THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of Arbitration between:

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

Claimants,

and

THE REPUBLIC OF COLOMBIA,

Respondent.

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

Volume 1

Thursday, May 19, 2022

The World Bank Group

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

MR. JOSÉ EMILIO NUNES PINTO, President

MR. JOHN BEECHEY, Arbitrator

PROF. MARCELO G. KOHEN, Arbitrator
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ICSID Secretariat:

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Secretary to the Tribunal

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P R O C E E D I N G S

PRESIDENT NUNES PINTO: Okay. Good morning.

My name is José Emilio Pinto. I am the Tribunal Chair. Some of you know me by Zoom. But this is—for us, it's very, very important to be back. We are extremely happy to be back in person after so many years using the platforms. I'm not blaming the platforms. They were extremely useful. But it's much better when you're sitting in the same room.

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

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

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

But first of all, I would like to ask you to be very kind and introduce your colleagues who are...
attending this Hearing here at the ICSID premises in D.C.

Claimants first.

MR. SILLS: Thank you, Mr. President.

On behalf of the Claimants, I'm Robert Sills of Pillsbury Winthrop Shaw Pittman. With me are my colleagues. On my left, Mr. Richard Deutsch, also with Pillsbury. To my right, Mr. Charles Conrad of our firm; Ms. Kristina Fridman, Pillsbury; Ms. Elizabeth Dye, Mr. Derek Soller, and Mr. Martin Ruiz Garcia.

PRESIDENT NUNES PINTO: Thank you.

Respondent, please.

MS. FRUTOS-PETERTON: Good morning, everybody. It's a pleasure being here in person. This is our first hearing in person, so we're really happy that--thank you to the Tribunal for making it happen.

So, I'm Claudia Frutos-Peterson, a partner with Curtis, Mallet-Prevost, Colt & Mosle, on behalf of the Republic of Colombia. And I'm here with the Curtis team and the [Agencia Nacional de Defensa
Jurídica del Estado, República de Colombia].  
To my right is Ana María Ordoñez, the director. And then to my left I have Fernando Tupa from Curtis, Elisa Botero from Curtis, Elizabeth Prado from the Agencia, Giovanny Vega from the Agencia. And, of course, we have our terrific team of associates attending online, and they are all--their names are in the List of Participants. Thank you so much.

PRESIDENT NUNES PINTO: Thank you very much.

DR. FRUTOS-PETerson: And I'm sorry, Mr. President. I forgot to introduce you to my two colleagues in the back, Jackie Messemer and Gabriela Sadler.

Thank you.

PRESIDENT NUNES PINTO: Thank you. You are all mostly welcome.

I would like to remind you that one of--this was highlighted by Marisa Planells Valero to you--but I would like to highlight [to] you that should you, for any reason, have any confidential matters to be addressed during the Hearing, please let the Tribunal...
know before you start so that we can decide and
disconnect the remote attendants. Okay?

So, unless you have any matters that you
would like to address to the Tribunal, I think we're
ready to start.

Mr. Sills, any matters?
MR. SILLS: We have no housekeeping matters,
Mr. President.

PRESIDENT NUNES PINTO: Thank you.

DR. FRUTOS-PETERSON: We don't have any
matters pending. Thank you, Mr. President.

PRESIDENT NUNES PINTO: So, we start--we
have 90 minutes now, to 10:40--10:30/10:40, for the
Opening Presentation by Respondent.

So, I think we can get started. And the
floor is yours.

OPENING STATEMENT BY COUNSEL FOR RESPONDENT

MS. ORDOÑEZ: Thank you, Mr. President.

Good morning, Mr. Chairman and Members of
the Tribunal. Let me start by making some clear
general remarks that are fundamental for the position
of the Republic of Colombia.
We signed the Treaty with the United States of America, convinced of the benefits it would bring to our bilateral relations. It provides investors with the exceptional and rare opportunity to sue the State directly before investment tribunals like this one.

This exceptional and expensive recourse to international adjudication should not be taken lightly. Colombia and the United States consented to accept claims from investors of the other party only when requirements of the consent are met.

My mission today is to introduce Colombia's preliminary objections in the case brought by Claimants on 6 December 2019. I would kindly ask the Members of the Tribunal to keep this date in your minds.

Because Colombia invoked Article 10.20.4 of the Treaty, the first task of the Tribunal is to decide whether, as a matter of law, the claim brought is a claim for which an award in their favor may be made.

As a matter of law, and accepting all facts
in the Notice of Arbitration as true, the claim submitted is not a claim for which an award in favor of the Claimants may be made under Article 10.20.4 because, first, on 6 December 2019, when the Notice of Arbitration was submitted, there was no State measure capable of breaching a substantive obligation of the Treaty or an investment agreement. Accordingly, there was no compensable loss or damage Claimant[s] could have incurred by reason of, or arising out of a breach that did not exist.

While 6 December 2019, is the critical date in the assessment of jurisdiction, as of today, there is still no measure capable of breaching the substantive obligations of the Treaty or an investment agreement, and Claimants have incurred no loss or damage by reason [of], or arising out of, a breach.

The second task of the Tribunal is to decide on the other five independent objections Colombia has raised against the jurisdiction of the Tribunal, including the allegation that there is simply no protected investment in this case. Some of these objections were even raised by the State before the
case was registered.

As the Tribunal can see, our agenda for the next two days is very busy and concerned with critical objections against its jurisdiction. This arbitration is novel for Colombia, since it is the first time it raises an objection according to Article 10.20.4 of the Treaty, and very much looks forward to learning from the decision of the Tribunal in this respect.

Now, Claimants have taken issue with Colombia's preliminary objections not only in this one but in its previous cases. Awarding attorneys' fees and costs is requested by Claimants as the proper way to discourage Colombia from raising preliminary objections in the future.

As the Head of the International Litigation Division of the Republic of Colombia, it is my duty to address this allegation, which is both unfair and very inaccurate.

First, I would like to recall my colleagues that raising preliminary objections is a valid action under international law, and an expression of respect for the peaceful settlement of disputes.
Colombia has consistently appeared before international investment tribunals to honor its international obligations, but this does not entail a duty to refrain from vindicating the limits of its consent to the international jurisdiction.

As far as investment arbitration is concerned, during the past five years under my direction, Colombia's practice has been characterized by a sincere respect and trust in investment arbitration. As a State committed to the rule of law, the terms of our treaties, in their interaction with other relevant rules of international law, have guided each and every aspect of our actions.

Precisely because of that, and contrary to the positions advanced by Claimants, Colombia has been successful when raising preliminary objections, including under this Treaty.

The present case is not an exception to Colombia's professionalism in approaching each step of the arbitral process. On the contrary, given the serious and numerous pathologies in the Claimants' case, it was foreseeable, not to say mandatory, for
Colombia to raise each and every single one of the preliminary objections it raised in these proceedings.

As you can see, the time and costs using these proceedings are not Colombia's fault, but the result of a Notice of Arbitration that was both premature, and a reflection of serious breaches to the conditions of our narrow consent to investor-State arbitration.

Let me finish with a brief general reference to the various agreements reached between Colombia and the United States of America regarding the interpretation of the TPA.

Claimants have taken serious issue with Colombia's reliance on non-disputing party submissions, and have argued that the NDP submission should be ascribed no legal value. In Claimants' view, such agreements should be given no weight under the general rule of interpretation, given a supposed bias by the non-disputing party.

Apart from the fact that the Vienna Convention Article 31(3)(a) is explicit to the effect that subsequent agreements between State Parties to a
treaty are part of the general rule of interpretation, Claimants' proposal leads to an unacceptable paradox: in this case, the more agreement would mean the less law. No law actually.

In the Claimants' case, despite having the highest possible degree of agreement regarding certain provisions in this TPA, such agreement would produce no law in the relationships between the Parties. We truly hope the Tribunal does not support this problematic proposition.

With this, I conclude the introductory statement of the Republic of Colombia and kindly ask Mr. Chairman to give the floor to Ms. Claudia Frutos-Peterson from Curtis to continue with our presentation.

Thank you for your attention.

DR. FRUTOS-PETERTON: Thank you, Ana. Good morning, Members of the Tribunal and everyone else in attendance.

Claimants have put [themselves] in an untenable position. They decided to launch a claim against Respondent preemptively, before Colombia has
taken any measure that could constitute a breach and having suffered no loss or damage as a result.

Their intentions in bringing a claim prematurely are plain. They hope that an international arbitration will dissuade Colombia's authorities, and specifically the CGR, from exercising their constitutional and legal powers.

Permitting such an abusive claim to proceed to the merits would not only undermine the legitimacy of investor-State arbitration, but directly contravene principles of law and the express language of the Treaty.

It is a well-settled principle that damage is an essential element of a cause of action. In this case, that principle is even more relevant because the two Contracting States expressly agreed that a claim cannot be submitted to arbitration under the Treaty if the claimant has not suffered a loss or damage.

That is a hurdle that Claimants cannot escape in this case, with the inevitable consequences that their claim is doomed from the start and must be dismissed in its entirety.
The premature nature of Claimants' claims is only the first of many reasons why the Tribunal should dismiss this case.

Respondent will go over each one of those reasons later in this Opening Presentation. But before proceeding any further, let us briefly recap the relevant facts for the preliminary objections raised by Colombia.

Claimants [sic] FPJVC, which I will refer to as the "Joint Venture," has a contractual association form--it is a contractual association formed by the two other Claimants, Foster Wheeler and Process Consultants, entered into a contract with Reficar to provide consulting services in respect of the management of a project to expand and modernize a refining complex in Cartagena, Colombia.

Pursuant to that Services Contract, Reficar reimbursed the Joint Venture for all its costs and expenses in performing the consultant services, and paid the Joint Venture a fixed rate for each manhour worked by the personnel assigned to perform the services, as well as a fixed profit for manhour.
The compensation structure set forth in the Contract ensured that the Joint Venture recovered all resources it used to provide the service to Reficar and guaranteed a return linked to the number of hours worked, not to the success or to the failure of the refining project.

The works for the expansion and modernization of the refinery were completed after years of delays and billions of dollars in cost overruns, leading the CGR, the Colombian State organ tasked with overseeing and controlling expenditures of public funds, to initiate a fiscal liability proceeding to determine whether there had been an economic damage to the State and, if so, determine the amount of such damage and identify those responsible for causing it.

The CGR's investigation led it to formally indict Claimants Foster Wheeler and Process Consultants, as well as other Colombian and foreign juridical and natural persons and fiscal--with fiscal liability.

The Indictment Order or, as Claimants call
it, the "CGR Charges," was an administrative act of mere procedural character marking the start of one of the mid-stages of the Fiscal Liability Proceeding.

The Indictment Order charged 14 individuals and five juridical entities, including Foster Wheeler and Process Consultants, with joint and several liability for the economic damage to the State in connection with the refinery Project.

We must stop the story here. This is the moment when the Claimants decided to submit their claim to arbitration despite the fact that the Indictment Order was not a final act, not even at the administrative level, and that--and that at that point in time, Claimants have suffered no loss or damage as a result of Colombia's supposed breaches.

As we will discuss in more detail later, this factual snapshot is crucial because determining the ripeness of Claimants' claim turns on whether Respondent has breached an obligation and Claimants had suffered a damage arising out of that supposed breach by the time Claimants filed their Notice of Arbitration.
Claimants' prayer for relief in the Notice of Arbitration is reflective of the fact that their claim was not ripe when they brought this case. Because there was no measure capable of constituting a breach and Claimants had suffered no damage arising out of Respondent's supposed breaches, their prayer for relief is forward-looking and completely speculative.

They essentially asked the Tribunal for compensation for supposed reputational damages for an offsetting award in an amount equivalent to the total amount of damages established in an eventual ruling with fiscal liability and for an injunction barring the CGR from ever seizing the assets.

But under Article 10.26 of the Treaty, the Tribunal cannot award moral or hypothetical damages or grant injunctive relief, to say nothing of the fact that compensating Claimants in an amount equal to the Ruling with Fiscal Liability will give them a huge windfall given that they have not paid a single penny towards satisfying that ruling.

It really is astonishing that not only do
they not seek compensation for actual damages, but
want to make a profit at the expenses of Colombia.

As the Tribunal is aware, on April 26, 2021, the CGR ultimately issued a Ruling with Fiscal Liability finding Claimants, as well as other 14 fiscal--another 14 others fiscally liable for the damage caused to the Colombian State.

The Ruling, which Claimants refer to as the "CGR Decision," came out roughly a year and a half after Claimants submitted their claim to arbitration.

That, however, did not resolve Claimants' predicament. Even today, two years after bringing this claim against Colombia, there is still no measure capable of constituting an international wrongful act and [no resulting damages] for Claimants.

The truth is, rather than [aid] Claimants' case, what has happened since they submitted the Notice of Arbitration helps defeat it. After bringing their claim, they initiated two acciones de tutela and filed an appeal against the Ruling with Fiscal Liability, materially violating the waiver requirement in Article 10.18.2 of the Treaty.
The recent initiation of a conciliation procedure against the CGR is an additional material violation of the waiver. And if Claimants file an annulment action against the Ruling with Fiscal Liability before the court of the administrative adjudicatory jurisdiction, as they have already said they will do if the conciliation fails, then that will constitute a further breach of the waiver for a grand total of five material violations of the waiver.

At this point, it is obvious that Claimants' so-called waiver is worthless and has no real effect. Claimants thought they could fulfill the requirement in Article 10.18.2 of the Treaty and engage Colombia's consent to arbitration by playing lip service.

In the Notice of Arbitration, they included a waiver saying they will waive their right to initiate or continue local proceedings with respect to the measures alleged to constitute a breach. But they also included a reservation that empties that waiver completely.

And on top of that, they have acted, since the outset of these proceedings, as if no waiver
existed at all, with the excuse that they are only acting defensively. The waiver, under the Treaty, is categorical and contains no such carve-out.

Realizing that the breach of the waiver is deadly to their claim and seeking to continue their participation in local proceedings, in their observations to the U.S. non-disputing party submissions, Claimants now argue that the measure alleged to constitute a breach of the Treaty is the Indictment Order, and not the Ruling with Fiscal Liability or the Fiscal Liability Proceedings more generally.

They believe this distinction saves their case because the local proceedings they have initiated and continued refer to the Ruling and the Fiscal Liability Proceedings and not to the Indictment Order, meaning that under their flawed logic, there will be no violation of the waiver.

But this belated distinction doesn't aid their case. In the course of these proceedings, Claimants have continuously argued that the action of the CGR during the Fiscal Liability Proceedings since
the initiation of the investigation through the
Indictment Order and up to the Ruling with Fiscal
Liability have violated the Treaty.

For example, in their Application for
Provisional Measures, Claimants argued that the CGR
Decision – and the CGR proceeding as a whole – render
Claimants' contractual rights meaningless and violate
Claimants' right to fair and equitable treatment.

Those are, according to the Claimants, the
measure at issue in this case. And so, each one of
those actions they initiate or continue locally with
respect to the Fiscal Liability Proceedings constitute
a violation of the waiver.

The maturity of the claim is another issue
altogether. As we have already explained, when
Claimants initiated this arbitration, which is when
the maturity of the claim must be assessed, the Fiscal
Liability Proceedings had barely just begun. It is
obvious that no breach of an investment treaty, let
alone damages, could exist by the mere commencement of
an administrative proceeding against an alleged
investor.
Before addressing each of Respondent's preliminary objections, let us briefly discuss the scope and significance of the non-disputing party submission of the United States, commenting on the meaning of various provisions of the Treaty relevant to deciding those preliminary objections.

The Tribunal has before it the common and consistent positions of both Contracting Parties to the Treaty on the interpretation of the provisions at issue in this case.

The non-disputing party submission filed by the United States, coupled with Colombia's pleadings, is a subsequent agreement between the parties regarding the interpretation of the treaty or the application of these provisions under Article 31(3)(a) of the Vienna Convention of the Law of the Treaties.

Simply put, a subsequent agreement is a consensus between the parties to a treaty, reached after they enter into force, about the interpretation of a treaty—of that treaty or the application of its provisions.

Since the parties are the masters of the
treaty, such interpretation is, in the words of the
International Law Commission's commentary on the
Vienna Convention, "an authentic interpretation by the
parties which must be read into the treaty for
purposes of its interpretation."

The International Court of Justice echoed
the ILC, stating that "an agreement as to the
interpretation of a provision reached after the
conclusion of the treaty represents an authentic
interpretation by the parties which must be read into
the treaty for purposes of its interpretation."

As the ILC explained in another report, if
the parties to a bilateral investment treaty agree on
an interpretation, that interpretation prevails and in
itself takes on the nature of a treaty, regardless of
its form.

Such "an agreement collateral to the treaty
[...] must be taken into consideration in interpreting
the treaty."

The literature is consistent in establishing
that a subsequent agreement does not require any
special form or formality, a view that is shared by
several investment tribunals. No single common act is required, as Claimants wrongfully allege.

In addition to being a subsequent agreement, the declarations of the Contracting Parties, in this case and in other cases, are also subsequent practice in the application of the Treaty pursuant to Article 31(3)(b) of the Vienna Convention.

In fact, several investment tribunals have stated that the submissions of the Contracting Parties constitute subsequent practice regarding the interpretation of the provision of a treaty that is "entitled to be accorded considerable weight."

Colombia and the United States have consistently maintained the same positions, not only in this case but also in other cases, interpreting this very same Treaty or other investment treaties that are similar or identically-worded.

The Contracting Parties to the Treaty envisioned the participation of the non-disputing State for good reason. They wanted to make sure that the interpretation and application of the provisions of the Treaty by the investment tribunals were
consistent with the understanding of both Contracting Parties.

Claimants' sole argument against giving weight to the submissions of the United States seems to be that a non-disputing State party is not impartial because it is concerned it will face investment claims, and so it will push for a limited interpretation of the Treaty provisions. That argument is really nonsensical.

If the Contracting Parties were concerned about facing investment claims, they would have not concluded the Treaty in the first place. They also have the authority to amend or terminate the Treaty if they--if they so wished.

What the Contracting Parties intended to achieve by allowing the participation of the non-disputing State in arbitration under the Treaty was to avoid interpretations of Treaty provisions that do not reflect their understanding.

Realizing that the United States' non-disputing party submission in the case and in other cases are damaging to their claim, Claimants try
to undermine the importance by claiming that Colombia's preliminary objections are almost exclusively based on those submissions, implicitly suggesting that they contain interpretative positions that are isolated. Claimants are clearly wrong.

Respondent's preliminary objections are based on the plain language of the Treaty, supported by the U.S. non-disputing party submission on the interpretation of the Treaty and by more than 300 legal authorities.

In short, as much as Claimant disliked the submissions of the United States and the consensus reached by the Contracting Parties regarding the interpretation of the provisions of the Treaty, they constitute an authentic interpretation that has binding force.

Let us now turn to Respondent's objections. Respondent has put forth two different categories of preliminary objections.

On the one hand, Respondent has raised an objection under Article 10.20.4 of the Treaty that, as a matter of law, the claim submitted by Claimants is
not a claim for which an award may be made in their favor.

That is because Claimants failed to comply with the conditions set forth in Article 10.16.1 of the Treaty for the submission of a claim to arbitration and because the relief they seek is not a relief that the Tribunal can grant under Article 10.26 of the Treaty.

In addition, Respondent raised five jurisdictional objections that the Tribunal decided to hear as a preliminary matter in conjunction with Respondent's 10.20.4 objection.

First, Respondent raised an objection that the Tribunal lacks jurisdiction ratione materiae because Claimants do not have a protected investment under either the Treaty or the ICSID Convention, given that the contract they entered into is a pure commercial contract for the provision of services.

Second, Respondent raised an objection that the Tribunal lacks jurisdiction ratione personae over Claimant FPJVC, the Joint Venture, because that Claimant doesn't qualify as a "juridical person" under
Article 25(2)(b) of the ICSID Convention.

Third, Respondent raised an objection that the Tribunal lacks jurisdiction ratione voluntatis with respect to Claimants Foster Wheeler and Process Consultants because such Claimants did not file a Notice of Intent as required under Article 10.16(2) of the Treaty.

Fourth, Respondent raised an objection that the Tribunal lacks jurisdiction ratione voluntatis with respect to the claims for breach of the Treaty's FET obligation because Foster Wheeler and Process Consultants made allegations to the same effect before Colombian courts and, pursuant to Annex 10-G of the Treaty, such an election shall be definite.

And finally, Respondent raised an objection that the Tribunal lacks jurisdiction ratione voluntatis because Claimants did not submit a valid and effective waiver pursuant to Article 10.18.2(b) of the Treaty and because they have acted inconsistently with that waiver in at least four instances.

As I said, they have filed two acciones de tutela before Colombian courts, an appeal against the
Ruling with Fiscal Liability before the Fiscal Chamber of the CGR, and just recently they initiated a conciliation procedure before the Procuraduría, which is a procedural pre-condition for initiating an annulment action before Colombian courts against the Ruling with Fiscal Liability.

Members of the Tribunal, drawing a distinction between the two categories of preliminary objections raised by Respondent is crucial because the treatment of the facts and the standard applicable to each category is entirely different.

To rule on Respondent's 10.20.4 objection, the Tribunal must look to Claimants' Notice of Arbitration and decide whether the claim thereby submitted is a claim for which an award can be made in Claimants' favor, assuming as true their factual allegations in that Notice of Arbitration.

To rule on Respondent's other jurisdictional and admissibility objections, the Tribunal must look at the facts, make any relevant factual determinations, and decide each objection, taking into account that Claimants have the burden of proving all
facts supporting their case on jurisdiction.

In their written and oral submissions, Claimants consistently ignore this key distinction and conflate the two standards. They want this Tribunal to take them at their word, presuming as true every single one of their allegations, both factual and legal. Unfortunately for Claimants, that is not how things work.

We will discuss each standard separately later in this Opening Presentation before addressing each category of preliminary objections. But I want to leave you with one final thought before we move on. Claimants have employed a truly questionable strategy in these proceedings, constantly undermining Respondent's due process rights and increasing the cost of defending this case.

First, Claimants have made a habit of speaking out of turn and out of scope. The record is full with instances where Claimants exceeded the bounds of the relevant submissions, trying to impermissibly include through the back door additional arguments or responses to Colombia's positions. Most
noteworthy is Claimants' Request for Provisional Measures and an Emergency Temporary Relief, a 64-page document accompanied by four witness statements and 79 exhibits, which was plainly a memorial on the merits poorly disguised as an application for interim measures. Just a few weeks ago, Claimants took advantage of the opportunity to provide comments on the U.S. submission to come up with new arguments in an attempt to fix their flawed claim.

Second, Claimants have made arguments that fly in the face of the language of the Treaty and continuously shifted their positions as they go along. Two examples easily come to mind. Claimants filed a Request for Provisional Measures seeking to enjoin the application of the same measure alleged to constitute a breach of this Treaty, directly contradicting Article 10.20.8 of the Treaty.

In fact, their shifting stance as to the measures alleged to constitute a breach, which we discussed earlier, is a prime example of how Claimants have moved the goalposts at every turn in this case. Another example is their expropriation
claim, which has changed significantly since the case has started. They started out claiming that Colombia had expropriated two specific clauses of the Services Contract. After Respondent explained why such an expropriation claim could not be succeeded, Claimants now offer a very different formulation.

In fact, Respondent will not be at all surprised if this afternoon, during their Opening Statements, Claimants offer a completely new theory of the case, raising entirely new arguments for the first time since this arbitration started.

If that were to happen, and Respondent, unfortunately, thinks that it will happen, Colombia's due process right will be severely impaired. Logically, Colombia can only defend against Claimants' claims as they originally pleaded them. And while their tactics are disruptive and violate Colombia's rights of defense, they only reveal that their case is flawed and bound to fail.

This claim should not have started in the first place, and has certainly gone far enough. Colombia requests that the Tribunal uphold
Respondent's preliminary objections and dismiss this case in its entirety.

I will now address Colombia's 10.20.4 objection.

Article 10.20.4 of the Treaty provides that the Tribunal shall address "as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26."

This preliminary objection is intended to dismiss, at an early stage of the arbitral proceedings, legally defective claims such as the one filed by Claimants. Before we discuss why Claimants' claim is not a claim for which the Tribunal can make an award in their favor, let's look into the standard applicable to deciding on Respondent's 10.20.4 objection.

Article 10.20.4(c) states that "in deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration."
The first thing to note about this standard is that the presumption of truthfulness in Article 10.20.4(c) only applies to Claimants' factual allegations. It doesn't apply to Claimants' legal allegations or conclusions that are unsupported by factual allegations.

This is a hotly debated issue between the Parties because Claimants want the Tribunal to take every single line of argument as a factual allegation. But not every allegation made by Claimant is a factual allegation that the Tribunal must accept as true. Claimants' attempt to unduly expand the limited scope of this presumption of truthfulness must fail. Let's look at a couple of examples. Claimants state, and I quote: "FPJVC was not a fiscal manager under Law 610, and there is no colorable basis upon which it could be asserted to be one."

This is not a factual allegation. Whether FPJVC qualifies as a fiscal manager is a legal allegation that the Tribunal must not and cannot accept as true. I will give you another example. Claimants' state that if the [investigated] party is
not a fiscal manager, the CGR does not have jurisdiction to initiate a fiscal liability proceeding.

That is also not a factual allegation but a legal allegation. Let us see one example of a true factual allegation made by Claimants. Claimants state that "CB&I eventually completed the Project in July 2016 according to specifications, but at a total cost of about US$6.1 billion - nearly three years late and more than double its original estimated cost."

Now, that is a factual allegation. It is an allegation about a fact, about an event or thing that may have existed or occurred.

Under Paragraph C, only the factual allegations in the Notice of Arbitration benefit from a presumption of truthfulness. As the tribunal in Pac Rim v. El Salvador correctly pointed out, the presumption of truthfulness is limited to the factual allegations raised by Claimants in their Notice of Arbitration and does not extend to factual allegations made elsewhere.

Claimants, of course, rally against this
rule, accusing Respondent of being formalistic and arguing that it is an "accepted principle that a tribunal should take account of developments since the case was commenced."

But Claimants conflate what are clearly two separate issues. The presumption of truthfulness in Paragraph C applies only to factual allegations in the Notice of Arbitration because it is the notice that Claimants submit their claim and, thus, it is where the Tribunal must turn to decide, over an objection, that a claim submitted is not a claim for which an award in favor of the claimants may be made.

A separate issue is whether developments after the submission of the claim can be considered by the Tribunal in deciding the merits. The issue is currently not before--that issue is currently not before this Tribunal. In addition, Respondent is not saying that Claimants may not offer clarifications after filing the Notice of Arbitration, but those supplemental facts do not benefit from a presumption of truthfulness.

Finally, in deciding Respondent's
Article 10.20.4 objection, the Tribunal may consider other relevant facts that are not in dispute between the Parties.

The United States shares this interpretation of Article 10.20.4(c). In the Rejoinder, Claimants argue that in order to uphold Respondent's 10.20.4 objection, the Tribunal has to find that Claimants' claims are certain to fail. But that standard is nowhere in the text of Article 10.20.4. In fact, the reality is that the tribunal in Corona vs. Dominican Republic dismissed a claim involving a factual pattern very similar to this case where the claimant was challenging an administrative act that had not yet been subject to judicial review.

