

**INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES**

ICSID Case No. ARB/19/6

BETWEEN

**ANGEL SAMUEL SEDA, JTE INTERNATIONAL INVESTMENTS, LLC, JONATHAN
MICHAEL FOLEY, STEPHEN JOHN BOBECK, BRIAN HASS, MONTE GLENN
ADCOCK, JUSTIN TIMOTHY ENBODY, JUSTIN TATE CARUSO AND THE BOSTON
ENTERPRISES TRUST**

Claimants

and

THE REPUBLIC OF COLOMBIA

Respondent

CLAIMANTS' REPLY MEMORIAL

19 September 2021

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I. INTRODUCTION

1. Angel Samuel Seda, JTE International Investments, LLC, Jonathan M. Foley, Stephen J. Bobeck, Brian Hass, Monte G. Adcock, Justin T. Enbody, Justin T. Caruso, and The Boston Enterprises Trust (together, “**Claimants**”) submit this Reply Memorial (“**Reply**”) and Appendices I and J in respect of their claims against the Republic of Colombia (“**Colombia**” or “**Respondent**”), arising from Colombia’s expropriation and unlawful treatment of the Claimants’ investments. Claimants submit this Reply in accordance with Procedural Order No. 1, dated 7 April 2020, as amended by subsequent Parties’ agreement and Rule 31 of the International Centre for Settlement of Investment Disputes (“**ICSID**”) Rules of Procedure for Arbitration Proceedings (“**ICSID Arbitration Rules**”).
2. The Reply is submitted together with:
 - a. A second witness statement by Mr. Angel Seda, dated 17 September 2021 (“**Seda 2 WS**”);
 - b. A second expert report on Colombian law by Dr. Carlos E. Medellín Becerra, former Minister of Justice and Law of Colombia, dated 16 September 2021 (“**Medellín 2 Report**”);
 - c. A second expert report on Colombian law by Dr. Wilson A. Martínez Sánchez, former Deputy Attorney General of Colombia (“**Vicéfiscal General**”) of Colombia, dated 16 September 2021 (the “**Martínez 2 Report**”);
 - d. A second expert report on damages by Daniela M. Bambaci and Santiago Dellepiane A. of BRG, dated 17 September 2021 (the “**BRG 2 Report**”);

- e. A second expert report by Jones Lang LaSalle (“**JLL**”) on the market survey of luxury hospitality and residential developments in Colombia, dated 16 September 2021 (the “**JLL 2 Report**”);
 - f. An updated Table of Select Abbreviations and Defined Terms;
 - g. A Dramatis Personae;
 - h. A consolidated Index of Factual Exhibits; and
 - i. A consolidated Index of Legal Authorities.
3. For ease of reference, the Claimants adopt the same definitions contained in their Memorial dated 15 June 2020 (the “**Memorial**”), including the Table of Select Abbreviations and Defined Terms submitted therewith. To the extent not expressly admitted herein, Claimants do not accept the allegations made by the Respondent in its Counter Memorial dated 16 November 2020 (the “**Counter Memorial**”). Claimants reserve the right to expand upon the facts and legal arguments set out in this Reply on further review of recently produced materials by Colombia on 15 September 2021 (just days before the deadline for this submission), the discovery of new evidence, or to respond to any new arguments or defenses asserted by Colombia for the first time in their Rejoinder.

II. EXECUTIVE SUMMARY

4. Colombia has unlawfully expropriated Claimants' investments in the Meritage Project—a mixed-use real estate development project just outside of Medellín that was to be comprised of 23 towers of over 400 units, dozens of commercial storefronts, and almost 100 houses. An extension of Mr. Seda's successful hospitality and real estate business, which included the market-leading Charlee Hotel and a sold-out Luxé by the Charlee luxury real estate project, the Meritage Project was poised to capitalize on and contribute to the revival of a city previously beset with drug violence. But in August 2016, based on little more than the testimony of a known drug trafficker, Iván López Vanegas, Colombia halted any further development of the Meritage Project by launching "**Asset Forfeiture Proceedings**," purportedly on the basis that the lot on which the Project was being built had, two decades ago, belonged to Mr. López Vanegas.

5. Just prior to the expropriation, 700 people were working on completing construction of the Meritage Project and sales of residential and commercial units were in full force, with over 150 units already sold, given Mr. Seda's successful development track record and the popularity of his brand. All this came to an abrupt halt, leading to the complete loss of Mr. Seda's and the other Claimants' investment in the Meritage Project. The loss extended beyond the Meritage Project. Mr. Seda's other developments also came to a grinding halt as a result of the stigma that comes with Asset Forfeiture Proceedings—banks and investors lost confidence in Mr. Seda and withdrew their financial support from all of the projects Mr. Seda was in the midst of pursuing. Claimants lost millions of dollars in profits as a result. But Colombia has not paid them a penny in compensation.

6. Colombia's misconduct did not stop with its unlawful expropriation. Though Colombia underpinned its decision to target the Meritage Project because of the underlying lot's alleged decades-old association with Mr. López Vanegas, Colombia has failed to take any action against any other properties belonging to Mr. López Vanegas. Most strikingly, Colombia has failed even to take action against a plot of land that was subdivided from the very same plot of land from which the Meritage Property originated, and thus suffers from the very same alleged infections of title as the Meritage Property. Colombia's excuses for its lack of action contradict its own assertions (and that of its experts) that the Attorney General's Office is required to initiate asset forfeiture proceedings against tainted lots. Colombia's manifestly discriminatory treatment violates its obligations under the United States-Colombia Trade Promotion Agreement ("TPA").
7. Colombia's inaction against other López Vanegas properties exposes both Colombia's arbitrary and unreasonable conduct in instituting the Asset Forfeiture Proceedings against Meritage and the corrupt nature of its actions, in flagrant breach of its TPA obligations. While the Asset Forfeiture Proceedings have rendered Claimants' investments worthless, they have left intact the proceeds of crime gained by Mr. López Vanegas and his criminal associates from the transfer of the Meritage Project's parent property. Colombia avers that the rationale for the Asset Forfeiture Proceedings was to "*fight organized crime*"¹ yet the actual criminals here have gotten away scot-free. The only victims are innocent third parties, including the U.S. investors in the Meritage Project (along with the Unit Buyers and the Project's fiduciary, Corficolombiana)—whose good faith the Attorney General's

¹ Counter Memorial, ¶ 303.

Office never bothered to assess before imposing precautionary measures, as expressly required under Colombian law.

8. These discriminatory and arbitrary actions can only be explained by the corrupt manner in which two dirty prosecutors within the Attorney General's Office—Ms. Andrea Malagón, the Director of the Asset Forfeiture Unit, and her deputy, Ms. Alejandra Ardila Polo—launched the Asset Forfeiture Proceedings. Mr. López Vanegas first reached out to Mr. Seda in 2014 asking for a payout after Mr. Seda had finalized due diligence of the Property and begun development of the Meritage Project. Mr. Seda declined his extortionate demands, leading Mr. López Vanegas to file a complaint with the Attorney General's Office. Mr. López Vanegas' complaint collected dust for nearly two years.
9. Then, on 7 April 2016, Mr. López Vanegas—newly represented by Mr. Victor Mosquera and Mr. Gabriel Valderrama—reinitiated contact with Mr. Seda. The very next day, Ms. Malagón assigned the complaint to Ms. Ardila. Mr. Mosquera asked Mr. Seda once again for a payout, bragging about his connections with and influence over Ms. Malagón and Ms. Ardila. During this time, Mr. Seda was approached several times by individuals claiming to represent the Attorney General's Office, asking him to pay to make the case go away. Mr. Seda persistently refused these demands.
10. Then, on 22 July 2016, Ms. Ardila signed a Precautionary Measures Resolution to seize the Property. Three days later, Mr. Valderrama attempted to contact Mr. Seda again, claiming “[i]t's very important that we talk” but when Mr. Seda refused to reengage, Mr. Valderrama ominously announced to Mr. Seda that “[t]he negotiation chapter is closed.”²

² Exhibit C-163, WhatsApp chain between Angel Seda and Gabriel Valderrama, 25 July 2016.

And, as Mr. Valderrama foretold, a week after that, Ms. Ardila arrived at the Meritage Property, armed with a Certificate of Seizure that forbade any further development of the Project. When Meritage’s fiduciary, Corfic Colombiana, attempted to gain a copy of the Precautionary Measures Resolution underlying the seizure, Ms. Malagón and Ms. Ardila continually refused to provide it and fired the official who ultimately handed over the document. This episode would be emblematic of how the entire Asset Forfeiture Proceeding would play out: Claimants would be denied such basic due process as receiving a copy of the order to seize their property. Claimants had submitted in their Memorial that these “*red flags*” (among others) were sufficient to infer corrupt, collusive conduct, which blatantly violates Colombia’s obligations under the TPA.

11. Two developments since the Claimants filed their Memorial all but confirm the existence of a corrupt scheme. First, Mr. Seda was invited by officials at the Attorney General’s Office—including the then-Head of the Asset Forfeiture Unit, Ms. Ana Catalina Noguera, and Colombia’s witness in this arbitration Mr. Daniel Hernández, who was the prosecutor in the Anti-Corruption Unit to whom Mr. Seda complained about the corruption scheme—to discuss corruption within the Attorney General’s Office. Concerned about potential entrapment and in self-defense, Mr. Seda recorded these meetings (as he was permitted to do under Colombian law). In these recordings, which Claimants invite the Tribunal to review in full, Ms. Noguera, Mr. Hernández, and two other prosecutors in the Attorney General’s Office openly admit that Mses. Malagón and Ardila were corrupt and had used “*the same modus operandi*” in other asset forfeiture cases to extort their victims.³

³ Exhibit C-323, Transcript of Audio File (Part 1), 4 June 2020, p. 29.

12. Second, Colombia has now produced—“*under protest*”—evidence of numerous credible allegations of corruption against Mses. Malagón and Ardila, accusing them of abusing their prosecutorial powers to extort victims by initiating improper asset forfeiture proceedings (“**Colombia’s Production Under Protest**”). In contempt of the Tribunal’s direct orders, Colombia has refused to provide documents that further evidence the corrupt schemes orchestrated by Mses. Malagón and Ardila, including documents that could go specifically to their conduct in the Asset Forfeiture Proceedings against the Meritage Project. Colombia’s refusal to disclose documents relating to the corrupt conduct of Mses. Malagón and Ardila warrants an adverse inference as to the contents of those documents. Given Colombia’s Production Under Protest, its contempt of the Tribunal’s disclosure orders, stark admissions of officials from the Attorney General’s Office (including Colombia’s witness in this Arbitration), and the striking “*coincidences*” in timing between the threats made by Mr. López Vanegas and his lawyer and the seizure, it is clear that Mses. Malagón and Ardila engaged in a corrupt scheme to extort Mr. Seda, and when he refused to pay, launched the Asset Forfeiture Proceedings. Few cases have as clear evidence of corruption as this one. Such corruption not only undermines investor confidence, but it is a threat to the development of Colombia’s economy and political institutions. It should be strongly condemned by this Tribunal and by Colombia itself.
13. Faced with these dire facts—most of which Colombia does not (and indeed cannot) oppose—Colombia refuses to take responsibility. Instead, it resorts to victim blaming. Colombia nit-picks Mr. Seda’s due diligence, and his reaction to being extorted and threatened in an attempt to justify taking away his Project on dubious grounds. Colombia does not dispute that Newport (Mr. Seda’s special purpose vehicle for the development of

the Meritage), through its fiduciary Corficolombiana, (i) hired a reputable firm to conduct a title study which searched the OFAC sanctions list, the UN anti-terrorism list, and conducted public sources searches; (ii) put together a list of prior owners of the property going back 50 years and submitted that list to the Asset Forfeiture Office, which certified that it had no record of any criminal activity associated with those individuals and entities (in its “**Certification of No Criminal Activity**”); and (iii) undertook its own anti-money laundering due diligence that it is required to do as a regulated financial institution. Despite acknowledging these steps, Colombia claims Newport did not do enough.

14. But Colombia’s attacks on Newport’s due diligence disintegrate completely in light of a recent decision by Colombia’s highest court confirming the applicable standard for due diligence. That decision found that “*the good faith and diligence that may be required of third-party acquirers refer exclusively to assets that are the object of a legal operation, but not to those persons who transfer domain over them.*”⁴ In other words, “*when someone intends to acquire an asset, it is up to that person to ascertain the legal status of such asset in order to establish the history and the chain of title and tradition, but not to inquire into the history or personal details of the party that transfers the respective assets to him.*”⁵ This decision—rendered three months before Colombia’s Counter Memorial in this case but not discussed by Colombia or its experts—is dispositive of the due diligence issue in this case. Colombian law is clear: Mr. Seda conducted the requisite amount of due diligence simply by hiring a firm to conduct a title study. That Mr. Seda and

⁴ **Exhibit C-329**, Constitutional Court of Colombia, Decision C-327/20, 19 August 2020, pp. 42-43 (emphasis added).

⁵ **Exhibit C-329**, Constitutional Court of Colombia, Decision C-327/20, 19 August 2020, pp. 42-43 (emphasis added).

Corficolombiana went above and beyond—including by securing an express Certification of No Criminal Activity from the Asset Forfeiture Unit of the Attorney General’s Office—is testament to their good faith and their commitment to ensuring that the land was clean. Colombia’s attempts to find fault with Newport’s and Corficolombiana’s diligence because they did not discover the alleged criminal links to Mr. López Vanegas, which took the Attorney General’s Office itself months of investigations backed by the prosecutorial authority of the State to establish, is simply farcical.

15. Indeed, both Ms. Noguera, who headed the Asset Forfeiture Unit, and Mr. Hernández, Colombia’s witness in this arbitration, were candid in their recent discussions with Mr. Seda that he was undoubtedly a good faith third party without fault. Ms. Noguera in particular declared that despite their robust diligence, Newport and Corficolombiana “*had no way of knowing*” the alleged vices in the property’s title.⁶ Mr. Hernández similarly declared in plain terms: “*How do you explain to [this Tribunal] that, at the end, this man [Mr. Seda] did everything he had to do, performed his checks—what he didn’t do was ask the drug dealer: ‘Hey, Mr. Drug Dealer, come here. Was this yours?’ That’s the only thing you could have done.*”⁷ These words could not be clearer. That is why Mr. Hernández plainly declared: “*these days we might say, as the Attorney General’s Office, that you’re a buyer in good faith.*”⁸ But the Meritage Property and Project nonetheless remain confiscated and there is no longer any hope that they can be developed.

⁶ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 7.

⁷ **Exhibit C-325**, Transcript of Audio File (Part 5), 4 June 2020, at pp. 45-46.

⁸ **Exhibit C-374**, Transcript of Audio File, 25 June 2020, p. 3

16. Colombia's suggestions that Mr. Seda's communications with Mr. López Vanegas somehow corrupted the due diligence process also fail. Mr. López Vanegas first contacted Mr. Seda in early 2014, over nine months after the title study had shown no defects in the chain of title, and approximately six months after the Attorney General's Office issued the Certification of No Criminal Activity, in reliance of which Mr. Seda and the other Claimants had already invested in the Meritage Project. Also, relying on their due diligence, Corficolombiana and Newport developed the trust structure to manage the Meritage Project and commenced presales of the units in 2013. Thus, Mr. López Vanegas' 2014 extortion demand has no bearing on the adequacy of the due diligence performed for the Meritage Project. Due diligence, by definition, is performed before a transaction. In this case, events occurring post-diligence, and after the investment had already been made, cannot be the basis to attack the initial diligence.
17. Likewise, Colombia's attempts to criticize Mr. Seda for not reporting the extortion to the Attorney General's Office until December 2016 have no bearing on his diligence. Colombia's critique ignores the fact that Mr. Seda had good reason—now fully substantiated by Colombia's own witness in this Arbitration and other senior prosecutors from the Attorney General's Office—to believe that individuals within the Attorney General's Office were colluding with Mr. López Vanegas to extort him. So Mr. Seda responded the way a reasonable business-person would. He first dismissed Mr. López Vanegas' claims in light of the clean title study and Certification of No Criminal Activity he had received. But when the Attorney General's Office seized the Meritage Project, just as Mr. López Vanegas predicted it would, Mr. Seda approached the only authorities he thought he could trust—the U.S. embassy. It was only when the Attorney General's

Office's Anti-Corruption Unit reached out to Mr. Seda (and Mr. Seda verified the legitimacy of the officials who had contacted him) that Mr. Seda filed a complaint with them. And indeed, Colombia's utter failure to act on his complaint at that time—the status of which is still unclear in light of Colombia's refusal to disclose ordered documents and its limited Production Under Protest—only confirm Mr. Seda's lack of faith in Colombia's authorities.

18. Had Colombia scrutinized its corrupt officers with even a fraction of the zeal it has shown for undermining Mr. Seda, the situation would be quite different. Instead, Colombia has chosen to come after Mr. Seda with the full force of the State. Not only did Colombia kill the Meritage Project, its carelessness has irrevocably damaged Mr. Seda's professional reputation, which, as a foreigner, Mr. Seda had painstakingly built over nearly a decade. Tainted by the Asset Forfeiture Proceedings, Mr. Seda has lost funding, investors, and business partners, leading to the collapse of his entire portfolio of real estate projects, which were projected to generate millions of dollars in profits. Critically, banks will no longer lend to him, and have in fact initiated lawsuits against him for defaulting on the loans advanced for the Meritage and Luxé Projects. As a result, even the substantially advanced Luxé Project remains unfinished (though it was months away from completion at the time of the expropriation of the Meritage), rendering null the investments made in it.
19. Thus, Colombia has breached its obligations under the TPA and must compensate Mr. Seda and the other Claimants. Ms. Bambaci and Mr. Dellepiane of BRG have estimated the fair market value (“**FMV**”) of the pipeline of projects (“**Claimants' Projects**”) as of 25 January 2017. Including pre-award interest, Mr. Seda is owed USD 239.2 million and the remaining Claimants USD 16.6 million, as of the date of this submission.

20. Colombia accepts that, if a breach of the TPA is found, Claimants are due the FMV of their investments as compensation, but Colombia fails to submit any such valuation. Instead, Colombia's expert, Dr. Richard Hern of NERA, performs a historical costs calculation, which he himself acknowledges is incomplete and unreliable. Indeed, such an approach would grossly undercompensate Claimants whose projects—in particular Meritage and Luxé—were significantly advanced. As of January 2017, all of the 152 Phase 1 units (as well as 21 Phases 4 and 6 units) of the Meritage Project had been presold and its construction was well underway. As of the same date, construction and sale of Phases 1, 2, and 5 of Luxé (which included 17 residential lots, 18 apartments, and 45 houses) were complete, and construction of the hotel associated with the Project was approximately 70 percent complete. A costs approach ignores the value of future cash flows that these Projects were on the cusp of making, and which one must consider in assessing the FMV of the Projects.
21. The remainder of this Reply responds to the factual, legal, and quantum theories put forward by Colombia. This Reply proceeds as follows:
22. **Part III** sets out the undisputed facts relevant to this dispute, followed by a discussion of facts that are in dispute and factual developments that have occurred since Claimants filed their Memorial;
23. **Part IV** addresses Colombia's challenges to this Tribunal's jurisdiction;
24. **Part V** addresses Colombia's challenges to the legal merits of the claims;

25. **Part VI** addresses Colombia's challenges to the valuation of Claimants' damages as conducted by their expert, BRG, and the alternative valuation supplied by Colombia's expert, NERA; and
26. **Part VIII** sets out the request for relief that Claimants respectfully request this Tribunal to award in order to remedy the egregious conduct that Claimants have suffered.

III. THE KEY FACTS ARE NOT IN DISPUTE

27. Colombia largely accepts the key facts most relevant to this dispute. Specifically, Colombia does not dispute that:

- a. Mr. Seda had almost a decade's worth of experience as a real estate and hospitality developer in Colombia prior to the Colombia's measures in dispute. In 2007, Mr. Seda arrived in Colombia and made the decision to invest in Medellín after recognizing the significant growth potential of the city, as well as Colombia's renewed focus on investor protection, and prioritization of economic growth and development.⁹ He set up a real estate development company, Royal Realty S.A.S. ("**Royal Realty**"), in Colombia as his personal development vehicle.¹⁰
- b. In 2008, Royal Realty commenced development of the Charlee Hotel.¹¹ In January 2011, the Charlee Hotel opened to widespread acclaim and remains one of the top luxury hotels in Medellín, consistently maintaining higher than average occupancy rates in Colombia.¹²

⁹ See Memorial, ¶¶ 31-33; Seda 1 WS, ¶¶ 10-11; Counter Memorial, ¶ 20. See also Memorial, ¶¶ 25-30.

¹⁰ See Memorial, ¶ 34; Seda 1 WS, ¶ 13; Counter Memorial, ¶ 21; **Exhibit C-012bis**, Royal Realty S.A.S. Certificate of Existence and Good Standing, 20 December 2017; **Exhibit C-356**, Royal Realty S.A.S. Certificate of Existence and Good Standing, 29 December 2020.

¹¹ See Memorial, ¶ 35; Seda 1 WS, ¶¶ 15-16; Counter Memorial, ¶ 22.

¹² See Memorial, ¶¶ 53-54, 492; Seda 1 WS, ¶¶ 26-28; NERA Report, ¶ 126; **Exhibit C-016bis**, Hot List 2012: Best New Hotels Under \$300, CONDE NAST TRAVEL, 16 April 2012, <https://www.cntraveler.com/galleries/2012-04-16/best-affordable-new-luxury-hotels-deals-hot-list-2012>; **Exhibit C-141**, Nell McShane Wulfhart, 36 hours in Medellín, Colombia, THE NEW YORK TIMES, 13 May 2015; **Exhibit C-159**, Nick Pachelli, 21 Reasons the Cool Kids of Colombia Flock to Medellín, VOGUE, 10 May 2016, <https://www.vogue.com/article/medellin-colombia-cool-destination-travel-guide>, p. 0002. See also **Exhibit C-017bis**, A. Marsh, 3 days in Medellín, Colombia, CONDE NAST TRAVEL, 16 April 2018, <https://www.cntraveler.com/story/3-days-in-medellin-colombia>; **Exhibit C-015bis**, Charlee Hotel Management Report, 2017, p. SP-0002. See also BRG 2 Report, ¶ 115.

- c. In 2009, Mr. Seda began development of a multi-phase luxury resort and residential complex called Luxé by The Charlee (“**Luxé**”) in the town of Guatapé.¹³ On 5 April 2009, Mr. Seda established Luxé by The Charlee S.A.S. (“**Luxé SAS**”) to manage and develop the project.¹⁴ Presales demand for units in the Luxé was very high.¹⁵ Construction on Luxé commenced in September 2010, and by August 2016, construction and sale of Phases 1, 2, and 5 of Luxé (which included 17 residential lots, 18 apartments, and 45 houses) were complete and construction of Phase 3 (a 116-room luxury hotel) was underway.¹⁶ A COP 8 billion (USD 4 million) loan from Colpatria was funding construction of Phase 3.¹⁷
- d. In 2012, Mr. Seda embarked on a landmark mixed-use community project called the “**Meritage Project,**” consisting of a luxury hotel with long-term stay suites (“**apartasuites**”), residential apartments, single family homes and commercial storefronts.¹⁸ In September 2012, he identified the property on which he would build the Meritage Project (the “**Meritage Property**”) in Envigado.¹⁹ The land was optimally situated between the city and the airport, and a tollbooth previously located between the

¹³ See Memorial, ¶¶ 43-46; Seda 1 WS, ¶¶ 21-22; Counter Memorial, ¶ 25; **Exhibit C-010bis**, N. Foster, Luxury Living in a Bucolic, Shoreline Setting in Colombia, The New York Times, 9 May 2013, <https://www.nytimes.com/2013/05/10/realestate/10iht-recolombia10.html>, p. 0001; **Exhibit C-214**, Aerial Video of Luxé by The Charlee, 31 July 2018.

¹⁴ See Memorial, ¶ 46; Counter Memorial, ¶ 25; **Exhibit C-249**, Luxé By The Charlee S.A.S. Certificate of Existence and Good Standing, 28 April 2020, p. SP-0002.

¹⁵ See Memorial, ¶ 51; Seda 1 WS, ¶ 25.

¹⁶ See Memorial, ¶¶ 51, 312; Seda 1 WS, ¶ 109; Counter Memorial, ¶ 27.

¹⁷ See Memorial, ¶ 312; Seda 1 WS, ¶ 72; López Montoya WS, ¶¶ 9-10; **Exhibit C-135**, Loan Approval Letter from Colpatria, 23 September 2014; **Exhibit C-137**, Amended Loan Approval Letter from Colpatria, 11 December 2014. See also Counter Memorial, ¶ 475.

¹⁸ See Memorial, ¶¶ 56, 81; Seda 1 WS, ¶¶ 38-48, 55-61; Counter Memorial, ¶ 53.

¹⁹ See Memorial, ¶¶ 57-59; Seda 1 WS, ¶¶ 40-48; Counter Memorial, ¶ 53.

property and the city would be moved to the other side of the Property, such that there would be no need to pay a toll when traveling between the Meritage Project and the city center of Medellín.²⁰ Additionally, Avianca Airlines, one of the largest airlines in Latin America, was moving its operations from Bogotá to Medellín, which was expected to bring in significant economic activity.²¹ The land Mr. Seda ultimately chose—based on its location, size, existence of environmental issues, and price—was owned by La Palma Argentina S.A.S. (“**La Palma**”).²²

- e. On 1 November 2012, Royal Realty and La Palma signed a Sales-Purchase Agreement whereby La Palma assumed the obligation to sell and Royal Realty acquired the option to purchase the Meritage Project.²³ The Sales-Purchase Agreement envisioned the creation of a trust into which La Palma agreed to transfer title to the Property and that would manage the funds for development of the Meritage Project.²⁴ The Sales-Purchase Agreement gave Royal Realty the right to acquire the Property in phases depending on the fulfilment of sales thresholds—known as the “**equilibrium point**”—to be determined by the trustee, to be appointed by Royal Realty.²⁵ On 9 May

²⁰ See Memorial, ¶ 57.

²¹ See Memorial, ¶ 58. **Exhibit C-018bis**, J. Felipe Sierra Suárez and N. Abrew Quimbaya, *Avianca will transfer its maintenance center to Rionegro*, EL COLOMBIANO, 24 May 2014, https://www.elcolombiano.com/historico/avianca_trasladara_su_centro_de_mantenimiento_a_rionegro-PXEC_295965.

²² See Memorial, ¶¶ 59-61; Seda 1 WS, ¶¶ 43-45; Counter Memorial, ¶ 53.

²³ See Memorial, ¶¶ 61, 370; Seda 1 WS, ¶ 47; Counter Memorial, ¶¶ 53-55; **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012.

²⁴ See **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, cl. 9.

²⁵ See **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, cl. 1(2), pmb1. 7. Colombia disputes the “*legal validity*” of the Sales-Purchase Agreement but not its content. Counter Memorial, ¶¶ 53-56.

2013, Royal Realty assigned its interest in the Sales-Purchase Agreement to Newport.²⁶

- f. On 7 March 2013, well known Colombian real estate law firm Otero & Palacio issued a title study that gave a “*favorable*” rating to the chain of title associated with the Meritage Property.²⁷
- g. On 22 August 2013, Corficolombiana, the fiduciary for the Meritage Project, submitted a petition to the Attorney General’s Office’s Asset Forfeiture and Money Laundering Unit asking whether the Unit was “*conducting an investigation regarding Asset Laundering and/or an Asset Forfeiture procedure*” involving the Meritage Property or “*whether any inquiry, investigation, or process whatsoever of a criminal nature [was] underway*” against any of the current or prior titleholders of the Property, including persons identified in then-current corporate records for the juridical persons in the chain of title.²⁸ On 17 September 2013, the Director of the Asset Forfeiture and Money Laundering Unit responded confirming that there was “*no evidence of any type of investigation related to this property or its owners in the database*” (“**Certification of No Criminal Activity**”).²⁹

²⁶ See Memorial, ¶¶ 74, 370; Seda 1 WS, ¶ 51; Counter Memorial, ¶ 57; **Exhibit C-103**, Agreement between Royal Realty S.A.S. and La Palma Argentina Y CIA. LTDA., 9 May 2013.

²⁷ See Memorial, ¶ 67; Seda 1 WS, ¶ 50; Counter Memorial, ¶ 74; **Exhibit C-030bis**, Otero & Palacio Title Study, 7 March 2013 and Supplement, 23 July 2013, p. SP-0003.

²⁸ See Memorial, ¶ 69; Seda 1 WS, ¶ 53; Counter Memorial, ¶ 82; **Exhibit C-031bis**, Petition for Information from Fiduciaria Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013.

²⁹ See Memorial, ¶ 72; Seda 1 WS, ¶ 54; Counter Memorial, ¶ 83; **Exhibit C-032bis**, Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Fiduciaria Corficolombiana, 9 September 2013, p. SP-0001.

- h. Once presales for the Meritage Project began, units sold quickly and by February 2015, the equilibrium point had been achieved for Phases 1 and 6.³⁰
- i. On 17 October 2013, Newport and Corficolombiana entered into the “**Presale Trust Agreement**” and the “**Administration and Payment Trust Agreement**” to manage the development of the Meritage Project.³¹ The Presales Trust Agreement authorized Corficolombiana to collect and manage funds from third-party “**Unit Buyers**” in the Meritage Project until the equilibrium point was achieved for each of the Meritage Project’s eight phases.³² The Administration and Payment Trust Agreement served to manage the funds through which, and land on which, the Meritage Project was going to be developed.³³
- j. On 20 January 2014, Colombia enacted Law 1708 of 2014 (“**Asset Forfeiture Law**”), which set out a comprehensive code for the regulation of the asset forfeiture process in Colombia.³⁴ The Asset Forfeiture Law provided the grounds on which forfeiture could be declared and established three phases for the process: (i) the initial phase during which the Attorney General’s Office investigates and collects evidence of illegality, which results in (ii) the provisional determination of the claim, following

³⁰ See Memorial, ¶¶ 89, 371; Seda 1 WS, ¶ 68; NERA Report, ¶ 49; BRG 2 Report, ¶ 30(b); **Exhibit C-139**, Letter from Newport to Corficolombiana, 9 February 2015.

³¹ See Memorial, ¶ 78; Seda 1 WS, ¶ 55; Counter Memorial, ¶¶ 59, 63; **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013; **Exhibit C-034bis**, Presales Trust Agreement, 17 October 2013.

³² Memorial, ¶ 79; Counter Memorial, ¶ 63; **Exhibit C-034bis**, Presales Trust Agreement, 17 October 2013, cl. 2.1, rec. 3.

³³ Memorial, ¶ 80; **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013.

³⁴ See **Exhibit C-003bis**, Law 1708, 20 January 2014.

which parties may file opposing briefs, on the basis of which the Attorney General's Office may file before a specialized asset forfeiture court; and (iii) the *requerimiento*, or final determination of the claim.³⁵ The Law also enshrined the requirement to protect good faith third parties from forfeiture processes. This included:

- k. Article 7 on the "Presumption of Good Faith" provides that "[g]ood faith is presumed in all legal action or transaction related to the acquisition or use of the assets, as long as the owner of rights proceeds in a diligent and prudent manner, without any fault."³⁶
- l. Article 3 on the "Right to Property" provides that "[a]sset forfeiture shall have as its limit the right to ownership legally obtained in good faith without fault and exercised in accordance with the social and ecological function inherent therein."³⁷
- m. Article 118(5) requires the Attorney General's Office to "[s]earch for and collect the proof which makes it possible to reasonably conclude that there is no good faith without fault" during the initial phase of the asset forfeiture process.³⁸
- n. Articles 87 and 89 allow the Attorney General's Office to impose precautionary measures on the asset prior to filing the determination of the claim only "*in cases of apparent urgency or when serious grounds have been established*" as long as "*the rights of third parties acting in good faith without fault [are] safeguarded.*"³⁹

³⁵ See Memorial, Appendix E.

³⁶ **Exhibit C-003bis**, Law 1708, 20 January 2014, art. 7.

³⁷ **Exhibit C-003bis**, Law 1708, 20 January 2014, art. 3.

³⁸ **Exhibit C-003bis**, Law 1708, 20 January 2014, art. 118(5).

³⁹ **Exhibit C-003bis**, Law 1708, 20 January 2014, arts. 87, 89.

- o. The Constitutional Court of Colombia has confirmed that this means that “even though an asset may have been acquired through purchase or swap, but originated directly or indirectly from an illicit activity, the acquiring third party must be protected if it demonstrates having acted with good faith that is free from fault, and therefore it shall not have to endure the consequences of a forfeiture.”⁴⁰

- p. In early 2014, Mr. López Vanegas first began to contact Royal Realty’s office demanding payment because he claimed that he was the rightful owner of the Meritage Property.⁴¹ Mr. Seda took steps to confirm the threats lacked a credible basis, contacted both La Palma and Corficolombiana, and publicly addressed Mr. López’s allegations on W Radio, a nationally syndicated radio show, to prevent any misinformation from spreading.⁴² Mr. López Vanegas then did not contact Mr. Seda again until 2016.⁴³

- q. On 3 July 2014, Mr. López Vanegas filed a criminal complaint with the Attorney General’s Office that included fabricated allegations that he had been forced to sign over ownership to the parent plot of the Meritage Property in 2004, while he was in the United States standing trial for drug trafficking offenses, because the Office of

⁴⁰ **Exhibit C-077**, Constitutional Court of Colombia, Judgment C-1007, 18 November 2002, p. SP-0075.

⁴¹ See Memorial, ¶ 85; Seda 1 WS, ¶ 62; Seda 2 WS, ¶ 5; Counter Memorial, ¶¶ 85, 94; **Exhibit C-035bis**, Declaration of Angel Seda, submitted on record of Asset Forfeiture Proceedings, 28 February 2017, pp. SP-0002 – SP-0003.

⁴² See Memorial, ¶ 86; Seda 1 WS, ¶¶ 62, 64-65; Seda 2 WS, ¶ 6; Counter Memorial, ¶ 85.

⁴³ See Memorial, ¶¶ 118-19; Seda 1 WS, ¶¶ 75-77; Seda 2 WS, ¶ 15; Counter Memorial, ¶ 95; **Exhibit C-151**, Letter from Víctor Mosquera Marín to Angel Samuel Seda, 7 April 2016; **Exhibit C-156**, Email from Víctor Mosquera Marín to Angel Seda and J. Evans, attaching Letter from Víctor Mosquera Marín to James Evans; and Letter from Víctor Mosquera Marín to Angel Samuel Seda, 27 April 2016, p. SP-0001; **Exhibit C-157**, Email chain between Víctor Mosquera Marín and Angel Seda, 3 May 2016, p. SP-0001.

Envigado drug cartel had kidnapped his son Sebastian López Betancur.⁴⁴ The Attorney General's Office has acknowledged that this statement is false.⁴⁵

- r. Mr. López Vanegas' claim was filed with Prosecutor No. 24 of the Organized Crime Section.⁴⁶ Thereafter, in September 2014, Prosecutor No. 24 assigned the matter to Prosecutor No. 37 of the Money Laundering and Asset Forfeiture Unit.⁴⁷ Prosecutor No. 37 assigned the matter to a unit of the Judicial Police assigned to the Superintendence of Notaries and Registry.⁴⁸
- s. On 25 November 2014, Newport, La Palma, and Corficolombiana entered into the "**Parqueo Trust**" to govern title to the Meritage Property.⁴⁹ The *Parqueo* Trust envisaged that La Palma would put the Property in trust to Corficolombiana and, once the relevant equilibrium points for each phase had been met, the land associated with that Phase would be transferred to the Administration and Payment Trust for development.⁵⁰ While Newport was initially the beneficiary of the *Parqueo* Trust, the

⁴⁴ See Memorial, ¶¶ 96-99; Counter Memorial, ¶ 141; **Exhibit C-130**, Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014.

⁴⁵ See **Exhibit C-167**, Transcript of TeleAntioquia Interview with Claudia Carrasquilla, 6 August 2018. In its Counter Memorial, Colombia likewise does not dispute that the statement was false. See Counter Memorial, ¶ 141. See also **Exhibit C-067bis**, Letter from Michael J. Burdick to Aimer Fredy Alonso Triana, 21 November 2016.

⁴⁶ See **Exhibit C-130**, Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014.

⁴⁷ See **Exhibit C-133**, Judicial Police Report to Prosecutor 37, 4 September 2014.

⁴⁸ See **Exhibit C-132**, Prosecutor 72's Response to Prosecutor 37's Request to Investigate Iván López Vanegas Complaint, 27 August 2014.

⁴⁹ See **Exhibit C-029bis**, *Parqueo* Trust Agreement and Amendment, 25 November 2014, pp. SP-0001 – SP-0021.

⁵⁰ See **Exhibit C-029bis**, *Parqueo* Trust Agreement and Amendment, 25 November 2014, p. SP-0003, cl. 3.4.

agreement was amended in February 2015 to make La Palma the beneficiary for tax planning reasons.⁵¹

- t. On 12 February 2015, the Superintendence of Notaries and Recordation executed a deed numbered 361 officially recording a number of transactions relating to the Meritage Property (“**Deed 361**”): (i) La Palma’s transfer of ownership over the Meritage Property to the *Parqueo* Trust; (ii) subdivision of the Property into lots for construction associated with each phase of the Meritage Project; and (iii) transfer of the plots on which Phases 1 and 6 of the Meritage Project were to be built from the *Parqueo* Trust to the Administration and Payment Trust.⁵²
- u. In mid-2015, Mr. López Vanegas met with Corficolombiana’s President, Mr. Jaime Sierra Giraldo at Corficolombiana’s offices.⁵³ Mr. López Vanegas repeated his false claims and demanded payment; Corficolombiana refused.⁵⁴
- v. In April 2016, Banco de Bogotá, which belongs to the same corporate family as Corficolombiana,⁵⁵ approved a loan of up to COP 35 billion (USD 11.5 million) to finance the Meritage Project, pending its due diligence process.⁵⁶ On 4 May 2016,

⁵¹ See Memorial, ¶ 90; Seda 1 WS, ¶ 69; Counter Memorial, ¶ 66; **Exhibit C-029bis**, *Parqueo* Trust Agreement and Amendment, Amendment No. 1, 6 February 2016, pp. SP-0022 – SP-0024.

⁵² See Memorial, ¶¶ 91, 270; Counter Memorial, ¶ 67; **Exhibit C-140**, Deed 361, 12 February 2015. See also Memorial, Appendix D.

⁵³ See Memorial, ¶ 86; Seda 1 WS, ¶ 65; Counter Memorial, ¶ 86.

⁵⁴ See Memorial, ¶ 86; Seda 1 WS, ¶ 65; Counter Memorial, ¶ 86.

⁵⁵ See Counter Memorial, ¶ 112.

⁵⁶ See Seda 1 WS, ¶ 74; Counter Memorial, ¶ 112; **Exhibit C-150**, Letter from Banco de Bogotá to Angel Seda and Jaime Andrés Toro, 5 April 2016; López Montoya Witness Statement, ¶¶ 23-24.

Banco de Bogotá authorized the loan, and on 2 June 2016, it registered a mortgage of COP 2 billion (USD 660,000) over the Property.⁵⁷

- w. On 7 April 2016, Mr López Vanegas renewed his attempts to contact Mr. Seda through his attorney Victor Mosquera Marín and requested an in-person meeting.⁵⁸
- x. On 8 April 2016, Andrea del Pilar Malagón Medina, the Director of the Asset Forfeiture Unit, assigned investigation of Mr. López Vanegas' July 2014 criminal complaint to Ms. Alejandra Ardila Polo, Prosecutor No. 44.⁵⁹ On 18 April 2016, Ms. Ardila initiated an asset forfeiture investigation into the Meritage Property.⁶⁰
- y. Mr. Mosquera wrote a second letter to Mr. Seda on 27 April 2016.⁶¹ Mr. Seda responded on 3 May 2016 and agreed to meet Mr. Mosquera and Mr. López Vanegas.⁶² Mr. Mosquera, however, responded abruptly that Mr. López Vanegas was no longer interested in meeting and would instead seek recourse through legal action.⁶³

⁵⁷ See Memorial, ¶ 129; Seda 1 WS, ¶ 74; Counter Memorial, ¶ 112; **Exhibit C-158**, Banco de Bogotá Promissory Note, 4 May 2016; **Exhibit C-277**, Banco de Bogotá Mortgage, 2 June 2016.

⁵⁸ See Memorial, ¶¶ 118-19; Seda 1 WS, ¶ 75; Counter Memorial, ¶¶ 95-96; **Exhibit C-151**, Letter from Víctor Mosquera Marín to Angel Samuel Seda, 7 April 2016.

⁵⁹ See Memorial, ¶ 120; Counter Memorial, ¶ 153; **Exhibit C-153**, Attorney General's Office Resolution No. 125, 8 April 2016.

⁶⁰ See Memorial, ¶ 121; Counter Memorial, ¶ 142; **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017.

⁶¹ See Memorial, ¶ 122; Seda 1 WS, ¶ 76; Counter Memorial, ¶ 103; **Exhibit C-156**, Email from Víctor Mosquera Marín to Angel Seda and J. Evans, attaching Letter from Víctor Mosquera Marín to James Evans; and Letter from Víctor Mosquera Marín to Angel Samuel Seda, 27 April 2016.

⁶² See Memorial, ¶ 122; Seda 1 WS, ¶ 77; Counter Memorial, ¶¶ 104-105; **Exhibit C-157**, Email chain between Víctor Mosquera Marín and Angel Seda, 3 May 2016.

⁶³ See Memorial, ¶ 122; Seda 1 WS, ¶ 77; Counter Memorial, ¶ 106; **Exhibit C-157**, Email chain between Víctor Mosquera Marín and Angel Seda, 3 May 2016.

- z. On 6 May 2016, Mr. López Vanegas filed a constitutional protection action, or *tutela*, alleging that the Attorney General’s Office had failed to act promptly on his July 2014 criminal complaint.⁶⁴ He named a number of interested parties including Royal Realty, Corficolombiana, La Palma, and Newport.⁶⁵ On 23 May 2016, the Bogotá Superior Court declared inadmissible Mr. López Vanegas’ action as against Royal Realty, Corficolombiana, La Palma, and Newport, and ordered the Attorney General’s Office’s Organized Crime Unit to determine within 15 calendar days whether or not it would open an investigation into Mr. López Vanegas’ complaint.⁶⁶
- aa. In June 2016, a stranger approached Mr. Seda in the Charlee Hotel’s parking lot and asked him to pay COP 500 million (approx. USD 160,000) to prosecutors from the Attorney General’s Office.⁶⁷
- bb. On 2 June 2016, Mr. Seda attempted to broker a commercial resolution between Mr. López Vanegas and La Palma.⁶⁸ Mr. Seda met with Mr. Mosquera and his associate Gabriel Valderama on 8 June 2016, and again with both of them and Mr. López Vanegas on 10 June 2016.⁶⁹ At these meetings Mr. López Vanegas and his

⁶⁴ See Memorial, ¶ 123; Seda 1 WS, ¶ 78; Counter Memorial, ¶ 108; **Exhibit C-037bis**, López Vanegas Tutela Action, 6 May 2016.

⁶⁵ See Memorial, ¶ 123; Seda 1 WS, ¶ 78; Counter Memorial, ¶ 108; **Exhibit C-037bis**, López Vanegas Tutela Action, 6 May 2016.

⁶⁶ See Memorial, ¶ 128; Seda 1 WS, ¶ 85; Counter Memorial, ¶ 111; **Exhibit C-039bis**, Decision on López Vanegas Tutela Action, 23 May 2016.

⁶⁷ See Memorial, ¶ 131; Seda 1 WS, ¶ 87; Counter Memorial, ¶¶ 109, 114.

⁶⁸ See Memorial, ¶ 132; Seda 1 WS, ¶ 88; Counter Memorial, ¶ 116; **Exhibit C-162**, Email chain between Víctor Mosquera Marín and Angel Seda, 6 June 2016.

⁶⁹ See Memorial, ¶¶ 133-134; Seda 1 WS, ¶¶ 89-92; Counter Memorial, ¶¶ 118-19; **Exhibit C-163**, WhatsApp chain between Angel Seda and Gabriel Valderrama, 8 June 2016.

representatives sought to scare Mr. Seda by emphasizing their connections to the Attorney General's Office and making direct threats against his family.⁷⁰

- cc. On 22 July 2016, Ms. Ardila at the Attorney General's Office issued the Resolution on Precautionary Measures, and ordered imposition of precautionary measures on the Meritage Property.⁷¹
- dd. On 25 July 2016, Mr. Valderrama contacted Mr. Seda again and, after Mr. Seda refused Mr. Valderrama's overtures, Mr. Valderrama told Mr. Seda that "[t]he negotiation chapter is closed."⁷²
- ee. On 3 August 2016, the Ms. Ardila at Attorney General's Office physically seized the Meritage Property and halted any further sales or construction.⁷³ The seizure was widely reported in the Colombian press.⁷⁴ The Attorney General's Office refused to provide Royal Realty representatives at the site with a copy of the Precautionary Measures Resolution.⁷⁵

⁷⁰ See Memorial, ¶¶ 134, 515; Seda 1 WS, ¶¶ 89, 91; Counter Memorial, ¶¶ 118-19; **Exhibit C-163**, WhatsApp chain between Angel Seda and Gabriel Valderrama, 8 June 2016. While Colombia, without cause, questions the authenticity of the WhatsApp exchanges, it does not challenge that these meetings took place. See Counter Memorial, ¶ 119.

⁷¹ See Memorial, ¶ 138; Seda 1 WS, ¶ 94; Counter Memorial, ¶ 166; **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016.

⁷² See Memorial, ¶ 135; Seda 1 WS, ¶ 93; Counter Memorial, ¶ 120; **Exhibit C-163**, WhatsApp chain between Angel Seda and Gabriel Valderrama, 8 June 2016, p. SP-0007.

⁷³ See Memorial, ¶¶ 136-139; Seda 1 WS, ¶¶ 97, 101; Counter Memorial, ¶ 168; **Exhibit C-165**, Certificate of Seizure of the Meritage Property, 3 August 2016.

⁷⁴ See Memorial, ¶¶ 187, 513; Seda 1 WS, ¶ 99; Counter Memorial, ¶ 632. See **Exhibit C-042bis**, Colombian Press Articles on Imposition of Precautionary Measures, August 2016; **Exhibit C-166**, *Meritage Project Dotted with Drug Trafficking*, EL ESPECTADOR, 4 August 2016.

⁷⁵ See Memorial, ¶ 138; Seda 1 WS, ¶ 102; López Montoya WS, ¶ 33; **Exhibit C-021bis**, Letter from Francisco José Sintura Varela to Alejandra Ardila Polo, 18 August 2016; **Exhibit C-169**, Letter from Francisco Jose Sintura Varela to Alejandra Ardila Polo, 13 August 2016.

- ff. The Meritage Property is adjacent to another parcel of land—which now belongs to Mr. López Vanegas’ half-brother—that was subdivided from the same parent lot as the Meritage Property (“**Sister Property**”) and is subject to the same alleged defects in the chain of title as the Meritage Property.⁷⁶ Asset forfeiture proceedings have not been initiated against the Sister Property.⁷⁷
- gg. On 10 August 2016, Banco de Bogotá triggered its acceleration clause, demanding immediate repayment of amounts it had disbursed for the Meritage Project in light of the precautionary measures.⁷⁸
- hh. On 17 August 2016, Corficolombiana’s counsel Mr. Sintura—a former *Vice-Fiscal* or Deputy Attorney General—went to the Attorney General’s Office in person and requested a copy of the Resolution on Precautionary Measures.⁷⁹ Ms. Malagón refused to provide him with a copy.⁸⁰ On 18 August 2016, Mr. Sintura followed up with a letter requesting a copy of the Resolution.⁸¹ He did not receive a response.⁸²

⁷⁶ See Memorial, ¶¶ 323-35; Counter Memorial, ¶¶ 488-96.

⁷⁷ See Memorial, ¶¶ 323-35; Counter Memorial, ¶¶ 488-96.

⁷⁸ See Memorial, ¶¶ 189; Seda 1 WS, ¶ 101; **Exhibit C-168**, Letter from James Andrés Toro Aristizabel to Angel Samuel Seda, *attaching* Letter from Juan Maria Robledo Uribe to Jaime Alberto Sierra Giraldo, 11 August 2016.

⁷⁹ See Memorial, ¶¶ 190, 192-93; Seda 1 WS, ¶ 102; **Exhibit C-021bis**, Letter from Corficolombiana to the Fiscalía, 18 August 2016. See also **Exhibit C-169**, Letter from Francisco Jose Sintura Varela to Alejandra Ardila Polo, 13 August 2016.

⁸⁰ See Memorial, ¶¶ 190, 192-93; Seda 1 WS, ¶ 102; **Exhibit C-021bis**, Letter from Corficolombiana to the Fiscalía, 18 August 2016.

⁸¹ See Memorial, ¶ 192; Seda 1 WS, ¶ 102; **Exhibit C-021bis**, Letter from Francisco José Sintura Varela to Alejandra Ardila Polo, 18 August 2016; **Exhibit C-169**, Letter from Francisco Jose Sintura Varela to Alejandra Ardila Polo, 13 August 2016.

⁸² See Memorial, ¶ 192; Seda 1 WS, ¶ 102.

Ultimately he received a copy of the Resolution from another official within the Attorney General's Office.⁸³

- ii. In late August 2016, Mr. Seda was again approached by a stranger requesting payment to the Attorney General's Office to "*keep the situation under control.*"⁸⁴ Highly alarmed, in early September 2016 Mr. Seda sought assistance from the U.S. Embassy in Bogotá and hired private security to look after his family.⁸⁵

- jj. On 26 September 2016, Corficolombiana filed a request for control of legality before the First Criminal Court of the Specialized Circuit for Asset Forfeiture of Antioquia ("**First Criminal Court**") to declare the seizure of the Meritage Property illegal.⁸⁶ On 20 October 2016, the First Criminal Court upheld the legality of the precautionary measures.⁸⁷ Corficolombiana appealed the decision on 26 October 2016, but the appeal was dismissed on 21 February 2017.⁸⁸

⁸³ See Memorial, ¶ 193.

⁸⁴ See Memorial, ¶ 208; Seda 1 WS, ¶ 103; Counter Memorial, ¶ 121.

⁸⁵ See Memorial, ¶ 209; Seda 1 WS, ¶¶ 104-105; Counter Memorial, ¶ 122; **Exhibit C-171**, Email chain between Angel Seda and U.S. Embassy Bogotá, 2 September 2016; **Exhibit C-172**, Email from Angel Seda to Elizabeth Garcon, with attachments, 7 September 2016.

⁸⁶ See Memorial, ¶ 195; Seda 1 WS, ¶ 107; Counter Memorial, ¶ 169; **Exhibit C-043bis**, Corficolombiana's Control of Legality Petition, 26 September 2016.

⁸⁷ See Memorial, ¶¶ 202, 243; Seda 1 WS, ¶ 107; Counter Memorial, ¶ 170; **Exhibit C-044bis**, Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016.

⁸⁸ See Memorial, ¶¶ 206, 243; Seda 1 WS, 107; Counter Memorial, ¶¶ 173-74; **Exhibit C-045bis**, Corficolombiana Appeal to First Instance Decision Corficolombiana's Control of Legality Petition, 26 October 2016; **Exhibit C-047bis**, Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017.

