13 explains what was done here.

14 SARLAFT was run on, not just on Newport, but
15 La Palma, the Investors. It all came back clean, no
16 reason not to proceed with the Project.

17 Now, Mr. Caro, on cross, expressed basically
18 complete ignorance of Corficolombiana's SARLAFT
19 procedures and just didn't seem to think they were
20 relevant to his inquiry about whether their diligence
21 had been adequate. But in fact, Claimant's Expert,
22 Dr. Martínez, again one of the drafters of the law,

1 explained that when an entity satisfies the minimum
2 requirements on prudence that the law demands, in this
3 case Corficolombiana complied with the requirements
4 applicable to it, as provided by Article 102 of the
5 EOSF, which details the SARLAFT due-diligence
6 requirements, by undertaking that due-diligence in
7 accordance to the legal system, it can be stated that
8 it has acted in a prudent manner without fault.

9 Colombia satisfied--Corficolombiana satisfied its
10 diligence duties, but it went above and beyond.

11 By the way, that's Paragraph 73 of his First
12 Report.

13 Corficolombiana went even further, though.
14 Their outside counsel, Francisco Sintura, who was,
15 himself, was a former Vice Fiscal, wrote to the
16 Attorney General's Office, wrote to the Asset
17 Forfeiture and Money Laundering Unit, which at that
18 time were a single unit, and he submitted a list of
19 over--you know, this is a 60-page submission--a list
20 of all the names of the owners of the property and the
21 legal representatives of the entities in the chain of
22 title that then appeared in the records plus La Palma

1 plus the property, submitted that list, told the
2 Attorney General's Office why they were submitting the
3 list because they were going to make an investment,
4 because they were going to acquire this property,
5 asked whether there were any active investigations
6 involving any of these persons or entities. The
7 response came back there's nothing. Again, this went
8 above and beyond.

9 Again, let's look at what Colombia's
10 criticisms are of the diligence that was done here.
11 In their Opening Statement, they criticized the title
12 study for going back only 10 years, not 20. They
13 claimed that had Otero & Palacio conducted a full
14 investigation, they will see, as we have seen before
15 and contrary to what the Claimants say, that, indeed,
16 there was Iván López Vanegas appearing as a
17 representative of Sierralta, and was, indeed, if they
18 had just done a Google search, they would have seen
19 that he's a drug dealer. Well, again, this is exactly
20 what the Constitutional Court has said you do not need
21 to do.

22 But it is also completely backwards-looking.

1 Colombia doesn't point to any written rules that say
2 your title study has to be 20 years instead of 10.
3 Nothing; right? It's all just based on--again, we
4 think we found a mistake here, since you made this
5 mistake, your diligence must not have been adequate.
6 That's exactly what the Constitutional Court said was
7 commercially unworkable.

8 Indeed, Colombia took the position that, in
9 order for diligence to be adequate, it would have to
10 go all the way back to the origin of the asset.
11 That's what they said. Again, there's no written
12 rule. That's just what they say would have been
13 needed.

14 Now, the question that has arisen in these
15 proceedings as well is, when did this diligence
16 attach; right? When did Newport become someone who
17 would have been an affected party with property rights
18 in the asset that was seized? The Decision of the
19 Superior Court of Bogotá that recognized Newport as an
20 affected party, relied on the Sales-Purchase
21 Agreement, which was executed in November of 2012.
22 Now, that is a--effectively, an option Contract. It

1 gives Royal Realty, later assigned to Newport, the
2 option to buy the property. One of the requirements
3 is that title come back clean. La Palma has to--you
4 know, title has to come back clean. So, of course,
5 they did as we've already discussed. They did go out
6 and do their title checks, they did all their
7 diligence and then create the rest of the structures
8 that eventually are set up to carry out the
9 development of the Meritage Project. So, when did the
10 good faith attach? When was this diligence done?
11 What is the date? The clearest statement in the
12 record comes from, again, Dr. Medellín, and he says:
13 "The date of the signing of the commercial trust
14 agreement entered into between Newport and
15 Corficolombiana in the Year 2013 is determinant. As
16 of that time, the Parties to said agreement already
17 had a patrimonial interest over the Real Property
18 asset." Again, it's not about title. It's about
19 having a patrimonial, a pecuniary interest in the
20 asset. It's not about having title to the asset.
21 Therefore it cannot be demanded of them that they
22 continue engaging in acts due diligence regarding a

1 transaction that had already taken place.

2 Dr. Wilson Martínez agrees that the relevant
3 time is October 2013. That's when the trusts are set
4 up. That includes the pre-sales trust and the payment
5 trust. And again, this is done in October 2013.

6 After those trusts are created, they start pre-sales,
7 they start promoting the Project, they start selling
8 units. Now, there is no duty to revisit diligence. I
9 think an exchange between the President of the
10 Tribunal and Colombian's witness make this is very
11 clear. If we just skip ahead to Slide 153.

12 The President of the Tribunal asked
13 Mr. Reyes: "Assume I buy a property in Colombia and
14 there is no problem, nothing turns out, I do a due
15 diligence that you would consider sufficient, and 10
16 years later I learned that a relative of Escobar was
17 involved in the initial--at the origin of the
18 property. Now, does that affect my property rights?"

19 Mr. Reyes's answer is unequivocal:

20 "Absolutely not."

21 The President goes on: "Okay, if I want to
22 resell the property in the year thereafter, so the new

1 circumstance has arisen, and I want to sell my
2 property, and now it is known that there was at the
3 origin an illicit circumstance, would I be able to
4 sell the property to somebody else? Would that
5 somebody else be a good faith purchaser because he
6 would know, wouldn't he, probably he would know, of
7 the illicit origin."

8 Again, the answer is unequivocal: "Yes, you
9 can sell it."

10 Part of being a good faith buyer is being
11 able to alienate the property; right? You don't
12 have--if you can't sell the property, that's not much
13 of a property right. The two are connected and
14 inherent. There is no duty to revisit diligence, redo
15 it.

16 But Newport and Corficolombiana nonetheless
17 did revisit the diligence when Mr. López first
18 approached Mr. Seda in 2013.

19 As Mr. Seda stated on cross: They
20 rereviewed all the diligence that had been done; he
21 reported the approach to La Palma Argentina, the
22 seller; he reported it to Corficolombiana; he went on

1 a nationally syndicated radio program to talk about
2 the extortion demand, so that the Unit buyers would
3 know about it and they found nothing. There was no
4 evidence that Mr. López owned the property, that he
5 had any ownership right to the property.

6 Corficolombiana also revisited the
7 diligence, and the testimony of Ms. Betancourt in
8 Slide 151, she sets forth exactly what they did, we
9 verified once again how the business deal had taken
10 place, we verified the title studies, we verified the
11 searches, we looked into La Palma again. We confirmed
12 that there were no issues, none at all. Again, this
13 wasn't required, but it was done anyway.

14 I apologize, I just want to correct the
15 record. I misstated the date when Mr. López
16 approached Mr. Seda. It was 2014, not 2013.

17 Slide 152.

18 Ms. Betancourt explained that all of the
19 Contracts remained in place. There was no grounds to
20 terminate them. After revisiting the diligence, there
21 was no reason to terminate them, and they proceeded
22 with the Project.

1 By initiating these Asset Forfeiture
2 Proceedings against the Meritage, arbitrarily and
3 without any rational policy purpose, Colombia breached
4 the Fair and Equitable Treatment protection provided
5 in Article 10.5 of the TPA. We've already talked
6 about the certificate. I'm just going to briefly
7 cover these slides.

8 You know, it created a legitimate
9 investment-backed expectation; right? Mr. Sintura
10 told the Fiscalía exactly why he was requesting this
11 information. Because we're going to conduct a
12 transaction in this property, because we want to avoid
13 acquiring any assets that may be involved in active
14 investigations; right? He told them, this is why
15 we're asking you for this information. The Head of
16 the Unit responded that there were no issues.

17 Mr. Seda testified about the reliance on
18 that certification from the Fiscalía as part of the
19 broader package of diligence that was done.

20 And as--again, a question from the President
21 of the Tribunal to Colombia's witness, Mr. Caro. The
22 President asked: "That's the part of the document

1 which deals with good-faith, and I would like to start
2 with the individuals that are named on Page 139,"
3 these are individuals identified in Corficolombiana's
4 petition, "when I look at them, Mr. Arboleda--that's
5 the mango vendor--Mr. Cardona Rodríguez--that's the
6 engineer--Ms. Muñoz and Ms. Rendón--the model, these
7 individuals were named in the list that was part of
8 the petition to the Attorney General's Office of
9 August 2013. When you received this petition and you
10 responded to it, those individuals were commented as
11 not listed in the information system. So, in other
12 words, I conclude from this that, at the time, you
13 were not aware that, for example, Mr. Arboleda who
14 was, according to Respondent's position, a front man
15 and a former mango vendor. Do I understand that
16 correctly, you were not in possession of such
17 information in 2013?"

18 Well, Mr. Caro says, I'm not the one to give
19 the answer, but he says the Chief of the Unit at that
20 time is that person, and that's exactly who provided
21 it.

22 Again, Colombia's own Prosecutors confirmed

1 to Mr. Seda that they had a legitimate expectation
2 based on this certification. That expectation was
3 backed up by investment; and, by frustrating that
4 legitimate expectation, Colombia breached its
5 obligations to provide fair and equitable treatment
6 under Article 10.5 of the TPA.

7 These cases explain that the touchstone of
8 fair and equitable treatment is the frustration of
9 legitimate expectations, expectations backed by
10 investment. That's exactly what happened here.

11 I'll just briefly cover another breach,
12 which is the fact that Colombia's Measures, the
13 Measures taken here, put Claimants' entire portfolio
14 in the line of fire. Colombia knew or should have
15 known this, should have known that all of Royal
16 Realty's business would be put directly in the line of
17 fire.

18 An Asset Forfeiture Proceeding and unfounded
19 criminal investigation taint the reputation of the
20 affected party. It really goes without saying. It
21 signals that the Party is involved in illegal activity
22 or that the Party did not conduct adequate diligence

1 or both. In either scenario, banks, investors and
2 customers will avoid working with that person.

3 [REDACTED]

4 [REDACTED] [REDACTED] [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED] [REDACTED]

9 [REDACTED] [REDACTED]

10 Colombia submits that we have put in no
11 evidence of this. That's simply not true. There's
12 the publicity. There are multiple letters, text
13 messages, agreements in the record. Testimony that
14 show that one-by-one these projects came to a halt,
15 and they came to a halt because of the proceedings
16 against the Meritage. We have Mr. López Montoya's
17 testimony, Mr. Seda's testimony. We have emails from
18 investors who said we can't--we can't go forward.

19 And there's more in the appendix. We cannot
20 go forward until the Meritage issue is resolved.

21 The Purchase Agreement for the land for the
22 Tierra Bomba project was revoked, and it specifically

1 states: "Given the difficulties and the scandal
2 related to Meritage Project, we're revoking this."

3 The management contract that Royal Realty
4 was going to enter into with a hotel in Tierra Bomba,
5 also revoked because of the Meritage Project.

6 Mr. Seda sets forth in his Witness Statement
7 how the Meritage seizure affected his other projects.
8 People wouldn't go into business with Royal Realty,
9 they would not buy land with them, they would not
10 enter into deals with them, they could no longer
11 attract investment, all of these projects at various
12 states of development died. They were put into the
13 line of fire by Colombia's actions.

14 Again, Colombia criticizes this evidence,
15 they say, it's based on testimony. It's not just
16 based on testimony. You saw some of the documents
17 there, there's more in the appendix, but again,
18 Colombia had the opportunity to cross-examine these
19 witnesses.

20 Colombia's conduct arbitrarily and
21 unreasonably placed Claimants' investments in the line
22 of fire in breach of the FET protection in

1 Article 10.5 of the TPA. Colombia also failed to
2 protect Claimants' investments from the arbitrary and
3 irrational conduct of officials within the Attorney
4 General's Office in breach of its obligation to
5 exercise vigilant pursuant to the TPA's protection,
6 also provided in Article 10.5 of the TPA.

7 As set forth in this Case, *Rompetrol v.*
8 *Romania*: "In the Tribunal's considered view, it is
9 part of the legitimate expectations of a protected
10 investor--without in any way trenching upon the
11 sovereign right of the host State to prescribe and
12 enforce its criminal law--that, if its interest find
13 themselves caught up in the criminal process either
14 directly or indirectly, means will be sought by the
15 authorities of the host State to avoid any
16 unnecessarily adverse effect on those interests or at
17 least to minimize or mitigate those adverse effects."
18 Colombia simply did not do that here. In fact, its
19 officials took the path that would cause the most
20 damage to Claimants' investment.

21 As the Tribunal explained in *AMT v. Zaire*:
22 "The obligation on the State is one of vigilance";

1 right? The State must be vigilant. The obligation
2 incumbent upon Zaire is an obligation of vigilance, in
3 the sense that Zaire is the receiving State of
4 investments made by AMT, an American company, shall
5 take all measures necessary to ensure the full
6 enjoyment and protection and security of its
7 investment and should not be permitted to invoke its
8 own legislation to detract from any such obligation."

9 Colombia cannot simply rely on the fact it has an
10 Asset Forfeiture Code, that--it's purportedly
11 following that code, it has to be vigilant. It has to
12 ensure that the measures it's taking are not
13 unnecessarily inflicting damage. They did not do that
14 here.

15 Finally, and briefly, Colombia has engaged
16 in a sustained and increasingly hostile campaign to
17 tarnish Mr. Seda's reputation. A completely
18 unnecessary campaign. The Asset Forfeiture Proceeding
19 itself did enough damage but they have not stopped
20 there. Although stating in their pleadings before
21 this Tribunal, that Mr. Seda was not personally
22 accused of any wrongdoing, Colombia has pivoted 180

1 and they've launched a retaliatory campaign. [REDACTED]

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[REDACTED]

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[REDACTED]

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But Mr. Seda and the rest of the Claimants

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have never been charged with a crime, either in

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Colombia or the U.S., even though Mr. Seda has been

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subject to invasive investigations, never been charged

1 with a crime, never been put on the OFAC List, the UN
2 list, et cetera. There is simply nothing to back up
3 all of this innuendo.

4 This campaign to tarnish Mr. Seda's
5 reputation amounts to a failure to protect Mr. Seda
6 and his investments from--excuse me--in breach of
7 Colombia's obligation to exercise vigilance pursuant
8 to the full protection and security protections
9 provided by Article 10.5 of the TPA.

10 I will turn it back over to my colleague,
11 Mr. Moloo, who will address damages.

12 MR. MOLOO: Thank you, Ms. Champion.

13 Just what you gentlemen want before lunch,
14 the most technical part of my presentation. So, for
15 the next 30 minutes if you'll bear with me, we will go
16 through why we think Colombia's conduct has caused
17 damage to Claimants and the amount of damage that
18 Claimants have suffered.

19 The first thing I want to talk about is
20 causation, and the TPA itself in 10.16 deals with
21 causation. It says that what can be claimed here is
22 loss or damage that, by reason of or arising out of

1 the breach, can be claimed. By reason of or arising
2 out of. And we would submit that all of the damages
3 that I'm going to talk about are by reason of or
4 arising out of, and in particular there's a question
5 about the non-Meritage Projects, and I think we've
6 given you enough evidence as to why all of those
7 projects--it doesn't make any sense why the Luxé
8 wouldn't have been finished. It's a 75 percent-done
9 hotel, financing is in place. Construction contracts
10 are all in place. Why that gets stopped? It gets
11 stopped because the bank pulls the financing. They
12 shut off the tap that they've already approved. There
13 is no other reason why these projects dry up, but for
14 the Measures that are at issue here.

15 And as Joseph Charles Lemire v. Ukraine
16 says, If it can be proven that in the normal cause of
17 events, a certain cause will produce a certain effect,
18 it can be safely assumed that a rebuttable presumption
19 of causality between both events exists and that the
20 first is the proximate cause of the other.

21 Ms. Champion took you through a lot of this.
22 But here on this slide is some of the evidence that's

1 in the record, as to, obviously the Meritage project
2 was halted, but why the banks pulled the financing.
3 That's covered by the Witness Statements, but also
4 Documents. Other investors withdraw from the Luxé,
5 one of them Paladin, one of the private equity
6 financiers refused to invest any longer in Luxé and in
7 some of the Development Projects where they basically
8 just said we're not investing with you anymore because
9 we're worried obviously that the same thing is going
10 to happen to your other projects that happened to the
11 Meritage.

12 One of the things that Colombia says, is
13 yeah, but nothing happened to The Charlee. The
14 Charlee is still operating, but The Charlee is
15 obviously in a very different situation because it
16 doesn't need third-party financing anymore; right?
17 There is no third-party financing. It's
18 self-sustaining; right? There's no other business
19 partnerships or anything needed. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

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[REDACTED]

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Now, Dr. Hern says--that's the Respondent's Expert--they say, Claimants should have no issues pursuing these other opportunities because they can just sell the Projects, they can just sell them or they can pursue other projects. But he fundamentally misunderstands the case that Colombia itself is putting forward: He can't sell them. He can't sell these other projects because now he's associated with

22

1 this illegality, so people are hesitant to buy from
2 him.

3 It's national news; right? So, on
4 Colombia's case in this proceeding, selling is going
5 to be difficult.

6 But in any event, I asked him in
7 cross-examination, well, you're saying this--you're
8 saying--you know, he can still develop these other
9 projects, what's stopping him, and, you know, he can
10 still sell them. But have you seen any of the
11 evidence? And he said, and I asked him, You haven't
12 seen the evidence; right? I referred to the Paladin
13 statements, these private equity investors. And he
14 says, I haven't. I haven't looked at the evidence
15 behind those. And I said, For example, C-186, we can
16 pull it up. Do you recall seeing this Agreement? It
17 was an Agreement where they had to terminate one of
18 the Contracts because of the Meritage. And he said, I
19 can't recall, honestly, whether I have seen that
20 particular agreement.

21 And then I took him to the statements by the
22 government officials where they're saying, yeah, of

1 course, you're going to be affected by these things.
2 And he said again, Can you take me to the statement?
3 And I took him to one of the statements and he said, I
4 have not seen this document. And I took him through a
5 number of these documents that you've seen today and
6 he hadn't seen any of them. And then I asked him, And
7 if he was prevented--Mr. Seda and Newport and Royal
8 Property Group--from being able to transact and to
9 sell these projects and do the business that you're
10 saying they could have done, then what would have been
11 your conclusion? And he said, Yes, logically if he is
12 impacted and he can't develop them and he can't also
13 sell them, then I would take a different view that
14 economically those projects must have been impacted
15 then.

16 That's what their expert ultimately said
17 after I took him to all of these documents, and he
18 said, Well, if I would have--if that was--if he
19 couldn't sell and he couldn't develop these projects
20 anymore, then I would have taken a different view.

21 So, what is that compensation? Well, we
22 start with what is the legal standard, and we all know

1 it's Fair Market Value. No dispute there. Colombia
2 agrees, Fair Market Value captures the full reparation
3 owed to Claimants. And Dr. Hern, their expert, says
4 it's the price that a willing buyer would pay a
5 willing seller in the market, in a liquid market, the
6 hypothetical price. He agrees that that's the
7 approach.

8 And then we talk about well, what is the
9 Fair Market Value? How do you assess Fair Market
10 Value? And there is three ways, I'm sure the Tribunal
11 is familiar with them: Income-based approach,
12 market-based approach, and an asset-based approach.
13 And the starting point, and I think it's well accepted
14 now, is the income-based approach. And why is that
15 the starting point? It's because it properly captures
16 the value of that investment to the owner. And the
17 owner or controller of the entity is likely to have
18 the detailed information needed to give a realistic
19 assessment of those future cash flows. So, that's why
20 you start with an investment-based approach. And
21 that's where all economists in the real world, and I
22 think more so now in investor-State arbitration,

1 generally start.

2 But especially in the context of real estate
3 development because there aren't a lot of real estate
4 development cases in the investor-State context. So I
5 think it's important to think about in the real estate
6 development context in particular, what do experts do?
7 And so, we went to CBRE, who's again, that's
8 Colombia's expert, CBRE, well-known industry expert,
9 real estate expert, and we found an expert assessment
10 they themselves had done of an undeveloped, completely
11 undeveloped, piece of land. You may recall there was
12 some confusion about whether this piece of land was in
13 California or in Mexico. It's in Mexico.

14 But this piece of land was a valuation,
15 there was a valuation done in March 20--of 2018 by the
16 expert that CBRE put up in this particular
17 arbitration. And their completely undeveloped piece
18 of land, that they used a Discounted Cash Flow
19 approach to assess the value of the land. They said
20 what's the highest and best use? Well, the highest
21 and best use is you're going to develop this land,
22 you're going to subdivide it, and you're going to

1 build a bunch of units and you're going to sell that
2 finished product. Let's do a Discounted Cash Flow of
3 this land based on that highest and best use of that
4 property.

5 And Ms. Ritwik asked Mr. Maugeri on
6 cross-examination, Have you ever done a DCF for an
7 undeveloped project, completely undeveloped." And he
8 confirmed, Yes, I have.

9 And when I took Dr. Hern to this because
10 he's not an industry expert, I would submit, I talked
11 to him and I asked him, Are you familiar with the
12 subdivision development approach that CBRE had taken
13 in this valuation report? And he ultimately said he
14 looked at it, he read through it. And he goes, The
15 value of the underlying land is then estimated. I'm
16 asking him, Estimated through a Discounted Cash Flow
17 analysis with revenues based on the achievable sale
18 price of the finished product. And I asked him, Have
19 you ever used this approach to value other assets,
20 undeveloped assets? Have you used this Discounted
21 Cash Flow Approach to do this for a piece of land.
22 And he said, Yes. So, apparently Dr. Hern has done

1 so, too.

2 And I asked him, Do you disagree with an
3 approach of valuing an undeveloped real estate
4 project, completely undeveloped, nothing on the land
5 whatsoever? Are you okay with basically using a DCF
6 Approach? Do you have any issue with that? And he
7 said, Not as a matter of principle. As a matter of
8 principle would I disagree with the use of a DCF for
9 undeveloped projects? Not necessarily because I think
10 there are some circumstances where one could get quite
11 comfortable with, you know, how that project become
12 evolve.

13 So, both CBRE and Dr. Hern are comfortable
14 with using the DCF Approach for completely undeveloped
15 land. Now, the Meritage and Luxé are obviously not
16 undeveloped pieces of land. We will get to that. But
17 even for a completely undeveloped piece of land,
18 they're okay with using the DCF Approach. They
19 confirmed that at the Hearing.

20 And why are sunk costs not okay? Why does
21 that not make sense, especially, I would say, in the
22 real estate development context? Well, first of all,

1 because it doesn't value the know-how, the brand
2 value, the track record, the experience of the folks
3 who are coming to build that property, so you don't
4 just, you know, what I paid for that piece of land is
5 not necessarily what it's worth tomorrow. There's
6 appreciation, obviously, but if I'm bringing some
7 added value, some knowledge, some expertise, I get
8 permitting done, et cetera, that all has value that
9 you have to give--that you have to account for, and
10 that's the problem with the sunk-costs approach. It
11 doesn't give any value to these intangibles, the
12 market knowledge, the consumer insight, the vendor
13 relationships, the hotel management experience. All
14 of the things that the Royal Property Group had, not
15 anybody can come in and do this. This requires some
16 sophistication, some knowledge, some knowledge that,
17 by the way, obviously the Royal Property Group had
18 because they had done this before.

19 But Dr. Hern, despite accepting that the DCF
20 Approach would be okay for a completely undeveloped
21 piece of property, he basically confirms that the
22 approach he took was a sunk costs updated at Risk-Free

1 Rate. I asked, Is that what you've done, you've
2 basically sunk costs updated at a Risk-Free Rate?

3 He said, Essentially.

4 He was resisting the sunk costs terminology
5 and said, You could think of it as a replacement, an
6 estimate of the replacement costs. But he confirmed,
7 It's sunk costs, Risk-Free Rate updated. That's not
8 Fair Market Value. Sunk costs, anybody who owns a
9 house knows what I paid for the house 10 years ago is
10 not what it's worth today. Hopefully it could go up
11 or down, but it's not what I paid. That's not the
12 Fair Market Value, even just for a piece of property.

13 Some more on confirming that that's the
14 approach he's taken, just basically a sunk-costs
15 approach or replacement cost.

16 And the reason why he justified this
17 Replacement Cost Approach, what was the reason? I was
18 trying to figure out how could he justify this as an
19 economist? And he said, Well, in a perfectly
20 competitive environment, where it is perfectly
21 competitive--that's an economic term of art--then it
22 makes sense, your sunk costs updated at a Risk-Free

1 Rate is going to be what the thing is worth. Because
2 it's a perfectly competitive environment. I can go
3 and buy that replacement. If I buy a widget from one
4 person, I can go and buy a widget from someone else
5 for the same price. And I asked him, But that's your
6 assumption, but nothing is perfectly competitive;
7 right? And he said, Right, right. That's right.

8 But that's his assumption. That's the only
9 way you get to replacement cost theory for Fair Market
10 Value. Is that you're assuming a perfectly
11 competitive environment. But he accepts that nothing
12 is perfectly competitive.

13 And I would suggest especially the real
14 estate development market in Medellín where one of the
15 main reasons why Mr. Seda went there in the first
16 place was because he saw opportunity. He saw that
17 there wasn't a widget on every corner that you could
18 buy. There wasn't a luxury hotel, there was
19 opportunity, and that's exactly what investors do.
20 They find those opportunities and they invest in them.
21 This is not a perfectly competitive environment with
22 no barriers to entry.

1 So, then the next question is, when using a
2 DCF is, can I say with a sufficient degree of
3 certainty that there would have been some profit
4 obtained here? And real estate is different than like
5 a big mining investment, for example, which I know we
6 see a lot more, for example; right? Where you can
7 sink a bunch of money, and you could lose it if
8 there's no gold in the ground; right? That's not the
9 case with property; right? Property has inherent
10 value. So, to be profitable, that threshold to reach
11 that sufficient certainty that there was going to be
12 profitability in a property development context, is
13 much easier to meet than, for example, mining or
14 something else, and so that's important to appreciate,
15 that that threshold for a sufficient degree of
16 certainty that there would have been profitability is
17 much easier to meet in the property development
18 context, and it was certainly met, I would say, here
19 especially looking at the track record of these
20 investors.