The Corona tribunal dismissed the claim under a provision identical to Article 10.20.5 of the Treaty, which is a more limited review mechanism than Article 10.20.4 due to its expedited nature.

What the Tribunal needs to do here is to determine whether the claim presented by Claimants in the Notice of Arbitration is a claim that as a matter of law can end with an award in their favor.
The simple answer to that question is no. As a matter of law, Claimants' claim is not a claim for which an award may be made in their favor for two reasons. First, because Claimants failed to comply with the conditions set forth in Article 10.16.1 of the Treaty for the submission of a claim to arbitration and, second, because the relief they seek is not a relief that the Tribunal can grant under Article 10.26 of the Treaty.

We will review each of these reasons separately. Let's start with the first of those reasons. Under Article 10.16.1 of the Treaty, in order for an investor, either on its own or on behalf--on its own behalf or on behalf of an enterprise that [it] owns or controls directly or indirectly to submit a claim to arbitration under the Treaty, two requirements need to be met. (A) that there be a breach of a substantive obligation under the Treaty or an investment authorization or investment agreement; and (B) that the claimant or enterprise has incurred loss or damage by reason of, or arising out of, such breach.
Failure to comply with these essential requirements affects not only the admissibility of the claim submitted to arbitration, but also the consent itself since Article 10.17.1 of the Treaty--since--since, according to Article 10.17.1 of the Treaty, the Contracting Parties only consent to the submission of a claim to arbitration under Section--under that Section in accordance with this Agreement.

That was expressly acknowledged by the tribunal in *UPS vs. Canada*, when they were interpreting a very identical provision.

Whether the requirements of Article 10.16.1 of the Treaty for submitting a valid claim to arbitration are met and, by extension, whether a claim is ripe, must be assessed at the time the claim is submitted to arbitration.

That was the holding in *Glamis v. the U.S.*, where the tribunal interpreted a provision of NAFTA that is almost identical to Article 10.16.1 of the Treaty. That is also the position of the United States in various of the non-disputing party
submissions and, in fact, in the submissions that the United States made in this case. It clearly says so. I quote: "The breach and loss must have already occurred prior to the submission of a claim to arbitration." And they continue saying: "No claim based solely on speculation as to future breaches or future loss may be submitted."

That is why events or damages that occur after the initiation of the arbitration are not relevant to determine whether the requirements of Article 10.16.1 of the Treaty are met. In their Rejoinder, Claimants argue that the Tribunal should take account of developments since the case was commenced. That is totally incorrect.

As the tribunal in Glamis put it, the issue of ripeness turns on the determination of whether the challenged measure had effected harm by the time Claimants submitted its claim to arbitration. Therefore, in determining the ripeness of Claimants' claim, the Tribunal must look at the facts as they stood at the time Claimants filed their Notice of Arbitration.
Claimants take issue with the actions of the CGR within the context of the Fiscal Liability Proceedings. So what had happened in the Fiscal Liability Proceedings when Claimants submitted their claim to arbitration? Let's look.

On your screen--on your screen, we are displaying a timeline [of] the main dates and events of the dispute. In the middle is the filing of the Notice of Arbitration on December 6, 2019, which is the key date for purposes of determining whether Claimants complied with the requirement of Article 10.16.1 of the Treaty.

The facts to your right of the screen, which occurred after Claimants filed a Notice of Arbitration, are wholly irrelevant to the question of ripeness.

Assuming as true Claimants' factual allegations in the Notice of Arbitration, the Tribunal must answer two key questions. One, by December 6, 2019, was there a prima facie breach of a substantial obligation under the Treaty or of an investment authorization or investment agreement?
And, two, by December 6, 2019, had Claimants incurred a prima facie loss or damage by reason of, or arising out, of such a breach?

The answer to both questions is a resounding "no." By the time Claimants submitted the Notice of Arbitration, there was no measure capable of constituting a prima facie breach, and Claimants have suffered no prima facie loss or damage as a result. Today, more than two years after this case started, the situation is still the same. There is no measure capable of constituting a breach and no associated loss. The claim is still not ripe.

Let's start with the measure under this article. Why do we say that Claimants' claim is premature? Because when Claimants initiated this arbitration, there was no measure capable of constituting a breach of a substantive obligation of the Treaty and causing damage to Claimants.

At the time the Notice of Arbitration was filed, the Fiscal Liability Proceeding was mid-way and the CGR had not made--had made no final determination on Claimants' potential fiscal liability.
When the Claimants decided to initiate this arbitration, the CGR had merely issued the Indictment Order or the CGR Charges, to take Claimants' terminology.

As Respondent has explained repeatedly, an indictment order is an administrative act whereby the CGR identifies the allegedly fiscally liable parties kicking off an evidentiary period during which the CGR will gather the evidence necessary to rule on the fiscal liability of the parties named in such Indictment Order.

Because the Indictment Order is not an administrative act— it is an administrative act of mere procedural nature that does not define any legal situation, it cannot possibly breach Colombia's international obligation under the Treaty.

The Ruling with Fiscal Liability is also not a measure capable of constituting a breach of Colombia's substantive obligation. It was rendered well after Claimants initiated this arbitration and, thus, cannot be taken into account in deciding whether Claimants' claim was ripe when commenced.
But even if the Tribunal were to take the Ruling into account, such Ruling cannot constitute a breach of the Treaty because it is also an administrative decision that is subject to judicial review, and such review has yet to take place.

As the United States rightly observes in its submission, and I quote: "It is well-established that the international responsibility of States may not be invoked with respect to non-final judicial acts."

"[N]on-final judicial acts cannot be the basis for claims under" the Treaty. Indeed, not every mistake by an authority can [give] rise to an international wrongful act resulting in State responsibility. A State cannot possibly ensure the legality and adequacy of every one of the decisions taken by authorities at every level. But States, including Colombia, have mechanisms in place to correct those mistakes. And until those mechanisms are allowed to operate, and if they ultimately fail, it cannot be said that there has been an act of a State capable of triggering international responsibility.
In this case, taking Claimants' factual allegations as true, there was not even a final administrative decision rendered by Colombia's authorities at the time that this arbitration was initiated. Thus, it is impossible for a treaty breach to have existed at that time. Even now that there is a Ruling with Fiscal Liability, which is final at the administrative level, there is still no measure capable of constituting a breach of Colombia's obligations under the Treaty because the Ruling with Fiscal Liability is subject to judicial review.

Claimants take issue with Respondent's position alleging that Colombia is reading an exhaustion of local remedies into the Treaty that the Treaty doesn't contain. But Claimants' argument is a red herring. The fact that the Treaty doesn't procedurally require the exhaustion of local remedies before initiating a treaty claim doesn't mean that exhausting local remedies is not [substantively] required in order to find that there is a violation of certain obligations of the Treaty.

It is simply not possible that a State could
be found internationally liable by an international tribunal when domestic courts have not yet been able to review an administrative decision, let alone when there was no definite administrative ruling when Claimants filed their claim.

As the United States correctly points out in the submission, there has to be a "final act that is sufficiently definite to implicate a state responsibility." In this respect, this case is analogous to *Corona v. Dominican Republic* where the tribunal found that a treaty breach could not exist before the claimant pursued judicial remedies under domestic law.

As the tribunal held in *Corona*, "[w]hen a claim is successfully made out international law, it is because the International Court or Tribunal accepts that the Respondent's legal system as a whole has failed to accord justice to the Claimant."

The premature nature of Claimants' claims dooms their case. Arbitral tribunals have consistently rejected [claims] for alleged breaches of treaty obligations when such claims have been raised
1 prematurely.

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

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

15 Let us now turn to the two specific
16 requirements under Article 10.16.1. I want to start
17 with the second one. For an investor to submit a
18 claim to arbitration under the Treaty, Claimants must
19 have incurred loss or damage at the time that the
20 Notice of Arbitration was filed by reason of, or
21 arising out of, the supposed breach of the Treaty or
22 investment agreement.
This express requirement reflects a well-settled principle of law that damage is a key element of cause of action and standing to bring a claim. This position is shared by the United States, who in this non-disputing party submission in this case has stated that "there can be no claim under Article 10.16.1 until an investor has suffered harm from an alleged breach."

Again, this is—the issue is one of ripeness. The Contracting Parties to the Treaty wanted to make sure that claims that had not yet ripened because no damage had occurred could not proceed to arbitration. Well, on December 6, 2019, when Claimants filed the Notice of Arbitration, Claimants had not incurred a prima facie loss or damage as a result of Colombia's supposed breach of the Treaty.

Let us look again to our timeline. Even taking Claimants' factual allegations as true, none of the actions of the CGR before the Notice of Arbitration has caused harm to Claimants. And how could they, given that the Indictment Order is an
That's where the analysis should stop because, as we have stated, the maturity of a claim is assessed at the time Claimants initiated arbitration. But even if the Tribunal were to look beyond December 6, 2019, the conclusions would be the same. The Ruling with Fiscal Liability has not caused a prima facie harm on Claimants, and any potential harm it may cause is completely hypothetical and speculative. That is because of the joint and several nature of the payment obligation in that Ruling, and the huge difficulties faced by the CGR in attempting to collect payment from fiscally liable persons who, like Claimants, have no assets in Colombia.

Claimants know full well that they have not suffered any damages, and that without damages they have no claim under Article 10.16.1. That is why they have tried desperately to fill in that gap, by arguing that they have suffered reputational damages and by trying to manufacture new categories of damages; that is, their legal fees and costs in defending themselves in the Fiscal Liability Proceedings.
On the one hand, Claimants assert that they have suffered reputational damages, but have offered no facts in support of the assertion. What is more, Claimants have not shown prima facie that the reputational damages they claim arise out of [Colombia's] supposed breaches of the Treaty.

In fact, Colombia has shown the opposite: that any reputational damages that Claimants may have suffered do not stem from Claimants' involvement in the Fiscal Liability Proceeding, which is not even criminal in nature, but from the more serious investigations of corruptions and bribery that Foster Wheeler and Claimants' parent companies have been involved in in very jurisdictional across -- various jurisdictions across the globe.

Claimants themselves admit in the Rejoinder that they were never charged with corruption or fraud in Colombia. Claimants brush aside the investigations to their parent companies calling them irrelevant because the entities implicated in those cases are not parties to this case. That argument cannot be taken seriously since many investigations have named
specifically branches of Amec Foster Wheeler.

On the other hand, their legal fees and costs in defending themselves in the Fiscal Liability Proceedings are not considered damages. Under Colombian law, attorneys' fees and legal costs are ordinary legal burdens to be borne by Claimants as part of their costs of doing business in Colombia, not compensable damages. If legal fees and costs were considered compensable damages and the State were to be—and the State were to reimburse every person it investigates for the legal fees and costs, the State could never launch an investigation.

Moreover, as explained by the Chevron v. Ecuador tribunal, legal costs incurred in local proceedings would have been incurred in any event, regardless of the alleged breach of the treaty, but, thus, there cannot be a causal link between those legal costs and the alleged breach of the treaty.

In any event, Claimants cannot seriously think that they can comply with the ripeness requirement in Article 10.16.1 by invoking their legal fees and costs in the Fiscal Liability Proceedings as
damages arising out of Colombia's supposed breaches of the Treaty.

   A simple hypothetical reveals that Claimants' characterizations of their legal fees and costs as damages is merely pre-textual, designed to artificially check the box of Article 10.16.1.

   Let's imagine a scenario where the CGR has started investigating Claimants, but ultimately decided not to charge them with fiscal liability. Would Claimants start an international arbitration seeking to recover - [as] damages - the legal fees and costs associated with their involvement in the preliminary investigation or even though--even though they emerged victorious from that investigation? Of course they wouldn't.

   Claimants also argue that they satisfied the second requirement in Article 10.16.1 because this is a case of future damages and the tribunal in Mobil v. Canada made clear that future damages come within NAFTA Article 1116, which is essentially similar to Article 10.16.1 of the Treaty.

   In its Reply, Respondent extensively
addressed the discussion in *Mobil* and show why it doesn't assist Claimants in this case. Essentially, in *Mobil*, the *Mobil* tribunal defined future damages as damages crystallizing and becoming payable sometime in the future that result from a breach that began in the past and continued.

We have a totally different scenario in this case. Claimants have no future damages, no breach has occurred, and so no resulting damages have begun. Their damages are purely hypothetical. There is absolutely no certainty that there will be--that they will pay a single cent, either voluntarily or forcibly, in satisfaction of the Ruling with Fiscal Liability.

One final thought on the lack of loss [or] damage in this case. Claimants believe that because Article 10.20.4(c) provides that the Tribunal must assume as true their factual allegations, then, to satisfy the requirements in Article 10.16.1, it is enough for them to simply state that they have suffered loss.

To accept Claimants' position will be
depriving Article 10.16.1 of meaning because a claimant could simply state--could simply satisfy the requirements set forth in that Article by alleging that there is a breach, there is a damage, and that there is costs--a causal link between the two.

The Tribunal must make its own prima facie determination on whether damages exist, and cannot simply take Claimants' allegations that they have suffered reputational damages as true.

That's not a factual allegation. It's a mere conclusion unsupported by any relevant factual allegations that doesn't benefit from a presumption of truthfulness.

Mr. President, if you consider it appropriate, we can now make a break and then continue with our Opening Presentation.

Thank you very much.

PRESIDENT NUNES PINTO: Okay. Thank you, Mrs. Frutos-Peterson.

We have scheduled a 30-minute break. So we will be back at 10:40. Okay?

(Brief recess.)
PRESIDENT NUNES PINTO: So, you can start, Ms. Ordoñez.

DR. FRUTOS-PETERSON: Yes, we can--we can start. Thank you.

PRESIDENT NUNES PINTO: Okay. So, you still have one hour and 20 minutes. Oh, sorry.

MR. SILLS: I apologize. Before we begin, we have a small housekeeping matter. Over the break, we noticed that the copy of this presentation provided electronically to us on the ICSID file-sharing platform contains what appears to be a series of notes at the end that are not in the printed copy and are not in what's being displayed on the screen here. I assume those are private.

DR. FRUTOS-PETERSON: They were not intended to be shared.

MR. SILLS: And I wanted to assure you that we have not read them in any way. But I think it would be appropriate if a clean copy were to be provided and substituted.

DR. FRUTOS-PETERSON: Well, Bob, thank you. Thank you so much. We apologize for that. And, of
course, thank you for letting us know.

    So, yes, we will ask our team, probably they are listening to us, to remove that presentation from the box. Or maybe, Marisa, you could--yeah, you can delete it.

    THE SECRETARY: I can delete it now.

    DR. FRUTOS-PETERSON: Yes. And we can go ahead and upload it. Thank you so much.

    Thank you. Appreciate it.

    PRESIDENT NUNES PINTO: Thank you.

    Well, you still have one hour and 20 minutes to complete your presentation.

    DR. FRUTOS-PETERSON: Thank you, Mr. President. Mr. Fernando Tupa will continue with our Opening.

    PRESIDENT NUNES PINTO: Okay.

    MR. TUPA: Good morning, Members of the Tribunal. I will now address the absence of a prima facie breach in this case, as well as the rest of Respondent's arguments under Article 10.20.4.

    I want to go back to the two requirements under Article 10.16.1 of the Treaty. We have covered
the second requirement. Now let's look at the first.

The first requirement under Article 10.16.1 is that there would be a breach of a substantive obligation of the treaty, an investment authorization, or an investment agreement at the time of submission of the claim.

On the date of the Notice of Arbitration, assuming as true all the factual allegations put forward by Claimants in such notice, there could not have been such a breach. Let's discuss the potential breach of the Treaty's substantive obligations first.

Claimants have failed to establish in their Notice of Arbitration that their claims constitute a prima facie violation of the Treaty's substantive obligations. Claimants complain about Colombia's prima facie analysis as a matter of principle, suggesting that Respondent is asking this Tribunal to evaluate the claims on the merits or turn these objections into a mini trial.

To be clear, Colombia is not asking this Tribunal to evaluate the merits of Claimants' claims or to make any factual determinations about contested
issues, as they wrongly suggest. Rather, Colombia requests that the Tribunal analyze whether Claimants' claims are legally defective.

Respondent is calling on this Tribunal to determine whether, assuming as true the factual allegations in their Notice of Arbitration, there could potentially be a breach of a substantive obligation of the Treaty at the time Claimants initiated this arbitration.

If the answer is no, then the Tribunal should uphold Respondent's 10.20.4 objection and reject the claim in its entirety due to Claimants' failure to comply with the requirements in Article 10.16.1.

Obviously, in order to determine whether a particular set of facts are capable of constituting a breach of a treaty provision, the Tribunal will first have to analyze the meaning and scope of these provisions. There is nothing impermissible about this type of review. It is an exercise that is perfectly within the scope of review allowed under Article 10.20.4 of the Treaty.
As the tribunal in *Corona v. Dominican Republic* observed, an expedited procedure does not preclude a claimant--does not preclude a tribunal--sorry--from considering an issue going to the substance of a case if the tribunal finds that it is appropriate to consider such an issue based on the facts as pleaded by the Claimant, and, in particular, when its task is to interpret legal provisions.

Simply put, Colombia submits that Claimants' claims, even if the factual allegations advanced in their Notice of Arbitration were true, are not capable of constituting a breach of the Treaty.

Besides taking issue with Respondent's prima facie analysis generally, Claimants also dispute Respondent's prima facie analysis of their specific claims. According to Claimants' flawed logic, they have made a prima facie case of breach because they have claimed a breach and Respondent has failed to prove that there was no breach.

But that's not how this works. A claimant has to formulate claims that are legally plausible on first impression, that pass muster on a prima facie
basis. In other words, the question is: Taking Claimants' factual allegations as true, have they made a case for a breach of the Treaty's obligations?

The answer is no, as we have demonstrated in our submissions and we will show now.

Let's start with their claim of breach of FET. Claimants have not established a prima facie breach of the FET obligation for several reasons.

The first of those reasons is that Article 10.5 of the Treaty only applies to investments, not to investors. And all of Claimants' claims pertain to alleged actions by Colombia that affected investors.

Article 10.5.1 of the Treaty unequivocally provides that: "Each party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."

The text of this provision is clear and unambiguous. The protection is only granted to covered investments, which is a defined term in the Treaty, not to investors.
The language of this provision stands in stark contrast with the language contained in the national treatment and MFN obligations under the Treaty, which protect both investors and covered investments.

An interpretation of the FET provision in accordance with Article 31 of the Vienna Convention, namely, pursuant to the ordinary meaning of its terms in their context, does not leave room for any other interpretation.

Respondent submits that to read into the provision terms that it does not contain would be no longer to interpret it but, instead, to rewrite it, which the Tribunal cannot and should not do.

That this provision only protects investments is also the understanding of the United States, the other Contracting Party to the Treaty. In its non-disputing party submissions interpreting the meaning of this very same treaty provision, the U.S. has repeatedly held that "Article 10.5 requires the Parties to accord 'fair and equitable treatment' and 'full protection and security' only to covered
investments, not to investors."

What's more, the law firm representing Claimants advanced the exact same argument when they were representing Mexico in another investment arbitration case. In *Lion v. Mexico*, the respondent argued that Article 1105 of NAFTA, which is identical to the provision at issue here, "extends protection to investments, but not to investors."

In certain cases, the difference may be immaterial since the alleged measure could affect both the investment and the investor. However, in this case, none of the allegations made by Claimants in their Notice of Arbitration are related in any way to a Services Contract, what Claimants' claim as their covered investment, but, rather, to actions that could have only affected the investors.

Thus, even if Claimants' factual allegations were true, the FET standard could not have been breached since Colombia's alleged actions could only have affected the investor, not the investment.

Claimants concede that the FET standard under the Treaty is limited to the minimum standard of
treatment under customary international law.

However, the Parties do not agree on whether the minimum standard has evolved since Neer, and, in particular, on whether the minimum standard includes the concept of legitimate expectations, which clearly it does not, as the International Court of Justice confirmed in the landmark case Bolivia vs. Chile.

But the Tribunal doesn't need to get caught up in this discussion about the standard since Claimants' claim does not even meet their own version of the standard.

For instance, in order to consider whether legitimate expectations exist, those purported expectations must be objectively analyzed at the time of making the investment, must be reasonable, and must be based on specific promises to the investor.

Claimants do not even allege in their Notice of Arbitration that there was a specific promise made by the government official at the time of making their investment upon which they relied in making said investment.

Thus, none of the factual allegations made
by Claimants could have violated any alleged legitimate expectations.

With the exception of a denial of justice claim, which we will address next, Claimants have not identified any other theory or element of FET that might have been breached in this case.

None of Claimants' factual allegations could arguably constitute a violation of the minimum standard of treatment, in particular when no judicial action has been initiated to challenge the administrative decision of the CGR, which, as indicated, did not even exist at the time this arbitration was commenced.

As to Claimants' denial of justice claim, it cannot be seriously argued that a denial of justice existed when the Notice of Arbitration was filed.

At that time, an administrative adjudicatory judicial proceeding had not even been commenced, and there was merely a procedural administrative act—in an administrative proceeding that was just at its initial stage.

Article 10.5.2(a) of the Treaty expressly
provides that the FET obligation includes "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings." The wording of this provision could not be clearer.

The denial of justice protection only applies when there is an "administrative adjudicatory proceeding," which is a proceeding of a judicial nature before courts with administrative adjudicatory jurisdiction.

Thus, the obligation not to deny justice is limited in scope to judicial proceedings and does not extend to administrative proceedings.

The Fiscal Liability Proceeding initiated by the CGR is merely an administrative proceeding, not an administrative adjudicatory proceeding.

In the Rejoinder, Claimants incorrectly allege that the term "administrative adjudicatory proceeding," or "procedimiento contencioso administrativo" in Spanish, includes not only judicial proceedings, but also administrative proceedings.

That argument is, frankly, absurd. The terms "procedimiento contencioso administrativo" in
Spanish, or "administrative adjudicatory proceeding" in English, encompass judicial proceedings only. That is precisely why the Treaty uses the terminology "administrative adjudicatory proceeding" or "procedimiento contencioso administrativo" and not simply "administrative proceeding" or "procedimiento administrativo."

Other provisions of the Treaty, which are part of the context in which the ordinary meaning of the terms of this provision have to be interpreted, also confirm this rather straightforward interpretation.

Whenever the Contracting Parties wanted to cover purely administrative proceedings, they used the terms "administrative proceeding" or "administrative process," as they did, for instance, in Articles 10.8.4 and 10.9.3(b)(ii) of the Treaty. Therefore, if the terms "administrative adjudicatory proceedings" or "procedimiento contencioso administrativo" in Article 10.5.2(a) of the Treaty are construed pursuant to the Vienna Convention, it should be concluded that both the
English and Spanish versions of the Treaty have the same meaning and do not cover purely administrative proceedings.

As Claimants rightly point out, the Spanish and English versions of the Treaty are equally authoritative. And according to Article 33(3) of the Vienna Convention, both are presumed to have the same meaning.

In any event, we should not get entangled in this linguistical discussion since a denial of justice requires, by definition, a final decision of the judicial branch of the State, and the standard to be met is extremely high.

The fact that there is still multiple judicial remedies available to challenge the Ruling with Fiscal Liability is, by itself, sufficient to show that Claimants have not made a prima facie case of denial of justice.

Claimants also take issue with the fact that Colombia challenges their bold assertion of futility regarding further Colombian proceedings. But the allegation of futility is not a factual allegation.
It is a mere conclusion that is not supported by any factual allegation, and which does not benefit from the presumption of truthfulness.

Claimants have not explained why the judicial review of an administrative decision would be futile. In fact, in its Memorial, Respondent showed that rulings with fiscal liability have been overturned in the past, both at the administrative and judicial level. It is worth recalling that Claimants have not even filed yet an action challenging the decision of the CGR in Colombian courts.

In sum, even if Claimants' factual allegations were true, there could not have been a denial of justice or any other type of FET breach at the time that they filed their Notice of Arbitration since there was not even a final administrative decision in place, let alone a judicial decision of a Colombian court with administrative adjudicatory jurisdiction.

Claimants have also not established a prima facie expropriation case. In their Notice of Arbitration, Claimants alleged that by initiating the
Fiscal Liability Proceeding, [Colombia] expropriated two of their rights under the Services Contract—their alleged investment in this case—

As Respondent explained in its pleadings, which is consistent with what many investment tribunals have held, it is not possible to expropriate two discrete rights that are not capable of being economically exploited independently and separately from the purported investment, the Services Contract.

In fact, it is a basic principle that an investment must be viewed as a whole for purposes of determining whether an expropriation occurred.

Article 10.7 of the Treaty expressly provides that "[n]o Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization."

That is why the tribunal in Grand River v.
the U.S. stated that "[a]n act of expropriation must involve 'the [investment] of an investor, not part of an investment,'" a notion that was also confirmed by one of the cases cited by Claimants, Koch v. Venezuela, where the tribunal graphically held that an "investment 'cannot be sliced off and isolated, like a piece of sausage.'"

Notably, as the original expropriation claim was patently flawed, Claimants have now radically changed their argument in their Rejoinder, and say that they have broadly alleged that Colombia has expropriated its investment, which consists not merely of the Services Contract, and that Colombia indirectly expropriated that investment by imposing a groundless penalty far exceeding the revenues realized.

Well, that was certainly not the claim that Claimants made in their Notice of Arbitration, which is the claim that the Tribunal should consider for purposes of Article 10.20.4--Article 10.20.4 objection.

But it doesn't matter. This new formulation of the expropriation claim still fails.
First, besides those two purported contractual rights, which, in any event, are still in effect, Claimants did not make any factual allegation in their Notice of Arbitration that the Services Contract was affected as a whole by any action of the CGR or any other Colombian authority, or that any other unspecified investment made by Claimants, different from the Services Contract, was somehow affected.

The Services Contract was performed and Claimants have been paid for the consulting services they provided.

Second, Claimants' allegation that the imposition of a penalty resulted in an indirect expropriation of their investment is an irrelevant argument. The Ruling with Fiscal Liability did not exist at the time that Claimants filed their Notice of Arbitration.

And even if it were to be taken into account, Claimants have never paid a dime of such penalty. So, they could not claim that any revenues were taken from them.
In any event, the two contractual provisions that Claimants originally alleged were expropriated have nothing to do with the actions of the CGR or Claimants' fiscal liability. Those provisions bind the Joint Venture and Reficar only, as parties to the Services Contract.

In sum, both Claimants' original and their new expropriation claim are not capable of constituting a prima facie breach of the Treaty.

Claimants have also failed to establish a prima facie breach of the national treatment obligation under the Treaty. The Fiscal Liability Proceeding involved both nationals and foreigners, and, thus, there is no action or measure that has prima facie favored nationals over non-nationals.

There seems to be no dispute in this case about the scope of the national treatment obligation, which is set forth in Article 10.3 of the Treaty, and which protects investors of the other Contracting Party against nationality-based discrimination. The dispute lies on the application of this standard.