- kk. In October 2016, the U.S. Embassy put Mr. Seda in touch with Michael J. Burdick, the Deputy Legal Attaché to the U.S. Federal Bureau of Investigation (“**FBI**”) in Colombia, and the pair agreed to meet.⁸⁹
- ll. In advance of this meeting, Mr. Seda contacted Mr. Mosquera again and sought to collect “*as much concrete evidence as possible*” of the extortionate scheme to which he had been subject.⁹⁰ Mr. Seda arranged to meet with Mr. Mosquera on 27 and 29 October 2016 and attempted to record the meetings but was unsuccessful because Mr. Mosquera and his team, clearly wary of being recorded, searched Mr. Seda before allowing him to enter the meetings.⁹¹ Mr. Seda then tried to draw out the threats Mr. Mosquera had previously made through emails.⁹² On 9 November 2016, Mr. Mosquera memorialized a “*proposal*” from Mr. López Vanegas that promised to “*settle this current situation*” (*i.e.*, seizure of the Meritage Property) in exchange for payment of approximately USD 19 million. Mr. Seda refused this offer.⁹³

⁸⁹ See Memorial, ¶ 209; Seda 1 WS, ¶ 116; Counter Memorial, ¶ 122; **Exhibit C-179**, Email chain between Michael Burdick and Angel Seda, 1 December 2016.

⁹⁰ Seda 1 WS, ¶ 116. See also Memorial, ¶ 210; Counter Memorial, ¶ 123; **Exhibit C-175**, WhatsApp chain between Angel Seda and Víctor Mosquera Marín, 26-29 October 2016.

⁹¹ See Memorial, ¶¶ 210-11; Seda 1 WS, ¶¶ 117-18; Counter Memorial, ¶¶ 124-25; **Exhibit C-176**, Email chain between Angel Seda and Víctor Mosquera Marín, 31 October 2016.

⁹² See Memorial, ¶¶ 211-14; Seda 1 WS, ¶¶ 119-21; Counter Memorial, ¶ 126; **Exhibit C-176**, Email chain between Angel Seda and Víctor Mosquera Marín, 31 October 2016; **Exhibit C-177**, Email chain between Angel Seda and Víctor Mosquera Marín, 10 November 2016.

⁹³ See Memorial, ¶ 212; Seda 1 WS, ¶ 120; Counter Memorial, ¶¶ 128-32; **Exhibit C-177**, Email chain between Angel Seda and Víctor Mosquera Marín, 10 November 2016.

- mm. On 21 November 2016, Mr. Burdick informed the National Police of Colombia that Mr. López Vanegas' son, Sebastián López Betancur, was not a kidnapping victim but had willingly transferred the property to pay an alleged debt of his own.⁹⁴
- nn. On 7 December 2016, Newport petitioned the Asset Forfeiture Unit to directly dismiss the Asset Forfeiture Proceedings and lift the precautionary measures.⁹⁵ On 14 December 2016, Newport supplemented its petition with additional evidence.⁹⁶ The Asset Forfeiture Unit did not respond. On 23 January 2017, Newport submitted a third petition requesting set aside of the precautionary measures.⁹⁷ The Asset Forfeiture Unit still did not respond.
- oo. In early December 2016, Mr. Seda met with Daniel Hernández and Oscar Martínez, prosecutors at the Attorney General's Office.⁹⁸ Mr. Hernández is Colombia's witness in this Arbitration. These individuals informed Mr. Seda that they were from a special Anti-Corruption Unit at the Attorney General's Office.⁹⁹ Mr. Seda met with them

⁹⁴ See Memorial, ¶ 215; Seda 1 WS, ¶ 122; **Exhibit C-067bis**, Letter from Michael J. Burdick to Aimer Fredy Alonso Triana, 21 November 2016.

⁹⁵ See Memorial, ¶ 218; Seda 1 WS, ¶ 145; Counter Memorial, ¶ 180; **Exhibit C-048bis**, Newport's First Petition to Attorney General's Office Asset Forfeiture Unit, 7 December 2016.

⁹⁶ See Memorial, ¶ 219; Seda 1 WS, ¶ 145; Counter Memorial, ¶ 180; **Exhibit C-049bis**, Newport's Supplement to Petition to Attorney General's Office Asset Forfeiture Unit, 14 December 2016.

⁹⁷ See Memorial, ¶ 225; Seda 1 WS, ¶ 145; Counter Memorial, ¶ 181; **Exhibit C-050bis**, Newport's Third Petition to Attorney General's Office Asset Forfeiture Unit, 23 January 2017.

⁹⁸ See Memorial, ¶ 220; Seda 1 WS, ¶ 124; Seda 2 WS, ¶ 24; Counter Memorial, ¶ 135.

⁹⁹ See Memorial, ¶ 220; Seda 1 WS, ¶ 124; Seda 2 WS, ¶ 24; Counter Memorial, ¶ 135.

- again in early December 2016 and they encouraged him to make a complaint against Ms. Malagón and Ms. Ardila.¹⁰⁰ Mr. Seda made a complaint on 19 December 2016.¹⁰¹
- pp. On 25 January 2017, the Asset Forfeiture Unit ordered the formal initiation of the Asset Forfeiture Proceedings by filing the Determination of the Claim.¹⁰² The Determination of the Claim identified the cause of the Asset Forfeiture Proceedings as being that “*Corficolombiana did not use the appropriate means it had at its disposal for verifying the origin of the asset [. . .] because had it done so, it would have noticed that Mr. IVÁN LÓPEZ VANEGAS, legal representative of SIERRALTA LÓPEZ Y CIA (the owner of rights in 1994), was in prison for the crime of drug trafficking in the United States of America.*”¹⁰³ On 9 March 2017, Newport filed its opposition to the Determination of the Claim. The Attorney General’s Office did not respond to Newport’s submission.¹⁰⁴
- qq. On 10 February 2017, Newport filed a *tutela* with the Penal Division of the Supreme Court of Justice requesting that the court order the Attorney General’s Office to respond to Newport’s three petitions.¹⁰⁵ The Supreme Court granted Newport’s petition on 28 February 2017 and ordered the Attorney General’s Office to provide a

¹⁰⁰ See Memorial, ¶ 220; Seda 1 WS, ¶ 124; Seda 2 WS, ¶ 24; Counter Memorial, ¶ 135.

¹⁰¹ See Memorial, ¶ 221; Seda 1 WS, ¶ 125; Counter Memorial, ¶¶ 135, 137; **Exhibit C-181**, A. Seda Complaint to Attorney General’s Office, 19 December 2016.

¹⁰² See Memorial, ¶ 226; Seda 1 WS, ¶ 145; Counter Memorial, ¶ 182; **Exhibit C-023bis**, Attorney General’s Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017.

¹⁰³ **Exhibit C-023bis**, Attorney General’s Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, p. SP-0128.

¹⁰⁴ See Memorial, ¶¶ 249-50; Counter Memorial, 195; **Exhibit C-055bis**, Newport’s Opposition to Determination of the Claim, 9 March 2017.

¹⁰⁵ See Memorial, ¶ 242; Seda 1 WS, ¶ 146; Counter Memorial, ¶ 189; **Exhibit C-052bis**, Newport Tutela Action, 17 February 2017.

response within 48 hours.¹⁰⁶ The Attorney General did not respond within 48 hours; instead, on 4 March 2017, the Attorney General’s Office responded that it could not conclude that Newport was a good faith third-party buyer because it did not need to make a finding at the Precautionary Measures phase and evidence collected allowed it to “*reasonably infer*” that Newport exhibited a “*lack of due diligence.*”¹⁰⁷

- rr. On 5 April 2017, the Attorney General’s Office filed its formal request for asset forfeiture, known as the *Requerimiento*, with the Special Asset Forfeiture Court.¹⁰⁸ With its *Requerimiento*, the Attorney General’s Office formally requested the court to commence the asset forfeiture proceeding based on the same claims it had articulated in the Determination of the Claim.¹⁰⁹
- ss. On 17 August 2017, the Second Criminal Court Specialized in Asset Forfeiture of Antioquia rendered its *avocamiento* order finding that Newport was not entitled to defend its rights in the Asset Forfeiture Proceedings before the court because it was

¹⁰⁶ See Memorial, ¶ 244; Seda 1 WS, ¶ 146; Counter Memorial, ¶¶ 190-91; **Exhibit C-053bis**, Decision on Newport’s Tutela Action, 28 February 2017.

¹⁰⁷ See Memorial, ¶ 245; Seda 1 WS, ¶¶ 146-47; Counter Memorial, ¶¶ 192-94; **Exhibit C-054bis**, Attorney General’s Office Asset Forfeiture Unit Response to Newport’s Petitions, 4 March 2017.

¹⁰⁸ See Memorial, ¶ 251; Seda 1 WS, ¶ 147; Counter Memorial, ¶ 196; **Exhibit C-024bis**, Attorney General’s Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017.

¹⁰⁹ See Memorial, ¶ 251; **Exhibit C-024bis**, Attorney General’s Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017.

not affected by the Proceedings.¹¹⁰ On 24 August 2017, Newport appealed the *avocamiento* decision.¹¹¹ This appeal remains outstanding.¹¹²

tt. On 26 September 2017, Mr. Seda suffered an assassination attempt.¹¹³ On 28 September 2017, a man tried to kidnap Mr. Seda's daughter.¹¹⁴ In February 2018, Mr. Seda learnt, through the FBI, that the Attorney General's Office had sent the FBI an (incorrect) alert that Mr. Seda was related to various Colombian drug traffickers listed by the U.S. Government's OFAC sanctions list.¹¹⁵ On 7 May 2018, the Second Criminal Court Specialized in Asset Forfeiture of Antioquia rejected the Attorney General's Office's *Requerimiento* for procedural deficiencies but kept the precautionary measures in effect.¹¹⁶

uu. On 25 May 2018, the Attorney General's Office filed an amended *Requerimiento*.¹¹⁷ On 5 October 2018, Newport filed another petition with the Second Criminal Court

¹¹⁰ See Memorial, ¶ 263; Seda 1 WS, ¶ 147; Counter Memorial, ¶ 213; **Exhibit C-057bis**, Asset Forfeiture Court Avocamiento Order, 17 August 2017.

¹¹¹ See Memorial, ¶ 276; Seda 1 WS, ¶ 147; Counter Memorial, ¶ 241; **Exhibit C-195**, Newport's Appeal Against the Avocamiento Order, 24 August 2017.

¹¹² See Memorial, ¶ 277; Seda 1 WS, ¶ 148; Counter Memorial, ¶ 241.

¹¹³ See Memorial, ¶ 320; Seda 1 WS, ¶¶ 137-41; Counter Memorial, ¶ 541; **Exhibit C-202**, Angel Seda Statement attached to Request for Police Protection, 11 October 2017; **Exhibit C-285**, A. Seda Statement to U.S. Embassy, 29 September 2017; **Exhibit C-198**, Photos of A. Seda's Car After Assassination Attempt, 26 September 2017; **Exhibit C-199**, Email from Elizabeth Gracon to Angel Seda, 3 October 2017; **Exhibit C-201**, Email from Angel Seda to Elizabeth Gracon, Pierre Richard Prosper, Timothy Feighery and Lee Caplan, 8 October 2017.

¹¹⁴ See Memorial, ¶ 320; Seda 1 WS, ¶ 139; Counter Memorial, ¶ 542; **Exhibit C-202**, Angel Seda Statement attached to Request for Police Protection, 11 October 2017; **Exhibit C-285**, A. Seda Statement to U.S. Embassy, 29 September 2017; **Exhibit C-174**, Screenshots from 28 September 2017 Incident.

¹¹⁵ See Memorial, ¶ 321; Seda 1 WS, ¶¶ 143-44.

¹¹⁶ See Memorial, ¶ 278; Counter Memorial, ¶ 207; **Exhibit C-058bis**, Asset Forfeiture Court Decision on First *Requerimiento*, 7 May 2018.

¹¹⁷ See Memorial, ¶ 279; Counter Memorial, ¶ 208; **Exhibit C-059bis**, Attorney General's Office, Amended *Requerimiento*, 25 May 2018.

Specialized in Asset Forfeiture of Antioquia presenting documentary evidence of Newport's status as a third party acting in good faith without fault in response to the amended *Requerimiento*.¹¹⁸ The amended *Requerimiento* was again rejected for procedural deficiencies.¹¹⁹

vv. On 19 December 2018, the Attorney General's Office filed a second amended *Requerimiento*.¹²⁰ On 14 June 2019, the court accepted the second amended *Requerimiento*.¹²¹ On 20 June 2019, Newport filed an appeal against the court's decision to accept the *Requerimiento*.¹²² This appeal remains outstanding.¹²³

ww. Mr. Seda had a pipeline of projects in addition to the Meritage and Luxé that included, amongst other planned developments, Tierra Bomba, Santa Fe de Antioquia, and 450 Heights ("Development Projects").¹²⁴ Claimants have been unable to build any of these projects.¹²⁵

28. As will be explained in **Section V**, the facts set out above are dispositive on the merits and show that Colombia has committed numerous breaches of its obligations under the TPA.

¹¹⁸ See Memorial, ¶ 280; Counter Memorial, ¶ 209; **Exhibit C-223**, Newport's Petition to Asset Forfeiture Court in Response to Amended *Requerimiento*, 5 October 2018.

¹¹⁹ See Memorial, ¶ 281; Counter Memorial, ¶ 210; **Exhibit C-060bis**, Asset Forfeiture Court Decision on Amended *Requerimiento*, 12 December 2018.

¹²⁰ See Memorial, ¶ 281; Counter Memorial, ¶ 211; **Exhibit C-056bis**, Second Amended *Requerimiento*, 19 December 2018.

¹²¹ See Memorial, ¶ 282; Counter Memorial, ¶ 212; **Exhibit C-236**, Specialized Asset Forfeiture Court's Decision on Second Amended *Requerimiento*, 14 June 2019.

¹²² See Memorial, ¶ 283; Counter Memorial, ¶ 212; **Exhibit C-237**, Newport's Appeal Against Decision to Accept Corrected *Requerimiento*, 20 June 2019.

¹²³ See Memorial, ¶ 283; Seda 1 WS, ¶ 148; Counter Memorial, ¶ 212.

¹²⁴ See Memorial, ¶¶ 104-16; Seda 1 WS, ¶¶ 29-37; Counter Memorial, ¶¶ 28-41.

¹²⁵ See Memorial, ¶¶ 313-18; Seda 1 WS, ¶ 111-15; Counter Memorial, ¶¶ 13, 563.

The limited number of facts that Colombia has contested do not assist its defense and are contradicted by the documentary record and its own witnesses' admissions. For the sake of good order, Claimants correct and clarify below some of the incorrect assertions Colombia makes. These include (a) criticisms of Mr. Seda's track record; (b) the nature of Newport's interest in the Meritage Project and the Meritage Property; (c) Mr. Seda's interactions with Mr. López Vanegas in 2014 and (d) 2016; (e) the impact of the Asset Forfeiture Proceedings on Luxé and Mr. Seda's other projects; and (f) the conduct of the Asset Forfeiture Proceedings before Colombian Courts. Claimants also set out additional developments that have occurred since they filed their Memorial: (g) recent admissions by representatives of the Attorney General's Office, including Colombia's witness Mr. Hernández, that the Asset Forfeiture Proceedings were afflicted with corruption and Newport should have been recognized as a good faith third party; and (h) a recent ruling by the Colombian Constitutional Court that disavows Colombia's arguments in this Arbitration.

A. Mr. Seda Had A Track Record Of Success And Profitability In Colombia Prior To Colombia's Seizure Of The Meritage Project

29. Colombia does not dispute the facts underlying the rapid and unique successes achieved by Mr. Seda prior to Colombia's seizure of the Meritage Project. Colombia nonetheless avers, pointing to a single reference to the Cavall Project in a radio interview, that Claimants also had "*failed projects*."¹²⁶ This is false. Below Claimants: (i) summarize Mr. Seda's successful track record; and (ii) explain the circumstances behind the Cavall Project.

¹²⁶ Counter Memorial, ¶ 42.

1. Mr. Seda's Projects Had Successful Track Records

30. Starting with the Charlee Hotel, Mr. Seda's projects boasted of rave reviews, high demand, rapid sales, high levels of investor interest, and ultimately above-market profitability. Mr. Seda's business plan was to capture an emerging market in Colombia characterized by a "*burgeoning, well-educated middle class*" and increasing commerce brought to the region by the presence of a number of multinational companies opening offices there.¹²⁷ The success of his Projects reflected this. To summarize:

- a. **Charlee Hotel:** The Charlee Hotel was, and continues to be, a resounding success as Royal Realty's premiere project in Colombia. All suites in the Charlee Hotel sold quickly, development commenced in 2008, construction was completed in 2010, and the Charlee Hotel opened its doors to the public in January 2011.¹²⁸ Since its opening, the Charlee Hotel has repeatedly been recognized by international publications, including the New York Times, Conde Nast and Vogue, as Medellín's leading luxury hotel.¹²⁹ The Charlee Hotel has also seen consistent occupancy rates between 73 percent and 80 percent, significantly above average occupancy rates in Medellín hotels of between 50 percent and 60 percent.¹³⁰ The Charlee Hotel's average daily rates ("ADR") have also significantly increased from USD 190 in 2013 to between USD

¹²⁷ Seda 1 WS, ¶ 11.

¹²⁸ Seda 1 WS, ¶¶ 16, 26.

¹²⁹ See Memorial, ¶ 53; Seda 1 WS, ¶¶ 27-28. See also **Exhibit C-016bis**, Nell McShane Wulfhart, *36 hours in Medellín, Colombia*, NEW YORK TIMES, 13 May 2015, <https://www.nytimes.com/2015/05/17/travel/things-to-do-in-36-hours-in-medellin.html>; **Exhibit C-141**, Nell McShane Wulfhart, *36 hours in Medellín, Colombia*, NEW YORK TIMES, 13 May 2015, <https://www.nytimes.com/2015/05/17/travel/things-to-do-in-36-hours-in-medellin.html>.

¹³⁰ See Memorial, ¶ 54; BRG 1 Report, ¶ 40; Seda 1 WS, ¶ 28.

213 and USD 237 for 2017 to 2019, despite significant devaluation of the Colombian Peso relative to the U.S. Dollar in the intervening period.¹³¹ As a result, the Charlee Hotel’s EBIDTA margin for the room rental business between 2014-2016 was 35 percent.¹³²

- b. **Luxé Project:** Mr. Seda established Luxé by The Charlee S.A.S. (“**Luxé SAS**”) as the development vehicle for the Luxé Project in 2009, following which he was able to raise funds for Luxé from, *inter alia*, the Luxé Claimants between 2012 and 2016.¹³³ He also secured a loan from Colpatria in September 2014 for the construction of Luxé.¹³⁴ The “*demand for Luxé’s units and lots was unprecedented.*”¹³⁵ Within three months of Mr. Seda’s sales launch, all lots, apartments and first phase residential units had been sold.¹³⁶ Construction of the hotel was approximately 72.5 percent complete, and on track for completion by December 2016, with operations starting in January 2017.¹³⁷ Royal Realty had already started to recruit employees who would work at the hotel.¹³⁸

¹³¹ BRG 1 Report, ¶ 40.

¹³² BRG 2 Report, ¶ 129.

¹³³ Memorial, ¶ 52.

¹³⁴ **Exhibit C-135**, Loan Approval Letter from Colpatria, 23 September 2014; **Exhibit C-137**, Amended Loan Approval Letter from Colpatria, 11 December 2014.

¹³⁵ Seda 1 WS, ¶ 25.

¹³⁶ Seda 1 WS, ¶ 25.

¹³⁷ *See* Seda 2 WS, ¶ 66; **Exhibit C-375**, Letter from José Luis Ochoa Yepes to Felipe López, 10 June 2015; **Exhibit C-338**, Letter from Ochoa Arquitectos & Ingenieros S.A.S. to Luxé By The Charlee S.A.S., 21 August 2021.

¹³⁸ *See* Seda 2 WS, ¶ 67.

- c. **Meritage Project:** Similarly, Mr. Seda raised funds from investors in 2013, including the Meritage Claimants,¹³⁹ for the Meritage Project soon after he identified the plot of land that would house the project and completed due diligence. Mr. Seda also procured a construction loan from Banco de Bogotá.¹⁴⁰ Units of the Meritage Project also sold quickly and indeed, it was among the best-selling projects in the state of Antioquia and the highest selling in the neighborhood of Las Palmas.¹⁴¹ The Meritage Project likewise generated tremendous publicity given it was one of the largest mixed-use developments in Antioquia and had generated high demand for units.¹⁴²
- d. **Development and Expansion Projects:**¹⁴³ Mr. Seda had taken a number of steps to design, plan for and find investors and business partners for these Projects.¹⁴⁴ Indeed, he had a large staff of employees working on furthering these Projects.¹⁴⁵

31. Thus, Mr. Seda's Projects had achieved a substantial degree of success and profitability prior to Colombia's measures.

¹³⁹ Memorial, ¶ 75.

¹⁴⁰ See **Exhibit C-150**, Letter from Banco de Bogotá to A. Seda, 5 April 2016; **Exhibit C-158**, Banco de Bogotá Promissory Note, 4 May 2016; **Exhibit C-277**, Banco de Bogotá Mortgage, 2 June 2016.

¹⁴¹ López Montoya WS, ¶ 15.

¹⁴² Seda 1 WS, ¶ 61.

¹⁴³ **Expansion Projects** are projects in Mr. Seda's pipeline that were at an earlier stage of development but formed part of the planned expansion of his business in Colombia, including Prado Tolima and other projects, including hospitality projects in Cali, Barranquilla and Amazonas. See BRG 2 Report, ¶ 100.

¹⁴⁴ See Seda 1 WS, ¶¶ 29-37; Seda 2 WS, ¶¶ 70-77. See also **Exhibit C-370**, Email from James Evans to Angel Seda, 12 March 2016; **Exhibit C-371**, Email from Camilo Verla to Angel Seda, 8 July 2016; **Exhibit C-372**, Email from Adolfo Velasco to Angel Seda, 8 July 2016.

¹⁴⁵ Seda 1 WS, ¶ 37.

2. The Cavall Project Reflected Mr. Seda's Successful Track Record

32. Colombia inaccurately refers to the Cavall Project as an example of Mr. Seda's "unsuccessful real estate projects" in Colombia.¹⁴⁶ Rather, the project did not move forward because Cavall's sponsor could not get his money out of Venezuela due to currency exchange restrictions and was forced to sell the land on which the project was to be constructed.¹⁴⁷ Indeed, the sponsor voluntarily agreed to publish a full page advertisement explaining that the end of the project had nothing to do with Royal Realty.¹⁴⁸
33. While the Charlee Hotel was still being constructed, Mr. Seda was approached by Venezuelan businessman Carlos Sultan to develop a luxury real estate project on 60 hectares of land he owned in the Municipality of Ríonegro, a little over 30 kilometers south east of Medellín.¹⁴⁹ Mr. Sultan was impressed with Royal Realty's ground up development of the Charlee Hotel and knew of its growing reputation as a leading developer of luxury properties in Colombia.¹⁵⁰ Mr. Sultan wanted to hire Royal Realty to act as the developer for a three-phase equestrian themed project called Cavall.¹⁵¹ The first phase would have approximately 65 cabana units, and a second phase of approximately 45 units and an 80-room hotel. The first two phases were to be constructed on 30 hectares, with land for a third phase being reserved for future development.¹⁵²

¹⁴⁶ Counter Memorial, ¶ 42.

¹⁴⁷ Seda 2 WS, ¶ 96.

¹⁴⁸ Seda 2 WS, ¶ 96.

¹⁴⁹ Seda 2 WS, ¶ 94.

¹⁵⁰ Seda 2 WS, ¶ 94.

¹⁵¹ Seda 2 WS, ¶ 94.

¹⁵² Seda 2 WS, ¶ 94. *See also* **Exhibit C-340**, Cavall by the Charlee Brochure.

34. Mr. Seda saw potential in Mr. Sultan’s vision and agreed to work with him.¹⁵³ On 14 September 2010, Royal Realty entered into a contract with Mr. Sultan pursuant to which Royal Realty would act as a service provider to coordinate project design, construction, and marketing and sales for the project.¹⁵⁴ In return, Royal Realty would receive a developer fee of 3 percent on gross sales in fees,¹⁵⁵ and be entitled to a 15 percent equity interest in the completed hotel.¹⁵⁶ While Royal Realty would receive a developer’s fee for its services, the Project itself was driven by Mr. Sultan and relied on his financing.
35. In 2012, the point of equilibrium for the first phase was achieved and Royal Realty was ready to start construction.¹⁵⁷ However, at the time, Venezuela was encountering a serious liquidity crisis and Mr. Sultan needed to sell the land on which Cavall was being developed.¹⁵⁸ Mr. Sultan decided to terminate development of Cavall, and as Colombia recognizes, the fiduciary, Acción Fiduciaria, returned all the money collected from prospective buyers.¹⁵⁹
36. Thus, Colombia inaccurately refers to this as an example of Claimants’ “*unsuccessful real estate projects*” in Colombia.¹⁶⁰ Cavall was not owned by or financed through any of the Claimants, and Royal Realty’s involvement was limited to that of a service provider. And

¹⁵³ Seda 2 WS, ¶ 95.

¹⁵⁴ Seda 2 WS, ¶ 95. *See also* **Exhibit C-303**, Contract for the Provision of Real Estate Management Services for the Development of the “Rincones del Capiro” Project, 14 September 2010.

¹⁵⁵ Seda 2 WS, ¶ 95. *See also* **Exhibit C-303**, Contract for the Provision of Real Estate Management Services for the Development of the “Rincones del Capiro” Project, 14 September 2010, cl. 6.

¹⁵⁶ Seda 2 WS, ¶ 95. *See also* **Exhibit C-303**, Contract for the Provision of Real Estate Management Services for the Development of the “Rincones del Capiro” Project, 14 September 2010, cl. 24.

¹⁵⁷ Seda 2 WS, ¶ 96.

¹⁵⁸ Seda 2 WS, ¶ 96.

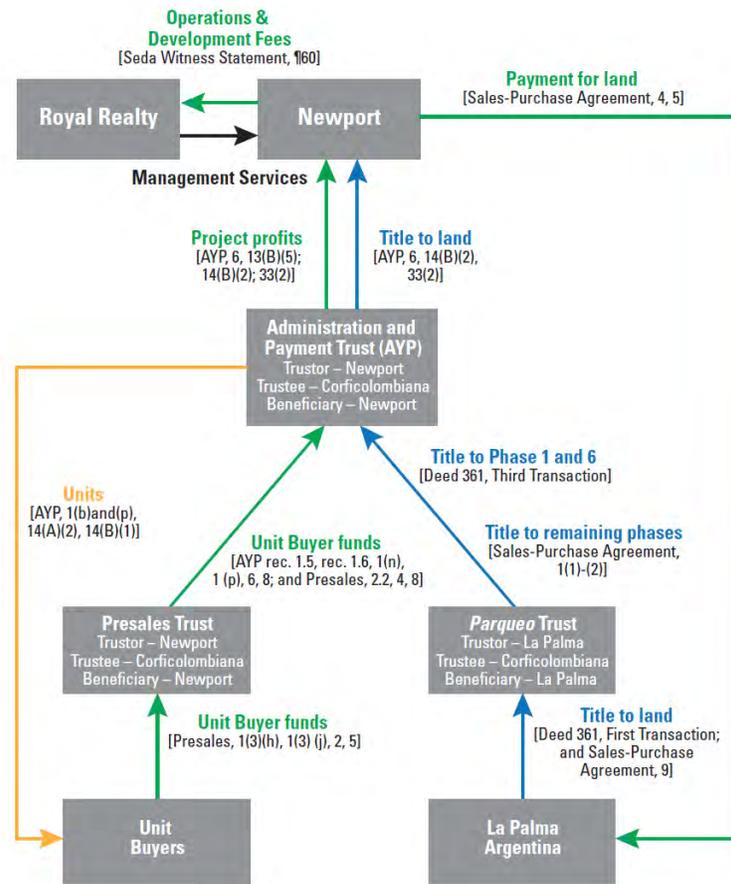
¹⁵⁹ Seda 2 WS, ¶ 96; Counter Memorial, ¶ 42.

¹⁶⁰ Counter Memorial, ¶ 42.

in its role as a service provider, Royal Realty excelled and achieved significant results for Mr. Sultan.

B. Newport Had A Right To Ownership Of The Meritage Property

37. As Claimants demonstrated in their Memorial, the Meritage Project’s Trust structure made it clear that Newport, and thus the Claimants who invested in Newport, had a right to own the Meritage Property. Appendix D to the Memorial set out Newport’s rights as follows:



38. Colombia does not dispute this structure. Rather, it asserts—without any basis—that Newport had no rights to or interest in the Meritage Property.¹⁶¹ This is not true, for reasons already explained in Claimants Memorial and as set out diagrammatically above. Claimants summarize below the facts relating to the key agreements.

1. Royal Realty Entered Into A Sales-Purchase Agreement With La Palma Argentina, Which Was Assigned to Newport

39. The Parties agree that Royal Realty entered into a Sales-Purchase Agreement with La Palma in November 2012 to purchase the Meritage Plot.¹⁶² As described in the Memorial, under the Sales-Purchase Agreement, La Palma assumed the obligation to sell and Royal Realty acquired the option to purchase the Meritage Property.¹⁶³ The Sales-Purchase Agreement envisioned the creation of a trust into which La Palma agreed to transfer title to the Property and that would manage the funds for development of the Meritage Project.¹⁶⁴ Royal Realty maintained a right to acquire the Property in phases depending on the fulfilment of sales thresholds to be determined by the trustee, to be appointed by Royal Realty.¹⁶⁵ On 9 May 2013, Royal Realty assigned its rights under the Sales-Purchase Agreement to Newport.¹⁶⁶

¹⁶¹ Counter Memorial, ¶ 257.

¹⁶² Memorial, ¶ 61; Counter Memorial, ¶ 53. *See also* **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012.

¹⁶³ **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, pp. SP-0002 – SP-0003, cls. 1, 4.

¹⁶⁴ **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, p. SP-0006, cl. 9.

¹⁶⁵ **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, pp. SP-0002 – SP-0003, cl. 1(2), rec. 7. *See also* Memorial, ¶ 61; Counter Memorial, ¶¶ 53-54.

¹⁶⁶ Memorial, ¶ 74; Counter Memorial, ¶ 57. *See also* **Exhibit C-103**, Agreement between Royal Realty S.A.S. and La Palma Argentina Y CIA. LTDA., 9 May 2013, p. SP-0002, cl. 1.

40. Colombia claims that this agreement has no “*legal validity*” because it was not done through a deed.¹⁶⁷ This is incorrect. Colombia conflates the “*legal validity*” of a contract—that is, its existence and enforceability—with whether the performance of such contract has been concluded. As Colombia acknowledges, this agreement was a promise agreement,¹⁶⁸ not yet a deed of sale. The agreement simply sets out the terms under which the parties promised to effectuate the land transactions, which would be (and were eventually) executed through a deed.¹⁶⁹ Nothing in Colombian law precludes two private parties from entering into agreements setting out terms that they wish to later formalize or effectuate through separate instruments; indeed, Colombia points to none.¹⁷⁰ Rather, under Colombian law, such a promise agreement—which is a common feature of civil law systems—is binding as long as it is in writing, for a lawful purpose, provides a date by which the contract must be executed, and only the transfer of the thing or the legal formality is required to perfect the agreement.¹⁷¹ The Sales Purchase Agreement here had all these attributes: it was in writing, for a lawful purpose, set a deadline by which it was to be executed,¹⁷² and the only thing required to perfect the agreement was the sale of the land

¹⁶⁷ Counter Memorial, ¶ 56.

¹⁶⁸ Counter Memorial, ¶ 53.

¹⁶⁹ See Exhibit C-140, Deed 361, 12 February 2015.

¹⁷⁰ Counter Memorial, ¶ 56. Colombia additionally points to a provision in the agreement whereby the parties agree to enter into another agreement but does not explain the relevance of this to the case at hand. Claimants reserve their rights to respond to any arguments Colombia raises belatedly on this basis.

¹⁷¹ Exhibit C-408, Law 153 of 1887, 1887, art. 89 (“*The promise to enter into a contract does not produce any obligation, unless the following circumstances concur: 1st. That the promise be in writing; 2nd. That the contract to which the promise refers is not one of those that the laws declare ineffective for not meeting the requirements established in article 1511 of the Civil Code; 3rd. That the promise contains a term or condition that fixes the time in which the contract is to be executed; 4th. That the contract be determined in such a way that to perfect it, it is only necessary to transfer the thing or the legal formalities. The terms of a promised contract will only apply to the matter as to which it has been contracted.*”)

¹⁷² Exhibit C-019bis, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, pp. SP-0004 – SP-0005, cl. 6.

through a registered deed. Simply put, the agreement here is legally valid—it exists and is enforceable—and contemplated that its *performance* would be completed at a later date (*i.e.*, the delivery of title to the land with subsequent registration in the public records).

2. The Trust Structure Gave Newport An Unquestionable Right To The Land

41. Newport, Corficolombiana, and La Palma entered into three trust agreements to govern the development of the Meritage Project, as set out in Appendix D to the Memorial (copied above):
- a. The **Administration and Payment Trust** managed funds and land of the construction and development of the Meritage Project.¹⁷³ The Administration and Payment Trust Agreement provided that development of the Meritage Project would proceed in eight phases.¹⁷⁴
 - b. The **Presales Trust Agreement** authorized Corficolombiana to collect and manage funds from Unit Buyers in the Meritage Project until the equilibrium point was achieved for each phase.¹⁷⁵ At this point, the funds were transferred to the Administration and Payment Trust for the development of the Meritage Project.
 - c. The **Parqueo Agreement** envisaged that La Palma would put the land in trust to Corficolombiana and, once the relevant equilibrium conditions for a Phase had been met, the land associated with that Phase would be transferred to the Administration

¹⁷³ Memorial, ¶ 80; **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013.

¹⁷⁴ Memorial, ¶ 81.

¹⁷⁵ Memorial, ¶ 79; Counter Memorial, ¶ 63; **Exhibit C-034bis**, Presales Trust Agreement, 17 October 2013.

and Payment Trust for development.¹⁷⁶ Newport was originally the beneficiary of the *Parqueo* Trust.

42. The Meritage Project's development proceeded under the above terms until it reached the equilibrium point for Phases 1 and 6 in February 2015.¹⁷⁷ At this time, two further developments occurred.
43. First, the land associated with Phases 1 and 6 of the Meritage Project were transferred into the Administration and Payment Trust.¹⁷⁸ There is no dispute that Newport is the beneficiary of this Trust.¹⁷⁹ This transfer was recorded on 12 February 2015, when the Superintendence of Notaries and Recordation executed Deed 361 officially recording a number of transactions relating to the Meritage Property.¹⁸⁰ As explained in the Memorial,¹⁸¹ and confirmed by Colombia,¹⁸² Deed 361 also recorded La Palma's transfer of ownership over the Meritage Property to the *Parqueo* Trust;¹⁸³ and the subdivision of the Property into lots for construction associated with the Phases of the Meritage Project.¹⁸⁴

¹⁷⁶ Memorial, ¶ 87; **Exhibit C-029bis**, *Parqueo* Trust Agreement and Amendment, 25 November 2014, SP-0003, cl. 3.4.

¹⁷⁷ The Pre Sales Trust Agreement contemplated that the "*pre-operating phase*" or point of equilibrium for Phase 1 of the Meritage Project would be achieved, at latest, by 16 October 2015. It was ultimately achieved significantly earlier on 9 February 2015. See **Exhibit C-139**, Letter from Newport to Corficolombiana, 9 February 2015; Colombia incorrectly posits that "*pre-operating phase*" continued to August 2016. Counter Memorial, n. 118.

¹⁷⁸ **Exhibit C-140**, Deed 361, 12 February 2015, pp. SP-0038 – SP-0051.

¹⁷⁹ See Counter Memorial, ¶ 61.

¹⁸⁰ **Exhibit C-140**, Deed 361, 12 February 2015. See also *supra* ¶ 27.t.

¹⁸¹ Memorial, ¶ 91.

¹⁸² Counter Memorial, ¶ 67.

¹⁸³ **Exhibit C-140**, Deed 361, 12 February 2015, pp. SP-0001 – SP-0009.

¹⁸⁴ **Exhibit C-140**, Deed 361, 12 February 2015, pp. SP-0010 – SP-0037.

44. Pursuant to this transfer, construction of Phases 1 and 6 began in March 2015.¹⁸⁵ Thus, contrary to Colombia’s assertions, Newport became the beneficiary of the trust holding the title to the plots of land associated with Phases 1 and 6.
45. Colombia does not substantially dispute this fact. Indeed, it acknowledges that “pursuant to the same Deed No. 361, Corficolombiana, in its capacity as the trustee of the Meritage La Palma Trust, transferred to the Meritage Trust the parcel of the Lot to develop Phases 1 and 6 of the Meritage Project.”¹⁸⁶ There is accordingly no dispute that this transfer was complete.¹⁸⁷
46. Second, once the equilibrium point for Phases 1 and 6 had been achieved, La Palma requested an amendment to the *Parqueo* Agreement to make it beneficiary of the agreement, in order to allow it to complete an “*auto evaluation*” process for the Meritage Property.¹⁸⁸ In Colombia, the “*auto evaluation*” process allows property owner to adjust upwards a property’s registered tax value, allowing the property seller to benefit from lower capital gains tax assessed on future sales.¹⁸⁹ This encourages the registered value of the land to appreciate with the actual value of the land and for the State to benefit from raised property taxes in the long run.¹⁹⁰

¹⁸⁵ Seda 1 WS, ¶ 69.

¹⁸⁶ Counter Memorial, ¶ 67.

¹⁸⁷ Colombia points out that the deed called for Corficolombiana to provide to Newport a gratuitous bailment, but does not explain why this is relevant. Counter Memorial, ¶ 67. Indeed, it does not have any impact on the validity of the transaction. The purpose of the bailment was simply to set out the terms under which Newport would perform construction on the lot.

¹⁸⁸ Exhibit C-029bis, *Parqueo* Trust Agreement and Amendment, Amendment No. 1, 6 February 2015, cl. 3; Seda 1 WS, ¶ 69; Seda 2 WS, ¶ 98.

¹⁸⁹ Seda 2 WS, ¶ 99.

¹⁹⁰ Seda 2 WS, ¶ 99.

47. Here, La Palma wished to reappraise the value of the land prior to its transfer to the Administration and Payment Trust so that La Palma could pay a rate of capital gains tax in line with the Meritage Plot's updated registered value.¹⁹¹ Critically, this did not modify La Palma's obligation under the Sales Purchase Agreement to sell the full plot to Newport.¹⁹² Indeed, Deed 361 had already effectuated this promise by transferring the full Meritage Plot from La Palma to the *Parqueo* Trust, and subdividing it in accordance with the Project's phases.¹⁹³ Thus, in addition to being the direct beneficiary of the trust holding Phases 1 and 6 plots, Newport was also entitled to become the owner of the land for the remaining phases: once Newport achieved the remaining equilibrium points, those plots of land would automatically transfer to the Administration and Payment Trust (of which Newport was the beneficiary). Sadly, Newport could not achieve any additional equilibrium points because of the Asset Forfeiture Proceedings.

C. Mr. Seda Rightly Ignored Mr. López Vanegas' First Attempt To Extort In 2014

48. Colombia relies heavily on a critique of Mr. Seda's actions throughout the period he was being targeted for extortion by Mr. López Vanegas, later assisted by Mr. Mosquera, and officials in the Attorney General's Office itself, Ms. Malagón and Ms. Ardila. If only Colombia subjected its prosecutors' conduct to the same level of scrutiny as it subjects Mr.

¹⁹¹ Seda 2 WS, ¶ 99.

¹⁹² **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, pp. SP-0002 – SP-0003, cl. 1(1)-(2).

¹⁹³ **Exhibit C-140**, Deed 361, 12 February 2015, pp. SP-0001 – SP-0037. *See also* Memorial, ¶ 91(a)-(b) and Counter Memorial, ¶ 67 (“Pursuant to Deed No. 361, La Palma Argentina transferred to Corficolombiana, in its capacity as the trustee of the Meritage La Palma Trust, the right of ownership and the real and material possession over [the Meritage] Lot”).

Seda's. Colombia's victim-blaming is inappropriate and should be disregarded. Mr. Seda's actions were measured and responsible given the context of the threats against him and the Meritage Project. Indeed, Mr. Seda's life was ultimately threatened.¹⁹⁴

49. Colombia makes a number of misleading statements about the first time Mr. López Vanegas approached Mr. Seda, which Claimants correct and clarify below.
50. First, Colombia inaccurately suggests that Mr. López made an initial outreach while the Claimants were still undertaking due diligence on the Property.¹⁹⁵ In fact, by early 2014, and Newport had already entered into contracts with La Palma and Corficolombiana,¹⁹⁶ and Meritage units had been available for presale for several months.¹⁹⁷ Mr. Seda and the team at Royal Realty had also coordinated a number of successful marketing campaigns and the Meritage Project was widely known in Medellín.¹⁹⁸ Critically, all the Meritage Claimants had by that time invested in the Project.¹⁹⁹

¹⁹⁴ Seda 2 WS, ¶ 45.

¹⁹⁵ See Counter Memorial, Heading D. Colombia takes issue with Mr. Seda's statement that: "*In early 2014, after diligence was completed and contracts were signed, I began receiving phone messages from an individual, Ivan López Vanegas, who, in his calls, claimed to be the rightful owner of the land on which the Meritage Project was being built.*" However, as the context of this sentence makes clear the turn of phrase "*being built*" means planned for construction, and as Mr. Seda explains, while permitting and licensing was ongoing in 2014, physical construction did not commence until March 2015. See Seda 1 WS, ¶¶ 62, 68-69; **Exhibit C-035bis**, Declaration of Angel Seda, submitted on record of Asset Forfeiture Proceeding, 28 February 2017; **Exhibit C-020bis**, Resolutions of Antioquia Urban Curator Issuing Construction Permits, 23 December 2014, pp. SP-0001 – SP-0004; **Exhibit C-139**, Letter from Newport to Corficolombiana, 9 February 2015; **Exhibit C-29bis**, Parqueo Trust Agreement and Amendment, Amendment No. 1, 6 February 2016, pp. SP-0022 – SP-0024.

¹⁹⁶ See *supra* **Section III.B**.

¹⁹⁷ López Montoya WS, ¶¶ 11-12; Seda 2 WS, ¶ 5.

¹⁹⁸ Seda 1 WS, ¶ 61.

¹⁹⁹ See **Exhibit C-276**, Company Agreement of RR Meritage Associates S.A. with Royal Realty, 10 May 2013; **Exhibit C-104**, Company Agreement of RR Meritage Associates S.A. with Beneficiary of Boston Enterprises Trust, 10 May 2013; **Exhibit C-105**, Company Agreement of RR Meritage Associates S.A. with JTE International Investments, LLC, 10 May 2013; **Exhibit C-106**, Company Agreement of RR Meritage Associates S.A. with Jonathan Foley, 10 May 2013.

51. Second, Colombia alternatively insinuates that Mr. Seda held the information about Mr. López Vanegas’ threats close to his chest and also inappropriately publicized them.²⁰⁰ In fact, Mr. Seda approached these threats the way any reasonable developer in Colombia would. After learning of Mr. López Vanegas’ complaints, Mr. Seda took steps to (i) confirm the threats lacked a credible basis, (ii) contacted both La Palma and Corficolombiana, and (iii) publicly addressed Mr. López’s allegations to prevent any misinformation from spreading.²⁰¹
52. As explained in the Memorial,²⁰² real estate developers in Colombia, including Mr. Seda,²⁰³ are often forced to deal with extortionate demands from third parties, in particular if their projects gain some publicity. Reasonably, the first step Mr. Seda took in the face of such threats, was to verify if Mr. López Vanegas had any connections with the Meritage Property.²⁰⁴ Mr. López Vanegas’ name did not appear in the title study completed by Otero & Palacio.²⁰⁵ As it later turned out, Mr. López Vanegas had taken steps to ensure that his name did not appear on the property records by owning it through an entity and installing his son Sebastián López as the legal representative of that entity.²⁰⁶ Mr. Seda further instructed Royal Realty’s in-house counsel, Juan Pablo Lopera, to conduct an internet search of Mr. López Vanegas’ name.²⁰⁷ The search revealed that Mr. López Vanegas had

²⁰⁰ Counter Memorial, ¶ 87.

²⁰¹ Seda 2 WS, ¶¶ 6-13.

²⁰² Memorial, ¶ 86. *See also* Seda 1 WS, ¶ 63.

²⁰³ Seda 2 WS, ¶ 7; Seda 1 WS, ¶ 63.

²⁰⁴ Seda 2 WS, ¶ 7.

²⁰⁵ *See* Exhibit C-030bis, Otero & Palacio Title Study and Supplement, 7 March 2013 and 23 July 2013.

²⁰⁶ *See* Memorial, ¶ 234.

²⁰⁷ Seda 2 WS, ¶ 7.

previously been convicted of drug trafficking charges in the United States. This gave him further reason to dismiss Mr. López Vanegas' claims, as they came from a highly discredited source.²⁰⁸

53. As Colombia accepts, Mr. Seda also took steps to notify La Palma and Corficolombiana about the threats.²⁰⁹ Fanny Giraldo, Legal Representative of La Palma, told Mr. Seda that La Palma had not heard of Mr. López Vanegas before but they would conduct further enquiries.²¹⁰ Ms. Giraldo subsequently told Mr. Seda that she had learned from the Attorney General's Office that Mr. López Vanegas had approached the Office with a complaint but his claims were baseless and would be dismissed summarily.²¹¹ Corficolombiana, one of Colombia's largest fiduciaries,²¹² similarly concluded that Mr. López Vanegas' claims were baseless and did not merit further attention.²¹³
54. Furthermore, as Colombia itself acknowledges, Mr. Seda candidly addressed Mr. López Vanegas' claims on 5 August 2014 in a radio interview with national broadcaster W Radio.²¹⁴ Following this interview, many people who had already purchased units in the Meritage Project during the ongoing presales contacted Royal Realty for more

²⁰⁸ Seda 2 WS, ¶ 7.

²⁰⁹ See Seda 1 WS, ¶¶ 62, 64. See also Counter Memorial, ¶ 86.

²¹⁰ Seda 2 WS, ¶ 9.

²¹¹ Seda 2 WS, ¶ 9.

²¹² Medellín Expert Report, ¶ 93(a).

²¹³ Seda 1 WS, ¶¶ 63-64. See also Seda 2 WS, ¶ 9.

²¹⁴ **Exhibit R-30**, W RADIO, Ángel Seda clears doubts about disputed lot for construction project in Medellín, 5 August 2014. See also Counter Memorial, ¶ 87.

information.²¹⁵ To these unit buyers, Mr. Seda provided a copy of the Otero & Palacio title study, as well as the Attorney General’s Office’s Certificate of No Criminal Activity.²¹⁶

55. Indeed, Colombia does not suggest an alternative response other than contacting the Attorney General’s Office. But Mr. López Vanegas had already taken his claims to this Office where they languished for over two years before (for reasons Colombia has not explained) being reactivated by the Asset Forfeiture Unit by Prosecutors Ardila and Malagón just as Mr. Mosquera and Mr. López Vanegas were telling Mr. Seda they could influence these very prosecutors.²¹⁷ It is unclear what Mr. Seda’s complaint at this stage would have accomplished in light of the confirmation Mr. Seda already had from the Attorney General’s Office and several due diligence studies that Mr. López Vanegas had no rightful claim to the Meritage Property. Indeed, Colombia itself acknowledges in this Arbitration that Mr. López Vanegas’ claims are premised on a lie and not the cause of the Asset Forfeiture Proceedings.²¹⁸ Thus, Colombia offers no reason for Mr. Seda to have “halted pre-sales and construction” at this stage.²¹⁹ Colombia’s argument amounts to charging Newport and others with knowledge that the Attorney General’s Office did not even have at that time, something the Supreme Court of Colombia has explicitly held is not required to meet the standard of good faith.²²⁰

²¹⁵ Seda 2 WS, ¶ 10.

²¹⁶ Seda 2 WS, ¶ 10.

²¹⁷ See Memorial, ¶¶ 103, 119-22.

²¹⁸ Counter Memorial, ¶ 141.

²¹⁹ Counter Memorial, ¶ 90.

²²⁰ See *infra* Section III.H.

D. Mr. Seda Responded Appropriately to Mr. López Vanegas' Renewed Extortion Attempts

56. Colombia also makes a number of misleading statements about the interactions between Mr. Seda and Mr. López Vanegas' representatives in 2016, which Claimants correct and clarify below.
57. First, Colombia criticizes Mr. Seda for trying to engage with Mr. Mosquera to reach a resolution after Mr. Mosquera's *tutela* was dismissed as against Newport and Royal Realty.²²¹ Mr. Seda was trying to get the Meritage Project built. Not only had Mr. López Vanegas filed a *tutela*, he had made it clear that he would take other legal action and was not going to relent in his efforts to extort the Meritage Project.²²² Mr. Seda re-engaged with Mr. Mosquera (not Mr. López Vanegas directly) to see if he could broker a commercial resolution between Mr. López Vanegas and La Palma that would put the matter to rest and allow him to refocus his energies on development of the Meritage Project.²²³ Mr. Seda noted unequivocally that he was "*definitely not going to pay [Mr. López Vanegas] any compensation*" but that if Mr. López Vanegas had legitimate claims against La Palma, he would be willing to "*negotiate between him and the previous owners of the lot.*"²²⁴ However, at their meetings on 8 and 10 June, things became a great deal more ominous. Mr. Mosquera and Mr. López Vanegas made clear that they were not interested in settling a legitimate claim with La Palma. They were interested in extortion, demanding a

²²¹ Counter Memorial, ¶ 116; **Exhibit C-039bis**, Decision on López Vanegas *Tutela* Action, 23 May 2016.

²²² Seda 2 WS, ¶ 16.

²²³ Seda 2 WS, ¶¶ 14-16.

²²⁴ **Exhibit C-162**, Email chain between Víctor Mosquera Marín and Angel Seda, 6 June 2016, p. SP-0002.

minimum payment of COP 56 billion (USD 19 million) or they would use their connections in the Asset Forfeiture Unit of the Attorney General’s Office to seize the Meritage Property.²²⁵ Around the same time, an attorney at La Palma, also told Mr. Seda that the Attorney General’s Office had requested a bribe to “*resolve*” the issue.²²⁶ Then another individual had approached Mr. Seda in the parking lot of the Charlee Hotel also requesting payment of a bribe on behalf of the Attorney General’s Office.²²⁷

58. Second, Colombia criticizes Mr. Seda for not reporting the extortion scheme being perpetrated against him prior to December 2016.²²⁸ Mr. Seda did not report Mr. López Vanegas in 2014 because Mr. López Vanegas’ claims were baseless and he took no action against the Meritage Property. By 2016, Mr. Seda understood that the Attorney General’s Office had become part of the extortion scheme.²²⁹ By mid-2016, Mr. Seda had been told by three separate sources that the Attorney General’s Office was requesting a bribe in relation to the Meritage Project.²³⁰

59. Indeed, Colombia’s purported concern that Mr. Seda’s failed to file a complaint until December 2016²³¹ is ironic given that once he did file a complaint, the Attorney General’s Office failed to timely or adequately investigate it and still has not taken steps to prosecute

²²⁵ Memorial, ¶ 134; Seda 1 WS, ¶¶ 89-91; Seda 2 WS, ¶ 17.