21 And Colombia appears to accept that a DCF
22 valuation is reliable with the correct assumptions and

1 that's in their Rejoinder. Colombia's Rejoinder said,
2 It is possible to correct some of the assumptions made
3 by BRG to reach a more reasonable DCF value which can
4 be verified by appropriate crosschecks as demonstrated
5 by Dr. Hern.

6 So, they confirmed that with the right
7 assumptions, DCF is the right approach.

8 The question, of course, then is who's got
9 the assumptions; right?

10 But by the way, before I get to those
11 assumptions, one important point is The Charlee Hotel,
12 no dispute that, wildly successful and profitable, I
13 think that was confirmed by the Respondent's Experts
14 as well.

15 With respect to the Meritage, DCF is
16 warranted, it was significantly advanced. This is a
17 situation where you pre-sell; right? So the owners
18 have already committed contractually to buy the
19 property. Sold out in record time, 152 units, I'm
20 going to build them, I already know who the buyers
21 are. I have contracts with them. They have to buy
22 them. They've put down deposits. My costs are known

1 because I've entered into contracts with my
2 construction contracts. There is--You've reached the
3 point of equilibrium. The banks are giving you money
4 because they know at this point that it's secure.
5 Right? You've reached that point where you know,
6 you've sold the units, everything with the hotel, et
7 cetera, is basically you've mapped it out, you know
8 your costs, et cetera, very far advanced.

9 And Colombia, by the way, did not contest
10 any of that evidence. They didn't challenge
11 Mr. Seda's testimony on any of this at the Hearing.

12 Luxé. The cabanas were already built. Now,
13 what's the income stream that comes from that? Well,
14 someone has to manage them; right? People--the owners
15 have bought these cabanas, and they've contracted with
16 the Royal Property Group to manage these cabanas.

17 Hotel. Financing is in place. The
18 hotels--they're already booking events. It's
19 72.5 percent complete, is what the C-338--the
20 construction folks will tell you that it's
21 72.5 percent complete when there is an audit done on
22 this project.

1 It was meant to commence operations in
2 January 2017, mere months. This was Meritage August
3 2016, January 2017, the hotel was meant to open. They
4 had already hired staff to work at the front desk.
5 Again, none of this is contested because they didn't
6 challenge Mr. Seda's testimony at the Hearing on any
7 of this.

8 So, let's go to the inputs. What are those
9 inputs? Well, there's three different categories that
10 I'm going to take you through. One is the real estate
11 business. That's basically the part of these projects
12 was that there were houses and apartment units that
13 are being bought and sold. And so you have the
14 revenue side of that and the cost side of that. Then
15 you've got the hospitality business, the hotels.
16 Right? How much does it cost to operate and what are
17 the costs and fees that you're going to earn.

18 And then we'll talk about the risk
19 adjustments. And there's two risk adjustments we'll
20 talk about. We'll talk about the Discount Rate, and
21 then the properties that are in development, 350
22 Heights, et cetera, Santa Fe, BRG, has taken a further

1 discount on the probability of survival.

2 So, let's start with the real estate
3 business. The formula is fairly straightforward.
4 What are your revenues. Let's start with the revenue
5 side of the equation. It's how much do I get to sell,
6 how many square meters am I selling, and what's the
7 sale price per square meter, and I multiply the two.
8 Right? Here's my average sellable area, and here's
9 how much I get per square meter. I multiply those two
10 and that gives me an output of how much I'm going to
11 sell a particular house for, for example. Right? So,
12 if I say my house is--we use square feet in the United
13 States--so \$1,000 per square foot, you figure out how
14 many square feet you have, and you multiply the two,
15 and that's what your price is. That's a proxy that
16 many folks use for sellable--for revenues on the real
17 estate side of things.

18 And here, you have two numbers here. The
19 blue column on this chart is based on the business
20 planning documents, so these are Luxé's projections.
21 Their contemporaneous Business Plans are projecting
22 the sale price per square meter in that blue bar.

1 And then JLL, who I'm sure this Tribunal
2 knows, is probably the world's leading expert on
3 property as an industry expert, they've corroborated
4 that by market data in Colombia, in other places
5 they're saying. If I look at similar units, how much
6 do they sell for per square meter? If I compare that
7 to the Meritage, for example, they're saying well,
8 actually in that area you can get COP 4.5 million per
9 square meter. So, what you see is BRG's assessment in
10 all of those cases except for Santa Fe, are actually
11 more conservative than JLL's market data in terms of
12 price per square meter. And the equation is as simple
13 as that on the revenue side of things for the real
14 estate business. It's price per square meter times
15 how much land do I get to sell, or how much property,
16 developed property do I sell.

17 So, then you look at the other side of the
18 equation, costs. How much does it cost me to build
19 this thing? And you have construction costs
20 essentially, and then you've got soft costs like
21 marketing and pre-development expenses. And again,
22 you've got the business planning documents and then

1 you've got market data in terms of costs.

2 I'm sure Tribunal Members love hearing this,
3 when they hear that costs, the cost side of the
4 equation here, is actually not in debate, and that's
5 confirmed by CBRE. They say, According to the
6 Claimants' model, construction costs are pretty much
7 aligned with our professional opinion. So, Colombia's
8 experts accept that the costs side of the equation
9 here on the real estate business is reasonable. And
10 Dr. Hern, when I asked him in cross-examination, you
11 agree that the construction costs in the BRG model are
12 reasonable; correct?

13 And he said, General speaking that's the
14 question. I said, Yes. He said, Because there are
15 obviously many, many thousands of construction costs
16 assumptions. I mean, based on the evidence that I've
17 seen from CBRE, I have no reason to think that they
18 are excessively different from what one would expect,
19 but there's still, I think, a lot of subjectivity to
20 those numbers but I see no real reason to dispute
21 them. That's right.

22 That's just a typical expert example, but

1 basically what he's saying is, I agree--that he agrees
2 that construction costs are reasonable.

3 So, to get your damages on the real estate
4 side of things, what do you do? And this is exactly
5 what BRG has done, they take the revenues, they
6 subtract the costs and that's your damages on the real
7 estate side of things. Obviously, then they update
8 that as appropriate.

9 Now, to verify that damage, Dr. Hern looks
10 at EBITDA margins to compare, you know, is this a
11 reasonable margin that they're getting. And he says,
12 No, they're not reasonable margins. But the examples
13 that he gives, you can see the red part of these
14 graphs, are social housing examples.

15 Now, the margins you get in social housing
16 projects are completely different than the kinds of
17 luxury projects that we're selling here; right? And
18 that's because the social housing business is a volume
19 business. You get--families get subsidies basically
20 to buy these social housing units and so you have
21 razor thin margins and basically the business is a
22 volume business, that's what JLL tells us. So, when

1 he's looking at EBITDA margins, you can't compare
2 social housing projects to the luxury apartments and
3 cabanas that you saw pictures of at the outset. Those
4 aren't the same types of margins.

5 And then if you look at Profit Margin
6 comparisons, what did CBRE do? CBRE went and they
7 interviewed people. They did a survey. Their own
8 survey. We don't know what the methodology was, but
9 they went and just asked people. They didn't tell us
10 who they asked, it was just random people--maybe not
11 random respondents, but they didn't identify the
12 Respondents. We can't assess whether or not they're
13 comparable or not.

14 And they just asked them, What are roughly
15 your profit margins? And they were asked on
16 cross-examination, Did you ask for the underlying
17 data, or did you take their word for it? And CBRE
18 said, We took their word for it.

19 And you don't list who these people are in
20 your Report, do you?

21 And he said, No, not explicitly.

22 So, quite frankly, I don't think you can

1 rely on any of the survey data that you got. They
2 didn't identify the Respondents. It's impossible to
3 verify whether the projects are comparable to the
4 Claimants, and it's really just survey data that was,
5 I mean, very--you know--I mean, you saw the
6 cross-examination and you may recall it's not very
7 reliable.

8 One of the other questions you asked is, How
9 quickly can you sell these things? Because the
10 quicker you sell them, the faster you get money;
11 right? So, you have a higher NPV, Net Present Value,
12 because you get money sooner in the bank account.

13 CBRE acknowledges that the Meritage Project
14 had record sales--this is in their direct
15 presentation, by the way, CBRE, that's their
16 presentation, Colombia's presentation--they say we know
17 that the Meritage at Phase 1 had record sales; we were
18 able to verify this.

19 So, they're confirming, record sales. The
20 Meritage Project.

21 But then what they did was they looked at
22 velocity of sales figures from their survey data.

1 Now, their survey data, it was really interesting, and
2 I went back and looked at this, and I was really
3 surprised. But even if you look at their survey data,
4 they did it for different reasons. So, they
5 interviewed four different projects from Medellín, for
6 example. Right? And they said, What's your velocity
7 of sales per month? And one Respondent said, Two to
8 three units per month. One said, Three to five.

9 Now, we don't know who these people are so,
10 we don't know if they're selling apartments or houses
11 or where in Medellín, but someone said two to three,
12 and someone said three to five, someone else said four
13 to 15, someone else said five to 15, and then someone
14 else said 1.4 to 2. And guess what number CBRE picked
15 for sales velocity for Medellín? 1.4. The lowest of
16 all of the numbers. They didn't take an average, they
17 didn't do anything like that. They just said, Oh,
18 sales velocity in Medellín should be about 1.4 per
19 month. And you can see that in the cross-examination.

20 And that's not what the numbers we're seeing
21 here, so it can't be right, but they ignored their own
22 survey data.

1 For Cartagena, same thing happened. They
2 looked at a couple of different developers, two--so
3 again, these are not very reliable results. But one
4 of them said, Oh, our sales absorption is 15 to 20 per
5 month. And another one said, Two per month. And
6 guess what number they picked to put in their Report?
7 Two. So, they're just taking the numbers that are the
8 most convenient.

9 And they had to say on cross-examination.
10 As I said, this was challenging in connection with the
11 sample we were able to collect. That's the only
12 non-highlighted part on the right side there. So,
13 they just said, It was challenging, and we had to pick
14 something. And they just happened to pick the lowest
15 number in all of the datasets. So, it's just not
16 reliable.

17 In terms of the hospitality business. So,
18 we've talked about real estate, you know, they built
19 these projects and they sell them, those are just
20 sales of houses basically; right? And apartment
21 units. But then there's the hospitality side of
22 things.

1 On the hospitality side of things, there are
2 again revenues and costs, and how do you assess
3 revenues? Well, revenues are their available rooms,
4 and what's called RevPar, it's a term that's used in
5 the hospitality industry. And basically what RevPar
6 is, is the average daily rate times the occupancy
7 rate. So, you take, let's say for a hotel I get \$500
8 a night, and let's say on average a hotel room is
9 occupied 200 nights a year, so I multiply \$500 a night
10 times 200 nights a year of occupancy and I get my
11 RevPar. And if I've got 100 rooms, I multiply all of
12 those and that gives me my revenues on the hospitality
13 side of the business.

14 And the revenue for available room for each
15 of the Projects, BRG calculates them here in this
16 slide. This is part of their direct presentation at
17 Slide 32. And you can see for the Meritage hotel, for
18 the Luxé, for Cartagena, for 450 Heights, for Santa
19 Fe, this was what was projected. And you can see as a
20 benchmark, The Charlee Hotel, the revenue per
21 available room was about COP 509,000 per night.

22 Other fees that they got, they got a

1 developer fee, there were certain contractual fees
2 that the Meritage Claimants, the Royal Realty as the
3 Manager and the developer, gets. Those are just
4 contractual development fees that they get. And
5 that's just purely a question of what rights do they
6 have in their contract? And that's reflected in the
7 RR Meritage company agreement at 3.08, and you've got
8 the provision there. They get a developer fee, they
9 get the percentage of gross sales, and they get
10 certain additional fees that are paid.

11 And when I asked Dr. Hern about this, he
12 said, Oh well, I'm not a lawyer, I can't interpret
13 this.

14 But it's all right there, and BRG has
15 assessed how much of these fees would then have
16 accrued to Royal Realty.

17 So, on the hospitality side of things, then
18 we go to the other side of the equation, what's the
19 cost? Well, to build and operate a hotel, there are a
20 number of costs. There's: Operating Revenues,
21 Operating Costs, there's some management brand fees,
22 and there's Profit Sharing Agreement. And that is all

1 information that BRG has calculated and verified by
2 comparing it to what the market data is, and JLL has
3 assessed what that market data is, and they derived a
4 value per key. So, in the hotel industry, that's a
5 metric that's often used, value per key.

6 And you can see the blue line on Slide 215,
7 that's the value, the average value per key, for the
8 Claimants' hotels. And you can see where that ranks
9 in terms of the comparable hotels, sample of hotels
10 that JLL used. So, the overall average is
11 USD \$414,000, and for Claimants' hotels the average is
12 USD \$388,000. So, when they're doing this market
13 check, it's a check against the DCF model. They're
14 saying, Yeah, it checks out because they're coming in
15 under the--against what we think are comparable
16 hotels--they're coming in under that overall average.

17 So, it's a reasonability check in terms of
18 the DCF model for revenue--for the value per key from
19 a hospitality industry perspective.

20 So, when Dr. Hern looks at these
21 comparables, what does he do? Well, the way he
22 assesses whether or not these are actually comparable,

1 he goes to Booking.com, the website that we all--many
2 of us may have gone to, and he just picks a random
3 night of the year. And he goes, Let me see how much
4 each of these hotels cost on that random night that I
5 pick. So, he picked October 28, 2020, which, by the
6 way, is at the height of the pandemic. And he said,
7 Let me check the price for that night and then I can
8 make an assessment as to whether or not they're
9 comparable to the Meritage and all of these other
10 hotels. And I asked him, So, you did this on
11 October 28, you went to Booking.com; is that right?
12 He said, Yes. And I said, I also use that website.
13 And you forecast out, you put in the date June 16th.
14 Why did you pick June 16, out of curiosity? Did you
15 try other dates, or did you just--you just thought
16 June 16th, it's a nice date, let's pick that date?

17 And his answer is, Pretty much. That's why
18 he picked the date. Not a very scientific approach to
19 picking comparables and deciding or criticizing, I
20 would say, JLL, one of the world's leading hotel
21 experts as to what is a comparable hotel.

22 I'm not sure that I actually need to do much

1 more on why his approach was flawed. But quite
2 frankly, what he was saying were comparables, were
3 just, I mean, you heard it. Were just not comparable
4 options. I mean, you heard from JLL basically saying
5 this demonstrates a complete lack of understanding of
6 the industry.

7 But I do want to spend a bit of time on
8 those Discount Rate, which is at Slide 220.

9 And some of the questions were, well, what's
10 captured by the Discount Rate in this particular case?
11 Does it capture the, you know, likelihood that this
12 project might fail? And he said--and he was asked,
13 But I'm talking about the Project completely failing.
14 Is that impossible?

15 And when they're talking about the Meritage,
16 he says--and the Luxé, he says, That is--is it taken
17 into account by the Discount Rate? Mr. Dellepiane was
18 asked about that, and he said, A hundred percent.
19 That's exactly what it is. It's assessing that for a
20 project that is reasonably likely to succeed, and you
21 know--for the Meritage and Luxé, he's saying that is
22 what the Discount Rate assesses. It's assessing the

1 risk of the project failing. That's one of the things
2 that's captured by that.

3 And I know the President of the Tribunal
4 asked that same--a similar question: How do you
5 capture a risk such as delay in construction and
6 things like that?

7 And that was answered, again by the experts,
8 they said, In two ways. One is when you project cash
9 flows because you're taking into account those kinds
10 of risks, delays. That's accounted for in when you're
11 projecting when am I likely to get cash flows.

12 But the second is in the Discount Rate
13 because the beta parameter for the real estate
14 industry, that's one of the things that's incorporated
15 into the Discount Rate. So things like delays of
16 construction work, that is all captured by the
17 Discount Rate.

18 If we go to 223, Dr. Hern's Discount Rate
19 and his assumptions are just not reasonable, in our
20 view, and why is that? Well, the Discount Rate, as
21 this Tribunal will know is driven partly by the Cost
22 of Debt and the Cost of Equity, so the overall

1 Weighted Cost of Capital. And the Cost of Debt that
2 he uses for his Discount Rate is the cost of
3 construction loans. But when you're operating a
4 hotel, that's not the right Discount Rate to use.
5 Because the cost of construction, the loans for
6 construction, is just a different metric than when
7 you're actually operating a hotel because at that
8 point, you're getting--you have cash flows; right?
9 So, the rate at which you can borrow for an operating
10 hotel or for management of houses or apartasuites is
11 totally different that the Cost of Debt for just
12 construction loans. So his Cost of Debt is not a
13 reasonable proxy for what should be used for an
14 investment like this. And he overestimates the Market
15 Risk Premium by calculating the arithmetic rather than
16 the industry preferred geometric average; and BRG has
17 talked about that, and Damodaran, who I've never
18 actually met but have said his names more times than I
19 can count, prefers the industry preferred geometric
20 averages. And if there's one thing I've learned in
21 arguing damages is when Damodaran says it, it's
22 something you should look at closely, and we would

1 urge the Tribunal to do that in this particular
2 instance. Of course, you have to apply it
3 appropriately, but in this particular instance, the
4 industry preferred geometric average, we would say, is
5 preferred.

6 And in assessing country risk, he uses the
7 Colombia peso-dominated issuances which are thinly
8 traded and just not reliable, because they are thinly
9 traded to assess country risk. When something is not
10 traded robustly, you shouldn't use that as a proxy for
11 assessing country risk. Whereas, BRG uses the EMBI
12 calculated by JPMorgan, which is based on U.S.
13 dollar-denominated issuances, which are much more
14 widely traded to assess country risk.

15 And then, as I said for these early-stage
16 projects what they do, based on input from JLL on the
17 probability of survival--JLL, what they did was they
18 said, When projects are started, what is the
19 probability at these early stages, that they fail? So
20 let's add an additional, taking a conservative
21 approach, what is the probability of success for
22 projects that aren't as advanced as a Luxé or a

1 Meritage where you've already sold units. You know,
2 it's--the Construction Contracts you de-risked it all
3 the way.

4 And there they've applied a multiplier of
5 77 percent for the Development Projects and 61 percent
6 for the expansion projects. To give you, sort of
7 taking into account that additional risk.

8 Now, Members of the Tribunal, it is 1:00.
9 Maybe let me say one more thing and then I think I
10 have about 15 minutes left, but I'm sure I'll be
11 corrected if I'm wrong, but I can do that last bit
12 after the break, if that makes sense.

13 But let me end on this Slide 227 before I
14 suggest we take a break, which is, based on all of
15 those parameters that I've just discussed, you put
16 that into the Model, and ultimately what BRG comes up
17 with is damages that align with this table. So,
18 \$64 million for the Meritage, \$44 million for Luxé,
19 for a total of \$108 million for those two projects.
20 And then the Projects in development, an additional
21 \$80.5 million. With Pre-Award Interest, that's how
22 you get the \$255 million.

1 Actually, I lied, one more thing I do want
2 to say which is on Pre-Award Interest.

3 I think at the very least, something that
4 needs to be or should be considered generally by
5 tribunals in general and I hope this Tribunal in
6 particular, it is a disincentive for Respondents to
7 pay when you use a Pre-Award Interest Rate that is
8 lower than their own Cost of Capital. So, when a
9 State can borrow, whatever they borrow money
10 at--right?--and here you have on Slide 229, their Cost
11 of Debt. When you use an interest rate that is lower
12 than that, then they have a disincentive to pay us
13 because this is the cheapest money that they can
14 get--right?--not paying us is cheaper than borrowing
15 money from someone else. So, what we suggest is using
16 a Cost of Debt, the Claimants' Cost of Debt as an
17 appropriate proxy for Pre-Award Interest because
18 that's how much we have to borrow at, which is about
19 5 percent, and that number is above Colombia's Cost of
20 Debt, which I think incentivizes things appropriately.
21 It doesn't disincentivize them from paying this
22 particular Award.

1 The last thing that I would spend my last
2 10-15 minutes on is the Essential Security Defense.
3 We will not likely cover the jurisdiction slides
4 today. We may come back to them tomorrow in rebuttal,
5 but Members of the Tribunal, it makes sense to take a
6 brief--our lunch break before I come back after lunch
7 to address you on Essential Security.

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

9 It's interesting that we hear that the
10 jurisdiction slide will not be addressed but maybe
11 addressed tomorrow in rebuttal. I do have a
12 due-process issue with this because there is a great
13 number of slides that were just passed over that we
14 didn't hear about. This is not the way that we've
15 done things. It's a full new submission, and I do
16 have an issue with Mr. Moloo just going through or not
17 going through them and just saying, I'm going to come
18 back to it tomorrow in rebuttal. If he has not
19 addressed it, so either he does or he doesn't, and I
20 have a problem with essentially putting all of these
21 slides as a submission and not address them and just
22 keep them in a safe place for tomorrow as a rebuttal.

1 That is an issue in terms of due process, I'm afraid.

2 PRESIDENT SACHS: Yes, Mr. Moloo?

3 MR. MOLOO: Mr. President, we were expecting
4 not just to have these slides but possibly other
5 slides, if we may burden the Tribunal with additional
6 slides. But for rebuttal, I don't think there was
7 anything in the Procedural Order not allowing us to
8 rely on slides. Obviously when you talk about
9 jurisdictional issues, those are Objections on
10 Jurisdiction that have been raised by the Respondent,
11 so I think some of those may be more appropriately
12 dealt in rebuttal. You know, we're in the Tribunal's
13 hands, but I don't think we should be prevented from
14 using slides in rebuttal tomorrow.

15 MS. BANIFATEMI: Just to be clear, the
16 rebuttal is expected to address what we will have
17 argued. So, if they're keeping under their sleeve
18 slides that they will address tomorrow, which may or
19 may not be in response to our briefing today, that is
20 inappropriate. Either it's in rebuttal precisely if
21 what Moloo said, or it's not and then they cannot do
22 that. The question is not about having slides or not

1 having slides. By the way, we are at a disadvantage
2 here because they will have all of evening to prepare
3 for their rebuttal. We will have very short time
4 after the rebuttal, so there is an imbalance there, so
5 this is even further aggravated by the fact that they
6 are keeping slides just in case, and they may address
7 more than what we will have said as a rebuttal.

8 So, rebuttal is rebuttal.

9 MR. MOLOO: Yes, we agree. We will not--if
10 they don't address jurisdiction, for example, at all,
11 we would not address jurisdiction, either. So, I'm
12 not suggesting that we would address arguments that
13 are not in response to arguments that they raise
14 tomorrow--this afternoon, rather. And I'm not sure I
15 understand the disadvantage because we've now given
16 our full openings, and they have more time than we do
17 to respond. I'm not sure I understand that argument.
18 But I can assure the Tribunal Members that we will not
19 deal with anything tomorrow that has not been raised
20 this afternoon.

21 MS. BANIFATEMI: To be very clear, this is a
22 submission which has not been put fully before the

1 Tribunal, so I do take issue with all of the slides
2 that we have not seen and are there that the Tribunal
3 may or may not look at in its own time. But it's an
4 imbalance in the sense that we have tried really to
5 address it. We asked for more than three hours. We
6 were given only three hours. In those three hours, we
7 will address a number of things, but there is so much
8 in this submission that they have not even gone
9 through that the Tribunal will now have in front of it
10 for deliberation purposes, and it will not have our
11 view on those slides because it's way more than what
12 you would expect for three hours. That's Point 1.

13 Point 2, the imbalance that I discussed
14 about rebuttal is that they will have all evening, all
15 afternoon and all evening to prepare for the rebuttal
16 of what they will hear this afternoon from our side.
17 Whereas, from our rebuttal of 30 minutes tomorrow, we
18 will have, for now, about 15 minutes to listen to what
19 they say and come back and discuss and argue rebuttal.
20 So, the imbalance is between what's going to happen
21 tonight and the 15 minutes we will have tomorrow for
22 that.

1 The other imbalance that I'm talking about
2 is the fact that this is a full submission with a lot
3 of slides that have not been explained and the
4 Tribunal has before it, which is much more than what
5 we will have the opportunity to explain to the
6 Tribunal because there's a lot here that you heard,
7 and we are only in a position in the little that we
8 have, which is three hours, where we are trying to
9 address things, but we cannot address everything, and
10 so this is the issue of the imbalance on the slides,
11 which is a different issue of the rebuttal. I hope
12 this clarifies.

13 PRESIDENT SACHS: Let's go step by step.
14 You said you need 15 more minutes to deal with the
15 Essential Security exception?

16 MR. MOLOO: Yes, by our calculation, that's
17 about what we have, I may be wrong, but that's about
18 how long I think I'll be.

19 PRESIDENT SACHS: How much more time do you
20 have?

21 MR. MOLOO: About 15 minutes. Sara will
22 correct me--Ms. Marzal will correct me.

1 SECRETARY MARZAL: I have seven-and-a-half,
2 but--

3 MR. MOLOO: We're in the Tribunal's hands.
4 I think I have about 15 minutes more of submissions,
5 if that is--

6 PRESIDENT SACHS: On the security issue?

7 MR. MOLOO: Correct.

8 PRESIDENT SACHS: Not on jurisdiction?

9 MR. MOLOO: Not on jurisdiction. And we
10 made the decision at the break that if we were pushed
11 for time, which I'm in a bit of between a rock and a
12 hard place, which is I want to, obviously, be
13 respectful for the time limit, which is three hours,
14 and I think what makes most sense is for me to address
15 you on Essential Security. And if there was one thing
16 that we would submit that we will just deal with, if
17 it's raised by--to the extent it's raised this
18 afternoon on rebuttal, is the jurisdictional issues.