Claimants' claim for violation of the
national treatment obligation is entirely based on the fact that the CGR did not charge the members of Ecopetrol's Board of Directors with fiscal liability, while it did charge Foster Wheeler and Process Consultants, despite the fact that both were, according to Claimants, in like circumstances.

Claimants allege that "they were 'in like circumstances' to the Ecopetrol Board of Directors because they were both involved in the Project and indicted in the CGR proceedings."

Likewise, Claimants allege that the CGR treated Claimants less favorably because they dismissed the Ecopetrol Board of Directors as not being fiscal managers, although they had actual decision-making authority over the Project, but refused to dismiss Claimants from the proceedings, though Claimants were not fiscal managers.

The assessment that they were in like circumstances is not a factual allegation benefiting from a presumption of truthfulness, but a legal conclusion.

What are Claimants' true factual allegations
and the uncontroverted facts related to this standard?

One, the CGR charged both nationals and foreigners, including natural persons such as the members of the Board of Directors and certain administrators of Reficar, and juridical persons, such as CB&I, with fiscal liability.

Two, the CGR dismissed charges against both nationals and foreigners, such as CB&I N.V.

Three, the CGR issued precautionary measures against Colombian nationals but did not issue precautionary measures against Claimants.

Based on those facts, there is no prima facie case of nationality-based discrimination. And so Claimants have failed to establish a prima facie breach of the national treatment obligation under the Treaty.

Claimants have also failed to establish a prima facie breach of the most favored nation treatment obligation under the Treaty.

Claimants are not alleging here that there was another foreign investor that received a better treatment but are merely trying to use the MFN clause
of the Treaty to import an umbrella clause, which does not exist in the Treaty, from the Switzerland-Colombia BIT.

Claimants attempt to use the Treaty's MFN provision to import an umbrella clause must fail. First, Article 10.4 of the Treaty, the MFN clause, merely requires a comparison of factual situations of treatment actually granted under similar circumstances.

That was the conclusion arrived by the tribunal in Ickale v. Turkmenistan when it had to interpret a similarly-worded clause, reasoning that "given the limitation of the scope of application of the MFN clause to 'similar situations,' it cannot be read, in good faith, to refer to standards of treatment--standards of investment protection included in other investment treaties between a State party and a third State."

Colombia submits that this is the correct interpretation of Article 10.4 of the Treaty.

In response, Claimants argue that Respondent's interpretation is prohibitively narrow.
But that is not what the same law firm representing Claimants thought when they were representing Mexico in another investment case in which they cited with approval the Ickale case, and alleged that there was a categorical impossibility of using the MFN clause to import standards of treatment from other treaties. Obviously, that interpretation does not suit their needs now.

In this case, Claimants do not allege that there was another foreign investor that received a better treatment and, thus, no prima facie breach of the MFN clause could have possibly existed.

Second, even if an importation of an umbrella clause from another investment treaty were to be theoretically allowed through Article 10.4 of the Treaty, there are several reasons why such importation would not be possible in this case, which are explained in detail in our pleadings.

But what is most striking about Claimants' argument is that even if the MFN clause were to be applied in the way Claimants propose, importing from the Colombia-Switzerland BIT a right to submit a claim
to arbitration for breach of an umbrella clause would be inconceivable due to the fact that such right does not exist in the Colombia-Switzerland BIT.

This was expressly confirmed by the tribunal in *Glencore v. Colombia*, one of Claimants' favorite cases.

It is quite telling that Claimants barely mentioned the Switzerland-Colombia BIT in their Rejoinder, and now put all their eggs in a different basket, the Japan-Colombia BIT, which, by the way, was not mentioned by Claimants in their Notice of Arbitration.

However, this new argument makes no real difference since none of Colombia's treaties provide consent to arbitrate claims under an umbrella clause.

Claimants are wrong when they state that the Colombia-Japan BIT allows for arbitration of umbrella clause claims. The text of the relevant provision establishes that the Contracting Parties' consent to the submission of investment disputes, except for disputes with regard to the umbrella clause.

Faced with this clear impossibility,
Claimants say that what they are trying to do is to import a substantive standard of protection without incorporating the dispute resolution provision of the Colombia-Japan BIT.

But that argument overlooks the basic operation of an MFN clause. What Claimants are trying to achieve is contrary to the very definition of the most favored nation obligation.

The MFN obligation contained in Article 10.4 of the Treaty only guarantees that U.S. investors will receive a treatment not less favorable than that accorded, in like circumstances, to Swiss or Japanese investors.

It does not guarantee a more favorable treatment, which is what Claimants want here. Such an application of the MFN clause would be contrary to the nature, content, and spirit of this Treaty obligation.

In sum, no prima facie breach of the MFN obligation under the Treaty could have possibly existed here.

Claimants have not only failed to make a prima facie case of breach of the substantive
obligations of the Treaty, they also--they have also
not raised a valid claim for a prima facie breach of
an investment agreement.

Claimants seem to believe that merely
alleging that the CGR, through the Fiscal Liability
Proceeding, has deprived them of the protections under
the Services Contract constitute a prima facie breach
of an investment agreement. However, this allegation
is fundamentally flawed. As a preliminary matter,
there could not have been a breach of an investment
agreement in this case because there is no investment
agreement at all.

"Investment Agreement" is a defined term in
the Treaty, and Article 10.28 states that it
corresponds to a "written agreement between a national
authority of a Party and a covered investment or an
investor of another Party, on which the covered
investment or the investor relies in establishing or
acquiring a covered investment other than the written
agreement itself."

According to Claimants' Notice of
Arbitration, the Services Contract is their alleged
investment. But the Services Contract cannot simultaneously be the written agreement and the covered investment, as the text of the Treaty literally makes clear.

That is also confirmed by Vandevelde in his often-cited treatise where he clarifies that "the investment established in reliance on the written agreement cannot be the written agreement itself."

Claimants do not even attempt to deal with this threshold issue.

Although this by itself should be dispositive of Claimants' claim for breach of an investment agreement, the Services Contract is also not an investment agreement within the meaning of the Treaty because it did not involve a national authority of a Party, as such term is defined in Article 10.28 of the Treaty.

Article 10.28 of the Treaty defines a "national authority" as an "authority at the central level of government." Reficar, which is the party to the Services Contract, is not a national authority of Colombia. Under Colombian law, Reficar is a mixed
capital company that carries out commercial activities belonging to the decentralized level of the Colombian Government.

Reficar's decentralized character is further confirmed by Annex 9.1 of the Colombia-U.S. TPA on government procurement, which contains a list of central level of government entities that does not include Reficar or its parent company, Ecopetrol.

This decentralized status was recognized by Claimants themselves in the Acción de Tutela 2018 that they initiated before Colombian courts.

Claimants alleged that Reficar is a national authority, and hope that the Tribunal will take that supposed factual allegation as true.

But asserting that Reficar is a national authority of Colombia is not a factual allegation, it is a legal allegation as to the application of--to Reficar of the term "national authority of a Party," which is defined in the Treaty. As a legal allegation, it does not benefit from a presumption of truthfulness.

In any event, even if an investment
agreement did exist in this case, Claimants' allegation for breach of an investment agreement is confusing and impossible to understand. Claimants have been changing and adjusting their arguments on this issue throughout their pleadings and, to this date, it is not clear what exactly Claimants are claiming with respect to an alleged breach of an investment agreement.

The Fiscal Liability Proceeding concerns Claimants' fiscal liability, not their contractual liability. Thus, no prima facie breach of an investment agreement was advanced by Claimants.

So, to recap, Claimants have failed to satisfy the two requirements set forth in Article 10.16.1 to submit a claim to arbitration and, thus, their claim is premature. At the time of the Notice of Arbitration, there was no prima facie breach of the Treaty or an investment agreement, and no prima facie loss or damage to Claimants resulting from that alleged breach. For that reason, as a matter of law, Claimants' claim is not a claim for which an award may be made in their favor.
As we mentioned earlier, there is a second reason why, as a matter of law, Claimants' claim is not a claim for which an award can be made in their favor. Let's move on now to that second reason, which is that the Tribunal is not empowered under Article 10.26 of the Treaty to grant any of the forms of relief requested by Claimants.

First, Claimants seek an award of moral damages, but the Tribunal does not--sorry--but the Treaty does not grant the Tribunal authority to award non-monetary or punitive damages.

A tribunal constituted under the Treaty can only issue an award subject to the limitations and exclusions provided in Article 10.26. Article 10.26.1 of the Treaty provides that a tribunal is only empowered to award "monetary damages," or "daños pecuniarios" in the Spanish version, and Article 10.26.3 provides that "[a] tribunal may not award punitive damages."

Moral damages are generally viewed as non-monetary or non-pecuniary damages or as punitive damages. However, the discussion as to whether moral
damages are punitive damages or non-monetary damages is irrelevant here and purely academic.

The Treaty prohibits the award of both punitive damages and non-monetary damages, making it impossible for the Tribunal to grant moral damages to Claimants however characterized. Thus, the Tribunal does not have the power to grant the moral damages that Claimants request here.

In addition, Claimants requested in its Notice of Arbitration that the Tribunal enjoin any attempt by the CGR or any other Colombian organ to seize any of Colombia's--any of Claimants' assets, in Colombia or elsewhere. Colombia explained that Article 10.26 of the Treaty does not permit the granting of non-monetary orders or injunctions such as those sought by Claimants here.

Moreover, Article 10.20.8 of the Treaty provides that the Tribunal may not enjoin the application of a measure alleged to constitute a breach of the Treaty. In their subsequent pleadings, Claimants were silent on this point, implicitly conceding that the Tribunal does not have the power to
grant the form of relief originally requested.

The third form of relief requested by Claimants in this case is the issuance of an offsetting award equivalent to the amount of the Ruling with Fiscal Liability, which this Tribunal also does not have the authority to grant since it is not empowered to award hypothetical damages or to make declaratory awards.

Claimants have not made any payment of any amount of the fiscal liability determined in the Ruling with Fiscal Liability, either voluntarily or forcibly, so there is no actual monetary damage that could be offset by the Tribunal in an award. What's more, when this arbitration was initiated, there was not even a ruling with fiscal liability.

In their Provisional Measures Application, Claimants themselves acknowledged that they have not yet suffered any damage. They acknowledge it yet again in their recent letter opposing Respondent's request to include a new document into the record.

The prayer for relief in the Conciliation Request is a further recognition that Claimants'
damages in the Fiscal Liability Proceeding are purely hypothetical, and that they will only suffer actual damages if they make any payments in satisfaction of the Ruling with Fiscal Liability.

Until Claimants actually make a payment to satisfy the Ruling with Fiscal Liability, their damages will be merely hypothetical for three main reasons.

One, the Ruling establishes the joint and several liability of Foster Wheeler and Process Consultants and the other fiscally liable parties and, thus, it is impossible to know whether Claimants will ever have to make any full or partial payment.

Two, the Ruling with Fiscal Liability is subject to several judicial remedies, and could eventually be declared null and void. And, three, since the forced collection against Foster Wheeler and Process Consultants faces enormous legal and practical hurdles, it is possible that none of Claimants' assets be identified, seized, and much less auctioned.

Claimants have not even attempted to provide a substantive response to any of these threshold
arguments raised by Colombia. It is, frankly,
astonishing that, not having paid a single penny to
satisfy the amount of the Ruling with Fiscal
Liability, Claimants are seeking more than 900 million
in damages.

Claimants now say that they're only seeking
a compensation payment to be made for any assets
seized by Colombia, and that they are not seeking a
windfall because they are not asking for any recovery
in excess of the assets actually seized.

Well, it's undisputed that Colombia has not
seized, much less auctioned, any of Claimants' assets
and, thus, any offsetting award would be compensating
merely hypothetical damages and would be granting
Claimants a windfall.

As much as Claimants like to assimilate this
case to Glencore vs. Colombia, they are worlds apart.
In Glencore, the claimant voluntarily paid the ruling
with fiscal liability, a fact which has been
acknowledged by Claimants themselves. In this case,
Claimants have made no payment whatsoever to satisfy
the Ruling with Fiscal Liability.
Contrary to what Claimants contend, this is not a question reserved for the Hearing on the merits. Claimants are requesting a form of relief that this Tribunal does not have the authority to grant and, thus, their claim is legally defective. It is nonsensical to argue that the claim has to be fully aired when the form of relief requested by Claimants cannot be granted by this Tribunal.

In sum, Claimants' claim is legally defective and, thus, it is not a claim for which an award in favor of Claimants may be made under the Treaty. Claimants did not comply with the requirements of Article 10.16.1 of the Treaty, and the relief they request is not a relief that the Tribunal can award under Article 10.26.

For those reasons, the claim submitted to arbitration by Claimants should be dismissed under Article 10.20.4 of the Treaty.

This concludes our presentation on the preliminary objection under Article 10.20.4 of the Treaty. My colleague, Elisa Botero, will now address Colombia's jurisdictional objections.
Thank you.

MS. BOTERO: Thank you, Fernando.

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

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

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

In the words of the United States, "[s]ubparagraph (c) does not address, and does not govern, other preliminary objections, such as an objection to competence, which the tribunal may already have authority to consider." Such interpretation was upheld by the tribunal in Kappes v.
Guatemala, which stated that "[u]nlike objections under Article 10.20.4, jurisdictional objections do not require a tribunal to assume as true all facts alleged in the notice of arbitration."

Rather, as the U.S. observed in its non-disputing party submission in Seo Jin Hae v. Korea, which concerned an identical provision to Article 10.20.4 of the Treaty, the burden is on claimant to prove the necessary and relevant facts to establish that a tribunal is competent to hear a claim.

The fact that the Tribunal is to decide on Respondent's jurisdictional objections as a preliminary question, together with an objection under Article 10.20.4 of the Treaty, does not alter that burden. Claimants attempt to avoid this burden by arguing that they are not required to present evidence at this preliminary stage of the proceeding. In their latest pleading commenting on the U.S. submission, Claimants go as far as to say that the Parties supposedly agreed that all of Respondent's objections, including its jurisdictional objections, "would be
heard preliminarily without requiring an evidentiary submission."

This is absurd. First, Respondent never agreed to such a thing. Respondent simply requested that its jurisdictional objections be heard and decided as a preliminary question together with its objection under Article 10.20.4 of the Treaty, as the Treaty expressly allows.

But more importantly, hearing jurisdictional objections at a preliminary phase doesn't mean that Claimants are exempt from proving the necessary facts to establish jurisdiction. It just means that this—that the jurisdiction of this Tribunal is established before going into the merits. The evidence on jurisdiction is being heard now. This is what we have been doing for the past two years.

During those two years, Claimants had plenty opportunity to satisfy their burden of proof on jurisdiction. In addition to their Notice of Arbitration, which was accompanied by multiple exhibits and legal authorities, Claimants had two full rounds of written submissions as well as various other
opportunities to submit additional evidence. Despite that, Claimants have failed to prove the facts on which the jurisdiction of this Tribunal is based.

Let's now analyze each of Claimants' five—sorry—Colombia's five jurisdictional objections that the Tribunal will decide as a preliminary question.

Colombia's first objection is that the Tribunal lacks jurisdiction ratione materiae because the Services Contract does not constitute a protected "investment" under the Treaty and the ICSID Convention.

Article 10.28 of the Treaty defines "investment" generally as every asset that has the characteristics of an investment, including such characteristics as a commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

Article 10.28 goes on to list several examples of the forms that an investment may take, including, under Subparagraph (e), different types of contracts such as construction, management, and other
similar contracts.

However, that enumeration of assets is not dispositive. To qualify for protection under the Treaty, an asset, including a construction, management, and other similar contract, must have the characteristics of an investment. Ordinary commercial contracts are excluded from the definition of investment because they do not possess the characteristics of an investment.

This interpretation follows from a plain reading of Article 10.28 and is also the interpretation of both Contracting Parties to the Treaty.

In its non-disputing party submission in this case, the United States made it clear that "ordinary commercial contracts for the sale of goods or services typically do not fall within" the definition of "investment."

Under the so-called double-barrel test, for a tribunal constituted under the ICSID Convention to have jurisdiction ratione materiae over a claim, the asset must not only qualify as an investment under the
Treaty, but it must also be objectively considered an investment under the terms of the ICSID Convention.

Article 25 of the ICSID Convention provides that the jurisdiction of the Centre only extends to disputes of a legal nature "arising directly out of an investment."

Many ICSID tribunals have held that there is an objective notion of what constitutes an investment under the ICSID Convention. Under the test first developed by Salini v. Morocco, the assumption of risk is one of the essential elements of what constitutes an investment under the Convention. Commentators and tribunals agree that ordinary commercial contracts are outside the scope of the Centre's jurisdiction.

Thus, the assumption of risk--of an investment risk or operational risk is one of the main characteristics of an investment under both the ICSID Convention and the Treaty. It represents the uncertainty faced by an investor regarding the return it will receive on its investment, including whether or not it will recover, in whole or in part, the capital invested. This type of risk must be
distinguished from generic risks inherent to any
economic activity and from simple commercial risks
inherent to any contract, including the risk of
non-payment.

As the tribunal in Romak v. Uzbekistan
reasoned, "all economic activity entails a certain
degree of risk. But 'an 'investment risk' entails a
different kind of alea, a situation in which the
investor cannot be sure of a return on his investment,
[or] may not know the amount he will end up spending,
even if all relevant counterparties discharge their
contractual obligations. Where there is 'risk' of
this sort, the investor simply cannot predict the
outcome of the transaction."

Similarly, the tribunal in Posštová v.
Greece explained that an investment risk entails an
operational risk and not a commercial risk, a risk
inherent in the investment operation in which the
profits are not ascertained but depend on the success
or failure of the economic venture concerned.

Claimants have two main criticisms to
Colombia's position. First, they argue without
providing any support that the double keyhole approach to ICSID jurisdiction does not apply and that, therefore, they need only comply with the definition in the Treaty to gain access to the Centre. Claimants cannot simply ignore decades of ICSID jurisprudence on this issue.

Claimants' second criticism has to do with the definition of "investment" in Article 10.28 of the Treaty. Claimants insist that the assumption of risk is not a necessary requirement for the existence of a covered investment, emphasizing the word "or" in the chapeau of the definition of "investment" in Article 10.28.

That argument is not only contrary to the express language of the Treaty, but also to the very notion of investment itself. The assumption of an investment risk is the fundamental feature of an investment. It is what distinguishes an investment from an ordinary commercial contract.

If a certain business operation entails a commitment of capital and an expectation of profit, but the party who committed that capital and expected
a profit is not at risk of losing it and turning no
profit, then there is no investment risk. That
business operation is likely an ordinary commercial
contract but not an investment.

The fact that the Treaty uses the [words]
"or" and "including" when listing the characteristics
of an investment does not mean that the listed
characteristics are not essential characteristics of
an investment. It simply means that there are other
characteristics in addition to those listed. That
reading of the definition of "investment" is shared by
the United States.

Let's turn now to the facts. The question
before this Tribunal is simple. Is the Services
Contract an investment?

The answer to that question is no. The
Services Contract between the Joint Venture and
Reficar is, on its face, an ordinary commercial
contract for the sale of consulting services that did
not entail any investment risk. An analysis of the
relevant contractual provisions inexorably leads to
this conclusion. For one, the stated purpose of the
contract is to provide "consulting services for the
management of the Project," which included, among
other services, the supervision and control of the
detailed engineering and of materials and equipment
procurement for the Project.

The Contract is an agreement for the
provision of services, as Claimants themselves have
recognized countless times. Claimants insist that the
Services Contract is "a management or construction
contract" falling within the scope of Subparagraph
(e), deceitfully equating management and construction,
but the fact that the Services Contract is related to
the provision of consulting services in connection
with the construction and expansion of an oil refinery
does not transform that contract into a construction
contract.

And even if it did, a construction contract
is also not necessarily an investment. Regardless of
how a contract is named, only contracts that have the
objective characteristics of an investment qualify for
protection under the Treaty. In any event, the
discussion about which is the best way to call the
Services Contract does not have any practical significance.

As the U.S. stated in its submission in this case, "[t]he determination as to whether a particular instrument has the characteristics of an investment is a case-by-case inquiry involving an examination of the nature and extent of any rights conferred under the State's domestic law."

And there is no question in this case that the nature and the extent of the rights conferred under the Services Contract is that of an ordinary contract for the provision of consulting services.

In addition to the purpose of the Services Contract, the provisions concerning compensation also show that Claimants did not bear any investment risk. The remuneration structure in the Services Contract guaranteed Claimants the recovery of all the resources they allocated to the performance of their obligations under the Contract, as well as a profit.

To recap what Colombia explained at length in its Memorial on Objections to Jurisdiction, via the different components of the remuneration structure,
the Joint Venture recouped salary costs for all personnel assigned to the performance of the services, whether foreign, expat, or local; non-salary costs for all personnel, including administrative overhead, taxes and bonuses; direct costs associated with all personnel, including computer equipment, office leases, domestic and international call charges, office furniture and relocation expenses; the cost of equipment, tools, materials and software the Joint Venture deemed necessary for the correct performance of the services in Colombia, and I could go on.

Besides recouping on all its costs, the Joint Venture charged a fixed fee for each hour worked by its personnel assigned to the Services Contract. In fact, as of the day of Respondent's Memorial, the Joint Venture had received over US$14 million in fixed fees from Reficar. That fee was a 100 percent profit since the Joint Venture recovered its costs through—all its costs through the other components of the remuneration. In addition, by virtue of the tax gross up, the Joint Venture received Reficar's payments in full, without any decrease for tax
What's noteworthy is that Claimants recouped their costs and earned a profit regardless of the outcome of the refinery project.

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

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

Claimants never disputed Colombia's description of the relevant provisions of the Services Contract. In two rounds of pleading, they outright refused to engage with the text of the Contract because they are fully aware that it supports Respondent's position.
Unable to deal with the nature and the terms of the Services Contract, Claimants resort to all sort of creative arguments to save their case, none of which assist them.

First, Claimants allege the Services Contract did entail risk, such as the risk of non-payment and termination, among others, and that the fact that there is a dispute here constitutes evidence of risk. However, as we've explained, every economic transaction entails some sort of risk, but not every risk is an investment risk.

In fact, as a paper cited by Claimants themselves explain, not every business dispute is an investment dispute because not every economic activity constitutes an investment.

Second, in their Rejoinder, Claimants assert that they specifically faced an investment risk as set forth in Romak. That argument is, frankly, absurd. Claimants were assured a return on their investment because under the Services Contract they received a profit per manhour.

Maybe they were not sure how much they would
ultimately end up spending, but they were certainly sure that they would recoup every single penny of those expenditures. Whether they would be paid or not is a quintessential commercial risk, but that commercial risk in this case was practically non-existent because Claimants invoice monthly and had a right to terminate for non-payment of invoices.

There is no such thing here as the "outcome of the transaction." They were hired to provide a consulting service, and for that they recouped their costs and were paid a fee. As simple as that.

In the comments to the U.S. non-disputing party submission, Claimants raised for the first time an additional reason why they believe the Services Contract entailed risk. They point to the bonuses provided in the Services Contract as additional evidence of risk.

However, as Respondent explained in its Memorial, those bonuses were mere commercial incentives that did not alter the remuneration structure which guarantees Claimants their costs plus a profit, as we've just reviewed.
Third, Claimants argue that the Services Contract is not their only relevant investment in Colombia, pointing to the amounts of time, capital, personnel, and labor they devoted to performing the services. But all those resources are not separate "investments" unrelated to the Services Contract. Rather, those are the resources that the Joint Venture employed to comply with its obligations under the Services Contract.

Four, Claimants argue that they have a long history of investment in Colombia. That fact, whether true or not, is irrelevant. The Tribunal has to decide whether the Services Contract is a covered investment under the Treaty and the ICSID Convention, not whether Claimants' supposed prior investments qualify for protection.

Finally, Claimants contend that their supposed investments should be considered as a whole, looking at the totality of the project. That is wrong. Claimants' purported investment was the Services Contract, not any other contract within the framework of the Project.
In conclusion, the Services Contract does not qualify as a covered investment under the Treaty and the ICSID Convention because there was no assumption of an investment risk, which is a quintessential characteristic of an investment, and, thus, this Tribunal lacks jurisdiction ratione materiae over the present dispute.

Let's move on to Respondent's second jurisdictional objection. Respondent has raised an objection that the Tribunal lacks jurisdiction ratione personae over the claims of Claimant FPJVC, a contractual joint venture, because FPJVC is not a juridical person and, therefore, it does not qualify as a "national of another Contracting State" under Article 25 of the ICSID Convention.

This objection is rather straightforward. In order to qualify as a "national of another Contracting State" under Article 25 of the ICSID Convention, a claimant needs to be a natural or a juridical person.

According to Professor Schreuer, legal personality is a requirement for the application of
Article 25(2)(b), and a mere association of individuals or of juridical persons does not qualify as a juridical person under the ICSID Convention.

Several ICSID tribunals have held that unincorporated joint ventures are not juridical persons because they lack legal personality. In *Impregilo v. Pakistan*, the tribunal reasoned that the claimant, a contractual joint venture, was not a juridical person and had "no separate legal personality" because it was "nothing more than a contractual relationship between different entities," holding that it had no jurisdiction ratione personae, because the claimant failed to meet the requirements of Article 25 of the ICSID Convention.

Foster Wheeler and Process Consultants expressly agreed in the Joint Venture Agreement they executed that FPJVC would be an unincorporated entity. Under New York law, the law under which Claimant FPJVC was formed, a contractual joint venture is recognized as a partnership for a limited purpose and, therefore, does not have a legal personality separate and independent from that of its members, Foster Wheeler
Because FPJVC is not a juridical person under New York law, it is also not a "national of another Contracting State" under Article 25 of the ICSID Convention.

In their Rejoinder, Claimants insist that the Tribunal does have jurisdiction ratione personae over FPJVC, raising three arguments, all flawed.

First, Claimants argue that the Tribunal has jurisdiction because the Treaty expressly references joint ventures within the definition of an "investor of a party."

However, under the double-barrel test, an ICSID Tribunal must be satisfied that a claimant meets both the criteria set forth in the relevant treaty and the ICSID Convention in order to exercise jurisdiction.

Claimants draw the Tribunal's attention to the Treaty but ignore the ICSID Convention altogether, ignoring the multitude of ICSID cases recognizing the existence of the double-barrel test.

The issue here is not whether FPJVC is an
investor within the meaning of the Treaty, but whether it qualifies as a "national of another Contracting State" for purposes of Article 25 of the ICSID Convention.

As Professor Schreuer stated in his well-known treatise, some bilateral investment treaties include associations without legal personality in their definitions of investor. But for purposes of the ICSID Convention, the quality of legal personality is inherent in the concept of juridical person and is part of the objective requirements for jurisdiction of ICSID.

Second, Claimants allege that contractual joint ventures qualify as juridical persons under New York law. That is simply wrong. Both Parties agree that New York law governs this question and that under New York law, a contractual joint venture is treated as a partnership for limited purposes. However, the Parties disagree on whether a partnership is a juridical person under New York law.

Respondent has shown that, under New York law, a partnership is not a juridical person because
it does not have a legal personality separate and
independent from that of its members.

Claimants argue that a partnership is a
juridical person because it can sue and be sued in its
own name, hold property, and hold a nationality.

Claimants are wrong in all three respects.