²²⁶ Memorial, ¶ 127; Seda 1 WS, ¶ 82.

²²⁷ Memorial, ¶ 131; Seda 1 WS, ¶ 87.

²²⁸ Counter Memorial, ¶ 134.

²²⁹ Seda 2 WS, ¶ 18.

²³⁰ Seda 2 WS, ¶¶ 18, 23.

²³¹ Counter Memorial, ¶ 115.

those involved for the extortion plot perpetrated against the Meritage Project.²³² Mr. Seda was informed by the Attorney General’s Office that his complaint against Ms. Ardila was closed in January 2021 (four years after the complaint was made and six months after Claimants filed their Memorial in this Arbitration pointing out that the investigation appeared to have been closed by Colombia).²³³ [REDACTED]

60. Third, Colombia complains that Mr. Seda did not warn Banco de Bogotá about Mr. López Vanegas’ threats, or about the Attorney General’s Offices solicitation of bribes.²³⁵ However, it simultaneously acknowledges that Banco de Bogotá is “*a bank that belongs as does Corficolombiana to Grupo Aval*”²³⁶ and that Corficolombiana’s President not only met with Mr. López Vanegas about his claims in 2015,²³⁷ but was also a party to Mr. López Vanegas’ *tutela*.²³⁸ Colombia further ignores that Mr. Seda has publicly addressed the allegations made by Mr. López Vanegas in the national press.²³⁹ This was clearly not a situation where Mr. Seda was seeking to keep Mr. López Vanegas’ threats secret. He did the opposite—he sought to confront Mr. Vanegas’ spurious threats directly to protect Claimants’ investment.

²³² See *infra* ¶ 302

²³³ **Exhibit C-402**, Email from Esmeralda Chinchilla Martinez to Alejandro Mejia, 22 February 2021.

²³⁴ [REDACTED]

²³⁵ Counter Memorial, ¶ 113.

²³⁶ Counter Memorial, ¶ 112.

²³⁷ Counter Memorial, ¶ 86.

²³⁸ **Exhibit C-039bis**, Decision on López Vanegas *Tutela* Action, 23 May 2016.

²³⁹ See *supra* ¶¶ 27.p, 48.

61. Fourth, Colombia criticizes Mr. Seda for re-engaging with Mr. López Vanegas “*of his own volition*” after he sought the assistance of the U.S. Embassy in Bogotá in September 2016.²⁴⁰ Mr. Seda had by then lost his livelihood completely, and feared for the safety of himself and his family in Colombia. He only contacted Mr. Mosquera to collect “*as much evidence as possible*” of the extortionate scheme to which he had been subjected.²⁴¹ Mr. Mosquera had been discerning in their written communications and had largely avoided putting his threats into writing. After Mr. Seda was thwarted from recording meetings on 27 and 29 October 2016,²⁴² he tried to instead draw out the threats Mr. Mosquera had previously made through emails.²⁴³
62. Mr. Seda succeeded in his efforts and on 9 November 2016, Mr. Mosquera memorialized a “*proposal*” from Mr. López Vanegas:

“[T]herefore based on the negotiation taking place between the parties, by way of this document I submit to you the proposal made by Mr. Iván López, by which he would be compensated and would be willing to settle this current situation:

He bases the proposal on the fact that as the legitimate owner of the 556,675.50 square meters (equal to his 75%). Therefore, his request starts with the sum of COP \$100,000.00 M².”²⁴⁴

63. Mr. López Vanegas could not have offered to “*settle this current situation*” (*i.e.*, seizure of the Meritage Property) for approximately USD 19 million without cooperation from the

²⁴⁰ Counter Memorial, ¶ 123.

²⁴¹ Seda 2 WS, ¶ 20.

²⁴² Seda 1 WS, ¶¶ 210-11; Seda 2 WS, ¶¶ 20-21.

²⁴³ Seda 2 WS, ¶ 21.

²⁴⁴ **Exhibit C-177**, Email chain between Angel Seda and Víctor Mosquera Marín, 10 November 2016, p. SP-0004.

Attorney General's Office—the property had already been seized. Evidence of the extortion in hand, Mr. Seda bluntly refused the offer.²⁴⁵

E. Meritage's Seizure Halted Rapidly-Developing Luxé And Other Projects

64. Colombia questions the effect of the Asset Forfeiture Proceedings on Claimants' other Projects. But the record makes it clear that Claimants' other Projects were doomed as a result of Colombia's actions. Taking each in turn:
65. **Luxé:** By July 2016, Phases 1, 2, and 5 of Luxé were complete and Phase 4 (the hotel) was 72.5 percent complete.²⁴⁶ However, following the seizure of the Meritage Project, all construction on Luxé was halted as Colpatría informed Royal Realty that it could no longer continue to make disbursements to the development.²⁴⁷ Colpatría was concerned that other properties with which Royal Realty was affiliated might also be impacted by the Asset Forfeiture Proceedings and therefore refused to provide further financing.²⁴⁸ At the time, another major Latin American real estate investor, Paladin Realty Partners, was also looking to invest in Luxé but halted discussions in August 2016 asking to “*wait until the Meritage issue is resolved.*”²⁴⁹

²⁴⁵ **Exhibit C-177**, Email chain between Angel Seda and Víctor Mosquera Marín, 10 November 2016, pp. SP-0002 – SP-0004.

²⁴⁶ Seda 2 WS, ¶ 66; **Exhibit C-375**, Letter from José Luis Ochoa Yepes to Felipe López, 10 June 2015; **Exhibit C-338**, Letter from Ochoa Arquitectos & Ingenieros S.A.S. to Luxé By The Charlee S.A.S., 21 August 2021.

²⁴⁷ López Montoya WS, ¶¶ 44-48; Seda 1 WS, ¶ 110; Seda 2 WS, ¶ 68.

²⁴⁸ López Montoya WS, ¶¶ 44-48; Seda 1 WS, ¶ 110; Seda 2 WS, ¶ 68.

²⁴⁹ **Exhibit C-379**, Email from Alejandro Krell to Angel Seda, 8 August 2016. *See also* Seda 2 WS, ¶ 68; **Exhibit C-380**, Email from Michael Carlton to Angel Seda and James Evans, 4 April 2016.

66. As a result of being unable to complete the hotel, Royal Realty was also prevented from establishing a rental pool for the completed cabanas that formed Phases 1, 2, and 5 of Luxé. Royal Realty had planned to manage these cabanas and would have collected a service fee for renting out these units.²⁵⁰ However, it was unable to do so because the seizure of the Meritage Project and threats against Mr. Seda, made it impossible for him to remain in Colombia to manage a hospitality operation.²⁵¹
67. **Tierra Bomba:** The Parties agree that in 2013 and 2014, Mr. Seda took steps towards the development of a mixed use real estate project on the island of Tierra Bomba near the popular resort town of Cartagena.²⁵² Mr. Seda: (i) set up RDP Cartagena S.A.S. as his development vehicle for the project;²⁵³ (ii) developed the project concept and architecture;²⁵⁴ (iii) entered into investment agreements with six investors;²⁵⁵ (iii) secured 15 acres of valuable property in a prime location on the island for the project;²⁵⁶ and (iv) commenced the process of obtaining the approval of the indigenous population on the

²⁵⁰ Seda 2 WS, ¶ 69.

²⁵¹ Seda 2 WS, ¶ 69.

²⁵² Memorial, ¶¶ 105-109; Seda 1 WS, ¶¶ 30-33; Counter Memorial, ¶¶ 28-31.

²⁵³ Memorial, ¶ 108.

²⁵⁴ **Exhibit C-129**, Tierra Bomba Plan, July 2014. *See also* Memorial, ¶¶ 106-107.

²⁵⁵ **Exhibit C-112**, RDP Cartagena S.A.S. Investment Agreement with Roger Khafif, 1 September 2013; **Exhibit C-113**, RDP Cartagena S.A.S. Investment Agreement with Maria Alvarez & CIA S.C.A., 1 September 2013; **Exhibit C-114**, RDP Cartagena S.A.S. Investment Agreement with Gustavo Velasquez and Paula Hoyos, 1 September 2013; **Exhibit C-115**, RDP Cartagena S.A.S. Investment Agreement with Ashmina Foundation S.A.S., 1 September 2013; **Exhibit C-116**, RDP Cartagena S.A.S. Investment Agreement with Inversiones Blue Sky, 1 September 2013; **Exhibit C-117**, RDP Cartagena S.A.S. Investment Agreement with Packy S.A.S., 1 September 2013.

²⁵⁶ **Exhibit C-124**, Promise to Purchase Contract between Angel Seda and Jaime Francisco Martínez Pinilla and Edilia Rosa Sánchez Hoyos, 6 March 2014; **Exhibit C-128**, Promise to Purchase Contract between Angel Samuel Seda and Ramon Antonio Duque Marín, 17 June 2014; **Exhibit C-134**, Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sánchez Vargas, 19 September 14.

island.²⁵⁷ Mr. Seda separately (v) entered into an in principle agreement with businessman Vicente Caro to manage another hotel in Cartagena.²⁵⁸

68. Colombia complains that Mr. Seda did not purchase the lots of land outright. But as seen with development of the Charlee Hotel, Luxé, and the Meritage Project—and consistent with the general development practice in Colombia—it was sufficient to originally put the land into contract through a “*promise to purchase*” agreement on very specific terms.²⁵⁹ The transfer of title would then occur through a trust structure. Mr. Seda spent USD \$1.5 million on presales development work and the deposits.²⁶⁰
69. By August 2016, Royal Realty was getting ready to begin presales for Tierra Bomba in early 2017. It was anticipated that construction would start in April 2018, and Royal Realty planned to apply for the construction and urbanization license in advance of this, in around November 2017.²⁶¹ The hotel was scheduled to begin operations in January 2020.²⁶²
70. However, following Colombia’s unlawful seizure of the Meritage Project, the development of Cartagena came to a complete halt. Mr. Seda’s investors, the land owners he had contracted with, and Mr. Caro all refused to continue to work with him. Specifically, on 3 January 2017, Colombian investors divested their shares in RDP Cartagena (the

²⁵⁷ **Exhibit C-066bis**, Presentation to Tierra Bomba Native Community, 19-21 January 2016.

²⁵⁸ **Exhibit C-315**, Email from Angel Seda to Carlos Rodríguez, *attaching* Addendum to Cartagena Hotel Operation Agreement (Draft), Private Agreement (Draft), 5 February 2017. *See also* Seda 2 WS, ¶ 74.

²⁵⁹ Seda 2 WS, ¶ 73.

²⁶⁰ Seda 2 WS, ¶ 73.

²⁶¹ Seda 2 WS, ¶ 73.

²⁶² The Memorial erroneously states that construction was to begin in 2020, and the hotel was scheduled to begin operations in August 2022. *See* Memorial, ¶ 108.

development vehicle for Tierra Bomba).²⁶³ Thereafter, in March and August 2017, the land sellers cancelled their “*promise to purchase*” agreements with Mr. Seda.²⁶⁴ As the contract notes, the reason for the cancellation is that:

*“[I]t is difficult for the prospective seller to continue the commercial relation with the prospective buyer, given the difficulties and the scandal wield upon the MERITAGE project in Medellín, which was disclosed both in written and oral media outlets, a situation that may result in a lack of success in any other project that shall be undertaken in the future.”*²⁶⁵

71. By September 2017, despite negotiating a near final contract with Mr. Seda to manage a hotel on Tierra Bomba,²⁶⁶ Mr. Caro “determined that we must put an end to the negotiation process for the operation of our hotel, since we don’t want the situation that’s going on with the Meritage project to affect us in the near future.”²⁶⁷
72. **Santa Fé de Antioquia:** The Parties agree that in 2015, Royal Realty and other investors purchased two plots of land in Santa Fé de Antioquia, a municipality that is a 1.5-hour drive from Medellín.²⁶⁸ In January 2016, Revmarketing S.A.S. became the development vehicle for this project.²⁶⁹ In May 2017, the local municipality approved the construction

²⁶³ **Exhibit C-183**, Agreement between Royal Realty and Greenpark Trading & Maria Álvarez Y CIA, 3 January 2017.

²⁶⁴ **Exhibit C-193**, Cancellation of Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sánchez Vargas, 3 August 2017; **Exhibit C-194**, Cancellation of Promise to Purchase Contract between Angel Seda and Ramón Antonio Duque Marín, 15 August 2017; **Exhibit C-186**, Cancellation of Promise to Purchase Contract between Angel Seda and Jaime Francisco Martínez Pinilla and Edilia Rosa Sánchez Hoyos, 1 March 2017.

²⁶⁵ **Exhibit C-193**, Cancellation of Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sánchez Vargas, 3 August 2017, p. SP-0003 (emphasis added); **Exhibit C-194**, Cancellation of Promise to Purchase Contract between Angel Seda and Ramón Antonio Duque Marín, 15 August 2017, p. SP-0004 (emphasis added).

²⁶⁶ **Exhibit C-315**, Email from Angel Seda to Carlos Rodríguez, *attaching* Addendum to Cartagena Hotel Operation Agreement (Draft), Private Agreement (Draft), 5 February 2017.

²⁶⁷ See **Exhibit C-197**, WhatsApp chain between Manager of Tierra Bomba Hotel Owner and Angel Seda, 13 September 2017 (emphasis added).

²⁶⁸ Memorial, ¶ 111; Counter Memorial, ¶ 32.

²⁶⁹ Seda 1 WS, ¶ 34.

of a 250-room hotel, and 180 residential lots.²⁷⁰ This was a preparatory step to applying for a construction and urbanization license in early 2018, prior to commencing construction in mid-2018.²⁷¹ Any environmental permits, to the extent required, would also be obtained in early 2018.²⁷²

73. Despite the local municipality's approval, Colombia argues that the environmentally protected nature of the nearby Cauca River would have precluded the proposed development.²⁷³ This is a vague and unsubstantiated criticism that does not appropriately take into account the fact that approval had already been given for the full development. It would be nonsensical for the local municipality to do so if there was no prospect of the proposed development being granted the necessary environmental permits.²⁷⁴
74. Following the Attorney General's Office's seizure of the Meritage Project, development of Santa Fe has come to a complete halt.²⁷⁵ In January 2017, Mr. Seda had to offer a portion of his property to investors who wanted to divest from his other projects because he no longer had access to funds to repay them.²⁷⁶ By October 2018, two of his investors transferred their interest in the purchased land back to Mr. Seda because they felt it would be impossible for them to find additional investors and buyers for the units due to the

²⁷⁰ **Exhibit C-065bis**, Santa Fe de Antioquia Land Use Certificate, 9 May 2017.

²⁷¹ Seda 1 WS, ¶ 35; Seda 2 WS, ¶ 75.

²⁷² Seda 2 WS, ¶ 76.

²⁷³ Counter Memorial, ¶¶ 34-35.

²⁷⁴ Seda 2 WS, ¶ 76.

²⁷⁵ Memorial, ¶¶ 315-16.

²⁷⁶ **Exhibit C-183**, Agreement between Royal Realty and Greenpark Trading & Maria Álvarez Y CIA, 3 January 2017. *See also* Seda 1 WS, ¶ 112; Memorial, ¶ 316.

reputational harm caused by the Asset Forfeiture Proceedings against the Meritage Project.²⁷⁷

75. **450 Heights:** The Parties likewise agree that Mr. Seda worked towards development of another mixed-use property on the outskirts of Medellín.²⁷⁸ In 2013, Mr. Seda set up Interpalmas S.A.S. as his development vehicle for this Project.²⁷⁹ He identified a suitable property in 2014,²⁸⁰ and commenced sales negotiations with the sellers.²⁸¹ At this time, Royal Realty was also simultaneously working on Luxé and the Meritage Project and Mr. Seda made the decision to prioritize advancement on those projects, while also continuing to grow and develop Royal Realty's Colombian workforce.²⁸²
76. Nevertheless, Mr. Seda continued to progress 450 Heights incrementally. By January 2017, he had completed and collected several studies of the land, including geological surveys, water studies, and land surveying, and was in the design phase of the project.²⁸³ This included a land survey that was commissioned by the existing land owners in 2011.²⁸⁴ Colombia takes issue with the fact this survey was not personally commissioned by Mr.

²⁷⁷ Seda 1 WS, ¶ 113; Memorial, ¶ 316; **Exhibit C-224**, Land Transfer Deed between Royal Realty S.A.S., and Nicolas Navarro and Paola Diez, 17 October 2018.

²⁷⁸ See Memorial, ¶¶ 113-115; Seda 1 WS, ¶ 36; Seda 2 WS, ¶ 77; Counter Memorial, ¶¶ 36-38.

²⁷⁹ Memorial, ¶ 113.

²⁸⁰ See **Exhibit C-068**, 450 Heights Investment Brochure; **Exhibit C-069**, 450 Heights Topography Map; **Exhibit C-094**, 450 Heights Land Survey, 18 September 2011.

²⁸¹ **Exhibit C-308**, Promise of Sale Contract (Draft), 1 September 2014. See also **Exhibit C-376**, Declaration from León de Jesús Naranjo Pizano, 30 August 2021.

²⁸² Seda 2 WS, ¶ 77.

²⁸³ See **Exhibit C-068**, 450 Heights Investment Brochure; **Exhibit C-069**, 450 Heights Topography Map; **Exhibit C-094**, 450 Heights Land Survey, 18 September 2011.

²⁸⁴ Seda 2 WS, ¶ 77; **Exhibit C-094**, 450 Heights Land Survey, 18 September 2011.

Seda but does not explain why that is relevant to the damage that was ultimately suffered by Mr. Seda at the hands of Colombia's wrongdoing.²⁸⁵

77. Presales for 450 Heights units were scheduled to commence by the end of 2017, with construction beginning 12 to 18 months later, and hotel operations commencing by 2020.²⁸⁶ However, following the seizure of the Meritage Project, the land owners withdrew from negotiations with Royal Realty.²⁸⁷
78. As set out in Memorial, and as acknowledged by Colombia, Royal Realty had also commenced preparatory work on a number of other real estate development projects in Colombia.²⁸⁸ This includes establishing RVP Land Fund I S.A.S. as the vehicle that would develop three hotels on the banks of the Represa de Prado Dam, close to the Department of Tolima and only 200 kilometers from Bogotá. At the time of the measures, Mr. Seda had begun to bring on board additional investors, secured valuable plots of land in the area, and commenced the design process.²⁸⁹ He had a team of about 50 employees working on this.²⁹⁰ This came to a halt following the measures.²⁹¹

²⁸⁵ Counter Memorial, ¶ 37.

²⁸⁶ Seda 1 WS, ¶ 36; Memorial, ¶ 115; Seda 2 WS, ¶ 77.

²⁸⁷ Seda 1 WS, ¶ 114; Seda 2 WS, ¶ 77; **Exhibit C-376**, Declaration from León de Jesús Naranjo Pizano, 30 August 2021.

²⁸⁸ Memorial, ¶ 116; Seda 1 WS, ¶ 37; Counter Memorial, ¶¶ 39-41.

²⁸⁹ Memorial, ¶ 116; Seda 1 WS, ¶ 37; Counter Memorial, ¶¶ 39-41.

²⁹⁰ Seda 1, ¶ 37.

²⁹¹ Memorial, ¶ 499.

F. Colombia Mischaracterizes The Asset Forfeiture Proceedings Related To The Meritage Project

79. In its Counter Memorial, Colombia criticizes “Claimants’ portrayal of the Asset Forfeiture Proceedings as some sort of discretionary process subject to the whims of individuals within the Attorney General’s Office and which has been carried out without observing due process and in connivance with the Colombian Courts.”²⁹² Instead, Colombia argues that the proceedings “have been carried out with strict adherence to the law and guaranteeing that all measures and decisions could be revised and reassessed in independent instances.”²⁹³ Colombia’s assertions are not correct.
80. First, Claimants fully agree with Colombia that an asset forfeiture proceeding should not and must not be “*subject to the whims of individuals within the Attorney General’s Office.*”²⁹⁴ Claimants have never argued otherwise. In fact, the record confirms that the only thing Claimants have ever sought in the Asset Forfeiture Proceedings is that the letter of the law be followed: that, Newport and/or Corficolombiana be recognized as a good faith third party as required by law. Unfortunately, a proceeding driven by the whims of individuals within the Attorney General’s Office is precisely what Claimants received. What the record shows—indeed, what Colombia’s own witness in this Arbitration, Mr. Hernández, has confirmed—is that prosecutors within the Asset Forfeiture Unit acted

²⁹² Counter Memorial, ¶ 140.

²⁹³ Counter Memorial, ¶ 140.

²⁹⁴ Counter Memorial, ¶ 140.

corruptly and that they simply failed to investigate, let alone recognize, Newport's good faith status.²⁹⁵

81. Second, Colombia tries to avoid scrutiny of its actions in the Asset Forfeiture Proceeding by arguing that the forfeiture proceeding was not “*some sort of discretionary process.*”²⁹⁶ That is, it seeks to portray its prosecutors as somehow handcuffed in their ability to do anything except press forward with an asset forfeiture action. This, too, is not true. Colombian asset forfeiture law specifically provides prosecutors procedural opportunities to dismiss or withdraw an asset forfeiture action if, upon investigation, they determine that asset forfeiture would not be proper including because they found the existence of a good faith third party. As former Minister of Justice and Law, Dr. Medellín, explains in his second expert report, Colombian Asset Forfeiture Law “*directly empowers the prosecutor to terminate the forfeiture proceeding through its dismissal.*”²⁹⁷ Specifically, Article 123 of Law 1708 expressly indicates that: “*Upon completion of the investigative work ordered during the initial stage, a resolution regarding dismissal of the case or the provisional determination to proceed with the asset forfeiture claim shall be rendered*”²⁹⁸

82. As Dr. Medellín explains, Article 124 of Law 1708 establishes the circumstances under which the Prosecutor may issue a Resolution of Dismissal, as follows:

“The Attorney General of Colombia or his or her delegate shall be able to issue a resolution to dismiss the action, based on a prior factual, legal, and probative justification, at any time where any of the following circumstances occur: 1. No assets are identified which may be covered by the forfeiture action. 2. It is demonstrated that the assets reported or

²⁹⁵ See, e.g., *infra* ¶¶ 105-106.

²⁹⁶ Counter Memorial, ¶ 140.

²⁹⁷ Medellín 2 Report, ¶ 21.

²⁹⁸ Medellín 2 Report, ¶ 21, citing Exhibit C-003bis, Law No. 1708 of 20 January 2014, art. 123 (emphasis added).

identified are not covered by any grounds for asset forfeiture. 3. It is demonstrated that the holders of rights over the assets which are identified are not connected with any grounds for forfeiture. 4. It is shown that the assets in question are in the name of third parties acting in good faith without fault, and there are no assets in an equivalent value which can be forfeited. 5. Any circumstance is demonstrated which prevents the determination to proceed with the asset forfeiture claim.”²⁹⁹

83. Thus, it is simply untrue that prosecutors do not have discretion in these proceedings—including to withdraw the proceedings altogether—when circumstances so dictate (as they did here).
84. Third, it is equally untrue to say that the proceedings here “*have been carried out with strict adherence to the law.*”³⁰⁰ As the expert reports from former Minister Medellín and former Deputy Attorney General Martínez show, there were myriad deficiencies with the proceedings.³⁰¹ The action here was in plain contravention of the legal and procedural guarantees enshrined under the Colombian Constitution and the Asset Forfeiture Law. Chief among these violations are the lack of due process and recognition of Newport as an affected party, the improper imposition of precautionary measures, and the arbitrary denial of the good faith third party protection afforded by law.³⁰²
85. In addition to the above, throughout its Counter Memorial, Colombia suggests that Colombian courts have upheld the findings of the Attorney General’s Office with respect to the Precautionary Measures, thus implying that the courts have conducted a substantive

²⁹⁹ Medellín 2 Report, ¶ 22, citing **Exhibit C-003bis**, Law No. 1708 of 20 January 2014 (emphasis added).

³⁰⁰ Counter Memorial, ¶ 140.

³⁰¹ See, e.g., Medellín Report, ¶ 17; Martínez Report, ¶¶ 28-44; Medellín 2 Report, ¶¶ 7-13; Martínez 2 Report, ¶¶ 30, 56-57, 60,

³⁰² See, e.g., Medellín 2 Report, ¶¶ 7-13; Martínez 2 Report, ¶¶ 30, 56-57, 60.

review of the issue.³⁰³ The courts have conducted no such review. Law 1708 makes clear that precautionary measures are not subject to appeal. Article 111 states: “*The precautionary measures which are ordered by the Attorney General of Colombia or his or her delegate shall not be subject to remedies of reconsideration or appeal.*”³⁰⁴ Instead, they are subject to a limited recourse called a “*subsequent procedural legality control.*”³⁰⁵ As part of this, the court can only review for one of four specified issues, including whether the measure appears to be “*necessary, reasonable, and proportional in order to achieve its ends.*”³⁰⁶

86. Critically, the court does not conduct a substantive review of the underlying evidence.³⁰⁷ That is, in this case, the Attorney General’s Office premised its precautionary measures in large part on the now-debunked theory that Mr. López’s son was kidnapped and forced to transfer title of a portion of the Meritage Property.³⁰⁸ When conducting the legality control proceeding, the reviewing court does not assess the merits of the allegations about the kidnapping. It does not require the Attorney General to prove that the kidnapping occurred. Instead, the court accepts the Attorney General’s factual assertions *prima facie* and, on that basis, determines whether such facts would support the necessity, reasonableness, and

³⁰³ See, e.g., Counter Memorial, ¶¶ 452-53, 456.

³⁰⁴ Exhibit C-003bis, Law No. 1708 of 20 January 2014, art. 111.

³⁰⁵ Exhibit C-003bis, Law No. 1708 of 20 January 2014, art. 111.

³⁰⁶ See Exhibit C-003bis, Law No. 1708 of 20 January 2014, art. 111.

³⁰⁷ See Exhibit C-044bis, Decision by Asset Forfeiture Court on Control of Legality Petition, 20 October 2016, p. 24.

³⁰⁸ See Exhibit C-044bis, Decision by Asset Forfeiture Court on Control of Legality Petition, 20 October 2016, p.p. 2-3.

proportionality of the challenged measures.³⁰⁹ As the court itself acknowledges in its ruling the control of legality proceeding “*is not the venue to discuss whether FIDUCIARIA CORFICOLOMBIANA S.A. actually is a third party in good faith without fault.*”³¹⁰ For these reasons, it is misleading for Colombia to suggest that the courts have independently upheld Colombia’s position.

87. In its Counter Memorial, Colombia offers a long rendition of the Second Criminal Court’s *Avocamiento* order.³¹¹ That order—which, incredibly, has been pending appeal since 11 September 2017³¹²—is unavailing to the propositions for which Colombia offers it.
88. First, the court’s denial of standing to Newport was manifestly erroneous. As explained in detail by Drs. Medellín and Martínez in their expert reports, Newport was entitled to standing (*i.e.*, ‘*afectado*’) status in the proceedings because, among other things: (*i*) the definition of affected party under the Asset Forfeiture Law is intentionally broad and must be read holistically;³¹³ (*ii*) Newport had a contractual rights under the trust agreements that gave it an irrevocable *right to title* to Phases 1 and 6 of the Meritage Project;³¹⁴ and (*iii*) it has the exact same rights to Phases 1 and 6 that La Palma Argentina has to the remaining phases, and La Palma Argentina’s standing was recognized.³¹⁵

³⁰⁹ See **Exhibit C-044bis**, Decision by Asset Forfeiture Court on Control of Legality Petition, 20 October 2016, p. 24.

³¹⁰ **Exhibit C-044bis**, Decision by Asset Forfeiture Court on Control of Legality Petition, 20 October 2016, p. 24.

³¹¹ Counter Memorial, ¶¶ 213-41.

³¹² Counter Memorial, ¶ 241 (“*The decision on appeal is still pending.*”).

³¹³ See Medellín 2 Report, ¶¶ 32-55.

³¹⁴ Medellín 2 Report, ¶ 49. See also *id.* ¶¶ 42-56.

³¹⁵ Martínez 2 Report, ¶ 57.

89. Second, the *Avocamiento* court did *not* consider the issue of whether there was evidence to credit Newport and/or Corficolombiana as good faith third parties. In fact, because the court found—in plain error—that Newport lacked *in rem* rights and only had personal rights, it held that the inquiry of “*good faith that is free from fault*” did not “*matter in the prosecution of a forfeiture action.*”³¹⁶ And even beyond Newport’s good faith status, the court did not even assess Corficolombiana’s diligence and good faith, despite the fact that it recognized Corficolombiana as an affected party.
90. Third, even assuming *arguendo* that the court resolved the standing issue correctly by recognizing Corficolombiana (and La Palma) as affected parties but not Newport, the ultimate assessment of due diligence and good faith third party status should have been the same. After all, most of Newport’s due diligence with respect to the Meritage Property was performed through and by Corficolombiana, which would have been in a position to advance at least some of the arguments that Newport would have advanced. Particularly given the Constitutional Court’s recent pronouncements on the limited scope of due diligence required to secure good faith purchaser status,³¹⁷ there can be no meaningful dispute that Newport and Corficolombiana far exceeded the diligence requirements.

91. In sum, while Colombia largely accepts the facts as set out in Claimants’ Memorial, the few points of disagreement are made clear by the record.

³¹⁶ **Exhibit C-057bis**, Asset Forfeiture Court *Avocamiento* Order, 17 August 2017, p. SP-0120.

³¹⁷ See *infra* ¶ 151 *et seq.*

92. Additionally, as discussed in the sections that follow,³¹⁸ there have been two developments in this case since Claimants filed their Memorial that provide further confirmation of Claimants' case and undermine Colombia's assertions. First, high level officials in the Attorney General's Office, including Colombia's witness in this case, Daniel Hernández, have admitted the corrupt nature of the prosecutors pursuing the Asset Forfeiture Proceedings against the Meritage Project, and confirmed the good faith status of Newport. Second, the Constitutional Court of Colombia, the State's highest judicial authority, has confirmed that the Asset Forfeiture Law requires only a review of the chain of title of the land prior to its purchase, not any review of the historical or personal details of the prior owners of the property. Taken together, these two developments confirm that Colombia's position in this Arbitration is wrong on the facts, and wrong on the law of asset forfeiture.

G. Senior Officials In The Attorney General's Office Acknowledge Corruption And Confirm Newport Was A Good Faith Third Party, A Total Shield Under Asset Forfeiture Law

93. Colombia's assertions regarding Claimants' due diligence and Mr. Seda's role in the extortion process have been flatly denied by its very own prosecutors in the Attorney General's Office, including Colombia's witness, Mr. Hernández. Below Claimants set out in detail statements made by high level Colombian prosecutors to Mr. Seda: (i) acknowledging corruption in the Asset Forfeiture Unit of the Attorney General's Office, including very likely in the specific case of the Meritage Project; and (ii) affirming that Mr.

³¹⁸ See *infra* Sections III.G, III.H.

Seda's diligence was beyond reproach and undoubtedly qualified him as a good faith third party.

94. Based on the evidence in these tapes, on 20 October 2020, Mr. Seda filed another criminal complaint (a “*denuncia penal*”) before the Attorney General’s Delegate for Crimes Against Public Administration (the “*Fiscal Seccional Delegado – Unidad de delitos contra la administración pública*”) against prosecutors Ardila and Malagón.³¹⁹ Incorporated within this complaint were transcript extracts of new recordings in which senior officials within the Attorney General’s Office plainly acknowledge two critical facts: (i) that there is known corruption within the Attorney General’s Office’s Asset Forfeiture Unit—even detailing the mechanisms for how such corruption works—and that such corruption tainted the Meritage case; and (ii) that Newport was clearly a good faith buyer in the Meritage Project that should not be subject to asset forfeiture—a fact that the prosecutors in the recordings describe as undeniable.
95. Aside from their substance, which we will address in detail below, the context of the recordings is remarkable.
96. First, the speakers in the recording are not low-level, uninformed government officials. They include: (i) current Prosecutor and Delegate to the Courts of the Bogotá Judicial District and Colombia’s witness in this Arbitration, Daniel Hernández; (ii) the former Prosecutor and Delegate to the Supreme Court for Criminal Finance, and former National Director of the Asset Forfeiture Unit, Ana Catalina Noguera; (iii) former Prosecutor and Delegate to the Superior Court for Anti-Corruption, Daniel Cardona; and (iv) Expert

³¹⁹ **Exhibit C-332**, Criminal Complaint against Alejandra Ardila Polo and Andrea Malagón Medina, 20 October 2020. *See also* Seda 2 WS, ¶ 36.

Investigator assigned to the Specialized Directorate for the Extinction of the Right of Ownership, Paula Espinosa.

97. Second, the recordings are of conversations occurring on 24 January, 4 June, and 25 June, all in 2020—during the pendency of this Arbitration.³²⁰ That is, when these senior-level prosecutors—including Colombia’s witness, Hernández—spoke, they knew the backdrop against which they were doing so: with Claimants’ case front of mind, and with Colombia likely in the throes of drafting its Counter Memorial. Indeed, it is highly likely that, at least by the later recordings in June 2020, Mr. Hernández himself knew he may be a witness in this Arbitration. Therefore, these recordings constitute compelling admissions by Colombia’s own officials and witnesses. The context of these statements lends even more credibility and reliability to their substance because the speakers had every motive and indication to be guarded about their words, and they were not. What we are left with are admissions by senior Colombian officials who were speaking freely, unbound by the State’s scripted talking points for this Arbitration, who meant what they said.

1. The Recordings

98. On 12 December 2019, Seda met with the Director of the Asset Forfeiture Unit, Ana Catalina Noguera, and her colleague, Paula Espinosa, in Medellín.³²¹ Ms. Noguera had sought out Mr. Seda through a mutual acquaintance, a local lawyer in Medellín, and

³²⁰ See Seda 2 WS, ¶¶ 30-33.

³²¹ Seda 2 WS, ¶ 79.

requested the meeting to discuss corruption within the Asset Forfeiture Unit.³²² This first meeting was not taped.³²³

99. The first recording was of a follow-up meeting that took place on 24 January 2020 between Mr. Seda, Ms. Noguera, Ms. Espinosa, prosecutor William Florez, prosecutor Daniel Cardona, and an informant who helped facilitate the meeting (“**Informant No. 1**”).³²⁴ The prosecutors had invited Mr. Seda in for an interview regarding his complaints of corruption against Ms. Malagón and Ms. Ardila.³²⁵ One of Claimants’ counsel in this Arbitration attended part of this meeting because Mr. Seda did not want to be interviewed by the Attorney General’s Office without counsel present.³²⁶ Mr. Seda was concerned that the meetings were a pretext for the officials of the Attorney General’s Office to obtain information from him in connection with a criminal investigation he had learned the Attorney General’s Office was conducting against him.³²⁷

100. The second set of tapes records a meeting on 4 June 2020,³²⁸ between Mr. Seda and Prosecutor Daniel Hernández, Mr. Florez, Noguera, Ms. Espinosa, and Informant No. 1.³²⁹

³²² Seda 2 WS, ¶ 28. See also **Exhibit C-328**, Memorandum to Ana Catalina Noguera from Paula Espinosa, *Executive Report – Timeline (Sources)*, 3 August 2020, p. 3 (recording the meeting took place).

³²³ Seda 2 WS, ¶ 29.

³²⁴ Seda 2 WS, ¶ 30; **Exhibit C-322**, Transcript of Audio File, 24 January 2020. See also **Exhibit C-328**, Memorandum to Ana Catalina Noguera from Paula Espinosa, *Executive Report – Timeline (Sources)*, 3 August 2020, p. 3 (recording the meeting took place).

³²⁵ Seda 2 WS, ¶ 30.

³²⁶ Seda 2 WS, ¶ 30.

³²⁷ Seda 2 WS, ¶ 30.

³²⁸ **Exhibit C-323**, Transcript of Audio File (Part 1), 4 June 2020; **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020; **Exhibit C-325**, Transcript of Audio File (Part 5), 4 June 2020.

³²⁹ Seda 2 WS, ¶ 31. See also **Exhibit C-328**, Memorandum to Ana Catalina Noguera from Paula Espinosa, *Executive Report – Timeline (Sources)*, 3 August 2020, p. 3 (recording the meeting took place).

The topic was, once again, corruption within the Attorney General’s Office, particularly by Ms. Malagón and Ms. Ardila.³³⁰

101. The context of the third and final recording is similar. On 25 June 2020, Mr. Seda again met with Mr. Hernández, Ms. Noguera, Ms. Espinosa, and Informant No. 1. Like the 4 June 2020 meeting, this meeting also took place at the headquarters of the Attorney General’s Office, and was meant to be a follow-up on the ongoing corruption probes.³³¹
102. At the time of these meetings, Mr. Seda had learned from a third party that the Attorney General’s Office had launched a criminal probe against him for purported money laundering, even going so far as to claim he was part of the Office of Envigado drug cartel.³³² At the same time, his experience with Colombian authorities thus far had shown that they could be corrupt—he had been solicited for bribes multiple times by persons claiming to represent the Attorney General’s Office in connection with Mr. López Vanegas’ extortion plot against the Meritage.³³³ Mr. Seda was concerned Colombian authorities were attempting to entrap him or surreptitiously obtain evidence to use against him. Accordingly, Mr. Seda felt it necessary to record these discussions to preserve evidence that may be used to frame or harass him,³³⁴ or even to be proof of new extortions, since he had previously been extorted on several occasions by people claiming to be part

³³⁰ Seda 2 WS, ¶ 31.

³³¹ Seda 2 WS, ¶ 33; **Exhibit C-374**, Audio Transcript, 25 June 2010. *See also* **Exhibit C-328**, Memorandum to Ana Catalina Noguera from Paula Espinosa, *Executive Report – Timeline (Sources)*, 3 August 2020, p. 3 (recording the meeting took place); Seda 2 WS, ¶ 26.

³³² **Exhibit C-369**, Specialized Directorate Against Money Laundering of the Attorney General’s Office, Registration No. 6020 (SIJUF 6020), 19 December 2018.

³³³ *See* Memorial, ¶¶ 127, 131, 206.

³³⁴ Seda 2 WS, ¶ 29.

of the Attorney General's Office. Colombian law permits recording of conversations without the explicit consent of the other party when the recordings are made for purposes of turning them over to authorities to clarify issues that are the subject of investigation.³³⁵

103. The import of these recordings cannot be overstated. Before the Tribunal there is now direct evidence—in the words of Colombia's own senior prosecutors, including a witness in this very Arbitration—(i) acknowledging the serious corruption issues within the Attorney General's Office, (ii) describing in detail the extortion schemes regularly used within the Asset Forfeiture Unit in particular, and (iii) offering their candid assessment that

³³⁵ There is no rule governing the recording of a conversation in Colombia (as long as wire-tapping technologies are not used). Rather, under multiple precedents of the Criminal Cassation Chamber of the Supreme Court of Justice of Colombia, which are legally binding, a person, such as the victim of a crime or an accused person, has a right to record evidence for purposes of taking it to the authorities to clarify issues that are the subject of investigation, in particular, conversations to which he or she is a party. *See, e.g.*, **Exhibit C-388**, Criminal Cassation Chamber of the Supreme Court of Justice of Colombia, Decision No. 19.219 (18 May 2006), Opinion Writer Justice Edgar Lombana Trujillo, p. 17; **Exhibit C-389**, Criminal Cassation Chamber of the Supreme Court of Justice of Colombia, Decision No. 41.790 (11 September 2013), Opinion Writer Justice María del Rosario González Muñoz p. 22; **Exhibit C-390**, Criminal Cassation Chamber of the Supreme Court of Justice of Colombia, Decision No. 52.299 (13 June 2018), Opinion Writer Justice Luis Antonio Hernández Barbosa, p. 12; **Exhibit C-391**, Criminal Cassation Chamber of the Supreme Court of Justice of Colombia, Decision No. 55.798 (2 October 2019), Opinion Writer Justice Patricia Salazar Cuéllar, pp. 88-93; **Exhibit C-392**, Constitutional Court of Colombia, Decision SU611 of 2017 (4 October 2017), p. 28. In the circumstances here, the Attorney General's Office was investigating Mr. Seda for money laundering. **Exhibit C-369**, Specialized Directorate Against Money Laundering of the Attorney General's Office, Registration No. 6020 (SIJUF 6020), 19 December 2018.

Mr. Seda is not a government employee, but an individual the Attorney General's Office was simultaneously purporting to investigate and to interview in connection with other investigations. Clearly, neither Mr. Seda nor the officials of the Attorney General's Office at the meetings had a reasonable expectation of privacy with respect to conversations. Mr. Seda was entitled to record these conversations and use them not only for his own defense but to prove criminal activity of which he was a victim, which he did in the criminal complaint he filed on 20 October 2020, when he reported Ms. Malagón and Ms. Ardila for the crime of "*prevaricato*" or official malfeasance. **Exhibit C-332**, Criminal Complaint against Alejandra Ardila Polo and Andrea Malagón Medina, 20 October 2020.

Consequently, the audio recordings were obtained in the context of: (i) the actions of Mr. Angel Seda as a victim of possible extortion and his past experience with corrupt members of the Attorney General's Office or their delegates, (ii) the right to defense that Mr. Seda has as a person under investigation by the Attorney General's Office in a criminal investigation, and (iii) the principle of transparency, associated with public officials exercising their official functions. Colombia likewise has indicated that it does not view these recordings as unlawful since it has not made any such allegations in response to the criminal complaint he filed on 20 October 2020. *See* **Exhibit C-332**, Criminal Complaint against Alejandra Ardila Polo and Andrea Malagón Medina, 20 October 2020.

the Meritage Asset Forfeiture Action was improper because, in their words, it is undeniable that Newport was a good faith third party and that there was nothing more it could have done to diligence the property. Their statements are clear, come from first-hand knowledge, and belie Colombia's entire case.

2. Senior Prosecutors Openly Acknowledge Corruption In The Attorney General's Office, Including With Respect To The Meritage Project

104. Throughout their Memorial, Claimants repeatedly explained that corruption has played a significant role in the Asset Forfeiture Proceedings against the Meritage Property.³³⁶ In reviewing the facts, corruption is practically the only explanation for the arbitrary, non-transparent, and unfair conduct suffered by Claimants. Of course, Colombia has denied the allegations—feigning indignation at the “*unsupported [. . .] claims of an orchestrated attempt by the different authorities to deprive [the Claimants] of the Meritage lot in violation of due process*”³³⁷ and asserting that Claimants' allegations “*ring hollow.*”³³⁸ The recordings now before the Tribunal demonstrate conclusively that Colombia's own senior prosecutors—and its key witness in this Arbitration—do not agree with its position.
105. In one of the recordings, the former head of the Asset Forfeiture Unit, Ana Catalina Noguera, says point-blank: “*we know that Andrea [Malagón] committed acts of corruption not just in this, but in other situations.*”³³⁹ Noguera expands on why both Ms. Malagón and

³³⁶ See, e.g., Memorial, ¶¶ 389-93,

³³⁷ Counter Memorial, ¶ 10.

³³⁸ Counter Memorial, ¶ 10.

³³⁹ **Exhibit C-322**, Transcript of Audio File, 24 January 2020, p. 9.

Ms. Ardila are key targets of the Attorney General’s Office, and how they were involved in corrupt schemes—including in the Meritage case in particular:

*Noguera: “Truthfully, Andrea Malagón is a target of the Attorney General’s Office not just because of this case [Meritage] but because of other situations that have arisen within asset forfeiture proceedings, and also Alejandra Ardila who has many instances.”*³⁴⁰

[shortly thereafter]

*Noguera: “The whole matter of Andrea Malagón and Alejandra Ardila, why it was truly important for the Attorney General’s Office to get to the bottom of the situation with Andrea and Alejandra, is because we know that Andrea committed acts of corruption not just in this, but in other situations, and we need to be able to document it to be able to finally, let’s say, get to the bottom of this subject, because she was a person that enjoyed a lot of trust, so therefore this was more of an institutional issue, let’s say it that way[.] And aside from that, as I told you, because of the international arbitration, we want to know what’s there in the bottom in reality, what is it that happened with Meritage. Because independently of the lot having, let’s say a legal vice that we have demonstrated, it is also true that you bought in good faith, and you have told us. One has to be very clear with things, and if [the action] is really appropriate, in any event these persons—you—should be recognized [as a good faith third party], and well, the issue of the international arbitration see what your proposal is, we share it with the Attorney General and we can see what to do, let’s say, what’s best for all of us.”*³⁴¹

106. In another recording, Mr. Hernández is discussing the Meritage Asset Forfeiture Proceedings with Mr. Seda and the other participants. As part of this discussion, Mr. Hernández expresses his concern that even if Newport is ultimately recognized as a good faith third party buyer—which is an outcome that subsequent recordings outlined below suggest that Mr. Hernández fully supports—corruption will nonetheless continue to reign “with impunity” within the Attorney General’s Office. Mr. Hernández states:

³⁴⁰ **Exhibit C-322**, Transcript of Audio File, 24 January 2020, p. 9 (emphasis added).

³⁴¹ **Exhibit C-322**, Transcript of Audio File, 24 January 2020, p. 19 (emphasis added).

“No, the most likely outcome is that maybe . . . maybe. . . maybe you, through lawsuits [tutelas] or whatever will be recognized as a good faith third party, and well. . . But the situation of corruption within the Fiscalía will continue with impunity. For what?”³⁴²

107. Seconds after this comment, then-Prosecutor Noguera jumps in regarding the open and notorious acts of corruption going on in the Asset Forfeiture Unit, and how by merely reporting it, her life could be at risk. She states:

“Then, when I started to hear everything. . . that Alejandra Ardila [Polo], that other prosecutors who were there, that Andrea Malagón, that this is how things were done. . . at that point I had to say. . . because, again, with other situations in Barranquilla, I came and I said ‘look, I am turning over the information, but you can’t say it’s from me,’ because in Barranquilla, I can be murdered for this situation. Then, that’s why I think it struck a chord with him, and then I came and asked for a transfer of unit. I did not want to keep working on asset forfeiture. That’s when I sat down with Dr. Jiménez and I told Dr. Jiménez what I had heard.”³⁴³

108. And it is precisely because of these risks that, ultimately, the prosecutors recognize that they have witnesses who have come forward and acknowledged paying bribes to the Asset Forfeiture Unit, but they fear admitting it publicly given the corruption within the Attorney General’s Office. Ms. Espinosa specifically says: *“We have people who told us: ‘I gave it to her, but I will not admit that I gave it to her’.”*³⁴⁴

109. These discussions were not one-off comments. Mr. Hernández and Ms. Noguera repeatedly acknowledge the well-known corruption within the Attorney General’s Office and the Asset Forfeiture Unit in particular. In one such exchange, they say:

³⁴² **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 10 (emphasis added).

³⁴³ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 10 (emphasis added).

³⁴⁴ **Exhibit C-323**, Transcript of Audio File (Part 1), 4 June 2020, p. 33.

Hernández: “*Rather, we need your [Mr. Seda] commitment if you can collaborate with us on the corruption issue.*”

Noguera: “*With the lawsuit.*”

Hernández: “*Making it a matter for the court.*”

Noguera: “*Oh, of corruption and the lawsuit.*”

Hernández: “*So that you can also take that veil off[.] This is not a political matter, this is not . . . this is a matter of corruption in our agency.*”

Seda: “*Yes.*”

Hernández: “*That we need to solve.*”³⁴⁵

110. To be sure, Mr. Hernández, Ms. Noguera, and Ms. Espinosa were not speaking hypothetically about generalized corruption. In fact, their comments demonstrate that they have a crystal-clear understanding of the mechanisms through which the corruption is taking place. In the following remarkable exchange, the prosecutors acknowledge that the *modus operandi* is for persons working on behalf of the Asset Forfeiture Unit prosecutors to attempt to extort “*settlements*” through “*negotiations*” with property owners whom they threaten with asset forfeiture. And, then, if such property owners do not pay—as was the case with Mr. Seda—then they place the property into an asset forfeiture action to increase pressure and leverage. And, at that juncture again, they try once more to extort a payment. This is how the prosecutors clearly explain the scheme:

Hernández: “*Of course, God willing [. . .] we come across the person that we’ve always wanted, what I have told you, the person who can look at us and say, I paid 100 pesos to Pedro Pérez to lift my asset forfeiture proceedings.*”

Seda: “*Well that’s dangerous.*”

Hernández: “*It’s starting to string together various things, but what you have to bear in mind, Angel, is that an investigation is not so simple from*

³⁴⁵ **Exhibit C-325**, Transcript of Audio File (Part 5), 4 June 2020, p. 42 (emphasis added).

the following perspective: we are investigating possible acts of corruption. What's the issue? Apparently, they undertook an asset forfeiture action against you in an irregular manner—let's call it that—but these days we might say, as the Attorney General's Office, that you're a buyer in good faith. A good faith third party, right? But that asset had some complications from a chain of title perspective. . . from a chain of title perspective, then you'll observe that I can't even attack the prosecutors who took those decisions for abuse of power, I couldn't. . . Right? But what permits my investigation? A possible matter of bribery – that they've requested money, for example some chats that you and I discussed a few years ago, remember? I used to tell you – they're managing the extortion disguised as a negotiation.”

Seda: “Yes.”

Hernández: “Right? Between Mosquera.”

Seda: “Yes, I provided the emails.”

Hernández: “Exactly, between Mosquera and the drug trafficker.”

Seda: “Yes.”

Hernández: “And what's the mechanism for the pressure – because you did not yield to the negotiation, then we go to the Attorney General's Office.”

Seda: “Yes.”

Hernández: “Right? Because if they knew that the asset had, in plain terms, *sin [vice]*, then: *ahhh*. You didn't want to negotiate this? Then, wait, and you will see this go into asset forfeiture[.] They sent you messages, indirect messages, to see if you would be open to some kind of arrangement.”³⁴⁶

111. The scheme was simple. Corrupt prosecutors merely sought a kickback to either “avoid” putting a property into asset forfeiture proceedings or to sabotage the case once it was filed to get it dismissed. Mr. Hernández described it bluntly:

“Look, the smallest case that we have detected. . . that they handle. . . well, lately they've started getting involved in bigger cases, but what we have detected is that it was easier in smaller cases. What I tell you . . . Let's go do an asset forfeiture of 500 million pesos in Medellín . . . Well, I'll kick you

³⁴⁶ **Exhibit C-374**, Audio Transcript, 25 June 2010, pp. 3-4 (emphasis added).