19 PRESIDENT SACHS: Okay. I think we would
20 prefer to give you some more minutes also to deal with
21 jurisdiction, so that we cover all what is in the file
22 here. Of course, you would be granted some more time

1 as well. And possibly also consider that--I mean,
2 this program was set up by you, so but when I look at
3 it, the break--the break is a bit too short, indeed,
4 in the morning, next morning, so we could consider
5 prolonging it to at least half an hour or to 11:00.
6 And then we start with the Respondent's rebuttal at
7 11:00 o'clock. That would lead us to 11:30, then we
8 will have a short break, and then we have the
9 questions and answer. I think this--this was your
10 program, but looking at it, I think the Respondent has
11 a point here.

12 MR. MOLOO: We're fine with giving them a
13 longer break, Mr. President. That's fine with us.

14 PRESIDENT SACHS: Okay. So, this afternoon
15 you will deal both with the Essential Security
16 exception and jurisdiction, very shortly?

17 MR. MOLOO: Yes. I think if we're in that
18 position--so, I think maybe we get instead of 15
19 minutes, we do 30 minutes and we can deal with--

20 PRESIDENT SACHS: Obviously, you will get
21 the same 15 minutes more.

22 MS. BANIFATEMI: Well, there is a

1 discrepancy between the understanding from the
2 Claimant about how much they have, which is 15, and
3 ICSID's calculation, which I think is what binds
4 everyone, to seven-and-a-half. So, if they have
5 seven-and-a-half plus the rest, then we should have
6 the equivalent.

7 PRESIDENT SACHS: Okay, okay.

8 MR. MOLOO: We're fine.

9 MS. BANIFATEMI: But it would be helpful to
10 a count when we come back so that we know how much
11 more time we have.

12 PRESIDENT SACHS: I think that's already
13 said.

14 MS. BANIFATEMI: Seven-and-a-half, if they
15 have 30 minutes, then we have the rest, 30 minus
16 seven-and-a-half. Thank you.

17 PRESIDENT SACHS: Very good. So, we will
18 have a break and resume at 2;15. Is that all right?

19 (Whereupon, at 1:13 p.m., the Hearing was
20 adjourned until 2:15 p.m., the same day.)

21 AFTERNOON SESSION

22 PRESIDENT SACHS: All right. Mr. Moloo,

1 you're invited to proceed.

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

3 Oh, sorry, we'll just need a moment.

4 (Pause.)

5 MR. MOLOO: Thank you, Mr. President, and I
6 hope you all enjoyed the lunch as much as I did. I
7 have to say, I don't know if it's a function of being
8 in Paris or this particular hotel, probably a bit of
9 both, but I'm not used to having those types of
10 lunches during my breaks but welcome it, so thank you
11 perhaps to Respondent's counsel for picking the menu.

12 Let me turn to the Essential Security
13 Defense, and before I do, there's one point that I do
14 want to make, which is, you know, that this is a new
15 submission. I do want to make the point--I do take
16 issue with that for one important reason, which is all
17 of this is in the record. Right? Our submissions are
18 what you hear from Ms. Champion and I, but none of
19 this is new, and I think that's important point, and I
20 said at the outset, it is an important theme for us
21 because none of this has changed. These are the
22 arguments--I hope you're not tired--you may be tired

1 of hearing them from us, but they are the same
2 arguments that you will have heard supplemented by
3 additional evidence, but none of this is new
4 submissions.

5 And likewise, with the Essential Security
6 Submission that I will make, these are all arguments
7 that you will have heard before.

8 And I think it's actually a fairly
9 straightforward argument in the first instance when
10 we're talking about the Essential Security Defense
11 that was first raised in the Rejoinder.

12 And I take you to Article 22.2, which is the
13 Essential Security Provision, and it says: "Nothing
14 in this Agreement shall be construed to preclude a
15 party from applying measures that it considers
16 necessary for the fulfillment of its obligations with
17 respect to the maintenance or restoration of
18 international peace or security, or the protection of
19 its own Essential Security Interests."

20 Nothing precludes a party from applying
21 measures that it considers necessary to do that. And
22 the reason why this is important, this language, is

1 the language, the ordinary meaning of it, makes it
2 clear that they must adopt the Measures for the
3 purposes of achieving that Essential Security
4 Interest, which means they must know the Essential
5 Security Interest at the time they're applying the
6 Measures. That's the language in 22.2. They're not
7 precluded from applying measures that they consider
8 necessary to protect their Essential Security
9 Interest, but you can't apply measures, not know what
10 that Essential Security Interest is come six years
11 later and say, Oh, I now have an Essential Security
12 Interest for which I can justify measures that I
13 applied six years ago. That's not the way it works.
14 You must know at the time that you're applying the
15 Measures what the Essential Security Interest is.

16 And what's exactly what the International
17 Court of Justice said in the Nicaragua versus USA
18 case, where the Treaty there was dealing with
19 non-precluded measures clause: "The present treaty
20 shall not preclude the application of measures." In
21 that case, if you look at the "necessary to fulfill
22 the obligations of a party for the maintenance,

1 restoration of the international peace and security or
2 necessary to protect its Essential Security
3 Interests," whether this is self-judging or not is
4 totally irrelevant, by the way, to the question--this
5 temporal question that I'm--or issue that I'm raising,
6 which is at what point in time must the Essential
7 Security be identified or known.

8 And the Court there said--they specifically
9 said was to bear in mind the chronological sequence of
10 events. They must have been at the time they were
11 taken Measures necessary to protect its Essential
12 Security Interest, and the same is, of course, true
13 here.

14 [REDACTED]

1

[REDACTED]

22

You can end the analysis right there, but if

1 you feel the need to go on, Members of the Tribunal,
2 there is another important point, which is this is not
3 a jurisdictional clause, and you've heard the change
4 in--you know, in order to introduce this late, they
5 raise it as a jurisdictional defense, and then you
6 start to hear the vocabulary change to,
7 justiciability, which is different from jurisdiction?
8 Right? So this is not a jurisdictional defense? It's
9 an affirmative defense to, we would say, a remedy.

10 It specifically says that nothing in this
11 Agreement shall be construed to preclude a party from
12 applying measures. That's what it is. It says--it
13 allows them to apply measures. It does not exempt
14 them from the obligation to comply with the treaty or
15 to pay compensation for a breach of the treaty.
16 They're just entitle to keep their Measures in place
17 assuming it was done in a timely way, et cetera. And
18 that's exactly what "prevent" means, the ordinary
19 meaning, to prevent from taking place.

20 And that makes sense in the context of
21 International Investment Treaty Law and International
22 Trade Law, and this is important because the exception

1 applies equally to the "Investment" chapter as well as
2 the "Trade" chapter. It applies equally to Chapter 10
3 and 21. And it's important to note in that context
4 why--you know, when I say it just goes to the remedy,
5 why is that relevant? Why is that important? Because
6 in the trade context, the primary remedy is the
7 removal of a non-conforming measure. Right? If
8 someone is--they apply a quantitative restriction or
9 something like that, in the trade context, the primary
10 remedy under international law is you have to remove
11 that quantitative restriction, and they're saying,
12 well, you're not--you don't have to remove the Measure
13 if it's done to protect your Essential Security
14 Interest.

15 And likewise in the investment-treaty
16 context, 10.26 specifically contemplates the
17 possibility of restitution of property. But here this
18 provision says you can keep the Measure in place if
19 it's to protect your Essential Security Interest, but
20 it does not exclude the possibility of monetary
21 damages, and that's exactly the issue that was before
22 the Eco Oro versus Colombia tribunal under the

1 Canada-Colombia BIT. And again, this has nothing to
2 do with whether it's self-judging or not. It's a
3 question of what is the remedy? What does this get
4 you? Whether--if it is properly invoked, whether
5 self-judging or not, what does it get you?

6 And the Eco Oro versus Colombia case dealt
7 exactly with this question. When they were
8 interpreting language that was similar, nothing in
9 this agreement shall be construed to prevent a party
10 from adopting or enforcing measures necessary to do
11 various things.

12 And they said Colombia also provided no
13 justification as to why it was necessary for
14 protection of the environment, in that case, not to
15 offer compensation to an investor for any loss
16 suffered as a result of the Measures taken by Colombia
17 to protect the environment, nor explained how such
18 construction would support the protection of
19 investment in addition to the protection of the
20 environment.

21 And they said--and Canada came in with
22 Colombia there, and they said it can't--the Tribunal

1 there did not accept Canada's Non-disputing Party
2 submission, that in such circumstances, payment of
3 compensation is not required.

4 So very similar to here. They said it just
5 says you could adopt the Measure, not that you're
6 precluded from the compensation obligation, so Eco Oro
7 is very much on point, we would say; and there again
8 was a situation where you had Canada and Colombia both
9 coming in, making submissions to that effect, and the
10 Tribunal said, no, that's not what it says. That's
11 not the ordinary meaning. It doesn't comport with the
12 purpose of this Treaty, either. And it doesn't
13 comport with the purpose of the Treaty in this case
14 either. I've already taken you to the Preamble, but
15 it also needs to be interpreted in a way that is the
16 consistent with the purpose and object of this Treaty
17 which includes, you know, promoting broad-based
18 economic development in order to reduce poverty and
19 generate opportunities for sustainable economic
20 alternatives to drug-crop production, to promote new
21 employment opportunities and increase the living
22 standards. That's the kind of things that this

1 investment was doing.

2 They've relied on travaux, and they put in
3 hundreds of pages of travaux. But if the ordinary
4 meaning is clear and unambiguous, then one needs not
5 go to the travaux. And we would submit, and Colombia
6 has even said, that the Article 22.b is unambiguous,
7 so there is no need to go to the travaux. But if you
8 do go to the travaux, the travaux is not very clear on
9 this, and this is why travaux--you have to look at
10 very carefully because one of the things we would
11 submit the travaux makes absolutely clear is that this
12 obligation of compensation for a breach of the Treaty
13 was of critical importance in particular for the
14 United States. They said the other point is that this
15 chapter establishes that it is possible to expropriate
16 for social interest. You can expropriate for social
17 interest, but you still have to pay compensation.

18 The U.S. also said, But we feel it is
19 legally necessary that investors have the opportunity
20 to receive compensation for damages caused to them.
21 We seek to give you that in a way that does not
22 fundamentally harm the Investors. They wanted to give

1 them what they were looking for, what Colombia was
2 looking for while not harming, fundamentally,
3 investors and their right to receive compensation.

4 At one point in the negotiations, they're
5 saying we continue with the underlying problem, we
6 want it to be compensated immediately after the
7 Measures invoked. That is fundamental. Immediate
8 compensation was fundamental. So, at various points
9 in the negotiating rounds, the U.S. was saying you can
10 expropriate for social interest, but you're not going
11 to exempt the compensation obligation. In their
12 words, that obligation was fundamental.

13 There is some talk about subsequent
14 agreement, and I think this is important. In *Infito*
15 *Gold*, what the Tribunal there said was that even if
16 you have non-Parties submissions in the middle of an
17 Arbitration, that cannot be used to form a subsequent
18 agreement. Why is that? The Tribunal said: Even if
19 the Tribunal confer an agreement from the Contracting
20 State's submissions during the proceedings, *quad non*,
21 this agreement would post-date the commencement of
22 this Arbitration, and the Tribunal could not take into

1 consideration in favor of one litigant to the
2 detriment of the other without incurring the risk of
3 breaching the latter's due-process rights.

4 So, you can't take into account a subsequent
5 agreement during the course of the proceedings and use
6 it against one of the litigating Parties. That's what
7 the *Infinito Gold v. Costa Rica Award* found.

8 And in any event, even if there was a
9 subsequent agreement here between the Parties, it
10 cannot be used to modify the treaty obligations. You
11 can't use a subsequent agreement to modify treaty
12 rights, and the *Sempra Tribunal* says, more or less,
13 the same thing.

14 I will briefly touch upon the last couple of
15 arguments with respect to Essential Security. You
16 have our submission that we think it's late. The
17 Tribunal in Procedural Order No. 9 only allowed the
18 submission insofar as it was--for purposes--it was a
19 jurisdictional objection. I don't think it is a valid
20 jurisdictional objection. We've explained to you why.

21 Arbitrator Perezcano asked the question of
22 counsel for Respondent during the Hearing, noting

1 that, in the footnote, it says the Tribunal or panel
2 hearing the matter shall find, suggesting that the
3 Tribunal has the authority to make a finding, and we
4 would say that that confirms in our submission, at
5 least, that there is jurisdiction, it's not a
6 jurisdictional question, in our view. It's a merits
7 defense. It's an affirmative defense. And as a
8 merits defense, it is out of time. According to
9 Procedural Order No. 1, they were only allowed to
10 raise defenses that were in response--were responsive
11 in the Reply and the Rejoinder submissions. That's in
12 Procedural Order No. 1. And in Rule 26 of the ICSID
13 Arbitration Rules, it says any step taken after
14 expiration of the applicable time limit shall be
15 disregarded unless there are special circumstances,
16 and there are no special circumstances here, in our
17 submission, because there can be no new facts because
18 otherwise it's out of time for different reasons. The
19 fact must have been known at the time the Measure was
20 taken in order to come within the protection of the
21 provision.

22 There is also a good-faith defense. We

1 don't think this is a defense that's raised in good
2 faith for two reasons: One, it's simply a recasting
3 of arguments they made in the Counter-Memorial and the
4 Rejoinder. You can see that at Slide 255. It's more
5 or less the same reasons, it's to fight organized
6 crime, but they just recast that as all of a sudden an
7 Essential Security Interest in the Rejoinder.

8 But more than that, as I think is accepted
9 by both Parties, one of the questions when you're
10 assessing good faith is whether or not the Measure is
11 plausibly connected to the Essential Security Interest
12 that's been identified. And for the reasons
13 Ms. Champion has already mentioned and I've discussed
14 earlier, there is no connection here between the
15 Measure and whether you call it a "police purpose," a
16 "public purpose" or an "Essential Security Interest,"
17 there is no rational connection between the Measure
18 adopted here and that Essential Security Interest.

19 Colombia accepts that the Claimants'
20 wrongdoing is not the subject of the Measures, and if
21 they were actually concerned with the Essential
22 Security Interest of fighting organized crime, they

1 would have gone after the assets of those individuals
2 who--whose actions are actually, they say, criminal,
3 and they haven't done that.

4 And, lastly we rely--as certainly we don't
5 think you need to get this far down this chain, but
6 the most-favored-nation treatment standard is one that
7 we think applies if the Tribunal were to find that
8 this were to preclude us from bringing our claims
9 because there are other treaties that don't preclude
10 investors from those States from bringing claims in
11 similar circumstances. And just one example is the
12 Colombia-Swiss BIT.

13 I will turn it over to my colleague,
14 Ms. Kahloon, to deal with the jurisdictional issues.

15 MS. KAHLOON: Good afternoon Mr. President
16 and Members of the Tribunal. Thank you for the
17 opportunity to address you again on behalf of the
18 Claimants.

19 I will be providing the Tribunal with a
20 summation of the jurisdictional issues in dispute
21 between the Parties.

22 As a threshold matter, since the Parties

1 Opening Submission at the May Hearing, the only
2 movement in jurisdictional objections between the
3 Parties has been the addition of overwhelming evidence
4 to the record through the testimony of Mr. Seda and
5 Claimant's Experts that reaffirms Claimants' status as
6 protected investors who have made a protected
7 investment in Colombia and who have standing to
8 adjudicate Colombia's unlawful conduct before this
9 Tribunal.

10 Turning first to Claimants' status as
11 protected investors under the TPA. It's agreed
12 between the Parties that in order for an ICSID
13 tribunal to exercise jurisdiction over a claimant, the
14 *ratione personae* requirements in both the ICSID
15 Convention and the TPA, extracted on this slide, must
16 be met. It's uncontested between the Parties that
17 each of the seven individual Claimants and JTE
18 International Investments qualify as protected
19 investors under the TPA and the ICSID Convention.

20 It is also uncontested that Boston
21 Enterprises Trust is a protected investor under the
22 TPA. The only remaining issue in dispute between the

1 Parties is whether Boston Enterprises Trust qualifies
2 as a protected investor under the ICSID Convention.

3 In the TPA, the Contracting Parties expressly agreed
4 that a trust is a type of enterprise that has legal
5 personality and standing to initiate international
6 arbitration. The ICSID Convention in turn extends
7 standing to any juridical entity. This is not a
8 limited class and it extends to any juridical entity.

9 Moreover, to the extent that there is any
10 ambiguity in the ordinary meaning of this phrase, the
11 travaux préparatoires, Colombia's favorite tool of
12 treaty interpretation, confirm that the drafters
13 wanted to keep the definition as neutral as possible
14 in order to take into account differing national law.
15 Colombia, after having agreed to include trusts as a
16 type of enterprise within the TPA, cannot
17 retroactively seek to add conditions of corporate
18 liability when the clear terms of the Treaty
19 contemplated in corporation of trust within the
20 concept of an investor who could initiate ICSID
21 Arbitration. Accordingly the Boston Enterprises Trust
22 should be held to be a covered investor with standing

1 to act as a claimant.

2 Turning next to Claimants' ownerships of a
3 protected investment under the TPA. Article 10.28 of
4 the TPA incorporates a very broad definition of what
5 constitutes an investment, to include every asset that
6 an investor owns or controls which has the
7 characteristics of an "investment." The TPA,
8 thereafter, sets non-cumulative and non-exhaustive
9 examples of what such characteristics could include.

10 As highlighted in Claimants' Opening, there
11 are a number of decisions that support adopting a
12 broad interpretation of Article 10.28 of the TPA.
13 Now, Claimants' investment in Colombia are comprised
14 of a bundle of rights, including shares earned by each
15 of the investors in Newport, Luxé and/or Royal Realty,
16 management contracts that were in place between Royal
17 Realty and Newport as well as Royal Realty and Luxé,
18 as well as equity in enterprises through investment
19 vehicles that were set up for Development Projects,
20 such as RDP Interpalmas, RDP Cartagena, and
21 Revmarketing.

22 Accordingly, it's clear that the Claimants

1 are in a broad range of investments in Colombia. Each
2 of which display the characteristics of an
3 "investment." However, the Parties disagree on
4 whether the ICSID Convention creates a separate
5 jurisdictional hurdle that investors must discharge in
6 order to gain access to ICSID Arbitration. The ICSID
7 Convention does not include a definition for the term
8 "investment" or the so-called "cumulative criteria"
9 that Colombia is attempting to read into the
10 Convention. And a number of tribunals, including
11 those on the slide, have rejected a so-called "double
12 keyhole test." However, in any event, and has only
13 been reinforced since the Hearing, Claimants meet each
14 of the criteria advanced by Colombia.

15 First, Claimants have made a commitment of
16 capital or other resources as protected investments.
17 Thusly, there is no minimum contribution that needs to
18 be made in order for an investment to qualify as
19 protected, and Colombia itself has conceded on
20 numerous occasions that Claimants have made a
21 contribution. However, they disagree as to whether
22 this contribution was allegedly large enough. But it

1 became apparent at the Hearing that Colombia had
2 ignored evidence of contributions that were put on to
3 the record by Claimants of contributions in both Luxé
4 and Newport. That be found in Exhibits C-358 and
5 C-359.

6 Moreover, as this Tribunal has now heard
7 straight from the source himself, Mr. Seda contributed
8 significantly know-now and brand value to create a
9 highly successful portfolio of projects that had great
10 potential within the Colombian tourism market.

11 Second, Claimants have assumed significant
12 investment risk through their Investments. Claimants
13 assumed the risk that they would lose their invested
14 capital, and concomitantly they held an expectation of
15 gain or profit. Accordingly, even applying Colombia's
16 test, there is no question that the Claimants made an
17 investment in the State.

18 Moving to the next objection. Now, as
19 Mr. Moloo and Ms. Champion have already covered
20 extensively, the claims advanced in this Arbitration
21 by Claimants are directly related to the Measures in
22 dispute and are not limited to the Meritage Project.

1 As Claimants have established in their submissions to
2 date, all that is required at the jurisdictional stage
3 with respect to this objection is a relationship of
4 apparent proximity between the challenged measure and
5 the Claimant or its investment. Any further analysis
6 is more suitably reserved for a consideration on the
7 merits of the Claim. Now, Mr. Moloo and Ms. Champion
8 have gone far beyond establishing a relationship of
9 apparent proximity between the Measures and the impact
10 that these Measures have had on Luxé, as well as the
11 development projects and Royal Realty's--

12 REALTIME STENOGRAPHER: Just a moment. I
13 need you to slow down. It is making it very difficult
14 for the interpretation as well.

15 MS. KAHLOON: My apologies.

16 REALTIME STENOGRAPHER: Start with that
17 sentence again.

18 MS. KAHLOON: As Mr. Moloo and Ms. Champion
19 have already covered extensively in their submissions,
20 the Measures at issue in this Arbitration severely
21 affected not only the Meritage Project, but also Luxé
22 and Royal Realty's pipeline of Development Projects.

1 The impact on these Measures, which was widely
2 publicized, should have been foreseeable to Colombia
3 before it wrongfully initiated Asset Forfeiture
4 Proceedings against the Meritage Project.

5 Moving to the final objection. Both Boston
6 Enterprises Trust and Brian Hass have standing in this
7 Arbitration.

8 First, addressing Boston Enterprises Trust,
9 the settlor Trustee and beneficiary of Boston
10 Enterprises Trust is a U.S. national that has
11 maintained continuous ownership of an investment in
12 Newport since 30 March 2016, and in Luxé since
13 14 February 2012. The change in ownership structure
14 through affiliated entities of the same nationality
15 was purely to maintain anonymity as established in
16 Claimants' Opening Submissions, as opposed to an
17 effort to gain access to ICSID Arbitration. It is not
18 appropriate to draw parallels between this corporate
19 restructuring and a situation where there has been an
20 abuse of process, because at all points Boston
21 Enterprises Trust would have been entitled to have
22 recourse to ICSID Arbitration, and tribunals have

1 recognized that internal corporate organizations of
2 this kind are committed.

3 With respect to Mr. Hass, Colombia contends
4 that Mr. Hass does not have standing in this
5 Arbitration because he's drafted his investment in
6 Luxé through a Family Trust. However, the record
7 shows that Mr. Hass made his investment through
8 Haystack Holdings, which in turn was controlled by a
9 family trust, which Mr. Hass and his wife are the
10 settlers and sole beneficiaries. As can be seen in
11 C-222. As Mr. Hass is the ultimate beneficial owner
12 of the Shares, he has standing to claim relief before
13 this Tribunal, pursuant to the principle in
14 international law that grants standing and relief to
15 the owner of the beneficial interest.

16 Mr. Moloo will now conclude Claimants'
17 Opening Statement.

18 MR. MOLOO: I asked Ms. Kahloom to leave me
19 with three minutes, so I apologize if she was rushing.
20 It was because I had asked you to leave me three
21 minutes, which I think I do have.

22 What we want to end is with our request for

1 relief. You can see on Slide 278, and again, this is
2 the same request we've asked from the outset that the
3 Tribunal declare that there have been breaches that
4 the Claimants be awarded \$255.8 million plus interest,
5 and we're also claiming moral damages. And I want to
6 say one note on moral damages.

7 This is the first case in which I have ever
8 claimed moral damages, so we didn't take the Decision
9 lightly to make a claim for moral damages, and I know
10 we've covered a lot of uncomfortable topics over the
11 last several years, including the alleged extortion
12 scheme and corruption issues, and we don't think you
13 need to find any of that in order to find that
14 Claimants have prevailed in this case, and for that
15 reason we thought is this something--we want to go
16 there because they are uncomfortable topics. But we
17 thought we had to because these--this is an important
18 part of what happened in this case, and we had to tell
19 that story to show how egregious the conduct was.

20 Mr. Seda has been subject to, and his
21 investments and the Investors in this case, have been
22 subject to rather egregious conduct, and we think it

1 is a case where moral damages would be appropriate to
2 show that this is not acceptable. It's important to
3 show that to other investors, and it's important to
4 show that to the Treaty Parties.

5 And I want to end where Mr. Seda ended in
6 his testimony, and it's up on the screen. I asked
7 him, why did you go back to Colombia? You went back
8 to Colombia. With all of this happening, why did you
9 go back to Colombia, and why are you pursuing all of
10 this? There's the threat of potential investigations
11 and all of this is coming out because you're pursuing
12 this claim. Wouldn't you just want to put this all to
13 an end?

14 And he said because I'm defending my name,
15 and because this is going to follow me no matter where
16 I go. It's true. It's going to. It has for the last
17 several months, and it's going to continue to follow
18 him. And he wants it to come to an end, and he wants
19 to put an end to this. And putting an end to this is
20 hopefully this Tribunal saying that the type of
21 conduct that happened in this case is not acceptable.
22 It's not what Colombia and the U.S. wanted when they

1 signed this Treaty. It's not meant--if this type of
2 conduct is not what this Treaty is meant to protect
3 then I don't know what is. It's not what the
4 Claimants deserved. It's not what the people of
5 Colombia deserved. But in order to put an end to
6 this, the Claimants must be compensated for the
7 wrongful conduct that happened in this case.

8 Those are our submissions.

9 PRESIDENT SACHS: Thank you very much,
10 Mr. Moloo.

11 We will have a short break, a few minutes?

12 MS. BANIFATEMI: Just a few, yes.

13 PRESIDENT SACHS: Do you want to stay in the
14 room or do you leave?

15 MS. BANIFATEMI: We are in your hands. We
16 can leave, come back.

17 PRESIDENT SACHS: No, no, no. How long does
18 it take you to get prepared?

19 MS. BANIFATEMI: To switch computers and do
20 some switching of the team here, so, five minutes
21 should be fine. 10, if the Tribunal wishes to have
22 more. We're in your hands.

1 PRESIDENT SACHS: I'd say 10 minutes, yeah.

2 MS. BANIFATEMI: 10 minutes?

3 (Comment off microphone.)

4 MS. BANIFATEMI: Yes, it will be sent right
5 away.

6 (Recess.)

7 PRESIDENT SACHS: I think everyone is ready
8 to resume, and the floor goes to Ms. Banifatemi.

9 MS. BANIFATEMI: Thank you, Mr. President.
10 Ms. Ordoñez will start for Colombia, with your
11 permission.

12 PRESIDENT SACHS: Okay.

13 Yes, please.

14 MS. ORDÓÑEZ: I will be addressing you in
15 Spanish as well.

16 CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

17 MS. ORDÓÑEZ: Mr. President and
18 co-Arbitrators, before I give the floor to our
19 colleagues from GBS Disputes, I would, first of all,
20 like to make a few observations related to major
21 issues.