The New York Court of Appeals, the highest
court in the State of New York, has stated that
although persons conducting a business as a
partnership may be sued in the partnership name,
unlike a corporation, a partnership is not a separate
entity.

Claimants' own legal authority confirms
this. And while partnerships can hold property in
their name, the members of the partnership maintain a
direct interest in that property, which goes to show
that the partnership is not a distinct legal entity
separate from its members.

As to nationality, the Third Restatement on
Foreign Relations defeats Claimants' argument, stating
that "under common law systems a partnership is not an
entity having nationality."
Finally, Claimants contend that Colombia considered Claimant FPJVC a sufficient juridical entity capable of entering into the Services Contract. That is irrelevant to the issue of whether FPJVC is a juridical person under the ICSID Convention. In any case, as a matter of Colombian law, a joint venture, or "consorcio" in Spanish, has the capacity to enter into contracts with public entities but is not a legal person.

In short, Claimant FPJVC is merely a contractual joint venture which does not have legal personality separate and independent from that of its members. Because it is not a juridical person under New York law, FPJVC does not qualify as a "national of another Contracting State" under Article 25 of the ICSID Convention, and so this Tribunal does not have jurisdiction ratione personae over the claims of that Claimant.

Colombia's third objection is that the Tribunal lacks jurisdiction ratione voluntatis over the claims of Claimants Foster Wheeler and Process Consultants because they did not send a notice of
intent before initiating this arbitration, as expressly required by the Treaty.

Article 10.17 of the Treaty provides that "[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this [Treaty]," while Article 10.16.2 provides that "[a]t least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration."

Delivery of a notice of intent by the claimant is, thus, a precondition to the respondent State's consent to international arbitration. Note that the text of Article 10.16.2 refers to "a claimant", in the singular, signaling that each and every claimant must deliver a Notice of Intent before submitting a claim to arbitration.

The United States agrees with this interpretation. In its non-disputing party submission in this case, the U.S. stated that "[p]ursuant to Article 10.17, the Parties to the Treaty did not provide unconditional consent to arbitration under any
and all circumstances”, and that “[a] disputing investor that does not deliver a notice of intent [...] fails to engage the respondent's consent to arbitrate.”

Very well. Of the three Claimants in this case, only the Joint Venture sent a Notice of Intent prior to submitting the Notice of Arbitration.

Claimants Foster Wheeler and Process Consultants did not send a Notice of Intent, which means they failed to engage Colombia's consent to arbitration under the Treaty, depriving the Tribunal of jurisdiction ratione voluntatis over their claims. Claimants argue that the Notice of Intent submitted by the Joint Venture provided notice for all three Claimants, because the Joint Venture comprises Claimants Foster Wheeler and Process Consultants.

They are wrong. The Notice of Intent only identified the Joint Venture as the investor claimant under the Treaty and was submitted by the Joint Venture on its own behalf, not on behalf of Foster Wheeler and Process Consultants.

That position is further confirmed by the
Notice of Arbitration in this case, which states that each of the Claimants qualified as a separate enterprise and investor under the Treaty, meaning that each should have notified its own intention to submit a claim to arbitration.

The fact that the joint venture is a contractual joint venture comprised by Foster Wheeler and Process Consultants is irrelevant. If the three Claimants want to submit a claim against Colombia under the Treaty, then each Claimant must comply with the requirement of Article 10.16.2. Foster Wheeler and Process Consultants cannot benefit from the Notice of Intent submitted by the Joint Venture on its own behalf.

Claimants' try to lessen the importance of the requirement in Article 10.16.2, arguing that a formal defect in the Notice of Intent is not enough to destroy jurisdiction. Claimants are wrong.

As a precondition to the State's consent to international arbitration, the delivery of a Notice of Intent is a mandatory procedural requirement, the non-compliance of which "a tribunal cannot simply
Several investment tribunals have held that pre-conditions and formalities, such as the Notice of Intent, required under Article 10.16.2 of the Treaty, are not "merely procedural niceties," but perform a substantial function.

These tribunals have noted that such pre-conditions constitute "a fundamental requirement that a Claimant must comply with compulsorily, before submitting a request for arbitration," and that their omission "constitutes a grave noncompliance" that prevents a Tribunal from exercising jurisdiction.

Notably, Claimants' position here is completely at odds with the position that their Counsel put forth in an investment arbitration where they acted on behalf of Mexico.

In that case, Pillsbury argued that the failure by a claimant to comply with the requirement to deliver a Notice of Intent under NAFTA, which is virtually identical to the requirement under this Treaty, meant that the submission was null ab initio and that, therefore, there was no consent under NAFTA.
Claimants also attempt to minimize their non-compliance with Article 10.16.2, by arguing that Colombia suffered no prejudice as a result of Claimants Foster Wheeler and Process Consultants' failure to deliver a Notice of Intent. Whether Respondent suffer or not a prejudice is beside the point. A claimant must comply with any and all formal requirements and pre-conditions to "perfect" the respondent's State consent to arbitration.

Those pre-conditions have been included in investment treaties for good reason and constitute an important safeguard, especially because we're dealing here with a waiver of the State's sovereignty.

Claimants' attempt to shift the burden of proof to Respondent should fail. There's nothing that Colombia needs to prove. The Treaty is clear as to the requirements to State consent to arbitration, and it's for Claimants to comply with those requirements.

Finally, Claimants contend that Colombia contradicts itself by arguing at the same time that the Joint Venture is not a juridical person separate from its members, and that the Joint Venture delivered
the Notice of Intent on its own behalf.

There is no such contradiction. Those are two separate and distinct issues. Each individual Claimant, including the Joint Venture, must qualify as a "national of another Contracting State" under Article 25 of the ICSID Convention, and each individual Claimant, including Foster Wheeler and Process Consultants, has to comply with the compulsory requirement in Article 10.16.2 of the Treaty of delivering a Notice of Intent.

It is Claimants' position that it's patently contradictory. Claimants say that the Joint Venture is an investor under the Treaty, that is advancing a claim on its own behalf, but they argue that Foster Wheeler and Process Consultants should benefit from the Notice of Intent sent by the Joint Venture because they are members of that joint venture.

Claimants cannot have it both ways. In conclusion, the Tribunal lacks jurisdiction ratione voluntatis over the claims of the two Claimants, Foster Wheeler and Process Consultants, due to the failure to deliver a Notice of Intent prior to
submitting their Notice of Arbitration in this case.

Colombia's fourth objection is that this Tribunal lacks jurisdiction over Claimants' claims for breach of FET because Claimants elected to submit their FET claim to Colombian courts when they initiated an acción de tutela alleging such breach.

Paragraph 1 of Annex 10-G of the Treaty states that if an investor of the United States has "alleged" a breach of an obligation under Section A in proceedings before a court or administrative tribunal of Colombia, then such U.S. investor may not "submit" that claim to arbitration under the Treaty.

Notice the verb usage. If the claimant has "alleged" a particular claim of breach before Colombian courts, it cannot "submit" that claim to arbitration.

The ordinary meaning of the word "allege"--in Spanish "alegar"--is clear and leaves no room for ambiguity. The specific terms used in this provision were chosen carefully and are not a mere drafting error. That's evident when one compares Annex 10-G with Article 10.18.4 of the Treaty.
The electa una via provision contained in that Article, which applies to breaches of investment authorizations and investment agreements, uses the verb "submit," while Annex 10-G—which only applies to U.S. investors with respect to breaches of the substantive obligations--uses the verb "alleged."

This difference between the two electa una via provisions can also be found in other treaties entered by the United States, such as the Trade Promotion Agreement with Chile, the CAFTA-DR, and the Uruguay-U.S. BIT.

In this case, it is undisputed that Foster Wheeler and Process Consultants alleged a violation of the Treaty's FET provision in the Acción de Tutela they initiated in 2018 before Colombian courts.

Under Annex 10-G, alleging that violation prevents them from bringing a claim for breach of FET before this Tribunal. Turning a blind eye to the text of the Treaty, Claimants argue that there are no material differences between Article 10.18.4 and Annex 10-G of the Treaty, and that Annex 10-G of the Treaty really means "submit" rather than "allege,"

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pointing to Paragraph 2 of Annex 10-G in support of
that position.

The second paragraph of Annex 10-G only
provides a clarification that the election is definite
but does not modify or override the language of the
operative part of the provision contained in the first
paragraph, which is clear and unambiguous. There is
no reason to depart from the ordinary meanings of the
terms of the provision, which says what it says, and
it says "alleged."

Claimants' interpretation is contrary to the
Vienna Convention. Not only does it ignore the
Treaty's express language but also defeats the object
and purpose of Annex 10-G, which is to avoid the
duplication of claims and proceedings.

In conclusion, since Claimants alleged a
breach of the Treaty's FET provision in Colombian
courts, that election was definite and they cannot
make the same claim before this Tribunal.

Finally, Colombia objects to the
jurisdiction ratione voluntatis of this Tribunal
because Claimants have not made a valid waiver, either
formal or material, under Article 10.18.2(b) of the Treaty.

Article 10.18.2(b) of the Treaty explicitly provides that in order to submit a claim to arbitration, the notice of arbitration must be accompanied by a written waiver "to initiate or continue before any administrative tribunal or court [...] or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach" of the Treaty.

Only a waiver pursuant to Article 10.18.2(b) of the Treaty is an effective waiver capable of perfecting the offer of consent made by the Contracting Parties. To be effective, a waiver must comply with both formal and material requirements.

As the U.S. observes in its non-disputing party submission, "[i]f all formal and material requirements under Article 10.18.2(b) are not met, the waiver is ineffective and will not engage the respondent State's consent to arbitration [and] the Tribunal's jurisdiction ab initio under the Agreement." In other words, "[a]n effective waiver is
therefore a precondition to the Parties' consent to arbitrate claims."

Let's review Claimants' formal waiver in their Notice for Arbitration. As you can see in the slide, Claimants added the text highlighted in yellow to the waiver. This waiver is without prejudice of Claimants' right to defend themselves in the fiscal liability and any related proceedings, including any appeals.

Claimants' broad reservation of rights is impermissible under the Treaty because it renders the purported waiver meaningless and ineffective. To be effective, a waiver must be explicit and categorical, leaving no doubt that Claimants will cease pursuing and will not pursue proceedings in a local forum with respect to the measures at issue in this arbitration.

In its non-disputing party submission, the United States explained that the waiver provision, which is a "no U-turn provision," requires an investor to definitely and irrevocably waive all rights to pursue claims in another forum once claims are submitted to arbitration with respect to a measure
alleged to have breached the Agreement.

Claimants are simply not allowed to qualify their waiver however they like, as they did here. The tribunal in *Renco v. Peru* explicitly stated that "waivers qualified in any way are impermissible" and that a reservation is not permitted since it "undermines the object and purpose" of the waiver provision and is "incompatible with the 'no U-turn' structure."

The U.S. has echoed this view in its submission in this case, stating that a waiver containing any conditions, qualifications, or reservations will not meet the formal requirements and will be ineffective. Leaving aside the formal requirements, Claimants have also failed to materially comply with the waiver requirement.

As the Tribunal in *Commerce Group v. El Salvador* noted, a waiver must be more than just words; it must accomplish its intended effect and assure materially that no other legal proceedings are initiated or continued. Claimants have violated the waiver four times already and they threaten with a
fifth violation.

Claimants violated the waiver twice by initiating an acción de tutela on April 23rd, 2021, and another one on April 28 of that same year. The third violation came when Claimants filed an administrative appeal against their ruling with fiscal liability, seeking to reverse it.

The fourth violation is more recent. Claimants initiated a conciliation proceeding against the CGR before the Procuraduría or PGN, while also threatening an additional violation: filing an annulment action against the fiscal liability proceeding before the courts of the administrative adjudicatory jurisdiction.

As a matter of principle, Claimants contend that reserving the right to defend themselves in the fiscal liability proceedings and other related proceedings is not contrary to the requirements of the waiver, and that the waiver requires Claimants not to act offensively but does not prevent them from mounting a defense.

Claimants are wrong on both counts.
Claimants' all too convenient interpretation empties the waiver of any practical effect. In Claimants' view, nothing bars them from continuing to file appeals and judicial remedies to reverse the ruling with fiscal liability while pursuing, at the same time, this arbitration challenging the same measure.

Simply put, Claimants are trying to get two bites at the apple. Moreover, Claimants' artificial distinction between defensive and offensive actions is nowhere to be found in the provision itself. The waiver bars Claimants from continuing any local proceedings concerning the same measures alleged to constitute a breach.

Let's be clear. To defend is to continue. Because defending continues to give impetus, or in Spanish "impulso procesal," to a proceeding that may otherwise end or wrap up.

Let's turn now to the violations of the waiver. Claimants argue that the two acciones de tutelas as well as the appeal are not violations of Article 10.18.2(b) because they fall within the scope of the carve-out set out in Article 10.18.3 of the
Treaty. But that's incorrect. Article 10.18.3 provides that a claimant may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

As the U.S. observed in its submission in this case, the exception in Article 10.18.3 applies in very narrow circumstances. It certainly doesn't apply here. None of Claimants' actions sought entering injunctive relief, and none of these actions, if successful, would have the effect of preserving Claimants' rights at stake while this arbitration is ongoing.

That is probably why Claimants initially invoked this provision in their Counter-Memorial but abandoned that argument in their Rejoinder. The conciliation request is an additional violation of the waiver. Initiating a conciliation is initiating a
dispute settlement procedure within the meaning of Article 10.18.2(b) with respect to the same measure at issue here.

In their May 9th letter, Claimants argue that the reference to dispute settlement procedures in Article 10.18.2(b) encompasses proceedings before a third party with adjudicatory power but excludes dispute settlement mechanisms before a third party without adjudicatory power, like the conciliation initiated by Claimants before the PGN. This distinction Claimants want to draw is artificial.

From a policy perspective, the point of the waiver in Article 10.18.2(b) is to prevent the Respondent from having to defend itself in different fora. The conciliation before the PGN defeats that purpose because it opens an additional dispute settlement forum, regardless of the fact that the PGN lacks adjudicatory power.

Finally, if Claimants ultimately decide to file an annulment action, they will violate the waiver for a fifth time. Quite ironically, given that this case is based on pure speculation of future breaches
and future losses, Claimants argue that Respondent cannot rely on a future event to support its claim of violation of the waiver because they haven't filed an annulment action yet.

The only reason why Colombia is mentioning a potential breach of the waiver is because if and when Claimants file their annulment action, this Hearing will be long past us, and with it Respondent's opportunity to argue before this Tribunal.

It is important to highlight at this point that the Treaty does not require Claimants to abandon all their proceedings before administrative and judicial tribunals with respect to the same measure. It only requires Claimants to do so in the event that they wish to submit a claim to arbitration.

In other words, what the Treaty's "no U-turn" structure does not allow is for Claimants to continue their proceedings in Colombia and at the same time submitting a claim to arbitration before this Tribunal, [challenging] the same measure alleged to constitute a breach.

In their pleading commenting on the U.S.
submission, Claimants tried to save their waiver by arguing that the measures [about] which they complain in the Notice of Arbitration was the Indictment Order, and that the waiver they submitted referred only to that Indictment Order.

According to their flawed logic, the tutelas, the appeal, the conciliation request, and an eventual annulment action against a ruling with fiscal liability do not violate the waiver because they do not refer to the Indictment Order but to the fiscal liability proceeding in general and to the ruling.

This is a clever argument. But the problem is that it's inconsistent with what Claimants have been arguing in this case since day one.

The measure they rally against is the fiscal liability proceeding as a whole, including the ruling. Because they clearly intend to continue with local proceedings, Claimants now argue that they retain their rights to initiate or continue proceedings that challenge the ruling with fiscal liability until that ruling itself becomes the subject of a claim under Article 10.16.
Are they telling us now that the only supposed breaches at issue in this case arise from the Indictment Order and nothing else? Because that would mean that any discussion regarding other aspects of the fiscal liability proceeding and the ruling with fiscal liability would be outside the scope of this Tribunal's jurisdiction. Ironically, this last-minute argument actually shows that Claimants know full well that they violated the waiver.

To conclude, Claimants reservation of rights is incompatible with the formal waiver requirement contained in Article 10.18.2(b) of the Treaty. Moreover, Claimants' initiation and continuation of administrative, judicial, and dispute settlement procedures in Colombia, including the recent commencement of the conciliation proceeding, is equally inconsistent with the material waiver requirement of the Treaty.

Thus, there is no consent to submit this dispute to arbitration, and the Tribunal lacks jurisdiction ratione voluntatis over Claimants' Claims.
I now turn it over to Dr. Frutos-Peterson to conclude our presentation.

DR. FRUTOS-PETERSON: Thank you, Elisa.

Dear Members of the Tribunal, as Ms. Ordoñez said during her preliminary remarks, this is a novel case for Colombia since it is the first time it raises an objection according to Article 10.20.4 of the Treaty.

But we submit to you, very respectfully, that this is a simple case because we have shown you that there is no breach, no damage—two essential requirements under the Treaty. Thus, Claimants' claim is not ripe, not at the time Claimants submitted a Notice of Arbitration, not even as of today, at this precise moment. What is more, there is no investment and there is no consent to international arbitration.

Colombia respectfully requests that you, one, uphold Respondent's preliminary objections under Article 10.20.4 of the Treaty and dismiss the claims submitted by Claimants; two, uphold Respondent's five jurisdictional objections; and, three, order Claimants to pay all costs and expenses in this arbitration,
including Respondent's attorneys' fees together with interest thereon.

This concludes, Members of the Tribunal, the presentation of Colombia. Thank you so much for your time and attention.

PRESIDENT NUNES PINTO: Thank you very much, Ms. Frutos-Peterson. We are done. You have exceeded ten minutes of your time. No?

THE SECRETARY: They have seven minutes left on the time.

PRESIDENT NUNES PINTO: Oh, really? I'm sorry.

DR. FRUTOS-PETERTON: We were counting.

PRESIDENT NUNES PINTO: Problem with my watch. My apologies.

So, now we have the break for lunch. One hour. And we will be back at 10 past 1:00. Thank you.

(Whereupon, at 12:08 p.m., the Hearing was adjourned until 1:10 p.m. the same day.)

AFTERNOON SESSION

PRESIDENT NUNES PINTO: Okay. Can we
resume? Both sides?

Okay.

So, let's get started. Now we have the
Opening Presentation of Claimants. We will go through
2:30, then we have a break around 2:30, in the
vicinity of, and then you'll have an additional
60 minutes to go.

MR. SILLS: Perfect.

PRESIDENT NUNES PINTO: Okay?

MR. SILLS: Thank you, Mr. President.

PRESIDENT NUNES PINTO: So, the floor is
yours.

OPENING STATEMENT BY COUNSEL FOR CLAIMANTS

MR. SILLS: Thank you, Mr. President.

Slide 2, please.

Is that better?

THE SECRETARY: Yes.

MR. SILLS: I was trying not to yell.

(Comments off microphone.)

MR. SILLS: Now that we've got the technical
issues out of the way.

So, thank you, Mr. President. The slide
before us describes how we will address the opening issues, addressing the case as pleaded and addressing the issues in the context of the case as pleaded.

We begin by discussing the standard of review for this proceeding, in accordance with the rules and in accordance with the agreement of the Parties.

We briefly address the question of the non-party submission of the United States. And we will address—and I'll actually ask my colleague, Mr. Conrad, to address the factual background here because that's the necessary context, and I have to say, with all respect, what we didn't hear about this morning for this case and this application.

We'll describe the violations of the TPA as pleaded, address the question of our damages, address the various jurisdictional objections that have been made, and then conclude, hopefully on time, Mr. President.

So, if we could have Slide 4, please.

Mr. Conrad will describe this in more detail, but the procedural history here, very briefly, is this. In
2009, Reficar, a wholly-owned subsidiary of Ecopetrol, which, in turn, is owned by the Ministry of Finance of the Republic of Colombia, and FPJVC, not the individual members, entered into a contract to provide specified services in connection with the upgrading and modernization of a refinery in Cartagena, Colombia.

But very shortly after that contract was entered into, Reficar, exercising its rights under an express term of that contract, radically changed the scope of the joint venture's work and, in effect, as we will describe, made FPJVC essentially a provider of personnel to what Reficar referred to as an integrated project management team and critically deprived FPJVC of any authority over the expenditure of public funds either to prevent the expenditure or to authorize the expenditure.

FPJVC completed its work under the contract. It invoiced for that work. Each of those invoices was paid by Reficar without objection. Nonetheless, the CGR then went and initiated fiscal liability proceedings against the Claimants and a host of
others, arguing that FPJVC--actually, the members of FPJVC were fiscal managers, which is a specific defined term under the Colombian statute, Law 610, that creates the CGR and under which the CGR operates. And that requires that a fiscal manager have authority, as we have repeatedly pleaded and as we have shown, over the expenditure of public funds, and that it--in order to incur liability, that it must act with, at a minimum, gross negligence. Although the claim, despite its language, essentially asserts a breach of contract at most, against--against the Claimants.

The Claimants did give notice. The record shows that Colombia ignored that notice of an intent to bring a claim, refused to engage at all.

After the cooling-off period had expired, the Claimants reached out again to Colombia, pointing out that they now were free to bring a claim but, again, inviting Colombia to meet and attempt to resolve this matter.

And this time Colombia did respond, and representatives of the Claimants, both counsel and
business personnel, traveled to Bogota and met with
ANDJE, the governmental agency represented here today
which has authority over investor-State claims in
Colombia. Those discussions were fruitless. And
after those discussions failed, this arbitration was
initiated.

Slide 5, please.

So, the TPA itself addresses the question of
preliminary questions. The language is before us.
And I don't think it's seriously disputed
that--perhaps not disputed at all, that wasn't
entirely clear to me from this morning's
presentation--that on preliminary questions, the
allegations of the Request for Arbitration are to be
taken as true and that preliminary questions are not
intended to resolve factual disputes.

They're not intended to resolve mixed
questions of fact and law, virtually all of the issues
that were highlighted this morning, or complex
questions of law. It's, in effect, intended to weed
out claims that clearly show, on their face, that they
don't come within the terms of the Treaty.
Next slide, please.

And the Tribunal will recall the discussions leading up to Procedural Order Number 1. I don't think we have to spend a great deal of time talking about who said what about this. The procedural order does speak for itself.

But this is what Colombia said about how we came to be here, and that is that the Tribunal—the only point at issue is whether the Tribunal will establish a calendar to hear solely Respondent's Article 10.20.4 objection as a preliminary matter or whether it will establish a calendar to hear both Respondent's Article 10.20.4 and Respondent's other jurisdictional and/or admissibility objections as preliminary questions.

THE TECHNICIAN: Excuse me. I'm sorry to interrupt. We can't see the slides on the screen.

MR. SILLS: Going on. Next slide, please.

As reflected in Procedural Order Number 1, that it was without prejudice to its objections to jurisdiction and/or admissibility.

On the next slide, Number 8, we highlight
the particular provisions of PO Number 1 that govern this proceeding.

And the Tribunal will recall that we had actually proposed--we, the Claimants' counsel, had proposed a jurisdictional phase in which, as in any jurisdictional phase, there would be a full development of the factual record, because jurisdiction typically turns on questions of fact or mixed questions of fact and law.

And that was actually objected to by Colombia, saying there was no need for disclosure because these would only be questions of law. And now we're told that there's a burden of proof on facts on Claimants when that is the exact opposite of what was agreed. This was going to be done as a consolidated preliminary matter addressed to questions of law raised by the RFA.

And I should say at the outset that all the cases that were referred to this morning about jurisdictional dismissals were in jurisdictional phases of cases. The Tribunal certainly knows that it's not at all uncommon in investor-State claims for
there to be a separate jurisdictional phase in advance of a hearing on the merits, and sometimes those do result in jurisdictional dismissals.

What wasn't provided, because so far as I know, it doesn't exist, is a jurisdictional dismissal in effect on briefing an oral argument addressed to a pleading, and certainly none was cited to us this morning.

So, it is true that as the Claimants, we bear the burden of proof ultimately to show jurisdiction. We don't--couldn't contradict that. But that is on a full record. The case was not bifurcated into a jurisdictional and a merits phase. The case was not trifurcated into a preliminary objections, jurisdictional, and a merits phase.

It was on the request of the Respondent, set up as preliminary questions, and if they failed on those--as they should, as they will--that there would be a merits phase, at which they will be free to raise any and all jurisdictional objections that they choose to raise.

But that will be on a full record with the
benefit of disclosure, with the benefit of witness testimony, with the benefit of a full developed record, as should be the case for any attempt to terminate a case.

Slide 10, please. And Slide 11. There we are.

So, this is the language of the Treaty regarding a hearing on preliminary questions. Claimants' factual allegations in support of any claim in the Notice of Arbitration must be assumed to be true, although we heard repeated challenges this morning to the truth of those various allegations. And I'll turn to some of those later in our presentation. But...

Next slide, please.

This is not an evidentiary hearing, although Colombia has repeatedly attempted to turn it into one. Here on Slide 12 is an example. Two examples.

"Claimants"—we—"have not proved"—proved—"that there is a lack of effective or sufficient means or remedies against the ruling with fiscal liability, or that such remedies are futile, ineffective or
improbable."

Well, that's because we haven't had a hearing yet on that. But we pleaded that because—particularly in light of the extraordinary delays, a decade or more, that plagued the Colombian judicial system. And we're not just making this up.

As the Tribunal will recall from the Hearing on Interim Measures, the former chief legal officer of the CGR provided a witness statement detailing exactly the difficulties that we would encounter in seeking relief.

But the allegation here, it's a well-founded allegation. It is either a question of fact or a mixed question of fact and law. It is not a question of law, as was asserted this morning.

Similarly, we hear that Claimants—in Paragraph 204 of the Reply that was filed by Respondent: "Claimants assert they have suffered reputational damage as a result of the alleged violations perpetrated by Colombia"—indeed we do, and indeed we did—"but they have failed to prove, even prima facie, the existence of such damage."
If this were an evidentiary hearing, we would call witnesses precisely to that effect. But that is not how this was set up. That is not how this part of the proceeding is organized. And it is inappropriate to suddenly shift gears and assert that there’s an obligation to come forward and prove these allegations on a hearing intended and designed to hear preliminary questions.

And so, on the next slide, 13, we cite from the decision in *Pac Rim v. El Salvador*, a widely cited case in which the Tribunal will recall Mr. Veeder sat as the President of the Tribunal.

And he, in turn, citing Professor Schreuer and his commentary on the ICSID Convention, states that—talking about—saying: "No proof is required at this stage. On most points, a mere assertion in the request will suffice, and the information thus given may be developed at a later stage. By assertion, the Tribunal assumes these authors to mean an appropriate statement specifying the factual and legal bases of the claim, without evidential proof."

The following slide, Number 14, discussing
CAFTA, which in this respect is materially identical to the Colombia-U.S. TPA, makes the important point, which I think has been alluded to by Colombia, that the procedure under 10.20.4 is clearly intended to avoid the time and cost of a trial and not to replicate it.

"There can be no evidence from the Respondent contradicting the assumed facts alleged in the Notice of Arbitration, and it should not ordinarily be necessary to address at length complex issues of law, still less legal issues dependent on complex questions of fact, or mixed questions of fact and law."