*back, say, 10 [percent]. . . 50 [million pesos]. You see? But that way, [you do] ten deals and you've got 500 [million pesos]."*³⁴⁷

112. In the recordings, Mr. Hernández makes abundantly clear that the scheme described above was not limited to Meritage or Mr. Seda, but that it is a widespread problem within the Asset Forfeiture Unit. Hernández explained:

Hernández: *"Understand this. . . look. . . and I will say it from the bottom of my heart, my friend, you're not the first one. In my matter, I have 12 people who have told me that they know that Andrea Malagón. . . Look, the most important case that we have. . ."*

Seda: *"Well, I have refused to pay all along. You understand? [From] that point of view I will not pay."*

Hernández: *"No, no, no."*

Seda: *"They did request it."*

Hernández: *"Well, the mere fact of asking for it is a crime[.] If you say that, that's bribery. . ."*³⁴⁸

113. Similarly, Mr. Hernández clearly acknowledges that the Attorney General's Office "*ha[d] determined*" that in three cases "*the same as yours,*" it "*looks like it's the same modus operandi*" of extortion by Ms. Ardila. Mr. Hernández declares:

"Maybe you used to say: 'Hey! I reported [inaudible] extortion and no one was paying attention to me.' We kept working, and what happened was that your [Seda] extortion process is over there. Do you follow? But we want to get there because, logically, if we can get there, just remember all the . . . what I remember, just so you see that I have a recollection, Alejandra Ardila arrives, almost in an arbitrary manner, and she calls you out, and then come the propositions for negotiations, the offering from the attorney. Agreed? That you could collaborate with a better attorney, and that, that you can, you can help her in a broader way, and you can start to overcome this. For instance: in these three cases, we have it determined, the same as yours, and in the other world of cases that we have: Gran Estación, the apparent

³⁴⁷ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 12 (emphasis added).

³⁴⁸ **Exhibit C-374**, Audio Transcript, 25 June 2010, p. 4 (emphasis added).

drug case with Supercundi . . . It looks like it's the same modus operandi, then you realize that in the end. . . in the end, [it's] extortion."³⁴⁹

114. In addition, Mr. Hernández provides the specific example of former Senator Otto Bula, who has publicly claimed that persons came to his prison cell to offer him an illicit deal through which they would get an asset forfeiture action against his properties dropped through Malagón and Ardila in exchange for a kickback:

*"This is different. I have 10 versions that tell me . . . messages, look I've got people pinned down there, some sisters, who would say directly to [former Senator] Otto Nicolás Bula Bula in the National Picota prison, sir, we have a message . . . Mr. Daniel Quintana Torres could be your lawyer, he charges 6000 million pesos. What does he guarantee? The complete return of your properties that are in asset forfeiture[.] That it's not precluded[.] That Julian Nicolas Quintana Torres is Andrea Malagón and Alejandra Ardila's boss, that he's the one who put them in those roles, and that in addition, it was who left her as director[.] So that's the 'plus' that I can offer, look I had him intercepted, this guy who went[.] . . . The Attorney General during that time tried to help me to get it, because the final sum ended up being 2000 million pesos. . . He tried to help and said what you said – we'll capture them red-handed, that is, but these guys are all free because of statute of limitations."*³⁵⁰

115. Shortly thereafter, Mr. Hernández confirmed in the recordings that they were able to arrest the co-conspirator who made the offer to former Senator Bula. Mr. Hernández explained:

"His process is still ongoing but I think they will convict him. I think they will convict but at the same time the mystery remains of what was happening in asset forfeiture[.] Also, to Otto Bula, it's not the first time that he was sent messages, the issue is that the first Director to Otto Bula, possibly lacked the courage ["le faltaron tal vez los pantalones"] because now, that is really the first time that Otto said that Colonel Quintana sat directly in front of him . . . at the El Refugio [prison] and asked directly for 2500 million pesos[.] That time, Otto called me as a prosecutor working on matters of cooperating witnesses. . . and says to me, this just happened[.] And I said to him . . . it doesn't matter how much I want to do things [about it], I also

³⁴⁹ **Exhibit C-324**, Transcript of Audio File (Part 1), 4 June 2020, p. 29 (emphasis added).

³⁵⁰ **Exhibit C-374**, Audio Transcript, 25 June 2010, p. 5 (emphasis added).

*have a few enemies. If I take single misstep, everything comes down, be assured of that[.] I will end up in prison . . .”*³⁵¹

116. And it was not just Mr. Hernández making these statements. Ms. Espinosa and Mr. Florez—both employees of the Attorney General’s Office—also recognized the widespread corruption complaints relating to the Unit, including to Ms. Ardila and Ms. Malagón in particular. They showed Mr. Seda a chart of the various cases they were investigating and the connections between the different players. They explained:

Espinosa: *“There are other cases that have not been made public so we cannot show them [to you].”*

[shortly thereafter]

Espinosa: *“No, I mean, the other thing is that there is a lot of information in other cases that have not yet, that will come out soon. So, I am showing that to you. Our case we can’t show you yet because there are many names of other companies that had things happen, and we are strengthening that.”*

Seda: *“The thing is that I believe she thought . . . I believe she [Ardila] only knocked on doors where she thought that there was a sin [a fault]. The problem is sometimes there is no sin [fault], sometimes you’re just totally wrong.”*

Espinosa: *“What we think is that also . . . That is, that with the judicial power they had and everything, they . . . what we were able to evidence was that they started looking for cases – but smaller. And that’s what we are documenting. For example: a person that has three farms in Villavicencio, each a thousand million [pesos]. That is, three thousand. . . three thousand million persons. A million dollars. That is, the entire estate is one million dollars. The entire estate.”*

Seda: *“Yes, yes, yes.”*

Espinosa: *“I will organize it for you and you give me five hundred million. ‘Keep three thousand million.’”*

Seda: *“Yes.”*

³⁵¹ **Exhibit C-374**, Audio Transcript, 25 June 2010, p. 6 (emphasis added).

Espinosa: “*Right. It started to work out for them, and then they started trying to get to structures that were bigger.*”

Florez: “*And they got to these.*”

Espinosa: “*Yes. And they got to this [matter], and these cases. Because, for example, this case is . . .*” [interrupted]

Florez: “*and very large cases!*”³⁵²

117. In the end, the recordings make clear that corruption within the Attorney General’s Office—and the Asset Forfeiture Unit in particular—was such an open and notorious fact that in the recordings, Mr. Hernández openly joked that whoever advised Mr. Seda to pay off the Attorney General’s Office was doing him a favor:

Seda: “. . . *the attitude here in Colombia, when this happened is that everyone would say: ‘Angel’ . . .*”

Hernández: “*Pay.*” [Laughter]

Seda: “*I would say: ‘No, no, no’*” [Laughter]

Hernández: “*Yes . . . but pay!*” [Laughter]

Seda: “*Oh, oh . . . yes.*”

Hernández: “*They’re helping you.*”³⁵³ [Laughter]

118. Mr. Hernández’s “joke” is of course not funny at all; rather, it is a sad and searing indictment of the corrupt nature of the Asset Forfeiture Unit.

³⁵² **Exhibit C-323**, Transcript of Audio File (Part 1), 4 June 2020, p. 32 (emphasis added).

³⁵³ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 12 (emphasis added).

3. Senior Prosecutors Admit Newport Is A Good Faith Third Party And The Asset Forfeiture Process Is Unfounded

119. For as blunt as the prosecutors' assessment in the recordings is regarding the corruption within the Asset Forfeiture Unit—which they describe with clear *modus operandi* and specific case examples—the recordings make even clearer that all three officials: Ms. Noguera, Ms. Espinosa, and Mr. Hernández believe that Newport and Corficolombiana did everything they could to conduct robust diligence on the Meritage Property, that their failure to identify the Property's allegedly tainted past was through no fault of their own, and that they relied openly and reasonably on the Attorney General's Certification of No Criminal Activity.³⁵⁴ Taken together, all three prosecutors make it clear that Newport is a good faith third party and that there can be no proper asset forfeiture action against the Meritage Property.

120. First, Ms. Noguera and Mr. Hernández both recognize that Corficolombiana acted in reliance upon the Attorney General's Certification of No Criminal Activity, and Mr. Hernández even acknowledges this may lead to liability against the State:

Noguera: “*Corficolombiana comes in, which is what they've always wanted, because independently of other errors that they have committed in the past, in this case they do have a legitimate reliance, on the history [of title provided by the Attorney General's Office] that we can say the lot did not have [any issues].”*

Hernández: “*That too, pardon the interruption, that too will generate responses. Right? Because they will see a very different position from that of the Attorney General and what I am saying is that there are a lot of people here who need to be afraid, and not because of the fear. . . but because of the fear that you will come out with a favorable ruling, right? With a favorable ruling, not of return of the asset, but something that allows you to*

³⁵⁴ Exhibit C-032bis, Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Fiduciaria Corficolombiana, 9 September 2013.

*be able to sue. And logically sue the State, and at that time, the State will be the Attorney General of the Nation.”*³⁵⁵

121. Ms. Noguera, Ms. Espinosa, and Mr. Hernández are so concerned about the mishandling of the Meritage case, that they jointly discuss a plan to: (i) apprise Judge Maria Idalí Molina Guerrero, who is hearing Newport’s appeal, of the situation; (ii) take the matter directly to the Attorney General and Deputy Attorney General; and (iii) request that the Judge transfer the matter out of Medellín out of concern for the Asset Forfeiture Judge’s safety. They explain:

Noguera: “. . . *I will do it all from here from Bogotá.*”

Seda: “*Oh, okay.*”

Noguera: “*We form a technical and legal committee so we can, let’s say, meet the various phases within the Attorney General’s Office[.] And I will speak with the Attorney General, and the Deputy Attorney General, and I will present the situation. And what I think needs to be done about this.*”

Hernández: “*Hey, and how are we going to. . . it’s a matter of, it’s a matter also of, it’s of Directors, Doctor [Noguera], you have to start to respond within the chain.*”

Noguera: “*Exactly, exactly. Yes and then, on that basis, I go to the magistrate [in my capacity] as Delegate, and I put the situation to her, and I say: ‘Look, this is happening, etc.,’ and I leave it to her criteria. I can’t say: You have . . . and just leave it to her criteria. We tell her the situation. We organize a meeting with her, the prosecutor, and we tell her the situation. And against this backdrop, have [the Judge] Dr. María Idalí understand this. We hope that she will admit you, that is, say: ‘Yes, we have to recognize them.’ In the same request that I will bring to her, I will also request the possibility of a transfer of judge. With two situations, I will say it this way, ‘Look. This is a proceeding in Medellín, right? Where, unfortunately, because of with everything that has happened. . . eh. . . no. . . without saying I see the judge as corrupt, but that. . . look, even to protect him, just to avoid that nothing would happen to him, etc., that it’s better that this is handled in Bogotá, particularly given. . .*”

³⁵⁵ **Exhibit C-325**, Transcript of Audio File (Part 5), 4 June 2020, p. 40 (emphasis added).

Espinosa: “Yes, that’s best, to watch out for the interest by the Oficina de Envigado.”

Noguera: “. . . the context of this proceeding in particular, with respect to asset forfeiture generally. That’s why we request the change of asset forfeiture judge. If we’re successful, this will be managed in Bogotá.”³⁵⁶

122. At another point, Ms. Noguera comes back to the issue of reaching out to the Judge and explaining, in Ms. Noguera’s words, that the Attorney General’s Office “screw[ed] up” and that “when you screw up, you have to try to make it right.” Ms. Noguera explains:

“And basically, well, to do things formally in the derecho de peticion, you say that you are well [. . .], in this process, that you are a good faith third party, that you attach documentation that supports what you did before acquiring the lot, the entire due diligence process, and I, with that information, will approach the magistrate. And I will say: look, we have this situation, and as the Attorney General’s Office, say – look we have this situation, and here we prove that effectively there is a situation that, that possibly they are good faith third parties and it would be prudent because well, when you screw up, you have to try to make it right. And let’s see if we can get her to admit you and in the ruling that she issues, admit you as third parties. That’s what we can do. It will then depend on her will, but she seems to me to be a proper person.”³⁵⁷

123. Shortly thereafter, Mr. Hernández follows up on Ms. Noguera’s plan, agreeing that it is crucial to go to the Court and “accept[] the error.” Mr. Hernández is blunt in his assessment and even suggests that the Attorney General’s Office should either support Newport’s petition to dismiss the asset forfeiture, or file a petition as the Attorney General’s Office directly to that effect:

“We have to recognize the error. . . recognize the Attorney General’s Office’s error. Agree? With respect to not. . . to . . . to support the petition for recognition as a good faith third party. Maybe supporting the petition

³⁵⁶ **Exhibit C-325**, Transcript of Audio File (Part 5), 4 June 2020, pp. 40-41.

³⁵⁷ **Exhibit C-325**, Transcript of Audio File (Part 5), 4 June 2020, p. 30 (emphasis added).

[to dismiss the asset forfeiture], or [maybe] filing a petition directly will help.”³⁵⁸

124. Indeed, Mr. Hernández thinks getting the Judge to try to right the wrong is crucial:

“Because . . . it’s not just the Attorney General’s Office that got it wrong [. . .] The Judiciary also got it wrong.”³⁵⁹ This is of course a stunning admission by senior officials

in Colombia’s Attorney General’s Office. Their exchange is as follows:

Hernández: *“I do not have experience in asset forfeiture, but legal logic tells me that the best way to do it is as the Doctor [Noguera] has explained.”*

Espinosa: *“Yes, I agree too.”*

Noguera: [inaudible]

Seda: *“In the normal course [inaudible].”*

Hernández: *“We have to recognize the error. . . recognize the Attorney General’s Office’s error. Agree? With respect to not. . . to . . . to support the petition for recognition as a good faith third party. Maybe supporting the petition, or [maybe] filing a petition directly will help.”*

Informant No. 1: *“This is the point. Listen to this. Supporting the petition.”*

Hernández: *“Yes. I think that is, legally, it would be properly founded.”*

Seda: *“And what does this mean?”*

Hernández: *“That we support . . . that we support the petition for nullity.”*

Noguera: *“It’s to say: The Attorney General’s Office says [to the court] – ‘Look, this is what happened here, and they are in fact good faith third parties.’”*

Hernández: *“It’s what Doctor [Noguera] said. It’s accepting the error. Look, your Honor, maybe because of inexperience because well, for now, what I am saying is, we don’t have the corruption proven. [. . .] Or for lack of knowledge. . . the prosecutor on the case at the time considered that, we appeal to your Honor, you have analyzed the case [inaudible] for greater peace of mind, a technical legal committee.”*

³⁵⁸ Exhibit C-325, Transcript of Audio File (Part 5), 4 June 2020, p. 38 (emphasis added).

³⁵⁹ Exhibit C-325, Transcript of Audio File (Part 5), 4 June 2020, p. 38 (emphasis added).

Espinosa: “Yes.”

Hernández: “*put at your disposal the best experts on asset forfeiture.*”

[shortly thereafter]

Hernández: “*Because. . . it’s not just the Attorney General’s Office that got it wrong. [. . .] The judiciary also got it wrong.*”³⁶⁰

125. Ms. Espinosa and Ms. Noguera were equally blunt in their assessment of the effect of the Attorney General’s Certification of No Criminal Activity:

Noguera: “*The issue is that . . . you have a thing called a right . . . there is a concept in the law that is legitimate reliance. You acquired the lot because they told you, look, the lot doesn’t have anything. . .*”

Espinosa: “*It was the state itself, man. . .*”³⁶¹

126. Of course, this blunt assessment stands in stark contrast to Colombia’s position in this Arbitration, in which they have tried to downplay the significance of the Attorney General’s certifications. But what the officials say in this recording—when they were not scripted and were offering their candid assessment—is true: Newport and Corficolombiana acted in legitimate reliance of the Government’s own statements that the history of title did not contain any entities or individuals of concern.
127. But aside from this Certificate by the Attorney General, all three officials describe in plain terms that Newport and Corficolombiana conducted all reasonable due diligence, and that they are accordingly entitled to good faith third party status and the corresponding protection.

³⁶⁰ **Exhibit C-325**, Transcript of Audio File (Part 5), 4 June 2020, p. 38 (emphasis added).

³⁶¹ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 5.

128. Crucially, Ms. Noguera, who had been the head of the Asset Forfeiture Unit, admits that Newport could not have known about the deficiencies in the Meritage Property's title. In her words:

Noguera: *"Only the people who have worked . . . who worked in this area or that at have performed investigations at the Fiscalia level could have known that information, because for people to all of a sudden, well, I won't say Iván López, but I'll give you the example. Ivan López is a clean ['sano' or no criminal record] person; the other, he's a person, because apparently you could not see him, but if you're in the middle of it or you have information, then you say: look, he's no saint because there was this issue, and I don't know, etc., etc., etc., which is the information that we have. Right? But obviously not [Mr. Seda] does not have a reason to know that."*

Informant No. 1: *"Not even . . . with an aggravating factor . . . not even the people involved in the drug trafficking organization were in the chain of title of the property."*

Noguera: *"Nothing."*³⁶²

[shortly thereafter]

Noguera: *". . . they knew whose name to put it under to keep the chain of title clean."*

Informant No. 1: *"Of course. The mango seller, and then Tatiana Gil, and she's clean and from there the investment in La Palma, which is clean."*

Noguera: *"If you look at the chain of title, it's clean, but when you go in to investigate, you don't know that obviously they did not put it in this guy's name because obviously you would say: Oh! . . . I don't know how, they put it through the mango seller who was clean, then they put it under this model because she was allegedly clean, but we knew that we have all of these statements and that's what taints this lot."*³⁶³

129. In this part of the discussion Mr. Seda rightfully perks up and asks bluntly: *"How can one know that?"* That is, if as Ms. Noguera explains, the chain of title is kept intentionally clean by presumptive criminals, and if the Attorney General's Office has relevant

³⁶² **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 5 (emphasis added).

³⁶³ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 7 (emphasis added).

information but does not provide it, how could an innocent third party possibly know that? Ms. Noguera's response is direct: Newport and the diligence firms "*had no way of knowing this.*" The remarkable exchange was as follows:

Seda: "*How can one know that?*"

Noguera: "*I reiterate, no, no, I reiterate, I reiterate, a common person, and what these companies that you hired to do the due diligence, they had no way of knowing this. That's why I asked at the Fiscalía when this guy got this certificate, because if you are thoughtful, well, in asset forfeiture, I don't give out information, I say it's confidential.*"

Seda: "Yes."

Noguera: "*But we already knew through information that we had that the lot has been mishandled, even if on paper it was totally transparent [clean]. But to us, because we had the testimony, we knew it was an issue. But they did not have that information. . . We held on to that information.*"³⁶⁴

130. At a different point in the conversation, Ms. Noguera—the Head of the Asset Forfeiture Unit—again emphasized that Newport and Corficolombiana had done everything within their power to diligence the land:

Noguera: "*There are two things happening here, and they have to do with the asset forfeiture. . .*"

Seda: "*But, look . . .*"

Noguera: "*. . . there are two things [that are] happening, the lot, is a lot that was subject to asset forfeiture because it was always in the hands of the Oficina de Envigado. So, let's say, the lot is contaminated.*"

Informant No. 1: "*Mistake, not the Oficina de Envigado, but drug traffickers.*"

Espinosa: "*Yes, that.*"

Noguera: "*Yes... of drug traffickers. Thanks. But, what's the issue there? It's the issue of the certification, that you undertook all your due diligence with your companies and all of that. Right? And the same for doctor*

³⁶⁴ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 7 (emphasis added).

Sintura and Corficolombiana. Then, there, there is, there is. . . let's say, a good-faith third party, and we cannot say that there was not. What happens then? Well. . . effectively, the lot is tainted, but you guys performed, let's say. . ."

Seda: "Yes."

Espinosa: "*the due diligence*"

Noguera: "*in asset forfeiture it could go the legal route but . . . but the Fiscalia, at the appropriate time, and the judge, they will have to admit good faith third parties.*"³⁶⁵

131. Plainly contrary to Colombia's position in this Arbitration, the recordings demonstrate, in black-and-white, the former Head of Asset Forfeiture's acknowledgment that "*there is. . . let's say, a good faith third party, and we cannot say that there was not.*" Ms. Noguera continued, suggesting that if she were the prosecutor in charge of the matter, she would have handled it much differently:

Noguera: "*. . . let's say, if I had gotten the whole asset forfeiture proceeding. If I had been the fiscal that takes this case, I would have said [to the judge]: yes, there is an issue here, but I would have included the third parties.*"

Seda: "Yes, of course."

Noguera: "*She has not included you, that's what did not happen. Then, the obligation is the proceeding that will follow. But when do they have to recognize it. At this moment, it's in front of a magistrate, doctor María Idalí. She's judicious [thoughtful], and I hope doctor María Idalí recognizes you as [affected] third parties in the process as it regards the asset forfeiture. Why? Because with that third party recognition, then you intervene, and the judge must recognize that, and that's how it should be.*"³⁶⁶

132. At this point in the conversation, Colombia's witness in this Arbitration, Mr. Hernández, was even more candid in his assessment:

Hernández: "*. . . You have to get a judge. . . get a judge. . . because it's a judge who is serious like the first specialized one, the one I told you about .*

³⁶⁵ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 4 (emphasis added).

³⁶⁶ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 4.

. . . A judge like that would not admit such a weak claim. Or at the very least he would say: ‘Look, ok, the asset is screwed. . . the asset is screwed. But everyone, this man was a good faith third party.’ . . . An honest judge . . . an honest judge would say: No, no look, an honest judge would say to Angel: ‘Angel, my brother. . .’

Espinosa: “*The lot was off-limits.*”

Hernández: “[the lot] *was screwed, you lost. But you are a good faith third party. And I will admit you.*”³⁶⁷

133. Sadly, Mr. Hernández’s desire for a “*serious*” and “*honest*” judge to put an end to this incredible saga has not yet come to bear.

134. The extent and depth of Newport and Corficolombiana’s diligence was so significant that Ms. Noguera and Mr. Hernández wondered how they could possibly explain to the Tribunal in this Arbitration what has transpired here. Mr. Hernández is left to ask sarcastically whether the only additional diligence step they could have taken was approach a drug dealer and ask him to confirm whether he had owned the land. In fact, Ms. Noguera and Mr. Hernández specifically wonder how Mr. Seda could explain this absurdity to this Tribunal, and say:

Noguera: “Yes. But I will explain to the three arbitrators so that they understand that, even though this is called an indirect expropriation, or however you call it, what is this concept called in Colombia? Because even though I have to comply with international treaties, I also have the situation that happens here, and the reason for which the lot is there. Then, what I am saying is, you will not be able to get three arbitrators to agree, because when you sit with the three arbitrators, and that you can’t perform a kind of forfeiture. . .”

[shortly thereafter]

Hernández: “Yes, because it’s that... the most screwed up part is that . . . What can we explain about the asset forfeiture proceeding, because not even us as Colombians understand it. But how do you explain [to the Arbitrators] that at the end, this man did everything he had to do. Right?”

³⁶⁷ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 4 (emphasis added).

He ran his checks. What he did not do was ask the drug dealer: Mr. drug dealer, come here. Did this use to belong to you? That's the only thing he did not do."

Seda: "That so and so, Lopez, that he was arrested, that he was acquitted. [. . .] He's not on OFAC. He's not on the Clinton list. He's not in trouble."

Hernández: "Sirs, we are punishing the same man."

Espinosa: "The State."

Hernández: "We are punishing him [Seda] for the fact of . . . of having bad luck."

Seda: "Imagine three. . ." [interrupted]

Hernández: "He [Mr. Seda] had no fucking idea."

Seda: [continuing] ". . . arbitrators."

Espinosa: "Terrible. Terrible. Terrible."³⁶⁸

135. Thus, to summarize these recordings, Claimants borrow Mr. Hernández's own words: "This man [Mr. Seda] did everything he had to do, [he] performed his checks." Nothing more could have reasonably been asked of him. And thus, as Mr. Hernández stated: "these days we might say, as the Attorney General's Office, that you're a buyer in good faith."³⁶⁹

4. Colombia Has Ignored Significant Evidence Of Corruption In The Asset Forfeiture Unit, In Particular, Involving Ms. Malagón And Ms. Ardila

136. Colombia goes on at length in its Counter Memorial about the history of narco-trafficking in Colombia and the state's consequent interest in fighting "the scourge of drug-dealing and money laundering," with a strong asset forfeiture regime,³⁷⁰ arguing that "Claimants

³⁶⁸ **Exhibit C-325**, Transcript of Audio File (Part 5), 4 June 2020, pp. 45-46.

³⁶⁹ **Exhibit C-374**, Audio Transcript, 25 June 2010, p. 3.

³⁷⁰ Counter Memorial ¶ 2. See also Counter Memorial, ¶¶ 3-7.

*knew, or should have known, the legal framework” for asset forfeiture and “accepted and decided to invest within a given legal framework and knowing the risks that investing in the area entails.”*³⁷¹ Yet, Colombia makes little to no attempt to respond to the evidence set forth in Claimants’ Memorial of pervasive corruption in the Attorney General’s Office and the Asset Forfeiture Unit in particular.³⁷² Former Attorney General Néstor Humberto Martínez told *El Espectador* on 5 April 2017 that corruption was the fastest growing crime in Colombia, comprising over 100,000 cases, nearly 14 percent of the cases being investigated by the Attorney General’s Office at that time.³⁷³ *“It has acquired a systematic characteristic, this phenomenon,”* said Attorney General Martínez, *“it’s not an isolated behavior, but generalized.”*³⁷⁴ Indeed, the very person Attorney General Martínez appointed as National Director of Anti-Corruption in 2016 was arrested less than a year into the job for conspiracy to launder money in order to promote foreign bribery, to which he later plead guilty.³⁷⁵ Thus, for all of Colombia’s assertions that Claimants somehow assumed the risk that the land they purchased after extensive due diligence would be subject to asset forfeiture proceedings, by entering into the TPA, Colombia too knew it was

³⁷¹ Counter Memorial ¶ 5.

³⁷² See Memorial, Section III.I, ¶¶ 289-99.

³⁷³ **Exhibit C-405**, *Attorney General: “Corruption in Colombia Is Systematic,”* EL ESPECTADOR, 5 April 2017, available at <https://www.elespectador.com/judicial/la-corrupcion-en-colombia-es-sistemica-fiscal-general-article-687960/>.

³⁷⁴ **Exhibit C-405**, *Attorney General: “Corruption in Colombia Is Systematic,”* EL ESPECTADOR, 5 April 2017, available at <https://www.elespectador.com/judicial/la-corrupcion-en-colombia-es-sistemica-fiscal-general-article-687960/>.

³⁷⁵ **Exhibit C-406**, *National Director of Anti-Corruption in Colombia Charged with Conspiracy to Launder Money in Order to Promote Foreign Bribery*, Press Release, U.S. Department of Justice, 27 June 2018; **Exhibit C-407**, *Colombia’s Former National Director of Anti-Corruption and a Foreign Attorney Sentenced to Prison for Participating in a Conspiracy to Launder Money in Order to Promote Foreign Bribery*, Press Release, U.S. Department of Justice, 2 January 2019.

encouraging investment from foreigners and guaranteeing them certain protections against a backdrop of endemic domestic corruption.

137. Since Claimants filed their Memorial, additional evidence of corruption in the Asset Forfeiture Unit, and indications of how the schemes worked under the leadership of Ms. Malagón, have emerged, confirming what the officials at the Attorney General’s Office told Mr. Seda during their meetings. First, in June 2020, Colombia’s own witness here, Mr. Hernández, showed Mr. Seda a criminal organization chart,³⁷⁶ and explained that they were investigating multiple corrupt schemes involving the Asset Forfeiture Unit. The criminal organization chart depicts various individuals associated with asset forfeiture proceedings in Colombia, including Ms. Malagón, as Director of the Asset Forfeiture Unit, and her husband, Édinson Hernán González, head of Army Intelligence in charge of asset forfeiture. The chart suggests that Ms. Malagón “*controls and manages the distribution*” or assignment of asset forfeiture cases using the “*Sagittarius System*,” with the help of “*Yolanda*.”³⁷⁷ Ms. Ardila and her husband Nelson Humberto Espinosa Olaya are also depicted on the chart, both with connections to three asset forfeiture cases depicted on the chart, the Lyons Case, the Reficar case, and the Guardianship Cartel (*Cartel de las Tutelas*).
138. Two articles published in *El Espectador*, a major Colombian newspaper, in October 2020, shed further light on the schemes in the Asset Forfeiture Unit under Ms. Malagón, as well

³⁷⁶ **Exhibit C-317**, Diagram of Relationship of Oscar Espinosa Olaya with Government Officials, 4 June 2020. See also **Exhibit C-328**, Memorandum to Ana Catalina Noguera from Paula Espinosa, *Executive Report – Timeline (Sources)*, 3 August 2020, p. 4 (internal document of the Attorney General’s Office incorporating the same chart).

³⁷⁷ **Exhibit C-317**, Diagram of Relationship of Oscar Espinosa Olaya with Government Officials, 4 June 2020.

as the struggle to rid that Unit of corruption.³⁷⁸ The first article, published on 24 October 2020, titled, “*The Hidden File*,” explained that “[s]ince December of 2016, suspicions on the existence of an alleged cartel made up of corrupt officials within the Asset Forfeiture Unit of the Prosecutor’s Office have been gathering steam,” and that this effort had “gained strength” when Ms. Noguera took over the Asset Forfeiture Unit.³⁷⁹ The article explained how a drug trafficker-turned-informant told authorities that under Ms. Malagón’s leadership, prosecutors in the Asset Forfeiture Unit would accept bribes corresponding to 10 percent of the value of the assets in order to influence the outcome of asset forfeiture proceedings.³⁸⁰ According to the article, after Ms. Noguera reported this scheme, it was discovered that one of the accused prosecutors in the Asset Forfeiture Unit, Monica Valencia, had a secret cell phone for making corrupt arrangements, a phone the authorities had been unable to decrypt.³⁸¹

139. The 25 October 2020 article, titled “*The Case That Warned of an Alleged Corrupt Network in the Prosecutor’s Office*,” focuses on some of the highest profile asset forfeiture proceedings in Colombia, including the proceedings against the Meritage, a large shopping center (*Gran Estación*), the Supercundi Supermarket case, the Otto Bula case, and others.³⁸² The article alleges that multiple sources, including within the Attorney General’s Office, told the newspaper that Ms. Malagón and her husband, Colonel González, were seeking

³⁷⁸ **Exhibit C-365**, EL ESPECTADOR, *The Hidden File*, 24 October 2020; **Exhibit C-366**, EL ESPECTADOR, *The Case That Warned of an Alleged Corrupt Network in the Prosecutor’s Office*, 25 October 2020.

³⁷⁹ **Exhibit C-365**, EL ESPECTADOR, *The Hidden File*, 24 October 2020, pdf p. 2.

³⁸⁰ **Exhibit C-365**, EL ESPECTADOR, *The Hidden File*, 24 October 2020, pdf pp. 5-6.

³⁸¹ **Exhibit C-365**, EL ESPECTADOR, *The Hidden File*, 24 October 2020, pdf pp. 3-7.

³⁸² **Exhibit C-366**, EL ESPECTADOR, *The Case That Warned of an Alleged Corrupt Network in the Prosecutor’s Office*, 25 October 2020. See also Seda 1 WS, ¶ 131.

bribes of up to 10 percent of the value of assets in forfeiture proceedings “*in exchange for having their assets returned.*”³⁸³ Mr. González reportedly “*worked for the Army’s intelligence commandos that assist in forfeiture proceedings,*”³⁸⁴ and “*was in charge of collecting payments.*”³⁸⁵ This article describes a web of corruption that also included Ms. Ardila and her husband Mr. Espinosa, who, according to the article, “*would receive classified information from Ardila Polo regarding pending forfeiture cases, and any assets that would be transferred to the Sociedad de Activos Especiales (SAE [the agency charged with disposing of seized assets]), and would then seek to become custodian*” of those assets.³⁸⁶ In other words, a web that looks similar to the criminal organization laid out in the chart obtained from Mr. Hernández of the Attorney General’s Office.³⁸⁷

140. Even more disturbingly, the article indicates that there was effectively a plot within the Attorney General’s Office to frame Mr. Seda as somehow associated with the Envigado Office—the drug cartel with which Mr. López Vanegas was purportedly associated—and as a “*front man for Javier Garcia, alias ‘Maracuyá’*”—a notorious drug dealer. The article reports that Ms. Noguera rejected these false accusations because despite efforts within the Attorney General’s Office to “*connect [the Meritage Property] to the Envigado Office,*”

³⁸³ **Exhibit C-366**, EL ESPECTADOR, *The Case That Warned of an Alleged Corrupt Network in the Prosecutor’s Office*, 25 October 2020, pdf p. 1.

³⁸⁴ **Exhibit C-366**, EL ESPECTADOR, *The Case That Warned of an Alleged Corrupt Network in the Prosecutor’s Office*, 25 October 2020, pdf p. 3.

³⁸⁵ **Exhibit C-366**, EL ESPECTADOR, *The Case That Warned of an Alleged Corrupt Network in the Prosecutor’s Office*, 25 October 2020, pdf p. 3.

³⁸⁶ **Exhibit C-366**, EL ESPECTADOR, *The Case That Warned of an Alleged Corrupt Network in the Prosecutor’s Office*, 25 October 2020, pdf p. 3.

³⁸⁷ **Exhibit C-317**, Diagram of Relationship of Oscar Espinosa Olaya with Government Officials, 4 June 2020.

“*there was no such connection.*”³⁸⁸ The article further reports that Ms. Noguera forced the resignation of Ms. Malagón’s husband from his position in the Colombian Army.³⁸⁹

141. As described above, Ms. Noguera also made efforts to seek out Mr. Seda and find out what he knew about Ms. Malagón and Ms. Ardila’s corruption and how it had influenced the Meritage case.³⁹⁰ And though these articles depict a prosecutor trying to root out corruption, shortly after their publication, Ms. Noguera was asked to hand in her resignation.³⁹¹ Ironically, the publicly stated reason for her resignation was the extradition of two of her relatives for narco-trafficking, but in fact, they had been indicted nearly a year and a half before her resignation (and her promotion), and they were not closely related to her.³⁹²

142. Despite Ms. Noguera’s efforts, it appears that the investigations of Ms. Malagón and Ms. Ardila’s corrupt conduct have stalled, reportedly because “*those who have stated they paid bribes refuse to file formal complaints fearing for their lives and jeopardizing their properties again.*”³⁹³

143. Documents obtained through public records requests and that Colombia has produced in this arbitration show that the investigations against Ms. Malagón and Ms. Ardila are many.

³⁸⁸ **Exhibit C-366**, EL ESPECTADOR, *The Case That Warned of an Alleged Corrupt Network in the Prosecutor’s Office*, 25 October 2020, pdf p. 3.

³⁸⁹ **Exhibit C-366**, EL ESPECTADOR, *The Case That Warned of an Alleged Corrupt Network in the Prosecutor’s Office*, 25 October 2020, pdf p. 3.

³⁹⁰ See *supra* **Sections III.G.1-III.G.2**. See also **Exhibit C-328**, Memorandum to Ana Catalina Noguera from Paula Espinso, *Executive Report – Timeline (Sources)*, 3 August 2020, p. 3.

³⁹¹ **Exhibit C-367**, EL TIEMPO, *The Story Of The Narco Kings Who Cost A Prosecutor Her Job*, 12 November 2020.

³⁹² **Exhibit C-367**, EL TIEMPO, *The Story Of The Narco Kings Who Cost A Prosecutor Her Job*, 12 November 2020.

³⁹³ **Exhibit C-366**, EL ESPECTADOR, *The Case That Warned of an Alleged Corrupt Network in the Prosecutor’s Office*, 25 October 2020, pdf p. 4.

Indeed, there have been over a dozen investigations and disciplinary proceedings against them, and those are just the ones Claimants have become aware of.³⁹⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] There are also multiple inactive or closed investigations and disciplinary proceedings against each of them, regarding which Colombia has provided few to no details.³⁹⁷ Indeed, based on a search of a public database of the Judicial Branch of Colombia, there are also at least four disciplinary proceedings against Ms. Malagón.³⁹⁸ In addition, Colombia identified two additional active disciplinary investigations against in its Exemption Log, Nos. 45482 and 48473 respectively, responsive to Request 1, which seeks documents “*related to the Asset Forfeiture Proceedings of the Meritage Lot and/or Ms. Malagón’s participation in the Asset Forfeiture Proceedings.*”³⁹⁹ Colombia has refused to produce any information about these files on the basis that the investigations are ongoing.⁴⁰⁰ Details on these proceedings are set forth in the table below.

³⁹⁴ See Appendix I.

³⁹⁵ See [REDACTED]

³⁹⁶ See [REDACTED]

³⁹⁷ See Appendix I.

³⁹⁸ **Exhibit C-403**, Extracts from Database of Judicial Branch of Colombia, 16 September 2021.

³⁹⁹ See Procedural Order No. 2, 18 February 2021, Request 1; Procedural Order No. 4, 13 August 2021, Annex B, Item Nos. 2 and 3.

⁴⁰⁰ See **Exhibit C-346**, Letter from Respondent to Tribunal, 3 September 2021, p. 13.

**Appendix I: Disclosed Investigations & Disciplinary Actions
Against Andrea Malagón and Alejandra Ardila Polo**

Target / File Number / Investigating Entity	Core Allegations	Status
Criminal Proceedings		
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]		
[REDACTED]		
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]		
[REDACTED]		
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]		
[REDACTED]		
Andrea Malagón 11001600050201702097	<ul style="list-style-type: none"> - Influence Peddling by a Public Official (Penal Code § 411) - The key allegation was that “<i>various prosecutors, among which is doctor Andrea del Pilar Malagón Medina, who at the time was the</i> 	Closed

Target / File Number / Investigating Entity	Core Allegations	Status
Attorney General's Office No. 24 of Bogotá	<i>National Director of Asset Forfeiture, who is alleged to have in such role used trusted prosecutors from her unit to undertake asset forfeiture actions and affect many assets that were held by politicians, contractors, and individuals who were in one way or another involved in the carousel of contracting."</i>	
[REDACTED]	[REDACTED]	[REDACTED]
Alejandra Ardila Polo and Andrea Malagón 110016000050202055879 Delegate to the Superior Court of Bogotá (Office No. 56)	<ul style="list-style-type: none"> - Breach of Public Duty by Action and Omission (Penal Code § 413) - Conspiracy to Commit a Crime (Penal Code § 340) - This complaint was filed by Angel Seda, and included the recordings referenced in this Reply. - It alleged, among other things, that <i>"the Attorney General's Office, through the then Prosecutor 44 ALEJANDRA ARDILA POLO, ordered not only the opening of the proceedings for confiscation of property in case no. 13.641 and the imposition of precautionary measures based on the absurd and anachronistic account of IVÁN LÓPEZ VANEGAS regarding an alleged kidnapping and extortion that supposedly forced him to transfer the property on which the Meritage project now sits, in total disregard of the rights of bona fide third parties."</i> - It also alleged that Ardila Polo engaged in <i>"possible maneuvers"</i> to <i>"favor the interests of IVÁN LÓPEZ VANEGAS."</i> 	Closed
[REDACTED]	[REDACTED]	[REDACTED]
Alejandra Ardila Polo 110016000027201600541 Delegate to the Superior Court of Bogotá (Office No. 56)	<ul style="list-style-type: none"> - Breach of Public Duty Through Action (Penal Code § 413) - Extortion (Penal Code § 244) - Complaint filed by Mr. Seda, the investigation as to Ms. Ardila was apparently closed, but not as to Ms. Malagón. 	Closed

Target / File Number / Investigating Entity	Core Allegations	Status
Disciplinary Proceedings		
Andrea Malagón 11001110200020180311200 Disciplinary Jurisdictional Chamber of Bogotá	- Claimants were able to identify the investigation through a public records search of the Colombian Judiciary's website.	Closed
Andrea Malagón 11001110200020120209001 Disciplinary Jurisdictional Chamber of Bogotá	- Claimants were able to identify the investigation through a public records search of the Colombian Judiciary's website.	Closed
Andrea Malagón 11001110200020150192800 Disciplinary Jurisdictional Chamber of Bogotá	- Claimants were able to identify the investigation through a public records search of the Colombian Judiciary's website.	Closed
Andrea Malagón 11001110200020170500500 Disciplinary Jurisdictional Chamber of Bogotá	- Claimants were able to identify the investigation through a public records search of the Colombian Judiciary's website.	Closed
Andrea Malagón 48473 Directorate of Disciplinary Control	- Colombia identified this proceeding in its Exemption Log as being a document " <i>related to the Asset Forfeiture Proceedings of the Meritage Lot and/or Ms. Malagón's participation in the Asset Forfeiture Proceedings.</i> " - Colombia has stated that this file relates to " <i>ongoing disciplinary proceedings</i> " but has refused to produce any information in connection with this proceeding in contempt of the Tribunal's order in PO 4.	Active
Andrea Malagón 45482 Directorate of Disciplinary Control	- Colombia identified this proceeding in its Exemption Log as being a document " <i>related to the Asset Forfeiture Proceedings of the Meritage Lot and/or Ms. Malagón's participation in the Asset Forfeiture Proceedings.</i> " - Colombia has stated that this file relates to " <i>ongoing disciplinary proceedings</i> " but has refused to produce any information in connection with this proceeding in contempt of the Tribunal's order in PO 4.	Active
Andrea Malagón	- Claim of harassment by a private property owner alleging that Ms.	Closed

Target / File Number / Investigating Entity	Core Allegations	Status
28270 Internal Control Directorate of the Attorney General's Office	Malagón had defamed him through a purportedly baseless, long-running investigation into his properties, including opening investigations that were legally precluded.	

144. Under protest, Colombia produced executive summaries for a handful of the investigations against Ms. Malagón and Ms. Ardila. The allegations reflected in these summaries are credible in their specificity and shocking in their content. They include a complaint from an anonymous public official reporting a “*network of corruption [which] is headed by the director of asset forfeiture, Dr. Andrea Malagón [. . .] along with prosecutors of her group, who would be very trusted such as Dr. Alejandra Ardila, asset forfeiture prosecutor [. . .] and her spouse, trial attorney Nelson [Espinosa] Olaya, defen[se counsel] in asset forfeiture cases.*”⁴⁰¹ According to this official’s allegations, prosecutors in the Asset Forfeiture Unit, in particular Ms. Ardila, “*carries out the lawsuits with innumerable inconsistencies in them,*” as a lawyer “*to those being investigat[ed],*” informs him of the “*errors in the lawsuit filed by the prosecutor before the respective judge, so that the latter decides in favor of the investigated party.*”⁴⁰² This scheme too, resembles what is laid out in the criminal organization chart obtained from Mr. Hernández.⁴⁰³

145. The summary produced by Colombia shows very little activity on Mr. Seda’s 2016 criminal complaint against Ms. Malagón and Ms. Ardila. Indeed, the investigation as to Ms. Ardila

401 [REDACTED]

402 [REDACTED]

403 Exhibit C-317, Diagram of Relationship of Oscar Espinosa Olaya with Government Officials, 4 June 2020.

has been closed altogether,⁴⁰⁴ while the investigation against Ms. Malagón remains open, but shows no activity since 2018.⁴⁰⁵ And Mr. Seda's follow up criminal complaint against them for breach of public duty (*prevaricato*) filed in October of 2020⁴⁰⁶ was summarily closed in January 2021, just months after it was filed and with no apparent investigation.⁴⁰⁷

146. Finally, as one possible reason for the apparent inability of the Attorney General's Office to advance the corruption investigations against Ms. Malagón, Ms. Ardila, and a coda to the apparently intractable problem of corruption in the Attorney General's Office, one of the two "*anti-corruption*" prosecutors who interviewed Mr. Seda in late 2016 and encouraged him to file his criminal complaint, was recently sentenced to prison in his own corruption scandal.⁴⁰⁸ Oscar Martínez was sentenced to nearly five years in prison for extortion and conspiracy in connection with an attempt to extort a public official for not opening a criminal investigation against him.⁴⁰⁹
147. Colombia has also failed to produce both Ms. Ardila and Ms. Malagón as witnesses in this Arbitration without explanation. Ms. Ardila remains an employee of the Colombian State and therefore could be compelled to appear before this Tribunal. Instead, Colombia has put forward Mr. Hernández, who carefully limits his testimony on key issues and has already refuted some of his testimony in this Arbitration through prior inconsistent

⁴⁰⁴ **Exhibit C-402**, Email from Esmeralda Chinchilla Martinez to Alejandro Mejia, 22 February 2021.

⁴⁰⁵ [REDACTED]

⁴⁰⁶ See **Exhibit C-332**, Criminal Complaint against Alejandra Ardila Polo and Andrea Malagón Medina, 20 October 2020.

⁴⁰⁷ **Exhibit C-402**, Email from Esmeralda Chinchilla Martinez to Alejandro Mejia, 22 February 2021.

⁴⁰⁸ Seda 1 WS, ¶ 124.

⁴⁰⁹ **Exhibit C-339**, *A Former Prosecutor Is Sentenced in Sincelejo Corruption Ring*, EL TIEMPO, 2 September 2018.

statements.⁴¹⁰ Moreover, Colombia has failed to produce documentary evidence of two open disciplinary proceedings against Ms. Malagón (Nos. 45482 and 48473) that are “related to the Asset Forfeiture Proceedings of the Meritage Lot and/or Ms. Malagón’s participation in the Asset Forfeiture Proceedings.”⁴¹¹ This refusal is in contempt of an express, now-reiterated order from the Tribunal requiring it to produce the documents, subject to an agreed Confidentiality Order between the Parties.⁴¹²

148. Colombia has not provided any explanation for why it was able to produce documents relating to other active investigations against Ms. Malagón, but not these two,⁴¹³ and the Tribunal has twice rejected Colombia’s vague defenses to production. Nor has Colombia explained why neither Ms. Malagón nor Ms. Ardila have presented evidence in this Arbitration. Like in *Metal-tech*, the Tribunal should draw “draw certain inferences from the failure to produce requested documents [. . .], namely that the requested contemporaneous documents [. . .] do not assist the Respondent in support of its arguments in these proceedings.”⁴¹⁴ Claimants reserve the right to ask for further adverse inferences following a more fulsome review of Colombia’s last-minute Production Under Protest.

⁴¹⁰ See *supra* ¶¶ 104-135.

⁴¹¹ See Procedural Order No. 2, 18 February 2021, Request 1; Procedural Order No. 4, 13 August 2021, Annex B, Item Nos. 2 and 3.

⁴¹² See Exhibit C-346, Letter from Respondent to Tribunal, 3 September 2021, p. 13.

⁴¹³ See



See generally, Appendix I.

⁴¹⁴ Exhibit CL-204, *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award, 28 May 2013, ¶ 145. See also Exhibit CL-205, Carolyn Lamm, Hansel Pham, Rahim Moloo, *Fraud and Corruption in International Arbitration*, in *LIBER AMICORUM BERNARDO CREMADES* (2010), pp. 704-706.

H. The Colombian Constitutional Court's Recent Ruling Plainly Disavows Colombia's Arguments On Due Diligence In This Arbitration

149. In this Arbitration, Colombia and its legal experts have taken the position that various aspects of Newport and Corficolombiana's diligence with respect to the Meritage Property were "*insufficient in time and depth and which were ill-fitted for a due diligence in the context of asset forfeiture,*"⁴¹⁵ and that the diligence was "*far from exhaustive.*"⁴¹⁶
150. As discussed below, the extensive diligence record that has been documented in this Arbitration speaks for itself and belies Colombia's assertion. The record includes title studies by reputable law firms,⁴¹⁷ diligence by industry-leading fiduciaries,⁴¹⁸ checks of sanctions-related and other criminal databases,⁴¹⁹ and even an inquiry directly to the Office of the Attorney General.⁴²⁰ But of particular significance is a recent ruling by the Constitutional Court of Colombia plainly contradicting Colombia's position regarding the depth of diligence required to be considered a good faith third party.
151. On 19 August 2020, three months before Colombia's Counter Memorial, the highest court in Colombia, the Constitutional Court, issued ruling C-327/20, considered a constitutional challenge to a provision of the Asset Forfeiture Law. The case was brought by two private

⁴¹⁵ Counter Memorial, ¶ 7.

⁴¹⁶ Counter Memorial, ¶ 79.

⁴¹⁷ **Exhibit C-030bis**, Otero & Palacio Title Study and Supplement, 7 March 2013 and 23 July 2013; **Exhibit C-160**, Osorio & Moreno Abogados, Title Study, 17 May 2016; **Exhibit C-161**, Daniel C Pardo, Study for Banco de Bogotá, 26 May 2016.

⁴¹⁸ Memorial, ¶¶ 62-65.

⁴¹⁹ Memorial, ¶¶ 62-65.

⁴²⁰ **Exhibit C-031bis**, Petition for Information from Fiduciaria Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013.

citizens who challenged the constitutionality two provisions of Article 16 of the Law, which sets forth the legal bases for asset forfeiture.

152. The Court’s ruling goes directly to the standard of due diligence that is required under Colombian law to obtain good faith third party purchaser status and its corresponding protections. The Court declared:

“[T]he good faith and diligence that may be required of third-party acquirers refer exclusively to assets that are the object of a legal operation, but not to those persons who transfer domain over them. In fact, when someone intends to acquire an asset, it is up to that person to ascertain the legal status of such asset in order to establish the history and the chain of title and tradition, but not to inquire into the history or personal details of the party that transfers the respective assets to him, especially when in many cases the transfer occurs when the State itself has not been able to prove or penalize the perpetration of illegal activities.”⁴²¹

153. In this regard, the Court specifically rejected the notion that a party conducting diligence would have to:

“[P]erform meticulous investigations into the legal past of the sellers, into any legal disputes they may be involved in in different jurisdictions, into the investigations and enquiries carried out by the Prosecutor’s Office in which they could be involved, and even into opinions about said sellers in their communities and on social media.”⁴²²

154. The Colombian Constitutional Court explained:

“As in the hypothetical cases provided for in the principles being claimed, the asset comes from a legal source and is going to a legal destination, and the only reason for the extinction of domain over it is that in the past it belonged to someone who carried out and profited from some illegal activities, and the power granted to the State to extinguish domain would presuppose demanding that third parties deploy their good faith and

⁴²¹ **Exhibit C-329**, Constitutional Court of Colombia, Decision C-327/20, 19 August 2020, pp. 42-43 (emphasis added).

⁴²² **Exhibit C-329**, Constitutional Court of Colombia, Decision C-327/20, 19 August 2020, pp. 42-43 (emphasis added).

diligence not only with regard to the assets that they intend to acquire, but also to the history and conditions of whoever is selling them.

In a scenario such as this, people in legal commerce would be obliged not only to study the titles to assets, but also to perform meticulous investigations into the legal past of the sellers, into any legal disputes they may be involved in in different jurisdictions, into the investigations and enquiries carried out by the Prosecutor's Office in which they could be involved, and even into opinions about said sellers in their communities and on social media.

One aggravating factor of all of this is that normally the transfer of assets from lawful sources to third parties in lawful destinations and acquired in good faith by persons who have profited from illegal activities, occurs when the State has not determined the existence of the illegal activities or the participation of such individual in these activities, so any investigation prior to acquiring any kind of asset would have to be preceded by informal and unofficial investigations of every kind aimed at determining whether the potential seller is presently, or has in the past been, involved in any illegal activity from which he could have obtained any economic benefit.

This perspective makes legal trade difficult or impossible, and also imposes unreasonable and unsustainable burdens on individuals, which go far beyond the duties that the legislator can constitutionally impose on them.

*Thus, the Court will make a declaration regarding the conditional enforceability of the principles being claimed, in order to exclude this interpretation that clashes with the constitutional order.*⁴²³

155. As former Deputy Attorney General Martínez explains in his expert report, the Court's decision "*is fundamental*" to the issues in this Arbitration, and "*refutes the stance taken by the experts of the Republic of Colombia concerning the diligence with which Newport and Corficolombiana acted in this case.*"⁴²⁴ Dr. Martínez explained that the Court's decision is instructive to the present matter in three principal respects.