22 First of all, I'd like to refer to the

1 expectations that explain and inform our consent to
2 investor-State arbitration. These include the
3 exceptional nature of both this mechanism and the
4 foreign investor's powers and rights under Section 10
5 of the Treaty with the United States of America.

6 Then, secondly, I will refer to some of the
7 basic content of the Law on Asset Forfeiture, which,
8 almost after four years of litigation before you,
9 should now be clear to everyone.

10 Further, I must, first of all, refer to
11 these basic points because, as we've heard this
12 morning, it seems the Claimants are suggesting that
13 those points are either unclear or are being
14 misrepresented.

15 Regarding Colombia's consent to
16 investor-State arbitration, I would like to refer to
17 the three main premises that we in Colombia feel are
18 important. On the one hand, the International Foreign
19 Investment Law that we understand is a law of minimum
20 protections which does not seek to put the foreign
21 investor in a more favorable position than that of a
22 domestic investor. This is how we understand the

1 rights of foreign investors and their investments in
2 relation to the minimum standard of treatment, but
3 also in relation to the standards of expropriation,
4 national treatment, and full protection and security.

5 We find it also important to recall this
6 understanding, because we can't help but to identify
7 in the position of our colleagues from the
8 counterparty questionings that, far from being
9 supported by a strict understanding of International
10 Foreign Investment Law, they would seem to reject
11 certain types of situations, which, although not
12 comfortable, are typical of asset forfeiture actions
13 in Colombia and are equally borne by all domestic and
14 foreign investors in our country who invest in illicit
15 property.

16 -Further, we understand that investor-state
17 dispute settlement is an exceptional mechanism, where
18 the investor exclusively has the rights that the State
19 Parties have provided. Despite the sophistication of
20 investor-state arbitration and the agreement to
21 litigate in equal conditions, the rights of the
22 investor in this kind of proceedings arise from the

1 consent provided by the States. That's why the State
2 of Colombia--

3 PRESIDENT SACHS: Can you slow down a little
4 bit, the translators.

5 MS. ORDÓÑEZ: Thirdly, we understand that
6 the jurisdiction of the tribunals is subject to the
7 implicit condition of legality, and this is why the
8 Colombian State, has the burden, and the Tribunal the
9 obligation, to, as far as it possibly can and with all
10 diligences, make sure that the investment does not go
11 against any of the legal systems of the State. This
12 is why this allegation of illegality or unlawfulness
13 is so severe that it can have an effect on
14 transnational public order.

15 I'd finally like to conclude by clarifying
16 some specific aspects of asset forfeiture that should,
17 as I say, be clear to everyone now after almost four
18 years of consideration but don't seem clear on
19 Claimants' side, this apparent misunderstanding, which
20 we have described as a convenient misrepresentation,
21 explains how part--or to a great extent their claims
22 are unfounded.

1 Firstly, the asset forfeiture procedure
2 comprises two stages. One which is completely
3 reserved, including for those who may be affected.
4 So, after almost four years, it should be clear to
5 everyone that these publicity claims are not
6 admissible in relation to the activities that take
7 place during this first phase, and that includes the
8 introduction of Precautionary Measures. This is why
9 it is not correct to say that the imposition of
10 Precautionary Measures should have been preceded by
11 consultation with the affected Party in order to
12 understand whether they were third Parties in good
13 faith and free of fault.

14 For the same reason, it's absurd to say that
15 the response to a right of Request for Information is
16 just a mechanism, even the moderately diligent
17 mechanism to understand if a piece of land or a group
18 of people are subject to this asset forfeiture
19 proceeding. Even if they were, and if the proceeding
20 were in its initial stage, response to the right of
21 petition could never have given an account of those
22 proceedings.

1 Secondly, the Asset Forfeiture Procedure is
2 a progressive one aimed at establishing the origin of
3 the grounds for asset forfeiture and the existence of
4 any third party in good faith without fault, the
5 latter being the only instance accepted by Colombian
6 law in order to generate property rights over assets
7 of illicit origin.

8 This progressive character implies that the
9 establishment of these above situations goes to a
10 first stage, initial phase, led by the Prosecutor's
11 Office, but then it goes on to a following phase, and
12 it has to go before the Asset Forfeiture Court, and
13 it's up to the Prosecutor's Office to take such
14 measures such as Precautionary Measures or to file an
15 asset forfeiture suit that would have to be defended
16 before a court. This defense includes the existence
17 of the causes of action and the existence or not of
18 third parties in good faith without fault.

19 This simple description, which should be
20 familiar to all, completely rules out any argument
21 suggesting that if a certain piece of information was
22 not known and was invoked during the initial phase it

1 can no longer be the subject of analysis and debate in
2 the trial stage. The same Asset Forfeiture Procedure
3 allows for supervening evidence to be invoked, and
4 that evidence can be passed from one proceeding to
5 another, if it's necessary in the context of the
6 forfeiture.

7 This is--this now brings me, having given
8 these clarifications, to the end of the State's
9 opening allegations. Thank you.

10 PRESIDENT SACHS: Thank you very much.

11 MS. BANIFATEMI: Mr. President, Members of
12 the Tribunal, thank you very much. And following from
13 Ms. Ordoñez's comments, I will now address a number of
14 points.

15 You will see on Slide 2, which is my Table
16 of Contents, we will address the Essential Security
17 exception, issues of jurisdiction, and the premature
18 and abusive nature of this proceeding. I will address
19 all three first points. Following that, Ms. Herrera
20 will address issues of liability and the fact that the
21 Respondent has not breached its international
22 obligations under the TPA.

1 And, finally, Ms. Ribco Borman will address
2 the issue of damages or the fact that the Claimants
3 are not entitled to damages in this case.

4 Before I start, Mr. President and Members of
5 the Tribunal, I would like to make a few opening
6 comments for which I do not have slides but which I
7 would like to address based on what I heard this
8 morning, and these are important points.

9 The first point I would like to make is, as
10 you know, it's always important for Tribunal Members
11 to go back to the record and to double-check the
12 record and to not make a decision or deliberate based
13 on misrepresentations by parties and out-of-context
14 quotes.

15 We saw a lot of out-of-context quotes this
16 morning in the presentation by the Claimants. I would
17 urge the Tribunal to go back to the record and truly
18 to double-check everything in the context in which
19 questions were posed and answered, and the actual
20 arguments that were made.

21 It is in that context also that I make the
22 previous comment that had we had the same notion as

1 our friends on the other side, we could put a lot of
2 slides and not argue them, but the point that I was
3 making is that in some arbitrations I've been where
4 simply slides not argued have been excluded from the
5 record because these are submissions that are not put
6 before the Tribunal, so we were not asking for that.
7 I just ask for the Tribunal to be indulgent in the way
8 that it will, indeed, look at the Parties'
9 submissions. And we have been selective because we
10 were trying to accommodate the Tribunal's directions
11 of arguing in three hours. And by definition, we will
12 not have time to address everything, so we will refer
13 the Tribunal back to our submissions with respect, and
14 we will do our best to address the rest today.

15 The second point I would like to make is,
16 again, going to your experience as arbitrators, you
17 have sat in many, many, many arbitrations and you know
18 that by definition there's always ships in the night.
19 You have one story narrative and you have another
20 story narrative, and the two almost never reach each
21 other.

22 In this case, it feels like this is also the

1 same. You hear one narrative on the other side, which
2 is an investor mistreated by Colombia, a good-faith
3 investor having done everything he can to invest in
4 Colombia has been mistreated at every point in time,
5 at every turn, and Colombia has been this horrible
6 State and taking action against him, being retaliating
7 against every single action, and moral damages and so
8 on and so forth. A lot of theatrics. You will have
9 heard that.

10 We will not engage in theatrics because
11 that's not what this is about, but we will address the
12 gravity of the situation. This is a very serious
13 case. We heard a lot of personal comments by
14 Mr. Moloo and his colleague about going to Colombia
15 and taking pictures and having seen how The Charlee is
16 wonderful. The only comment I will make is that, in
17 my over 25 years of practice, I have never been in a
18 situation--representing Claimants and investors or
19 representing States--I have never been in a situation
20 with this level of gravity, and I'm not saying this
21 lightly.

22 We are in a case, and this is what you

1 really have to realize, and I will address it in the
2 few moments to come--we are in a case where Colombia
3 is trying to put some order in its country in relation
4 to narco-trafficking, which is a very extremely
5 serious situation not only for Colombia but for the
6 world, because these are violent, organised groups,
7 and they have a--and as you will have seen from--and
8 you will see from also the U.S.' perspective, they
9 have--they go much beyond Colombia in what they do in
10 their actions.

11 So, this is what you have in front of you.
12 This is Colombia taking action through Asset
13 Forfeiture Proceedings, and you will have heard a lot
14 of misrepresentation about what these are. An Asset
15 Forfeiture Proceeding is, by definition, as its name
16 says, relating to an asset. The asset is the Meritage
17 Lot. It's not about Mr. Seda as such, so it's not
18 that Colombia has discriminated Mr. Seda or looked at
19 Mr. Seda. It has looked at Meritage. And if Mr. Seda
20 is taken and captured in those Measures, it's his own
21 doing. It was his own obligation to go through due
22 diligence. When you allegedly invest in Colombia and

1 to ensure that he was investing in a framework that he
2 knows, because this is Medellín, we are talking about-

3 [REDACTED]
4 [REDACTED]
5 [REDACTED] so he had a duty of due diligence, and
6 anything that might happen including asset forfeiture
7 procedures, it's his own doing.

8 Now, we heard from Mr. Moloo that they have
9 not shifted. We have shifted constantly. No, they
10 have frozen their case at one particular point in time
11 which is when the Measure of Asset Forfeiture
12 Proceeding was taken at the beginning. We're not
13 shifting position. By nature, Asset Forfeiture
14 Proceeding, as Ms. Ordoñez just explained, is that
15 it's evolutive. It is an ongoing proceeding. It
16 starts, and it continues. There is proceedings before
17 the courts. That's why we say it's premature. You
18 still have a process that will continue going on. So,
19 this is, by nature evolutive. So, by definition, the
20 facts will evolve. The other reason--and so we're not
21 shifting at all, so this is the nature of Asset
22 Forfeiture Proceedings.

1 The other point I want to make is that there
2 is a tension from Mr. Moloo to say that, oh, their
3 case is shifting all the time, but when it comes to
4 Essential Security, they say, oh, it's all a recast of
5 what they said at the beginning. It's either a recast
6 and we've said all along, and it's the same thing and
7 we're recasting or it's not the same thing, so you
8 cannot have it both ways.

9 The reality is that the case has evolved (1)
10 because Asset Forfeiture Proceedings evolve, and (2)
11 because in relation to legality questions, we have
12 come, we, Colombia, and you will have heard
13 Ms. Ordoñez this morning about the prosecution of
14 Colombia, having gone through the very taxing,
15 burdensome exercise of looking at the investigations
16 in relation to the Meritage and responding, and this
17 is the Claimants' own doing. They asked for this.
18 They asked for Document Production. It all started
19 because Colombia went through that process to produce,
20 follow the Tribunal's Order, investigation
21 proceedings, and that is when all of these
22 illegalities started to come out, and that's when

1 Colombia started to connect the dots between what it
2 was seeing in the Asset Forfeiture Proceedings, in
3 relation to the Meritage, and it was seeing in this
4 Arbitration, in relation to Mr. Seda, Mr. López
5 Vanegas, [REDACTED], who has come out because
6 of this evolving situation.

7 Likewise, the fact the rebuttal evidence
8 that was not admitted, this was rebuttal evidence to
9 Ms. Giraldo's statement that was belatedly put by the
10 Respondent, and I'm not going to rehash our letters.

11 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

12 [REDACTED] So, if there's any evolution, it's one
16 because of the nature of the Asset Forfeiture
17 Proceedings and simply because everything that has
18 been uncovered, it's because we were responding to
19 requests in Document Production by the Claimants or
20 rebutting to statements made by Ms. Giraldo--I will
21 come back to that. So, that again is extremely
22 serious and you have to take that into account. Our

1 case is not shifting, our case is addressing very
2 precisely what this Tribunal is confronted with.

3 And, finally, maybe one point on Mr. Moloo's
4 comment at the end about moral damages, and I will
5 finish here with where you started. This is not a
6 case of an investor being treated poorly, a good-faith
7 investor, this is a case about Colombia being dragged
8 unfairly, abusively into an arbitration through an
9 instrumentalization of arbitration when Colombia is
10 trying to address wrongdoing by the Oficina de
11 Envigado, this is what we're talking about. And now,
12 I'm going to address that more precisely.

13 Starting with the Essential Security
14 because--and you've heard that I will try to--of
15 course, I'm not going to rehash what you heard in the
16 Opening, but I will address some of the important
17 points that you have in front of you.

18 I'm at Slide 4 now with the first point,
19 which is that, given that Colombia's invoking that
20 exception under Article 22.2(b) of the TPA, any
21 determination by you would seriously undermine
22 Colombia's Essential Security Interests.

1

[REDACTED]

■

[REDACTED]

1

[REDACTED]

■

[REDACTED]

1

[REDACTED]

■

[REDACTED]

1

[REDACTED]

█

[REDACTED]

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[REDACTED]

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[REDACTED] [REDACTED]

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[REDACTED]

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[REDACTED]

█

[REDACTED]

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[REDACTED]

█

[REDACTED]

█

[REDACTED]

11

[REDACTED] so,

12

these were just factual circumstances and the context

13

for you to understand why Essential Security is such

14

an important matter here for Colombia. Dealing with

15

the Treaty itself. Before I do that, I would like to

16

address two points that were made by Mr. Moloo about

17

the timing issue. So, he says that you should just

18

look at the period of time when the Measures were

19

taken so--and then, you don't want to look at the rest

20

of the period, and he--I think he refers to the

21

Nicaragua Case. Well, our response to that is

22

that--and, of course, we made this point in the

1 Opening but it is as if we had not said anything, so
2 they rehashed the same thing, but, again, we need to
3 respond that. The Treaties are not the same thing.
4 The Treaty here does not have the same elements as the
5 one that was in the case of Russia trafficking
6 transit, where the Treaty addressed Measures taken
7 during a certain period of time. It's not the case
8 here in the TPA.

9 The second point is that the evidence at the
10 beginning was based on the Oficina being the previous
11 owner of the Meritage Lot, and Mr. López Vanegas is
12 also related to Oficina. But as you know, the
13 Arbitration revealed that the Asset Forfeiture
14 Proceedings are protective of something much more
15 serious [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

19 So, again, you have to take into account the
20 evolution of the facts, the Measures are taking into
21 account that evolution, but importantly
22 Article 22.2(b) doesn't make any--it doesn't bring any

1 limitation as to the timing of the Measures. And
2 here, the Measures complained of having a continuous
3 nature, and you have to take into account the fact
4 that they have because the Asset Forfeiture
5 Proceedings are ongoing and also because of this
6 Arbitration simply. Because of this Arbitration, we
7 came to connect the dots between this case and [REDACTED]

8 [REDACTED]
9 So, it's neither here nor there. The
10 Nicaragua Case cannot be raised because, simply, the
11 Treaties are different--written differently, and the
12 language has nothing to do with this case.

13 On the MFN, I will say just one word. MFN
14 Clause cannot apply because you have the language of
15 the TPA, which says nothing in this Treaty and
16 excludes pretty much everything, so it goes to the
17 fundamental--and Ms. Ordoñez talked about it--is the
18 fundamental consent of Colombia to accept arbitration
19 under certain circumstances. So, it's not enough that
20 we--you have--so, what they say is that, oh, forget
21 Article 22.2(b), just go to a treaty that doesn't have
22 that exclusion. But that exclusion is fundamental to

1 U.S. and to Colombia, and you could just not forget
2 that because that's the very substance of the consent
3 of Colombia to this case.

4 Now, if I may go to Article 22.2(b), at
5 Slide 10, you see that well, the language is pretty
6 clear; right? So, you have the nature of the
7 Essential Security itself, which is the Colombian
8 sovereign power to take measures against the worst
9 type of organized crime that has historically been
10 known in Colombia. That's what I just mentioned, and
11 the language shows that the implication of the
12 Essential Security Exception renders the matter
13 non-justiciable. Non-justiciable means what? It
14 means that it cannot be reviewed by a court, simply.

15 So, this what you have in the text. It says
16 "nothing in this Agreement", so this is essentially an
17 entire exclusion, "nothing in this Agreement shall be
18 construed to preclude a party from applying measures".
19 This means that a party can apply measures,
20 notwithstanding anything that is in the Treaty and,
21 therefore, that can be done without any legal
22 assessment.

1 I will come back later to the footnote
2 because our friends on the other side would like to
3 forget the footnote, but it's very much there. But
4 non-justiciability--and I will come back to the
5 Parties' joint interpretation of the Treaty in that
6 regard--this is what this means.

7 A party can take measures, can apply
8 measures, protecting its own Essential Security
9 Interests without--notwithstanding anything in this
10 Treaty, including the investor-State dispute
11 resolution. Now, if you look at my next slide, this
12 is not new. We said it in our Rejoinder at Slide 11,
13 we had said it in our Rejoinder of 16 February 2022,
14 so now, they say, ah, it's all new, because the U.S.
15 said it, you said it now. We said it from our
16 Rejoinder 16 February 2022, not surprisingly because
17 this was actually discussed between Colombia and the
18 U.S. during the travaux préparatoires and you see that
19 the U.S. on the 3 May Hearing, actually said and I
20 quote from the U.S., "once a State Party to the TPA
21 raises the exception, its invocation is not
22 justiciable, and the Chapter 10 Tribunal must find

1 that the exception only applies to the dispute before
2 it." And you--on the left side, you see that we had
3 said that the dispute is not justiciable under grounds
4 of Article 22.2 of the U.S.-Colombia TPA. So, it's
5 not new, we said it at the outset as soon as we
6 invoked the exception.

7 On my next slide, they argued, the Claimant
8 argued that this is belated, and in any event, it's
9 meritless. And you see on the left side, we put an
10 excerpt of the Rebuttal. They say that it's
11 time-barred, and they said during the Hearing, they
12 change position--I just addressed that. And they say
13 that under ICSID Article 41(2), the Tribunal has
14 discretion to consider jurisdiction or competence at
15 any stage of the proceeding, but cannot do that for
16 matters of justiciability. With respect, this is
17 wrong, for the five following reasons:

18 First of all, ICSID's Procedural Rules
19 cannot trump the mandatory language of the Treaty.
20 It's not only the mandatory language of the Treaty,
21 but I will come back to that. It's also the authentic
22 interpretation of the Treaty, which is binding on this

1 Tribunal. That's the first point.

2 The second point is that Article 41(2)
3 essentially--and the Claimants' interpretation of that
4 is incorrect because the Tribunal has the power and
5 duty to satisfy itself at the time it has
6 jurisdiction. What does that mean? That means that
7 you have the power, at any point in time, to raise ex
8 officio, your jurisdiction, because it's your duty to
9 ensure that you cannot proceed without having
10 jurisdiction. So, it's because that is--can be done
11 at any point in time, a fortiori, it also is something
12 you can and should do in terms of justiciability,
13 which is even beyond jurisdiction because it means
14 that you do not have the power to exercise
15 jurisdiction.

16 They say, also, that this is belated . With
17 respect, we have raised the exception based on newly
18 discovered facts that reveal the seriousness of the
19 circumstances of this case. I explained earlier this
20 is because of everything that was uncovered after the
21 document production, and the investigations that we
22 had to submit following and complying with the

1 Tribunal's Order.

2 And following that, the Claimants had ample
3 opportunity to address the point and to present their
4 case in that regard, so they cannot blame--complain
5 about any due-process issue.

6 In the alternative, what we say is that, if
7 you look and seek to ensure, even if you're not with
8 us on justiciability, which we say you should be
9 because, essentially, as soon as we say it applies, it
10 applies, and Colombia is entitled to take measures
11 without any assessment by a court--you still have--you
12 still lack jurisdiction, and that's my point C, to
13 decide the dispute.

14 On my Slide 14, we have put the chart of
15 essentially how you should look at this from the point
16 of view of international general law as codified under
17 the Vienna Convention on the Law of Treaties. I will
18 address each of them with more or less detail and
19 rebutting--you don't have everything on slide because
20 I had not planned on saying it, but, again, having
21 heard my colleagues, I have to respond to some of
22 these points.

1 First of all, of course, you have to look at
2 ordinary meaning of Article 22.2(b). I will come back
3 to this and I won't talk about it now.

4 Context of the Article 22.2(b), I had not
5 planned on discussing it, but I will rebut briefly the
6 context. We discussed this during the Opening. You
7 have to take into account that it's at the end of the
8 Treaty, and you know that it says "nothing in this
9 Agreement", so the fact it is at the end of the Treaty
10 shows that it encapsulates the entirety of the Treaty,
11 including investor-State arbitration and including
12 compensation.

13 There was a point made by Mr. Moloo about
14 the U.S. actually having had a very strong desire to
15 allow compensation for investors. With respect, this
16 is wrong. You just need to go back to what the U.S.
17 actually said during the Hearing of May, and if I may
18 refer you to Page 390 of the Hearing of May. That's
19 3 May 2022, Lines 9 to 21, which I will read for the
20 record. So Page 390, Lines 9 to 21.

21 I quote from the U.S. Government: "I would
22 like it address an argument we heard from Claimants

1 yesterday that Article 22.2(b) merely allows the State
2 to apply or continue to apply Measures that it
3 considers necessary for the protection of its own
4 Essential Security Interest but that Article 22.2(b)
5 does not address the question of liability of
6 compensation. The United States disagrees. Once the
7 Essential Security Interest exception is invoked, a
8 Tribunal may not, thereafter, find the relevant
9 Measure in breach of the Chapter 10 obligation and may
10 not consequently order the payment of any compensation
11 in connection with that Measure."

12 It's very clear what the U.S. says, and
13 here, again, there is an agreement between the U.S.
14 and Colombia, which dates back to the travaux
15 préparatoires, and I will come back to this. So, if
16 you look at the context, the fact that it's at the end
17 and the language together mean that everything is
18 excluded, including investor-State arbitration and
19 compensation as the U.S. has clarified in its
20 submission.

21 Object and purpose of the TPA, you saw there
22 was a slide, I don't have it with me, but there was

1 this very interesting slide about the preamble of the
2 Treaty, which is essentially about allowing,
3 promoting, broad-based economic development in order
4 to reduce poverty. My friends forget some other--and
5 with permission, I don't have it in my Slide, so I
6 will respectfully refer you back to the actual
7 Hearing. Yes, so they have quoted from the three--no,
8 WHEREASES 2, 3, and 4 in their Slide 4. So, promote
9 broad-based economic development in order to reduce
10 poverty and generate opportunities for sustainable
11 economic alternatives to drug-crop production. So, we
12 see that drugs is, indeed, very much in the State's
13 mind when they entered into this Treaty.

14 But look also at what they do not
15 address--or if you look at the Preamble, in your time
16 because I don't have it handy, four WHEREASES before
17 the end, I quote: "Promote transparency and prevent
18 and combat corruption, including bribery and
19 international trade and investment."

20 And the last whereas--no, sorry. It's not
21 whereas--it's on the first page, so it's first page,
22 fourth before last, and the last on the first page of

1 the Preamble, I quote: "Preserved their ability to
2 safeguard the public welfare."

3 So, these are important object and purpose
4 of the Treaty, but they do not mention on the other
5 side of the table but, of course, fighting against
6 corruption, including bribery, international
7 trade/investment, that is also part of what the
8 Treaty--the States had in mind.

9 On effet utile, going back to my chart, I
10 will respectfully refer you back to our submissions,
11 that this has to be a purposeful provision.
12 Otherwise, if you don't give effect to it, you're
13 simply not giving effect to a very important provision
14 in the Treaty. And now I'll come to the rest, which
15 is authentic interpretation and travaux, but saying
16 one word about the ordinary meaning at Slide 15.

17 So, you have, of course, on the left side,
18 the actual text. "Nothing in this Agreement"--and
19 that, of course, again, exclude ISDS and exclude
20 compensation, shall be construed to preclude a Party
21 from applying measure, that it considers necessary for
22 the protection of its own Essential Security. What

1 you see is that it says, it considers necessary,
2 "measures it considers necessary." This means that
3 it's a subjective determination by the State who
4 invokes the exception. It's not an objective
5 criterion; it's a subjective one.

6 This has been consistently interpreted--you
7 have that--the references on the right side--by every
8 court or tribunal that has had to deal with similar
9 language on the self-judging nature of this sort of
10 language, meaning it considers necessary. They have
11 always interpreted this as a carve-out of
12 jurisdiction.

13 And if you look at the footnote, which is
14 not discussed by the other side, you see that it says
15 "for greater certainty". So, it's just for the
16 evidence of doubt. It doesn't mean the text is not
17 clear, the text is very clear, but to even clarify
18 more, they say for greater certainty. If a party
19 invokes the provision, the Tribunal or panel hearing
20 the matter shall find that the exception applies.

21 And I'll come back to this, the U.S. and
22 Colombia took a position on this in the travaux

1 préparatoires and in otherwise.

2 I want to say here one word here about Eco
3 Oro because our friends have said--had said a number
4 of things in that relation. I just want to make sure
5 that you go back to actually what Eco Oro says. The
6 provision under Eco Oro, which was Article 2201(3) of
7 the Canada-Colombia FTA, is a general exception
8 related to environmental matters, not Essential
9 Security, so not the same thing we're talking about.
10 And that provision is fundamentally different from the
11 provision you have in front of you because it does not
12 have the self-judging elements that are expressly
13 provided in this provision. So, these are two main
14 reasons why Eco Oro cannot apply.

15 And you have to look at the chapeau of Eco
16 Oro, which is--which essentially talks about measures
17 adopted by the State that are not applied in a manner
18 that would constitute a means of arbitral
19 unjustifiable discrimination, that's what they refer
20 to. That is not found in Article 22.2(b), so, again,
21 the provisions are completely different.