But that sort of mini trial in advance of the development of the record is precisely what Colombia is attempting to create here.

From the Kappes case in the next slide, cited this morning by Colombia, it makes it clear that if there were any deficiencies identified, we can, in fact, clarify and submit them. And I should say at the outset, you know, as the case goes forward, we will, of course, amend it because there is now an award of the Tribunal, which we were told at the
hearing on interim measures they intend to enforce and are making efforts to enforce, depending on the exchange rate in effect, somewhere between USD 750 million and USD 900 million. So, of course, we will address that as the case moves forward.

But the point here is that by making this application on preliminary questions, Colombia, in effect, froze the case in time because that application, as we were told this morning, properly so, is addressed to the RFA as pleaded. And that will withstand this application, as we will show.

But that doesn't mean that that is the case that will ultimately be heard by the Tribunal. Everybody knows that as circumstances develop, cases change, claims are amended, supplemented. And, obviously, it's a very significant development.

And I should say at the outset there was a lot of discussion about how this is something—somehow a moving target, and there was a quote put on the screen, and that the measure being challenged was the CGR Decision in response to a question asked by the Tribunal at the Interim Measures Hearing.
Well, that was at the Interim Measures Hearing. And the question was what measure were we challenging there. The question—and I answered it, at least as I understood it and as the record shows was the case in context, was not what is the measure being challenged in the RFA.

There's no contradiction there. The case is not a moving target. The case is as pleaded, and it's as pleaded precisely because Colombia chose to make this application prematurely.

If they wanted to raise these questions, which are questions of fact or mixed questions of fact and law, they should have done it in an appropriate way, either seeking a separate jurisdictional phase, which they expressly disclaimed in the negotiations leading up to—or the discussions leading up to the issuance of PO Number 1, or applied for that. By agreeing to treat everything, in their words, as preliminary questions—whether they are preliminary questions within the meaning of the Treaty or could otherwise be considered on a factual record—the decision was made to put them in that particular
procedural context governed by PO Number 1, and they should be held to the bargain that they made.

And along those lines, again, as Pac Rim makes clear in Slide 16 and 17—if we could have—oh, we do have them up.

The Tribunal should not take a formalistic view of a pleading. This isn't some 18th century common law court where exact wording is the sine qua non of jurisdiction or on the merits. Particularly in considering preliminary objections, it is not appropriate to take a strictly formal and formalistic view.

So, as Slide 18 makes clear, the burden of proof—the Respondent attempts to place the burden of proof at this stage of the case on Claimants, but they're conflating the ultimate burden of proof in the case, which we don't dispute rests on the Claimants. The Claimants, as Claimants, must prove each and every element of their claim.

Could we have Slide 19, please.

So, 17, 18, and 19 consist of quotes from the papers submitted by Colombia, all attempting to
raise factual issues, all suggesting that there's a
burden of proof on the facts at this stage in the case
upon Claimants.

That's not the law. It's not Procedural
Order Number 1. And it would be, I have to say, a
miscarriage of justice to suddenly switch ground at
this point in these proceedings and assert that
Claimants bear some kind of burden, let alone the
final and ultimate burden of proof on these factual
issues.

If we could have Slide 21, please.

This is a quote from the Pac Rim decision
making it clear that the burden of proof at this stage
of the proceedings rests on the Respondent to show
clearly and convincingly, to a certainty in the words
of some tribunals, that there is no case. And that
they cannot show.

We also refer to Bridgestone v. Panama where
the Tribunal stated: "At all times during the
exercise under CAFTA Articles 10.20.4 and 10.20.5, the
burden of persuading the Tribunal to grant the
preliminary objection must rest on the party making
that objection."

And indeed, in our field, in international arbitration, the burden of proof is always on the party asserting a fact, a claim, or a defense. And that is Colombia at this stage.

If we could have Slide 22, please.

Specifically with respect to the burden of proof on jurisdictional objections about which we heard so much this morning, Colombia cites a line of cases. But all of those cases arose in the context of decisions on jurisdiction in the jurisdictional phase of the case, not on preliminary questions, whether under Article 10.20.4 or under ICSID Rule 41.

And as I've already noted, that is not the position that Colombia took in the discussions leading up to Procedural Order Number 1, and it is certainly--had it been the position, we would have objected as strenuously as possible to having a hearing on the merits, some sort of mini trial or preliminary trial before the record was developed.

Could we have Slide 23, please.

And this, again, is from the Respondent's
saying: "It is worth noting that Respondent's position is that document production"--which, of course, would be necessary to a hearing on the merits, on the facts--"will not be required during the preliminary phase because the issues discussed will turn mostly to legal questions."

And if we could have Slide 24, please.

This is how the Tribunal resolved that issue and ordered that the case proceed, and those are the paragraphs that bring us here today.

And if we could have Slide 26.

It's, again, from two decisions, RSM vs. Granada and, again, the Pac Rim decision, both by distinguished tribunals. Under ICSID Rule 41(5), an alternative source--it's already here--a tribunal should only dismiss if it finds that the claimants are certain to fail.

ARBITRATOR BEECHEY: Mr. Sills, for the record, you said Slide 26. You mean 25, don't you?

MR. SILLS: I did. Thank you. Thank you, Mr. Beechey. I'm getting ahead of myself.

ARBITRATOR BEECHEY: Don't worry. I'm
MR. SILLS: Let me turn very briefly to the question of the non-disputing party submission about which we heard so much this morning.

First, as it always does when it makes a non-disputing party submission, the United States expressly disclaimed expressing a view on the merits of the case. And it is concerned largely with theoretical and somewhat abstract questions of law, largely referring to the Treaty itself and to the views of the United States on that Treaty.

But if we could have Slide 28, please.

Colombia takes the view that this non-disputing party submission is arguably more important than other arbitral decisions or jurisprudence and actually claims that it represents subsequent agreement or subsequent practice under Article 31 of the Vienna Convention.

This morning's transcript shows that that non-disputing party submission shows, quoting from the transcript, "the highest possible degree of agreement."
One would think that the highest degree of agreement would be an amendment to the Treaty. But the position that Colombia advances here, that the U.S. submission is binding authority here, has been rejected repeatedly by ICSID and other tribunals hearing investor claims.

If we could have Slide 30, please.

This is a quote from the decision of the Tribunal in Telefónica v. Argentina. They are—these non-disputing party submission are not evidence of subsequent agreement. They don't evidence subsequent practice.

They can't be evidence of subsequent agreement because non-party submissions are a unilateral act. A subsequent agreement requires the parties to come to an agreement in a single common act, an amendment to the treaty, for example.

And the interpretation being offered this morning would simply blur the distinction under the Vienna Convention under Articles 31(3)(a) and 31(3)(b) of the Convention, and no case has been cited endorsing the notion that a non-party submission
constitutes a subsequent agreement. They're also not evidence of subsequent practice, because subsequent practice depends not on a single instance but on whether and how it's repeated. And a single instance of common conduct, even if a non-disputing party submission was such evidence, is not dispositive for treaty interpretation, although it is asserted to be.

But I think more important, this is an amicus submission. It's an amicus submission that's entitled to the weight that its logic and reasoning and authority cited carries. And it's for the Tribunal to decide how much weight to give to a non-disputing party submission.

It is not true that simply by filing a statement on an amicus basis to which another party will agree that it suddenly becomes a binding agreement. There is no authority for that. The Vienna Convention, after all, says only that the tribunal should take into account a non-disputing party submission, not that its hands are tied or that it's somehow bound.
Now, some treaties do have a mechanism for the State Parties to the treaty--NAFTA, in its original form, for example, set up a mechanism where the parties, through a formal procedure, could agree on a binding interpretation. But that's simply absent here.

And I have to say, with respect to the United States, the submission made here consists largely of a series of ipse dixits, assertions about the law without reference to the decided cases, without reference, for the most part, to significant jurisprudence, and taking a view that the United States, for its own reasons--and as we suggest as a State party, the U.S. has an interest, it's not purely a disinterested party--would take.

But it's for the Tribunal. As all the tribunals cited in our papers and in these slides have dealt with non-disputing party submissions, not only by the United States but by other State parties and, for that matter, private parties.

Those submissions get the weight they deserve. And it's for the Tribunal, exercising its
discretion and weighing those submissions against the body of decided cases and against the jurisprudence that everyone follows, to decide whether to give any weight to that submission and, if so, how much weight to give to that submission.

So, with that—and I do note, finally, Colombia relied heavily this morning—relied heavily on its papers on non-disputing party submissions, but it's a closed loop. And they are presumably relying on those because they cannot find decided authority in their favor, because they cannot find jurisprudence supporting their positions.

But those are amicus submissions. And as I say, they are—they have the weight that they deserve, and it's for this Tribunal to decide how much weight to give that submission in this case, as will become clear in a moment from Mr. Conrad's presentation.

To the extent that there are assumed facts underlying the submission of the United States, they are based on an incorrect reading of the record here. And, in particular, the statements of the United States regarding the burden of proof took no account
of the procedural order that actually governs here, or
the discussions leading up to it, and simply relied on
abstract statements about who bears the ultimate
burden of proof on jurisdictional issues, a point that
I don't believe is actually in dispute here.

With that, I'll ask Mr. Conrad to describe
the factual background of the dispute.

MR. CONRAD: Thank you, Mr. Sills, Members
of the Tribunal, opposing counsel.

I wanted to start out with a slide here that
goes through kind of some of the chronology of
Claimants' investment in Colombia.

This began in 1975 when Claimants started
first beginning--began investing in Colombia. Over
those years, almost 30 years--it wasn't until 2004
when Ecopetrol began planning this megaproject known
as the expansion and revamp of the Cartagena Refinery
in 2004.

Subsequently, in 2007, Ecopetrol, which
Mr. Sills stated earlier, 100 percent owns an entity
called "Reficar." And it created Reficar in 2007 for
this very purpose, to own this refinery and
subsequently operate this refinery.

Ecopetrol is owned by Colombia of 88 percent--it's majority owned, 88 percent, and that--those shares are actually owned by the Ministry of Finance of Colombia.

Colombia also owns all the hydrocarbons which are managed by the National Hydrocarbons Agency, and Ecopetrol and Reficar carry out many of the National Hydrocarbons Agency's duties.

In 2009, Reficar entered into a contract, which we heard about this morning from Colombia's counsel, which I will go into a little bit more detail here during this factual background section--but entered into a contract called "The Project Management Consultancy Agreement or Contract" or the "PMC Agreement."

This Contract specifically contemplated project management services for the construction of a megaproject refinery. I mean, this was a multi-billion-dollar project upon which Ecopetrol, through its wholly owned subsidiary, Reficar, contracted with Foster Wheeler to provide these
project management services related to this construction megaproject.

In that agreement, it contemplated delegation of authority. Essentially what was contemplated by the agreement, as it was signed and executed back in November of 2009--there was an appendix to that agreement that outlined all of the specific obligations, contractually, that Reficar expected Foster Wheeler to perform.

Many of those agreements--many of those duties within that agreement contemplated that Foster Wheeler would effectively serve as the owner's representative, be the face of Reficar vis-à-vis Chicago Bridge & Iron, who had been selected as the engineering, procurement, and construction contractor or, in other words, the general contractor.

But it was contemplated that Reficar would hire a PMC. And a PMC is not unusual in megaprojects such as this one, as far as the setup.

From 2009, again November, when the PMC Contract was first signed, that agreement lasted for the better part of almost a decade. It went from 2009
until the end of 2018. It was a long-term agreement upon which Foster Wheeler was performing services.

Next slide, please.

And in our Request for Arbitration, which is excerpted here on Slide 33, there were--it specifically refers to additional investments that Claimants made in Colombia and wasn't limited just to performing this long-term Construction Project Management Services Contract on behalf of Reficar. It also incorporated or included specifically investing significant amounts of time, capital, personnel, and labor in the Colombian territory.

And in that regard--as we all know, there are two entities that comprised the contractual joint venture Amec Foster Wheeler USA and also Process Consultants, Inc. Process Consultants, Inc., formed a local Colombian branch called PCIB which performed the local work, performed the local labor. Amec Foster Wheeler performed the offshore work.

So there was--and Claimants have pled that there was significant amount of investment locally in order to perform that work; not just the work that was
contemplated within the Contract but, also, in order to do that work, they expended significant time, significant capital, hired personnel, and paid taxes in Colombia.

Before I turn to the next slide, Tribunal, the next slide contains confidential information. I just wanted to advise the Tribunal.

THE SECRETARY: If you can give us one minute.

MR. CONRAD: Of course.

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

THE SECRETARY: Okay.

MR. CONRAD: Thank you, Mr. President. May I proceed?

Thanks for that time allowing me to collect my thoughts before proceeding to the next phase here. So, on Slide Number 34, this contains confidential information because it is portions of the PMC Contract’s material terms. Contrary to some of the statements made by the Respondent this morning, there was investment risk, there was material risk that was specifically outlined in the PMC Contract. Profit was not guaranteed. Reficar could require FPJVC, who was the signatory on behalf of the Claimants here to this Contract, to re-perform its work at its own expense, to impose penalties. We’ve cited sections here specifically regarding the PMC Contract, Sections 5.4, 5.8, 5.9, 18.1. I mean, what’s really important here is that these penalties could say that they would have to return the work, return monies that were paid, and that was not guaranteed, contrary to the assertions...
earlier this morning. Additionally, certain expenses were not necessarily to be reimbursed. And those are outlined also here on Slide 34, 13.2, 13.4, 15.1, and 15.2. Lastly, this slide also describes the contractual bonus structure, which was incentive, you know, based on performance. You know, if Foster Wheeler met certain milestones within the Contract—again, not too different—then a typical construction management agreement, which is what this Contract was—it included these types of upside bonuses of up to a maximum of 2 percent of the estimated value of the legal business there on line 5, as just one example, among others, that are listed on Slide 34. So, these were typical terms that included investment risk. The entirety of the Contract was not guaranteed as Colombia misstated earlier this morning. May I move to the next slide, please. Slide 35. The next slide here is an excerpt. Again, we're finished with the confidential part of the discussion here. I'm sorry if this is going to take a few minutes before I proceed. I just
wanted to make sure I didn’t go too far and not have 1
the State Department on the line.

PRESIDENT NUNES PINTO: I would like to ask 2
you something. Do you expect to have more cases 3
during your presentation that you require our 4
disconnecting for confidential purposes?

MR. CONRAD: Actually, let me--we have one 5
other point in time later, but I can--I’m happy to 6
address that now so we do not have to do that again, 7
if that makes sense.

PRESIDENT NUNES PINTO: Yes. It’s up to 8
you. I do not want to disturb the structure of your 9
presentation.

MR. CONRAD: Sure. I think we can address 10
it this way. If we’re still in the confidential 11
portion, then I’ll proceed with it.

Really, the confidential portion that we 12
were mentioning, and I believe Colombia already 13
mentioned it, was the 10 percent cap specifically as 14
far as limitation of liability that was contemplated 15
and bargained for between Reficar and Colombia.

I mean, it’s our position, which we will
state here later—but, in essence, is that this entire proceeding by the Contraloría on a fiscal liability basis, just as an end round, 100 percent of the contractual bargained-for terms that the Claimants agreed to with Reficar.

And so, it was just the material terms of the 10 percent cap that we— I think they discussed them earlier, but since it is a specific term of the Contract and the Contract terms are confidential, we wanted to keep it that way.

PRESIDENT NUNES PINTO: Okay.

So...

MR. CONRAD: Yes, we can move on to Slide Number 5.

PRESIDENT NUNES PINTO: So can move out of confidential.

MR. CONRAD: Yes. Yes, Mr. President.

(Attorneys' Eyes Only session ends at 2:00 p.m.)
OPEN SESSION

(Pause in the proceedings.)

THE SECRETARY: Okay. We can proceed.

MR. CONRAD: Thank you, Madam Secretary.

The next slide is just an excerpt of one section of the PMC Contract that specifically contemplates that Reficar here this last--or the second paragraph that's excerpted here says that Reficar may make the decision at anytime whether to continue or not all or any part of the services included in the offer.

Next slide, please.

As I stated earlier in November of 2009, this Contract, as written and as contemplated by the Claimants here who signed it and agreed to perform it as written originally, changed almost within 30 days of after signing it.

At the first kick-off meeting between Reficar and FPJVC, Reficar informed FPJVC that they were no longer going to be serving the role as a traditional PMC. Instead, Reficar decided to create what's called--what they called an "Integrated Project
Management Team." But really, in reality, it was really just Reficar's project management team with Foster Wheeler providing support.

On Slide 36 here is an excerpt from the Jacobs Report. Jacobs is Jacobs Consultancy. It's a well-known EPC contractor very similar to Foster Wheeler, very similar to CB&I. It's a competitor to both of those companies.

Jacobs was retained by Ecopetrol to serve as its, basically, eyes and ears to report to Ecopetrol, who was the 100 percent owner of Reficar, to basically audit and supervise and check in and report to Ecopetrol about the project's status.

In October of 2015, well after the project had been, you know, started in 2010, basically at the time of the project's construction completion but prior to the pre-commissioning and start-up of the refinery, Jacobs issues a report to Ecopetrol. This is what's shown here.

And specifically in Paragraph 1, Jacobs found that "in an integrated project management team, PMT--the authority and responsibility for
decision-making must be delegated in specific
positions within the organization, and these positions
should not be duplicated.

This was not so in the Reficar project, and
all of the decisions had to be made by only Reficar
managers. [Foster Wheeler]'s team had no authority
and became only additional personnel in Reficar's
team, and many of the management functions were
duplicated.

Without having any authority, [Foster
Wheeler]'s personnel could only make suggestions and
provide tools for project management." "All of the
decisions had to be made by Reficar's managers."
Despite having received, or this report been issued in
October of 2015, the Comptroller General, who is the
most senior person within the Contraloría, orders a
special audit in December of 2015, just a few months
later. After that, in May, shockingly, the
Comptroller General makes public statements about
Foster Wheeler's management control was, quote,
shameful and embarrassing.

Thereafter, the final report on the special
audit was issued in November of 2016. And then on March 10th, 2017, the CGR commences its fiscal liability proceedings based on Law 610.

In this opening resolution, which is March 10 on Page 37 before I move to Page 38, notably the CGR—and I don't think that Colombia mentioned this in their proceeding—their discussion earlier. They did not charge Ecopetrol. They did not charge Reficar. Who did they charge? They charged certain officers and directors of Reficar. They charged—excuse me. They opened an investigation with respect to the directors and officers of Reficar and the directors of Ecopetrol along with Foster Wheeler and CB&I and several insurance companies.

Next slide on 38.

On February 2018, Claimants Foster Wheeler USA and PCI submitted in English—the translation is free versions. What were these free versions? These were opportunities for the Claimants to explain to the CGR that there is no liability here. We are not fiscal managers.

Claimants attached the Ecopetrol Jacobs...
Report as evidence to the fiscally— to the Contraloría, along with other evidence that the Claimant submitted to the Contraloría.

Despite that fact, on June 5th, Auto 773, the charging document or, as Colombia stated in its papers, the Indictment Order was issued. So despite having all of that evidence and proof conclusively showing that neither the Claimants or none of the Claimants were fiscal managers, they charged them. In that same document, they charged them with $2.43 billion worth of damages.

The entirety of the amount earned, gross revenue, was just shy of $270 million. This project cost total over $8 billion. But the charge here was a multiple of almost ten times what Claimants had been paid on this Contract at the time of June 5th, 2018.

In this same document, Auto 773, the Contraloría also dismissed charges against the Ecopetrol Board members, finding that they didn't have ultimate decision-making authority. They were not fiscal managers, which is exactly the same argument that the Claimants have presented to the Contraloría.
in its free version and that the Colombian Government, through Ecopetrol, had within the Jacobs Report of October of 2015.

That decision to the final—memorializing that dismissal of the Ecopetrol Board members was made on August 5, 2018, as shown here on Slide 38 and Auto 188.

Thereafter, the Claimants filed a tutela with—seeking, basically, whatever they could to try to get—seek dismissal of the Contraloría's proceeding asserting violations of Colombian law only, and it was dismissed thereafter. Claimants submitted their Notice of Intent in December of 2018. And as Mr. Sills stated earlier, between the submitting—the submittal of the Notice of Intent, there were meetings taking place where Claimants sought to potentially resolve pursuant to that notice and the cooling-off period.

Those discussions were unsuccessful and Claimants filed their Request for Arbitration in December of 2019.

The last few slides here are subsequent to
the Request for Arbitration filing, but they deal with the ongoing defense that are related to Claimants in a proceeding that they didn't begin. It's a proceeding--the Contraloría's Fiscal Liability Proceeding, to be clear, was instituted by the Colombian Government, specifically the Contraloría. This was not a proceeding that the Claimants instituted on their own.

These actions of the tutela were limited to technical issues related to that defense seeking the right to cross-examine technical experts on the first occasion; and the other one, seeking additional time to file their responsive or motion to reconsider of this internal appeal within the CGR. All--again, no external proceedings. No commencement of any new proceedings.

And then ultimately on April 26 of 2021, the CGR issues its decision finding Claimants, along with others except for the Ecopetrol Board members who had been dismissed, jointly and severally liable for, at then, $811 million based on the rate of exchange. And then subsequently on July 6, 2021, the CGR Decision
Where are we now? Just most recently after our Provisional Measures Hearing back in November, Colombia has begun its collection efforts. The collection proceeding is now commenced. We received notice of a persuasive collection. As Colombia mentioned earlier, that's an opportunity for the Claimants to voluntarily make a payment. And then after that, as we described at the Provisional Measures Application Hearing, there will be a forced collection proceeding commencing now.

And so, this concludes the section on the factual background. I'll now turn it back to my colleague, Mr. Sills, to discuss Respondent's prima facie violations objections as preliminary questions to the TPA. Thank you.

MR. SILLS: Thank you. If we could have Slide 42.

These are the five claims pleaded to date in the RFA. And I'm going to go briefly through them in turn, beginning with the violation of Article 10.5 of the Treaty, the minimum standard of treatment.
Slide 44, please.

Slide 44 requires Colombia to provide Claimants with fair and equitable treatment. That specifically includes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment. And it goes on, of course, to provide in Paragraph 2 that FET includes the obligation not to deny justice in civil, criminal, or administrative adjudicatory proceedings, and then makes itself subject to Annex 10-A.

Slide 45, please.

Annex 10-A states that the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Slide 46, please.

The RFA pleads at least six particular grounds who are concluding that the treatment of Claimants fell below the minimum standard of treatment.

Those are, first, that the CGR concluded,
without any possible basis, that Claimants were fiscal
managers and asserted jurisdiction in the fiscal
liability proceeding on the grounds that they were, in
fact, fiscal managers who would engage in gross
negligence.

Although, as we have pleaded, as Mr. Conrad
has just described, very early in the process, Foster
Wheeler, the joint venture, had been reduced to
providing personnel to Reficar, which determined to
manage its own project. And that joint venture had no
authority over the expenditure of funds, no ability to
stop the expenditure of public funds, and could not
possibly have acted with gross negligence.

Second, the CGR failed to articulate or give
proper notice of viable theories of liability,
causation, and damages. It was simply asserted in
this enormously long charging document that all
respondents were jointly and severally liable for all
damages. The damages, essentially, the difference
between the bid price as estimated by Chicago Bridge &
Iron, not by FPJVC, and the amounts that were
ultimately incurred in order to complete the project.
Those damages not only were joint and several, but they were grossly disproportionate to Claimants' alleged harm, and there was no attempt to establish a causal link between any wrongful act of FPJVC or, for that matter, other defendants, and any damages alleged to have resulted.

And, of course, the Tribunal will recall that in the Glencore case, an irrational damage theory adopted by the CGR was the basis for liability found by the tribunal in that case. And Colombia also took, through other agencies of the Colombian Government, conflicting positions on this.

The Jacobs Report was specifically endorsed by the PGN, and that is the Jacobs Report as commissioned by Ecopetrol, the owner of Reficar, the owner of the project. We pled that we were not afforded an adequate opportunity to defend ourselves. And, as Mr. Conrad just described, the CGR, supposedly a neutral decision-maker of the Colombian Government, repeatedly made inflammatory statements impugning the integrity of the Claimants here, asserting that their fiscal management, which didn't exist, was
embarrassing or shameful, publicizing, waging a campaign in the press against the Claimants and resulting, as we plead, in reputational harm.

If we could have Slide 47, please.

This slide puts up in graphic form Colombia's objections regarding the FET claim. And as we'll show in a moment, putting to one side that they're entirely unfounded, they're certainly not appropriate for consideration as preliminary objections.

As I was describing before, preliminary objections deal with straightforward legal questions so that the Tribunal doesn't have to make factual determinations or resolve complex issues of law.

Here, Colombia raises questions about the content of the FET standard. In fact, this morning I believe they made an attempt to resurrect the Neer standard of 1923 as to the minimum standard of treatment. And, thankfully, the minimum standard of treatment has evolved well beyond that.

Mixed questions of law and fact. Choose only one of many examples whether Claimants have
adequately exhausted local remedies on the denial of
justice claim or, for that matter, whether there is a
meaningful and effective remedy at all.

But to the extent the Tribunal—and these
should not be addressed on preliminary questions
because it's simply inappropriate in the procedural
posture, which the case is in now, to resolve those
questions, even to address them. But to the extent
the Tribunal does decide to address any of them,
Colombia is wrong on the law.

Slide 48, please.

The first of the objections Colombia has
raised that I want to address is the notion that the
Treaty protects investments but not investors. Now,
as the quoted language on Page—I'm sorry—on Slide 48
makes clear, the FET provision states that—it means
the customary international law minimum standard of
treatment of aliens as the minimum standard of
treatment.

Aliens are investors. Aliens are not
investments. And there is no way to construe the term
"investments" to include the term "aliens."
Similarly, Annex 10-A, which is a part of the FET standard, as it's defined by the Treaty, states that it refers to all customary international law principles that protect the economic rights and interests of aliens.

Slide 49, please.

This is an extract from the Decision in Lion v. Mexico. We've heard a great deal this morning about Lion v. Mexico because a colleague of mine, not a member of the team on this case, was counsel for Mexico in that case.

And the case under NAFTA is distinguishable in many ways. But something we didn't hear this morning is that the positions being ascribed to our firm were rejected by the Tribunal in that case. And I understand why an attempt was being made to suggest that we were taking contrary positions. But it's parties that take positions, not law firms. And the fact of the matter is the NAFTA Tribunal in Lions specifically rejected the argument that investors were not protected by, essentially, similar language in NAFTA. The language is here on Slide 49.
But this is not an anomaly. Other NAFTA tribunals have rejected this precise argument and are cited in our Rejoinder, Paragraph 72, that include GAMI v. Mexico, Chemturra v. Canada, Merrill & Ring v. Canada, and S.D. Myers v. Canada, each of which rejected this argument.

And there is no case, of which I'm aware and no case that's been cited, where an FET--where a claim was rejected based on the notion that the Treaty protects--the Treaty in question protected only investments and not investors.