⁴²³ **Exhibit C-329**, Constitutional Court of Colombia, Decision C-327/20, 19 August 2020, pp. 42-43 (emphasis added).

⁴²⁴ Martínez 2 Report, ¶ 8.

156. First, the Constitutional Court makes clear that the diligence required for good faith third party purchaser status is only on the property itself, and not on its prior owners.⁴²⁵ In this case, there is no dispute between the Parties that Newport and Corficolombiana performed diligence on both the Property itself and on the prior owners—including running their names through sanctions lists, and inquiring about them directly to the Attorney General’s Office.⁴²⁶ Thus, it should be equally undisputed that Newport and Corficolombiana exceeded the diligence that the Constitutional Court has articulated.
157. Second, as Dr. Martínez explains in his report, the Court’s decision clearly acknowledged that “a great limitation” to diligence is “understanding what information could be available to a good faith third party that is attempting to conduct the study.”⁴²⁷ The Court specifically acknowledged that “normally the transfer of assets from lawful sources to third parties in lawful destinations and acquired in good faith by persons who have profited from illegal activities, occurs when the State has not determined the existence of the illegal activities or the participation of such individual in these activities.”⁴²⁸ In this regard, the Court held that the State cannot possibly require that a good faith third party be privy to such information.
158. Third, as Dr. Martínez explains, “in declaring conditional enforceability [of the principles], directly acknowledges that the standard of diligence that the Attorney General’s Office is attempting to impose, that is to do exhaustive diligence on individuals, ‘makes legal trade

⁴²⁵ Martínez 2 Report, ¶ 9.

⁴²⁶ See *infra*, ¶¶ 260.b-260.e

⁴²⁷ Martínez 2 Report, ¶ 10.

⁴²⁸ **Exhibit C-329**, Constitutional Court of Colombia, Decision C-327/20, 19 August 2020, pp. 42-43.

difficult or impossible, and also imposes unreasonable and unsustainable burdens on individuals, which go far beyond the duties that the legislator can constitutionally impose on them.”⁴²⁹

159. For these reasons, the Constitutional Court’s ruling is plainly irreconcilable with Colombia’s position in this Arbitration.

⁴²⁹ Martínez 2 Report, ¶ 11.

IV. THE TRIBUNAL HAS JURISDICTION TO DECIDE THE DISPUTE

160. As set out in Claimants’ Memorial, this Tribunal has jurisdiction over this dispute in accordance with the provisions of the TPA and Article 25 of the ICSID Convention.⁴³⁰

161. Colombia has raised several jurisdictional and admissibility objections in the hope of distracting from the condemning facts set out above. But each fails upon a review of the TPA and international law and must be dismissed for the reasons set out below.

A. Claimants Are Protected Investors

162. As set out in Claimants’ Memorial, each Claimant is a qualifying “*investor*.”⁴³¹ While Colombia does not directly contest Claimants’ nationality, it complains that some of the evidence submitted was of “*bad quality*” and/or out of date.⁴³² Notwithstanding the questionable relevance of these objections, Claimants had submitted sufficient evidence with their Memorial to establish Claimants’ nationalities. Owing to Colombia’s retaliatory measures against Mr. Seda,⁴³³ many Claimants were understandably reticent to disclose any more information than was strictly necessary to establish jurisdiction. Nonetheless, in the spirit of cooperation and in light of the Tribunal’s recent Confidentiality Order,⁴³⁴ Claimants have now disclosed additional documents on this matter. These include:

⁴³⁰ See Memorial, Section IV.

⁴³¹ Memorial, ¶¶ 338-42.

⁴³² Counter Memorial, ¶ 245, n. 418.

⁴³³ See Memorial, ¶¶ 319-22; Seda 1 WS, ¶¶ 137-44; Seda 2 WS, ¶¶ 45-47.

⁴³⁴ See Procedural Order No. 5, 14 September 2021.

- a. The U.S. passports of Stephen John Bobeck, Monte Glenn Adcock, Justin Timothy Enbody;⁴³⁵
- b. The identity and U.S. passport of [REDACTED], who is the settlor, trustee, and beneficiary of the Boston Enterprises Trust;⁴³⁶
- c. A certificate of good standing confirming that JTE International Investments LLC was on 25 January 2019, and remains, an “*enterprise*” constituted under the laws of Delaware, United States;⁴³⁷ and
- d. JTE International Investments LLC’s constitutional documents confirming that it is owned and controlled by its sole member Justin Enbody,⁴³⁸ who is a U.S. citizen.⁴³⁹

163. Moreover, though Colombia fails to articulate why the certificates of good standing for Royal Realty and Newport are relevant to the question of jurisdiction, Claimants have also produced updated certificates.⁴⁴⁰ Thus, any (unwarranted) complaints Colombia had with Claimants’ evidence on nationality can be fully put to rest.

⁴³⁵ **Exhibit C-348**, United States Passport of Monte Adcock, 3 December 2020; **Exhibit C-349**, United States Passport of Stephen Bobeck, 18 April 2012; **Exhibit C-350**, United States Passport of Justin Enbody, 28 January 2015.

⁴³⁶ **Exhibit C-351**, United States Passport of Beneficiary of Boston Enterprises Trust, 9 May 2005; **Exhibit C-352**, United States Passport of Beneficiary of Boston Enterprises Trust, 17 December 2014.

⁴³⁷ **Exhibit C-353**, Certificate of Good Standing of JTE International Investments, LLC, 5 January 2021.

⁴³⁸ **Exhibit C-354**, Organizational Meeting of the Member of JTE International Investments, LLC, 30 June 2013; **Exhibit C-355**, Letter from the Internal Revenue Service to JTE International Investments, LLC, 6 December 2013

⁴³⁹ See also **Exhibit C-350**, United States Passport of Justin Enbody, 28 January 2015.

⁴⁴⁰ **Exhibit C-356**, Royal Realty S.A.S. Certificate of Existence and Good Standing, 29 December 2020; **Exhibit C-357**, Newport S.A.S. Certificate of Existence and Good Standing, 8 May 2019.

B. Claimants Have Made Protected Investments

164. As set out by Claimants in their Memorial, each Claimant made a qualifying “*investment*” under the TPA, which comprised of a “*bundle of rights*” including Claimants’ shares in Newport, Luxé or both.⁴⁴¹ Claimants also explained that these investments met the requirements of Article 25 of the ICSID Convention.⁴⁴² Colombia does not dispute that the “*bundle of rights*” identified by Claimants in the Memorial constitute protected investments under the TPA.⁴⁴³ Rather, Colombia’s objection is limited to alleging that Claimants have not “*made*” an investment that “*satisfie[s] the objective definition of ‘investment’ of the ICSID Convention and the FTA.*”⁴⁴⁴
165. Colombia’s objection does not find support in the TPA or the ICSID Convention. First, Claimants’ investments fall squarely within the TPA’s definition of “*investment.*” Second, the ICSID Convention does not impose separate requirements that must be met in order to qualify as having made a covered “*investment.*” Third, and in any case, Claimants’ investment in Colombia exhibits a commitment of capital or other resources, and required an assumption of risk.

⁴⁴¹ Memorial, ¶ 344.

⁴⁴² Memorial, ¶¶ 351-53.

⁴⁴³ See Memorial, ¶ 344 (including Claimants’ shares in Newport, Luxé SAS, or both, and contractual rights held by Mr. Seda).

⁴⁴⁴ Counter Memorial, ¶ 247.

1. Claimants’ Investments Falls Within The TPA’s Broad Definition Of “Investment”

166. Colombia does not appear to dispute that Claimants’ investments satisfy the criteria set out in the TPA. Article 10.28 of the TPA defines a protected “investment” as, in relevant part:

“[E]very asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stock, and other forms of equity participation in an enterprise;

[. . .]

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

[. . .]

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges

[. . .]”

167. As Colombia accepts, this broad definition expressly contemplates that “[a]n investment may take diverse forms” so long as it “has the ‘characteristics of an investment.’”⁴⁴⁵ The TPA provides a non-exhaustive list of such characteristics, and connects these with the disjunctive “or” to indicate that these are merely stated by way of example and do not need

⁴⁴⁵ Counter Memorial, ¶ 251.

to be fulfilled cumulatively.⁴⁴⁶ Here, Claimants’ investment comprised of shares in Colombian enterprises as well as contractual and property rights emanating from these enterprises.

168. The tribunal in *Seo v. Korea*, interpreting a similar provision, held:

“The Tribunal notes that Article 11.28 of the KORUS FTA expressly mentions three such characteristics: ‘the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk’. However, this list is non-exhaustive as it is preceded by the words ‘including such characteristics as’. In our view, this means that other characteristics may also be relevant in determining what is an investment under the KORUS FTA.”

It is also worth noting that Article 11.28 of the KORUS FTA connects the three listed characteristics with the word ‘or’. Thus, not all three characteristics must necessarily be present cumulatively for an asset to qualify as an investment. Based on the plural in the phrase ‘including such characteristics’ (emphasis added), the Respondent argues that at least two of the mentioned three mentioned characteristics must be present.

However, the Tribunal is not attracted by the Respondent’s argument. It would have been very easy for the drafters of the KORUS FTA to incorporate such ‘two out of three’ requirement in a very clear fashion if that is what was intended.”⁴⁴⁷

169. In sum, “none of [the characteristics] is indispensable”⁴⁴⁸ and instead a “the prudent course of action is a global assessment”⁴⁴⁹ to determine whether the assets in question display the

⁴⁴⁶ See **Exhibit CL-134**, *Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019, ¶¶ 93-95; **Exhibit RL-105**, *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018, ¶ 254 (finding that “DR-CAFTA does not restrict an investment to monetary contributions [. . .] the Treaty expressly acknowledges that the investment may be in the form of a commitment of capital or other resources or the assumption of risk.” (emphasis in original)).

⁴⁴⁷ **Exhibit CL-134**, *Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019, ¶¶ 93-95 (emphasis added).

⁴⁴⁸ **Exhibit CL-134**, *Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019, ¶ 95.

⁴⁴⁹ **Exhibit CL-134**, *Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019, ¶ 96.

characteristics of an investment (as listed or otherwise). As shown below, each of the characteristics contested by Colombia has been met in this case.

2. Article 25 Of The ICSID Convention Does Not Impose An Autonomous Definition Of “Investment”

170. As set out in Claimants’ Memorial, Article 25 of the ICSID Convention only requires: (i) the United States and Colombia to be Contracting States of the ICSID Convention; (ii) Claimants to be nationals of the United States; (iii) written consent to arbitrate from Colombia and Claimants; and (iv) the existence of a “*legal dispute arising directly out of an investment.*”⁴⁵⁰ Each of these requirements has been met in this case.

171. The ICSID Convention does not define the term “*investment.*”⁴⁵¹ Yet, according to Colombia, the ICSID Convention demands that a qualifying investment consist of the following (unwritten) criteria “*cumulatively:*” “(i) *a contribution; (ii) a certain duration; and (iii) an assumption of risk.*”⁴⁵² The Convention does not contain such criteria, and Colombia’s assertions are unsupported by both the history of the drafting of the ICSID Convention and arbitral jurisprudence.

⁴⁵⁰ Memorial, ¶¶ 352-53.

⁴⁵¹ ICSID Convention, Art. 25. Article 25(1) merely provides that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.” See also Counter Memorial, ¶ 252.

⁴⁵² Counter Memorial, ¶ 252.

172. The drafters of the ICSID Convention expressly and deliberately chose not to circumscribe the definition of “*investment*” in the Convention.⁴⁵³ The 1965 Report of the Executive Directors on the ICSID Convention notes that “[n]o attempt was made to define the term ‘*investment*’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre.”⁴⁵⁴ Colombia, therefore, does not have a basis upon which to import additional criteria into Article 25 that are not present in the plain language of the provision.
173. Colombia’s reference to a handful of cases where tribunals read in a requirement for these so-called objective criteria is of no moment where the text of the Convention clearly does not contain them. Indeed, numerous other tribunals have held that the term “*investment*” in the ICSID Convention does not impose additional jurisdictional requirements beyond the scope of the language of the relevant treaty, here the TPA.⁴⁵⁵

⁴⁵³ See **Exhibit CL-065**, *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, ¶¶ 63-82 (reviewing, in detail, the drafting history of the ICSID Convention); **Exhibit CL-135**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶ 236 (“*It is notorious that the drafters of the ICSID Convention chose not to include a definition of the term ‘investment’ in the text of the Convention*”); **Exhibit CL-007**, ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, ¶¶ 25, 27. Professors Dolzer and Schreuer have similarly confirmed that “[t]he negotiating history of the ICSID Convention speaks in favour of a party-defined approach” and objective definitions of the term investment “will operate as a corrective only in cases of manifest departure from the ordinary understanding of ‘investment’ by the parties.” **Exhibit CL-136**, Rudolf Dolzer & Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2d ed. 2012), pp. 74, 76.

⁴⁵⁴ **Exhibit CL-201**, ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, ¶ 27.

⁴⁵⁵ See, e.g., **Exhibit CL-138**, *Philip Morris Brand SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, ¶ 204 (“[w]hether the so-called Salini test relied upon by the Respondent has any relevance in the interpretation of the concept of ‘investment’ under Article 25(1) of the ICSID Convention is very doubtful [. . .] there is no such ‘jurisprudence constante’ with respect to acceptance of the Salini test.”); **Exhibit CL-135**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶¶ 239-42 (“*Claimant’s burden of showing that its investment that is the subject of this arbitration falls within the meaning of ‘investment’ as used*

3. In Any Event, Claimants' Investments Satisfy The *Salini* Criteria

174. For the avoidance of doubt, Claimants' investments nevertheless satisfy each of the “*criteria*” advanced by Colombia.

a. Claimants Made A Commitment Of Capital Or Other Resources

175. Colombia incorrectly alleges that Claimants have not evidenced a “*contribution of value*.”⁴⁵⁶ Colombia undermines its own argument when it simultaneously concedes that the Newport Claimants have invested—at a minimum—COP 5.1 million (USD 2 million) into Newport between 2013 and 2017.⁴⁵⁷ Without citing any authority, Colombia then contends that the Newport Claimants' contribution is insufficient relative to the damages claimed for the Meritage Project.⁴⁵⁸ While Colombia sorely underestimates the amount invested by Claimants,⁴⁵⁹ neither the TPA, nor the ICSID Convention, nor general

*in the ICSID Convention as well as in the BIT is satisfied by the Tribunal's conclusion that the Claimant's investment comes within the definition of 'investment' in the BIT and that nothing about that definition or the Claimant's investment itself exceeds what is permissible under the ICSID Convention or is incompatible with its purpose.”); **Exhibit RL-029**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 312-18; **Exhibit CL-139**, *Abaclat and Others (formerly Giovanna A. Beccara and Others) v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 364 (“Considering that these criteria were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the *Salini* criteria. The *Salini* criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create.”); **Exhibit CL-065**, *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, ¶¶ 69-80; **Exhibit CL-140**, *Ambiente Ufficio S.p.A. and Others v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶ 479; **Exhibit CL-141**, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, ¶¶ 128-31.*

⁴⁵⁶ Counter Memorial, ¶ 256.

⁴⁵⁷ Counter Memorial, ¶ 256.

⁴⁵⁸ Counter Memorial, ¶ 256.

⁴⁵⁹ See *infra* ¶ 271.

principles of international law set a minimum amount for a claimant's contribution before an investment is entitled to treaty protection.⁴⁶⁰ Indeed, Colombia fails to identify a single legal source in support of its claim that the alleged size of Claimants' capital contributions are "ludicrous."⁴⁶¹ Claimants have undoubtedly made a capital contribution (as Colombia openly acknowledges). While Colombia (incorrectly) alleges that the contributions are disproportionate in reference to the amount of damages claimed (which they are not for the reasons set out below),⁴⁶² these complaints relate to the amount of the quantum claimed; they are not grounds to decline jurisdiction.

176. In addition, as the TPA expressly recognizes, contributions can be made by "other resources" beyond an injection of capital.⁴⁶³ Here, Mr. Seda moved to Colombia and contributed his significant expertise in luxury real estate and hospitality development. Mr. Seda built on the know-how and brand value he created through the success of the Charlee Hotel to develop Claimants' Projects. His contributions included researching and

⁴⁶⁰ **Exhibit CL-142**, *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶ 210 ("Third, the Tribunal agrees with the Claimants that the amount of the purchase price is similarly immaterial. Neither the ICSID Convention nor the BIT requires that the purchase price of a particular asset reach a certain threshold in order to constitute an 'investment' and the Tribunal does not consider it appropriate to read such a requirement into them."); **Exhibit CL-101**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, ¶ 105 ("the ICSID Convention (or the BIT) imposes no monetary threshold to the notion of investment and takes the view that actual plans to invest may qualify as 'investments' under the ICSID Convention.").

⁴⁶¹ Counter Memorial, ¶ 256.

⁴⁶² See *infra* Section VI.B-VI.C.

⁴⁶³ **Exhibit CL-001**, TPA, art. 10.28 ("the commitment of capital or other resources") (emphasis added) (hereinafter "TPA"). See also **Exhibit CL-141**, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, ¶ 123 ("an injection of funds is by no means the only way."); **Exhibit CL-143**, *Mobil Corporation, et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 198 ("It should also be added that the Treaty contains no requirement that the origin of the capital be foreign. Nor does general international law provide a basis for imposing such a requirement."); **Exhibit CL-102**, *Bernhard Friedrich Arnd Rüdiger Von Pezold, et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 288 ("There is no origin of capital requirement in the BITs or under the ICSID Convention; therefore this objection is also dismissed.").

identifying potential development opportunities, conceptualizing and designing a large-scale luxury real estate project, coordinating marketing and sales, obtaining financing, training employees, managing construction, and acting as an operator upon completion of the project.⁴⁶⁴ It is also not in dispute that Mr. Seda contributed these resources beginning in 2009 with the establishment of Royal Realty and had thus made these contributions for approximately seven years as of the date of Colombia's unlawful measures. Tribunals have consistently recognized such activities to constitute a contribution of "other resources."⁴⁶⁵

b. Claimants Assumed Risk

177. Colombia accepts that if Claimants have made a contribution of capital or other resources, they will necessarily have assumed investment risk but nevertheless contends that

⁴⁶⁴ See, e.g., Memorial, ¶¶ 84, 105.

⁴⁶⁵ See **Exhibit RL-105**, *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018, ¶¶ 253, 258 (finding that claimants' contribution of "marketing and real estate development experience" was sufficient to qualify as a protected investment). See **Exhibit CL-144**, *Mason Capital L.P. (U.S.A.) and Mason Management LLC (U.S.A.) v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections, 22 December 2019, ¶ 207 (finding that claimant's contribution of "decision-making, management and expertise constitutes a commitment of 'other resources'"). See also **Exhibit CL-145**, *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 36 (considering the definition of investment under the France-Dominican Republic BIT and finding jurisdiction *ratione materiae* when an investment—shares in a corporation—was purchased for just USD 2, a nominal price the tribunal described as "a normal kind of transaction the world over where there are other interest and risks entailed in the business," which risks would be addressed at the merits phase); **Exhibit CL-146**, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009, ¶¶ 430-31 (rejecting "Respondent's argument that an 'Investment,' to qualify under the ECT, requires an injection of foreign capital" and finding jurisdiction where the investment was paid for with promissory notes that were themselves to be funded by future operations of the business in the host State).

Claimants have not incurred risk.⁴⁶⁶ As shown above, Claimants made monetary and non-monetary contributions and therefore assumed concomitant investment risk,⁴⁶⁷ which renders this argument moot.

178. Claimants’ risk, moreover, extended beyond ordinary commercial risk. Their investment in Newport and Luxé SAS respectively was an equity investment contingent on the success or failure of the Meritage Project and Luxé. Claimants therefore assumed the risk that they would not receive an amount equal to or greater than their invested capital. In addition, Mr. Seda’s investment of know-how was also contingent on the success of these developments, as well as his project pipeline.⁴⁶⁸ In each case, the Claimants assumed investment risk with the expectation of gain or profit (an investment characteristic expressly included in the TPA but ignored by Colombia).⁴⁶⁹

C. The Claims Directly Relate To Colombia’s Unlawful Measures

179. Colombia claims that the “*vast majority of Claimants’ claims do not concern the Meritage Project*” and that any claims unconnected to the Meritage Project should be dismissed.⁴⁷⁰ While it is not completely clear, Colombia appears to argue that the Claimants who did not

⁴⁶⁶ See Counter Memorial, ¶ 262 (“*In other words, the Claimants have failed to demonstrate a contribution or commitment of capital or resources, as a corollary the investment risk requirement is also not satisfied.*”). See also Counter Memorial, ¶ 261.

⁴⁶⁷ See *supra* ¶¶ 175-176.

⁴⁶⁸ See **Exhibit CL-144**, *Mason Capital L.P. (U.S.A.) and Mason Management LLC (U.S.A.) v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent’s Preliminary Objections, 22 December 2019, ¶ 222 (finding that the claimant “*share[d] in the downside by having rendered its services in vain and without receiving any consideration*”)

⁴⁶⁹ See *supra* ¶ 166.

⁴⁷⁰ Counter Memorial, ¶¶ 263-66.

invest directly in the Meritage Project do not fall within the Tribunal’s jurisdiction.⁴⁷¹ This misses the point and conflates the distinct *ratione materiae* and *ratione personae* jurisdictional requirements under the TPA.

180. As a preliminary matter, the TPA provides that it “*applies to measures adopted or maintained by a party relating to*” qualifying investors and investments.⁴⁷² The measures at issue in this Arbitration consist of, *inter alia*, Colombia’s unlawful treatment of the Claimants’ investment in the Meritage Project and Luxé. As set out in Claimants’ Memorial, despite being well aware of Claimants’ investments in the near-complete Luxé project, and thus understanding that Luxé “*stood directly or indirectly in the line of fire,*”⁴⁷³ Colombia did not take any steps to minimize or mitigate the possibility of harm that was unleashed on Luxé as a direct result of the Asset Forfeiture Proceedings against the Meritage Project.⁴⁷⁴ Indeed, representatives of Colombia’s Attorney General’s Office have willingly acknowledged that the State’s actions irrevocably wrecked Mr. Seda’s reputation, leaving Luxé with no opportunity to progress.⁴⁷⁵ Thus, as pled by Claimants in their Memorial, Colombia’s measures constituted a separate and independent breach of its obligations to Claimants’ investments in the Luxé Project.⁴⁷⁶

⁴⁷¹ Counter Memorial, ¶ 265.

⁴⁷² **Exhibit CL-001**, TPA, art. 10.1.

⁴⁷³ **Exhibit CL-089**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 279.

⁴⁷⁴ Memorial, ¶ 459.

⁴⁷⁵ See, e.g., **Exhibit C-322**, Audio Transcript, 24 January 2020, p. 10 (“*SEDA: [...] every financial institution thinks we are criminals. Because even so, with all of the news, doubt will remain. SALAZAR: Yes; NOGUERA: Yes, of course, of course.*”).

⁴⁷⁶ Memorial, ¶¶ 455-59.

181. There is, of course, a “*direct connection*” between Colombia’s actions, which eviscerated the value of Luxé, and the Claimants who invested in Luxé.⁴⁷⁷ And, as established above and in the Memorial, the Tribunal indisputably has *ratione personae* jurisdiction over all Claimants, including those who invested only in the Luxé Project.⁴⁷⁸ Accordingly, the dispute before the Tribunal is properly within the scope of the TPA.
182. Colombia’s arguments in this respect relate not to the Tribunal’s jurisdiction but to whether the TPA’s substantive requirements of causation have been met. That question, however, is more appropriately reserved for the merits and is discussed at length below.⁴⁷⁹ At the jurisdictional phase, all the Tribunal should consider is “*whether there was a relationship of apparent proximity between the challenged measure and the claimant or its investment,*” and “[i]n doing so, the tribunal should ordinarily accept pro tem the facts as alleged.”⁴⁸⁰

⁴⁷⁷ Counter Memorial, ¶¶ 265-66.

⁴⁷⁸ See *supra* Sections IV.A-IV.C. See also Memorial, ¶¶ 338-42.

⁴⁷⁹ See *infra* Sections V.C.3 and VI.A.

⁴⁸⁰ **Exhibit CL-147**, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 242. See also **Exhibit CL-147**, *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶¶ 247-48 (finding jurisdiction over claims that the respondent State disadvantaged the claimant by providing a competitor with benefits that made it more competitive than the claimant); **Exhibit RL-071**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶¶ 6.23-6.24 (finding jurisdiction over claims where the respondent State imposed an import alert that made it impossible for claimant’s company to receive contracted products from its factories in Canada and prevented the claimant from carrying on a major part of its business).

D. All Claimants Have Standing In This Arbitration

1. Brian Hass Owns A Protected Investment

183. Colombia alleges that Mr. Hass does not have standing in this arbitration because he structured his investment in Luxé through a family trust.⁴⁸¹ While Colombia raises a number of questions regarding the documents underlying the structure of Mr. Hass' investment, Colombia fails to articulate precisely why these questions are relevant to Mr. Hass' standing. Indeed, they are not.

184. As is clear from the face of the documents, Mr. Hass owns his investment in Luxé through Haystack Holdings LLC, a company incorporated in the Island of Nevis.⁴⁸² Mr. Hass, together with his wife, owns and controls Haystack Holdings LLC through the Hass Family Investment Trust ("**Hass Trust**"),⁴⁸³ a private trust of which he and his wife are both settlors and sole beneficiaries.⁴⁸⁴ Mr. Hass and his wife are the ultimate beneficial owners of the assets in the Hass Trust.⁴⁸⁵ Mr. Hass has further been granted a power of attorney to act as

⁴⁸¹ Counter Memorial, ¶¶ 275-77.

⁴⁸² **Exhibit C-360**, Certificate of Good Standing of Haystack Holding LLC, 11 January 2020.

⁴⁸³ **Exhibit C-361**, Membership Certificate of Haystack Holdings LLC, 2 March 2005.

⁴⁸⁴ **Exhibit C-362**, Trust Agreement of the Hass Family Investment Trust, 15 November 1999, p. 56 ("*the Settlers shall be deemed as the sole Beneficiaries of this Settlement such that the Trustees (subject to the Trustees' absolute and complete discretion) shall make such distributions of the income and/or principal of this Settlement for the benefit of the Settlers as the Settlers may from time to time jointly request in writing.*")

⁴⁸⁵ **Exhibit C-222**, Letter from The Private Trust Corporation Limited, 4 October 2018. *See also* **Exhibit C-362**, Trust Agreement of the Hass Family Investment Trust, 15 November 1999, arts. III(A)(5) (granting Settlers the power to amend the Hass Trust as they deem necessary and appropriate), III(D) (granting Settlers the power to withdraw all or any property from the Hass Trust or to revoke the Hass Trust).

attorney-in-fact in relation to the Hass Trust’s interest in Haystack Holdings and Luxé S.A.S.⁴⁸⁶

185. Colombia raises a number of questions regarding the powers and rights Mr. Hass has in connection with the trust.⁴⁸⁷ But it is “*uncontroversial*” that “*the dominant position in international law grants standing and relief to the owner of the beneficial interest*” in an entity.⁴⁸⁸ As the ultimate beneficiary, settlor, and attorney-in-fact of the Hass Trust, Mr. Hass “*enjoy[s] ultimate control over the trust assets and [. . .] will ultimately enjoy or suffer, as the case may be, the fortunes of the trust assets.*”⁴⁸⁹ Mr. Hass is therefore a protected investor who has made a protected investment.

2. Boston Enterprises Trust Has Standing Before This Tribunal

186. Colombia argues that the Boston Enterprises Trust lacks standing because: (i) as a trust, it lacks legal personality to bring a claim; and (ii) it acquired its investment after the dispute arose.⁴⁹⁰ Neither complaint has merit.

⁴⁸⁶ **Exhibit C-363**, Letter from Business Management Limited, 18 January 2021; **Exhibit C-364**, Form of Acknowledgement.

⁴⁸⁷ Counter Memorial, ¶ 277.

⁴⁸⁸ **Exhibit CL-148**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, ¶ 259 (partially annulling the underlying award where the majority held that the claimant was entitled to compensation for portions of the investment in which it only held a nominal interest).

⁴⁸⁹ **Exhibit CL-149**, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017, ¶ 170 (declining jurisdiction over the trustee on the basis that “[t]he party that would come closest to satisfying the requirements of ‘ownership’” would be the beneficiary). See also **Exhibit CL-150**, *James M. Saghi, et al. v. The Islamic Republic of Iran*, IUCST Case No. 298, Award, 22 January 1993 (finding jurisdiction over claimants, even though they did not have nominal ownership over shares of a local company, on the basis that they held beneficial ownership).

⁴⁹⁰ Counter Memorial, ¶¶ 267-74.

187. First, the Boston Enterprises Trust qualifies as a “*national of another Contracting State*” under Article 25 of the ICSID Convention as it is a “*juridical person*” with United States nationality. The ICSID Convention does not define “*juridical person*”.⁴⁹¹ This was a deliberate choice and the Convention’s State Parties wished to delegate the decision of which types of entities can qualify as an investor to the parties to the ICSID arbitration agreement. As Former Chairman Aron Broches noted, in the course of negotiating the Convention, Article 25 “*had been deliberately drafted to take into account the fact that countries might differ in the way their national laws treated partnerships. For that reason, it had been thought desirable to keep the definition as neutral as possible.*”⁴⁹²

188. Tribunals have accordingly held that:

“[T]he requirements and criteria to be fulfilled in order to qualify as a corporate investor shall be those set out in the applicable investment treaties and that there is no scope for importing additional conditions purporting to be based upon Article 25 of the ICSID Convention.”⁴⁹³

189. Here, the parties mutually agreed to expressly include “*trust[s]*” as a form of “*enterprise*” and “*entity*” which is “*constituted or organized under applicable law*” and entitled to treaty

⁴⁹¹ **Exhibit CL-139**, *Abaclat and Others (formerly Giovanna A. Beccara and Others) v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 417(ii). See also **Exhibit RL-129**, Christoph Schreuer, THE ICSID CONVENTION: A COMMENTARY (2009), ¶ 689.

⁴⁹² **Exhibit CL-137**, History of ICSID Convention, Volume II-1, 2019, p. 359. Chairman Broche’s remark was in response to a query from the delegate of Panama who noted that “*in his country commercial organizations were not legally considered to be ‘Companies’ unless they possessed juridical personality.*”

⁴⁹³ **Exhibit CL-104**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 196. See also **Exhibit CL-151**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, ¶ 81 (“*the Contracting Parties to the BIT themselves, having under international law the sole power to determine national status under their own law, who decide by mutual and reciprocal agreement which persons or entities will be treated as their ‘nationals’ for the purposes of enjoying the benefits the BIT is intended to confer.*”); **Exhibit CL-142**, *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶ 192 (“*A tribunal would need compelling reasons to disregard such a mutually agreed definition of investment. The Tribunal will not impose additional requirements beyond those expressed on the face of the BIT and the ICSID Convention.*”).

protection under the TPA,⁴⁹⁴ and granted all investors the right to initiate arbitration,⁴⁹⁵ including under the ICSID Convention.⁴⁹⁶ Colombia cannot now retroactively add conditions for corporate nationality in order to limit liability for its unlawful conduct. Indeed, by extending the TPA’s protections—including the right to ICSID arbitration—expressly to “*trusts*,” Colombia and the U.S. clearly considered that trusts must also be capable of bringing an ICSID claim under the TPA, and that the term “*juridical person*” must therefore encompass trusts.

190. The decisions cited by Colombia are inapposite.⁴⁹⁷ In *LESI-DISPENTA*, the tribunal held that the claimant’s claims were inadmissible because the named claimant, a consortium, was not a signatory to the disputed contract and therefore could not enforce rights under the contract.⁴⁹⁸ In *Impreglio*, the claimant sought to bring a representative claim on behalf of the partners in an unincorporated joint venture who were not covered investors.⁴⁹⁹ In contrast, the trustee and beneficiary of Boston Enterprises Trust directly owns an interest

⁴⁹⁴ **Exhibit CL-001**, TPA, arts. 1.3 (“*enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association*” (bold emphasis in original)), 10.28 (“*investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party*” (bold emphasis in original)).

⁴⁹⁵ **Exhibit CL-001**, TPA, art. 10.28 (“*claimant means an investor of a Party that is a party to an investment dispute with another Party*” (bold emphasis in original)).

⁴⁹⁶ **Exhibit CL-001**, TPA, art. 10.16(3)(a) (“*a claimant may submit a claim [...] under the ICSID Convention and the ICSID Rules of Procedure for Arbitration, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention.*”)

⁴⁹⁷ Counter Memorial, ¶¶ 269-70.

⁴⁹⁸ **Exhibit RL-017**, *Conorzio Groupement L.E.S.I. – DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005, ¶ 39.

⁴⁹⁹ **Exhibit RL-018**, *Impregilo, S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶¶ 10, 119.

in Newport and Luxé SAS, and is a covered investor with capacity to act as a claimant in this Arbitration in his own right.

191. Second, the settlor, trustee, and beneficiary of the Boston Enterprises Trust is a United States national [REDACTED],⁵⁰⁰ who has held a continuous interest in Newport since 30 March 2016,⁵⁰¹ and in Luxé SAS since 14 February 2012.⁵⁰² Since 2016 and 2012, respectively, [REDACTED] was a direct shareholder, in his own name, in Newport and Luxé SAS. Accordingly, he has been the uninterrupted direct or indirect owner of these interests since well before the dispute.⁵⁰³ That [REDACTED] has brought his claim through a trust should be of no consequence. Indeed, [REDACTED] transferred his interest to Boston Enterprises Trust because he was fearful of the retaliatory and intimidatory tactics Colombia employed against Mr. Seda and was consequently wary to reveal his name in this Arbitration to Colombian authorities. He therefore restructured his investment in Newport and Luxé SAS through his fully owned and controlled trust so that his identity could remain concealed during the Arbitration. However, in light of the Tribunal's Confidentiality Order, [REDACTED] has consented to revealing his identity on a limited basis. Accordingly, with these documents now available to Colombian counsel and the Tribunal, there can be no doubt that this Tribunal has jurisdiction over Boston Trust Enterprises. Colombia should withdraw its jurisdictional objection on this basis.

⁵⁰⁰ Exhibit C-351, United States Passport of Beneficiary of Boston Enterprises Trust, 9 May 2005; Exhibit C-352, United States Passport of Beneficiary of Boston Enterprises Trust, 17 December 2014.

⁵⁰¹ Exhibit C-227, Newport S.A.S. Share Ledger, 15 January 2019, pp. SP-0005, SP-0014.

⁵⁰² Exhibit C-226, Luxé By The Charlee S.A.S. Share Ledger, 15 January 2019, pp. SP-0003, SP-0025.

⁵⁰³ *See supra* ¶¶ 162-165.

V. COLOMBIA HAS BREACHED FUNDAMENTAL OBLIGATIONS UNDER THE TPA

192. As demonstrated above, Colombia does not dispute the essential underlying facts, and facts these egregious undoubtedly result in liability for the State. Colombia's attempts to shirk liability fail. Below, Claimants set out the basis for and address Colombia's arguments in relation to: (A) its failure to accord national treatment to the Meritage Claimants; (B) its expropriation of the Meritage Claimants' investment; (C) its denial of fair and equitable treatment; and (D) its failure to provide full protection and security.

A. Colombia Breached Its Obligation To Accord National Treatment To The Meritage Claimants And The Meritage Claimants' Investment

193. In their Memorial, Claimants set out that Colombia had violated Article 10.3 of the TPA when it singled out the Meritage Project for Asset Forfeiture Proceedings while leaving intact other properties involving Mr. López Vanegas in the chain of title.⁵⁰⁴ Most notably, Colombia did not then initiate (nor has it since initiated) any proceedings against the other parcel of land—which now belongs to Mr. López Vanegas' half-brother, a Colombian citizen—that was subdivided from the very same parent lot as the Meritage Property (“**Sister Property**”), and which is subject to the very same alleged defects in the chain of title as the Meritage Property.⁵⁰⁵ Colombia does not challenge these facts. Indeed, it avers again and again that once the Attorney General's Office detected this alleged illegality, it had no choice but to instigate asset forfeiture proceedings against the tainted land, conveniently ignoring that if the parent lot was indeed tainted, then the alleged illegalities

⁵⁰⁴ Memorial, ¶¶ 460-65. *See also* Memorial, ¶¶ 324-34.

⁵⁰⁵ *See* Memorial, Appendix F.

were necessarily inherited by the two split parcels, and the forfeiture proceedings should have applied to both the Meritage and Sister Properties. And it is clear that the Attorney General’s Office is aware of the Sister Property and other López properties involving Mr. López Vanegas (“**López Vanegas Property**” or “**López Vanegas Properties**”). Yet, more than five years since initiating the Asset Forfeiture Proceedings against the Meritage Property, Colombia has taken no such measures against the Sister Property, or indeed any other López Vanegas Property. The only difference between the Meritage Property and the other López Vanegas Properties is that the former was to house a multi-million dollar project backed largely by U.S. investors whereas the latter is owned by a Colombian national. This differential treatment of properties under otherwise identical circumstances has no reasonable justification and violates the prohibition against discrimination in Articles 10.3, 10.5, and 10.7(1)(b) of the TPA.⁵⁰⁶

194. Article 10.3 of the TPA provides that Colombia “shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors”.⁵⁰⁷ As Colombia acknowledges, this requires a showing that “(i) a foreign investor, (ii) has received treatment less favourable (iii) than other investors in ‘like circumstances’, and (iv) the different treatment is not justified.”⁵⁰⁸ Colombia does not seriously contest (i) and (ii);⁵⁰⁹ in other words, Colombia does not dispute that it has refused to take any action against other Colombian-owned López Vanegas Properties,

⁵⁰⁶ See *infra* ¶¶ 194, 271, 307 et seq.

⁵⁰⁷ **Exhibit CL-001**, TPA, art. 10.3(2).

⁵⁰⁸ Counter Memorial, ¶ 484.

⁵⁰⁹ See Counter Memorial, ¶¶ 489-91.

including the Sister Property that remains in the hands of the family of López Vanegas’ half-brother.

195. Colombia instead attempts to justify its disparate treatment of the properties on the basis that the Meritage Property had an ongoing development on it, and thus was not in “*like circumstances*” with other López Vanegas Properties.⁵¹⁰ But that is not a basis to find that the properties in question are not in like circumstances. Like circumstances must be assessed in relation to the wrongful conduct in question—here, that conduct is based on the potential that illegally derived funds were used to acquire the property and allegedly illicit transfers of the property to various “front” buyers, not on that the status of development on the property.
196. Colombia also argues that its measures did not harm Claimants’ investments because it would have instituted them anyway.⁵¹¹ But that is the wrong analytical framework. Under the TPA, Claimants were entitled to the same, more favorable treatment Colombia accorded to domestic investors—*i.e.*, the absence of asset forfeiture proceedings. The disparate treatment by itself confers a benefit to the domestic investors and disadvantage to the foreign investor, irrespective of the legal grounds for the measure.
197. Claimants explain below: (i) the Meritage Property is in “*like circumstances*” with other López Vanegas Properties, and most notably with its Sister Property, under the specific circumstances of this case;⁵¹² (ii) Colombia offers no reasonable explanation for its

⁵¹⁰ Counter Memorial, ¶¶ 488-96.

⁵¹¹ See Counter Memorial, Section V.

⁵¹² See *infra* ¶¶ 198-203.

reluctance to prosecute other López Vanegas Properties, which breaches its obligation to accord Claimants’ investment in the Meritage Project national treatment;⁵¹³ and (iii) Colombia’s charge that the disparate application of the Asset Forfeiture Proceedings did not harm Claimants is not relevant to the question of national treatment and is, in any event, incorrect.⁵¹⁴

1. The Meritage Property Was In “Like Circumstances” With Its Sister Property And Other López Vanegas Properties

198. As Claimants explained in their Memorial, the Meritage Property was in “*like circumstances*” with other López Vanegas Properties, especially its Sister Property.⁵¹⁵ Colombia acknowledges that the “*assessment of whether the cases are similar or in ‘like circumstances’ is fact-specific and cannot be carried out in the abstract.*”⁵¹⁶ The specific fact that establishes “*like circumstances*” here is the common ownership of the plots of land by Mr. López Vanegas. The common ownership is shared most closely with the Meritage Project’s Sister Property, as set out in the following chart at Appendix F of the Memorial (which Colombia does not dispute):⁵¹⁷

⁵¹³ See *infra* ¶¶ 198-203.

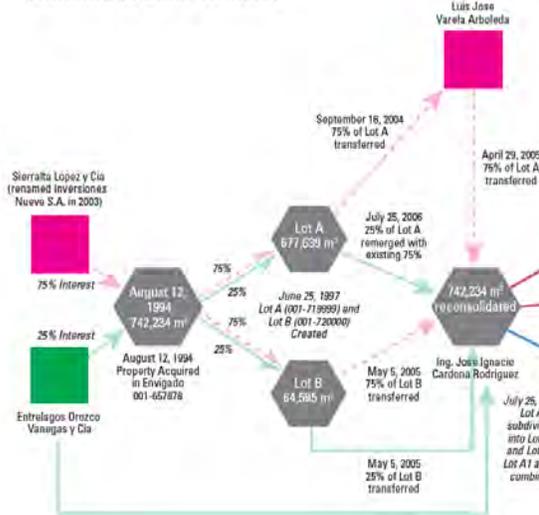
⁵¹⁴ See *infra* ¶ 213.

⁵¹⁵ Memorial, ¶ 465. See also section III.K and Appendix F.

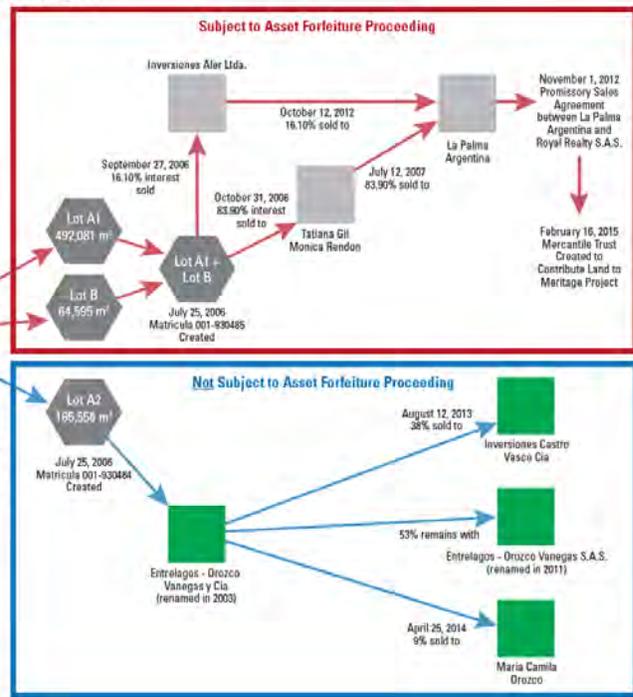
⁵¹⁶ Counter Memorial, ¶ 310.

⁵¹⁷ Memorial, Appendix F. See also Memorial, ¶¶ 324-334.

Timeline of Land Transfer



APPENDIX F



199. Ownership by Mr. López Vanegas is the most salient circumstance in this case for the purpose of comparison because the Attorney General’s Office initiated the Asset Forfeiture Proceedings against the Meritage Project on the basis of its association with Mr. López Vanegas. Colombia submits that the Attorney General’s Office made its Provisional Determination of the Claim in large part based on findings of López Vanegas’ criminal history.⁵¹⁸ Then, in its *Requerimiento*, the Attorney General’s Office asserted that it was pursuing Asset Forfeiture Proceedings against the Meritage Project due to “*the illegal drug trafficking activities displayed by IVAN LÓPEZ VANEGAS, given that the lots [. . .] were acquired as the result of illicit activities on the part of IVAN LÓPEZ VANEGAS during his*

⁵¹⁸ Counter Memorial, ¶ 186 (“*The Provisional Determination of Claim provides [. . .] findings of the Judicial Police and the Attorney General’s Office confirming [. . .] that Ivan López Vanegas was extradited in 2003 to the United States [. . .] [and] as representative of Sierra Alta López y Cia S. en C. [. . .] had acquired respectively 75% and 25% of the Lots [. . .] which after several modifications and mergers correspond to the Meritage Lot[.]*.”)

involvement with criminal activity related to drug trafficking.”⁵¹⁹ The Attorney General’s Office goes on to explain that the Meritage Property allegedly had a “*corrupted history of transfers*” because “[t]he [original] property acquired in the year 1994 [by Mr. López Vanegas] is the product of the illicit activities of the extradited person [i.e., Mr. López Vanegas].”⁵²⁰ Even in this Arbitration, Colombia’s own witness, José Iván Caro Gómez, claims that he pursued the Asset Forfeiture Proceedings against the Meritage Project because of its alleged connection to Mr. López Vanegas.⁵²¹ Thus, if this is a valid basis to pursue asset forfeiture proceedings affecting subsequent good faith purchasers (which it is not), other plots of land originally belonging to Mr. López Vanegas, under Colombia’s own position in this Arbitration,⁵²² should have suffered the same fate as the Meritage Project. They did not. This remarkably includes the Sister Property, which is still owned by Mr. López Vanegas’ family members (presumably for his benefit).

200. Colombia does not dispute the above. Nonetheless, it asserts that this is not enough to establish “*like circumstances*”, calling instead for a showing that the lots were “*competing entities in the same business or economic sector.*”⁵²³ But this is not what the TPA requires. The TPA requires that the foreign and domestic entities be in “*like circumstances*”, the assessment of which (as Colombia accepts) will be “*context dependent and have no*

⁵¹⁹ **Exhibit C-024bis**, Attorney General’s Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, pp. SP-0119 – SP-0120.

⁵²⁰ **Exhibit C-024bis**, Attorney General’s Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, pp. SP-0128 – SP-0129.

⁵²¹ Caro Witness Statement, ¶¶ 13-18.

⁵²² See Counter Memorial, ¶ 314

⁵²³ Counter Memorial, ¶ 490 (internal quotation marks omitted).

unalterable meaning across the spectrum of fact situations.”⁵²⁴ In other words, the choice of a domestic comparator must have a nexus with the challenged measures. Colombia’s actions in this case were not predicated on the nature of the Claimants’ business. Rather, Colombia is emphatic that it acted as it did because 20 years prior, the land had allegedly belonged to Mr. López Vanegas.⁵²⁵ Thus, quite obviously, the appropriate basis of comparison in this case is the ownership of the land, not the business sector for which the land was ultimately used.

201. But even if, on Colombia’s insistence, we were to mechanically employ the factors advanced by Colombia, the result would be the same. That is because tribunals have assessed comparable business or economic sectors in a broad and fact-specific manner in light of the purpose of the national treatment provision to protect foreign investors.⁵²⁶ The *Occidental v. Ecuador* tribunal, for instance, cautioned against the interpretation of the

⁵²⁴ **Exhibit CL-026**, *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, ¶ 75.

⁵²⁵ See, e.g., Counter Memorial, ¶ 154 (“*The totality of the evidence obtained showed that the Meritage Lot had been acquired by Mr. López Vanegas in 1994, and that Mr. López Vanegas had been involved in criminal activities including drug trafficking and had been associated with members of the criminal organization Oficina de Envigado. In other words, the evidence collected by the Asset Forfeiture Unit showed that the Meritage Lot had been acquired using illegal funds.*”). See also Counter Memorial, ¶¶ 140, 314; Caro Witness Statement, ¶ 23 (“*In this particular case, the grounds for asset forfeiture invoked by the Attorney General’s Office are structured on the assets subject to the action, based on the accreditation of the direct link of those assets with the illegal activities engaged in by Mr. Iván López Vanegas and the criminal organization to which he was a member, which used third parties to conceal the illegal origin of the asset. Those illegal activities related to the illegal traffic of narcotics brought Mr. López Vanegas an economic benefit, with which he acquired the assets subject to prosecution in this proceeding.*” (emphases added)).

⁵²⁶ See, e.g. **Exhibit CL-055**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶ 198 (“*As confirmed in S.D. Myers v. The Government of Canada [UNCITRAL, NAFTA Final Award on the Merits (November 13, 2000) para. 251] the domestic entities ‘in like circumstances’ whose treatment should be compared are those firms operating in the same sector, which should be interpreted broadly to include the concepts of ‘economic sector’ and ‘business sector.’*” (emphasis in original)). See also **Exhibit CL-023**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 250 (“*The Tribunal takes the view that the word ‘sector’ has a wide connotation that includes concepts of ‘economic sector’ and ‘business sector.’*”).

term “like situations” “in the narrow sense [. . .] as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.”⁵²⁷ Indeed, the foreign investor “may be compared with less like comparators, if the overall circumstances of the case suggest that they are in like circumstances.”⁵²⁸ Thus, tribunals have frequently taken into account other factors, such as the legal or regulatory regime applicable to the comparators,⁵²⁹ and even the location of the comparators.⁵³⁰

202. This guidance further confirms that the Meritage Property was in “like circumstances” with other López Vanegas Properties, and particularly the adjacent Sister Property, which was subdivided from the same original lot that gave rise to the Meritage Property. Critically, all these properties were supposed to be regulated by the same Asset Forfeiture Law; thus, they were subject to the same legal and regulatory regime. Indeed, Colombia appears to acknowledge that assets subject to asset forfeiture proceedings are in like circumstances as it attempts to argue that its treatment was not discriminatory because it has also instituted

⁵²⁷ **Exhibit CL-036**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 173.

⁵²⁸ **Exhibit CL-055**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶ 202.

⁵²⁹ See, e.g., **Exhibit CL-026**, *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, ¶¶ 83-104; **Exhibit CL-165**, *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 114; **Exhibit CL-166**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, ¶¶ 166–67

⁵³⁰ See, e.g., **Exhibit CL-167**, *Olin Holdings Ltd. v. State of Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018, ¶¶ 151–67.

forfeiture proceedings against *other* properties with purported connections to members of drug cartels (but strikingly not other López Vanegas Properties).⁵³¹

203. Moreover, the Meritage Property and the other López Vanegas Properties are all plots of land in the Medellín area available for purchase and development of real estate projects, and thus qualify as being in the same economic sector. In fact, at least one other plot of land that originally belonged to Mr. López Vanegas is now the site of a multi-million dollar housing development backed by Colombian investors called Quartier,⁵³² the construction and development of which continued well beyond 2016.⁵³³ Units are currently available for purchase by the general public.⁵³⁴ Yet—despite its blatant association with López Vanegas (which can be verified from a quick search of public records generated by Colombia)—Colombia has taken no action against this project.

2. Colombia’s Discriminatory Forfeiture Of The Meritage Property Had No Reasonable Justification

204. Colombia’s differential treatment of the Meritage Project compared to other López Vanegas Properties has no rational justification. Colombia avers that “*once the Attorney*

⁵³¹ Counter Memorial, ¶ 492 (“*in October 2019 more than 380 assets including [. . .] lots were seized due to their connection with members of the criminal organization La Terraza.*”).