22 And the Eco Oro also applies to provisions

1 contained in Chapter 8, which is the "Investment"
2 chapter of that FTA whereas Article 22.2(b) applies to
3 the entirety of the Treaty because it says "nothing in
4 this Agreement".

5 And, of course, as we discussed, that means
6 that it includes investor-State arbitration and
7 compensation, so for these reasons Eco Oro simply is
8 neither here nor there, and it cannot apply, and it's
9 not binding on this Tribunal for one, but in any
10 event, it is a completely different finding.

11 Now, if you're not with us at all on that,
12 we--and I'll come back to this, the exception has been
13 fully invoked by Colombia in good faith, and I will
14 show that. But before I do that, on my next Slide 16,
15 I want to discuss the interpretation by the Parties.

16 So, you see here on the left side,
17 Colombia's positions, on the right side, the U.S.
18 submission. On the left side, you have Colombia's
19 Rejoinder of 16 February, and you see that
20 Colombia--and you see what the arrows and the boxes,
21 red boxes--you see that we have referenced what was
22 exactly the same wording used by both States. So, in

1 Colombia's Rejoinder, we argued and submitted that
2 this renders the case non-justiciable. The U.S. in
3 the Hearing of 3 May said exactly the same thing.
4 They said it's not justiciable.

5 We argued also the self-judging nature of
6 the provision, and you see on the right side, that the
7 U.S. also has said the same thing. The fact that both
8 States are saying the same thing about the
9 interpretation means that there is an authentic
10 interpretation of the Treaty by both Contracting
11 Parties that binds this Tribunal. You cannot escape
12 the fact that both States are saying the same thing.
13 And the U.S., who are present today, are listening to
14 this, the U.S. have--probably, when they come and
15 argue interpretation, they have at heart the correct
16 interpretation of the Treaty and ensuring that the
17 Tribunal understands what the U.S. had in mind when it
18 entered into this Treaty, just as Colombia had the
19 same thing in mind at the time.

20 And you see that, during our oral
21 submission, which happened the day before the U.S.,
22 and for that matter, we had no clue what the U.S.

1 would say. So, on the 2nd of May, we argued the
2 subsequent agreement under the Vienna Convention on
3 the Law of Treaties, the fact that the same things
4 would be found in the submissions of the U.S. and
5 Colombia. That makes it, under Article 31(3)(a) of
6 the Vienna Convention on the Law of Treaties, a
7 subsequent agreement between the Parties, that makes
8 it an authentic interpretation.

9 And you see that the next day, the U.S.,
10 relying on the same provision, said that is the
11 Parties', the TPA Parties' common understanding. So,
12 that, if anything, confirms that the Parties, the two
13 Parties have the same interpretation, they viewed this
14 as non-justiciable, meaning that the States cannot
15 assess--the Tribunal--I'm sorry, cannot assess any or
16 determine the actions of Colombia, as soon as Colombia
17 addresses--invokes the exception, and that it is
18 self-judging in the sense that it's a subjective
19 determination by Colombia, and that it is a joint
20 interpretation by the two States.

21 ARBITRATOR PONCET: I'm sorry to interrupt
22 you, Professor Banifatemi. I was just asking the

1 Chairman if I should ask the question tomorrow when we
2 have time for the questions and I've been told to ask
3 it right away.

4 Just assume for the sake of argument, assume
5 the United States is invoking the Treaty, and it's
6 invoking it in bad faith, does the Arbitral Tribunal,
7 in front of which the United States would invoke the
8 Treaty, have to step back and say this is it, or does
9 the Arbitral Tribunal have any power to assess whether
10 or not the implication is made in good faith? I am
11 not saying by this, let me emphasize that, in our
12 case, there is any issue about that. I'm just asking
13 for my understanding of the provisions, so I'm taking
14 the other example, for ease of reference, assuming a
15 Colombian investor in the United States, let's say
16 it's the Trump administration and it's invoked in a
17 totally crazy manner, does the Arbitral Tribunal
18 sitting under the Treaty have the power to adjudicate
19 that?

20 MS. BANIFATEMI: I will start with the end,
21 which is that, as you will have understood from our
22 submission, we have a series of alternatives: One,

1 it's not justiciable; two, you do not have
2 jurisdiction. In the event that you decide against us
3 that you do have jurisdiction, we are--we have invoked
4 this in good faith and I will address that later on.
5 So, I--just to give the Tribunal comfort that, even if
6 you were to go there, which we say is wrong because
7 this is not the sense of the Treaty, you should feel
8 comfort in the fact that this is an extremely
9 important, serious matter for which Colombia has
10 raised the exception in good faith.

11 Going to the first question, I am not
12 authorized by the U.S. to speak for the U.S., so I
13 cannot say anything for the U.S. The U.S. are hearing
14 us, if they have anything to say, they probably will.
15 All I can say is that, based on the interpretation
16 that you have seen from both States, from Colombia and
17 from the U.S.--and I'll come now to the travaux
18 préparatoires, but from what you've heard at the
19 Hearing, self-judging means self-judging. When the
20 U.S. says it's not justiciable, meaning that it cannot
21 be submitted to a determination by a court or
22 tribunal, that's what it means.

1 So, it's that--in other words, it's
2 intrinsic to the concept of Essential Security. If a
3 State says, the Measures that I've taken go to my
4 Essential Security, nobody other than that State can
5 determine what that Essential Security is, and that's
6 enough. That's what self-judging means, and that's
7 what the subjective determination means.

8 And it's only for--and that's when I say
9 it's a purposeful meaning. You have to give effect--
10 effet utile, you have to give effect to this,
11 otherwise you just are overlooking an essential
12 provision in the Treaty. There's a reason why the
13 State--the two States put that text in the Treaty.
14 Colombia, by the way, if I recall correctly, there are
15 17 BITs and TPAs in which Colombia has this in its
16 Treaties. And again, there's a reason why, because
17 Colombia is engaged in one of the worst efforts
18 worldwide in relation to narco trafficking and armed
19 and bloody crime. These are some of the worst
20 organizations worldwide, now having relationship with
21 the Hezbollah. I mean, we're talking about extremely
22 serious wrongdoing around the world.

1 So, if Colombia says this is my Essential
2 Security, that should be enough.

3 Now, if you would like to look at
4 jurisdiction, you have to say, okay, I look at
5 jurisdiction, I look at--it's not justiciability, but
6 it's jurisdictional. So, you need to look at that and
7 determine that Colombia is right when it says "nothing
8 in the Agreement can be construed". It's still
9 self-judging, and you say, I do not have jurisdiction
10 because Colombia is saying that it's Essential
11 Security. So, you can either say I do not have the
12 power to decide and assess, or you say I do not have
13 the jurisdiction. And, as far as I'm concerned, there
14 is a level, its power comes before jurisdiction but
15 the end result would be the same. I, as the Tribunal
16 cannot make a determination based on law in relation
17 to this point.

18 ARBITRATOR PONCET: And the Measure under
19 Article 22 is the overall fight against a particularly
20 dangerous form of organized crime--

21 MS. BANIFATEMI: Yes.

22 ARBITRATOR PONCET: --that is active in the

1 drug trade?

2 MS. BANIFATEMI: Yes. And the Meritage was
3 targeted--Ms. Herrera will come back to this because
4 there was a huge number of misrepresentations about
5 Asset Forfeiture Proceedings and she will explain what
6 exactly this is. It follows the assets, so Colombia
7 looks at the Meritage in the first instance.
8 Meritage, at the time, we saw that there was in the
9 tracing of the asset, there was--

10 ARBITRATOR PONCET: Yeah, I got that.

11 MS. BANIFATEMI: Okay. So--but then, as the
12 facts uncover and as the facts keep growing, and
13 that's when we invoked Essential Security, we saw more
14 and more--

15 ARBITRATOR PONCET: I got your point.

16 MS. BANIFATEMI: Okay. So--

17 ARBITRATOR PONCET: I got your point, but
18 what you're saying is that measure is, not contrary to
19 what we heard this morning, something specifically
20 adopted, for instance, it would be a determination of
21 some kind in an international environment where
22 Colombia would have said, well, we--rightly we regard

1 the fight against organized crime as an Essential
2 Interest of our State due to the vast experiences
3 we've had, et cetera, et cetera. It's not that. It's
4 the simple existence of this undoubtedly extremely
5 important and extremely difficult crime against--the
6 fight against form of organized crime, in which so
7 many people have lost their lives.

8 MS. BANIFATEMI: Yes.

9 ARBITRATOR PONCET: It's just the fact that
10 it exists, is what you're saying?

11 MS. BANIFATEMI: The continuum--

12 ARBITRATOR PONCET: That's the Measure?

13 MS. BANIFATEMI: The continuum of all of the
14 Measures that--and, indeed, the existence of the Asset
15 Forfeiture Proceedings in relation to the Meritage,
16 because this is the subject of the case that's before
17 you. What's the case before you is not the entirety
18 of the fight against narco trafficking. What's before
19 you is Colombia's fight against narco trafficking.

20 [REDACTED]

[REDACTED]

[REDACTED] I will

1 address that very briefly, but the Measures taken in
2 relation to Meritage, all of the Measures--the
3 continuum of those Measures and how they're unfolding
4 because, as we go more and more, the Asset Forfeiture
5 Proceedings are developing and more and more facts are
6 being uncovered, all of those Measures, in relation to
7 the Meritage, given the fight against narco
8 trafficking and money-laundering.

9 ARBITRATOR PONCET: Thank you. Sorry for
10 the interruption.

11 MS. BANIFATEMI: Not at all, Mr. Arbitrator.
12 Thank you.

13 [REDACTED]

1

[REDACTED]

2

[REDACTED]

3

[REDACTED] So, nothing new, both

4

Contracting Parties to the Treaty have maintained

5

consistently the same view of how this should be

6

interpreted, and it's a very specific determination.

7

And as you see, consistent.

8

Now, if I may--

9

SECRETARY MARZAL: Excuse me, Ms.

10

Banifatemi, the Interpreters are asking if you could

11

please slow down a little bit.

12

ARBITRATOR PONCET: And she keeps being

13

interrupted. I'm sorry.

14

SECRETARY MARZAL: Sorry.

15

MS. BANIFATEMI: I will try to slow down for

16

sure. Apologies.

17

So, I'm coming to the further alternative,

18

which is that in any event, this has been raised by

19

Colombia in good faith. And the Measures complained

20

of are designed to protect Colombia's Essential

21

Security Interest and, therefore, there is no universe

22

in which the Tribunal could find that Colombia has

1

[REDACTED]

■

[REDACTED]

1

[REDACTED]

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21

One final word, and that's my Point 2, at

22

Slides 33 and 34, that's the consequences of that

1 implication is that the Tribunal cannot find liability
2 and/or compensation, there is also three reasons for
3 that, so first of all, as you know, the Essential
4 Security Exception is a derogation to the entirety of
5 the TPA--I've explained that--so no breaches and no
6 compensation.

7 Importantly, this is my second bullet, in
8 order to award compensation to the Claimant, the
9 Tribunal would be taking a premature measure because
10 the Asset Forfeiture Proceedings are still ongoing.
11 They're evolving. The Meritage Lot has not yet been
12 forfeited. And there has been no determination by the
13 Colombian court as to whether or not Newport is a bona
14 fide without-fault third party. So, this is ongoing,
15 so therefore it's completely premature for this
16 Tribunal to decide that there has been any breach of
17 the Treaty because the Colombian Courts have not made
18 any determination in that regard.

19 And finally, any determination by the
20 Tribunal of Colombia's actions in the circumstances
21 poses the risk of interfering with Colombia's
22 Essential Security Interest and would be essentially

1 allowing the instrumentalization of international
2 arbitration by Mr. Seda and his acolytes to the
3 benefit of criminal organization, and would be
4 contrary to international public policy and we said
5 that the Tribunal should be extremely cautious before
6 doing that.

7 I will say a few words about jurisdiction,
8 if I may. And I'm in your hands as to when you wish
9 to have a break.

10 The first point is that the Claimants have
11 not made a protected investment under the TPA and the
12 ICSID Convention. The Claimants have first--so, on
13 Slide 37, you see that the Claimants have failed to
14 show that they provided any significant contribution
15 of capital or other resources into the Project. As
16 you now know, pursuant to the Financial Statements of
17 Newport, less than \$2 million were paid by the
18 Shareholders, including Newport. This is anything but
19 substantial.

20 Interestingly, it's through the Unit Buyers
21 that the Meritage Project has been financed mostly,
22 and as *Vestey v. Venezuela* said, any capital resources

1 committed by the Claimants are incapable because of
2 their insignificance of contributing any meaningful
3 way to the objective of the, in that case, or in this
4 case, the U.S.-Colombia TPA.

5 Because there is no significant contribution
6 and no real contribution in fact, there cannot be any
7 risk and Mr. Seda cannot complain of being mistreated
8 or legitimate expectation. And one word here about
9 that and the risk. If anything, when he allegedly
10 invested in the Medellín Region and dealing with
11 cartel individuals, he should have had the expectation
12 that the Asset Forfeiture Proceedings might be
13 initiated against the asset that was the subject of
14 his alleged investment, and that in that sense there
15 cannot be any legitimate expectation, there is only a
16 real risk in that sense. But in any event, we say
17 that, as the definition, he didn't really take a risk
18 as such because the contribution was nowhere.

19 However, we said that there is an
20 expectation of gain and profit, which is not
21 sufficient to establish a protected investment was
22 made. And on profit, I just want for you to remember

1 the very interesting--when did they talk about
2 proportionality but look at they invested even less
3 than 2 million. It's actually the Unit Buyers who
4 invested, but against that 2 million, they're asking
5 for 255 million. This is better than the casino.
6 They win at every step. So, if you please look at the
7 cross-examination of Mr. Seda during the Hearing of
8 3 May, and, for example, Page 444, Lines 15 to 22, I
9 asked him that he had identified land in previously
10 dangerous regions and the perception of danger causes
11 prices to be fixed at the bargain, and he said yes.

12 And likewise, at Page 447, I asked him
13 again, "this is what I call being a good businessman.
14 You buy pieces of land in regions that are either
15 perceived as previously dangerous or are still
16 dangerous and you expect to make a very high profit
17 out of it--right?--and you talk about profit of
18 1000 percent," and he accepts, he agrees. And he says
19 later on at Page 448 on Lines 17 and 18, "my job is to
20 give returns to my Investor. That's the way I can do
21 what I love." So, what is interesting for Mr. Seda is
22 that he barely makes any investment, and he expects a

1 1000 percent profit, and even more, \$255 million in
2 this case. Again, it's better than the casino.

3 On my next slide, I will be very fast

4 [REDACTED]

14 Now, on illegality, that's Point B, you have
15 under Rule 41(2) of ICSID Rules, again, this is a
16 question of jurisdiction. So, at any point in time
17 you have to raise matters of jurisdiction, and that
18 includes the legality of the Investment that was made,
19 which goes to jurisdiction. And you have the example
20 here of Infinito versus Costa Rica: "The Tribunal had
21 the duty to assess ex officio in accordance with ICSID
22 Rule 41(2). As a result, the Tribunal cannot merely

1 rely on the Parties' assessment and must engage in its
2 own inquiry on the basis of the evidence on the
3 record. This is particularly true when there are
4 allegations of corruption, which is a matter of
5 international public policy."

6 So, you do have the duty when you're
7 confronted with illegality of the scale that we're
8 talking about, even if we had not raised the
9 illegality of the investment, it would be your duty to
10 raise that and to address that.

11 And you have case law in that regard on my
12 next slide, it's Phoenix, Oxus, Mamidoil. And you
13 look at Phoenix, for example, illegal investments
14 according to national law and the host-State cannot be
15 protected through an ICSID arbitral process, you're
16 familiar with the case law.

17 And going to doctrine, of course, I wanted
18 to pay tribute to Professor Gaillard, late Professor
19 Gaillard's writings on corruption matter, in that the
20 investment has to be made in conditions of legality
21 but don't take only Professor Gaillard's words for it,
22 take Mr. Moloo's word for it. This is an article

1 written in 2010, at Slide 43, where he says that, I
2 quote: "The consent of a host-State to resolve
3 disputes with investors is governed by certain
4 overarching principles, including transnational public
5 policy." And further down he says that the applicable
6 law includes transnational public policy against fraud
7 and corruption.

8 And again, he says, I quote: "Breaches of
9 transnational public policy may also prevent the
10 admissibility of any claim that relates to an
11 investment that involved fraud and corruption by the
12 Investor." So, in 2010 when he's not representing
13 Mr. Seda, he agrees with me.

14 Next Slide 44, just to wrap up, that the
15 Claimants' alleged investment are tainted by
16 illegality and money-laundering. First as regards
17 Meritage, illicit origin, it has been in the
18 possession and control of members of the Oficina, as
19 we've shown. It has experienced several
20 transformations and has been the subject of fake sales
21 via front men currently investigated for
22 money-laundering. And it's currently owned by La

1 Palma Argentina, [REDACTED]

2 [REDACTED]

3 These facts alone should be the end of this
4 matter. You should say "we cannot judge this. This
5 is, indeed, good-faith invocation by Colombia." If
6 you were on the merits only and not on the principle,
7 which is that you should not assess at all. If you
8 decided to assess the good-faith invocation by
9 Colombia, these facts should show you enough that, and
10 given the circumstances we've shown, that this has
11 been, indeed, invoked by Colombia in utter good faith.

12 And also in regards to Luxé, [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 So, this also shows that again this is not the
18 representation of the alleged investment as Mr. Seda
19 would have it.

20 [REDACTED]

[REDACTED]

[REDACTED]

1

[REDACTED]

█

[REDACTED] Two-thirds of the Claimants' claim concerned

17

projects unrelated to the Meritage Project, actually

18

Mr. Moloo showed this to you. It's only 31 percent of

19

the Claims of 64 million that relates to the Meritage

20

that is part of the quantum that they are asking.

21

If I may, I can finish before we have--

22

SECRETARY MARZAL: The Court Reporters are

1 asking for a break.

2 MS. BANIFATEMI: Okay, I'll stop.

3 PRESIDENT SACHS: Thank you for your
4 endurance both Court Reporters, that was quite
5 something.

6 Let's see, it's 4:25. Let's say 4:40.

7 (Recess.)

8 PRESIDENT SACHS: Mr. Moloo, can we resume?
9 There are still members of your team missing but in
10 the interest of time?

11 MR. MOLOO: Yes, we can resume.

12 PRESIDENT SACHS: Very good. Please.

13 MR. MOLOO: May I point out one correction,
14 if I may, Mr. President.

15 PRESIDENT SACHS: If it's short, yes.

16 [REDACTED]

1 indirectly holds shares in Luxé through his Family
2 Trust which is a discretionary trust. If you look at
3 the excerpt, you see that the Trust is at the
4 discretion--I'm in the second box--to completely
5 withhold distributions from any one beneficiary and
6 you also see that they have the power to exclude the
7 beneficiaries. So, to the extent that this is a
8 discretionary trust, the true Claimant should have
9 been the Trustee, who is the owner and not Mr. Hass,
10 who, therefore, cannot have standing to be here before
11 you.

12 [REDACTED]

1

[REDACTED]

2

[REDACTED]

3

[REDACTED]

4

Just as a reminder, in any event, on my next

5

slide, you see that they focused on the TPA and say

6

that the TPA allows trust as being investors, but

7

since you're an ICSID Tribunal, the cumulative

8

conditions must be met. So, for the purpose of the

9

ICSID Convention, that's Article 25, which requires

10

that there be a national of another Contracting State,

11

which means legal personality, and this is reference

12

to the commentary by Professor Schreuer, and the Trust

13

not having a legal personality, again, cannot have

14

standing before this Tribunal, and the Tribunal does

15

not have jurisdiction over it.

16

This completes my second part on the lack of

17

jurisdiction over the Claimants and their claim.

18

I would like to say one word which I forgot

19

in my introductory remarks, and I think it is the

20

appropriate time to say it. And it's important. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1

[REDACTED]

2

[REDACTED]

3

[REDACTED]

4

You heard Mr. Moloo say earlier that he was

5

scared that Mr. Seda somehow is scared about

6

initiating anything because there will be some type of

7

retaliation. We take serious issue with that. There

8

has been nothing done by Colombia that was

9

retaliation. [REDACTED]

10

[REDACTED], so

11

this is something that she has done, and that's her

12

own decision in relation to the slander that she

13

considers she has been the subject of.

14

[REDACTED]

15

[REDACTED]

16

[REDACTED] So, it's not

17

retaliation by Colombia. It's what Mr. Seda is doing

18

and the reaction that he should expect as a result.

19

[REDACTED]

20

[REDACTED]

21

[REDACTED]

22

[REDACTED]

1

[REDACTED]

█

[REDACTED]

█

[REDACTED]

█

[REDACTED]

█

[REDACTED] [REDACTED]

█

[REDACTED]

█

[REDACTED]

█

[REDACTED]

9

So, Colombia, in its traditional--and you

10

remember that that's part of the--also the

11

judicial--and that same letter refers to the U.N.

12

Convention Against Elicit Traffic in Narcotic Drugs

13

and Psychotropic Substances. That's part of that

14

cooperation between the FBI and the Colombian

15

Authorities.

16

PRESIDENT SACHS: Forgive me, but we

17

discussed all this in May, didn't we?

18

MS. BANIFATEMI: We did, but it's--I'm

19

answering Mr. Moloo when he says that he's scared and

20

if there's a retaliation against Mr. Seda, explaining

21

that there's no retaliation. [REDACTED]

█

[REDACTED]

1

[REDACTED]

█

[REDACTED] [REDACTED]

█

[REDACTED]

20

And finally I want to refer you back to the

21

cross-examination Day 3 of Mr. Seda, Pages 639 to 653,

22

which is the entire discussion between me and Mr. Seda

1 of these exact actions and, of course, on the other
2 side we didn't hear anything about that.

3 So, if anything, Mr. Seda is not scared. ■

■ [REDACTED]
■ [REDACTED]. If anybody is scared, it would be
6 the prosecutors who with courage in Colombia are
7 actually going after these drug lords, and even my
8 colleague sitting here and I do recall that we have
9 the equivalent of the Head of the FBI in Colombia, the
10 Head of the CTI, sitting with us. If the Tribunal has
11 any questions on this issue, he's here to answer.

12 So, I finish with the third part which is
13 the premature and abusive nature of this arbitration.

14 Point A, Slide 55 is simply that the asset
15 forfeitures are still before the Colombian courts.
16 You have a timeline. I will not go through it. You
17 remember that in May there was a discussion about
18 whether Newport is afectado or it's not afectado.
19 You will recall that the prosecutors treated Newport
20 as afectado, so it had access to the file. Then, in
21 2017, there was the Requerimiento, and that was
22 appealed. As a result of the appeal, the process was

1 suspended until in 22 April 2022, the Appeal Court
2 reinstated Newport as an afectado for the trial stage,
3 which will now start, and this is all ongoing. So,
4 and, of course, Newport will have access to the full
5 case and the trial stage.

6 So, as a result of that, there is no final
7 determination as to whether or not Newport is a bona
8 fide third party without fault and the merits of the
9 Attorney General's asset forfeiture petition.

10 Further, the court decision is further
11 subject to appeal as a matter of Colombian law. And
12 finally, as you remember from the U.S. submission in
13 May, the responsibility of a State cannot be invoked
14 until a final judicial act has been decided and, in
15 this case, there is no final judicial act because this
16 is all ongoing and Newport has to make its claim to
17 the Colombian courts who will decide whether or not
18 Newport is a bona fide third party without fault.

19 Point B, the remedies and mechanisms allowed
20 under Colombian law. It's a reminder. You heard this
21 in May. Article 34 of the Colombian Constitution,
22 which says that there is a right to a judicial

1 decision for the forfeiture assets acquired by means
2 of illicit enrichment.

3 Article 90 of the Colombian Constitution
4 also provides that there shall be financial liability
5 of States for unlawful damages attributable to it. In
6 the event that Mr. Seda has any issue with damages,
7 the appropriate measure should be taken to the
8 Colombian courts and, therefore, you see that
9 Colombian law allows for full remedies under Colombian
10 law for any damages caused for the wrongful or alleged
11 wrongful conduct attributable to the State.

12 And the reality, and that's my last point
13 under C, not only these are premature claims but
14 they're also abusive because what Mr. Seda and his
15 acolytes are trying to do is to be compensated
16 multiple times, with my Slide 59.

17 Mr. Seda and his acolytes are effectively
18 trying to have four bites at the Apple, so it's to
19 have the cake and eat it four times.

20 First, they want compensation from this
21 Tribunal--\$255 million. It's again better than a
22 casino.

1 Then they want to be able to seek
2 compensation from the Colombian court, which is still
3 open to them during the process and throughout and at
4 the end of the process.

5 There is a legal action by Newport against
6 La Palma Argentina. We know that but we don't have
7 much information about it, so we don't know, but we
8 know that it exists.

9 And, finally and importantly—this is
10 something you need to bear in mind—Mr. Seda is feeding
11 domestic proceedings brought by the Unit buyers
12 against the State of Colombia by feeding them—and this
13 is uncontested—by feeding them the process and reports
14 from this Arbitration, and these are reports by
15 Mr. Martínez, reports by Mr. Medellín, the –
16 confidential report prepared by investigator Paula
17 Espinosa and addressed to Ms. Noguera, and finally the
18 Transcripts of Mr. Seda's improper recordings.

19 This has been feeding the proceedings in
20 Colombia, the Unit buyers, and rather than be
21 responsive to the potential actions that may be
22 brought by Unit Buyers against Newport, Mr. Seda is

1 trying to avoid responsibility by saying, "hey, go
2 against Colombia, don't come after me." And so he's
3 feeding them this.

4 So, Colombia is, as a result, exposed more
5 than one time. It's exposed to in the country by the
6 actions of Mr. Seda, by the actions of Unit buyers,
7 and also in this Tribunal for \$255 million.

8 This is abusive. It's nothing short of
9 abusive, and this should not be allowed by this
10 Tribunal, who we say should be safeguarding the
11 integrity of international arbitration as a mechanism
12 and the integrity of this process, and, frankly the
13 integrity of treaty protection of international law.