I have to say it seems like a somewhat artificial distinction in any event. It's, after all, investors who make investments. And the notion that [investments] are protected but not the investors who make those investments, I've always found difficult to follow. Nonetheless, these other tribunals have rejected that claim as well.

Could we have Slide 50, please.

Here on Slide 50 is a quote from the Decision in Bahgat v. Egypt. And the Tribunal did describe why they were rejecting this argument,
saying: "Measures against an investor or the management"—or "measures deteriorating circumstances"—sorry.

ARBITRATOR BEECHEY: You're reading it right. It's rather strange English, but you're reading it right.

MR. SILLS: That's what gave me pause there, Mr. Beechey.

"Which were favorable for the investment, may equally have a negative impact upon the investment. It would reduce the effectiveness of the system of investment protection system if it would only prohibit limitations to the flow of capital or infringements of property."

It probably read better in the original.

Turning next to the question of the substantive standard itself. There was reference again this morning to Neer. I don't think we need to spend a lot of time on this. I think it's common ground or, at the very least, should be common ground that ever since the Neer case, which was decided just under a hundred years ago, and involved, as I recall,
the failure to initiate criminal proceedings involving a murder in Mexico--the standard of treatment to be afforded in international law has evolved well past that, in particular through a very dense network of investment treaties, bilateral and multi-lateral, that have come into being since then.

For example, in the Azurix case, cited on Slide 51 here, the minimum requirement to satisfy the standard has evolved, and the Tribunal considers that its content is substantially similar, whether the terms are interpreted in their ordinary meaning as required by the Vienna Convention or in accordance with customary international law.

The next Slide, Page 52, has a quote from Professor Paulsson, a widely-cited article. And, in fact, I don't think that the academic debate over the source of the standard of treatment, whether autonomous or not, really has much meaning here because those have converged.

And looking at Slide 53, to close the loop on this, in the Eco Oro case, one of--another case by an investor against Colombia, the Tribunal said:
"Colombia correctly accepts that the Tribunal is not rigidly bound by the standard set out in Neer, and it is the Tribunal's view that the standard today is broader than that defined in the Neer case."

And, hopefully, they will stand by that position in this case.

Slide 54, please.

So, on Slide 54 is a quote from the Waste Management decision, widely cited and widely followed in our field. And so, what do they say?

"The minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State"--here the CGR--"and harmful to the Claimant," which is certainly the case. Not only being hauled into this proceeding and the subject of serious reputational harm, both from the filing of the case and then the false publicity surrounding it by the Comptroller General, but now being on the receiving end of an award for hundreds of millions of dollars.

"If the conduct is arbitrary, grossly unfair, unjust, or idiosyncratic"--here it is because
it was a proceeding seeking billions of dollars when
initiated and resulting in an award for hundreds of
millions of dollars, based on the notion that a
supplier of personnel having no authority over the
expenditure of public funds could be held to account
by the Comptroller General for allegedly having
mismanaged a project that it didn't manage in the
first place is discriminatory.

And, as I'll explain in a moment, the
Colombian nationals, prominent citizens, all of them
make up the Board of Ecopetrol who were let out of the
case, who were similarly situated, and had, at a
minimum, the same defense that the Claimants have.

Or involves a lack of due process leading to
an outcome which offends judicial propriety. And as
Mr. Conrad was explaining, there was first an opening
resolution--again, a document of enormous
length--asserting charges. That was addressed in
formal proceedings, the free versions, in which the
Claimants explained that they were not fiscal managers
and could not be thought to be fiscal managers, and
that the Jacobs Report of Ecopetrol had concluded they
were not fiscal managers.

And, nonetheless, unlike the Colombians who were let go for not having final authority--though as I'll show in a moment they did have significant authority over the expenditure of public funds--the Claimants were held in the case.

And finally, in applying this standard, it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on.

And those are the representations made in the Contract with Reficar, a public entity.

And, obviously, a limitation on liability for ordinary breach of contract, which is at most what was pleaded here by the CGR, limited to 10 percent of the amount of the revenue derived from the Contract is an extremely valuable incentive to an investor, knowing that liability is capped.

And here that cap, assuming liability could be proven at all, would amount to $25 million, which is a very small fraction of the 750 or 811--the figures vary because of exchange rate fluctuations
between the Colombian peso and the U.S. dollar. But those are just grossly disproportionate.

In the following Slides, Number 55 quotes from Glamis Gold. Again, addressing the question of the Neer standard and its evolution. I don't think there's any serious dispute that this is a well-pleaded claim of a violation of FET. At the merits, can Colombia on a full record attempt to explain and justify the conduct of the CGR? Of course they can.

At this stage of the proceedings, based on their assertions that they did nothing wrong in the face of these well-pleaded allegations, would it be appropriate to terminate this case before any hearing on the merits? It would not.

Mr. President, this might be an appropriate time for a break.

PRESIDENT NUNES PINTO: Thank you. So, it's 2:30 p.m. So, we have our 30-minute break. We will be back at 3:00 o'clock. Thank you.

(Brief recess.)

PRESIDENT NUNES PINTO: Are we ready to go
So, Mr. Sills.

MR. SILLS: Thank you, Mr. President. So, continuing with our discussion of fair and equitable treatment. FET does include, contrary to what Colombia has stated, legitimate expectations of the Parties.

And we would refer to Waste Management II, an extremely well-known and widely followed decision, that explicitly includes legitimate expectations in the standard and explains precisely why they should be.

Now, Colombia relies on Bolivia v. Chile for its argument that legitimate expectations do not form part of the standard.

But that was a State-to-State dispute heard at the ICJ. And State-to-State disputes occupy a critical and important part of the public legal order, but they're entirely distinct from the relationships between investors of one State and another.

For one thing, disputes between two states or between two sovereigns and the disparities that
lead to the treatment under treaty of investors are just entirely different. The case is simply inapposite.

And if we could have Slide 58, please.

And Colombia goes on to argue that even if legitimate expectations are part of the FET standard, as indeed they are, Claimants have not alleged sufficient facts to prove a breach of legitimate expectations.

Once again, this is a mixed question of law and fact, inappropriate for a decision at this stage of the case.

But to the extent there were any burden on Claimants at this point, they have set out an adequate claim of a breach of their legitimate expectations, both specific assurances given in the form of the Contract with its limitation on liability and its other protective clauses, as well as the expectation that Colombia would administer its laws in a fair and even-handed and appropriate manner.

For example, most importantly here, that the regime of fiscal control administered by the CGR would
be administered only against fiscal managers in a fair and reasonable and impartial way.

And I should note here that the course of conduct here by the CGR, from the opening resolution itself until the decision on the merits, is an almost paradigmatic example both of the frustration of that reasonable expectation of due process as well as a classic denial of justice.

The opening resolution listed 30-some individual acts. The response that was filed in the free version, in addition to pointing out that Claimants were not fiscal managers at all, addressed those acts.

Apparently, thinking better of the position they had taken, the charging document, what's referred to as "the indictment" by Colombia, went on a completely different footing and shows a completely different theory pointing to the change controls, the change orders involved, and a joint and several theory of liability.

Then in order to meet—and I realize this, of course, couldn't have been pleaded in the RFA, but
it will be adduced in this case.

    Faced with the fact that the record was
overwhelming that Claimants were not fiscal managers,
Colombia actually changed the law and then purported
to apply that retroactively, including consultants on
a vague aiding and abetting theory.

    And then when the final decision came out,
it was, yet again, a complete change in legal theory
and in its theory of damages, which meant that as a
practical matter, Claimants never had an opportunity
to defend themselves.

    It was like the American carnival game of
whack-a-mole. As soon as one of Colombia's claims had
been refuted, another one was floated in its place,
and that is the basis upon which hundreds of millions
of dollars are said to be owed to Colombia.

    Now, an arbitrary administrative act
can--and this is a separate point or a subheading, I
guess, of FET--can itself breach the fair and
equitable treatment standard.

    Could we have Slide 60, please.

    Now, as a general matter, it ought to be the
case that arbitrary conduct by an administrative agency, surely as arbitrary action by an executive agency or by a Court, can trigger liability. And that is indeed the case.

In the TECO case that we have--thank you--the claimants argued that a tariff--an administrative tariff review--administrative actions breached the fair and equitable treatment standard. And Guatemala argued in that case, as Colombia does here, because administrative acts were subject to judicial review, it couldn't breach FET. And that was rejected there by the Tribunal.

And I mention again that it is our case that there is no effective remedy in the Colombian courts for administrative misconduct. And it is admitted here that there was no administrative remedy for the bringing of this case, the measure complained of in the RFA.

And in Baghat v. Egypt, in a perhaps better-drafted portion of that--of that award involving a criminal case, but for legal purposes an important precedent--Slide 62, please--the Tribunal
noted that denial of justice can include the entire criminal process, including the acts of the prosecution before trial, prosecutorial misconduct, or malicious prosecution.

And as surely as bringing an unfounded criminal case can cause damage in advance of a criminal trial, even one in which the defendant is acquitted, let alone one here where administratively our clients have been condemned to pay enormous damages, that single step can trigger a liability.

Finally, if we could have Slide 63.

As one element of the FET standard, Claimants say that--the Claimants have not stated a claim for denial of justice. Colombia argues that denial requires the exhaustion of all local remedies, and that exhaustion of administrative remedies is not enough.

But the disagreement here, and what we heard this morning, it really comes down to the correct understanding of the term "administrative adjudicatory proceeding."

And Colombia argued, and argued this
morning, that that is a term of art in Spanish that refers to a particular kind of court in Colombia, one charged with the review of administrative action.

Now, it's our position that the words mean what they say, that "administrative adjudicatory proceeding" refers to an administrative proceeding taking place in an adjudicatory manner, because administrative agencies do not always adjudicate.

So, in the United States, for example, the Securities and Exchange Commission both has proceedings before administrative law judges to determine whether or not an individual or a company has violated the anti-fraud provisions of U.S. Securities Law, and, if so, it can impose appropriate penalties, including monetary penalties or bars from the securities industry.

But the SEC also has a rulemaking function, a non-adjudicatory function, in which they might, for example, amend or change or clarify the anti-fraud provisions.

And that's the ordinary meaning of those words in English. There's nothing in the Treaty/the
notes to the Treaty that indicates that this was meant
to indicate this particular kind of Colombian court,
and the history of the Treaty makes it clear that it
was not.

If we could have Slide 64, please.

This TPA had its origins with the model BIT
prepared and utilized by the U.S. State Department.
And that's the 2012 model BIT.

And when we look at the language of the BIT,
which is up here on the screen, it precisely tracks
the language at issue here, "administrative
adjudicatory proceedings." That was obviously not
drafted with Colombia in mind because it's a model to
be used by the United States as the basis for
investment treaties, as it clearly was here.

It was not drafted in Spanish. It was
drafted only in English. And so, it cannot be said to
be referring to a particular type of proceeding in
Colombia or countries that have similar legal systems
to Colombia, assuming that this would be a term of art
there.

It means what it says. It means what it
says. In English, the language in which it was
drafted, it means an administrative proceeding which
is adjudicatory as opposed to one which is rulemaking
or legislative or another area in which administrative
agencies act.

And I'll note that in--Slide 65 in the
Corona Materials case, the same claim, that
"administrative adjudicatory proceeding" had this
special term of art meaning, was rejected by the
tribunal.

Following the rules of the Vienna
Convention, it is correct that efforts should be made
to harmonize treaties that are executed in two
authentic languages. The only way in which to do that
here is to give these terms their ordinary English
meaning. Because this is not a term of art in
English. It is not a term of art in American law.

And, finally, I'll note that the
construction urged by Colombia would leave a sovereign
free to do whatever it wanted, free of the constraints
of the Treaty obligations it has before its
administrative agencies, so that a $10 civil dispute
before the Colombian courts would presumably quick
trigger liability under the Treaty, whereas a
billion-dollar dispute before an administrative agency
acting far beyond its bounds, according to Colombia,
is subject to no constraints under the Treaty at all.

And, again, as I said earlier with respect
to the availability of a judicial remedy in Colombia,
that is hotly disputed here. It will have to be heard
at the merits phase of the case.

Mr. Torrente's Witness Statement in the
interim measures case makes it clear that a nullity
action would take, in the first instance, many years,
with levels of review beyond that. Colombia is free
to contest that, but they are not free here to assert
that that's wrong and that the case should be
dismissed on that basis.

Let me turn to the question of national
treatment, which was also much discussed this morning.

If we could have Slide 71, please.

Now, the pleading here alleges that the
Board of Directors--the individuals who made up the
Board of Directors of Ecopetrol were treated more
favorably under like circumstances than were the Claimants, in violation of the guarantee of Article 10.3 of the Treaty.

Could we have Slide 73, please.

The—as we noted, although initially named in the opening resolution, the Directors of Ecopetrol made a free version submission, stating that they lacked ultimate authority over the expenditure of public funds and, hence, were not fiscal managers and, hence, were not proper respondents in the CGR proceeding.

And that was granted by the CGR. And those individuals, all Colombian nationals, all prominent, were dismissed from the case.

Whereas the same assertion, backed up by, among other things, the Jacobs Report commissioned by Ecopetrol itself, were rejected by the CGR. They were in like circumstances.

We're told in Colombia's papers and this morning that, "Well, other Colombians were charged." But that is irrelevant here because they were not in similar circumstances. We're told that precautionary
measures were not sought against the Claimants as if they had somehow been treated more favorably.

But, again, the test is whether or not in practice--and it can be de jure. It can be de facto. Investors are entitled to the same treatment as domestic investors. And that was breached here.

So, the decision in Seda--I'm sorry. The submission of the U.S. in Seda takes that same position, that it may be de jure; it may be de facto. That's in Slide 76. But here I think it's very instructive to look at the submission made at the free version stage by the directors of Reficar.

So, could we put up Slide 77, please.

Okay. This is the chart that was submitted by counsel for the Ecopetrol directors in the free versions submitted to the CGR in which the prospective respondents had an opportunity to explain why they should not be made actual respondents.

And looking at this chart, it shows the flow of approval for the expenditure of funds on this project. And as you can see, it ends at the Reficar level in this orange box, "Aprobación Control de
Cambios."

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

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

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

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

If the directors of Ecopetrol, who had the actual authority to say "si" or "no" under this chart as to the expenditure of funds, were let out because
they were not fiscal managers because there was one more step in the process, then it is--it cannot be explained how, on a chart adopted by the CGR itself, the Claimants were held in. And the only plausible explanation for that is that they were not Colombian and the directors of Ecopetrol were.

Now, there may be some answer to that, although I don't know what it is. But that is a question for the merits. This is a perfectly well-pleaded, plausible, and, as this chart makes clear, true explanation of the denial of national treatment, which is a part of the FET standard that governs here.

It cannot be resolved at this stage of the proceedings and, as this chart makes clear, in all likelihood, it will be resolved in favor of the Claimants at the merits phase.

Let me turn to the question of most-favored nation treatment under Article 10.4. If we could turn to Slide 80, please.

This is the MFN clause that appears in the TPA, and it's not atypical of such clauses in modern
So, Colombia raises a host of objections here, all of them rather complex and debatable issues of law. First, they say the MFN clause concerns only actual practice in comparison. How was a Swiss investor treated, in fact, in Colombia?

That an MFN clause cannot import new substantive protections. But as I'll discuss in a moment, the TPA does include a limited umbrella clause with its reference to investment agreements.

That umbrella clauses are contrary to public policy in Colombia, but Colombia has ratified at least two treaties that do have umbrella clauses, the Swiss treaty and the Japanese treaty.

That the umbrella clauses in those treaties are not subject to mandatory arbitration, but the Treaty here, the TPA, makes it clear that procedural provisions are not to be imported and, by necessary implication, that substantive provisions are.

And finally, they say that--assuming that the umbrella clauses are imported, that Reficar is not a central--is not an agency of the Colombian
Government at the national level. As I'll show in a moment, it is, and we have stated a prima facie claim.

So, Slide 82, please.

This is the footnote in the treaty language itself that says: "For greater certainty, treatment with respect to the establishment, acquisition, expansion"—or so on, referring to the MFN clause referred to in Paragraphs 1 and 2—"does not encompass dispute resolution mechanisms that are provided for in international investment treaties or trade agreements."

Well, if the drafters excluded those procedural mechanisms, it necessarily follows that substantive provisions were included, as they—as they generally are in this area of investment law.

On Slide 83, we quote from an article on this point. And we don't dispute that there is a dispute in the literature about the scope of MFN clauses and their incorporation of umbrella clauses.

But, again, this is a highly complex question of law, inappropriate for a decision at this point. If it has to be decided or were to be decided,
the better view is that they are incorporated because of the overriding principle that investors of varying countries should be treated on an equal footing.

On Slide 84, along those lines, we quote from the award in *Sirketi v. Turkmenistan*, taking exactly that position.

And on the following slide, Slide 85, we quote from the decision in *Bayindir v. Pakistan*, a holding exactly that a more favorably substantive standard of treatment is incorporated.

And I'll just stop to note briefly that the suggestion made this morning as to the lack of mandatory arbitration in the Swiss Treaty somehow suggests that Colombia is free to ignore the substantive provisions of the umbrella clause there. I'm fairly sure that's not what they meant to say.

And, again, on 86 we cite from the *EDF* decision, *EDF v. Argentina*, where, under the Argentina-France BIT, the umbrella clause was imported. And we cite further decisions there.

And then on Slide 88, we cite the language we rely on from the Colombia-Japan Treaty and the
Colombia-Switzerland Treaty.

As Siemens holds, now looking at Slide 89, the intended result of an MFN clause is to harmonize benefits agreed with a party with those considered more favorable granted to another party.

The Swiss Treaty grants rights under an umbrella clause to Swiss investors. The Japanese Treaty grants rights under an umbrella clause to Japanese investors. The U.S. investors here should be granted those same rights.

And Siemens goes on to hold that the disadvantages of that treaty, here presumably the lack of mandatory arbitration, don't travel with the substantive right. And there's no reason that they should because those rights are presumably going to be honored by Colombia.

So, what is imported here? An umbrella clause imports a contractual undertaking. Now, the undertaking here is expressed in the Reficar FPJVC Contract.

Bear with me one second, Mr. President.

Well, I'll address the question of Reficar
as a national authority in the next section of our discussion concerning investment claims. I'm sorry. Investment agreements. Let me turn to that.

Article 10.28, which is cited on Slide 93, defines an investment agreement.

And so, the only point of dispute here, since this was a Contract for a multi-year investment in Colombia on a major project that took years, involving the expenditure of billions of dollars, is whether or not--first, whether or not the investment consisted solely of the Contract. And Colombia keeps saying that. But that is not the Claimants' position, and it is not the position pleaded in the RFA.

As Mr. Conrad was explaining, and as cannot be challenged really at this stage of the proceedings, the investment was time, capital, personnel, facilities, labor, invested in Colombia for years, in keeping with the definition of "investment" in the TPA itself, and there is no other definition of "investment" in the ICSID Convention.

So, Colombia argues next that Reficar is not a national authority of Colombia. Again, a
fact-specific question and a mixed question of fact
and law.

But Colombia, acting through its Ministry of
Finance, the owner of Ecopetrol, and, in sequence,
Ecopetrol's wholly owned subsidiary, Reficar, gave the
right to enter into contracts with the government.

And Ecopetrol and Reficar have the function
of concluding contracts for the exploration,
exploitation, refinement, transportation,
distribution, and commercialization of hydrocarbons by
the National Hydrocarbons Agency, as explained in our
Counter-Memorial at Paragraphs 108. And in Colombia,
all hydrocarbons are the property of the State.

Now, the claim was made before that Reficar
is not at the national level, the central level of
authority.

Could we put up the slide from their
presentation, please.

But in fact--ah, this is the slide that was
referred to where Reficar is referred to as a
decentralized entity.

"Decentralized entity" is a term of art in
Colombian law. It does not mean an entity not at the central level of government. And, in fact, when you read along in this slide that they relied on, it is a decentralized entity at the national level.

The Ministry of Finance is--"decentralized" can refer, as I understand it, for example, to an entity not in the Capitol. It can refer to an entity not literally in the center. But it does not mean not at the national level, not at the central level of government.

Because there the distinction would be between a public entity owned, say, by the department or by a municipality, and there were plenty of those. So that an electric company owned by the City of--the Municipality of Bogota would not be at the central level of government.

But as the pleading they rely on makes clear, this is a term of art, "decentralized entity at the national level." It's Colombia's pleading.

PRESIDENT NUNES PINTO: Mr. Sills, you made a reference to this slide--there was this slide. For record purposes, I think it would be important to make
reference to the slide number. I cannot read from
here. 112?

MR. SILLS: Your eyes are better than mine,
Mr. Chairman.

PRESIDENT NUNES PINTO: Yeah, 112 from
Colombia's today's presentation. Okay. Just for
reference because we--in one week we may have
forgotten this. Thank you, and my apologies for
interrupting.

MR. SILLS: I'm glad to have the chance to
clarify. And, obviously, the chain of ownership here
is the Ministry of Finance, which is clearly at the
central level of government, which owns and has
delegated to [Ecopetrol] critical functions here,
which, in turn, owns and organized Reficar for the
purpose of carrying out this project. So, it is only
at the central level of government that these entities
exist and, hence, this is a Contract with an entity at
the central level of government.

I'll also note that in the ICC proceeding
that Reficar has commenced for unspecified contract
damages against FPJVC and its members, the--Reficar
took the position that before—Reficar simply took the
position that even for something that would be
ordinary in a commercial case as approving the
selection, the designation of an arbitrator to the
Tribunal, it needed to secure approval as a public
authority from the Office of the President of the
Republic.

    It conducts itself as a public authority.

It is a public authority. The Contract with—between
Reficar and FPJVC is a Contract with an arm of the
Colombian State at the central governmental level.

    The next claim that's made is one of
indirect expropriation. And Colombia argues that it's
not possible to expropriate specific contract
provisions.

    But the charges as made, and certainly the
award which has now been rendered, have destroyed the
value of the investment, the very meaning of indirect
expropriation.

    And what has happened here, Colombia entered
into a commercial arrangement. Colombia entered into
a commercial arrangement under which it was to
pay--ended up paying roughly $250 million for--under the Contract.

Having received the benefits of that Contract and the refinery is up and running, Colombia decided to put on its sovereign hat, if you will, and, exercising its government powers in an entirely arbitrary and unreasonable way, sought to extract and is in the process of attempting to extract hundreds of millions of dollars, three times--three times at least all the revenues paid under the Contract and received by my clients and, if my math is correct, more than a hundred times the profit.

That is an expropriation, to take the benefit--to cause the investment to be made and then to attempt to deprive my clients of the benefit of that investment by the arbitrary exercise of governmental power.

The next question raised by Colombia concerns damages. Could we have Slide 103, please. So, Colombia has a host of objections on this. First,
they say Claimants have not incurred any damages at
the time of the RFA.

But as you can see on Slide 105, Claimants
did allege damage in the RFA. They alleged, from the
making of the charge, reputational harm, which is
compensable, and the expenditure of attorneys' fees in
defending that baseless charge. Now, Colombia cites
to Chevron as saying attorneys' fees are
unrecoverable. But what the award in Chevron that
they quote from actually says is that there had been
no proof of the amount of the attorneys' fees. And
those were fees incurred as a result of delay.

The claim here is that we never should have
been respondents at all. And attorneys' fees are the
natural and probable consequence of having--of the
Claimants having to defend themselves, separate and
apart from the reputational harm.

Now, there is also a claim that moral
damages are not permitted.

Slide 106, please.

And moral damages, of course, that's simply
a term of art for reputational harm, and they are
pecuniary damages, they are compensable in money.
They are compensable in money for the loss of business
that results.

This is not a claim for hurt feelings. It
is not a claim for punitive damages. It's not a claim
that Colombia should somehow be punished for its
unconscionable conduct in waging a campaign in the
press when it was supposedly a neutral decision-maker.

Those may all be reprehensible, but that's
not what we are seeking here. The claim for
reputational harm is one that resulted in the loss of
business. And that is a pecuniary loss that can be
compensated for here.

Looking at Slide 106, as Professor McLachlan
says: "There is no controversy as to whether moral
damages can be obtained under classical principles of
public international law."

The next slide cites from Desert Line v.
Yemen, that moral damages are recoverable. The
International Law Commission cited at Page--I'm
sorry--at Slide 108. "The injury for which a
responsible State is obliged to make full reparations
embraces any damage, whether material or moral, caused by the intentionally [sic] wrongful act of a State. Material and moral damage resulting from an intentionally wrongful act will normally be financially assessable and hence covered by the remedy of compensation."

I'm sorry. I misread it. "Resulting from an internationally wrongful act." Yes. Thank you. As this one--as this one was, as we have shown.

And to close on this section, on Slide 109 is a quote from Colombia's recent submission in Seda. And what do they say? "In sum, while it is undisputed that the Tribunal has discretion to determine whether the Claimants are entitled to moral damages and in what amount, the Respondent respectfully submits that the Claimants have not shown that the exceptional circumstances to award"--and it goes on to say moral damages are present here.

Well, they're telling here Colombia--not Colombia's lawyers, but Colombia has taken the position that moral damages cannot be recovered in investment arbitration under any circumstances. We
heard that this morning.

But in the Seda case, they said, "Well, they're available but hard to get."

If they're available but hard to get, that can only be determined at the merits phase. It is not a basis for striking the pleaded request at this preliminary stage of the proceedings because there has to be a showing. There is no showing here because this is not a trial or a mini trial. No witnesses are being called.

So, Colombia also argues that there cannot be an offsetting award here. But that's a remedial question for the end of the case, not a preliminary question for the beginning of the case.

Of course, in Glencore an offsetting award was granted against Colombia for the misconduct of the CGR in assessing damages against Glencore on what the tribunal concluded was an irrational and unsupportable theory. Now, Colombia distinguishes that by saying, "Well, they paid the money, and then they sued to get it back."

That's true, but it's a distinction without
a difference because that has to do with the form of the award. And now in the RFA, we stated that the outcome of the case was predetermined, that there would be a substantial award. Indeed, that has come to pass.

As the case progresses, the events since the RFA will be brought into the case. But could the Tribunal craft an award that compensated an offsetting award, that compensated the Claimants for the wrong done to them and avoiding the kind of windfall we heard about this morning? Of course it could.

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

If they don't do that, then no harm to them. If they do that, it would be fine. Would that have to be crafted or could that be crafted as a partial final award so that the Tribunal would have continuing power to police it? Yes.

At some point Colombia will run up against
its own statute of limitations and the award will no longer be collectible. I believe, though, subject to correction, that that period is five years.

But these are premature questions. I mean, the scope of the relief to be granted/the precise form of the decree will depend upon all the facts shown at the hearing on the merits. Is this a form of relief that cannot be granted? I don't think so.

Is it a form of relief that would be crafted to avoid an imbalance between the Parties? It would. It could. And I'm confident--we're confident that the Tribunal could readily do that.

But dismissing the claim at this point, when the claims will be amended, the facts will be supplemented--we will show, as the case progresses, that an offsetting award, as in Glencore, is an appropriate remedy.

But the notion that the case should be dismissed with finality at this point in time because the scope of relief has not been precisely determined is just wrong.