⁵³² **Exhibit C-341**, Title Study for Development On Property No. 001-719319, 1 June 2015, pp. 4, 9 (noting that the title study is being performed for the purposes of setting up a fiduciary trust for the Quartier project); **Exhibit C-336**, Certificate of Title of Lot 001-462801, 22 February 2018, pp. 1, 5 (showing Mr. López Vanegas as the owner of Lot 001-462801, which was subdivided into 8 lots, one of which is the Quartier lot, No. 001-719319); **Exhibit C-337**, Certificate of Title of Lot 001-719319, 3 April 2018, p. 1 (showing that the promoter for the Quartier project purchased the property from Mr. López Vanegas).

⁵³³ **Exhibit C-342**, Photographs of Construction of Quartier, 10 September 2021; **Exhibit C-343**, Google Earth Photographs of Quartier, June 2019.

⁵³⁴ **Exhibit C-344**, Quartier Website, available at <https://quartier.com.co/>, last accessed 16 September 2021; **Exhibit C-345**, *Quartier, Studio Apartment In El Poblado, Medellín*, LAHAUS, available at <https://www.lahaus.com/nuevo/quartier/medellin>, last accessed 16 September 2021.

General's Office found evidence of the illicit origin of the Meritage Lot, it had to move forward with the Asset Forfeiture Proceedings."⁵³⁵ It is undisputed that the Meritage Property and its Sister Property share the same parent lot, purchased with the same allegedly tainted funds, which the Attorney General's Office uncovered in the course of the Asset Forfeiture Proceedings.⁵³⁶ Mr. Caro acknowledges that "*all these [lots] that are derived from the property tainted with illegality [. . .] all of these have been tainted by the initial property, because its illicit origin has not been cleaned*" and thus their titles—like the Meritage Property's—"*are considered void ab initio.*"⁵³⁷ Moreover, the Attorney General's Office had found evidence of 47 other properties associated with Mr. López Vanegas in the course of its investigation.⁵³⁸ And Colombia's own records indicate that Mr. López Vanegas currently owns at least four properties.⁵³⁹ Thus, under Colombia's interpretation of its Law, the Attorney General's Office "*had to move forward with the Asset Forfeiture Proceedings*" against the Sister Property, and indeed all other properties currently or previously associated with Mr. López Vanegas (the critical exception being that Colombia had the obligation to investigate and set aside actions against innocent third

⁵³⁵ Counter Memorial, ¶ 314 (emphasis added).

⁵³⁶ **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, pp. SP-0026 – SP-0033.

⁵³⁷ Caro WS, ¶ 24 ("*At present, the property is divided into twelve (12) lots that are derived from the property tainted with illegality, and all of these have been tainted by the initial property, because its illicit origin has not been cleaned, despite the fact that the chain of title has been transferred by different apparent owners, who have not consolidated a real title of ownership over such assets, since the acts or legal transactions that gave rise to the various sales, material divisions and transformations are contrary to the constitutional and legal regime of property, and therefore, those acts that deal with the original property resulting from illegal activities, in no case constitute fair title and therefore are considered void ab initio.*")

⁵³⁸ **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0027.

⁵³⁹ **Exhibit C-281**, Derecho de Petición to Superintendencia of Notary and Registry re Iván López's Properties, 15 May 2020; **Exhibit C-282**, Superintendencia of Notary and Recordation's Response to Derecho de Petición re Iván López Properties, 25 May 2020.

parties, which it also failed to do, as discussed below). Yet neither the Sister Property⁵⁴⁰ nor any other lot associated with Mr. López Vanegas has a pending asset forfeiture action against it,⁵⁴¹ despite Mr. Caro’s remarkable admissions otherwise. Colombia can point to no reasonable explanation for its disparate treatment.

205. Colombia asserts that the “specific circumstances of the Meritage Project called for urgent measures” because the Meritage Property had ongoing development on it and Colombia wanted to “avoid any further negotiations with the units in the lot [. . .] and, thus, protect the buyers of the units.”⁵⁴² This hardly explains why Colombia failed to take measures against other López Vanegas Properties, including the one now hosting the Quartier housing development.⁵⁴³ Indeed, units in this project are currently on sale, yet Colombia appears unconcerned for these buyers.⁵⁴⁴

206. This is but one such development on a former López Vanegas property known to Claimants; there are quite possibly many others. Indeed, it is difficult to imagine that of the more than 50 properties (including the Sister Property, 47 other properties identified by the Attorney General’s Office,⁵⁴⁵ and at least four properties that Mr. López Vanegas

⁵⁴⁰ **Exhibit C-123**, Guzman & Monroy Title Study, 3 March 2014; **Exhibit C-254**, Superintendence of Registry Certificate of Tradition for Lot No. 001-930484, 18 May 2020.

⁵⁴¹ See, e.g., **Exhibit C-252**, Superintendence of Registry Certificate of Tradition for Lot No. 001-1172710, 18 May 2020; **Exhibit C-253**, Superintendence of Registry Certificate of Tradition for Lot No. 001-1172711, 18 May 2020.

⁵⁴² Counter Memorial, ¶¶ 318, 491.

⁵⁴³ See *supra* ¶ 203.

⁵⁴⁴ **Exhibit C-344**, Quartier Website, available at <https://quartier.com.co/>, last accessed 16 September 2021; **Exhibit C-345**, *Quartier, Studio Apartment In El Poblado, Medellín*, LAHAUS, available at <https://www.lahaus.com/nuevo/quartier/medellin>, last accessed 16 September 2021.

⁵⁴⁵ **Exhibit C-022bis**, Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0027.

currently owns as indicated by public records in Colombia⁵⁴⁶), none has since been “*further negotiat[ed]*.” The truth is that Colombia has not even bothered to look. When asked to produce documents relating to investigations “*into properties currently or formerly owned directly or indirectly by Iván López Vanegas other than the Meritage Property*,”⁵⁴⁷ Colombia refused even to list in its Exemption Log—much less produce—any responsive documents.⁵⁴⁸ When ordered to conduct additional searches and produce or log documents responsive to this request, Colombia announced that it had “*conducted additional searches*” but had “*not been able to identify any additional responsive documents*.”⁵⁴⁹ Colombia thus effectively acknowledges that it has refused to pursue any other property formerly or currently associated with Mr. López Vanegas, irrespective of whether that property contains an ongoing or completed real estate development.

207. Moreover, even if the “*specific circumstances of the Meritage Project called for urgent measures*,” this—based on Colombia’s interpretation of the law—only justifies the differential application of precautionary measures on the Meritage Project.⁵⁵⁰ It does not

⁵⁴⁶ **Exhibit C-281**, Derecho de Petición to Superintendence of Notary and Registry re Iván López’s Properties, 15 May 2020; **Exhibit C-282**, Superintendence of Notary and Registry’s Response to Derecho de Petición re Iván López Properties, 25 May 2020.

⁵⁴⁷ Claimants’ Document Request No. 12 (“*All documents relating to the Attorney General Office’s identification of or investigations into properties currently or formerly owned directly or indirectly by Iván López Vanegas other than the Meritage Property, including but not limited to documents relating to Lot No. 001-930484 in Antioquia.*”)

⁵⁴⁸ Procedural Order No. 4, 13 August 2021, Annexes A (request 12) and B. *See also* **Exhibit C-283**, Derecho de Petición re Asset Forfeiture Proceedings re Iván López or Sierralta Properties, 17 May 2020; **Exhibit C-284**, Response to Derecho de Petición re Asset Forfeiture Proceedings re Iván López or Sierralta Properties, 1 June 2020, confirming Mr. López Vanegas continues to own properties in Colombia.

⁵⁴⁹ **Exhibit C-346**, Letter from Respondent to Tribunal, 3 September 2021, p. 13 (“*As regards Requests No [. . .] 12 [. . .] the Respondent has taken note of the Tribunal’s instructions contained in Annex A of PO No. 4, and has conducted additional searches. The Respondent has however not been able to identify any additional responsive documents besides the ones listed in its Exemption Log or already produced.*” (emphasis added))

⁵⁵⁰ In reality, Colombia’s imposition of the precautionary measures separately violated the TPA, as explained below. *See infra* ¶¶ 17-20. *See also* Memorial, ¶¶ 158-207.

explain why, more than five years since Colombia has discovered the alleged source of illegality—Mr. López Vanegas’ former ownership—of dozens of other properties, Colombia has failed to take any action against them. Indeed, it is Colombia’s own position,⁵⁵¹ as well as that of its witnesses⁵⁵² and experts,⁵⁵³ that the Attorney General’s Office has no choice but to pursue asset forfeiture proceedings against properties where illegality in the chain of ownership has been exposed (*except* if the buyer acted in good faith). Yet, Colombia has pointedly refused to lift a finger against López Vanegas’ other properties.

208. So, what makes the Meritage different? Mr. Hernández meekly offers the explanation that Colombia only has “*limited resources and must prioritise assets*” such as Meritage.⁵⁵⁴ This contradicts Colombia’s very own position (and Colombian law) that the Attorney General’s Office is obligated to act when it has evidence of illegality. But even taking Mr. Hernández at his word, it is striking that over five years after the Attorney General’s Office found evidence of illegality in more than 50 other plots of land associated with López Vanegas⁵⁵⁵—four of which he still owns and one of which is the Sister Property—the Office

⁵⁵¹ Counter Memorial, ¶¶ 314 (“*once the Attorney General’s Office found evidence of the illicit origin of the Meritage Lot, it had to move forward with the Asset Forfeiture Proceedings*” (emphasis added)), 355 (“*In fact, by law the Attorney General’s Office is obliged to pursue the Asset Forfeiture proceedings if it finds that an asset has an illegal origin. Failure to do so will entail criminal and disciplinary sanctions.*” (emphasis added)), 495 (“*in light of the findings of the illicit origin of the Meritage Lot, the lot was subject to asset forfeiture and the Attorney General’s Office had the obligation to bring forward the proceedings for the Court to ultimately decide.*” (emphasis added)).

⁵⁵² Hernández WS, ¶ 17 (“*If other lots are found to have an unlawful origin, the corresponding proceedings shall be initiated and, if any flaws are found in this respect within the Attorney General’s Office that correspond to crimes of prevarication, the corresponding sanctions will be applied.*”)

⁵⁵³ Pinilla Report, ¶¶ 37-40; Reyes Report ¶¶ 10-12.

⁵⁵⁴ Counter Memorial, ¶ 319.

⁵⁵⁵ *See supra* ¶ 206.

has taken absolutely no action against any of them. “[L]imited resources” hardly explains such a staggering oversight. Indeed, such oversight should have—in Colombia’s words—“entail[ed] criminal and disciplinary sanctions” for the Attorney General’s Office, yet Colombia has taken no action against these ostensibly delinquent prosecutors,⁵⁵⁶ as verified by Colombia’s Production Under Protest.⁵⁵⁷

209. Colombia invokes the *Al Tamimi v. Oman* case to justify its conduct.⁵⁵⁸ But this case has little bearing to the one at hand. In *Al Tamimi*, the tribunal found that the claimant had not “adduced any objective or quantifiable evidence to show” that the investment was treated in a different manner to domestic operators in like circumstances.⁵⁵⁹ There, the claimants were only able to provide anecdotal information on the other operators.⁵⁶⁰ By contrast, in this case, Colombia’s own records and statements make plain that it has failed to take any actions against other properties formally owned by López Vanegas that Colombia itself had identified during the Asset Forfeiture Proceedings despite Colombia’s assertions that the Attorney General’s Office was required to do so.⁵⁶¹

210. The implication Colombia cannot escape is that what makes the Meritage different is that it presented an opportunity to extort a U.S. real estate developer on a high-profile project;

⁵⁵⁶ See Counter Memorial, ¶ 355.

⁵⁵⁷ See Appendix A and B to Procedural Order No. 4; see also Appendix I to this Reply.

⁵⁵⁸ Counter Memorial, ¶ 493.

⁵⁵⁹ **Exhibit RL-80**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 ¶ 463.

⁵⁶⁰ **Exhibit RL-80**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 ¶¶ 464-67.

⁵⁶¹ See *supra* ¶ 206.

an opportunity enthusiastically seized upon by corrupt members of its Asset Forfeiture Unit whom Colombia has often investigated, yet somehow never caught.

3. Colombia's Measures Negatively Impacted Claimants' Investments

211. Colombia argues that in addition to showing that they received less favourable treatment in like circumstances, Claimants must also show that Colombia's less favourable treatment had a "*practical negative impact*."⁵⁶² But this is objectively false. It is beyond doubt that as a direct result of the Asset Forfeiture Proceedings, the Claimants lost the entirety of their investment in the Meritage Project, and the stigma of the Proceedings in turn resulted in the loss of Claimants' investment in its other development projects. This is patently a "*practical negative impact*".
212. Colombia further argues that the Tribunal should not find Colombia liable because "regardless of the initiation or not [sic] of similar proceedings against other properties, the Meritage Lot would still have remained subject to Asset Forfeiture Proceedings."⁵⁶³ But this misses the point. The question is not what would have happened if national investors would have been treated equally to the Claimants, but how Claimants' investment would have benefited if it had received equal treatment to the similarly situated domestic investors. Here, that means that Claimants were entitled to avoid Asset Forfeiture proceedings on the same basis that domestic investors were so entitled.

⁵⁶² See Counter Memorial, ¶¶ 315, 495.

⁵⁶³ Counter Memorial, ¶ 316.

213. Put differently, applying the Asset Forfeiture Proceedings in a disparate manner by itself constitutes a violation of Article 10.3 because it resulted in the “*less favourable*” treatment of Claimants’ investment. And this less favorable treatment indisputably caused Claimants significant harm (as detailed below).⁵⁶⁴ Indeed, by being free and unencumbered by asset forfeiture proceedings, the Colombian-owned Sister Property and López Vanegas’ other plots received an unfair and disproportionate benefit. This benefit is likewise manifest in the Quartier project that continues unabated.⁵⁶⁵
214. Moreover, Colombia’s position finds no support in the TPA or international arbitration jurisprudence. Article 10.3 of the Treaty does not require a showing of “*practical negative impact*” at all; it merely requires that the treatment be “*less favourable*” in “*like circumstances*.”⁵⁶⁶ And the cases Colombia cites do not help its position.⁵⁶⁷ In *Apotex v. U.S.A.*, the tribunal found no violation of the national treatment clause because the regulatory regime applicable to domestic pharmaceuticals was different from that applicable to foreign ones; thus, the products were not in like circumstances.⁵⁶⁸ As Claimants show above, the Meritage and López Vanegas properties are squarely in like circumstances.⁵⁶⁹ And in *SD Myers v. Canada*, the tribunal found that Canada had violated the national treatment provision by selectively preventing exports to the U.S. by the

⁵⁶⁴ See *infra* Section VI.

⁵⁶⁵ See *supra* ¶ 203.

⁵⁶⁶ **Exhibit CL-001**, TPA, art. 10.3(1).

⁵⁶⁷ Counter Memorial, n. 513.

⁵⁶⁸ **Exhibit RL-71**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, NAFTA, Award, 25 August 2014, ¶¶ 8.40-8.58.

⁵⁶⁹ See *supra* Section V.A.1.

claimant, which violated Canada's obligations under NAFTA.⁵⁷⁰ Despite finding that Canada's measures were consistent with legitimate public policy goals, the tribunal found the State's treatment of the claimants inconsistent with the State's national treatment obligations under NAFTA.⁵⁷¹ Indeed, Colombia has not supplied any examples of tribunals denying a national treatment claim on the basis that the claimant would have suffered the harm anyway.

215. Thus, by pursuing Asset Forfeiture Proceedings solely against the Meritage Project to the exclusion of other López Vanegas properties, Colombia has failed to accord national treatment to Claimants and their investment, as required by the TPA.

B. Colombia Unlawfully Expropriated The Meritage Claimants' Investments

216. As Claimants explained in their Memorial, by initiating and implementing Asset Forfeiture Proceedings against the Meritage Project, Colombia unlawfully expropriated Claimants' investment in the Project. Colombia denies that its actions constitute expropriation under the TPA or that its expropriation was unlawful. Colombia's arguments fail in both respects.

⁵⁷⁰ Exhibit CL-023, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 255.

⁵⁷¹ Exhibit CL-023, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶¶ 241, 255.

1. Colombia Has Indirectly Expropriated The Meritage Claimants' Investments

217. As set out in Claimants' Memorial, Colombia's "*suspension of the power of disposition, attachment, and seizure*" of the Project had "*an effect* [on the Meritage Claimants' investments] *equivalent to direct expropriation.*"⁵⁷² The Meritage Claimants had invested in the Meritage Project by purchasing shares in Newport, which in turn had entered into a Sales Purchase Agreement with the seller of the property, La Palma, to purchase it in phases and build the Meritage Project.⁵⁷³ Separately, in accordance with Colombian law,⁵⁷⁴ Newport had entered into three trust agreements with fiduciary Corficolombiana to manage the flow of funds from Unit Buyers and plots of land from La Palma required for the development of the Project.⁵⁷⁵ These trust agreements ensured that Newport would have access to the necessary funds for the construction of the Project as it met the relevant equilibrium point, and any funds remaining after such costs were covered would accrue to Newport. Additionally, Newport had the "*exclusive responsibility*" of operating the aparta-hotel of the Meritage Project,⁵⁷⁶ which it contracted out in part to Royal Realty.⁵⁷⁷ By February 2015, Newport had met all the contractual requirements to reach the equilibrium point for Phases 1 and 6 of the Project,⁵⁷⁸ and accordingly entered into Deed

⁵⁷² Memorial, ¶ 374.

⁵⁷³ **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012; Memorial, ¶ 61; *supra* ¶¶ 47, 224.

⁵⁷⁴ Martínez 1 Report 1, n. 16.

⁵⁷⁵ Memorial, Section III.B.5; *supra* ¶¶ 27.i, 41.b.

⁵⁷⁶ **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, arts. 1(m), 3.

⁵⁷⁷ Memorial, ¶ 77; **Exhibit C-120**, Management Contract between Newport S.A.S. and Royal Realty S.A.S., 3 December 2013, art. 3.01.

⁵⁷⁸ Memorial, ¶ 89.

361 with La Palma and Corficolombiana to become the beneficial owner of the land associated with these phases and thus begin construction.⁵⁷⁹

218. Colombia put an end to the Meritage Project when it, in its own words, “*haphazard[ly]*” initiated investigations into the property on which the Project was built, based on a fabricated tale about a kidnapping from a known drug trafficker who was enlisting the asset forfeiture process *against the very property he claimed he rightfully owned* as part of an extortion scheme.⁵⁸⁰ It has since become clear that he instigated these proceedings in collaboration with corrupt prosecutors from the Attorney General’s Office.⁵⁸¹ These investigations culminated with Colombia’s imposition of precautionary measures on the Property followed by Asset Forfeiture Proceedings, even though Colombia was made aware of the falsity of the initial allegations and failed to conduct any meaningful review of Newport’s status as a good faith third party.⁵⁸² Indeed, the head of the Asset Forfeiture Unit, Ms. Noguera, and Colombia’s witness, Mr. Hernández, have both expressly affirmed that Newport’s due diligence was beyond reproach and qualified it as a good faith third party.⁵⁸³ Nevertheless, on 25 January 2017, without assessing Newport or Corficolombiana’s good faith, the Colombian Attorney General’s Office issued the Determination of the Claim, ordering the indefinite “*suspension of the power of disposition, attachment and seizure*” of the Meritage Property, including all the structures on it, by the

⁵⁷⁹ Memorial, ¶ 91, Appendix D; **Exhibit C-140**, Deed 361, 12 February 2015; *supra* ¶¶ 27.t, 43, 45.

⁵⁸⁰ Counter Memorial, ¶ 314.

⁵⁸¹ *See supra* **Section III.G.**

⁵⁸² Memorial, Sections III.E.5, V.5.2.e.; *supra* ¶ 302.

⁵⁸³ **Exhibit C-325**, Transcript of Audio File (Part 5), 4 June 2020, pp. 45-46.; *supra* ¶¶ 110, 123-124. *See* **Exhibit C-374**, Audio Transcript, 25 June 2010, p. 3.

Colombian State.⁵⁸⁴ As a result, the Project is dead and Newport’s and Royal Realty’s rights to develop and operate the Project have been extinguished.⁵⁸⁵

219. Colombia largely does not deny taking these actions. Instead, it denies that they constitute expropriation under the Treaty. Specifically, Colombia argues that (i) Claimants’ investments cannot be expropriated because Claimants did not have property rights; and (ii) its actions do not meet the criteria to be considered in assessing whether an indirect expropriation has taken place. Colombia’s challenges fail for the reasons below.

a. The Meritage Claimants’ Investments Are Capable Of Expropriation

220. The TPA provides that the Contracting Parties can only expropriate when a “*tangible or intangible property right or property interest in an investment*” is at issue.⁵⁸⁶ Colombia accepts that “*Newport [and accordingly Claimants] had rights in rem over the Meritage Project*” but avers that Claimants’ rights should be denied because, according to Colombia, Claimants did not have *in rem* rights over the Meritage Property.⁵⁸⁷ This mischaracterizes Claimants’ claim and the TPA’s requirements.

221. As a preliminary matter, Claimants are seeking compensation for Colombia’s unlawful expropriation of their investment in the Meritage Project. This investment was established through purchasing shares in Newport, which had secured rights to develop the Meritage

⁵⁸⁴ **Exhibit C-023bis**, Attorney General’s Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, p. 129.

⁵⁸⁵ Memorial, ¶ 139; *supra* ¶¶ 384, 388. See, e.g., Seda 2 WS, ¶ 91 (“*Royal Realty has nevertheless continued to try and engage investors but, in each case, although investors are interested in our projects they are not willing to associate themselves [with us]*”).

⁵⁸⁶ **Exhibit CL-001**, TPA, Annex 10-B, art. 1.

⁵⁸⁷ Counter Memorial, ¶ 351.

Project. Newport had done so through (i) a Sales Purchase Agreement with La Palma and (ii) trust agreements with Corficolombiana and La Palma to manage the funds and land, which provided that once Newport achieved the equilibrium point for a phase of the Project, the land and funds associated with that phase would transfer to the Administration and Payment Trust of which Newport was the beneficiary.⁵⁸⁸ At the time Colombia imposed the precautionary measures, Newport had achieved the equilibrium point for Phases 1 and 6 and the property and funds associated with those phases had already been transferred into the Administration and Payment Trust. Additionally, Royal Realty had secured contractual rights to manage the aparta-hotel on the Project.⁵⁸⁹

222. Claimants thus had a “*bundle of rights*” associated with their ownership of Newport and Royal Realty: (i) Newport had rights under the Sales Purchase and trusts agreements to develop the Meritage Project; and (ii) Royal Realty had rights to operate the aparta-hotel on the Project. Contrary to Colombia’s position, it is well-settled that contractual rights can be subject to expropriation.⁵⁹⁰ Even the cases Colombia cites concede that a contract

⁵⁸⁸ Memorial, ¶ 370; *supra* ¶¶ 41, 47.

⁵⁸⁹ Memorial, ¶¶ 370-73; *supra* ¶ 217.

⁵⁹⁰ See, e.g., **Exhibit CL-127**, UNCTAD, Expropriation, Series on Issues in International Investment Agreements II, 2012, p. 67 (“*Loss of control is thus a factor that is alternative to destruction of value. It is particularly relevant in situations where the investment is a company or a shareholding in a company. The tribunal noted in Semptra v. Argentina that ‘a finding of indirect expropriation would require [. . .] that the investor no longer be in control of its business operation, or that the value of the business has been virtually annihilated’.* A valuable investment would be useless to the owner if he cannot use, enjoy or dispose of such an investment.”); **Exhibit CL-011**, *Starrett Housing Corporation, et. al. and The Government of the Islamic Republic of Iran, et al.*, Case No. 24, Interlocutory Award, Iran-U.S. C.T.R., 20 December 1983, 23(5) I.L.M. 1090, p. 51 (“*property interest taken by the Government of Iran [included] the right to manage [an apartment construction project] and to complete the construction in accordance with [the agreements] and to deliver the apartments and collect the proceeds of the sales*”); **Exhibit CL-024**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶¶ 98-99 (“*It is also well established that an expropriation is not limited to tangible property rights. As the panel in SPP v. Egypt explained, ‘there is considerable authority for the proposition that Contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore.’ Similarly, Chamber Two of the Iran-U.S. Claims Tribunal observed in the Tippetts case that ‘[a] deprivation or taking of property may occur under international law through interference*

can act “as a source of property rights”⁵⁹¹ capable of expropriation when it “gives rise to an asset owned by the claimant to which a monetary value may be ascribed”.⁵⁹² Thus, Colombia’s acknowledgment that “Newport had rights in rem over the Meritage Project”⁵⁹³ concedes that Claimants had an indirect property right capable of expropriation. Moreover, as a real estate development project, the investment was inextricably bound to the land—thus the land’s seizure also necessarily seized the Project and investments in the Project. It goes without saying that the Project—a massive construction of various buildings—cannot be separated from the land on which it sits.

by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.”); **Exhibit CL-083**, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012, ¶¶ 300-301 (finding that Ukraine’s travel ban “deprived Claimants of access to and control over the essential asset for its investment, i.e., the ship, and thus of Claimants’ contractual rights to use that asset” which “[a]t a minimum [. . .] amounted to an indirect expropriation in that it destroyed the value of Claimants’ contractual rights”); **Exhibit CL-168**, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, ¶ 360 (“pre-lease right” “must be deemed to benefit from the protection against uncompensated State interference”); **Exhibit CL-169**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018, ¶¶ 122, 239; **Exhibit CL-027**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶¶ 603-607; **Exhibit CL-021**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 102-104. See also **Exhibit CL-115**, *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 822 (“[C]ontractual rights may be the subject of an expropriation. In particular, they may be considered as forming an integral part of an investment and the taking of these rights may amount to an expropriation (in whole or in part) of such investment.”); **Exhibit CL-041**, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, ¶ 241 (“There is an amplitude of authority for the proposition that when a State deprives an investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to a deprivation [. . .] The deprivation of contractual rights may be expropriatory in substance and in effect.”); **Exhibit CL-043**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 314 (“Whether contract rights may be expropriated is widely accepted by the case law and the doctrine.”)

⁵⁹¹ **Exhibit RL-77**, *Accession Mezzanine Capital LP and Danubius Kereskedőház Vagyonkezelő Zrt. v. Republic of Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015, ¶ 157.

⁵⁹² **Exhibit RL-67**, *Emmis International Holding et al. v. Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 169. See also **Exhibit RL-135**, Zachary Douglas, *Property, Investment, and the Scope of Investment Protection Obligations* in Z. Douglas et al (ed.) *The Foundation of International Investment Law: Bringing Theory into Practice* 363 (2014), p. 383 (noting that claims to money or rights to future income can be classified as intangible property).

⁵⁹³ Counter Memorial, ¶ 351.

223. Colombia complains that Claimants did not have *in rem* rights over the Meritage Property.⁵⁹⁴ But the Treaty does not limit property rights to those over land—the Treaty is express that any “*tangible and intangible*” property right or interest is capable of expropriation.⁵⁹⁵ *In rem* rights over the Meritage Project squarely satisfy this criterion.
224. But in any event, the Meritage Claimants also had *in rem* rights in the Meritage Property. Newport was the sole beneficiary of the Administration and Payment Trust, which held title to Phases 1 and 6 of the Meritage Property pursuant to Deed 361.⁵⁹⁶ Moreover the Sales Purchase Agreement between Newport and La Palma obliged the latter to transfer of the Property to the *Parqueo* Trust (which was later effectuated by Deed 361), which would then move to the Administration and Payment Trust by phase.⁵⁹⁷ The Meritage Claimants, through Newport, thus had an indirect “*property right*” over the land associated with Phases 1 and 6 and, at a minimum, a “*property interest*” over the plots associated with the remaining phases.

b. Colombia’s Indirectly Expropriated Claimants’ Investments

225. Article 3(a) in Annex 10-B of the TPA recognizes that whether an action constitutes an indirect expropriation “requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action [. . .] (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations;

⁵⁹⁴ Counter Memorial, ¶ 351.

⁵⁹⁵ **Exhibit CL-001**, TPA, Annex 10-B, art. 3(a).

⁵⁹⁶ Memorial, ¶ 91, Appendix D; **Exhibit C-140**, Deed 361, 12 February 2015, Third Transaction; *supra* ¶¶ 43-44.

⁵⁹⁷ Memorial, ¶ 90, Appendix D; **Exhibit C-140**, Deed 361, 12 February 2015, First Transaction; **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012; *supra* ¶ 47.

and (iii) the character of the government action.”⁵⁹⁸ Considering these factors, Colombia’s actions clearly constitute an indirect expropriation of the Meritage Claimants’ investments.

226. First, by instituting the Asset Forfeiture Proceedings, Colombia effectively destroyed the Meritage Project, causing Newport to lose its only source of expected revenue, rendering the company and the Meritage Claimants’ shares in the company valueless.⁵⁹⁹ Colombia argues that “*the Claimants’ purported damages are largely speculative*”.⁶⁰⁰ Colombia is wrong.⁶⁰¹ But in any event Colombia’s complaints with the methodology of the quantification of damages purposes do not impact the question of liability. Colombia also questions whether, in fact, it was the Asset Forfeiture Proceedings that eviscerated Newport’s value, referring again to its arguments in the damages section of its Counter Memorial. But there, Colombia questions only whether its actions caused Claimants’ losses to Claimants’ other projects; Colombia does not dispute that its measures ceased development of the Meritage Project, thus evaporating its value.⁶⁰²

227. Colombia also asserts—without any explanation or evidence—that its measures only had a “*limited and temporary*” adverse economic impact because the “*precautionary measures are temporary*.”⁶⁰³ If only! Colombia’s head-in-the-sand assertion is inconsistent with reality. While the precautionary measures are, in theory, “*temporary*,” the Asset Forfeiture

⁵⁹⁸ **Exhibit CL-001**, TPA, Annex 10-B, art. 3(a).

⁵⁹⁹ Memorial, ¶ 375.

⁶⁰⁰ Counter Memorial, ¶ 353.

⁶⁰¹ See *infra* **Section VI.C**.

⁶⁰² See Counter Memorial, ¶ 353 referring to section V.B. (See, e.g. at ¶ 564: “*The damages claimed by the Claimants in connection with the projects other than the Meritage Project are not compensable.*”)

⁶⁰³ Counter Memorial, ¶¶ 354, 360.

Proceedings that followed it continue to this day and continue to prohibit the development of the Meritage Property. Moreover, the property has been taken on and off Colombia's "early sale" list multiple times, which means it could be sold before the Asset Forfeiture Proceedings even conclude.⁶⁰⁴ Colombia's nonsensical position implies that Mr. Seda could continue building the Project on land seized by the Government, that the Government could have sold at any moment through early sale, and despite a standing order from the State to stop all activity. The fact is that the Meritage Project remains stalled to this day; and even if it could be restarted, the Project has been halted for so long that the Project has long ceased to be economically viable, and development and construction would essentially have to start from scratch (if it could be restarted at all, given the loss of Mr. Seda's credibility as a result of the Measures).⁶⁰⁵ Thus, Colombia's actions have completely and permanently deprived the Meritage Claimants of all value of the investment.

228. Second, the Meritage Claimants reasonably expected that the Meritage Project would be built, unfettered by wrongful interference by Colombia because Newport had conducted extensive due diligence before acquiring the lot, making it a good faith third party. The Meritage Claimants' expectations in this regard were reasonable and well-founded: among other indicia, (i) they had retained one of the most reputable fiduciaries in Colombia and conducted significant diligence on the lot, including (ii) obtaining a certification in writing from Colombia itself that the prior titleholders to the land (dating back to 1955) on which

⁶⁰⁴ See Memorial, ¶¶ 285-288, describing attempts by the Colombian Society of Special Assets ("SAE") to dispose of the Meritage Property followed by its apparent reversal. See also [REDACTED].

⁶⁰⁵ Seda 1, ¶ 152.

the Meritage Claimants intended to build the Meritage Project were not involved in any criminal activity (and the seller had obtained a similar certification in 2007); and (iii) they had retained a respected and experienced specialized law firm to conduct a thorough title study and a study of the seller, La Palma.⁶⁰⁶

229. Colombia's assertions to the contrary have been directly undermined by its own prosecutors in the Attorney General's Office. The Head of the Asset Forfeiture Proceedings Unit at the Attorney General's Office, Ms. Noguera, did not mince words when she told Mr. Seda that "*you undertook all your due diligence with your companies*"; and that the "*certification*" he received means that "*we cannot say that [you were] not*" "*a good faith third party.*"⁶⁰⁷ Similarly, Mr. Hernández, Colombia's witness in this case, repeatedly told Mr. Seda: "*you are a good faith third party.*"⁶⁰⁸ Thus, Colombia's top asset forfeiture officials themselves do not believe the complaints about Mr. Seda's diligence.
230. Nor is the emergence of Mr. López Vanegas in 2014 with his false claims and threats relevant to whether the diligence performed was adequate—they came after the relevant contracts were executed, while diligence must be assessed at the time of the transaction and not based on facts that come to light at some later date.⁶⁰⁹

⁶⁰⁶ Memorial, ¶¶ 60, 72; *supra* ¶ 260.d.

⁶⁰⁷ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 4.

⁶⁰⁸ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 4.

⁶⁰⁹ Medellín 2 Rpt. ¶ 68 ("*If whenever a person who is going to conduct a transaction involving a real property asset, despite having conducted acts of due diligence to become aware of the true status of the asset, fails to find irregularities that are later evidenced by the Attorney General's Office, and it is going to be argued that such conduct was insufficient, then the protection offered to good faith third parties without fault would be meaningless.*").

231. The unvarnished view of Colombia’s own officials is fully endorsed by the Constitutional Court of Colombia, which has found that the due diligence obligation under the Asset Forfeiture Law does not require ‘*inquir[y] into the history or personal details of the party that transfers the respective assets*’ to the party receiving the asset; indeed, requiring the type of diligence Colombia now insists Mr. Seda should have done would “*make[] legal trade difficult or impossible, and also impose[] unreasonable and unsustainable burdens on individuals.*”⁶¹⁰ Colombia’s position thus contradicts the edicts of its highest court.
232. Thus, by conducting due diligence to ensure that the Property was not encumbered by prior criminality, including by receiving from the AML and Asset Forfeiture Unit a Certification of No Criminal Activity for this very purpose, the Meritage Claimants had “*distinct, reasonable investment-backed*” expectations that the same Unit would not seize the Property at a later date on the basis of an alleged criminal in the history of title that purportedly existed at the time of the certification at issue.
233. Third, Colombia accepts that “*it is undisputed that the Asset Forfeiture Proceedings was [sic] a governmental action.*”⁶¹¹ But Colombia rehashes its arguments that the measures were non-discriminatory and for a public purpose, and thus cannot constitute an expropriation. Yet this factor does not call for an inquiry as to whether Colombia’s actions were justified (they were not); rather it simply assess whether they were carried out with the weight of State authority, which the Asset Forfeiture Proceedings indisputably were. In any event, as discussed above, Colombia has applied the Asset Forfeiture Proceedings

⁶¹⁰ Exhibit C-329, Constitutional Court of Colombia, Judgment C-327/20, 19 August 2020, pp. 42-43 (emphasis added).

⁶¹¹ Counter Memorial, ¶ 358.

against the Meritage Project in a blatantly disparate fashion and has not supplied any reasonable explanation for this.⁶¹² Moreover, punishing innocent third parties by condemning their investment while failing to pursue the real proceeds of the crime has no conceivable public purpose, as discussed further below.⁶¹³

c. Colombia’s Conduct Was Not A Legitimate Exercise Of Regulatory Powers

234. Faced with these facts, Colombia attempts to hide behind its “*police powers*”. Colombia claims that its actions do not constitute an expropriation because they were “*a legitimate exercise of Colombia’s regulatory powers.*”⁶¹⁴ Colombia invokes the TPA’s Article 3(b) in Annex 10-B, which provides that:

*“Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”*⁶¹⁵

235. Colombia claims that because the Asset Forfeiture Law was designed to protect a “*legitimate public welfare objective*[]”, the specific Asset Forfeiture Proceedings here should be condoned. But the TPA does not excuse *any* action taken under the pretext of a “*legitimate public welfare objective*[]”; rather, the measure must be a *bona fide* one taken in a “*non-discriminatory*” manner. As detailed above in **Section A.1**, Colombia’s singular action against the Meritage Project while leaving all other López Vanegas properties—which necessarily suffer from the same alleged vice that Colombia attributes to the

⁶¹² See **Section V.A.**

⁶¹³ *Infra* ¶ 242.

⁶¹⁴ Counter Memorial, ¶ 300.

⁶¹⁵ **Exhibit CL-001**, United States-Colombia Trade Promotion Agreement, Art. 3(b), 10-B.

Meritage Property—intact is *de facto* discriminatory. Thus, this exception does not apply here and the Tribunal need not consider this exception further.

236. In any event, the Asset Forfeiture Proceedings were not a bona fide application of the Asset Forfeiture Law. “[T]he police power defense is not a *carte blanche*; a State’s actions must be justified, meet the international standards of due process, and *inter alia* be proportional to the threat to public order to which it purports to respond.”⁶¹⁶ In this case, Colombia’s actions do not meet even the minimum due process standards mandated by international law, as described in **Section V.C.2.d** below. Moreover, the Asset Forfeiture Proceedings lacked any reasonable justification and were not proportionate to the purported needs for public order.⁶¹⁷ The Magyar tribunal, having conducted a review of investment awards on this matter, found that “measures annulling rights of the investor [. . .] can be exempt from the otherwise applicable duty of compensation” only if they fall in “two broad groups”: (a) “measures of police powers that aim at enforcing existing regulations against the investor’s own wrongdoings, such as criminal, tax and administrative sanctions” and (b) “regulatory measures aimed at abating threats that the investor’s activities may pose to public health, environment or public order.”⁶¹⁸ Neither circumstance applies to Colombia’s purported use of police powers here.

⁶¹⁶ **Exhibit CL-172**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award, 23 December 2019, ¶ 230.

⁶¹⁷ *Supra*, ¶¶ 236-238.

⁶¹⁸ **Exhibit CL-168**, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, ¶ 366 (emphasis added).

237. Colombia acknowledges that Claimants did not engage in any wrongdoing.⁶¹⁹ The alleged criminal ties Colombia found in the chain of title of the Meritage Property had no relation to Newport.⁶²⁰ Indeed, at the time that Mr. Seda identified and procured rights to build the Meritage Project on the land, the Attorney General's Office was aware of no criminal activity associated with the land and had certified as much in a letter to Corficolombiana.⁶²¹
238. Additionally, there is no allegation here that the development of the Meritage Project posed any threat to "*public order*," nor can there be. The alleged drug traffickers who had owned the Meritage Property had made the transfers between themselves and done away with the proceeds of their crime long before Mr. Seda found the Meritage Property, and indeed even before La Palma had acquired it.⁶²² The Meritage Project was instead contributing to the economic growth and social stability of a region that had been long plagued by violence and narco-trafficking.
239. Colombia does not deny this. Rather, Colombia invokes the legitimate public welfare purpose underlying the Asset Forfeiture Law more broadly as its justification for pursuing the Asset Forfeiture Proceedings.⁶²³ But while the Asset Forfeiture Law may have been designed with legitimate public welfare objectives in mind, the Asset Forfeiture

⁶¹⁹ See, e.g., Counter Memorial, ¶ 565 ("*The Claimants acknowledge that 'Mr. Seda was not accused of any wrongdoing (and, indeed, he could not be.'*"); ¶ 632 ("*Yet the Claimants themselves acknowledge (as it could be otherwise, given the nature of the asset forfeiture proceedings under Colombian law) that Mr. Seda was not personally accused of any wrongdoing [. . .]*").

⁶²⁰ **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, SP-0118 - SP-0135.

⁶²¹ **Exhibit C-032bis**, Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Fiduciaria Corficolombiana, 9 September 2013, pp. SP-0001 ("*as can be seen in the attached document, there is no evidence of any type of investigation related to this property or its owners in the database of*" the AML and Asset Forfeiture Unit at the Attorney General's Office.)

⁶²² **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, SP-0118 – SP-135. See also Appendix F to the Memorial.

⁶²³ See Counter Memorial, ¶¶ 303-307.

Proceedings against the Meritage Property certainly did not serve that public welfare objective.

i. The Legitimate Public Welfare Objectives Of The Asset Forfeiture Law Were To Fight Organized Crime And Protect Good Faith Third Parties

240. The Parties agree that the objective of the Asset Forfeiture Law was to “fight organized crime through the rejection of wealth originating in illicit activities, such as drug trafficking” with the purpose of ultimately “obtain[ing] social and economic stability in the country.”⁶²⁴ The Parties also agree that the Law was to be applied “subject to the principles and guarantees provided by the Colombian Constitution and law.”⁶²⁵ A critical guarantee enshrined in the Asset Forfeiture Law was the protection of good faith third parties in the implementation of asset forfeiture proceedings: the Law presumes good faith,⁶²⁶ provides that “[a]sset forfeiture shall have as its limit the right to ownership legally obtained in good faith,”⁶²⁷ and requires the Attorney General’s Office to “[s]earch for and collect the proof which makes it possible to reasonably conclude that there is no good faith without fault.”⁶²⁸

241. Indeed, the objective of attaining “*social and economic stability*” cannot be achieved without ensuring that asset forfeiture laws do not target good faith third parties who, through no fault of their own, found themselves with a tainted asset. Without such a

⁶²⁴ Counter Memorial, ¶ 303, *quoting* Medellín 1 Report, ¶¶ 17-18.

⁶²⁵ *See* Counter Memorial, ¶ 301.

⁶²⁶ **Exhibit C-003bis**, Law 1708, 20 January 2014, art. 7.

⁶²⁷ **Exhibit C-003bis**, Law 1708, 20 January 2014, art. 3.

⁶²⁸ **Exhibit C-003bis**, Law 1708, 20 January 2014, art. 118(5).

guarantee, the Law would contravene the axiomatic principle that innocence must be presumed and the innocent may not be punished.⁶²⁹ Thus, Colombian asset forfeiture law—consistent with major asset forfeiture laws around the World—has two principal motivations: (i) prevent persons involved in illicit activities from profiting from their crimes, and (ii) simultaneously protect good faith third parties who unknowingly transact in tainted assets.⁶³⁰

242. The necessary consequence of these objectives is that the Asset Forfeiture Law does not follow *assets* tainted by illegality; it follows *the proceeds of crime*.⁶³¹ Indeed, Article 16(10) of the Law identifies that an asset forfeiture action will be “*inadmissible due to the recognition of the rights of a third party acting in good faith without fault*.”⁶³² In such instances, the Law provides that asset forfeiture should be undertaken against legal assets “*whose value corresponds or is equivalent to that of assets being the direct or indirect product of an illicit activity*” that would have been seized but-for the presence of a good faith third party.⁶³³ In this regard, the Constitutional Court of Colombia recently confirmed that: “*this Court has understood that, to the degree that the aforementioned tool [asset forfeiture] was developed by the constituent [assembly] as a primary tool to combat criminality and illegality through the elimination of the underlying financial incentives to*

⁶²⁹ See e.g., **Exhibit CL-200**, International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (open for signature 19 December 1966; entry into force 23 March 1976), art. 14(2) (“*Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according law.*”).

⁶³⁰ See, e.g., **Exhibit C-003bis**, Law 1708, 20 January 2014, art. 16(10) (an asset forfeiture action will be “*inadmissible due to the recognition of the rights of a third party acting in good faith without fault.*”)

⁶³¹ Martínez 2 Report, ¶ 34; Medellín 2 Report ¶ 60.

⁶³² **Exhibit C-003bis**, Law 1708, 20 January 2014, art. 16(10).

⁶³³ **Exhibit C-003bis**, Law 1708, 20 January 2014, art. 16(11).

*those phenomena, it must be understood to be directed at eliminating the financial benefits inherent to those activities. In this manner, the action goes not so much as suppressing the domain over the assets that are linked to the illegality, but avoiding that this [illegality] becomes an instrument of profit and personal enrichment.*⁶³⁴

243. That is to say, when there is an asset that has been tainted by illegality *but* such asset is in the hands of a good faith third party who acquired the asset without knowledge of the illegality, the asset forfeiture proceeding may not be directed at the asset itself or at the good faith buyer. Rather, as explained by former Attorney General Martínez, who led the Drafting Committee of the Asset Forfeiture Code,⁶³⁵ the proceeding must be focused on disgorgement of ill-gotten profit—the asset forfeiture is directed at other, *even legal (untainted)* assets held by the party that participated in the illegality, not the good faith third party, that are the equivalent value of the tainted asset under question.⁶³⁶ This approach focuses the State on seizing the proceeds that the seller obtained from having sold the tainted asset to a good faith third-party. The Constitutional Court confirmed this understanding in its recent decision, noting that asset forfeiture is appropriate when “*assets [are] acquired through unlawful enrichment, to the detriment of the public treasure or causing serious harm to social morality*’, [as this] *means that the patrimonial benefit for those who have profited from illegal activities is suppressed, and it is this circumstance that*

⁶³⁴ **Exhibit C-329**, Constitutional Court of Colombia, Decision C-327/20, 19 August 2020, p. 37 (emphasis added).

⁶³⁵ Martínez 1 Report , ¶ 6.

⁶³⁶ Martínez 2 Report, ¶ 34 (“*Asset forfeiture seeks to prevent anyone from knowingly profiting from illegality. If there is a good faith buyer without fault, that person’s interest cannot be encumbered; rather, the proper thing to do is to follow the chain of title history backwards to find the illegality and determine who was not a good faith buyer. Once it has been determined who that person lacking in good faith is, the state can take action against the assets of that person to recover the value of the asset the illegality of which has been established.*”)

*allows the extinction of domain over assets”, but “this circumstances is not applicable in the case of third parties who acquire assets that come from a legal source and are going to a legal destination”.*⁶³⁷

244. Simply put, if one person sells a “*tainted*” plot of land to another who acts in good faith and is not aware of the illegality despite reasonable diligence, an asset forfeiture action would not lie against the buyer, or even against the asset itself. The system is not designed to punish the innocent buyer.⁶³⁸ No reasonable system would. Instead, the asset forfeiture would properly be against the proceeds that the seller received from the sale of the asset.⁶³⁹
245. Thus, Colombia’s assertion that illegality attaches to an asset “*independently of who has [it] in a given moment*”⁶⁴⁰ is plainly wrong. If Colombia’s assertion were credited, the concept of good faith third-party status would be devoid of meaning—essentially written out of the statute. If the illegality exists “*independently*” of who is holding the asset, it is meaningless to ask whether the person who is holding it acquired the asset in good faith or what diligence he or she undertook. Of course, that is not what Colombian law provides; Colombian law requires an examination of good faith third party status and actively seeks to protect such persons by exempting them from asset forfeiture altogether.
246. This is also true from an international perspective: several leading States with model asset forfeiture regimes, such as the United Kingdom, Canada, and Australia, specifically titled

⁶³⁷ **Exhibit C-329**, Constitutional Court of Colombia, Judgment C-327/20, 19 August 2020.

⁶³⁸ Martínez 2 Report, ¶ 34 (“*Asset forfeiture seeks to prevent anyone from knowingly profiting from illegality.*”) (emphasis added).

⁶³⁹ Martínez 2 Report, ¶ 34 (“*the proper thing to do is to follow the chain of title history backwards to find the illegality and determine who was not a good faith buyer.*”) (emphasis in original).

⁶⁴⁰ Counter Memorial, ¶ 6.

their laws the “Proceeds of Crime Act” for this very reason.⁶⁴¹ The goal is blocking criminals from enjoying the proceeds of their crimes, not to punish innocent parties. Indeed, were Colombia’s position correct, its Law could not withstand scrutiny under the Colombian constitution or basic precepts of justice and fairness under international law.⁶⁴²

247. Thus, the Asset Forfeiture Proceedings may only be considered a proper use of public powers if they achieved the dual objective of preventing criminals from profiting from the proceeds of crime and protecting innocent parties from wrongful seizures. That standard is not met here.

ii. Colombia’s Asset Forfeiture Proceedings Contradicted The Purpose Of the Law

248. While Colombia notes that its Asset Forfeiture Law was designed to promote public welfare, Colombia does not even attempt to explain how the Asset Forfeiture Proceedings against Meritage purported to achieve this goal. This is because they did not. The Asset Forfeiture Proceedings were a gross misuse of the powers of the State that targeted the

⁶⁴¹ See, e.g., Proceeds of Crime Act 2002, c. 29, § 7(1) (Eng.) (the “*recoverable amount is [. . .] equal to the defendant’s benefit from the conduct concerned.*”) (emphasis added).

⁶⁴² See Medellín 1, ¶ 90 (“*Failure to recognize a person, natural or juridical, as affected in an asset forfeiture proceeding means depriving said person of the opportunity to exercise the right to a defense and to present contrary evidence. This fundamental deprivation results in the denial of each and every constitutionally and legally enshrined right, including those found in international treaties and conventions on human rights ratified by Colombia.*”) (emphasis added). See also **Exhibit CL-200**, International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (open for signature 19 December 1966; entry into force 23 March 1976), arts. 14(2) (“*Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*”) and 15(1) (“*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.*”).

property of good faith third party buyers and left untouched the proceeds of illegal activity identified by Colombia itself. This was clearly contrary to the goals of the Law.

249. As a preliminary matter, there is substantial evidence that Ms. Malagón and Ms. Ardila acted corruptly and collusively with Mr. López Vanegas to initiate these proceedings.⁶⁴³ Mr. López Vanegas' lawyer made express representations to this effect, and Mr. Seda continually received surreptitious messages from someone claiming to be from the Attorney General's Office.⁶⁴⁴ There is no question that Ms. Malagón and Ms. Ardila have been the subject of numerous corruption allegations, including allegations of extorting individuals with the threat of asset forfeiture, as has been amply confirmed by Colombia's Production Under Protest and admissions by officials at the Attorney General's Office.⁶⁴⁵ Both Mses. Malagón and Ardila were investigated, and Ms. Malagón left the Attorney General's Office in 2018; Ms. Ardila was transferred off the Meritage case in 2017, and out of the Asset Forfeiture Unit in 2018 (but still reportedly works at the Attorney General's Office).⁶⁴⁶ Indeed, the former head of the Asset Forfeiture Unit, Ms. Noguera, and Mr. Hernández have acknowledged that Mses. Malagón and Ardila were notoriously corrupt and acted with impunity.⁶⁴⁷

250. Colombia denies that it has found any wrongdoing with respect to Ms. Malagón's and Ms. Ardila's actions in relation to the Meritage Project.⁶⁴⁸ But Colombia has refused to hand

⁶⁴³ See *supra* Section III.G.

⁶⁴⁴ Seda 1, ¶¶ 87, 103.

⁶⁴⁵ Memorial, ¶ 392; Appendix I to Reply; *supra* ¶¶ 105, 112.

⁶⁴⁶ Memorial, ¶¶ 301, 304.

⁶⁴⁷ **Exhibit C-322**, Transcript of Audio File, 24 January 2020, p. 19.