14 With this, and with my thanks to the
15 Tribunal for its patience and the interpreters, I pass
16 on to Ms. Herrera.

17 PRESIDENT SACHS: Thank you very much.

18 Ms. Herrera.

19 MS. HERRERA: Thank you very much,
20 Mr. President and Members of the Tribunal.

21 I will address now the allegations on the
22 merits, both in fact and, later on, on law.

1 I will echo Ms. Banifatemi's point made
2 about the series of misrepresentations made that we
3 heard from our friends on the other side earlier this
4 morning regarding the law, the testimonies and, in
5 fact--and the facts. So, again, I'm not sure that we
6 will be able to respond to all of them and correct all
7 of them, and again, ask the Tribunal to please refer
8 back to the documents and don't take the word of the
9 Claimants as the real text or the real facts.

10 Anyway, one point that it's quite important
11 here, and I'm sorry, I know we walked you through
12 this, the Asset Forfeiture Law in May but, again, I
13 think that it's important to remember one thing, and
14 that is: What is the purpose? And the purpose is to
15 forfeit an asset. The imperative word is the "asset."
16 And that's important here because, as you have heard,
17 the case of the Claimants is: Mr. Seda was target?
18 No, Mr. Seda wasn't target. It was the Meritage Lot.
19 And in fact, the Meritage Lot is not even owned by
20 Mr. Seda.

21 So, that's the first point. Very quickly, I
22 just want to remind the Tribunal, again, that there

1 are two phases in the Asset Forfeiture Procedure: The
2 Initial Phase before the Prosecutors and the Trial
3 Stage before the Court. Again, why is this important?
4 And I know that that seems pretty basic because the
5 Claimants through all the presentations, what they
6 have done is apply the level of proof, the level of
7 evidence, the level of determination that is to be
8 applied and determined by the Judge, at the final
9 stage, and bring it back to the beginning and say, no,
10 no, no, it's the Prosecutors who should have done
11 basically what the Judge has to determine, and I will
12 again refer to this.

13 The two quick last points to recall. The
14 Asset Forfeiture Proceedings are not criminal in
15 nature, and finally, to recall again, they're not
16 subject to statute of limitations, and this is
17 important, again, regarding the so-called "due
18 diligence" performed by Newport.

19 As you will see in Page 64, we're trying to
20 address the main allegations regarding--the Claimants
21 have made regarding the asset forfeiture--and why they
22 say that they were wrong, in fact, they are not wrong.

1 And the first one--and we heard again about
2 this, this morning, is that the Attorney General's
3 Office has initiated the Asset Forfeiture Proceedings
4 and imposed Precautionary Measures based solely on a
5 false kidnapping story. They refer again--we went
6 through this in May. They refer again to the fact
7 that it seems that there was no--or there was no
8 kidnapping story, at least there was no kidnapping as
9 such when Sebastian López was coerced to transfer the
10 property. He was coerced, whether there was
11 kidnapping or not, that doesn't matter. That's the
12 way that the Oficina de Envigado functions: They
13 coerce payments of any debt.

14 But this is just wrong. This is wrong.
15 It's not based on the false kidnapping. And I'm going
16 to go through this, and this is important, again,
17 because the--the Claimants have said--you have to have
18 perfect certainty of everything at the beginning, the
19 Prosecutor have had perfect certainty all the evidence
20 of everything covered at the initiation of the
21 proceedings. This is not true. And again, here we
22 have the Claimants wrongly attempting to apply to the

1 initiation of the proceedings and imposition of the
2 Precautionary Measures, the standard of proof that
3 applies at later stages of proceedings.

4 Ms. Banifatemi referred how the Asset
5 Forfeiture Proceedings are a continuum, are ongoing,
6 and, in fact, is almost a crescendo, as is normal in
7 any procedure that becomes a contentious proceeding,
8 where more evidence is being brought into the forum.

9 So, first thing, what is--what does the
10 Prosecutors, what do they have to do at the initiation
11 of the proceedings? What's the standard? They can
12 initiate proceedings if there are serious and
13 reasonable basis to infer the probable existence of
14 assets that could be subject to Asset Forfeiture. As
15 you see, that's not a certainty, it's a reasonable
16 basis to infer.

17 Now, as I have said, this continues, so it
18 escalates, and then for the Determination of Claim,
19 that is when the Prosecutor asks the Court, please do
20 forfeit or if--or not forfeit, but please do forfeit,
21 in regards on indication that there are grounds, so
22 again, there are grounds for forfeiture. And you see

1 this very clearly in Mr. Caro's---Prosecutor Caro's
2 Requerimiento or Determination of Claim.

3 And again, at the stage of the Asset
4 Forfeiture before the Courts at the Trial Stage,
5 that's a completely different standard. Its
6 demonstration--yes, there has to be a certainty at
7 demonstration. So, you cannot just--because it's
8 convenient, I take the standard at the end that the
9 Judge--in which the Judge will make the recommendation
10 and I bring it back at the initiation of the
11 proceeding. It just doesn't work that way.

12 Now, we hear about--we hear our friends of
13 opposing counsel saying Ms. Ardila, again, it were
14 just under study, it was just on a--the word of a
15 convicted drug trafficker that she seized Meritage, it
16 was based on a lie. And, in fact, in their PHB, they
17 say the following. They misrepresent what Prosecutor
18 Ardila said, and I read. That's from the PHB of the
19 Claimants. They say: "At the Hearing, Ms. Ardila
20 testified that she relied, almost entirely, on the
21 word of a convicted drug trafficker to seize the
22 Meritage property."

1 And then, you have what Ms. Ardila really
2 said at the Hearing, and that goes--again, it's
3 important to read the actual documents and the actual
4 transcripts, and it's--she says "when the case was
5 admitted and opened before the Asset Forfeiture Unit,
6 it was based on a detailed report of the real estate
7 recordation documents in connection with those pieces
8 of property in particular. When it was submitted to
9 me, it was accompanied by a very detailed study.

10 Amongst the evidence--amongst the evidence--was the
11 tutela action submitted by Iván López together with
12 other documents. Among those documents, so the ones
13 accompanying the tutela, were other title studies.

14 And let's look at what Ms. Ardila had at the moment
15 that she initiated Asset Forfeiture Proceedings and
16 Precautionary Measures.

17 So, she knew--and we know that--that Iván
18 López had been extradited on counts of drug
19 trafficking, that he had connections with the Oficina,
20 that he had owned the Meritage, that was shown in the
21 title deeds for the property, despite what our
22 friends on the other side have said, and I will go

1 back to that, although we went extensively on that in
2 May.

3 Two, that there were several irregularities
4 in the deeds, which included suspicions of forgery,
5 and this was based on a study of the Superintendency
6 of notaries which had gone and done 55 types of deeds
7 in the chain of transfer.

8 There was also an interview of Mr. Arboleda,
9 where, it has demonstrated that he didn't have the
10 financial capacity, et cetera, and, there was evidence
11 that the Meritage Lot had been the object of several
12 transformations, physical and legal, in a
13 relatively--excuse me, relatively short period of
14 time. As we know now, we are all always saying
15 Mr. Arboleda was the mango seller. Anyway, these are
16 all clear hallmarks of money-laundering.

17 One point that I want to clarify here is, we
18 heard this morning that, in fact, Ms. Ardila, when she
19 started, she had very little, and, curiously, she
20 started on the basis of a Report that didn't mention
21 the Meritage. There are two different moments in
22 terms of the collection of evidence that was carried

1 out in this process. I mean, there are several, but
2 in that initial phase.

3 So, when the procedure--when the case is
4 opened, this case is opened by the Asset Forfeiture
5 Unit--sorry, I'm going to give the whole timeline
6 because I think it's important. So, we have Mr. López
7 Vanegas going in 2004 before--excuse me, 2014, before
8 the Unit, the Criminal Unit, not the Asset Forfeiture
9 Unit, in Medellín, the Prosecutor is Ms. Correa, and
10 that's--she specialized in the Oficina de Envigado.
11 What happened? She looks at that and she says, I'm
12 going to send it to money-laundering and also to the
13 different places where there are investigations of
14 Oficina de Envigado.

15 Then, after going through money-laundering,
16 there is another case--you know how they send copies,
17 we referred several times about the "compulsa de
18 copias" (in Spanish)--in May, they said the
19 money-laundering, well, there must be here also. It
20 seems that this is the case where Asset Forfeiture
21 should be investigated.

22 At that point, and before it's opened, by

1 Ms. Ardila, before it's assigned to her, really, and
2 she opens the case, the Superintendency of Notaries
3 had this study that it had conducted, so there was a
4 lot already.

5 It's given to Ms. Ardila. Ms. Ardila will
6 start the Precautionary Measures, but it's important
7 to say she requires, then, another study. And that's
8 the other study--I mean, she receives this
9 information, she looks at López Vanegas, and she says,
10 I'm going to ask for another study on the other
11 properties of Mr. Vanegas, and that's the second study
12 that the Claimants have referred to, saying 47
13 properties--and I will go back to that when we talk
14 about discrimination, but 47 properties and the
15 Meritage was not there. Well, the Meritage was not
16 there because there had been already a previous study
17 before the case started on the Meritage, so surprise,
18 it wasn't there. It was just supplemental and looking
19 into López Vanegas. So, that was one first point that
20 I wanted to make clear.

21 Then, a second contention of the Claimants
22 is that there was insufficient evidence of the illicit

1 origin and change of transfer of the Meritage Lot, and
2 that's not true. Again, the collection of evidence
3 continued, and it keeps corroborating the illicit
4 origin and involvement of the Oficina de Envigado with
5 the Meritage Lot. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10 [REDACTED]

1

[REDACTED]

■

[REDACTED]

1

[REDACTED]

■

[REDACTED]

1

[REDACTED]

█

[REDACTED]

12

The Claimants say the Attorney General's

13

Office failed to evaluate Newport's good faith

14

before imposing the Precautionary Measures. And here,

15

again, what are they doing, the Claimants? So, they

16

conflate, or as the Director was saying this morning,

17

well, maybe she--they don't understand, but I doubt

18

it--what's the standard of proof in--that is required

19

in the application--sorry, what's the standard proof

20

but also what is the level of scrutiny that the

21

prosecution has to have on the good faith, or lack of

22

good faith, of the possible affected Parties at the

1 initiation of the proceedings and what is the one that
2 is applied by the Judges?

3 And again, here we know--and this is
4 Article 117 and 89 of the Asset Forfeiture Law--when
5 you're dealing with anticipated Provisional Measures,
6 which is an exception but it applies when there's a
7 necessity, when there's urgency, as it was the case
8 here, where there were being sales and everything was
9 going to be dissipated and third bona fide party
10 buyers will be affected, there's not really a
11 necessity. The law doesn't provide exactly you have
12 to conduct an analysis existing of bona fide third
13 parties as required by law. You have to include them
14 and notify them of the Measure when imposed as
15 affected. And Prosecutor Ardila did so. Now, when--

16 PRESIDENT SACHS: Excuse me, just to help
17 us.

18 MS. HERRERA: Yes.

19 PRESIDENT SACHS: Just to help us, the
20 Claimant referred to an article and I don't find--

21 MS. HERRERA: 117?

22 PRESIDENT SACHS: Yes, which applies in the

1 initial phase, which states in my recollection that
2 also during this initial phase, it has to be
3 ascertained whether the buyer has purchased the
4 property in good faith.

5 MS. HERRERA: In the initial phase, and
6 that's Article 152--no, the initial phase. Sorry.
7 So, we have--and that's Article 118, and that's in the
8 Requerimiento phase, and the standard is "search and
9 collect for evidence that allows to reasonably infer
10 the absence of good faith." So, that's the standard
11 at this stage of the Requerimiento. That's the formal
12 forfeiture petition, not the Precautionary Measure.
13 So, you're right, yes, there is the standard, they
14 have to look, but the standard is really low, I mean,
15 the standard is low, and it's "infer the absence".

16 Now, at the trial stage, both Parties, and
17 that's provided in Article 145, will present proof,
18 and there has to be a determination, really, who is in
19 the better position to prove? And that's provided in
20 the law, it's usually the--in this case the Claimants
21 or the ones that are having--the affected parties that
22 have the assets being forfeited, but, of course, the

1 Prosecutor has the obligation to present proof to try
2 to rebut, e t cetera.

3 Now, I move to--

4 PRESIDENT SACHS: I have another question,
5 I'm sorry.

6 MS. HERRERA: No, no.

7 PRESIDENT SACHS: Would you go back to
8 Slide 66.

9 MS. HERRERA: Um-hmm. 66.

10 Yes.

11 PRESIDENT SACHS: Did you say that at this
12 moment in time, Ms. Ardila already had in hand the
13 legal opinions as to the title research?

14 MS. HERRERA: At the time of the
15 Precautionary Measures?

16 PRESIDENT SACHS: Uh-huh.

17 MS. HERRERA: No.

18 PRESIDENT SACHS: Okay. Thank you.

19 MS. HERRERA: Had internal studies of the
20 register but not the opinions of the Experts.

21 Sorry, one problem.

22 So, okay. Now, moving--I continue on the

1 point of the bona fide under stages, and the Claimants
2 will say, look, you have to look at Article 87 of the
3 Asset Forfeiture Law, and, that's a word they say,
4 "there is an affirmative obligation to safeguard the
5 good-faith third Parties who might be affected by the
6 actions_". Yes, but look at the language of
7 Article 87--it refers--this Article 87 refers to the
8 normal Precautionary Measures, that is when there is
9 not that much urgency, which is not the case here, and
10 so there is a different level.

11 In any event, because for the exceptional
12 you will see Article 89 does not make reference to
13 this--it's not really affirmative to this obligation.
14 It only says you impose them as long as this--the
15 reason why you're imposing it is for any of the
16 purposes provided in 87. That's the reference.

17 Now, in any event, I'm not saying that you
18 don't have to protect, but they are protected, the
19 possible affected parties, they are protected because
20 they're notified, obviously there is no point of
21 notifying before you cannot put exceptional
22 Precautionary Measures because that defeats the

1 purpose, but they are notified as they were here. I
2 mean, we heard through--I mean, we have heard in May
3 and the Claimants were quite surprised that actually
4 they were included as afectados, and even with that
5 designation in the initial phase of this proceedings.

6 And they were given the possibility to file
7 documentation, including not the opinions obviously of
8 Medellín and Martínez, but opinions and briefs both
9 Newport and La Palma .

10 But anyway, further, their imposition of
11 Precautionary Measures here were studied twice by the
12 courts in the control of legality, and they were
13 approved. And what is interesting, further
14 interesting, is--I mean, the Claimants take issue and
15 say, oh, well, you know, but how come, oh, they
16 violated--they said before the courts--they say
17 violated the level of scrutiny they had had because
18 they had to go further. And you see at the end of
19 Slide 74, it says what is the scope of the legality of
20 the Asset Forfeiture Proceedings? Because what
21 happened was that the Claimants were making their
22 argument you have--before you applied the

1 Precautionary Measures, you have to find that actually
2 we're bona fide third-party Buyers. And the Courts
3 and the Appellate Courts says no, this is
4 clearly--there is no showing the lack of minimally
5 sufficient evidence based on Precautionary Measures.
6 Instead, what the appellant is seeking is a premature
7 lifting of the restriction, recognition of a status,
8 that's the *bona fide* third party which is only for the
9 courts' final determination, has no basis.

10 Now, the Claimants also rely on Article 152
11 of the Asset Forfeiture Law to argue that the Attorney
12 General's Office did not bother to identify, locate,
13 gather and file elements of proof regarding Newport's
14 good-faith status. And this is wrong because
15 Article 152 does not refer to the initial phase. This
16 referred to the trial stage of the Asset Forfeiture
17 Proceedings. And, of course, we know for a fact that
18 the Prosecutors are--have gathered and are presenting--
19 proof of that.

20 One of the other arguments that we hear from
21 the Claimants is, oh, well, but, in fact,
22 Mr. Caro--and Mr. Moloo cross-examined Mr. Caro and is

1 actually like you're conflating the due diligence that
2 was made by--between Corficolombiana and Newport, and
3 you didn't analyze the good faith of Newport.

4 This is interesting. This is interesting because you
5 may recall that Newport always relies--and we will go
6 back to that for purpose of how stringent its due
7 diligence was in Corficolombiana, but leave that
8 alone. The truth is that if you look at Mr. Caro's
9 provisional--in the Requerimiento, you will see at
10 Pages 732 that, in fact, he did look at what was the
11 due diligence that has been conducted by Newport. So,
12 did he not analyze? I don't think so.

13 And further, and that's one of the things
14 that is important to recall, who is the one that is
15 the spokesperson for the property at this stage? It
16 is Corficolombiana. And Corficolombiana, the good
17 faith or not, and the due diligence of
18 Corficolombiana, was also examined quite thoroughly by
19 the Prosecutor Caro in its Requerimiento.

20 Finally, and it has been confirmed by the
21 courts, and Prosecutor Caro also made it very clear,
22 again, it is for the Judge in the trial phase to

1 determine whether Newport is a *bona fide* third party
2 without fault or not. And I have these two quotes,
3 one from the Decision in which the Judge, the first
4 instance judge, accepts the request for commencing
5 Asset Forfeiture Proceedings, and then we have an
6 answer to Arbitrator Poncet of Mr. Caro explaining
7 this point. So again, you cannot apply the standard
8 of the end to the beginning, in procedures that are
9 supposed to be evolving and with their level of
10 evidence that's mounting.

11 Other of the arguments that the Claimants
12 made is the Attorney General's Office should not have
13 imposed Precautionary Measures since they're not
14 reasonable nor proportional, and they do not target
15 illicit proceeds. Okay. Again, this is a complete
16 misconception and it's an *ex post facto* created
17 position of the Experts and I will come back to this,
18 but let's see.

19 First of all, the Precautionary Measures
20 were legitimately adopted by the Attorney General's
21 Office, considering the urgency of the situation. So,
22 what was Prosecutor Ardila saying? And I said

1 already, López Vanegas, the Oficina in the chain of
2 transfer, the irregularities in the deeds including
3 possible forgery of documents, participation of front
4 men, physical and legal transformations. So, if you
5 told me that there were no basis and they were being
6 sold.

7 And Precautionary Measures are always
8 imposed. And the question is do you impose it earlier
9 on, the exceptional anticipated or a bit later, but
10 they're imposed because that's the only way to make
11 sure that the assets are not dissipated
12 when--through--before there is a determination by the
13 courts.

14 Again, just to recall, the legality of the
15 Measures was twice confirmed, and what is more, not
16 only was the legality of the Measures confirmed twice
17 by the Colombian courts, but because the way that the
18 Asset Forfeiture Law is construed and the logic that
19 enforcement--there is participation not only of the
20 courts but also of the Minister of Justice, of the
21 Inspector General's Office, the one that looks that
22 the State--the administrative entities and the State

1 are complying with their functions. And you have the
2 legality of Precautionary Measures was confirmed by
3 the Prosecutor, by the specialized judge of first
4 instance, by three superior judges of the Superior
5 Court of Bogotá, the Minister of Justice and the
6 Inspector General. Seven public officials of
7 different branches of the State.

8 So, unlike what Mr. Moloo had represented
9 this morning, it wasn't Ms. Ardila going and saying,
10 oh, I put the padlock and I finished this and because
11 I feel like. Or because theoretically I have an
12 interest, a further interest--and I will go back to--I
13 will address that later on--in paralyzing this
14 project. What she did was fully in accordance with
15 the law.

16 Now, we have now an ex post facto argument
17 that, you know, what the Attorney General's Office
18 should have done was target illicit proceedings
19 instead of the Meritage Lot. Well, I mean, the asset
20 is the Meritage Lot. You cannot target illicit
21 proceedings or credits that are of a personal nature.
22 You have to go for the asset. But also what the

1 Claimants had done is again, misrepresent how this
2 works. Under the Asset Forfeiture Law, you have 16
3 different grounds for Asset Forfeiture. The first
4 nine of them, with some variations, concerned illicit
5 assets for--given their origin or destination.

6 And the ones, the remaining ones, which are
7 the 10 and 11 of Article 16 of the Asset Forfeiture
8 Law, are equivalent, and that's--and they may refer to
9 the Decision of the Constitutional Court--I will go
10 back to that in a moment. But this is a different
11 reason, this is a different ground. You don't go and
12 simply because there is an illicit--I'm pursuing an
13 illicit asset and then I change to the other ground,
14 and what I go is to the proceedings of the--doesn't
15 work that way. If what you're saying is, the origin
16 of this asset is illicit--I go to that asset.

17 And this situation, what they're referring,
18 are conflating, the Article 16.10 and 16.11 is another
19 scenario. That's when what happens if as a prosecutor
20 or asset of the Court, I go and I cannot forfeit an
21 asset. Well, that it's illicit in its origin. I go
22 and forfeit an asset that is of licit nature, but it's

1 in the hands of the same person that committed the
2 illicit act. I will go back to that. So, it doesn't
3 work that way. You just cannot--

4 And interestingly, there was something that
5 Mr. Martínez had not referred to at all in the First
6 Opinion that he gave to Corficolombiana, you may
7 recall that Mr. Martínez appeared, gave an opinion
8 before the--to Corficolombiana and then what happened
9 is he comes here, he's actually supposedly an
10 independent expert, and he himself, had to say, I have
11 it somewhere during the Hearing saying, well, no,
12 actually, yes, in a way I cannot be completely
13 impartial.

14 Other of the arguments. Had the Attorney
15 General's Office evaluated Newport's due diligence,
16 then they would have found that it was bona fide
17 without fault. Again, we're going through the same
18 kind of thinking. And, this is important, because
19 let's look at what's a required standard of due
20 diligence applicable under the Asset Forfeiture Law.

21 So, what is the standard for--that the
22 Constitutional Court has said to find whether there

1 is-if--a person claiming to be a bona fide without
2 fault Party, has to fulfill. And it says the
3 Constitutional Court basically states that in order to
4 qualify as a *bona fide* without fault, the Party--that
5 Party needs to establish that it would have been
6 impossible, impossible, that's for any prudent and
7 diligent person to discover the process of error of an
8 apparent right of situation. So, that's what the
9 Constitution--that's the level, and that has not
10 changed actually with the Decision of 2020. And
11 again, I will address that later.

12 In fact, as you can see that this was
13 prompted by a question Mr. Martínez, Arbitrator
14 Perezcano asked him about this standard. And he had
15 to agree, he had to say yes, I have to agree you're
16 right, that's the standard.

17 Furthermore, what happens, and this is
18 important, as Ms. Banifatemi was saying before, when
19 you're investing in an area affected by violence and
20 civil unrest, and recall we know that for years
21 Medellín had the reputation as being a bad-ass town,
22 violence reigned, civil society had been destroyed.

1 No one seems to know how to put Medellín back
2 together. And we see, and I'm going to Page 85, what
3 the land restitution Civil Division of the High Court
4 of Antioquia district said in a decision of 2014. It
5 says, when you're dealing--title studies do not
6 suffice to infer good faith without fault to acquire
7 premises, and that there should be extremely diligent
8 inquiries regarding social and political context and
9 the effects caused by the internal armed conflict. It
10 cannot be clearer.

11 And why? Because this situation has impacts
12 in both the grounds of the Asset Forfeiture or, in
13 fact, it can be and that doesn't concern us here but
14 the victims of land restitution. It concerns us to
15 the extent that we know that the drug-dealing through
16 the paramilitary and the paramilitaries displace a lot
17 of the population. In fact, I think at one point,
18 Colombia was the third country with having the higher
19 number of refugees and it was its own internal
20 displacement.

21 And let's see what happened. So
22 Ms. Banifatemi asked--reads from the brochure of

1 Mr. Seda in which he is advertising his model of
2 business. We heard before saying you find these nice
3 regions, previously dangerous, you get a bargain and
4 that's it, and Mr. Seda said yeah, that's my strategy.
5 So, Mr. Seda knows where he's investing, that's the
6 strategy, yet he doesn't want to have the--comply with
7 the level of due diligence that he should.

8 So, as we said, but we heard, and we heard a
9 lot of that during the cross-examination and had been
10 repeated, I would say, ad nauseam, that Newport has
11 transacted in good faith. It had an extensive due
12 diligence that had been done on the property. It
13 included four types of title studies, a certification
14 of the fiscal year. Again, we have said that that
15 certification is just an answer to ratification.

16 But let's look during the cross-examination
17 of Mr. Seda. Four titles. So Mr. Seda said the four
18 titles, the first one is Otero & Palacio of 7 March
19 2013 commissioned by Royal Property. Then we have one
20 that's the title of Osorio & Moreno 17 May 2016, which
21 was commissioned by Colpatria to give a loan for the
22 project. And then he said, this is not the title

1 study, and we hired Corficolombiana, and according to
2 Mr. Seda the mere hiring of federally regulated
3 financial institutions which had impacted--financial
4 institutions would have impacted guidelines and
5 regulations.

6 But we heard today, I don't remember
7 opposing counsel saying SARLAFT, the SARLAFT has been
8 approved of Corficolombiana had been approved by the
9 Government. That's not true. The Government
10 established some guidelines, and then it's up to the
11 institution, the financial institutions to follow, but
12 they had the liberty of structuring it, so it's not it
13 had been approved.

14 PRESIDENT SACHS: Forgive me, the Court
15 Reporter asked for a short break.

16 (Brief recess.)

17 PRESIDENT SACHS: Ms. Herrera. Back to due
18 diligence. And you were on Slide 88?

19 MS. HERRERA: Oh, yeah. Thank you. 88.
20 Thank you, Mr. President.

21 So, let's talk about the studies, the title
22 studies. These are civil title studies, and these

1 are patently insufficient under Colombian law to asses
2 the risk of asset forfeiture given their limited
3 material scope and the temporal too, and I will go to
4 that.

5 And this was clearly put by Dr. Reyes, civil
6 title studies are patently insufficient and he says
7 the main objectives of these studies is to verify
8 there are no problems civil nature in the chain of the
9 tradition of property, to the purpose of the studies
10 are temporarily limited to ten years, and we heard
11 again today of opposing counsel saying they were clean
12 title studies and interestingly the way they were
13 described were again there were not liens, they were
14 not encumbrances--yeah, that's what you do when
15 selling a property, but that has nothing to do with
16 due diligence that is required to show that you have
17 bona fide without-fault party, and moreover in an area
18 where Mr. Seda and Claimants were investing.