And in any event, there is a present live
claim for damages for the reputational harm suffered from the bringing of the claim. I don't think it's a leap of imagination to appreciate that for a company engaged in the construction of projects like this throughout South America and elsewhere in the world, that the bringing of this charge and its publicity and the publication of these defamatory statements by the CGR had the capacity to and did materially harm the company's business and its ability to garner similar projects elsewhere.

Let me turn to the question raised of a qualifying investment. "Investment" is broadly defined under the TPA.

Could we have Slide 115, please.

And it includes turnkey construction, management, production, and similar contracts. It's interesting that Colombia now seeks to minimize the Contract when the whole basis of the CGR proceeding was that the Claimant somehow managed and mismanaged this project. The two cannot both be true. But there is no definition of investment in the ICSID Convention. There is a broad definition in the Treaty
itself.

As Mr. Conrad explained, significant assets were committed--were committed on the ground in Colombia over a period of many years involving a contract, not worth billions but worth to the Claimants hundreds of millions of dollars in revenues. That is the classic definition of an investment. With regard to the claims regarding risks that were made, there is risk. There was risk, as Mr. Conrad explained.

In any event, as some tribunals have held--if I could have Slide 120--and appropriately held the existence of a dispute like this shows there was risk. There was risk not only of non-payment, there was risk of penalties. And the mere fact of investing in a country--committing resources has happened here--is itself evidence of investment and investment risk.

May I have Slide 121, please.

So, here is a quote from the Salini award. A construction that stretches out for many years for which the total cost cannot be established with
certainty creates an obvious risk for the contractor. In the AMF case, cited at Slide 122, the long duration of the operation meant that a great number of events and contingencies could have happened to the asset while being utilized in another country, including governmental actions, which is, of course, what brings us here today.

Due to the location of the asset and duration of the operation, Claimants' risk was not limited to non-payment or general business risk. And that is exactly the situation here.

And whether or not this was an investment under the broad definition in the Treaty, whether or not there was risk, is, again, a mixed question of law and fact that cannot be decided at this stage of the case. It should be heard and decided on a full record.

Do we have the burden of proving that there was an investment? Of course we do, because that's an element of our claim under the Treaty.

Do we have the burden to prove it at this point with witnesses, with documents, on a full record
after disclosure? We do not.

This is--Colombia has jumped the gun on this, as it has on virtually every other question that it raises. This is not the appropriate procedural setting to resolve these questions. When they are resolved, they will be resolved, we are confident, in our favor, because the facts will support us. But this is not a factual contest. This is not a hearing on the facts.

Let me turn, because time is running short, Mr. Chairman, to the question of the waiver about which we heard so much this morning.

And on Slide 124 is the language of the Treaty calling for a waiver. So--and on Slide 125 is the language of the RFA which tracks exactly the language of the Treaty. What is called a reservation just says for the avoidance of doubt that the waiver is without prejudice of Claimants' right to defend--Claimants' right to defend themselves in the Fiscal Liability Proceeding.

Colombia actually has gone so far in its papers, and as they clarified in their argument this
morning, to suggest that in order to meet the condition of the waiver, the Claimants were obligated to stop defending themselves in the CGR proceeding brought by Colombia and seeking at that point to recover more than $2 billion from the Claimants.

It cannot be that simply defending oneself against a legal assault by the State violates the waiver. No case has ever suggested that. No award is cited for this extraordinary proposition.

This is simply noting a right that Claimants had and still have. That is the right to defend themselves.

It is not a reservation. It's not a condition. It's not an exclusion and, hence, is readily distinguishable from the cases that Colombia cites and relies on.

If we look at Slide 126, the RDC case that they cite there, there was language going beyond the exact words of the CAFTA Treaty, which is substantially identical here. But, nonetheless, that was held to be an effective waiver. And if Claimants have the right, as they do, to defend themselves, then
noting that they maintain that right can't by the waiver. Clients can only be required to waive the rights that the TPA requires, and that is to initiate or continue. And the only fair way to read that is to initiate or to initiate and continue.

   It is meant to--as Colombia points out, it's meant to prevent the bringing of a second proceeding, a second bite at the apple, the possibility of a contradictory result. Defending oneself against Colombia cannot possibly do that.

   Now, the Renco case on which Colombia relies so heavily was entirely different. That was a true reservation of the right to initiate proceedings following the waiver. That is not this case. There's no reservation of the right to bring a proceeding by the Claimants here.

   So, what does Colombia point to? Colombia points to the various tutelas. There were two tutelas brought after the RFA was filed. As Mr. Conrad explained, neither of them implicates the waiver because both were on narrow, technical points having to do with the proceeding--the CGR proceeding itself.
The first was seeking the right to cross-examine an expert witness. The second sought more time to respond to a filing of thousands of pages by the CGR. Both were denied. Neither of them implicated the waiver because neither of them sought to challenge the measures complained of.

Now—and the Thunderbird case, which is cited at Slide 131, makes it clear—I'm sorry. Let me back up, if I could.

Could we have Slide 128.

In the RFA, it is the bringing of the fiscal liability proceeding. That is the measure complained of. Neither of these tutelas challenged or otherwise implicated that.

In Claimants'—Respondent also point to what they call "the appeal." But that was all part of the CGR proceeding. The CGR issued, in effect, a tentative decision by the Deputy Controller. Comments were allowed to be made on that. Comments were filed by the Claimants. They were rejected.

But that was simply part of the ongoing defense of the CGR proceeding. All part of the same
proceeding, all before the same body, all part of responding to Colombia's legal assault. It was not a separate proceeding. It was not a proceeding initiated by the Claimants. It was not a proceeding continued by the Claimants except in the extraordinary sense in which Colombia insists that the Claimants were obligated to stop defending themselves before the CGR in the CGR proceeding that the CGR had initiated.

Could we have Slide 132, please.

Now, here, Colombia addressed the purpose of the "no U-turn" provision. And the clear purpose, they say, of the condition is to prevent the same claim from being heard simultaneously by several local and international tribunals. But the claim is not being heard simultaneously there.

And so, they turn to the conciliation request filed by the Claimants, which was recently admitted into the record. The conciliation request doesn't violate the waiver because it is not a proceeding. It is not for--it is not another dispute settlement procedure. It is exactly what its name suggests. It is a voluntary effort to resolve a case.
It is a mediation being conducted under State auspices. The mediator/the conciliator has no coercive power. No decision can be made other than by consent of the parties. And the notion that an effort to resolve a case by consent voluntarily--although the CGR has rebuffed all those efforts--it somehow violates the waiver provision makes absolutely no sense.

Colombian policy and international policy favor the voluntary resolution of disputes.

It's as if I were to write a letter to Ms. Frutos-Peterson suggesting that we have lunch and discuss a possible resolution of the case, and then we would hear that we had violated the waiver provision because that would be a settlement discussion, which would be a procedure in violation of the waiver provision.

It simply cannot be. And as for the claim that a nullity action will follow, that is simply unfounded. What the conciliation request actually says is not that an application to nullify will follow. It says it could follow. It's an available
remedy. There's certainly no assurance that the
Claimants will file such an action.

And the notion that a prediction about what
Claimants might do somehow triggers the waiver—a
violation of the waiver clause is just unfounded.

There is no nullity action. There may never be a
nullity action. If such an action were to be filed,
Colombia would be free to make its arguments. But
there is none. There may well be none.

What there is now is an effort to conciliate
the case, a good-faith effort to resolve this dispute
by consent, which is an outcome that will be favored
by Colombian policy and by the policy of the Treaty
and by international policy in general. And
Colombia's attempt to construct a violation of the
waiver clause out of that act of good faith, I think,
shows the extent to which they will go in attempting
to rid themselves of this case. It is entirely
unfounded and cannot possibly be the basis for seeking
dismissal.

If we could go to Slide 139, please.

There was a lot of discussion this morning
about FPJVC as a national of another State. It is a contractual joint venture. It is organized under New York law. It is undisputed here that under New York law, a joint venture can sue and be sued in its open name. It can own and possess property, both real and personal. It can employ individuals.

What they have done is they have conflated the fact that under New York law a joint venture is not an organization with limited liability, with the notion that it is not an entity at all. And I should note, by the way, the case that is cited to the Tribunal as coming from the New York Court of Appeals, which is the court of last resort in New York, was mis-described.

That is actually a decision of the Appellate Division, which is the Intermediate Appellate Court in New York for the Fourth Judicial Department which sits in Rochester, New York, and from which an appeal can be taken to the Court of Appeals by permission. It is not a decision of a court of last resort.

But, again, this is a question of New York law. It is much debated here. The Treaty itself
describes a joint venture as an enterprise. And an enterprise, in turn, can be an investor. The ICSID Convention does not define a juridical person. And, rather strikingly, it was with FPJVC that Reficar, a public company of Colombia, contracted.

So, they seem to be suggesting now that they contracted with a non-existent entity. FPJVC is a juridical person. There is no basis for FPJVC to be dismissed from the case. It appears to be Colombia's hope that they could prevail on this issue and then make their argument, turn around and say, "Well, the FPJVC is only its members, but because the Notice of Intent was made in the name of FPJVC"--a question I'll turn to in just a moment--"that that too is a nullity." And they both cannot be true.

And the cases are cited in our papers. The New York cases, they are described at Slide 145. And we can skip Slide 146, which shows the signature on the Contract of FPJVC, not the two Claimants.

At an absolute minimum, that claim, like all of Colombia's other claims, is premature at this point, and it is, in fact, simply wrong as a matter of
New York law.

There was a fair amount of talk this morning and in the papers, and as was pointed out before, indeed, in opposing registration of this claim that the notice given was somehow ineffective.

The notice, which appears at Slide 149, clearly describes the dispute, clearly describes FPJVC as consisting of--as being a contractual joint venture of its two members. This cannot have been a mystery to Colombia, because Colombia named the two members of the joint venture as respondents in the CGR case.

And the only fair construction of the notice is that it refers to FPJVC but correctly identifies all three of the Claimants. And, in fact, the point of the notice is to afford an opportunity for conciliation. As I described a little while ago, Colombia never responded. And the notion that Colombia would have responded if there had been a change in the Parties identified in the "Re" line of that letter, I have to say, is fanciful.

In any event, as the cases cited in our papers and described in Slides 152--I'm sorry, in
Slide 152 made clear, minor discrepancies or deficiencies in a Notice of Intent cannot destroy jurisdiction.

There is—as everyone on the Tribunal knows, a view that Notices of Intent are themselves precatory, and that the failure to comply with them, at least in technical ways, is not jurisdictional. Colombia got adequate notice. They were not prejudiced. Their insistence upon strict procedural formality, assuming that it was violated at all, has no place in a case like this.

Let me return, in the time I have remaining, to the fork-in-the-road question addressed by Colombia this morning.

Could we have Slide 135, please.

The fork-in-the-road claim that Colombia makes concerns the First Tutela, which was made before the RFA was filed and hence, obviously, cannot implicate the waiver clause.

And as explained in our papers, that tutela was expressly limited to claims under Colombian law. It is true that it refers to rights under the Treaty
but reserves those rights for this proceeding. No
relief was sought under the Treaty in Colombian
law—I'm sorry—in the Colombian court, assuming that
the Colombian court even had jurisdiction. Consider
that.

And, again, the objection made here is not
substantive but technical or, I think more properly,
hyper-technical. The claim is that because there is a
non-operative reference to the rights under the
Treaty, in the context of a claim which by its terms
is limited to Colombian law. And we heard a lot about
the word "allege." So, the mere mention somehow
transforms that into a violation of the
fork-in-the-road claim—okay, I'm sorry—requirement
cannot be sustained.

The fork-in-the-road provision is meant to
prevent submitting the claims that are before the
Tribunal to a national court. This was the exact
opposite. These were claims under Colombian law
submitted to a Colombian court. And the fact that the
pleading there makes a reference to the existence of
international rights does not transform it into a
violation of the fork-in-the-road provision because it disclaims seeking relief under such rights.

The rights that were invoked were Colombian rights. There is a reservation of rights in that pleading as to international rights. And the effort to turn something that is in the pleading, at most, for informational purposes into a waiver should be rejected.

So, where we are is that Colombia, having received the benefits of the Claimants' work, having received the benefits of the Contract it entered into, then turned on the Claimants and, marshaling all the powers of the State, began a proceeding against the Claimants seeking many times in damages the amount of revenue derived by the Claimants from doing their work in accordance with the Contract, as I say, which was performed without objection by Reficar.

And that proceeding was marked by gross irregularities. It is an outrage to due process. It is an outrage to international law. It was a shifting series of claims, all without any factual assertions that would link the Claimants in any way to fiscal
management, on a shifting series of theories and
easessing liability on a joint and several basis
without even an attempt to ascribe any wrongful act to
any claimed item of damage, for which my client's
tire business is now at risk.

And the fact that Colombia has so far not
succeeded in its efforts to seize and sell the assets
of the Claimants is very cold comfort indeed to my
clients. This is a well-pleaded, sustainable,
well-supported claim of wrongdoing under the Treaty,
in violation of the terms that Colombia entered into
to protect investors from the United States. And the
claim should be allowed to proceed to the merits phase
where it can be heard on a full factual record as the
Parties contemplated, as the Treaty requires.

Thank you, Mr. President.

PRESIDENT NUNES PINTO: Thank you,
Mr. Sills. It's 4:20. We have provided for a slot
here of one hour--I'm sorry--for 30 minutes for the
U.S. to submit oral--its oral arguments. But it was
confirmed to us yesterday that the U.S. will not
submit such argument.
So, the next activity we have is the questions from the Tribunal.

And I would like to consult with you if you would like--would be willing to have a 15/20-minute break so that we can relax a bit. Especially, Claimant has just finished making a long presentation.

Can we come back at 4:40? Is that okay?

MR. SILLS: Mr. President, I'm always in favor of relaxation.

DR. FRUTOS-PETESEN: I am not opposed to that, Mr. President. But just one minor point, but important point. I mean, we were happy to see that Counsel finished with their presentation, but there was an excess of time. I just would like to have the same rule applied in case that we go over a little bit on our Closing because there was a lot--

PRESIDENT NUNES PINTO: I was relying on Marisa's computation of time. And I think they did not exceed, did they?

THE SECRETARY: Two minutes.

DR. FRUTOS-PETESEN: Yes.

PRESIDENT NUNES PINTO: Two minutes.
DR. FRUTOS-PETERSON: Yeah, because our accounting is different. But anyway, if it is two minutes, it's two minutes.

PRESIDENT NUNES PINTO: Give them five.

Okay. Thank you. We will be here at 4:40.

(Brief recess.)

PRESIDENT NUNES PINTO: You are back, and we will resume the session.

Okay. Now, we will have this slot for questions by the Tribunal, and we'll start with Mr. Beechey, who will address the questions to the Parties.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR BEECHEY: Thank you, Mr. President.

Just a couple of things from me, if I may. And the first is perhaps a bit of a sidebar, but it may be relevant to us.

At Paragraphs 72 to 74 of the Request for Arbitration, there's a reference to the ICC Arbitration brought by Reficar against CB&I for damages for over $2.4 billion.
We were told that that was an arbitration from which FPJVC had been excluded as a respondent, and we were also told, tantalizingly, that the hearing on the merits is presently scheduled to take place in April 2020.

If that's a matter within the knowledge of the Parties, might we be told how that matter now stands?

MR. CONRAD: Mr. Beechey, this is Charles Conrad on behalf of the Claimants. I can address that question to the best of my abilities just because we are—you're correct. Claimants are not part of that proceeding. It's our understanding that that hearing has concluded and is awaiting a final award.

ARBITRATOR BEECHEY: It's nice to know that my old shop still moves to the degree of celerity.

So, as yet no award essentially? All right.

The second point is this: Picking up on the discussion this morning, it was put to us that we should be considering the claims as the position stood at the 8th of December 2009. 2009--yeah. '19. I'm sorry. I'm wishing away ten years of my life.
And taking that as my starting point, I'm looking at the Request for Arbitration. I quite see the argument that matters that occur some years down the track are matters which are simply the subject of speculative inquiry, as at that time, might properly be said to be the subject of some objection.

But for this reason, I have some difficulty. Because if you look at the Request for Arbitration, there's a number of matters there which are clearly said to be crystallized; in other words, there are wrongs which are said already to be apparent as at that time.

It's true to say that the— it's true to say that the relief sought goes, among other things, but principally to reputational damage and the like. And it's also true to say that matters are not quantified.

But is it right to say that on the basis of the request, the Claimants have not already put forward, as at December 2019, matters which are now in front of us and which then we might properly be in a position to debate, because they're not matters which have occurred—we're not being asked now to consider
matters which will have arisen later beyond the ambit of the Request for Arbitration.

I'm sorry. It's a 50-page Request for Arbitration. I'm not expecting you to read it straightaway now. But it seems to me you were taking a very narrow view of what had actually crystallized as at that time, and I'm just inquiring of you whether--given what is the content of that document and the way in which the arguments have been developed, are you saying to us that we shouldn't have regard to any of the substantive wrongs which is said to have already occurred at that point?

DR. FRUTOS-PETERSON: I will answer your question, Mr. Beechey. But, of course, tomorrow we will elaborate more on this point precisely in our Closing Statements.

What I can tell you--I don't have the Request for Arbitration in front of me, but I do recall the relief that they were asking for. If I'm correct, they include reputational --yes.

What I want to say at this point, Mr. Beechey, is that the problem that we have here is
that--well, not our problem; I think we submit that is Claimants' problem--is the language of Article 10.20.4. Because that Article, of course, will take you back to Article 10.16.1.

And if you read 10.16.1, you need to establish the breach, and you need to establish harm that arises from that breach. And that's why, when you go back--when you go back to Article 10.20.4, it gives you the standard to assess that breach under Article 10.16.1.

And that standard is in Article 20--I'm sorry--and that is, of course at [10.20.4], Paragraph C, you know, where it gives you the standard to assess, you know, the facts as of the time of the Notice of Arbitration.

ARBITRATOR BEECHEY: I agree. There's a difference, isn't there, between saying that as at December 2019, and there is a positive case being put forward on a particular ground, or particular grounds, which give rise to particular relief.

And you're right to say that at that time, there was a request for an order for damages for
economic and reputational harm suffered, including an
offsetting award and costs and attorneys' fees, but
also there's a declaration that there has been a
breach of obligations under the TPA.

And I think my point to you is that the
Request for Arbitration is not a bare document. It
does actually set out what is said to be breaches of
obligations which have already occurred as at that
time.

And then we get into an issue about the
merits, which is why I don't want to get into a debate
with you, because that—if it were right—if it were
right, would be the subject necessarily related to a
later date, but—an argument at a later date.

But on the face of it, I'm just pushing back
on the suggestion, that if you take a very narrow
view, are you entitled to, in fact, take such a narrow
view of what is said to be the position as at
December 2019?

DR. FRUTOS-PETERSON: And I think we are
because, as we explained in our submissions--

ARBITRATOR BEECHEY: Yes.
DR. FRUTOS-PETERTSON: --and during the
Hearing, at that time, that moment of the Notice of
Arbitration, the only--

ARBITRATOR BEECHEY: Request for
Arbitration.

DR. FRUTOS-PETERTSON: --Request for
Arbitration--or Notice of Arbitration, I think it's
called under the Treaty--the Request for
Arbitration--what you had is an indictment order.

And it is Colombia's submission. And we
submit to you that we have proven that, that under
Colombian law, an Indictment Order is a mere
administrative act by the authority.

So, if you were to agree with us, that is an
administrative--it's a mere administrative act, then
there is nothing there because--you know, so you
will--the ruling--even the ruling--the fiscal
liability proceedings hasn't even started at that
point, not even the ruling, of course, as a natural
consequence.

So, if you take that particular date, as we
show you in our timeline, nothing had happened yet.
So, the requirements made by the Treaty are important to respect because, of course, that's the intention of the Contracting States.

And if you don't have that breach that arises out of the harm at that time, you actually do not have the consent by the Contracting State, you know, to submit the dispute to arbitration.

So, that is why we explain in our submissions and during this Hearing, you know, the importance and the up-to-date, but also for you to understand what is the act that you had at that time. And at that time, the only thing is the Indictment Order, or what the Claimants call "the CGR charges."

ARBITRATOR BEECHEY: All right. Thank you.

DR. FRUTOS-PETerson: You're welcome.

ARBITRATOR BEECHEY: Would you like to comment on that?

MR. SILLS: I would, Mr. Beechey. Thank you.

We are where we are because Colombia elected to move on preliminary objections. In effect, they froze the case in time. If the case had proceeded in
the ordinary course, we would have amended with all
these subsequent events, and hope to do so eventually.

But I think the question makes it clear that
at that time the RFA was filed, there was--and it
pleads--a crystallized actionable wrong.

Now, I don't want to address the merits of
this claim about it being an unreviewable
administrative act. But as we explained in the course
of today's proceedings and as we explained throughout,
this charging document didn't come from nowhere.

There was the opening resolution, in effect
the proposed charges, albeit on a completely different
theory, to which our clients submitted, in effect,
their opposition; that is, that they were not fiscal
managers and, hence, could not be brought into this
proceeding.

The same submission was made by the
Ecopetrol directors.

The charging document, what Colombia calls
"the indictment," followed there. So, there were
proceedings before that leading up to the charging
document. And the charging document, it is an act of
the State.

And the fact that as a matter of Colombian law it's referred to as an administrative act, I have to say, with respect, is meaningless for international law purposes. It's an act of the Colombian State through its instrumentality, the CGR, and it caused real--I think the word is exactly right--crystallized damages, as we plead here, and, particularly coupled with the campaign of publicity being improperly waged by the CGR around that charging document, caused reputational harm.

And the RFA goes, in some detail, into that. The fact that it hadn't been quantified at the point of the RFA is something one would expect in any case because quantum is dealt with later.

But there was real harm traceable to a decision that Colombia has told us there was no recourse on. There was no administrative remedy, they say, for the filing of what they call a mere administrative act.

There was that First Tutela that sought relief under Colombian law, leaving our clients with
essentially no choice.

So, as at December 8th, 2019, it was a real harm and, as pleaded, arising from a violation of Colombia's treaty obligations to investors of the United States.

Now, as the CGR matter has progressed, have other wrongs occurred and have further and more substantial damages been incurred? The answer is yes.

And at some point those will be put before the Tribunal and, but-for the stay of proceedings that resulted from the making of this application, would already be before the Tribunal.

But I think your question highlights the fact that the measure complained of the issuance of what they call the indictment, and the publicity caused real actionable harm, and that's before the Tribunal. It's for the Tribunal to resolve on the merits.

But the notion that no harm was pleaded is just wrong, and it's belied by the record.

DR. FRUTOS-PETERTON: Mr. Beechey, I just want to add to this exchange, because I think they
are--they are starting with the wrong premises.

When we talk about that Indictment Order, you know, we describe it as an administrative procedure in the whole process, and it doesn't--it's not a decision. It doesn't have that nature to be obligatory, because it is the initial step that will actually push, you know, the process to start.

So, the fact is, as we demonstrated in our submissions, it's not even something that you could appeal, you know.

So, after the Indictment Order, the process about an evidentiary stage starts, you know. So--and then you have the following one, which is the proceeding, the--well, the proceeding and then the ruling.

And when you have a ruling, then you have a right to appeal that ruling. You know, you saw our big diagram. You know that now, because we also have explained that process in the Hearing during provisional measures.

But at this stage, we show you in our timeline, we continue to be at the administrative
level. So, that is why there is a misunderstanding in the conception that the Claimants are putting the case forward because what we have here is not a judicial decision by the State. There is no final act.

So, you need to wait to that to have, you know, a measure, a breach, that arises--a harm arises out of that breach.

So, as we pled in our case, you have to give the opportunity to the State to correct itself if--you know, if they can do that vis-à-vis that--or they will correct themselves or not, you know. They might decide what the CGR did, it was not proper, and then they annul the whole process.

So, this is the--this is the situation that we have.

ARBITRATOR BEECHEY: All right. I think we better leave it there before we do start walking down the line towards the merits.

PRESIDENT NUNES PINTO: I'll ask you if you'll help me to understand. I think I'm going to get lost. So, if you could walk me through the administrative procedure in Colombia or correct my
understanding.

    Let's take the indictment. And you use this expression, but perhaps it may mean that it is admissibility of the administrative procedure against the Parties. Is that the spirit? Is that the admissibility process or not?

    DR. FRUTOS-PETE: I think it's the spirit, but I will let my colleague from Colombia answer that directly, because she is a Colombian lawyer, and she will clarify that for you.

    PRESIDENT NUNES PINTO: Okay. And I have more questions.

    MS. BOTERO: Thank you, Mr. President. Can you hear me?

    PRESIDENT NUNES PINTO: Yeah. Sure.

    MS. BOTERO: All right. So, just stepping back a little bit to describe what happened. The fiscal liability proceeding is a proceeding of an administrative nature. It means it happens before an administrative authority, which is the CGR. Right?

    So, it starts with an initiation order. And that simply means that the CGR is going to look into a
situation that perhaps may have caused the damage to
the state. There is a preliminary investigation that
happens.

Then the next big step or milestone in the
process is the Indictment Order or, as the Claimants
called it, "the CGR Charges." That's still an
administrative act of procedural character.

What does it mean that it has procedural
character? It means that it gives impetus to the
process. But because it doesn't define a legal
situation of the Parties involved, it's just, you
know, a next step in the process. It's an
administrative act that doesn't admit any recourse.

It just--it's--nothing has really happened.
It's just the moment where the CGR decides that
there's enough to proceed to an evidentiary period to
gather more information to ultimately decide, in a
ruling, whether there is or not fiscal liability.

So, those three are the--like, the main
milestones of the process: the initiation, the
indictment, and then the ruling.

When Claimants initiated this claim, we
were--after the Indictment Order during the evidentiary period. So, the only real act at that point was the Indictment Order, which, as we've explained, is a mere procedural act. It's not defining any legal situation.

It's--in Spanish it's "un acto de procedimiento." A procedural act or a merely procedural act. That's the Spanish terminology versus "un acto administrativo definitivo," which would be the ruling.

And then just to finalize, the ruling can then--because it's a definite administrative act--can then be annulled in the courts. It's only the ruling can go to the courts.

PRESIDENT NUNES PINTO: Let me ask you something else. Which is the word you use in Spanish for indictment?

MS. BOTERO: It's "auto de imputación."

PRESIDENT NUNES PINTO: Okay.

DR. FRUTOS-PETERSON: That's why I said it's kind of like--

MS. BOTERO: "Imputa."
(Overlapping speakers.)

PRESIDENT NUNES PINTO: Okay. As they say, charging.

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

PRESIDENT NUNES PINTO: Okay.

DR. FRUTOS-PETERSON: That's why I said to your question originally, yes, it's kind of like the admissibility kind of thing. That, yes, let's look into that.

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

MS. BOTERO: So, I think your question is pertinent. Let me use the words in Spanish.

It's "auto de apertura," is what we call the opening order, initiation order. "Auto de imputación" would be what we call the Indictment Order; they call the CGR Charges.

And then "fallo con responsabilidad fiscal" is what we call the Ruling with Fiscal Liability and they call the CGR Decision. Those are the three main.