⁶⁴⁸ See Hernández WS, ¶ 11.

over its investigative files—providing only summaries of various investigations. Yet, even these summaries reveal that both Ms. Malagón and Ms. Ardila have been reported multiple times for schemes similar to what Claimants allege occurred here—demanding payoffs from property owners in exchange for not proceeding with—or bringing an end to—asset forfeiture proceedings against their properties.⁶⁴⁹ And Colombia’s treatment of Mr. Seda’s criminal complaints reveals a lack of interest in getting at the truth. They exhibit, for example, (i) no interviews of Mr. López Vanegas, Mr. Mosquera, or Mr. Valderrama with respect to their communications with Mr. Seda or anyone in the Asset Forfeiture Unit, (ii) no apparent scrutiny of how Mr. López Vanegas’ “kidnapping” complaint, filed with the Organized Crime Unit in 2014, suddenly became an active and emergent asset forfeiture case in 2016, just when Mr. López Vanegas re-established contact with Mr. Seda, and (ii) no assessment of how it came to be that precautionary measures were imposed on the Meritage Project just as Mr. López Vanegas’ henchman told Mr. Seda “*the negotiation chapter is closed.*”⁶⁵⁰

251. Thus, Colombia cannot credibly make assertions as to the purported lack of evidence of corruption with respect to the Meritage case, or with respect to Ms. Malagón or Ms. Ardila generally. The only reasonable inference that can be made based on Colombia’s refusal to disclose the relevant documents, its failure to produce Ms. Malagón or Ms. Ardila as witnesses here, and Colombia’s ambiguous statements on this matter is that Colombia knows—as its own officials have admitted to Mr. Seda—that Ms. Malagón and Ms. Ardila

⁶⁴⁹ See Appendix I to Reply.

⁶⁵⁰ **Exhibit C-163**, WhatsApp chain between Angel Seda and Gabriel Valderrama, 25 July 2016 (emphasis added).

acted corruptly with respect to the asset forfeiture proceedings against the Meritage Project, and likely many others. As the former head of the Asset Forfeiture Unit stated:

*“The whole matter of Andrea Malagón and Alejandra Ardila, why it was truly important for the Attorney General’s Office to get to the bottom of the situation with Andrea and Alejandra, is because we know that Andrea committed acts of corruption not just in this, but in other situations, and we need to be able to document it to be able to finally, let’s say, get to the bottom of this subject, because she was a person that enjoyed a lot of trust, so therefore this was more of an institutional issue, let’s say it that way.”*⁶⁵¹

252. Of course, proceedings launched in a corrupt and collusive fashion are not *bona fide* applications of the State’s police powers. On this basis alone, Colombia should be found to have breached its Treaty obligations to Claimants.

253. But even if Mses. Malagón and Ardila did not act corruptly, Colombia has not shown that the Asset Forfeiture Proceedings were a legitimate exercise of regulatory power. Colombia cannot simply purport to act with public purpose. As noted by the ADC tribunal, “[i]f mere reference to ‘public interest’ can magically put such interest into existence [. . .] this requirement would be rendered meaningless.”⁶⁵² But more than five years since it launched the Asset Forfeiture Proceedings, Colombia has not once articulated how these proceedings could have possibly promoted public welfare. Indeed, the very opposite is true. Colombia seized a large-scale real estate development bringing much-needed economic development and stability to the region, funded by U.S. investors who undertook numerous steps to ensure that the land was untainted by illegality including securing an assurance to this effect from the State. And Colombia has refused to go after the other assets or criminal

⁶⁵¹ **Exhibit C-322**, Transcript of Audio File, 24 January 2020, p. 19.

⁶⁵² **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 432.

proceeds of the very criminal Colombia claims infected the chain of title—Ivan López Vanegas.

254. Colombia initiated the forfeiture of the Meritage Project with precautionary measures based on a fabricated story about a kidnapping based on an unsubstantiated complaint filed by a known drug trafficker.⁶⁵³ Even though the Asset Forfeiture Law expressly requires that “*the rights of third parties acting in good faith without fault must be safeguarded*” in the application of precautionary measures,⁶⁵⁴ the Precautionary Measures Resolution makes no mention—much less assessment—of potential good faith third parties who would be affected by the measures. The Attorney General’s Office thus refused to follow the express provisions of the Law, which requires the Attorney General’s Office to “*safeguard*” the “*rights of third parties acting in good faith without fault.*”⁶⁵⁵ Ms. Malagón and Ms. Ardila took such drastic measures not for any legitimate public purpose, but because they were colluding with Mr. López Vanegas to extort Mr. Seda—just like they had apparently done dozens of other times. This also explains the lack of action against Mr. López Vanegas at this (or indeed any other) time.

⁶⁵³ Memorial, ¶ 162; *infra* ¶ 333.

⁶⁵⁴ **Exhibit C-003**, Law 1708, 20 January 2014, art. 87.

⁶⁵⁵ **Exhibit C-003**, Law 1708, 20 January 2014, art. 87. While Colombia’s expert, Dr. Pinilla, apparently agrees with Claimants that “*it is the duty of the Attorney General’s Office to investigate and act with objectivity and impartiality,*” Pinilla asserts “*it is not up to [the Attorney General’s Office] to demonstrate good faith without fault, as it cannot penetrate the human mind to know the motivations for the anomalous conduct.*” Pinilla Report, ¶ 52 (emphasis added). But, “[o]f course, no one has suggested [Colombia] do that;” rather, “*the law requires the complete opposite: to avoid speculation and to focus on objective, concrete and demonstrable evidence of good faith actions. In this case those clear, objective steps taken in good faith in the due diligence process included (among others): (1) engaging a fiduciary subject to strict SARLAFT requirements; (2) conducting title studies through specialized firms; and (3) writing directly to the Attorney General’s Office to consult about the property.*” Martínez 2 Report, ¶ 22. See also Medellín 2 Report, ¶ 73 (“*In addition, recognition of status of a good faith third party without fault requires that the analysis be conducted from their position, not to guess or penetrate the thoughts of the human mind, but to analyze the conduct in which diligent persons in that same position would engage.*”)

255. Even if (*quod non*) Colombia properly proceeded with the precautionary measures, as it became clear that the illegality did not lie with Newport’s purchase of the land from La Palma, but with owners of the Property well before that in the chain of title, starting with Mr. López Vanegas (whose name in fact did not even appear on the chain of title), Colombia should have withdrawn the precautionary measures and the Asset Forfeiture Proceedings and instead pursued the proceeds of crime in the possession of the suspected criminals, not the Project which had no criminal activity associated with it.⁶⁵⁶ As noted by Former Deputy Attorney General Martínez, who was the lead author of Law 1708:

*“[E]ven in the event the asset forfeiture was determined to be appropriate—that is, that there was some illegality in the history of the property—in my analysis, the correct course of action would have been to attach the payment rights (the profits) of the trustee and to identify who was a good faith buyer without fault and who was not.”*⁶⁵⁷

256. This is because:

“[A]sset forfeiture seeks to prevent anyone from knowingly profiting from illegality. If there is a good faith buyer without fault, that person’s interest cannot be encumbered; rather, the proper thing to do is to follow the chain of title history backwards to find the illegality and determine who was not a good faith buyer. Once it has been determined who that person lacking in good faith is, the state can take action against the assets of that person to

⁶⁵⁶ Martínez 2 Report, ¶¶ 34, 35 (“[I]f the funds (the profits) of the trust had been attached, the project could have continued. Once it had been confirmed that Newport was a good faith buyer, all the Attorney General’s Office had to do was to look for the next person in the chain of title, in this case, La Palma Argentina, and assess whether it was a good faith buyer. If it was not, the Attorney General’s Office could then have retained the payments that would have gone to La Palma from the trust. And if La Palma was a good faith buyer, the law requires the analysis to move to the next person in the chain.” Doing so would have been not only the correct, legally required approach, but would have made the most local sense. Here, the conclusion would have been that: “(1) the unit buyers would have paid for their units and would have received them; (2) as a good faith buyer Newport would have paid the seller of the property the amount it owed and would have received it; but (3) the party determined to not have acted in good faith would have not profited from the illegality—the State would have attached those earnings. [. . .] [E]ven in the event the asset forfeiture was determined to be appropriate—that is, that there was some illegality in the history of the property—in my analysis, the correct course of action would have been to attach the payment rights (the profits) of the trustee and to identify who was a good faith buyer without fault and who was not.”).

⁶⁵⁷ Martínez 2 Report, ¶ 34 (emphasis added).

*recover the value of the asset the illegality of which has been established.”*⁶⁵⁸

257. In this case, the application was quite straightforward. Former Deputy Attorney General Martínez explains:

*“[I]f the funds (the profits) of the trust had been attached, the project could have continued. Once it had been confirmed that Newport was a good faith buyer, all the Attorney General’s Office had to do was to look for the next person in the chain of title, in this case, La Palma Argentina, and assess whether it was a good faith buyer. If it was not, the Attorney General’s Office could then have retained the payments that would have gone to La Palma from the trust. And if La Palma was a good faith buyer, the law requires the analysis to move to the next person in the chain.”*⁶⁵⁹

258. Doing so would have been not only the correct, legally required approach, but would have made the most logical sense. Here, the conclusion would have been that: *“(1) the unit buyers would have paid for their units and would have received them; (2) as a good faith buyer Newport would have paid the seller of the property the amount it owed and would have received it; but (3) the party determined to not have acted in good faith would have not profited from the illegality—the State would have attached those earnings.”*⁶⁶⁰

259. Yet Colombia did not then—and has not since—taken any action against the alleged criminal actors involved in the various transfers of the property it claims are tainted. As noted above, Colombia has wholly failed to take any action against Mr. López Vanegas or his current or former properties. Nor has Colombia taken any action to seize or disgorge profits made from transfers of the Meritage Property by those Colombia alleged were guilty of criminal acts.

⁶⁵⁸ Martínez 2 Report, ¶ 34.

⁶⁵⁹ Martínez Second Expert Report, ¶ 35.

⁶⁶⁰ Martínez Second Expert Report, ¶ 35.

260. Colombia does not explain its lack of action against the real criminals in this scheme. Instead, it charges (mistakenly) that Newport and Corficolombiana did not do *enough* diligence to make them good faith third parties.⁶⁶¹ Yet Colombia does not actually deny that:

- a. Newport hired one of Colombia's leading fiduciaries, Corficolombiana, to manage the diligence process.⁶⁶²
- b. Corficolombiana's counsel wrote to the National Anti-Money Laundering and Asset Forfeiture Unit of the Attorney General's Office seeking information of enforcement actions "*against the real properties or their current or former owners,*"⁶⁶³ and obtained a response from the Government that confirmed that there were no criminal actions against or investigations into prior owners of the lot dating back to 1955.⁶⁶⁴ In this respect, the Colombian Government itself gave assurances that there was no reason to be concerned with the chain of title.
- c. Corficolombiana, undertook its own anti-money laundering due diligence, the SARLAFT process, which is a highly regulated process overseen by the Superintendent of Financial Institutions in Colombia.⁶⁶⁵

⁶⁶¹ Counter Memorial, ¶¶ 68, 79.

⁶⁶² Memorial, ¶ 15.

⁶⁶³ **Exhibit C-031bis**, Petition for Information from Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013, p. SP-0002.

⁶⁶⁴ Memorial, ¶ 72.

⁶⁶⁵ Memorial, ¶¶ 63-64.

- d. The prominent law firm of Otero & Palacio performed a title study on the property, which included searching the OFAC sanctions list, the United Nations anti-terrorism list, and conducting public source searches.⁶⁶⁶
- e. The results of Otero & Palacio’s due diligence were confirmed separately by two banks—Colpatria and Banco de Bogotá, both of which gave the property a clean bill of health.⁶⁶⁷

261. Colombia cannot and does not dispute that these diligence steps took place. Instead, Colombia quibbles around the margins—suggesting that each step could have been better or should have been more robust.

262. Colombia’s primary complaint appears to be the length of the 10-year title study by Otero & Palacio. Yet its own expert, Mr. Reyes, acknowledges that title studies are “*usually reduced to the verification of tradition in a period not exceeding 10 years[.]*”⁶⁶⁸ And Colombia cannot point to any law, rule, or regulation that requires a title study spanning longer than 10 years. Instead, Colombia suggests that because there is no limitations period to asset forfeiture actions the study should have gone farther back.⁶⁶⁹ But under Colombia’s theory, we are left to assume due diligence must be *ad infinitum*—to the beginning of the property’s history. This is of course impossible and senseless.⁶⁷⁰

⁶⁶⁶ Memorial, ¶ 67.

⁶⁶⁷ **Exhibit C-030bis**, Otero & Palacio Title Study and Supplement, 7 March 2013 and 23 July 2013.

⁶⁶⁸ Reyes Report, ¶ 62.

⁶⁶⁹ Counter Memorial, ¶ 75.

⁶⁷⁰ Martínez 2 Report (“*First, the standard that Reyes suggests for Newport is that a title study by definition must be ad infinitum; with no time limit whatsoever. That is not reasonable or feasible and does not reflect the commercial practice carried out in Colombia. Secondly, I must point out that there is no law, rule or provision establishing what period of time a buyer must cover in researching the title to a property. Attempting to impose a standard*”

263. In any event, Colombia ignores that while the Otero & Palacio study in particular spanned 10 years, the list of names provided to the Attorney General’s Office for verification of criminal history dated back to 1955—*almost 60 years from the date of the search*.⁶⁷¹ Thus, while it had no obligation to do so, Newport’s diligence spanned well over 10 years and it obtained representations from the Government itself to give it comfort that there was no need to be concerned about the owners on the chain of title.
264. It is also important to note that, despite Colombia’s insinuations to the contrary,⁶⁷² López Vanegas was not on the list because he had taken steps to hide his ownership of the property by changing the name of the entity through which he exercised ownership from Sierralta López to Inversiones Nueve and installing his son as the legal representative of the latter.⁶⁷³ Though López Vanegas’ son’s name was on the list Corficolombiana submitted to the Asset Forfeiture Office, as the then-legal representative of Inversiones Nueve, the Office confirmed that there were no criminal records relating to him.⁶⁷⁴
265. Moreover, Colombia’s quibbles ignore the fact that the title study was *not* the only diligence step that Newport performed; it separately asked the Attorney General’s Office

now—or, even worse, suggesting there is no limit whatsoever—is arbitrary and seems to me to constitute a post hoc rationalization.”).

⁶⁷¹ **Exhibit C-031bis**, Petition for Information from Fiduciaria Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013, p. SP-0006.

⁶⁷² Counter Memorial, ¶¶ 77-78.

⁶⁷³ Memorial, ¶¶ 234, 328. Compare **Exhibit C-031bis**, Petition for Information from Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013, p. SP-0029, with **Exhibit C-225**, Certificate of Existence and Representation - Inversiones Nueve S.A., 7 November 2018. See also **Exhibit C-079**, Letter from L. Maria Carvajal Velez to Sierralta López y CIA S. En C., attaching 9 September 2003 Deed 2379, 14 October 2003; **Exhibit C-075**, Deed 1668, 26 August 1998. The name of Entrelagos Orozco Vanegas was also changed slightly, to Entrelagos-Orozco Vanegas. See **Exhibit C-212**, Certificate of Existence and Representation - Entrelagos Orozco Vanegas S.A.S., 24 April 2018.

⁶⁷⁴ **Exhibit C-031bis**, Petition for Information from Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013.

for information on asset forfeiture proceedings in particular, relied on Corficolombiana’s SARLAFT and OFAC checks, etc. Thus, Newport did not review the diligence results it was receiving in isolation. Rather, each diligence piece—the various title studies, the sanctions checks, the SARLAFT process, the Attorney General’s certification—fed into an overall assessment of the suitability of the Meritage Property. A reasonable person reviewing all of these pieces of information, all which concurred that there were no known issues with the property, is entitled to proceed in good faith. That Newport’s due diligence was reasonable and appropriate has been confirmed by Colombia’s agents themselves.

266. First, Colombia’s highest court has confirmed Newport and Corficolombiana were under *no* legal obligation to perform diligence on the individuals on the chain of title (though they did so anyway). Their diligence undertaken in good faith, by definition, exceeded what the law required and the Constitutional Court has mandated.

*“[T]he good faith and diligence that may be required of third-party acquirers refer exclusively to assets that are the object of a legal operation, but not to those persons who transfer domain over them. In fact, when someone intends to acquire an asset, it is up to that person to ascertain the legal status of such asset in order to establish the history and the chain of title and tradition, but not to inquire into the history or personal details of the party that transfers the respective assets to him, especially when in many cases the transfer occurs when the State itself has not been able to prove or penalize the perpetration of illegal activities.”*⁶⁷⁵

267. To be sure, the Constitutional Court specifically rejected the notion that a party conducting diligence would have to:

“[S]tudy the titles to assets, but also to perform meticulous investigations into the legal past of the sellers, into any legal disputes they may be involved in in different jurisdictions, into the investigations and enquiries carried out

⁶⁷⁵ **Exhibit C-329**, Constitutional Court of Colombia, Judgment C-327/20, 19 August 2020, pp. 42-43 (emphasis added).

by the Prosecutor's Office in which they could be involved, and even into opinions about said sellers in their communities and on social media.”⁶⁷⁶

268. Second, the former Head of the Asset Forfeiture Unit of the Attorney General's Office, Ms. Noguera, and Colombia's witness, Mr. Hernández, have both acknowledged that Newport's diligence was exemplary—there was nothing more it could do. Both these prosecutors affirmed repeatedly that under any reasonable standard, Newport was a good faith third party. Ms. Noguera stated:

“But, what's the issue there? It's the issue of the certification, that you undertook all your due diligence with your companies and all of that. Right? And the same for doctor Sintura and Corficolombiana. Then, there, there is, there is [. . .] let's say, a good-faith third party, and we cannot say that there was not.”⁶⁷⁷

269. Likewise, Mr. Hernández told Mr. Seda point-blank: *“you are a good faith third party.”⁶⁷⁸*

He also noted the absurdity of Colombia's position to the contrary:

“If you can, for example, explain [to the Arbitrators] the process of asset forfeiture, because not even we, as Colombians, understand it[.] How do you explain to them that, at the end, this man did everything he had to do, performed his checks—what he didn't do was ask the drug dealer: ‘Hey, Mr. Drug Dealer, come here. Was this yours?’ That's the only thing you could have done.”⁶⁷⁹

270. Thus, Colombia's very own authorities recognize that the Meritage Project was built on the basis of more than sufficient due diligence and that Newport was a good faith third party that should not have been targeted by this proceeding. Thus, by acting in a corrupt

⁶⁷⁶ Exhibit C-329, Constitutional Court of Colombia, Judgment C-327/20, 19 August 2020, pp. 42-43.

⁶⁷⁷ Exhibit C-324, Transcript of Audio File (Part 2), 4 June 2020, p. 4.

⁶⁷⁸ Exhibit C-324, Transcript of Audio File (Part 2), 4 June 2020, p. 4.

⁶⁷⁹ Exhibit C-325, Transcript of Audio File (Part 5), 4 June 2020, pp. 45-46.

manner to pursue the assets of parties the Attorney General's Office acknowledged were innocent instead of those that were suspected of criminal activity, and then refusing to acknowledge and protect Newport as a good faith third party, Colombia's actions failed to comply with Colombian law and failed to accomplish any legitimate regulatory goals. Accordingly, Colombia's police power defense must fail.

2. Colombia's Expropriation Was Unlawful

271. Colombia agrees that, to be lawful, an expropriation must satisfy all four criteria listed in Article 10.7 of the TPA:

“No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation ... except

(a) for a public purpose

(b) in a non-discriminatory manner

(c) on payment of prompt, adequate and effective compensation; and

(d) in accordance with the due process of the law and Article 10.5.”⁶⁸⁰

272. In other words, if the expropriation fails any one of the four prongs of the standard, it is unlawful. Colombia does not dispute that it has failed to pay any compensation to Claimants; thus, its expropriation is unlawful.⁶⁸¹ While the Tribunal does not need to undergo further analysis of the other prongs, it is also clear that Colombia's conduct also violated factors (a), (b), and (d) of Article 10.7. Colombia's defenses lack merit.

⁶⁸⁰ **Exhibit CL-001**, TPA, art. 10.7.

⁶⁸¹ See Counter Memorial, Section IV.A.2. **Exhibit CL-202**, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Interim Decision, 17 January 2017, ¶ 147 (favorably citing proposition that “the requirement of compensation was one of the necessary conditions for an expropriation to be ‘lawful.’”).

a. Colombia Has Failed To Pay Prompt, Adequate, And Effective Compensation

273. Colombia does not deny that it has not paid a cent to Claimants. It defends this decision by claiming that its “*measures were of general application*” and “*not abusive, unreasonable or discriminatory.*”⁶⁸² Colombia’s measures here, of course, were not of general application,⁶⁸³ and they were abusive, unreasonable and discriminatory.⁶⁸⁴ But even if Colombia’s measures were *bona fide*, this by itself does not excuse Colombia from payment. The Treaty is express that any expropriation must be accompanied with compensation to be lawful. This requirement does not disappear if the measures are otherwise *bona fide*. As noted by the *Magyar* tribunal, “*creating an unqualified exception from the duty of compensation for all regulatory measures would be hardly compatible with the language of non-expropriation provisions of investment treaties [. . .] which require compensation for direct and indirect expropriation even if the measures at issues are for a public, purpose, non-discriminatory and compatible with due process of law.*”⁶⁸⁵ Indeed, such a blanket exception “*would create a gaping loophole in international protections against expropriations,*” particularly where the treaty—as here—expressly requires “*prompt, adequate and effective compensation*” for any expropriatory measures.⁶⁸⁶

⁶⁸² Counter Memorial, ¶ 287.

⁶⁸³ See *supra* Section V.A.

⁶⁸⁴ See *supra* Section ii; see also *infra* Section V.C.2.

⁶⁸⁵ **Exhibit CL-168**, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, ¶ 364 (emphasis added).

⁶⁸⁶ **Exhibit CL-173**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, ¶ 99, **Exhibit CL-064**, Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, in THE FUTURE OF INVESTMENT ARBITRATION (2009), p. 186; **Exhibit RL-61**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November

Thus, by failing to compensate Claimants for the loss of their investment in the Meritage Project, Colombia has breached the TPA.

b. Colombia's Expropriation Was Discriminatory

274. In Section V.A.2 above, Claimants have shown that the expropriation was discriminatory. The standard for discrimination is not substantially different from that for national treatment;⁶⁸⁷ in fact, the former is broader. As Colombia notes, the discrimination standard requires a showing that that “(i) similar cases are (ii) treated differently (iii) and without reasonable justification.”⁶⁸⁸ Colombia further acknowledges that this is a fact-specific inquiry.⁶⁸⁹ Colombia also notes that the determination of whether the comparators are similarly situated depends on the “policy objective” of the measure.⁶⁹⁰
275. Colombia declares that the objective of the Asset Forfeiture Proceedings was to “fight organized crime through the rejection of wealth originating in illicit activities, such as drug trafficking” with the purpose of ultimately “obtain[ing] social and economic stability in the country.”⁶⁹¹ Here, Colombia alleges to have determined that Mr. López Vanegas’ criminal activities infected the title of the Meritage Property. Thus the 47 other properties the

2012, ¶ 3.11. See also, **Exhibit CL-174**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, NAFTA, Award, 16 December 2002, ¶ 105.

⁶⁸⁷ Colombia appears to agree as it uses national treatment language in the elucidation of the discrimination standard. See, e.g., Counter Memorial, ¶¶ 310-13, discussing the existence of “like circumstances” in the context of finding discrimination under the expropriation provision.

⁶⁸⁸ Counter Memorial, ¶ 309, citing **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 313.

⁶⁸⁹ See Counter Memorial, ¶ 310.

⁶⁹⁰ See Counter Memorial, ¶ 311, citing **Exhibit CL-068**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 206.

⁶⁹¹ Counter Memorial, ¶ 303, quoting Medellín Expert Report 1, ¶¶ 17-18.

Attorney General's Office identified as being associated with Mr. López Vanegas López,⁶⁹² and in particular the Sister Property, were similarly situated with the Meritage Property, as they all shared the same alleged taint of being acquired with criminally-derived funds. Yet, despite identifying the other López Vanegas Properties, Colombia has not initiated asset forfeiture proceedings against any other López Vanegas Property. Colombia's attempts to justify this differential treatment—even if (quod non) there had been an urgency to impose precautionary measures on the Meritage Project because of the development—do not explain why other López Vanegas Properties have suffered no consequences more than five years since the Attorney General's Office learned of Mr. López Vanegas' criminal connections and landowning status. What is more, at least one other López Vanegas Property now has a thriving real estate development, Quartier, on it, the units of which are currently on sale.⁶⁹³ Colombia has clearly acted in a discriminatory manner in relation to the Meritage Claimants' investment.

c. Colombia Did Not Expropriate For A Public Purpose

276. As detailed in **Section V.B.1.c.ii** above, Colombia's actions failed to achieve its stated public purpose. To demonstrate a valid public purpose, Colombia must (i) identify the purpose; and (ii) demonstrate that a reasonable nexus exists between the expropriatory

⁶⁹² See **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0027.

⁶⁹³ *Supra* ¶ 203; **Exhibit C-344**, Quartier Website available at <https://quartier.com.co/>; **Exhibit C-345**, LaHaus website available at <https://www.lahaus.com/nuevo/quartier/medellin>.

measure and the declared public purpose.⁶⁹⁴ Colombia’s identified purpose has not (and cannot) be achieved by the Asset Forfeiture Proceedings against the Meritage Project.

277. Colombia acknowledges that the purpose of the law was to “fight organized crime through the rejection of wealth originating in illicit activities, such as drug trafficking” with the purpose of ultimately “obtain[ing] social and economic stability in the country.”⁶⁹⁵ But Colombia fails to explain how the Asset Forfeiture Proceedings achieved this objective. Indeed, they did not. Under Colombia’s admission, no asset forfeiture action has been taken against the original criminal identified in the scheme—Mr. López Vanegas. Thus, any criminal profits he made and laundered through his ownership in plots of land, including the progenitor of the Meritage Property, remain with him. Instead, Colombia has shut down the Meritage Project, which was creating jobs⁶⁹⁶ and bringing economic and social development and stability to the region, and in so doing also gravely harmed the Unit Buyers, who are indisputably innocent, good faith third parties. The Asset Forfeiture Proceedings have thus obtained the opposite of what Colombia claims its objectives were.

d. Colombia Did Not Expropriate In Accordance With Due Process Of Law

278. Claimants explained in their Memorial that Colombia’s actions violated substantive and procedural due process obligations by initiating the Asset Forfeiture Proceedings (*i*) almost solely on the debunked gossip of a drug trafficker, without any regard for the good faith

⁶⁹⁴ See **Exhibit CL-106**, *Vestey Group Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 296.

⁶⁹⁵ Counter Memorial, ¶ 303, *quoting* Medellín Expert Report 1, ¶¶ 17-18.

⁶⁹⁶ 700 people were working on the construction of the Meritage Project at the time of the seizure. Seda 1 WS, ¶ 96.

status of third parties like Newport, in contravention of the express terms of the Asset Forfeiture Law; and (ii) on the basis of a corrupt scheme in which Colombian Government officials colluded with a known drug dealer to attempt to extort Mr. Seda.⁶⁹⁷ Nothing in Colombia's Counter Memorial undermines these points.

279. First, Colombia does not dispute that it initially imposed precautionary measures on the basis of a two-year old complaint by Mr. López Vanegas, whom Colombia knew at the time was a convicted drug trafficker. Colombia vaguely claims that the Attorney General's Office conducted an "*in-depth investigation*" before imposing the measures,⁶⁹⁸ but a review of the Precautionary Measures Resolution tells another story. The full scope of the evidence submitted in support of the Resolution was Mr. López Vanegas' and his son's complaints, and a review of the legal and administrative documents relating to the chain of title.⁶⁹⁹ In other words, the only testimony that drove the Attorney General's Office—under Ms. Malagón and Mr. Ardila—to halt a multi-million dollar development were the those of a drug trafficker and his son, who is now also alleged to be a drug trafficker. And while Colombia now attempts to portray the basis of the precautionary measures as findings other than the kidnapping fib, the Resolution, executed by Ms. Ardila, itself is clear as it identified "[t]he existence of reasonable grounds supporting precautionary measures" as "*evidence included in the file and which show that the [Meritage Property was] acquired through punishable conduct such as kidnapping, threats, and personal misrepresentation*,"

⁶⁹⁷ Memorial, Section V.A.3.b.

⁶⁹⁸ Counter Memorial, ¶ 324.

⁶⁹⁹ Exhibit C-022bis, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0002 – SP-0005.

among others”.⁷⁰⁰ The Attorney General’s Office thus determined it was necessary to seize the Meritage Project “until it [could] be ascertained that the statements by Mr. Ivan López Vanegas are likely true”.⁷⁰¹ Colombia has since acknowledged that the kidnapping story was a lie.

280. Colombia also does not dispute that the Attorney General’s Office conducted absolutely no review of potentially affected good faith third parties before the seizure, as required. Indeed, Ms. Ardila acknowledges its obligation under the Asset Forfeiture Law to “safeguard” good faith third parties prior to imposing precautionary measures,⁷⁰² but did not even consider such parties in her analysis. Rather, she left the possibility open, indicating that at a future date such an analysis may occur—“*as long as the action herein is still in the initial stage [. . .] [the Attorney General’s Office must] refute the presumption of good faith of the parties who may be affected.*”⁷⁰³ She, of course, never did.

281. Shortly thereafter, on 26 September 2016, Corficolombiana filed a request for control of legality (a “*control de legalidad*”) against the precautionary measures. The challenge,

⁷⁰⁰ **Exhibit C-022bis**, Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0084 (emphasis added).

⁷⁰¹ **Exhibit C-022bis**, Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0086 (emphasis added).

⁷⁰² **Exhibit C-022bis**, Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0057 (listing its obligation to “*seek and collect evidence that may lead to a reasonable inference that there has been a faultless lack of good faith.*”; “*the Prosecutor’s Office is obligated to collect evidence that may prove a faultless lack of good faith*”); SP-0058 (“*In seeking its application, in any case, to protect the rights of third parties showing faultless good faith.*”).

⁷⁰³ **Exhibit C-022bis**, Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0064 (noting moreover that “[t]he aim here is to safeguard rights under faultless good faith, which requires the gathering of evidence confirming the preconditions of the legal grounds for forfeiture being invoked” and that “it is not enough to consider the existence of a possible link between the assets being investigated and illegal activities, but rather that broader evidence must be collected to prevent any impact a third party’s good faith rights”).

which went to the First Criminal Court of the Specialized Circuit for Asset Forfeiture of Antioquia (“**First Criminal Court**”) was premised on three principal arguments: (i) that Asset Forfeiture Law required the Attorney General’s Office to assess for potential good faith third parties and, once identified, safeguard their interests;⁷⁰⁴ (ii) that the measures were not necessary, reasonable, or proportional to their end goals, in violation of the Asset Forfeiture Law;⁷⁰⁵ and (iii) that the measures were not adequately tied to a compelling State interest, such as avoiding the property being transferred or destroyed, or stopping its ongoing, illicit use.⁷⁰⁶

282. On 20 October 2016, the First Criminal Court upheld the legality of the precautionary measures.⁷⁰⁷ The court’s decision limited its analysis to whether any of the four narrow bases under Article 112 of the Asset Forfeiture Law were met here.⁷⁰⁸ Such bases, the court held, did not allow it to consider issues such as whether there was a good faith third party harmed by the measures. In fact, the court specifically explained that the control of legality proceeding “*is not the venue to discuss whether FIDUCIARIA CORFICOLOMBIANA S.A. actually is a third party in good faith without fault.*”⁷⁰⁹

⁷⁰⁴ **Exhibit C-043bis**, Corficolombiana’s Control of Legality Petition, 26 September 2016, p. SP-0002 – SP-0004.

⁷⁰⁵ **Exhibit C-043bis**, Corficolombiana’s Control of Legality Petition, 26 September 2016, p. SP-0006 – SP-0007

⁷⁰⁶ **Exhibit C-043bis**, Corficolombiana’s Control of Legality Petition, 26 September 2016, p. SP-0011.

⁷⁰⁷ **Exhibit C-044bis**, Decision by Asset Forfeiture Court Corficolombiana’s Control of Legality Petition, 20 October 2016.

⁷⁰⁸ **Exhibit C-044bis**, Decision by Asset Forfeiture Court Corficolombiana’s Control of Legality Petition, 20 October 2016.

⁷⁰⁹ **Exhibit C-044bis**, Decision by Asset Forfeiture Court on Control of Legality Petition, 20 October 2016, p. 24.

283. Instead, the court held that the measures at issue were reasonable, proportional, and necessary—though it did not conduct a substantive review of the Attorney General’s bases for the measures, essentially accepting their accuracy and truthfulness *prima facie*.
284. Thus, by failing to consider Newport’s (or Corficolombia’s) good faith status, the Attorney General’s Office violated an express precondition of the Asset Forfeiture Law, depriving Claimants of their due process rights.
285. Second, and most critically, Claimants pointed out the glaring red flags indicating that Ms. Malagón and Ms. Ardila were colluding with Mr. López Vanegas to use the Asset Forfeiture Proceedings to extort Mr. Seda. The red flags, among others, include the coincidences in timing between Mr. López Vanegas’ approaches to Mr. Seda and key events in the Asset Forfeiture Unit,⁷¹⁰ Mr. Mosquera and Mr. López Vanegas’ explicit threats to Mr. Seda about asset forfeiture proceedings and their claims to be able to influence Ms. Malagón and Ms. Ardila, and the Asset Forfeiture Unit’s refusal to hand over a copy of the precautionary measures resolution.⁷¹¹ Colombia attempts to brush away the red flags as mere coincidences. But even more evidence that has come to light since Claimants submitted their Memorial—including admissions by Colombia’s own prosecutors and Colombia’s obstinate refusal to disclose relevant investigative materials in this proceeding—undermines Colombia’s protestations and confirms the existence of a nefarious scheme perpetrated by Colombia’s highest asset forfeiture authorities of which Mr. Seda was the victim.⁷¹²

⁷¹⁰ Memorial ¶¶ 135, 136, 139.

⁷¹¹ Memorial ¶¶ 190-93.

⁷¹² *See supra* Section III.G.

286. While Claimants acknowledge that they bear a *prima facie* burden to prove corruption within the Attorney General’s Office, as Colombia itself explained in the *Glencore* arbitration, “[i]n order to avoid making it practically impossible to prove corruption” it is “appropriate [for a tribunal] to connect the dots in the indicia of corruption before it.”⁷¹³ There, Colombia was seeking to prove that Claimants had acted corruptly. The *Glencore* tribunal agreed with Colombia:

“[This method of] ‘connecting the dots’ is nothing else than the time-honoured methodology followed by tribunals in all jurisdictions to establish truth based on indicia or circumstantial evidence: if a party marshals evidence that proves the existence of certain indicia, and it is possible to infer from these indicia (using experience and reason) that a certain fact has occurred, the tribunal may take such fact as established.”⁷¹⁴

287. In that case, the tribunal ultimately did not find that corruption had occurred after the complete and honest disclosure of all required documents by claimants, and based on the reasonable explanations provided by the claimants of activities that Colombia had alleged were suspicious, backed by documentary and testimonial evidence.⁷¹⁵ By contrast, Colombia here has refused to comply with the Tribunal’s orders for production and offers no rebuttal evidence or explanation for the uncanny coincidences; it just flatly denies or minimizes them without more. Colombia does not adduce the testimonies of Ms. Malagón and Ms. Ardila. Colombia acknowledges that there are multiple corruption investigations into these prosecutors but has not disclosed the evidence or results of those investigations

⁷¹³ **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 669 (internal quotation marks omitted).

⁷¹⁴ **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 670. See also **Exhibit CL-091**, *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 231.

⁷¹⁵ **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶¶ 676-738.

except to the extent that they are closed. Moreover, as discussed above, Claimants have now produced incontrovertible admissions by the former head of the Asset Forfeiture Office and Mr. Hernández confirming that foul play was afoot.⁷¹⁶

288. Contrary to Colombia’s representations,⁷¹⁷ Claimants are not asking the Tribunal to act on suspicion. Rather, each indicia advanced by the Claimants is “*substantiated by relevant and probative evidence relating to the specific allegations made in the case before it.*”⁷¹⁸ Having met this threshold, the only available inference is that the Attorney General’s Office acted corruptly in its initiation and prosecution of the Asset Forfeiture Proceedings. Specifically, each of the indicia set out below support a finding of corruption. Simply put, to “connect the dots” the Tribunal need only evaluate the circumstances at issue here, and then listen to the words of the senior Colombian prosecutors who were in charge of investigating the corruption and who have personally seen the investigative files at issue, and have come to the uniform conclusion that “*we know that Andrea [Malagón] committed acts of corruption not just in this, but in other situations.*”⁷¹⁹

289. Coincidences in timing. The timing of key events in the Asset Forfeiture Proceedings and the extortionate threats Mr. Seda received exposes a high degree of coordination between representatives of the Attorney General’s Office and Mr. López Vanegas.

⁷¹⁶ See *supra* Section III.G.2.

⁷¹⁷ See Counter Memorial, ¶¶ 331-33.

⁷¹⁸ Counter Memorial, ¶ 334, citing Exhibit CL-090, *ECE Projektmanagement International GMBH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft MBH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.879 .

⁷¹⁹ Exhibit C-322, Transcript of Audio File, 24 January 2020, p. 19.

290. First, Mr. Mosquera re-initiated contact with Mr. Seda on 7 April 2016, after two years of silence and just a day before Ms. Malagón suddenly re-assigned the case from Prosecutor No. 37 in the Asset Forfeiture Unit to Ms. Ardila.⁷²⁰ And though the resolution appointing her simply directs an investigation into the “*assets held by IVAN LÓPEZ VANEGAS,*” Ms. Ardila immediately set her sights on the Meritage, opening an asset forfeiture case against that property to the exclusion of Mr. López Vanegas’ many other properties.⁷²¹
291. Second, Ms. Ardila signed the Precautionary Measures Resolution on 22 July 2016, and thereafter on 25 July 2016, Mr. López Vanegas’ representatives informed Mr. Seda that “[t]he negotiation chapter is closed”⁷²² after Mr. Seda refused to re-engage with him.⁷²³ Ms. Ardila then seized the Meritage Project just a week later, on 3 August 2016 pursuant to a Certificate of Seizure issued that day.⁷²⁴
292. While Colombia contends that these are mere unreliable “*temporal correlation[s],*”⁷²⁵ this does not seem plausible and becomes even more implausible when these “coincidences”

⁷²⁰ Memorial, ¶¶ 118-20; Counter Memorial, ¶ 519; *supra* ¶¶ 10, 27.w-27.x; **Exhibit C-151**, Letter from Victor Mosquera Marín to Angel Samuel Seda, 7 April 2016; **Exhibit C-153**, Attorney General’s Office Resolution No. 125, 18 April 2016.

⁷²¹ **Exhibit C-153**, Attorney General’s Office Resolution No. 125, 18 April 2016, SP-0001.

⁷²² Memorial, ¶¶ 135-36; Counter Memorial, ¶ 120; *supra* ¶¶ 10, 27.dd-27.ee, 250; **Exhibit C-022bis**, Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016; **Exhibit C-163**, WhatsApp chain between Angel Seda and Gabriel Valderrama, 25 July 2016; **Exhibit C-165**, Certificate of Seizure of the Meritage Property, 3 August 2016.

⁷²³ Colombia suggest that because the Precautionary Measures Resolution was drafted before the exchange between Mr. Seda and Mr. Valderrama, the timing of the precautionary measures is not suspicious. Counter Memorial, ¶ 335. But, of course, this misses the point. While Ms. Ardila had the draft of the Resolution prepared, she chose not to enact it until Mr. Seda had conclusively foreclosed the possibility of any further discussions with Mr. López Vanegas and his associates. Indeed, Colombia otherwise asserts that the Precautionary Measures (for the purposes of triggering the limitations period) do not begin until the “*actual imposition of [] measures.*” Counter Memorial, ¶ 181.

⁷²⁴ Memorial, ¶ 136; Counter Memorial, ¶ 168; *supra* ¶ 27.ee (referencing **Exhibit C-165**, Certificate of Seizure of the Meritage Property, 3 August 2016.)

⁷²⁵ Counter Memorial, ¶ 336 (internal quotation marks omitted).

are viewed in context. During this period, Mr. Seda also met with Mr. López Vanegas and his representatives on several occasions. They explicitly threatened asset forfeiture proceedings against the property if Mr. Seda did not give into their demands, and claimed they could influence Ms. Malagón and Ms. Ardila. Lo and behold, when they were making these threats, Ms. Ardila was “*investigating*” an asset forfeiture proceeding against the Meritage at the direction of Ms. Malagón. If this were all just a coincidence, why did Mr. López Vanegas and his henchmen threaten asset forfeiture proceedings—which they would have had no reason to know had been opened unless someone in the Attorney General’s Office told them—at all? Indeed, why would Mr. López Vanegas want to throw a property he claimed he was the rightful owner of into asset forfeiture proceedings at all? The purpose of such proceedings is not to clarify who the rightful owner of an asset is and restore the asset to such person, rather if the asset forfeiture is ultimately successful, the property goes to the state, not any individual. The only plausible explanation for such a threat is that the asset forfeiture proceedings were a means to extort Mr. Seda that he believed he could control through Ms. Malagón and Ms. Ardila. And indeed, Ms. Mosquera and Mr. López Vanegas’ claims to be able to influence those proceedings continued even after the imposition of precautionary measures, with Mr. Mosquera telling Mr. Seda that Ms. Malagón would declare Newport a good faith purchaser if Mr. Seda paid. Colombia ignores this context, instead, accusing Mr. Seda of inviting the extortion and chastising him for not reporting it to the authorities even though the authorities were an essential part of the scheme.

293. Colombia also ignores that its own witness, Mr. Hernández, a Prosecutor in the Attorney General’s Office who was investigating Ms. Malagón,⁷²⁶ has corroborated that this timing was typical and represented the *modus operandi* adopted by Ms. Malagón and Ms. Polo in the execution of their extortion schemes:

Hernández: “[. . .] *A possible matter of bribery – that they’ve requested money, for example some chats that you and I discussed a few years ago, remember? I used to tell you – they’re managing the extortion disguised as a negotiation.*”

Seda: “Yes.”

Hernández: “*Right? Between Mosquera [. . .]*”

Seda: “*Yes, I provided the emails.*”

Hernández: “*Exactly, between Mosquera and the drug trafficker.*”

Seda: “Yes.”

Hernández: “*And what’s the mechanism for the pressure – because you did not yield to the negotiation, then we go to the Attorney General’s Office.*”

Seda: “Yes.”

Hernández: “*Right? Because if they knew that the asset had, in plain terms, sin, then: ahhh. You didn’t want to negotiate this? Then, wait, and you will see this go into asset forfeiture[.] They sent you messages, indirect messages, to see if you would be open to some kind of arrangement.*”

[. . .]

Hernández: “[. . .] *For instance: in these three cases, we have it determined, the same as yours, and in the other world of cases that we have: Gran Estación, the apparent drug case with Supercondi [. . .]. It looks like it’s the same modus operandi, then you realize that in the end [. . .] in the end, [it’s] extortion.*”⁷²⁷

⁷²⁶ See Hernández WS, ¶ 6; **Exhibit C-374**, Audio Transcript, 25 June 2010, pp. 3-4; Seda 2 WS, ¶ 31.

⁷²⁷ **Exhibit C-324**, Transcript of Audio File (Part 1), 4 June 2020, p. 29 (emphasis added).

294. Accordingly, the coordination in timing is not a mere coincidence and rather represents a high degree of orchestration whereby the Attorney General's Office prepared to initiate Asset Forfeiture Proceedings while Mr. Mosquera concomitantly pressuring innocent third parties to pay a bribe to prevent enforcement.⁷²⁸
295. Extortion attempts. Contrary to Colombia's claims that there is "no evidence" of extortion attempts,⁷²⁹ Claimants have adduced both documentary and testimonial evidence of the extortion threats Mr. Seda received from Mr. López Vanegas and other individuals acting as convoys for the Attorney General's Office.⁷³⁰
296. Colombia's complaints that Mr. Seda did not bring these complaints to the Attorney General's Office until December 2016 are incredulous in light of the fact that this was the very agency that was extorting him. Mr. Seda's predicament, therefore, can be distinguished from *ECE*, where corruption arose from the conduct of bureaucratic officials who would not be the ones investigating any complaint.⁷³¹

⁷²⁸ Exhibit C-374, Audio Transcript, 25 June 2010, pp. 3-4.

⁷²⁹ Counter Memorial, ¶ 436.

⁷³⁰ See Seda 1 WS, sections III.D, IV.B.2, V.A; Seda 2 WS, ¶¶ 5-22. See, e.g. Exhibit C-151, Letter from Víctor Mosquera Marín to Angel Samuel Seda, 7 April 2016.; Exhibit C-156, Email from Víctor Mosquera Marín to Angel Seda and J. Evans, attaching Letter from Víctor Mosquera Marín to James Evans; and Letter from Víctor Mosquera Marín to Angel Samuel Seda, 27 April 2016; Exhibit C-157, Email chain between Víctor Mosquera Marín and Angel Seda, 3 May 2016; Exhibit C-162, Email chain between Víctor Mosquera Marín and Angel Seda, 6 June 2016; Exhibit C-171, Email chain between Angel Seda and U.S. Embassy Bogotá, 2 September 2016; Exhibit C-172, Email from Angel Seda to Elizabeth Garcon, with attachments; Exhibit C-163, WhatsApp chain between Angel Seda and Gabriel Valderrama; Exhibit C-175, WhatsApp chain between Angel Seda and Víctor Mosquera Marín, 26-29 October 2016; Exhibit C-176, Email chain between Angel Seda and Víctor Mosquera Marín, 31 October 2016; Exhibit C-179, Email chain between Michael Burdick and Angel Seda, 1 December 2016; Exhibit C-177, Email chain between Angel Seda and Víctor Mosquera Marín, 10 November 2016; Exhibit C-181, Angel Samuel Seda Complaint, 19 December 2016.

⁷³¹ See Exhibit CL-090, *ECE Projektmanagement International GMBH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft MBH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶¶ 4.391-4.395.

297. In any event, Mr. Seda did go to the authorities he thought he could trust—the U.S. Embassy.⁷³² He also reported the scheme to the Colombian authorities after Mr. Hernández reached out to Mr. Seda for information on Ms. Malagón and Ms. Ardila. After Mr. Seda had verified Mr. Hernández’s credentials, Mr. Seda agreed to meet with him and file a formal complaint.⁷³³
298. Other charges against Prosecutors Malagón and Ardila. Colombia skirts around the issue of whether or not it is investigating and/or has found evidence of corruption committed by Prosecutors Malagón and Ardila in this or other cases.⁷³⁴ However, Colombia’s witness Mr. Hernández confirms that at least 12 people have made similar complaints against the pair.⁷³⁵ Indeed, the Attorney General’s Office has put together a series of comprehensive criminal organization charts that map the corrupt scheme Prosecutors Malagón and Ardila orchestrated.⁷³⁶
299. Thus, unlike in *ECE*, where the claimants relied upon a culture of corruption within the Czech Republic generally, Claimants in this Arbitration have exposed that numerous, detailed, and consistent allegations of corruption have been levelled directly against

⁷³² Seda 1 WS, ¶ 104; Seda 2 WS, ¶¶ 20, 22; **Exhibit C-171**, Email chain between Angel Seda and U.S. Embassy Bogotá, 2 September 2016; **Exhibit C-172**, Email from Angel Seda to Elizabeth Garcon, with attachments; **Exhibit C-178**, Letter from J. Richard Walsh to Angel Seda, 29 November 2016; **Exhibit C-179**, Email chain between Michael Burdick and Angel Seda, 1 December 2016; **Exhibit C-182**, WhatsApp chain between Angel Seda and William Neef, 22-27 December 2016.

⁷³³ Seda 2 WS, ¶ 22.

⁷³⁴ See Counter Memorial, ¶¶ 339-40.

⁷³⁵ **Exhibit C-374**, Audio Transcript, 25 June 2010, p. 4 (“*In my matter, I have 12 people who have told me that they know that Andrea Malagón*”). See also **Exhibit C-324**, Transcript of Audio File (Part 1), 4 June 2020, p. 29 (“*in [. . .] three cases, we have it determined, the same as yours [. . .]. It looks like it’s the same modus operandi, then you realize that in the end [. . .] in the end, [it’s] extortion*”).

⁷³⁶ See **Exhibit C-317**, Diagram of Relationship of Oscar Espinosa Olaya with Government Officials, 4 June 2020.

Prosecutors Malagón and Ardila specifically.⁷³⁷ And those allegations detail a *modus operandi* that resembles exactly the scheme that victimized Mr. Seda here. Moreover, internal documents from the Attorney General's Office's investigations show that it believed the asset seizure against the Meritage was affected by the criminal schemes perpetrated by these corrupt prosecutors.

300. Accordingly, the facts in this case establish that Ms. Ardila and Ms. Malagón acted in a corrupt and collusive manner to institute the Asset Forfeiture Proceedings against the Meritage Project.

301. Colombia attempts to but cannot seek refuge behind Mr. Caro.⁷³⁸ His rubber stamp on the Determination of the Claim, executed by Ms. Ardila under Ms. Malagón's supervision, does not cure the due process violations flowing from Prosecutors Malagón and Ardila's corrupt conduct. Indeed, a review of the relevant findings between the Determination of Claim and *Requerimiento* reveal that little of substance was changed by Mr. Caro.⁷³⁹ In particular, Mr. Caro relies exclusively on evidence collected by Mr. Ardila⁷⁴⁰ and effectively copies and pastes her findings on good faith.⁷⁴¹ The extent of his review is thus—at best—questionable. Moreover, Mr. Caro did not participate in the investigation

⁷³⁷ See Appendix I.

⁷³⁸ See Counter Memorial, ¶ 341.

⁷³⁹ Compare **Exhibit C-23bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (authored by Ms. Ardila) with **Exhibit C-24bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017.

⁷⁴⁰ Compare **Exhibit C-23bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, SP-0034 – SP-0110 with **Exhibit C-24bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, SP-0033 – SP-0116.

⁷⁴¹ Compare **Exhibit C-23bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, SP-0123 – SP-0130 with **Exhibit C-24bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, SP-0133 – SP-0139.

leading up to the Determination of the Claim.⁷⁴² And he does not appear to have reviewed the investigation and the files related to the proceedings with the understanding that the prosecutors who conducted the investigation have been charged with corruption, in this case and a dozen others just like it.⁷⁴³ Thus, his review does not absolve Colombia.

302. Likewise, the Colombian courts' supposed approval of Colombia's actions do not cure the lack of due process in the initiation of the proceedings either. Indeed, the courts did not have the benefit of any investigation by the prosecutor of the corruption scheme that gave rise to the proceedings. Moreover, and as explained in **Section III.F**, the limited judicial review to date has been ineffective in part because it has denied Newport due process, and has not tested the Attorney General's assertions against Newport in a meaningful way. For instance, in its legality control review, the First Criminal Court was required to accept the information presented by the Attorney General's Office as being *prima facie* true.⁷⁴⁴
303. Moreover, neither the court hearing the control of legality over the precautionary measures⁷⁴⁵ nor the court hearing the subsequent *avocamiento* considered whether Newport or Corficolombiana qualified for good faith third party protection at all.⁷⁴⁶ This

⁷⁴² See Caro WS, ¶¶ 25-26. See also **Exhibit C-314**, Attorney General's Office Resolution No. 0010, 17 January 2017 (creating the position of Deputy Prosecutor No. 53, and appointing Mr. Caro to this position); **Exhibit C-318**, Attorney General's Office, Resolution No. 0091, 6 March 2017 (assigning the Asset Forfeiture Proceedings to Mr. Caro).