19 So, this is limited. This is not the
20 purpose for what they created, Parties held everything
21 and, in fact, we see in the words of Ms. Ana María
22 Palacio of Otero Palacio, which is the firm that

1 performed the civil title study for Royal Property.
2 It says when she's asked if--and this is taken from
3 Pinturas Prime arbitration that involved claims also
4 regarding to the Asset Forfeiture Procedure regarding
5 Meritage, obviously, it says, well, when she's asked
6 about the investigation, so I'm not sure that for my
7 title studies which does not include an analysis of
8 the people who appear there as such, or who would have
9 affect my study, because I'm issuing an opinion of
10 legal civil matters of the possible defects that the
11 property may have; or that it has any affectation or
12 it has liens but nothing in matters of investigation
13 because that's not my scope. So, we go to the
14 material scope.

15 And then again, you see when Corficolombiana
16 listed among the due-diligence procedures that have
17 been carried, says study of the company La Palma
18 Argentina company carried out by Otero & Palacio
19 determine legal viability from a commercial point of
20 view. So, it's clear this is patently insufficient.

21 Then moving to 89, let's look again at the
22 Osorio & Moreno, and again this is interesting--and

1 again, I'm sorry, we went through this, but it seems
2 Claimants keep hammering on that, so I'm obliged to
3 address it again. So, we looked at the Osorio &
4 Moreno title, which is the second one that Mr. Seda
5 said of the four title studies. Osorio & Moreno was
6 the one commissioned by Scotiabank Colpatria for a
7 loan for the Project. And you see, again, what's
8 the--what they say, they said the real estate subject
9 of study is free from all liens or limitations upon
10 ownership rights of asset forfeiture..

11 And it says also a disclaimer that says
12 we're not liable for information that may appear
13 thereafter, that up to this day is not known by the
14 lawyer's office, such as information regarding Asset
15 Forfeiture Processes where such change has not been
16 recorded within the registration pages reviewed. Of
17 course. If that is unentered--that there has been a
18 measure and that it's in the registration of the Asset
19 Forfeiture Proceeding, that's a different thing, but
20 as explained before, if there are Asset Forfeiture
21 Proceedings that are ongoing, there is the initiation
22 of the investigation, well, they're not going to find

1 it. Definitely you're not going to find it in a civil
2 law-civil-title study.

3 And then again there is another aspect, and
4 as I recall earlier on, the Asset Forfeiture action is
5 not subject to statute of limitations, and that's why
6 also a title study of 10 years is clearly
7 insufficient.

8 And we saw this before. We saw that the
9 title study of Otero & Palacio was 10 years, and they
10 say-and when they ask again in the same arbitration to
11 Ms. Palacio, is, oh, why did you do a title study for
12 10 years? She said, "that was just a proposal, if the
13 client says no I want you to do the entire change of
14 recordation of titles, it can be done so it covers the
15 entire change."

16 And during the cross-examination, Mr. Seda
17 acknowledged Newport's failure to diligently
18 commission the title study, and Ms. Banifatemi asked
19 him, so what this shows is the title study can carry
20 shorter or longer terms, depending on what the client
21 asks. That's what it says. Yes, to be clear on the
22 title study and every title study we have ever

1 performed, we have never, ever directed, suggested or
2 made reference to a firm to perform a title study in
3 one way or another. I mean, if I'm investing, and the
4 quantities that supposedly I'm investing in this
5 project, I will make sure that this is carried out in
6 a proper manner.

7 But moreover, you may recall that also the
8 Osorio & Moreno title study extended to 20 years; and,
9 here during cross-examination, so Mr. Seda says, so
10 when we talked to Osorio & Moreno--I think that's her
11 name--I only talked to her once. She said, well, the
12 thing is because I asked the same question, meaning
13 the duration. She says the thing is we're only
14 required to do 10 years' title search, but banks are
15 particular about reputational damage. And she says
16 you know we go about 20 years because the banks ask us
17 to go back 20 years because they don't want to suffer
18 any reputational damage.

19 And President Sachs asked, when you learned
20 this, basically, this didn't give you the idea to go
21 back to your lawyer and to ask them, well, the bank
22 said it would be more prudent to go back 20 years,

1 could you do that for me also?

2 And Mr. Seda said, plainly: "Well, no."

3 Also, during the cross-examination, Mr. Seda
4 had to admit that, if they had done a more prudent
5 test starting of 20 years, they will probably as, in
6 fact, Osorio & Moreno would had, find the deed where
7 Sierralta López & Company (in Spanish) represented by
8 Iván López and in the case of (in Spanish), I don't
9 know how you say the "Managing Shareholder," is the
10 legal representative, and obviously a shareholder,
11 appear.

12 PRESIDENT SACHS: May I interject a
13 question?

14 MS. HERRERA: Yes.

15 PRESIDENT SACHS: At this point in time, if
16 I understood correctly, Mr. López was not on the OFAC
17 List?

18 MS. HERRERA: No.

19 PRESIDENT SACHS: So, had she detected this
20 indication, what is your position should have been
21 made further? I mean, I presume the lawyer would have
22 checked with the OFAC List, López was not on the OFAC

1 List, undisputedly, so what would the shortcoming then
2 be?

3 MS. HERRERA: Open searches, Google. In
4 fact, that's the case that Mr. Seda recognizes it. "In
5 fact, when in 2014, Mr. López appears and says well
6 the Meritage lot is mine I asked my lawyer Mr. Lopera
7 to conduct a search . And Lopera, my lawyer, found
8 indeed López Vanegas is a convicted drug-trafficker."

9 Thank you.

10 Quick two points: We were told today that
11 the due diligence conducted by Osorio & Moreno went 60
12 years back, but, in fact, there are a couple of
13 things. It didn't go 60 years back. They took the 10
14 years, what was there; and, in the scope of these 10
15 years, they listed the persons, and particularly with
16 regard--regarding the legal representatives, they only
17 listed the legal representatives at the date of that
18 search.

19 So, of course, that's limited, and, in fact, Moreno
20 Osorio, or Osorio Moreno--sorry--didn't find Ivan
21 López Vanegas, so you were told, oh yeah,--but you
22 know, many banks find Ozorio Vanegas and Ivan Lopez

1 and nothing happens Nothing happened? Nothing
2 happened, but there are different--you didn't know
3 what kind of transactions--different due diligence are
4 made. It's different if I'm buying this for investing
5 this; that if I'm giving a loan in which I basically
6 have a much more restricted due diligence, et cetera.
7 So, you cannot meet those sweeping affirmations.

8 Moving again to Page 92, then the Claimants
9 rely in what they call and again the certification
10 title, again, that doesn't exist under Colombian law.
11 There is just rights of petition.

12 And importantly, they say--with--Mr. Reyes'
13 idea is actually if you really know how Asset
14 Forfeiture works and we will expect that the lawyers
15 at least of the Claimant, or the Claimant will know
16 given the magnitude, supposed magnitude, of this
17 investment, then you don't ask. I mean, you cannot
18 rely on solely the Fiscalía, oh, can you tell me?
19 Please tell me if anybody is here and that's it. That
20 is a certification. The Fiscalía gave you information
21 that's public that's not confidential that it can
22 provide at that point, but that's it.

1 And also, what did they respond? They
2 respond on the basis of the list that is presented to
3 them. If you present the list and that's incomplete,
4 also the response of the Fiscalía is going to be
5 incomplete. The Fiscalía is not charged for doing the
6 due diligence that the Claimants should have done.

7 And again, in the Osorio & Moreno title
8 study in the disclaimer, you see this disclaimer, same
9 type of disclaimer.

10 Just a quick note, you may recall that I
11 refer, and I asked Mr. Martínez during the
12 cross-examination about whether really asking a
13 certification from the Fiscalía is a proof of good
14 faith, and I put to him an example of something that
15 happened in the Nineties where these so-called
16 "certifications" were used to evade the law and to
17 make mockery of the law, and he says I don't remember,
18 but yeah, that happened. And at that time, the
19 Attorney General was Mr. Sintura, the same person, and
20 he was the one who had this problem. The same person
21 that is making this petition.

22 So, it doesn't matter how you title it. You

1

[REDACTED]

2

[REDACTED]

3

[REDACTED]

4

[REDACTED]

5

[REDACTED]

6

bring me third parties that are going to appear as the

7

owners so that they can appear as if having good

8

faith. This is a ruse that had been--

9

PRESIDENT SACHS: Is this part of the new

10

evidence?

11

MS. HERRERA: No. It's in the record.

12

That's in the record. It's R-121.

13

Okay. Moving to 93--and we go here to the

14

particular, to not use another term, view of the

15

Decision of the Constitutional Court of Colombia,

16

C-327. The first thing that I have to recall

17

again--and I had referred to this--what was the

18

decision of constitutionality? The Claimants at one

19

point said this is not the case. No, it's a case on

20

the decision of the constitutionality of a norm. What

21

is the norm? Article 16 of the Asset Forfeiture Law.

22

What is being analyzed? The two last paragraphs,

1 meaning 10 and 11.

2 And why, whatever the quote says, doesn't
3 apply to the rest? Because the Court, the
4 Constitutional Court, has already decided on the
5 constitutionality of all the previous articles and
6 it's constitutional res judicata, and that's
7 important. If they want to go back, they have to do
8 so under Colombian Law on a specific decision
9 reversing a decision. This is not the case. And it's
10 crystal-clear that the Decision refers to assets of
11 legal courts.

12 So, of course, the Claimants take this and
13 say, oh, and you see, no, the levels of due diligence
14 is only the assets. But they're talking--the Court is
15 talking here to the assets of legal origin.

16 And I want to call your attention to one
17 thing, and it is when the Constitutional Court decides
18 on these two Articles 10 and 11, decide they are
19 conditionally constitutionally--constitutional. And
20 what does the Court says in terms of how do you have
21 to read this conditionality?

22 One minute.

1 Yes. So, in the C-27 of 2020, it's Exhibit
2 CMB-014 at Paragraph 7.5, when the Court says how are
3 you to understand these two provisions for purposes of
4 applying them and them being constitutional? It says
5 the Court will condition the constitutionality of
6 Paragraphs 10 and 11 of Article 16--that again is not
7 the cases, the scenario that we are analyzing here,
8 which is an asset of illicit origin.

9 Paragraphs 10 and 11, Article 16 of
10 Law 1708/2004, to specify on the one hand that, in
11 this hypothesis, the Asset Forfeiture shall operate
12 only when the holder of the right is the same person
13 who has carried out the underlying illegal activity,
14 the holder of the right of some licit assets who have
15 collected legal activities but the Prosecutors cannot
16 forfeiture assets, legal assets, and they have to go
17 for the equivalent of licit origin.

18 It says carry out the legal activities that
19 support the prosecutor powers of the state. And on
20 the other hand to point out that the aforementioned
21 restriction is applicable without prejudice of the
22 rights of third parties acting in good faith without

1 fault, in whose favor in rem titles have been
2 constituted over the legal property subject to asset
3 forfeiture.

4 And that's the case for instance, what
5 happens if there is a mortgage? The property is in
6 the hands of the person that committed the illegal
7 act, but whose licit assets are being forfeited in
8 lieu of the illicit ones, and they have a mortgage.
9 So, a third party could have a mortgage. You have to
10 make sure there is protection, but that's a complete
11 different scenario.

12 So, it doesn't matter the legal contortions
13 that you saw Mr. Martínez doing, and the Claimants
14 doing, to apply this. That just simply does not
15 follow. Whatever the Court said does not apply on
16 the level of due diligence which we saw is quite high,
17 doesn't apply to this scenario of illegal assets.
18 Illegal assets is stringent. You have to look at the
19 assets; you have to look at the change of title.

20 Now, moving to--why don't I have the number
21 of the page here?

22 Four. This is particular--I really find

1 this interesting the way that the Claimants have tried
2 to say they conducted a due diligence because it's
3 completely circular. You have Newport and
4 Corficolombiana trying to attempt to discharge the due
5 diligence by allocating the responsibilities to each
6 other, and making really mock of why are their anti
7 money-laundering and the "know your client"
8 obligations, et cetera, so you say during the
9 cross-examination, Mr. Seda was adamant that, for him,
10 having hired a federally regulated financial
11 institution, i.e. CORFI, which had guidelines and
12 regulations was kind of the summum of the due
13 diligence, was evidence of the seriousness of
14 Newport's due diligence.

15 And he put it here. He says--during the
16 Hearing, he says, "Mr. Seda, so I think we know, we
17 didn't--we were under Contract to purchase property,
18 but the acquirer of the property is Corficolombiana,
19 so they are doing the due diligence that's required by
20 them and I'm relying on them doing that due diligence,
21 so I have reliance on that they are going to do that
22 work right. They're going to acquire the property;

1 that property's going to be deposited in a trust, so
2 they have to do it. They have to do it."

3 And then it's quite interesting because--we
4 saw this in May, but Mr. Seda writes a letter to
5 Corficolombiana at one point saying can you please
6 send me the communication of the approvals of the
7 structuring of this business, and Corficolombiana
8 says, yeah, remember, it's important to note that it
9 is not the fiduciary but the Trustor, Newport, which
10 directly negotiated the acquisition of the Project's
11 plot with the Company La Palma, and they basically
12 said it's up to you to do the due diligence.

13 And moving forward to the following page,
14 when we address this with Mr. Martínez, this was quite
15 interesting because Mr. Martínez said during the
16 Hearing says--so Mr. Martínez at the Hearing,
17 basically what he's saying Corficolombiana didn't have
18 to do an enhanced due diligence regarding third
19 parties from which it didn't hold contractual
20 relationships as clients or counterparts. In view of
21 the Claimants' own experts, Corficolombiana was not
22 responsible for the due diligence in the chain of

1 transfer of Meritage. Who was responsible then?

2 He says, Mr. Martínez, my position after
3 looking at the documents in the case, is that the only
4 obligated party I have found in this case was the
5 fiduciary, Corficolombiana, but he says in the end,
6 in my opinion Corficolombiana did not have to do an
7 enhanced due diligence regarding third parties with
8 whom it did not hold a contractual relationship as
9 client or counterparts. Who are the clients of the
10 counterparts? Newport? La Palma? That's it; it
11 stops.

12 I have already said about the connection of
13 Mr. Martínez and Mr. Sintura, the lawyer of
14 Corficolombiana, and the impartiality of Mr. Martínez,
15 to put it that way, the questions.

16 Now, because you're in the discussions--and
17 this is quite important--a lot of the time was spent
18 during the evidentiary hearing in May regarding what's
19 the relevant time to conduct due diligence, and this
20 generated a lot of questions. And so, the first thing
21 is, as acknowledged by the Claimants' own expert, the
22 relevant time to conduct due diligence--and that

1 expert is Mr. Martínez--is when, with transfer of
2 property, and Arbitrator Perezcano says, you said that
3 good faith is evaluated based on information available
4 at the moment of entry into the transaction. And you,
5 my question to you, what is the Transaction, what is
6 the relevant transaction, when does this arise. And he
7 says the moment the act by which the properly
8 transfer is perfected. And then the Claimants said the
9 Sale Promise Agreement did not provide for transfer of
10 title. That's undisputed. President Sachs asked this
11 question again regarding the "promesa de compraventa"
12 (in Spanish), and Mr. Moloo confirmed: "Correct.
13 That did not provide transfer of title."

14 And then we got to why there is an ongoing
15 obligation, and this all arises because even if you
16 say, okay, it was extremely difficult, it was
17 impossible because we have seen it was impossible,
18 extremely difficult for the Claimants to find Mr. Iván
19 López when I have a drug dealer coming and saying
20 "that's mine," that raises a question, and there is no
21 contention that that happened in early 2014. So, we
22 talk about the continuous obligation to refresh its

1 due diligence.

2 And what Mr. Reyes clearly explains is,
3 look, it's a very different proposition if you're
4 talking of a one-off -transaction that is perfected
5 just with the sale; that when you're looking at the
6 whole complex project, that involves several phases.
7 And that the question of Arbitrator Poncet, rightly
8 so, what does it mean? I have to be doing the
9 exercise of due diligence all the time and given the
10 Claimants also asked what does it mean ad infinitum?
11 Mr. Reyes says no. It is if you receive information
12 that changes the perception regarding good faith,
13 then you're under the obligation to review your
14 opinion regarding good faith.

15 Now, we have heard today the Claimants
16 saying, oh, no, no, no, no, no, but the moment of the
17 transfer, and they cite Mr. Medellín, was when the
18 transfer of the property was made to the trust, and
19 that Trust is the Meritage-La Palma Trust referred as
20 the "Parqueo". Curiously enough, "Parqueo" means
21 parking because that's going to move, the whole
22 structure. And whose bona fide are we analyzing?

1 We're analyzing Newport. Newport is not there.

2 Anyway, in this--under this complex project,
3 there is an ongoing obligation, if you hear something
4 new that changes that, to do something. During the
5 Hearing, cross-examination, again I said this before,
6 it was clear that Mr. Seda had done or his lawyer had
7 done a Google search and had found that Mr. Iván López
8 was extradited and--had been extradited and was a
9 recognized drug-trafficker, and you have the reference
10 here, and this was before they started the
11 construction of the project, they say, my God they
12 stopped all the project, that many people working,
13 this is going, whatever we had managed to construct is
14 going to ruin. Well, you assumed the risk.

15 In cross-examination, Mr. Seda recognized
16 Newport refused to do the due diligence after learning
17 of Mr. Lopez' claim. Ms. Banifatemi asked

18 "Ms. Banifatemi: You did not deem necessary
19 given the situation and that you have a claim by
20 someone who says I'm the rightful owner to restart
21 maybe a due diligence, not a Google one, to have an
22 attorney maybe look at the chain of title to go as far

1 as possible? You did not do that; right?"

2 Mr. Seda said: "We did not redo the
3 diligence."

4 Again, it was a conscious choice. I would
5 say that's reckless behavior, reckless choice, but you
6 assumed the risk.

7 And the question from Mr. Poncet--actually,
8 Dr. Reyes gave an even more clear answer saying--well,
9 Arbitrator Poncet was asking, saying--how many times
10 do you have to renew the due diligence, with what
11 frequency, and Dr. Reyes says "every time a drug
12 dealer tells you that a criminal office has
13 dispossessed you of an illicit asset, and that this
14 fact will be informed to the Office of the Attorney
15 General." There is no mention of the Claimants going
16 to the Attorney General's Office.

17 Now, the issues with the pages.

18 Now, because of this discussion, the
19 submission was like, oh, you know, and we hear it
20 again, yeah, but you know, after we knew that Iván
21 López was claiming property, we responded to his
22 interview on the radio; we spoke to the Unit Buyers,

1 well you spoke to the unit buyers, you tried to assure
2 that everything is fine ,they will continue buying.
3 Okay. And then, they submit, the Claimants wrongfully
4 claim, they say that Corficolombiana thoroughly
5 refreshed its due diligence, so that's the contention
6 in the Post-Hearing Brief.

7 Now, if you look just make a perfunctory
8 analysis of the statement of the Legal Director of
9 Corficolombiana, Ms. Guzman, who we referred to today
10 and this was in another procedure that has been
11 encountered here, what is it that Ms. Betancourt says
12 that she did? She said -well, that actually she did
13 not refresh. It says I verify once again how the
14 business deals with La Palma had taken place, we
15 verified the title studies, the ones that had been
16 conducted and we know they were insufficient. We
17 verified the searches that Mr. Sintura--we already
18 talked about the searches and the petition and the
19 limitations on the searches and the list and the
20 petition--had performed, and once again the tool we
21 have is to search for the list of people whose name
22 appear in the title of transfer property, what really

1 showed that was incomplete. And those that appear,
2 particularly for La Palma, that were generated.

3 So, clearly, rechecking patently
4 insufficient titles, verifying incomplete lists, and
5 particularly doing enquiries about La Palma, it's just
6 looking at all the information. I don't see any
7 refreshing as they want, and conspicuously absent from
8 the alleged refreshed due diligence are searches
9 regarding López Vanegas and they know, Corficolombiana
10 knows, because Mr. Seda said I told Corficolombiana
11 about the call.

12 We move now to the Claims of the--Claimants'
13 allegations regarding violation of due process. So,
14 the Claimants had submitted they were denied the
15 opportunity properly to participate in the proceedings
16 that led to the seizure of the Meritage Project.

17 That's not true.

18 We have shown--and again to the surprise,
19 apparently, of the Claimants--that both Prosecutor
20 Ardila and Prosecutor Caro, and you have the evidence
21 here, even in the Requerimiento Mr. Caro says,
22 "identificacion y lugar de los afectados" , and is

1 listed the lawyer of Newport, and you see how before
2 that Prosecutor Ardila had also included Newport in
3 the afectados. So, I don't know what this idea that
4 they were not included comes from.

5 In cross-examination, and you know Mr. Seda
6 admitted, Ms. Banifatemi asked:

7 "Ms. Banifatemi: My question is simple.
8 Not getting to legalese. Are you aware that in
9 April 2017 the Prosecutor recommended that Newport be
10 admitted as an affected party?

11 Mr. Seda: No, no one told me that. That
12 the Fiscalía recommended us to be an affected party,
13 never."

14 I submit, starting an investment arbitration
15 and claiming that--they had been deprived of--there
16 had been a violation of due process when the facts
17 demonstrate the opposite, is to say the least
18 questionable. Anyway.

19 Now, at the trial stage, we have the
20 decision of the second judge of the section of Asset
21 Forfeitures, and we know that the Second Judge of the
22 Circuit of Medellin said no I don't consider Newport

1 as an afectado. Why ? Because in my reading of the
2 law, it only will be afectado if it has in rem rights,
3 which it doesn't. And this is not contested. We have
4 seen already that Mr. Moloo answering to President
5 Sachs that there had been transfer of title.

6 And you will see also that, during the
7 cross-examination, when I asked Mr. Martínez, I said

8 "So, that is, the Judge's explanation that
9 there need to be Real Property rights that they
10 would be--for it to be--basically you need Real
11 Property, it's upper cap, and that's not correct.
12 We're not referring to Real Property, the
13 Company. There need to be Real Property rights
14 and they would be the affected parties. That is
15 feasible, at least it coincides with your own
16 view in the First Opinion" and then in the
17 cross-examination

18 he said

19 "The general rule is that the affected
20 parties are the holders of Real Property rights,
21 rights in rem. That's the general rule."

22 So, at least, this was reasonable. And in

1 any event, this was revoked by the Court of Appeals,
2 and we know that part of the guarantees that the
3 Claimants have and we know now that Claimants are
4 fully participating, or we expect so, in the trial
5 phase. We have again the--you have again here the
6 chart, and another.

7 And another point I wanted to make very
8 quickly is, in fact, because the procedures were--with
9 the appeal of the Decision of not being considered
10 affected parties in the trial phase, there has been no
11 movements in terms of--The procedure was actually
12 suspended, so it's not that there had been a violation
13 of the due process of the Claimants, who now can
14 present all evidence.

15 PRESIDENT SACHS: May I ask, what is the
16 time perspective of the proceedings that now start to
17 deal with the good-faith issue, if I understand it
18 correctly?

19 MS. HERRERA: I had been told that one year.
20 Whether that's really feasible, I don't know. I want
21 to refer now and address that point in the following
22 slide of why it takes so long and also another point,

1 which is, you know, of course, they take the issue
2 with the--Claimants take the issue with, yeah,
3 according to Caro's testimony, it's one year; but the
4 Claimants take issue with the duration of the
5 proceedings.

6 But there are--Considering the aggregate
7 circumstances, there are reasons that explain why this
8 had happened and what's reasonable. First of all, as
9 acknowledged by Mr. Seda in the cross-examination, the
10 file is thousands and thousands and thousands and
11 thousands of documents. Yes, indeed. Just the part
12 that had been submitted is 8,500 pages.

13 The appeal was filed by Newport against the
14 Decision of the Second Judge which, of course, delayed
15 things. As explained by Prosecutor Caro, Prosecutors
16 and the judges specialized in asset forfeiture are
17 each in charge of around 120 cases, and there is only
18 one Court of Appeals specialized in Asset Forfeiture.
19 The activity of the Colombian Judicial Branch was
20 suspended during the COVID pandemic.

21 And this is interesting, because in an
22 exchange between Mr. Mosquera and Mr. Seda on

1 September 11, 2016, Mr. Seda says, "and if we don't
2 pay and we have the land taken, well, we lose a lot
3 less considering that in any case it will be
4 impossible to continue with the other phases. This
5 means that the necessary proof to take away this land
6 is almost impossible. The process could take years, of
7 course, it could be."

8 So, this is interesting because this is
9 September 2016, so shortly after the Requerimiento,
10 and Mr. Seda is well aware of the long duration of
11 the Asset Forfeiture Proceedings. There is no
12 mistake, they're now saying in this Arbitration, oh it
13 was awful. They knew the duration.

14 [REDACTED]

1

[REDACTED]

█

[REDACTED]

1

[REDACTED]

2

[REDACTED]

3

[REDACTED]

4

One quick point on that, and there was on

5

Ms. Ardila again, the Claimants had Ms. Ardila for

6

hours, I think, and that's the issue of—they're saying

7

she lied. I'm going to address first the point of

8

whether she knew or not. That we don't know. I

9

cannot testify for her. Again, I just want to point

10

out that the Claimants had the documents; they could

11

have confronted it with her complaint against

12

Mr. Seda. They chose not to do so and put it to

13

Mr. Caro.

14

In any event, and the second point on this

15

is on the credibility of Ms. Ardila. It is not true

16

that she lied when she said that she had no personal

17

relationship or professional relationship with

18

Mr. Mosquera. I mean, if you look at the Spanish,

19

it's very clear. When you say personal or

20

professional relations that you're working with or you

21

have the personal, but they write to you as he did

22

requesting that you include Mr. López Vanegas, and in

1 fact she said I'm not going to include López Vanegas
2 as afectado--that's a different thing--but look at the
3 Spanish because it's a misrepresentation. She did not
4 lie.