PRESIDENT NUNES PINTO: Yeah. We are neighbors, so there is not much difference between
your system and ours in Brazil.

Okay.

MR. SILLS: Mr. President, could we comment on that?

PRESIDENT NUNES PINTO: Yeah. Absolutely.

MR. SILLS: Thank you. So, the description we've just heard of Colombian administrative process, assuming it's accurate, is not the relevant inquiry here.

For one thing, there was a decision, as was just described. There was the opening resolution. There was the submission of the free versions, and there was a decision.

The decision was that the Ecopetrol directors, who were named in the opening resolution, were dismissed from the proceeding based on their claim that they were not fiscal managers.

My clients were not, although they had at least an equally strong claim for that and made that same submission.

So, there was a decision. The fact that Colombian law characterizes this as a non-final
administrative decision doesn't mean it wasn't an act of the Colombian State that caused real harm and real damage to our clients. And that's the essence here.

The fact--and the fact that there was--as we were just told, no recourse, only highlights the fact that it was an act causing damage that could not be remediated.

And the discussion about waiting for the ultimate award and then pursuing this remedy, which we say is illusory in the Colombian courts because it would take so very long, as Mr. Torrente explained, really has to do only with a denial of justice claim because that's where that kind of exhaustion requirement applies.

But here it's the--it's the issuance of this groundless claim and then the publicity around it by a supposedly neutral decision-maker that caused the real damage.

And that's not damage that could have been remediated by going on for years and seeking what we were just told was the possible favorable decision of the CGR--which, of course, never happened--or then
spending years in the Colombian courts pursuing an illusory remedy.

The harm, as Mr. Beechey's first question to the Respondent, I think, brought out, was that there was a real, definite, crystallized act at that time in a well-pleaded--and I don't mean to suggest that Mr. Beechey said it was well-pleaded--but a pleaded claim, and I would say a well-pleaded claim, of damage from that act of the State at that time, in violation of its treaty obligations.

Now, they can dispute that on the merits, but that is not an appropriate preliminary objection, and it's not an appropriate objection to raise in any context at this stage of these proceedings.

PRESIDENT NUNES PINTO: Thank you. Okay.

Five minutes.

DR. FRUTOS-PETERSON: No, less than that. If we are switching, then, the case to that, you know, to that point, to the Indictment Order, I mean, we would just--we were all here. We heard their case. And they are, of course--all their--all their claims and explanations are based on the Proceeding on Fiscal
Liability and the Ruling.

So, are they telling us now that that's not their case and we should not focus in on that? Because then, to me, it's a real problem under the Treaty then.

PRESIDENT NUNES PINTO: Mr. Sills.

MR. SILLS: If I understand the question correctly, we aren't switching anything. The pleading that was submitted on December 8 spoke to the CGR proceeding as it was then.

Colombia elected to challenge that proceeding and obtain a stay of all other proceedings while these preliminary objections, and I guess we could call them--well, where all of their objections would be heard on a preliminary basis. So, the case did not move forward.

Everybody in the room knows that the case did move forward, that there was a Ruling, that the Ruling, we say--and I think with complete justification--suffers from extremely grave legal problems and caused further damage to our client. And in the ordinary course, there would have been an
amendment to the pleading at this stage.

Once we're past these objections, there will be an amendment, and the case will consider additional facts. The record will expand. The measures being challenged will be added to.

I think that's hard to dispute. But, yes it is--and we've been consistent on this since this was filed. There is no switch. We challenged what had happened at the time. The RFA does speak as of December 8th, 2019. And that's what was challenged by Colombia.

But will there--you know, will this be the shape of the case for all time? No, because the case--the CGR case has moved on with what I have to say is this absurd decision imposing $750 million in damage jointly and severally, without even purporting to link any act or omission of my clients to any item of damage, and then hanging the label "gross negligence" on it when what they're talking about might be generously construed as a simple breach of contract. But that's all for the future.

I think that the key point is Colombia
jumped the gun. They've chosen to attack the pleading as it was then, and we are defending it as it was then.

And once we're past this, of course, we'll amend the case. We're not going to go forward on a pleading--I wouldn't say it's been overtaken by the event because the reputational harm remains, and it will remain an element of our claim, but there will be other elements of the claim.

And it's hardly a surprise to anyone in this room that claims are expanded and amended and supplemented as time moves on and as the case moves forward.

PRESIDENT NUNES PINTO: Thank you. Can we move on? So I'll turn now to Professor Kohen, his questions.

ARBITRATOR KOHEN: Thank you, Mr. President. Allow me to make a linguistic comment first. Because in the first Procedural Order, it was mentioned that English and Spanish are the procedural languages of the arbitration and have equal dignity. Nevertheless, the same Procedural Order indicated that
the hearings would be mainly occurring in English. So this is the reason why I'm prevented from using my mother tongue.

I have, I believe, very, very concrete and specific questions, some are more related to Claimants and others to Respondent, but obviously both I expect comments from both sides for all the questions.

I would like to start with the submission by the non-disputed party and the attitude adopted by both sides on this. I think we noticed that both Colombia and the United States are adopting similar interpretations of the Treaty now. My question is--my first question with regard to this is, when Colombia and the U.S. concluded the Treaty, did they have another interpretation in mind? Did they have a different intention when they concluded the Treaty of that they invoke today?

Yes, please.

MR. SILLS: Professor Kohen, and I should preface this by saying the linguistic provisions of the Procedural Order were the subject of extensive discussions among the Parties and, of course, with the
Everyone would, of course, prefer the language in which he is most comfortable. I can tell you, as a native English speaker, your English suffers from no disabilities.

But I--that was the deal the Parties made, that written submissions could be made in Spanish and these proceedings would be in English in part because everyone in the room speaks English and not everyone in the room speaks Spanish.

But no disrespect was meant to Spanish in any sense. And I know you know that, but it's worth saying.

ARBITRATOR KOHEN: It's just an invitation to improve language skills. That's all.

MR. SILLS: I heard a rumor that Americans are lagging in that regard.

But, Professor Kohen, with respect to the question you pose, I don't think we can get into the minds of the drafters of the Treaty. And what the Vienna Convention teaches us is that the best indication of what the drafters meant is the language
they used. I think that's common ground.

And sometimes the drafters of any instrument, a treaty, a contract, come to regret what they said, think there was a drafting gap, hadn't considered a particular issue, and they would wish to change it.

The mechanism for changing the Treaty is to amend it. But I don't think there is any reason to believe that a submission—and not really on the merits because the submission of the U.S. is highly abstract—somehow tells us that the Treaty means something that its plain words don't indicate.

I mean, if the United States were to submit a non-disputing party submission tomorrow that said, "In our view, requests for arbitration are valid only if they're printed on blue paper," and Colombia said, "Yes, we agree with that," we would be subject to dismissal because ours is printed on white paper.

The language of the Treaty sets the bounds of what it means.

And not only that, but the way in which that language has been interpreted over the years by
scholars, by other tribunals, how language in similar treaties has been construed and none of that is in the U.S. submission.

I have to say, with respect to the U.S., the submission is largely either a recitation of what's in the Treaty itself or a series of ipse dixits. And the Tribunal, I suppose, could be persuaded by what the U.S. submits. But it's up to the Tribunal to weigh that. And the Vienna Convention doesn't say if a non-disputing party/State party to a treaty makes a submission, that binds the Tribunal or it binds the world or it's authoritative. It says it shall be taken into account. And when something is taken into account, it gets the weight it deserves.

So can we get into the minds of the drafters of the treaty and, in effect, interview them and say, "What do you mean by this?" Or would you have taken a position, for example, that denial of justice means a different thing in an administrative and a judicial context because that inquiry can't be done now.

But I think we can look at how that language in this Treaty and other treaties has been...
interpreted, and I think that's the appropriate inquiry. So, that's a very long answer to your simple question. I don't think we can get into their minds. And I don't think--and, with respect, I don't think that's a useful inquiry. It's what they said, not what they thought, that's the relevant inquiry here.

ARBITRATOR KOHEN: Yeah. I know the content of the Vienna Convention treaties.

My question was concretely whether you believe that there was a change in the position. But you answered my question. Maybe Respondents are wanting to make a comment.

DR. FRUTOS-PETEÑER: Thank you, Professor Kohen. I just want to tell you that I keep pushing to argue in Spanish. Sometimes I win the battle; sometimes I don't. But it's a well point taken.

Thank you.

Regarding your question, no changes—I mean, no. That's the intention of both Parties. I mean, it is clear. And the United States, you know, came here under the possibility that they have under the Treaty confirming what they agreed with Colombia. And, you
know—and this is perfectly fine to do it, not only under the Treaty but also under the Vienna Convention.

Thank you.

ARBITRATOR KOHEN: Okay. Thanks, both Parties.

Yes, indeed, it is very important to distinguish between interpretation of treaties and modification of treaties. That's a very important point that one has to take into account.

The Parties have, in their written comments, discussed about subsequent—I can't pronounce this word—practice and subsequent agreement—that's better. Obviously, you have opposite views with this one thing and the other.

My question is: In order to have a subsequent agreement, is it indispensable to have a single text in which the Parties say, "Our right interpretation of this, the provision, is like that"?

Is it absolutely indispensable for a subsequent agreement to be concluded in a single instrument?

MR. SILLS: With regard to a subsequent
agreement, I believe the authorities do say yes. So, for example, the ILC Report of 2013 says this: The use in Article 31(3)(a) of the VCLT of the word "agreement" presupposes a single common act by the Parties by which they manifest their common understanding regarding the interpretation of the Treaty.

Now, does it have to be in a single document? Could it be a simultaneous exchange of documents that constitute or purport to constitute an agreement?

I think that's a--given the practical emphasis of the Vienna Convention, I suppose it could be an exchange of documents. In other public law areas, for example, the exchange of diplomatic notes can constitute an agreement as to the meaning of the treaty.

Again, I know this is a particular area of expertise of yours, Professor Kohen. But the exchange of diplomatic notes is a recognized way in which some treaties can be clarified or interpreted. But I think there is no case
suggesting that the submission, in effect an amicus brief, can constitute a subsequent agreement.

And there as the International Law Commission quote that I just read suggests, there is--there's no authority for the notion that an agreement can be extracted from those--you know, from a submission like this.

Does it all have to be on one piece of paper? I think the answer is no.

Can a contract consist of an exchange of documents? Yes, it can. But this is very far afield from that. So I think the abstract question is: Does it have to be a single document? No.

But does it have to be a single transaction, a single occurrence intended to definitively interpret the Treaty? Yes, it does.

ARBITRATOR KOHEN: Thank you.

Any comment from the other side?

DR. FRUTOS-PETERSON: The answer is no. We indicated that in our pleadings, and we supported it with the authorities, and the explanation is there, Professor.
Oh, I'm sorry. I was just saying that the answer is no from our perspective. We pled that--precisely that point because Claimants are arguing the contrary. And all the explanation and supporting authorities are in our submissions.

ARBITRATOR KOHEN: Okay. Thank you.

So in this same vein, do you consider that the Parties of the TPA follow a distinct practice from that that they invoke today?

Is it clear, my question? I can...

MR. SILLS: With apologies. I'm not quite sure.

ARBITRATOR KOHEN: Okay. I will try to explain myself better.

So, you have a treaty concluded by the USA and Colombia, the Treaty entered into force. Was there any change in the practice? Because my prior question was with regard to the interpretation. Okay? But my next question is with regard to the practice.

Did the practice of the Parties to the treaty change through the years? Is it better?

MR. SILLS: Thank you.
I think the only evidence of that would be claims--claims brought under the Treaty by investors here. Because there is no occasion for proceedings between the U.S. and Colombia. Although, you know, the Treaty does have State-to-State provisions in it. And so, if either Colombia or the U.S. sought a definitive interpretation of the Treaty, they could invoke that proceeding, that procedure, and they have not done so.

And I think just as some treaties have a very specific mechanism for States to secure interpretation, as NAFTA at least did, which could be invoked. But I think writing opinions is not practice. Submitting amicus briefs or making amicus submissions is not a practice. "Practice" refers to the real-world experience of the Treaty being applied to concrete situations. And--which is why I think the best guide to what the Treaty means, following its language, which has to be the starting point, is: How have tribunals interpreted and applied the Treaty in practice?

And here there isn't--I mean, although
Colombia has a robust docket of investor-State claims, only a few of them involve this particular Treaty. There are other treaties with a common origin or a common language. The U.S.--as we discussed this afternoon, one of the provisions in dispute here has its origins in the United States model BIT. And so, it's appropriate, I think, to look to that to see what light it can shed on the meaning of the treaty language there, administrative, adjudicatory, and--but the fact--but a practice, I think, common understanding, means: How has the Treaty been dealt with in actual concrete practices, disputes? And then, secondarily, how have similar or identical treaties been dealt with?

In addition, all the non-disputing submissions here that Colombia points to--some of which have been rejected by the tribunals that heard them--were submissions by the U.S. in cases against Colombia. There's nothing ever been submitted by a Colombian investor or by Colombia in a claim by a Colombian investor against the United States. Insofar as I'm aware, there have been no such cases.
So, I think when we think of a common practice, the raw material of a common practice just isn't here.

But, again, I mean, we discussed at some length the decisions of tribunals either rejecting essentially identical submissions by the U.S. on a non-disputing party basis or accepting parts of them.

But the notion that that would somehow establish a common practice, I think, is not correct under the Vienna Convention or under the common understanding of what a practice is.

ARBITRATOR KOHEN: Thank you. Any comment from the Respondent?

DR. FRUTOS-PETERSON: Thank you, Professor Kohen.

We submit that there is a common practice. That practice hasn't changed. You know, we explain it in our submissions, and also today you heard our position in that regard.

So, yes, the Contracting States have been consistent, you know, with the practice on these provisions. No change. Thanks.
ARBITRATOR KOHEN: Okay. Now, I have another question which probably would be better to be answered by the Respondent first.

Is there a possibility to cure jurisdictional deficiencies of the Notice of Arbitration later on? Is it clear, my question?

DR. FRUTOS-PETERSON: The categorical answer is no. I mean that you have to have the Notice of Arbitration at the time that--going back to the requirements of the Treaty, under that Notice of Arbitration, you will have to establish, you know, the breach and the harm that arises out of that breach.

And that is why this Treaty--as some other treaties of the United States with other countries, you know, such as NAFTA, they have those requirements, you know, that you need to demonstrate the breach and the harm that arises out of the breach by the time that you submit the Notice of Arbitration.

ARBITRATOR KOHEN: Claimants, maybe any comments?

MR. SILLS: I put to one side the fact that we believe that the RFA does not require--it's on.
Assuming for the moment, Professor Kohen, that there is a jurisdictional defect here, there is ample authority that a jurisdictional defect can be cured, and we discussed some of those cases in our presentation this afternoon.

So, for example, in the Kappes case, which is actually cited by Colombia here—the Tribunal actually said nothing in the DR-CAFTA, which I think it's common ground, is a very similar treaty to the U.S.-Colombia TPA, that jurisdictional allegations could be supplemented and amended. The same was—the same was true of the statements of the Tribunal in *Pac Rim*.

So, the answer is it's not categorical. And it depends upon the particular pleading. It depends on what cure might be—might be suggested. It depends on whether or not there's really any point.

So, for example, dismissing a claim just so that it could be refiled with a cured jurisdictional objection would make no sense.

So, I think there is ample precedent for taking a practical and not hyper-technical and
formalistic view and allowing clarification. The quotes from decisions--and, again, I--that we had earlier--and I apologize. I don't have the particular quotations before me.

But I know in our presentation this afternoon, we discussed a number of those cases, some from very distinguished tribunals and leading authorities in our field, making it clear that there could be--that jurisdictional objections that were determined--jurisdictional allegations that were determined to be defective could be corrected, supplemented, or amended.

And I do recall that one of those was authored by Mr. Veeder. And I apologize. It's been a long day, and I don't have the name of the case in mind.

ARBITRATOR KOHEN: Thank you very much, Mr. President. I wouldn't like to abuse my time, but I have--yes, I can?

PRESIDENT NUNES PINTO: Yes.

ARBITRATOR KOHEN: With your permission, okay. Go ahead.
When did the alleged investment by Claimants terminated, if it finished at one moment in time? At one moment in time, it finished.

MR. SILLS: The work on--under the Contract, the investment, that work terminated in about 2018 when the refinery was up and running, as it is today. Reficar has still not delivered the contractual close-out documents that are required by the Contract, but there is no ongoing work by the Claimants on.

But it is--I mean, the Contract is still open. And since the Contract is an element of the investment--I think there's no simple answer. I mean, if the question is when did the actual work--the compensated work stop, the answer would be 2018, or perhaps early in 2019.

ARBITRATOR KOHEN: Any comment from the Respondent's side?

DR. FRUTOS-PETRSON: No. We don't have any further comments. Thanks.

ARBITRATOR KOHEN: Thank you. My last question, Mr. President, will be--

PRESIDENT NUNES PINTO: Go on.
ARBITRATOR KOHEN: What is the concrete difference--I would like to know the concrete difference of the rights invoked by Claimants within the Colombian procedures and the rights invoked here. Concretely, which are the rights that are defended within Colombian procedures, and the difference with this--with the rights that are invoked here before this arbitral tribunal?

MR. SILLS: Well, it's a difficult question to answer briefly. But to begin with the source of the rights is different. So, the Treaty, for example, doesn't say due process under the Colombian Constitution. One of the rights that was invoked in the proceedings before the RFA was filed before--and before the CGR itself.

So, fair and equitable treatment is just different from due process under the Colombian Constitution. There we referred to Colombian cases, to Colombian jurisprudence, to--and, for that matter, Colombian procedures.

So, the source of the right is different and the contours of the rights are different.
You know, is there--does the--can the same conduct violate both Colombian law and international law? Of course.

But it's certainly the case that in the First Tutela, it invoked Colombian law and rights under Colombian law that are distinct from the rights under international law. Does Colombian law, for example, guarantee national treatment? So far as I know--I'm not a Colombian lawyer--it does not.

There's no guarantee in Colombian law that investors from other countries will be treated no less well than Colombian investors, whereas that comes from a bedrock principle of investment law, a guarantee of national treatment.

And it's a--it's a broad question, Professor Kohen. And we would have to lay the record and the CGR Proceeding alongside the record here. But I think there is a concrete example of rights that are invoked in this proceeding; that is, the right to national treatment that, so far as I'm aware, has no place in Colombian law.

Colombia does not have a provision that...
guarantees to investors from the United States or any
other country, so far as I'm aware, rights—the right
to national treatment.

   And the Claimants were scrupulous on the
limited—in the limited instances where they resorted
to the Colombian courts to reserve their rights to
seek relief under international law in this
proceeding.

   Is some of the conduct complained of here
conduct that was or could have been complained of in
Colombia? The answer is yes, because—but I don't
think it's a startling proposition to say that similar
wrong acts can give rise to rights under different
legal regimes. And that's—but some of the wrongful
acts are entirely distinct. And the national
treatment point that I just made, I think, is a good
example of that.

   They're different. Are they—I don't think
they're at—they are different. Their sources are
different. The acts that create liability are
different. The remedies are different.

   So, for example, could Colombia—could the
Colombian courts conceivably grant relief as a matter of Colombian law for violation of Colombian law that would go beyond the relief that the Treaty allows?

The answer is yes. So, the elements of a claim, the proof of the claim, the relief that can be granted for violation of a particular right under these two different legal regimes, they are distinct.

ARBITRATOR KOHEN: Thank you.

MR. CONRAD: Professor Kohen, I'm sorry for the interruption, but there's one clarification that I'd like to offer on your previous question, if I may.

ARBITRATOR KOHEN: Of course, yes.

MR. CONRAD: I think your question—and just to remind the Parties here present what the question was that I'll be addressing on the supplementation, is your question about when the investment ended or terminated. I wanted to make sure that we were clear.

Mr. Sills was discussing the scope of work of when the work on the Contract ended in 2018. However, the investment that the Claimants have continues.

And so, the investment that they made
regarding the office, the employees, and the
investment generally that they had in Colombia, the
local Colombian branch, if you will, that we discussed
in our presentation papers still exist. PCIB. I
mean, it's--that investment continues, and I just
wanted to make sure the record was clear on that
point, You Honor. Or--Your Honor, excuse me.
Professor Kohen.

ARBITRATOR KOHEN: Okay. So, if I
understand, your proposition is that it continues.

MR. CONRAD: Correct.

ARBITRATOR KOHEN: It's an ongoing
investment, according to you?

MR. CONRAD: That's correct.

ARBITRATOR KOHEN: Okay. I wonder whether
the Respondent is waiting to make a comment.

DR. FRUTOS-PETERSON: Well, thank you,
Professor Kohen. There are not assets in Colombia,
and they finished working under the Contract. Of
course, we say that that Contract is not an
investment. So--but in any event, the execution of
the Contract has ended, and there are not assets--the
services--I'm sorry--the performance of the services have ended, and there are not assets in Colombia.

ARBITRATOR KOHEN: Okay.

MR. SILLS: And I should say this is yet another disputed issue of fact that cannot be resolved now. But I should note, as we mentioned earlier,

So, I think it's--the work has finished, the refinery is there. The Contract has not been--the closing documents have not been delivered by Reficar as they're obligated to under the Contract, and they have, in fact, commenced proceedings.

So, I think it's fair to say it's a mixed question of law and fact whether the investment still continues. We say it does. They say it doesn't. But it's yet another question that can't be resolved in this procedural context.

ARBITRATOR KOHEN: Okay. Thank you very much. No further questions, Mr. President.
PRESIDENT NUNES PINTO: Before we close the
session, I have just one question. And I would like
to make a reference first to Claimants' Slide
Number 33 and also Respondent's 153. 1-5-3.

Basically, what we have here, it's along the
lines of your clarification. Respondent claims that
there was no investment risk and, therefore, no
investment. Okay? I do not want to go into the
details. This is something we'll decide later.

But in your Slide 33, the highlighted
portion says Claimants contracted with Reficar, a
Colombian-owned enterprise, to provide project
management services in connection with the
construction expansion of an oil refinery owned by
Colombia to supply environmentally clean motor fuels
to meet Colombian demand.

This portion is part of my question now. In
doing so, Claimants invested significant amounts of
time, capital, personnel and labor in Colombian
territory. This Slide is also Slide 96 in your
presentation, but that's the same.

Then I go to Slide Number 3 of Respondent,
which says it's a summary of the Services Contract and
says remuneration structure: Full reimbursement of
costs plus profit. Okay.

And the question is, how do I draw the line
to segregate what is investment and what is
reimbursement of a services contract? How? Because
you have just clarified that the Contract is still
open, it was not closed. and you have personnel there. The
investment--you told us the investment is there. And
then Respondent says, "No, you don't have anything.
You don't have assets."

This is something that we will decide at a
proper time.

But my question is: If you've got under the
service contract the reimbursement of amounts plus
profit, or costs plus profit, how do you draw the line
to say that there is a portion which is investment
made by me? That's what you are saying.

And this Slide 33, which is Paragraph 29 of
the Request for Arbitration.

Do you understand my point?
MR. SILLS: We do. And I put to one side, Mr. President, the notion that what Colombia describes as investment risk is a necessary element of an investment when the Treaty lists it disjunctively and common practice lists it disjunctively.

You know, if I build a factory in Colombia to provide a particular good to Colombia, and the Government is the only consumer of that good, and I build the factory and I hire labor and I buy raw materials and I sell them to the Colombian Government at an agreed price, I don't think anyone wouldn't say I haven't made an investment in Colombia. Even though Colombia would now say, "Well, you took no risk. You know, you agreed to do this on a cost-plus basis."

But I think what your question highlights is how fact-intensive this decision is.

PRESIDENT NUNES PINTO: Let me just add something. I'm not looking, with this question, the situation--the current situation today. As it was in the past, you'll have reimbursement and investment.

I'm looking to that point. Yeah.

MR. SILLS: And I understand. But I think
at the one extreme, you have a simple contract to sell goods or services. Is that an investment? I think its common ground that it's not.

And at the other extreme, you acquire real estate, put in an elaborate manufacturing facility and hire workers and pay taxes. And everyone would agree that is an investment. And there's a spectrum. And I think your question asks: Where does one draw the line along that spectrum?

And I think the answer is--and as the--actually, as the explanatory notes to the Treaty make clear, it's a complex question of law and fact, where to draw that line. And you have to draw it with reference to the particular investment.

But I have to say that as per Slide--was this the confidential Slide--as our Slide 34 made clear--

PRESIDENT NUNES PINTO: I did not mention it for obvious reasons.

MR. SILLS: But we do not at all agree with or endorse Colombia's graphic on Page 153 of the Contract. There was--even in the terms they set out,
there was investment risk here.

And as you know, the Czech case that we cited and discussed makes clear, it's somewhat remarkable that Colombia--Reficar's parent, Colombia, is now trying to extract from our clients 300 percent of the revenues that were recognized there. To say, "Well, you face no risk."

And any long-term investment in a foreign country is an investment within the meaning of the Treaty. But I think this is yet another issue because where one draws the line with respect to any particular investment or claimed investment is going to depend on the particular facts of the investment, the particular context in which it's made, the agreements that govern it, the real-world experience of how that investment was treated. And, it's, again, a question of fact.

And our Slide 34--and I thank you for leaving it as it is. But that Slide makes it clear that there was risk.

We say it's more than ample risk to satisfy that condition, assuming that risk is required for an
investment as opposed to being one of the elements
listed in the Treaty for an investment. Investment is
drafted in a very broad sense in the TPA, and that has
to be taken account of.

But it's simply Colombia's challenge to the
investment status of our investment is not one that
can be resolved at this point.

PRESIDENT NUNES PINTO: Thank you.

Any comments?

DR. FRUTOS-PETERTSON: Well, Mr. President,
we submit to you that this is precisely the question
that this Tribunal is to decide right now. You know,
it's a jurisdictional question, so it is before you.
You can decide that question just by looking at the
Contract.

The Contract is an exhibit in the case. We
went through those Slides. We have explained the
formulation of payments, you know, to all their
services that they rendered under the Contract, and we
still don't see the investment. They got every penny
they charged, they got it back, and we move on.

So, the--anyway...
PRESIDENT NUNES PINTO: Yeah. I know that this is something that we have to decide. But it's also useful to have the Parties' views on certain aspects, especially this one. Because I'm moving from today's date to the past, what happened when everything was active in the Contract and the joint venture. That's it.

Okay. I have the information. I thank you very much.

Well, this was just some questions. Any more questions?

Any matters you would like to address before we adjourn, or we can go home?

MR. SILLS: Nothing. Nothing for the Claimants, Mr. President.

PRESIDENT NUNES PINTO: Okay.


PRESIDENT NUNES PINTO: Again, I would like to thank you very, very much for this long day. It was excellent to be back and be here in this room sharing your views, our questions, your presentations
with those who, unfortunately, for sanitary reasons, could not be here but followed us by the platform.

So, I thank you very, very much. I'm delighted to be here. And tomorrow at 10:30 we start, an hour and a half later than today, and we should be closing by 1:00 o'clock. Okay.

(Whereupon, at 5:58 p.m. the Hearing was adjourned until 10:30 a.m. the following day.)
CERTIFICATE OF REPORTER

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

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

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