5 Going now to discrimination, several
6 important things here. The Claimants have gone and
7 said, oh, it's discrimination, they target Mr. Seda
8 because he was a foreigner. Well, no, the lot is an
9 asset, and for that, who are the ones who are really
10 the owners of this asset? We knew that it was La
11 Palma. And, in fact, La Palma is the trustor, and La
12 Palma is the beneficiary, has the beneficiary rights
13 under the Trust. La Palma is what nationality? It's
14 incorporated in Colombia. All the Shareholders are
15 Colombian--or as far as we know. Again, there are
16 always surprises behind, so as far as we know they're
17 just Colombians.

18 In any event, that's what the similar
19 situation, so Colombia has, indeed, conducted and
20 proceeded with forfeitures of other properties
21 belonging to nationals, Colombian nationals, which
22 have comparable connections to criminal activities.

1

[REDACTED]

2

[REDACTED]

3

[REDACTED]

4

[REDACTED]

5

[REDACTED]

6

[REDACTED]

7

[REDACTED]

8

And again, this is the "like circumstances".

9

And you heard the Claimants this morning "there are 47

10

properties, of Ivan Lopez, that have not been

11

targeted." Again, you have to look for these 47

12

properties, what had happened. A lot of them were

13

acquired in '85-'86, so before there is any

14

presumption that he was involved in drug-dealing.

15

And also they referred to one project "oh,

16

but the Quartier Project. The Quartier Project was in

17

a similar situation, you know, because López Vanegas

18

was the owner and yet there was no Asset Forfeiture,

19

then they completed that development, and they're

20

selling their units." Again, this was acquired by

21

López Vanegas in '86. So, you cannot just make swift

22

generalizations; you have to look at what happened

1 with each of them. And some of these properties had,
2 as I said, they had been--the Registration Number
3 disappeared or whatever; it requires a lot of work.
4 And I remind you that what Colombia has done is, okay,
5 if I miss anything, if I miss anything, we're looking
6 again.

7 We're looking again--sorry.

8 Let's talk briefly about the--not so
9 briefly, about the so-called "Sister Property", and
10 the Claimants are unhappy with any of the answers that
11 were given of what was the process of thinking of
12 Ms. Ardila. They say it is the Meritage that was
13 target, and it was Ms. Ardila who only herself decided
14 to do it.

15 The first thing, that assertion that,
16 Ms. Ardila, in the record, saying "I took the decision
17 myself" was in the context that she was pressed to
18 say, "oh but Ms. Malagón did it, and nobody told you
19 to do something that goes to corruption." You should
20 say "no, I--that was my own decision. Nobody forced
21 me to do it. I studied the thing and decided to
22 request Asset Forfeiture."

1 In any event, why the Sister Property is not
2 in identical circumstances? Because the defects are
3 not the same. First, if you look from 2006 onwards,
4 the Meritage Lot, the so-called "Sister Property," had
5 a different change of transfer, and a lot of transfers
6 and connections with the Oficina that were only
7 present in the Meritage Lot, including the one of
8 Gurú, the Model, [REDACTED] but
9 anyway there is much more elements in that property
10 pointing out to money-laundering.

11 Also--and this is what Ms. Ardila
12 explained--is the Attorney General's Office considered
13 it lacked sufficient evidence as to the illicit origin
14 of the Sister Property, and remember this goes back to
15 in August 1994, Jaime Orozco and Iván López buy a
16 property from La Granja divided in two lots but each
17 one has--jointly a certain percentage. Orozco,
18 25 percent--and that's the surface- 25 percent on one
19 lot and 25 percent on the other lot, and the other one
20 75 percent and 75 percent. And the surface of the 25
21 percent is 188,558 square meter. They are
22 consolidated afterwards, but then, in 2016, again they

1 are divided and what Orozco Vanegas keeps is exactly
2 the 25 percent that you have before.

3 So, I can understand—and this information
4 about the percentages was from the beginning, it
5 appeared and Ms. Ardila had it, since the beginning—I
6 mean, you can look at her provisional determination
7 that will appear there, how she knew there was 25, 75,
8 et cetera. So, I can understand she looked and said
9 25 percent. I don't know if there is any illicit
10 activity of Orozco, I see at the end he goes with
11 25 percent. Can I proceed to impose measures and here
12 there is not being sale, there is no units being
13 sold? Well, Probably, no. I have to look further.

14 And what does she do? Precisely that. She
15 imposed Precautionary Measures on the Meritage, and
16 the others she doesn't have the urgency and say but
17 I'm opening another investigation on the Sister
18 Property and other properties.

19 Now, we had been told that it was because
20 Ms. Ardila was corrupt, was in collusion with Iván
21 López, that she targeted the Meritage. But she
22 targeted the Meritage, but she opens--how is it this

1 go? Opens investigations into the so-called "Sister
2 Property," and it's not her who then decides in that
3 second investigation that actually let's prioritize
4 other assets [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] We have shown--and I refer you to

10 what was 114, our timeline, showing why the so-called

11 "coincidences" are not coincidences. And, in

12 particular, as we said in the Post-Hearing Brief, in

13 fact, the reason that you see that--the Claimants rely

14 on the alleged "suspicious coincidence in time" and

15 the speed of the Asset Forfeiture proceedings to

16 support the corruption theory. But, what they omit to

17 say is during this period López Vanegas filed a number

18 of petitions before the Attorney General to reactivate

19 the proceedings.

20 And, in fact, the Asset Forfeiture

21 Proceedings had started by the time that López Vanegas

22 said "please commence Asset Forfeiture." Why would I

1

[REDACTED]

■

[REDACTED]

■

[REDACTED] [REDACTED]

■

[REDACTED]

■

[REDACTED] [REDACTED]

■

[REDACTED]

■

[REDACTED]

■

[REDACTED] [REDACTED]

■

[REDACTED] [REDACTED]

■

[REDACTED]

■

[REDACTED] [REDACTED]

■

[REDACTED] [REDACTED]

■

[REDACTED]

1 [REDACTED] [REDACTED]
2 You know--I don't have time. You know very
3 well all the parameters and the requirements under
4 each of the standards of protection in the TPA. Very
5 quickly, you have an expropriatory--you have permanent
6 impact--this is no permanent impact here. This is a
7 measure that is ongoing. There had been no
8 determination--we will see if there is an impact or
9 not, and I said again that's redress if that's the
10 case. Interference with reasonable backed
11 expectations, the Claimants accepted framework of the
12 Colombian Asset Forfeiture Law, and would say that--
13 what I hear this morning is that the Claimants find
14 the Asset Forfeiture Law, the Colombian, odious. They
15 could find it that way. They even say, oh okay, it
16 doesn't follow international law--Well, the Asset
17 Forfeiture Law had been followed by other countries.
18 In any event, that's irrelevant. The point is that's
19 part of the framework when Mr. Seda and Claimants
20 decided to invest.

21 The character of the government actions, the
22 government action is not final, there are still no

1 final decisions, it is based on the existing
2 framework. Legitimate expectations, again, we don't
3 believe that, we say legitimate public welfare. We
4 hear that there was no legitimate public welfare I
5 have to tell you, fighting against criminal or
6 organized crime, [REDACTED], I'm sure
7 that everybody that is here from Colombia will agree
8 with me it's quite a legitimate one. I don't think
9 there is a single Colombian family that had not lost a
10 person due precisely to the Oficina and the violence
11 created by the drug-dealing, so that's combating
12 organized crime.

13 Compliance with due process of law, I show
14 you how it has been interpreted in the law and no
15 discrimination here, and this is bona fide application
16 of the Asset Forfeiture Law.

17 We move quickly to national treatment. We
18 see that one of the elements is that the measure has
19 to be applied to the foreign investment. Again, this
20 is a measure applied to the asset. It's not applied
21 to Mr. Seda. And again, the asset is owned by
22 Colombian nationals.

1 There has been less favorable treatment.
2 That's not the case, and that's evaluated in like
3 circumstances , I already touched on this. There is
4 no reasonable justification. Even if there was a
5 different treatment with Meritage Lot, that treatment
6 and the imposition of the Precautionary Measures was
7 urgent for the reasons I already explained.

8 On fair and equitable treatment, where the
9 standard is not arbitrary and reasonable, I have
10 touched upon this already. [REDACTED]
11 [REDACTED] , the illicit
12 origin of the asset. It was in accordance with
13 procedural protection, I talk about the protections,
14 the possibility to intervene, legality control, again
15 it was not discriminatory. And also, to recall, the
16 standard under the TPA doesn't include legitimate
17 expectation, but even if there were, again the
18 Claimants could not have legitimate expectations that
19 Asset Forfeiture Law would not apply when they have
20 not complied with--would have to do in due diligence
21 or at least appear so far.

22 And, finally, with the other projects, and

1 there is no evidence of sufficient causal nexus
2 between the Measures and the damages claimed on the
3 other projects.

4 As to full protection and security, remember
5 here, and the same in regards to minimum standard of
6 treatment, the protection is predicated of the
7 Investment and not of the investor, and we have seen
8 the Measures of, very quickly, that were taken to
9 protect not only the Claimants' investment, I mean
10 investment whatever it is—it's not, the investment has
11 not been--the Measure has been not against
12 investment, but also Mr. Seda as investor himself.

13 Thank you.

14 So, my colleague, Ms. Ribco, will address
15 damages now.

16 PRESIDENT SACHS: Damages.

17 How much time is left?

18 SECRETARY MARZAL: 23 minutes.

19 MS. RIBCO: Thank you very much.

20 Good afternoon, and I know everyone wants to
21 go home, and indeed Mr. Moloo mentioned this morning
22 that we should not get to damages and we should go

1 home, and we should, indeed, because as shown in this
2 roadmap that you have there, we have shown already
3 that the Measures were adopted in the protection of
4 Essential Security of Colombia. We have shown that
5 this Tribunal does not have jurisdiction. We have
6 shown that the claims are premature and abusive. And
7 we have shown that Colombia has not breached its
8 international obligations under the TPA.

9 But still I need to address damages, in case
10 you reach to it, and because there has been a lot of
11 misrepresentations and things to correct this
12 afternoon already from our friends on the other side.

13 We had originally prepared more slides but
14 we had to reduce them to fit them into the
15 three-and-a-bit more hours. I will need to rush
16 through anyway the few slides that were left, so I
17 respectfully request the Tribunal to refer back to the
18 PHB where all the damages cases are very clearly
19 explained.

20 So, it is undisputed that only the damages
21 incurred by reason of or arising out of the State's
22 unlawful conduct are compensable, and this has been

1 confirmed this morning by Mr. Moloo.

2 Now, only one-third of the damages claimed
3 by the Claimants concern the Meritage Project. This
4 is undisputed, as is also undisputed that the Asset
5 Forfeiture Proceedings also targeted the Meritage Lot,
6 not even the Meritage Project because, as we said,
7 it's an action that targets only assets and not the
8 Investors, as such. So, only 31 percent, if any, of
9 the claims should be claimed before this Tribunal.

10 We see in the following slide that there is
11 also no legal connection between the Meritage Project
12 and any of the Claimants' other projects. Indeed, if
13 you see all the Claims--and we have seen already at
14 the Opening, but if you see again all the Claimants
15 that are in yellow have absolutely no connection to
16 the Meritage. But even the ones--and also the
17 projects that you see--Luxé, the 450 Heights and Santa
18 Fe and Tierra Bomba--are developed by SPVs that are
19 totally unconnected to Newport.

20 So, there is no legal connection at all
21 between this and the Meritage Project, assuming that
22 the Meritage was the target of the Measures which

1 again it was not.

2 So, now if we look, for example, at the Luxé Project,
3 for which the Claimants claim 44 million, which is
4 22 percent of the full damages claim. This morning the
5 Claimants made the allegation that the banks
6 accelerated debt and that, therefore, the Luxé, at
7 least the construction of the hotel, had to stop
8 because financing dried up.

9 We searched really carefully the record, and
10 there is absolutely no evidence, first, that Colpatria
11 agreed to provide this financing; second, that
12 Colpatria ever decided to withdraw the financing due
13 to the Asset Forfeiture Proceedings.

14 And in fact, if you compare Exhibit C-168,
15 which is the letter that refers to the Decision of
16 Banco de Bogotá, which was the bank that was financing
17 construction of the Meritage. in that letter, for
18 example, the Banco de Bogotá really informed that it
19 was accelerating payment--the credit due to the Asset
20 Forfeiture Proceedings or actually to the Preliminary
21 Measures that had been adopted by them, and it
22 referred to provision of the Promissory Note which

1 allowed acceleration of those payments.

2 Then no such provision, if you look at
3 C-135, which is the loan approval letter for
4 Colpatria, no such provision is included, so there is
5 nothing that will allow, for example, Colpatria to
6 accelerate the payment in case of Asset Forfeiture
7 Proceedings against Luxé, let alone against a totally
8 unrelated project, which is Newport.

9 Now, as I said, the loan was granted to Luxé
10 by The Charlee, so it was not granted to Newport.
11 Newport does not appear anywhere in that loan
12 approval. And that, as I said, there is no ground.

13 Now, assuming that Colpatria did decide to
14 withdraw financing, there's absolutely no documentary
15 evidence that the Claimants ever claimed that
16 Colpatria--to give that financing back because they
17 did not have any grounds to accelerate payment.
18 That's what a diligent businessman would have done.

19 Now, they also--and a lot was said this
20 morning that the hotel was 70 percent completed.
21 There's, however, no evidence that construction was
22 halted because Colpatria allegedly decided to withdraw

1 financing.

2 Actually, they said it was only four months
3 away from being completed, so it's quite incredible
4 that they did not have by then financing, especially
5 when they say they are investors and there is
6 absolutely no evidence that they ever even attempted
7 to provide old funds to complete this almost completed
8 hotel that they claim as well would have been very
9 profitable.

10 So, all this looks very unreasonable, and
11 there's absolutely no evidence to show any of these
12 steps that I'm going through.

13 They also say, for example, that they tried
14 to sell the Project to alternative investors but that
15 they couldn't because of the Measures. However, if
16 you look at Exhibit C-381, it shows that actually by
17 November 2016, that's three months after the
18 Preliminary Measures were imposed, Royal Paladin were
19 still interested in negotiating the potential
20 investment in Luxé, and we don't know if that ever
21 went forward or not because we don't know who is at
22 the moment operating the Luxé Cabanas, which are

1 operating as the Claimant stated this morning.

2 Now, if we look what the evidence shows, and
3 we saw this in the Opening Statement, it shows that,
4 by the time the Precautionary Measures were adopted,
5 the Luxé Project was already significantly delayed.
6 It had experienced severe cost overruns and financing
7 had dried up.

8 Now, even assuming that there is a causal
9 link, the loss is suffered in connection with the Luxé
10 Project, is still highly exaggerated, as we will see
11 later, and the maximum compensation should be
12 3.7 million and not 44 million as claimed by the
13 Claimants.

14 A similar situation is with the other
15 project. I will move a bit faster in the interest of
16 time. So, with Tierra Bomba, we saw already the
17 evidence in the record. What does it show? That
18 there's absolutely no causation because the Claimants
19 did not own the land where they intended hopefully to
20 develop the Tierra Bomba project. They did not have
21 any approval by the indigenous population that was
22 required to develop those projects.

1 And indeed, what they had were promises to
2 purchase three lots but, as these were made with
3 prospective sellers that did not have legal title over
4 that land, those contracts were terminated some years
5 later, and what the termination contract says that
6 they were terminated by mutual consent of permitted
7 seller and buyers.

8 What there is no evidence of is that the
9 projects were viable or that, for example, the
10 Claimants tried to find other lots in Tierra Bomba,
11 which would have been the reasonable thing to do again
12 if the Project was so profitable as they claim they
13 were.

14 Now, there is a developing project which is
15 interesting because, in fact, this is little more than
16 ideas and brochures. Still, they claim \$54.5 million
17 in connection with this. This is their 450 Heights
18 and Santa Fe de Antioquia project. And there's again
19 no evidence that these were viable, that they had
20 financing or that the projects were halted due to the
21 Asset Forfeiture Proceedings.

22 What the evidence shows is that investors that were

1 seeking to divest from Mr. Seda's other projects
2 actually accepted interest in the Santa Fe de
3 Antioquia project.

4 Even more interesting is the Claim for
5 15 million in connection with what we called the
6 "future hypothetical projects," that 7 percent of the
7 claim in connection with projects that were not even
8 ideas, so we said the developing projects were little
9 more than ideas. These were not even ideas. Still,
10 the Claimants are claiming 15 million in connection to
11 this.

12 There is no evidence against that they were
13 viable, that there was financing, that they were
14 impossible to develop due to the Asset Forfeiture
15 Proceedings. What the evidence shows is that Mr. Seda
16 was still operating The Charlee Hotel, and that he
17 kept receiving offers to operate other projects.

18 Moving to the next issue, and it's assuming
19 that you find that there's causation and you actually
20 need to assess damages, there is a dispute between the
21 Parties as to which method to apply.

22 It is undisputed that the criteria for

1 Rusoro applies to determine whether DCF method is
2 appropriate in case of not-going concerns. We saw a
3 very similar slide during the Opening, and all we did
4 at the Hearing was to confirm. For example, one of
5 the criteria is that there should be an established
6 historical record of financial performance.

7 The Claimants' only operating hotel which is
8 The Charlee Hotel is very different in nature from the
9 other hotels that they would have developed. None of
10 them were developed.

11 So, just to recall, The Charlee Hotel had 42
12 rooms. It was in central Medellín and, as Mr. Seda
13 confirmed during his cross-examination, it was known
14 for its relation to "prepagos," which is "prostitutes"
15 in Spanish. All other projects were more family
16 oriented.

17 Also, they referred constantly to the
18 Meritage that was sold. Actually, phase one of the
19 Meritage Project is the only phase of the project that
20 had reached the equilibrium point, and as demonstrated
21 by Dr. Hern, it was sold at a loss. So, really the
22 track record of the Claimants speaks for itself.

1 The second issue, for example, reliable
2 protections of future cash flow. It's undisputed that
3 the business planning on which BRG relied had not been
4 verified by third Parties and, as confirmed by
5 Mr. Seda, they're highly unreliable because he said,
6 when faced with one that it was not possible to
7 determine whether it was the last version of the
8 document or just some undated draft of a brochure of
9 one of the projects.

10 Now, just in the interest of time, Dr. Hern
11 does, and we--our position is that a Cost Approach
12 should be followed, but even if the Tribunal decides
13 to go for a DCF, Dr. Hern explained that, because the
14 Claimants had invested in a competitive market, that
15 result of going for the Cost Approach or for a
16 reasonable DCF Approach or a DCF Approach based on
17 reasonable assumptions is very much consistent.

18 Now, the Claimants seem to question that the
19 hospitality and real estate market is a competitive
20 market. It has been shown that there is no barriers
21 in principle to entry, so it is, in principle--a
22 competitive market. If there is any barrier that

1 applies in the particular region where the Claimants
2 have invested is that most of the land in Antioquia,
3 where Medellín is, is largely in the hands of narcos,
4 and, and their blessing, to put it in a way, is needed
5 in order to do business there. So, if there is any
6 barrier to entry the market, that is the one.
7 Otherwise, it's fully, and not perfectly because there
8 is no perfectly competitive market as explained by
9 Dr. Hern, but it is competitive.

10 An important point on this is that the
11 Claimants have, other than contesting the Cost
12 Approach, they did not contest the cost valuation made
13 by Dr. Hern. So, if the Tribunal decides to adopt a
14 Cost Approach, then Dr. Hern's cost valuation is
15 uncontested.

16 But let's see because for the sake of
17 exercise and completeness, Dr. Hern also performed a
18 DCF valuation on the basis of reasonable or supported
19 assumptions. And for the hotel which are 80 percent
20 of the damages claims, despite the fact that they
21 mentioned that there's no operating hotel other than
22 The Charlee, the Claimants are claiming \$77 million,

1 only 25.5 concerned the Meritage, and that's on the
2 basis of what we call "the exaggerated assumptions."

3 Now, if we go to the adjusted assumptions,
4 let's see, for example, the EBITDA margin, the
5 Claimants--or BRG has applied a 38 to 56 percent
6 margin without any support.

7 Now, if we see, for example, if--Dr. Hern
8 adopted a 19 to 22 percent margin, which is in line
9 with The Charlee Hotel that the Claimants operate and
10 that they claim is a very successful hotel, and the
11 impact on the valuation is huge. It's between 51 and
12 61 percent, which equals 66 to 79 percent.

13 Now, just in--each one of these key drivers
14 has such a significant impact. So, if you just follow
15 Dr. Hern's approach on EBITDA margins, then the
16 valuation needs to be reduced by between 66 and
17 79 percent. If we go to the Discount Rate, BRG
18 applied a rate of 7.9 Discount Rate, which, as
19 explained by Dr. Hern, is highly unrealistic because
20 the Claimants themselves have offered investment as an
21 internal rate of return of between 25 and 28 percent.
22 Again, if only adjusting this driver, it has an impact

1 on the valuation of between 72 and 105 percent.

2 Failure rate. Again, this was highly--or
3 properly discussed because BRG decided to apply a
4 zero percent failure risk for Meritage and Luxé only
5 at 23 percent for projects that are little more than
6 ideas, as we mentioned, and for which they didn't have
7 the land or permits. So this is fully developed in
8 the PHB and, in the interest of time, I respectfully
9 refer you to the PHB.

10 Similar impact applies to the real estate
11 operations, and I will only--the real estate claims
12 amount to 20 percent, 21 million. Only if I may
13 correct only or comment on the speed of sales, BRG
14 applied speed of sale of up to 14.4 units per month
15 for the 450 Heights. This is up to more than three
16 times fast--I mean, selling, that they assumed that
17 the 450 Heights Project would have sold up to three
18 times faster than the Meritage Phase 1 sold. The
19 Meritage Phase 1 sold at four units per month during
20 the first month in which it was in the market.

21 Again, it was sold at a loss, so it's not
22 such a great comparator, but even taking it as a

1 comparator, the ones that BRG--on which BRG relied,
2 14.4 is highly, highly unreliable. And if we adjust
3 that, then the difference is around 3 percent which is
4 15--around 3 million, sorry, which is 15 percent.

5 Similarly unsubstantiated and exaggerated is
6 the Claimants' claim for lost fees, which amounts to
7 85.9 million, only 28.2 million concerned the Meritage
8 Project. There is no evidence that the Claimants
9 would have operated the yet-to-be-built hotels. As I
10 mentioned before, there is also not evidence, for
11 example, that they operated the Luxé Cabanas. There's
12 no evidence that Royal Realty lost the opportunity to
13 generate these fees because they could have provided
14 management and operating services to other third
15 parties. They are, indeed, still operating The
16 Charlee Hotel and their know-how that was mentioned by
17 the Claimants today, Claimants still have it, so they
18 could put it to use, instead of claiming in this
19 Arbitration. The claims are so exaggerated because
20 they're highly based on the exaggerated assumptions
21 that we mentioned before.

22 Then there is also a claim of 15.6 million

1 for future hypothetical projects. This is absolutely
2 and entirely speculative because there is no evidence
3 at all of any such future hypothetical project that it
4 would exist, that it would succeed, and even if, then
5 the valuation is exaggerated because again it's based
6 on the exaggerated assumptions that were considered
7 for the Claimants' valuation and real estate business.

8 Now, just to conclude, the DCF valuation in
9 this is a very helpful table because it compares
10 Dr. Hern's Cost Approach, and his correct DCF Approach
11 that you will see is largely consistent, as expected
12 because, as we said, this is a competitive margin and
13 it's ridiculously lower than BRG's exaggerated DCF
14 valuation.

15 Just to finish, the Claimants are also
16 claiming moral damages. It has been demonstrated at
17 the Opening, and it's also explained in the PHB, that
18 moral damages are only applicable or may only be
19 granted on exceptional circumstances such as physical
20 threat, illegal detention, kidnapping, forced
21 disappearance. None of this has happened here.
22 So--not even close to it.

1 And we saw also, if I may refer to a table
2 that we had in our Opening, comparing the amounts
3 granted in other cases where human rights had been
4 breached, including, as I said, forced disappearance
5 and assassination, and the amounts granted were far,
6 far lower than the amount claimed by the Claimants or
7 by Mr. Seda in this case.

8 I don't know if we have any time left.

9 SECRETARY MARZAL: One minute.

10 MS. BANIFATEMI: Thank you. Again I'll just
11 finish by the reverse order of what Ms. Ribco said,
12 that, as you will have seen, that there is no case on
13 damages. It's all inflated, and again it's Mr. Seda
14 playing the casino.

15 As Ms. Herrera has explained, there is
16 simply no breach of the Treaty. The only legitimate
17 expectation, obviously, Mr. Seda and his acolytes
18 should have been that by allegedly investing in
19 Colombia, they are investing in one of the worst
20 regions and the most dangerous regions, and then the
21 due diligence was on their burden and they didn't do
22 that, and I'm not going to reargue what Ms. Herrera

1 explained.

2 But, really, what you should decide is that
3 this case is a case where you do not have
4 jurisdiction, and as you know, you do not have the
5 power to decide the invocation by Colombia of its
6 Essential Security Interest exception in relation to
7 an extremely grave and serious set of circumstances
8 and [REDACTED].

9 We thank you, the Tribunal, for its
10 patience, and if there is any questions to be
11 addressed tomorrow, we're happy to take those; if not,
12 then we'll just proceed with rebuttal.

13 PRESIDENT SACHS: No, as agreed we will ask
14 our questions tomorrow. So this is the end of today's
15 pleadings. We will then start tomorrow with the
16 rebuttal, and then with the rejoinder rebuttal.

17 And we wish you a good evening. Marcus and
18 I will have a drink because today is a German national
19 holiday, and we are celebrating our reunification, and
20 so you can see how serious we take your case that we
21 sit tomorrow on a national holiday. So, thank you.
22 Good evening.

1 MR. MOLOO: Thank you. Thank you, David.

2 And the Interpreters.

3 (Whereupon, at 7:09 p.m., the Hearing was
4 adjourned until 9:30 a.m. the following day.)

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