⁷⁴³ See Caro WS, ¶¶ 25-35 (making no mention of the corruption allegations against the lead prosecutors involved in the Meritage Asset Forfeiture Proceedings).

⁷⁴⁴ **Exhibit C-044bis**, Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016, pp. SP-0018 – SP-0020.

⁷⁴⁵ See **Exhibit C-044bis**, Decision by Asset Forfeiture Court on Control of Legality Petition, 20 October 2016, p. 24 (explaining that the control of legality proceeding “*is not the venue to discuss whether FIDUCIARIA CORFICOLOMBIANA S.A. actually is a third party in good faith without fault.*”)

⁷⁴⁶ See **Exhibit C-057bis**, Asset Forfeiture Court *Avocamiento* Order, 17 August 2017, p. SP-0120 (because the court found—erroneously—that Newport lacked *in rem* rights and only had personal rights, it held that the inquiry of “good faith that is free from fault” did not “matter in the prosecution of a forfeiture action.”).

is despite the fact that both Newport and Corficolombiana clearly qualify as good faith third parties, particularly in light of the recent Constitutional Court decision confirming the narrow scope of due diligence required to secure good faith third party status.

304. Equally problematic has been the courts' unwillingness to recognize Newport as an affected party in the asset forfeiture proceedings, despite the fact that Newport had a contractual right under the trust agreements that gave it an irrevocable *right to title* to Phases 1 and 6 of the Meritage Project,⁷⁴⁷ and that it has the exact same rights to Phases 1 and 6 that La Palma Argentina has to the remaining phases, and La Palma Argentina's standing was recognized.⁷⁴⁸ None of this is the type of meaningful judicial review and basic due process that Colombia has promised its foreign investors.

* * *

305. Accordingly, Colombia's conduct in the Asset Forfeiture Proceedings constitutes an unlawful indirect expropriation of the Meritage Claimants' investments. It is undisputed that Colombia has not paid, making its expropriation unlawful, but in any case, Colombia's conduct was also discriminatory, not conducted for legitimate public purpose, and failed to accord due process.

C. Colombia Has Failed To Treat Claimants' Investments Fairly and Equitably

306. Colombia's conduct breaches its obligation to accord fair and equitable treatment ("FET") under the TPA. Colombia's attempts to recast the standard are unmeritorious and thus its

⁷⁴⁷ Martínez 2 Report, ¶ 49.

⁷⁴⁸ Martínez 2 Report, ¶ 57.

attempts to evade liability fail as well. First, Claimants address Colombia’s submissions on the appropriate standard of treatment. Second, Claimants show that Colombia has breached the FET standard by arbitrarily, discriminatorily, and unreasonably initiating and pursuing the Asset Forfeiture Proceedings against the Meritage Project, and by denying Claimants transparency and due process in those Proceedings.

1. Article 10.5(1) Of The TPA Prohibits Treatment Which Is Unreasonable, Discriminatory, Arbitrary, Non-Transparent, Fails To Accord Due Process, Or Is In Breach Of An Investor’s Legitimate Expectations

307. Article 10.5(1) of the TPA provides:

*“Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”*⁷⁴⁹

308. This provision protects Claimants from unreasonable, arbitrary, and discriminatory treatment; requires the State to act transparently and with due process; and honor an investor’s legitimate expectations at the time of investment. Confronted with these clear obligations, Colombia raises a series of general objections to try and limit its liability. Claimants address each of these objections below.

309. First, Colombia attempts to draw a false distinction between the minimum standard of treatment investors are entitled to under customary international law and the so-called “*autonomous*” FET standard.⁷⁵⁰ As Claimants have already briefed,⁷⁵¹ the weight of

⁷⁴⁹ **Exhibit CL-001**, TPA, art. 10.5(1)

⁷⁵⁰ See Counter Memorial, ¶¶ 368-70. The United States has made a similar submission in this Arbitration, and it is arguments are likewise unavailing for the reasons that follow. See Submission of the United States of America, 26 February 2021, ¶¶ 31-47 (hereinafter “**U.S. NDPS**”).

⁷⁵¹ See Memorial, ¶ 412.

authority, including decisions relied on by Colombia,⁷⁵² now recognize that the treatment under customary international law is a progressive standard that has converged with the autonomous FET standard to provide the same level of protection.⁷⁵³ It is generally accepted that the minimum standard of treatment has evolved, and acts that once may not have been considered to breach the minimum standard may constitute breach today.⁷⁵⁴

⁷⁵² See, e.g., **Exhibit CL-039**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005; **Exhibit CL-099**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015; **Exhibit CL-108**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016; **Exhibit CL-032**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. Arb (AF)/00/2, Award, 29 May 2003; **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006; **Exhibit CL-107**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016.

⁷⁵³ See, e.g., **Exhibit CL-039**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶ 274-76, 284 (“[T]he Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.”); **Exhibit CL-099**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶ 489 (“The minimum customary standard has not remained frozen. It has developed significantly since its early formulations 100 years ago [. . .]. What is relevant is not the standard as it was defined in the 20th century, but rather the standard as it exists and is accepted today[.]”); **Exhibit CL-108**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 520 (“[T]here is no substantive difference in the level of protection afforded by both standards.”). See also **Exhibit CL-032**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. Arb (AF)/00/2, Award, 29 May 2003, ¶ 153 (finding that the fair and equitable treatment provision of the relevant treaty was “an expression and part of the bona fide principle recognized in international law”); **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 291 (finding that “the difference between the [treaty FET standard] and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real”); **Exhibit CL-107**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 208 (“The Tribunal finds that there is no material difference between the customary international law standard and the FET standard under the present BIT.”). See also **Exhibit CL-030**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 125 (“[T]he [Free Trade Commission] interpretations [of the international law minimum standard of treatment] incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for ‘fair and equitable’ treatment of [. . .] the foreign investor and his investments.”).

⁷⁵⁴ See, e.g., **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 744 (“the Tribunal does not accept that the meaning of MST under customary international law must remain static. The meaning must be permitted to evolve as indeed international customary law itself evolves”); **Exhibit RL-41**, *Merrill & Ring Forestry L.P. v. The Government of Canada*, NAFTA, ICSID Case No. UNCT/07/1, Award, 31 March 2010, ¶ 213 (“[T]oday’s minimum standard is broader than that defined in the Neer case and its progeny.”); **Exhibit CL-097**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22

Colombia does not contest that the standards have converged.⁷⁵⁵ In defining the minimum standard of treatment, the tribunal in *Eco Oro v. Colombia* held:

*“Reviewing past decisions, concepts such as transparency, stability and the protection of the investor’s legitimate expectations play a central role in defining the FET standard, as does procedural or judicial propriety and due process and fairness, refraining from taking arbitrary or discriminatory measures, or from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment. Unjust or idiosyncratic actions, a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith have all been found to be in breach of FET. A State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”*⁷⁵⁶

310. In any event, if the Tribunal finds there are aspects of Claimants claims under Article 10.5(1) that are not protected under the minimum standard of treatment, Claimants are entitled to the autonomous FET protection granted to Swiss investors in Colombia pursuant to Article 4.2 of the Colombia-Swiss BIT⁷⁵⁷ through the TPA’s Most-Favored-Nation

September 2014, ¶ 567 (“It is the Tribunal’s view that public international law principles have evolved since the *Neer* case and that the standard today is broader than that defined in the *Neer* case on which Respondent relies.”); **Exhibit CL-030**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 117 (“It would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the *Neer* Tribunal (in a very different context) meant in 1927.”); **Exhibit RL-34**, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 613 (“[T]his Tribunal holds that the *Neer* standard, when applied with current sentiments and to modern situations, may find shocking and egregious events not considered to reach this level in the past.”).

⁷⁵⁵ See Counter Memorial, ¶¶ 368-71.

⁷⁵⁶ **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 754, citing **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 288 (stating FET is infringed by bad faith conduct); **Exhibit CL-067**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 178 (finding FET includes “the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment”); **Exhibit CL-030**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 116 (“[W]hat is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”)

⁷⁵⁷ **Exhibit CL-069**, Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, entry into force 6 October 2009, art. 4(2) (“Each Party shall ensure fair and equitable treatment within its territory of the investments of investors of the other Party.”). As Claimants explained in the Memorial, it is well accepted by tribunals that MFN provisions such as Article 10.4 of the TPA

(“MFN”) Treatment protection.⁷⁵⁸ The FET standard in Article 4.2 of the Colombia-Swiss BIT unequivocally provides protection to the autonomous standard.⁷⁵⁹

311. Second, Colombia contends that Article 10.5(1) only protects Claimants’ investments in the State, and does not provide protection to the Claimants themselves.⁷⁶⁰ In support of this construction, Colombia relies upon a non-disputing party submission (“NDPS”) filed by the United States in the course of *Bridgestone v. Panama*.⁷⁶¹ However, as that tribunal

can be used to import a more favorable FET provision from a Treaty with a non-Party State, such as Article 4.2 of the Colombia-Swiss BIT. See **Exhibit CL-080**, *Sergei Paushok, CJSC Golden East Company, and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, ¶ 254 (“[T]he MFN clause of the Treaty allows for the integration into it of the broader provisions contained in the U.S. Mongolia BIT and the Denmark-Mongolia BIT.”); **Exhibit CL-035**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 104 (noting the MFN provision may be used to import additional rights into FET provision “that can be construed to be part of the fair and equitable treatment of investors”); **Exhibit CL-067**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 155-57 (using the MFN provision to import FET, where the protection was not available in the BIT); **Exhibit CL-060**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 575 (parties agreeing that MFN could be used to import an FET provision); **Exhibit CL-098**, *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, ¶¶ 551-52, 554-55 (using the MFN provision to import FET, where the protection was not available in a multilateral treaty).

⁷⁵⁸ **Exhibit CL-001**, TPA, arts. 10.4(1) (“Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.”), 10.4(2) (“Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”). This provision serves to ensure that “a host country extends to the covered foreign investor and its investments, as applicable, treatment that is no less favourable than that which it accords to foreign investors of any third country.” **Exhibit CL-176**, UNCTAD, Most-Favoured-Nation Treatment, p. 13. See also **Exhibit CL-177**, Stephan W. Schill, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009), p. 142 (MFN clause is a “tool for the multilateralization and harmonization of substantive standards of investment protection. [. . .] MFN clauses elevate the level of protection in any given host State to the maximum level granted in any of that State’s investment treaties.”).

⁷⁵⁹ See **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1309 (interpreting the Colombia-Switzerland BIT).

⁷⁶⁰ Counter Memorial, ¶¶ 369-70.

⁷⁶¹ Counter Memorial, ¶ 369, citing **Exhibit RL-112**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, United States of America Oral Submissions, 29 July 2019, p. 22; **Exhibit RL-108**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, United States of American Written Submission, 7 December 2018, ¶ 3.

recognized in its award, the rights of an investor are intrinsically entwined with a host State's treatment of the investment:

*“[W]here the investor owns the shares of the company that owns the investment[and w]here that company suffers a denial of justice to the detriment of the investment, the investor can invoke Article 10.5.1. of the TPA even though he was not party to the proceedings in which the denial of justice occurred.”*⁷⁶²

312. The *Bridgestone* tribunal explained this was because an investor is entitled “*to rely upon duties owed to, and rights held by, its covered investment.*”⁷⁶³ The United States has not made a similar submission in this Arbitration.⁷⁶⁴ Indeed, the Contracting Parties expressly articulate in Annex 10-A of the TPA the inextricable relationship between covered investors and their investments: “*With regard to Article 10.5, 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.*”⁷⁶⁵
313. Indeed, throughout its Counter Memorial, Colombia has repeatedly relied upon the NDPS filed by the United States. However, the Tribunal should give limited weight, if any, to these NDPSs, including the one filed by the United States here. The United States' NDPS

⁷⁶² **Exhibit CL-178**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Award, 14 August 2020, ¶ 166.

⁷⁶³ **Exhibit CL-178**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Award, 14 August 2020, ¶ 174.

⁷⁶⁴ See generally U.S. NDPS.

⁷⁶⁵ **Exhibit CL-001**, TPA, Annex 10-A (emphasis added). See also **Exhibit CL-179**, *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic (I)*, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013, ¶¶ 241, 242 (“Allowing investors [. . .] to benefit from the protections of the [treaty] is fundamentally compatible” with treaty objectives); **Exhibit RL-44**, *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, ¶¶ 155, 156, 158 (finding that courts have interpreted the full protection and security standard to impose an obligation on a state to “protect the investor” as well as the investment).

is not an authoritative interpretation of the TPA. The TPA instead provides an express mechanism for Colombia and the United States to “*issue interpretations of the provisions of*” the TPA through an established Free Trade Commission “*comprising cabinet-level representatives of the Parties*”.⁷⁶⁶ It is only a “*decision of the Commission declaring its interpretation of a provision of this Agreement*” that “*shall be binding on a tribunal*”.⁷⁶⁷ If the United States and Colombia wanted to agree on an authoritative interpretation of a particular provision in the TPA, they could have done so through the Free Trade Commission. However, to date, the TPA Free Trade Commission has not issued any decisions interpreting the provisions in Chapter 10.⁷⁶⁸ Accordingly, the “*Tribunal is not bound by the views of either State Party*” and “*the proper interpretation of [the TPA] and how it should be applied to the facts of this case are tasks which reside exclusively with this Tribunal.*”⁷⁶⁹

314. Similarly, it is trite to observe that NDPSs filed by the United States in other disputes—interpreting treaties other than the TPA—are not binding on this Tribunal. Those submissions “*merely show[] what had been argued by counsel at that time [. . .] in that*

⁷⁶⁶ **Exhibit CL-001**, TPA, art. 20.1(3)(c).

⁷⁶⁷ **Exhibit CL-001**, TPA, art. 10.22(3).

⁷⁶⁸ See **Exhibit C-347**, *Colombia TPA Free Trade Commission Outcomes*, available at <https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa/free-trade-commission-outcomes>.

⁷⁶⁹ **Exhibit CL-180**, *The Renco Group Inc v. Republic of Peru*, UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, ¶ 156. See also **Exhibit CL-181**, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶ 251 (finding that Bolivia’s position in the arbitration and official statements by the Government of the Netherlands, “*despite the fact that they both relate to the present dispute, are not a ‘subsequent agreement between the parties’*”); **Exhibit CL-182**, *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, fn. 65 (nothing that “*contracting States have sometimes provided that mixed commissions made of their representatives may issue authentic, binding interpretations of the relevant treaty provisions, that amount to subsequent agreements by the parties*”).

particular arbitration” in relation to the treaty in question and in that dispute, which “do[] not allow [for] a broader understanding”.⁷⁷⁰

315. Third, Colombia incorrectly suggests that the standard for finding a breach of the FET protection is “*high*,”⁷⁷¹ and requires a Tribunal to grant the host State a “*margin of appreciation*”⁷⁷² that takes into account “*the political and economic situation of the host State*.”⁷⁷³ This is a blatant attempt to circumscribe the scope of Colombia’s FET obligation and is not supported by the weight of authority.
316. Colombia’s ability to regulate covered investors must necessarily be tempered by the obligations it has voluntarily undertaken in the TPA.⁷⁷⁴ Where a State engages in actions that are otherwise substantively or procedurally improper, it has breached its obligations under the TPA.⁷⁷⁵ Colombia cannot urge the Tribunal to adopt a high level of deference to

⁷⁷⁰ Exhibit CL-183, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, ¶ 51. See also Exhibit CL-184, *Telefónica S.A v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, ¶¶ 110-11.

⁷⁷¹ Counter Memorial, ¶¶ 371-75.

⁷⁷² Counter Memorial, ¶¶ 376-77.

⁷⁷³ Counter Memorial, ¶ 366.

⁷⁷⁴ See, e.g., Exhibit CL-108, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 525 (“*The right to regulate, however, does not authorize States to act in an arbitrary or discriminatory manner, or to disguise measures targeted against a protected investor under the cloak of general legislation.*”).

⁷⁷⁵ See, e.g., Exhibit CL-093, *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 529 (“*In the Tribunal’s view, the correct position is that the state may always change its legislation, being aware and thus taking into consideration that: (i) an investor’s legitimate expectations must be protected; (ii) the state’s conduct must be substantively proper (e.g., not arbitrary or discriminatory); and (iii) the state’s conduct must be procedurally proper (e.g., in compliance with due process and fair administration). If a change in legislation fails to meet these requirements, while the legislation may be validly amended as a matter of domestic law, the state may incur international liability.*”).

the State's conduct that neither the BIT nor international law supports.⁷⁷⁶ As the *GAMI v.*

Mexico tribunal explained:

“The duty of NAFTA tribunals is rather to appraise whether and how preexisting laws and regulations are applied to the foreign investor. It is no excuse that regulation is costly. Nor does a dearth of able administrators or a deficient culture of compliance provide a defence. Such is the challenge of governance that confronts every country. Breaches of NAFTA are assuredly not to be excused on the grounds that a government’s compliance with its own law may be difficult. Each NAFTA Party must to the contrary accept liability if its officials fail to implement or implement regulations in a discriminatory or arbitrary fashion.”⁷⁷⁷

317. Moreover, the TPA's FET standard should be interpreted “neither liberally nor restrictively”⁷⁷⁸ and instead the Tribunal's task is to interpret the provision “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁷⁷⁹ Thereafter, both Parties agree that

⁷⁷⁶ See **Exhibit CL-102**, *Bernhard Friedrich Arnd Rüdiger Von Pezold, et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 466 (“Here, the Government has agreed to specific international obligations and there is no ‘margin of appreciation’ qualification within the BITs at issue. Moreover, the margin of appreciation doctrine has not achieved customary status. Therefore the Tribunal declines to apply this doctrine.”); **Exhibit CL-095**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶ 492 (“[T]he deference to the State’s regulatory powers cannot amount to condoning behaviors that are manifestly arbitrary, idiosyncratic, or that show a complete lack of candor in the conduction of the regulatory process.”); **Exhibit CL-185**, *Antaris Solar GMBH and Dr. Michael Göde v. The Czech Republic*, UNCITRAL PCA Case No. 2014-01, Dissenting Opinion of Mr. Gary Born, 2 May 2018, ¶¶ 48, 50 (“The application of a margin of appreciation to a state’s fair and equitable treatment obligations under investment treaties is not a generally accepted principle of international law.”); **Exhibit CL-186**, *Philip Morris Brands Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Concurring and Dissenting Opinion of Mr. Gary Born, 8 July 2016, ¶ 87 (“The ‘margin of appreciation’ is a specific legal rule, developed and applied in a particular context, that cannot properly be transplanted to the BIT (or to questions of fair and equitable treatment more generally).”).

⁷⁷⁷ **Exhibit CL-165**, *GAMI Investments Inc. v. United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 94. See also **Exhibit CL-046**, *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, ¶¶ 110, 133-36 (rejecting a party’s attempt to characterize a bribe as a “gift of protocol” that “was routine practice” and had “cultural roots” in the respondent State).

⁷⁷⁸ **Exhibit CL-203**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 81 (“[T]he Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention.”).

⁷⁷⁹ **Exhibit CL-187**, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (open for signature 23 May 1969; entry into force 27 January 1980), art. 31.

what amounts to a breach of the FET standard should be assessed against the facts of the particular case.⁷⁸⁰

* * *

318. With these guidelines in mind, Claimants address below Colombia's assertions regarding the specific standards for breaches under the FET by (a) unreasonable, discriminatory and arbitrary conduct; (b) failure to act transparently and with due process; and (c) failure to protect Claimants' legitimate expectations.

a. Colombia Must Not Subject U.S. Investors To Unreasonable, Discriminatory And Arbitrary Treatment

319. As part of the requirement to accord Claimants' investments FET, the TPA prohibits unreasonable or arbitrary treatment that includes any of the following:

“a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;

b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;

c. a measure taken for reasons that are different from those put forward by the decision maker;

d. a measure taken in willful disregard of due process and proper procedure.”⁷⁸¹

⁷⁸⁰ See Memorial, ¶ 413; Counter Memorial, ¶¶ 365, 428.

⁷⁸¹ See **Exhibit CL-070**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303. See also **Exhibit CL-072**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 262-63 (quoting Professor Schreuer's description in *EDF* and “[s]umming up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law”); **Exhibit CL-064**, Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, in *THE FUTURE OF INVESTMENT ARBITRATION* (2009), pp. 184-88; **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 578 (“In the Tribunal's eyes, a measure is for instance arbitrary if it is not based on legal standards but on excess of

320. Colombia does not dispute that such conduct constitutes unreasonable and arbitrary treatment, but avers that the threshold for finding unreasonableness or arbitrariness is “high”.⁷⁸² Colombia’s vague assertions of a “high” standard offer little insight without an assessment of the specific facts of the underlying conduct. What is undeniable is that tribunals have found conduct to be arbitrary where “*inconsistent and chaotic*” approaches are taken by State agencies,⁷⁸³ decisions are “*not founded on reason or fact,*”⁷⁸⁴ or are “*contrary to basic principles of legal reasoning and financial logic.*”⁷⁸⁵ Moreover, Colombia accepts that measures must be adopted “*in pursuit of rational policy objective[s]*” to be deemed reasonable.⁷⁸⁶

321. Colombia asserts that review by domestic courts of breaching conduct somehow cures that breach.⁷⁸⁷ This is not correct. As the tribunal in *Azinian v. Mexico* (cited by Colombia) held, “*an international tribunal called upon to rule on a Government’s compliance with an*

discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker.”

⁷⁸² Counter Memorial, ¶¶ 385, 388.

⁷⁸³ **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 565 (finding Colombia acted arbitrarily in its delimitation of an ecosystem and failing to demonstrate that it took into account studies that it was legally required to consider).

⁷⁸⁴ **Exhibit RL-8**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 232 (finding the Czech Republic acted arbitrarily when it changed its position from allowing the investor’s direct participation in a company that held a license, to requiring the creation of a third company).

⁷⁸⁵ **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 356 (finding Colombia acted arbitrarily in calculating damages owed to the State).

⁷⁸⁶ Counter Memorial, ¶ 395.

⁷⁸⁷ See Counter Memorial, ¶ 396.

international treaty is not paralysed by the fact that the national courts have approved the relevant conduct of public officials.”⁷⁸⁸

b. Colombia Must Act Transparently And With Due Process

322. As explained in Claimants’ Memorial, the TPA requires Colombia to act transparently and in accordance with substantive and procedural due process.⁷⁸⁹ Colombia’s attempts to limit the scope of its obligations by reference to the minimum standard of treatment fail.
323. First, Colombia’s assertions that the minimum standard of treatment does not require transparency are inaccurate.⁷⁹⁰ Transparency has been recognized as a crystallized component of the minimum standard of treatment by numerous tribunals,⁷⁹¹ including tribunals confronted with NDPSs from the United States challenging the existence of a

⁷⁸⁸ **Exhibit RL-6**, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, ¶ 98. See also **Exhibit RL-98**, *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award, 14 December 2017, ¶¶ 367-68 (finding that a decision on whether Jordan’s imposition of a tax measure was “predetermined/politically motivated” was not affected by domestic court findings on legality of the measures); **Exhibit RL-63**, *Luigiterzo Bosca v. The Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013, ¶¶ 200-201 (finding that the respondent had breached an agreement where the Supreme Court held that a senior official was not guilty of a criminal act);. The remainder of the authorities cited by Colombia likewise conflate circumstances where the investors have challenged the underlying interpretation of domestic law, as opposed to the conduct of public officials in the application of this law. See **Exhibit RL-57**, *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, 17 August 2012, ¶ 371 (claiming a regulator applied Guatemalan law erroneously); **Exhibit RL-73**, *Hassan Awdi, Enterprise Business Consultants, Inc., and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, ¶¶ 318-32 (where claimant contended that Romanian courts committed a gross misapplication of law by striking down a law, but finding a breach of FET in any event because the law struck down created an “enabling framework” that established legitimate expectations).

⁷⁸⁹ Memorial, ¶¶ 420-22.

⁷⁹⁰ See Counter Memorial, ¶ 398. The United States has made a similar submission in this Arbitration, and its arguments are likewise unavailing for the reasons that follow. See U.S. NDPS, ¶ 42.

⁷⁹¹ See, e.g., **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 752 (“[T]he Tribunal is satisfied that FET encompassing concepts of non-arbitrariness, transparency and fairness are recognised elements of customary international law within the confines of reasonableness.”).

transparency obligation.⁷⁹² Colombia has not provided any explanation for why this Tribunal should not reach the same conclusion with respect to Article 10.5(1).⁷⁹³ As Colombia expressly recognizes, a host State’s obligation to act transparency is a corollary of its obligation to act with due process.⁷⁹⁴ In any event, Colombia appears to accept that the *Urbaser v. Argentina* tribunal’s articulation of the transparency obligation applies here:

*“The host State’s handling of matters in transparency cannot mean that it has to act under complete disclosure of any aspect of its operation. It rather means that in relation to a foreign investor, the authorities of the State shall act in a way to create a climate of cooperation in support of investment activities. Investors must have trust in the host State’s best efforts to sustain their operation on this State’s territory.”*⁷⁹⁵

324. Second, while “*closely linked*”, a breach of due process is not a precondition to the Tribunal finding a breach of the minimum standard of treatment,⁷⁹⁶ contrary to Colombia’s

⁷⁹² See **Exhibit RL-14**, *Waste Management, Inc. v. United Mexican States*, NAFTA, UNCITRAL, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 98 (finding MST “*is infringed by conduct attributable to the State and harmful to the claimant if the conduct [. . .] involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.*”) (emphasis added); **Exhibit CL-189**, *Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020, ¶¶ 276, 278 (endorsing the standard of MST advanced by the tribunal in *Waste Management II* despite the U.S. filing a NDPS that disputed whether transparency had crystallized as an obligation); **Exhibit CL-032**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. Arb (AF)/00/2, Award, 29 May 2003, ¶ 154; **Exhibit CL-190**, *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, 27 October 2006, ¶ 164. See also Memorial, fn. 825.

⁷⁹³ See Counter Memorial, ¶¶ 398-400.

⁷⁹⁴ See Counter Memorial, ¶ 407 (“*Therefore, in order to constitute a breach of the FET standard, the due process irregularities have to lead (i) to an outcome which offends judicial propriety [. . .] in judicial proceedings or to [. . .] a complete lack of transparency and candour in an administrative process.*”) (internal quotation marks omitted).

⁷⁹⁵ **Exhibit CL-110**, *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, ¶ 628 (emphasis added). See also Memorial, ¶ 420; Counter Memorial, ¶ 400.

⁷⁹⁶ **Exhibit CL-191**, *Lidercón, S.L. v. Republic of Peru*, ICSID Case No. ARB/17/9, Award, 6 March 2020, ¶ 266 (“*Judgments or other decisions having tantamount to judicial effect constitute a breach of the fair and equitable treatment standards attributable to the State of which the adjudicatory body is a part only if they were the result of a failure of due process, or if the decision is so deficient as to constitute a decision which no reasonably competent court could have reached, and therefore a denial of justice.*”) (emphasis added); **Exhibit CL-194**,

assertions. The concepts remain distinct. Indeed, a number of tribunals interpreting a similarly worded treaty provision have confirmed that due process is a discrete component of the minimum standard of treatment, separate from a denial of justice.⁷⁹⁷

325. Colombia does not point to any language in the TPA; it relies on the *Aven v. Costa Rica* award to support its position.⁷⁹⁸ However, the *Aven* case is inapposite—in that case, the tribunal made no such general finding of principle; rather, it understood the claimants’ case to be one of denial of justice as those claimants’ contentions related mainly to the judicial review of the claimants’ prosecution.⁷⁹⁹ By contrast, Claimants here have not advanced a denial of justice claim in name or content; rather, Claimants’ case stems primarily from the discriminatory, inequitable, and unfair conduct of the Attorney General’s Office.⁸⁰⁰
326. Third, covered investors are entitled to procedural fairness in all proceedings, irrespective of the ultimate outcome.⁸⁰¹ The Parties agree with the tribunal in *Krederi v. Ukraine* that the due process violation will constitute a breach of the FET standard where a proceeding is affected by “*serious defects*”, including “*violations of equal treatment of the parties*”

OAO Tatneft v. Ukraine, PCA Case No. 2008-8, Award on the Merits, 29 July 2014, ¶ 394 (distinguishing breaches of due process from denial of justice).

⁷⁹⁷ See **Exhibit CL-095**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶ 587 (“Article 10.5 CAFTA-DR also obliges the State to observe due process in administrative proceedings. A lack of reasons may be relevant to assess whether a given decision was arbitrary and whether there was lack of due process in administrative proceedings.”); **Exhibit CL-084**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 219.

⁷⁹⁸ Counter Memorial, ¶ 401.

⁷⁹⁹ **Exhibit RL-105**, *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018, ¶ 349.

⁸⁰⁰ Claimants accordingly do not address the denial of justice cases discussed by Colombia in its Counter Memorial, but reserve their rights in this regard.

⁸⁰¹ Cf. Counter Memorial, ¶ 411.

and “*the right to be heard.*”⁸⁰² Colombia chooses to characterize this as a “*high standard*”⁸⁰³ whereas in fact these are simply the basic tenets of adjudicative proceedings. Failure to discharge these basic requirements would necessarily be “*manifestly unfair or unreasonable.*”⁸⁰⁴

327. Fourth, there is no requirement for a claimant to exhaust local remedies in the host State before initiating a claim for an alleged administrative wrong.⁸⁰⁵ The cases cited by Colombia do not support this proposition.⁸⁰⁶ In fact, the tribunal in *Rumeli v. Kazakhstan* (relied on by Colombia) expressly found an FET breach arising from due process violations during an administrative process, even though subsequent judicial appeals were not affected by the same procedural shortcomings:

“The Arbitral Tribunal therefore considers that the process that led to the decision of the Working Group lacked transparency and due process and was unfair, in contradiction with the requirements of the fair and equitable treatment principle. Since the Working Group acted as an organ of the State, the violation amounts to a breach of the BIT by the Republic.

On the other hand, the Arbitral Tribunal considers that it does not have any clear evidence that the decisions of the various Kazakh Courts which have been reviewed above were wrong procedurally or substantially, or were so egregiously wrong as to be inexplicable other than by a denial of justice. As

⁸⁰² Exhibit RL-103, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶ 461; Memorial, ¶¶ 422-23; Counter Memorial, ¶ 403.

⁸⁰³ Counter Memorial, ¶ 404.

⁸⁰⁴ Exhibit CL-076, *AES Summit Generation Limited and AES-Tisza Erömi Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 9.3.40.

⁸⁰⁵ See Exhibit CL-072, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 276-77

⁸⁰⁶ See Exhibit CL-067, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 347-48 (finding that the claimant was afforded the right to be heard in administrative dealings with Pakistan, and making no reference to the ability to appeal a measure to local courts); Exhibit RL-8, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 314 (dismissing the claimant’s claim for FPS arising from the host State’s duty of diligence, not the due process component of FET, and noting “[t]he Respondent’s only duty under the Treaty was to keep its judicial system available for the Claimant”).

was evidenced by the legal experts who testified during the hearing, the issues that the Courts had to decide were sometimes highly disputed issues. The Tribunal has also noted that when the decisions were appealed, they were carefully reviewed by the appellate courts and sometimes partially reversed by them.”⁸⁰⁷

328. The *Rumeli* tribunal thus found a breach where the claimants were presented with conflicting and disparate reasons for a contractual termination and not given “*a real possibility to present their position.*”⁸⁰⁸ The tribunal ultimately found that Kazakhstan had treated claimants unfairly and inequitably and expropriated the value of their investment.⁸⁰⁹

c. FET Protects Investors’ Legitimate Expectations

329. FET prohibits a State from frustrating an investor’s legitimate expectations relied upon by the investor when it decides to invest. Even those tribunals that considered the customary international law standard of treatment in the narrowest terms (deferring to the State’s arguments on the scope of this standard) have concluded that an investor’s legitimate expectations are a core element of even the minimum standard of treatment due to foreign investors:

“Having considered recent investment case law and the good faith principle of international customary law, the concept of ‘legitimate expectations’ relates, within the context of the NAFTA framework, to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on

⁸⁰⁷ See **Exhibit CL-060**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶¶ 618-619 (emphasis added), cited in Counter Memorial, ¶ 410.

⁸⁰⁸ **Exhibit CL-060**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 617.

⁸⁰⁹ **Exhibit CL-060**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 818.

*said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.”*⁸¹⁰

330. Colombia does not address this authority, or the additional authorities cited in Claimants’ Memorial on this issue,⁸¹¹ and once again primarily relies on the United States’ NDPS and inapplicable NDPSs submitted by the United States in unrelated cases to assert that legitimate expectations do not give rise to “*an independent host State obligation.*”⁸¹² As noted above, NDPSs are of limited value to this Tribunal.⁸¹³ In any event, Colombia at minimum does not contest that legitimate expectations serve as the “*touchstone*” to an assessment of whether an investor has been afforded FET under customary international law.⁸¹⁴ Colombia also does not dispute that, assuming protection of legitimate expectations

⁸¹⁰ **Exhibit RL-21**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, NAFTA, Award, 26 January 2006, ¶ 147 (citations omitted); **Exhibit RL-14**, *Waste Management, Inc. v. United Mexican States*, NAFTA, UNCITRAL, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶¶ 98-99; **Exhibit CL-195**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 141. See also **Exhibit RL-34**, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶¶ 620-21 (citing *International Thunderbird Gaming* with approval and observing that “[i]n this way, a State may be tied to the objective expectations that it creates in order to induce investment”) (emphasis in original).

⁸¹¹ See Memorial, ¶¶ 425-30.

⁸¹² See Counter Memorial, ¶ 413.

⁸¹³ See *supra* ¶¶ 311-314.

⁸¹⁴ **Exhibit CL-196**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. The Republic of India*, UNCITRAL, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, ¶¶ 458, 463 (“There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the parties, which derive from the obligation of good faith. [. . .] [W]hatever the scope of the FET standard, the legitimate expectations of the investors have generally been considered central to its definition.”). See also **Exhibit CL-197**, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Arbitral Award, 15 February 2018, ¶ 648 (referring to legitimate expectations as the “primary element” of FET); **Exhibit RL-61**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.75 (“It is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor’s reasonable and legitimate expectations.”).

is a component of the applicable standard, Claimants’ “*objectively reasonable*” expectations are protected.⁸¹⁵

331. The Parties agree that representations made by a host State to an investor will be sufficient to create legitimate expectations.⁸¹⁶ Moreover, the more specific the representation, the more credible the claim that an investor was entitled to rely on it.⁸¹⁷ Specific representations warrant even greater reliance when made within a regulatory framework that calls for the issuance of such representations by the Government.⁸¹⁸

2. Colombia’s Actions Breached The FET Standard

a. Colombia Launched The Asset Forfeiture Proceedings Arbitrarily, Unreasonably And Discriminatorily, And In Blatant Disregard Of Fundamental Procedural Protections

332. Colombia initiated the Asset Forfeiture Proceedings on the basis of a false story contrived by a convicted drug trafficker. It did so through prosecutors with an established pattern of corruption whose conduct in this case Colombia has refused to disclose and perhaps even investigate. In so doing, Colombia has engaged in what, under any standard, amounts to arbitrary and unreasonable conduct. Moreover, as Claimants establish above, this conduct was blatantly discriminatory.

⁸¹⁵ Counter Memorial, ¶¶ 414-15.

⁸¹⁶ Counter Memorial, ¶ 416; Memorial, ¶ 428.

⁸¹⁷ See **Exhibit CL-079**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, ¶ 121. See also Counter Memorial, ¶¶ 417-19.

⁸¹⁸ **Exhibit CL-116**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/21/1, Decision on Jurisdiction and Liability, 10 November 2017, ¶¶ 917-42.

333. Colombia’s assertions that “*the Asset Forfeiture Proceedings are not – and were never – based on the kidnapping story*”⁸¹⁹ are belied by the documentary record. Specifically, the Precautionary Measures Resolution unequivocally states that the “*grounds supporting precautionary measures*” were that the Meritage Property was “*acquired through punishable conduct such as kidnapping, threats, and personal misrepresentation, among others.*”⁸²⁰ The Attorney General’s Office thus determined it was necessary to seize the Meritage Project “*until it [could] be ascertained that the statements by Mr. Ivan López Vanegas are likely true.*”⁸²¹ Colombia’s own contemporary statements (later confirmed by two courts)⁸²² thus demonstrate that the Asset Forfeiture Proceedings were arbitrarily and unreasonably initiated on the basis of a confirmed false kidnapping story in order to purportedly verify said falsity. Similar to the situations in *Stati*⁸²³ and *Tethyan*,⁸²⁴

⁸¹⁹ Counter Memorial, ¶ 433.

⁸²⁰ **Exhibit C-022bis**, Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0084 (emphasis added).

⁸²¹ **Exhibit C-022bis**, Attorney General’s Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0086 (emphasis added).

⁸²² See *infra* ¶¶ 335-336.

⁸²³ See **Exhibit CL-094**, *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd. v. The Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, ¶ 1093 (finding a breach of FET where Kazakhstan commenced a criminal investigation against the claimants where “*the evidence indicate[d] that the charge [. . .] did not comply with Kazakh law*”); **Exhibit CL-116**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, ¶¶ 1366, 1372 (finding Pakistan’s refusal of a mining license to be “*arbitrary, unreasonable and discriminatory*” where the “*measures were motivated by the desire to implement its own project – without having a justified ground for denying the Mining Lease Application.*”); **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1564 (Colombian government agency applied arbitrary, unreasonable methodology for establishing alleged damages attributable to a mining contract); **Exhibit CL-043**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 393 (finding arbitrary and without legal basis the actions of provincial authorities “*calling for non-payment of bills even before the regulatory authority had made a decision, threatening the members,*” disallowing collection of payment for services rendered, and denying access to documentation detailing reasons for sanctions).

⁸²⁴ See **Exhibit CL-116**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, ¶ 1264.

Colombia's conduct exhibits that initiation of the Asset Forfeiture Proceedings "*was not founded on reason or fact*"⁸²⁵ and instead tainted by "*capriciousness*."⁸²⁶

334. Indeed, Colombia's refusal to disclose the relevant documents underlying Claimants' corruption allegation, combined with open admissions by the Attorney General's Office of glaring and widespread corrupt conduct by Ms. Malagón and Ms. Ardila, including in the Meritage asset forfeiture proceeding and by participation in schemes directly analogous to the circumstances here, demonstrate that the Asset Forfeiture Proceedings were not only initiated under a false premise but also on the basis of corrupt conduct.⁸²⁷ These corrupt motives are the only explanation for why such grave precautionary measures were taken on such flimsy grounds, and so suddenly after two years of inactivity, in timing that was uncannily coincident with Mr. Seda's extortion.

335. Colombia's seizure of the Meritage Property was a disproportionate measure unconnected from any rational policy purpose. Colombia's actions have not stopped any criminal activities or disgorged criminal profits.⁸²⁸ If, as Colombia argues, the justification for the Attorney General's Office's seizure of the Meritage Project was Mr. López Vanegas' background as a drug trafficker (although never prosecuted or charged in Colombia), Colombia does not explain why the Attorney General's Office seized the Meritage Property, an asset in which Mr. López Vanegas no longer held any interest, as part of an

⁸²⁵ **Exhibit RL-8**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 232.

⁸²⁶ **Exhibit RL-90**, *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017, ¶ 523.

⁸²⁷ See *supra* **Section III.G**.

⁸²⁸ See, e.g., *supra* ¶¶ 27.ff, 253-260

effort to prevent him from profiting from illegality.⁸²⁹ The seizure had no effect on Mr. López Vanegas’ assets, and he continues to profit from any illegality he may have committed. Instead, Colombia arbitrarily and discriminatorily punished Newport, the Unit Buyers, and Corficolombiana—all of whom are good faith third parties—by taking their property, but left the alleged wrongdoers to keep the profits from the transaction. This was a disproportionate measure that did not achieve Colombia’s stated policy purpose of “*fight[ing] organized crime and secur[ing] social and economic stability*”⁸³⁰ and instead antithetically just created extreme hardship and turmoil for the Claimants (as well as the Unit Buyers, among others).

336. Colombia attempts to hide behind the alleged approval of its domestic courts for its actions.⁸³¹ But Colombian courts are only permitted to conduct a limited judicial review of the Attorney General’s Office’s conduct, and were not able to review the sufficiency of the evidence relied upon by the Attorney General’s Office, and could not review the Attorney General’s (lack of) assessment of good faith.⁸³² In fact, the Courts confirmed that the kidnapping alleged by Mr. López Vanegas was the rationale given to justify the Attorney General’s Office’s decision to initiate the Asset Forfeiture Proceedings and concludes that, assuming this were true, this was a reasonable hypothesis for imposing precautionary measures.⁸³³ The Bogotá Superior Court then likewise confirmed that the kidnapping plot

⁸²⁹ See *supra* ¶ 218.

⁸³⁰ Counter Memorial, ¶ 428.

⁸³¹ Counter Memorial, ¶ 456.

⁸³² See *supra* ¶¶ 85-86, 281-283, 303.

⁸³³ **Exhibit C-044bis**, Decision by Asset Forfeiture Court Corficolombiana’s Control of Legality Petition, 20 October 2016, pp. SP-0018 – SP-0020 (“*In view of the foregoing, the events reported by Mr. López Vanegas and the other elements of proof gathered which have already been referred to (justified grounds) form the basis for the hypothesis put forth by the Prosecutor that there is - probability- ‘a negative connotation which, not being false,*

“served as the basis for building the theory of the” Asset Forfeiture Proceedings.⁸³⁴ However, this was not true, and the Attorney General’s Office was aware that it was not true at all relevant points.⁸³⁵ Colombia cannot use its courts’ decisions as a badge of approval when these courts were not apprised of, did not have the authority to decide, and indeed did not decide on the false nature of Mr. López Vanegas’ claim or the collusive nature of the Attorney General’s Office’s conduct.

337. Finally, Colombia cannot deny that its agents acted without transparency in its initiation of the Asset Forfeiture Proceedings. In its Counter Memorial, Colombia does not even attempt to explain why Prosecutor Ardila refused to provide a copy of the Precautionary Measures Resolution to Newport or Corficolombiana.⁸³⁶ Nor does Colombia explain why it punished the representative of the Attorney General’s Office who later informally provided Mr. Sintura with a copy of the Resolution.⁸³⁷

can also not be deemed to be true,’ of a connection with grounds for the extinction of ownership rights affecting the real property on which the Meritage Luxury Community project is being built, and therefore, the order of precautionary measures is legitimate.”).

⁸³⁴ **Exhibit C-047bis**, Appellate Decision on Corficolombiana’s Control of Legality Petition, 21 February 2017, p. SP-0004. *See also* **Exhibit C-047bis**, Appellate Decision on Corficolombiana’s Control of Legality Petition, 21 February 2017, p. SP-0014 (“As noted in the case record from the investigation stage of the proceedings, there is convincing evidence showing that the properties identified by property record numbers 001-719999 and 001-720000 were acquired through kidnapping, threats, misrepresentations, and other means, and that therefore the legal transaction could be flawed.”).

⁸³⁵ *See* **Exhibit C-167**, Transcript of TeleAntioquia Interview with Claudia Carrasquilla, 6 August 2018 (senior official of the Attorney General’s Office notes in a television interview that “*this attempt of [López Vanegas] to portray themselves as victims of an alleged kidnapping that never occurred cannot be described as anything other than that.*”).

⁸³⁶ *See* Memorial, ¶ 437. *Cf.* Counter Memorial, ¶¶ 439-40.

⁸³⁷ **Exhibit C-311**, Letter from Miguel Angel Pardo Nocobe to Yolima Cruz Pacheco, 28 November 2016; **Exhibit C-312**, Letter from Yolima Cruz Pacheco to Nohora Patricia Ferreira Garcia, 11 July 2017; **Exhibit C-321**, Letter from Alejandra Ardila Polo to Ivonn Giset Acero Cortes, 14 June 2017.

b. Colombia Launched Asset Forfeiture Proceedings Against The Meritage Project But Not Other López Vanegas Properties

338. As detailed above, Colombia’s conduct, at a minimum, is arbitrary and discriminatory, as Colombia has failed to proceed against Mr. López Vanegas’ properties in over five years since initiating the Asset Forfeiture Proceedings against the Meritage Property.⁸³⁸ Colombia offers no reasonable justification for this lapse even as it attempts to pin the motives for the Asset Forfeiture Proceedings on Mr. López Vanegas’ criminal conduct.

c. Colombia’s Shifting Rationale For Asset Forfeiture And Conflicting Explanations Regarding Internal Corruption Demonstrates A Lack Of Transparency

339. With the benefit of hindsight, Colombia attempts to backtrack on its clear contemporaneous statements in the Precautionary Measures Resolution from August 2016, set out above,⁸³⁹ that its justification for initiating Asset Forfeiture Proceedings against the Meritage Property was to investigate the Property’s ties to the alleged kidnapping of Sebastian López (a kidnapping it knew did not occur). Colombian courts, in their review of the Precautionary Measures Resolution, identify the same rationale.⁸⁴⁰

340. However, by January 2017, in the Determination of Claim, the Attorney General’s Office abandons the kidnapping storyline and now contends that it was Mr. López Vanegas’ criminal background instead that was the cause of the Asset Forfeiture Proceedings:

“Corficolombiana did not use the appropriate means it had at its disposal for verifying the origin of the asset [. . .] because had it done so, it would

⁸³⁸ See *supra* Section III.A

⁸³⁹ See *supra* ¶ 333.

⁸⁴⁰ See *supra* ¶ 336.

*have noticed that Mr. IVÁN LÓPEZ VANEGAS, legal representative of SIERRALTA LÓPEZ Y CIA (the owner of rights in 1994), was in prison for the crime of drug trafficking in the United States of America.”*⁸⁴¹

341. As explained in the Memorial, this pivot was predicated by overwhelming evidence that demonstrated the falsity of the alleged kidnapping, including direct outreach from the United States to Colombian authorities, and the Attorney General’s Office could not continue to maintain its façade.⁸⁴² However, the sudden and unexplained pivot renders moot the reasons for the seizure of the Meritage Property given in the Precautionary Measures Resolution. The Attorney General’s Office, however, has exhibited a complete lack of transparency and candor to Claimants or other affected parties.
342. Colombia attempts to characterize Mr. Seda’s meetings with the Attorney General’s Office as an attempt to “*create a climate of cooperation.*”⁸⁴³ But at the same time one branch of the Attorney General’s Office is conducting this outreach, another was purporting to investigate him for “*money laundering*” in connection with the purchase of the Meritage Property.⁸⁴⁴ Mr. Seda has been subjected to more than five years of mixed signals from the Attorney General’s Office, chequered with broken promises to investigate the illicit origin of the Asset Forfeiture Proceedings and the extortion scheme perpetrated against him and Claimants’ investments. This is anathema to “*creat[ing] a climate of cooperation in*

⁸⁴¹ **Exhibit C-023bis**, Attorney General’s Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, p. SP-0128.

⁸⁴² Memorial, ¶ 440.

⁸⁴³ Counter Memorial, ¶¶ 441, 448.

⁸⁴⁴ See **Exhibit C-369**, Specialized Directorate Against Money Laundering of the Attorney General’s Office, Registration No. 6020 (SIJUF 6020), 19 December 2018.

*support of [Claimants'] investment activities.”*⁸⁴⁵ Colombia has utterly failed to engender “*trust in the host State’s best efforts to sustain their operation.*”⁸⁴⁶

d. Colombia Has Violated Its Due Process Obligations With Respect To Claimants

343. Colombia has undeniably violated its due process obligations under the FET standard by instigating the Asset Forfeiture Proceeding on the basis of a corrupt plot. But even if corruption were not to be found (*quod non*), Colombia’s refusal to consider Newport’s good faith status, followed by its reversal of standards of what constitutes good faith under Colombian law, all violate its obligations to accord due process.

344. As explained above, Colombia’s treatment of the Meritage Property has been tainted by endemic corruption within the Attorney General’s Office.⁸⁴⁷ The Attorney General’s Office’s collaboration with a drug trafficker to extort Mr. Seda has eviscerated any semblance of procedural fairness from the Asset Forfeiture Proceedings in addition to rendering them arbitrary and unreasonable.

345. Moreover, the Attorney General’s Office has failed to consider Newport’s status as a good faith third party in breach of Colombian law and Newport’s right to due process. Colombia’s defense is rooted entirely in its contention that it has purportedly complied with Colombian law in its decision to exclude Newport from the Asset Forfeiture

⁸⁴⁵ **Exhibit CL-110**, *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, ¶ 628.

⁸⁴⁶ **Exhibit CL-110**, *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, ¶ 628.

⁸⁴⁷ *See supra* ¶¶ 136-148.

Proceedings.⁸⁴⁸ As Claimants have explained above, this is incorrect and a distortion of the rights granted to parties in Newport’s position by Colombian law. However, in its effort to shield itself behind domestic law, Colombia neglects to recognize that the due process rights at issue in this Arbitration are pursuant to international law and independent of any rights Claimants may or may not have under domestic law. Under international law, Colombia accepts that it must facilitate “*an actual and substantive legal procedure*” “*within a reasonable time*” that allows an injured foreign investor to “*raise its claims against the depriving actions.*”⁸⁴⁹ Accordingly, Colombia cannot “*invoke the provisions of its internal law as justification for its failure to perform*”⁸⁵⁰ this international law obligation.

346. As the Parties agree, Colombia is required to afford Claimants procedural fairness in both administrative and judicial proceedings, including most importantly the right to be heard, the right to present evidence, the right to equality of arms, and the right to receive a reasoned decision.⁸⁵¹ These rights are untethered to domestic law, which may or may not afford similar protections.⁸⁵²

⁸⁴⁸ See Counter Memorial, ¶¶ 322-28, 452-53.

⁸⁴⁹ **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 435; Counter Memorial, ¶ 321.

⁸⁵⁰ **Exhibit CL-187**, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (open for signature 23 May 1969; entry into force 27 January 1980), art. 27.

⁸⁵¹ See *supra* ¶ 326.

⁸⁵² See **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 435 (outlining due process rights investors are entitled to, and finding “[i]f no legal procedure of such nature exists at all, the argument that ‘the actions are taken under due process of law’ rings hollow”); **Exhibit CL-158**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, 6 July 2007, ¶ 396 (finding that Georgia “failed to ensure that there was a procedure or mechanism in place, either before the taking or thereafter, which allowed [the claimant], within a reasonable period of time, to have his claims heard.”).

347. More than five years after the Claimants’ investment was subject to an arbitrary and unreasonable taking, no such “*substantive legal procedure*” has taken place. As a preliminary matter, the Attorney General’s Office, under Ms. Ardila, refused to consider the existence of *any* good faith parties—including Newport and Corficolombiana—prior to imposing precautionary measures, in direct contravention of express provisions of Colombian law. Though Corficolombiana challenged these measures, the court adopted a deferential standard of review and did not review the Ms. Ardila’s refusal to consider good faith third parties.⁸⁵³ Later, with the Determination of the Claim, Ms. Ardila refused to acknowledge Corficolombiana good faith status, again in direct contravention of Colombian law.⁸⁵⁴ Other than Mr. Caro copy-pasting her findings into the *Requerimiento*,⁸⁵⁵ no independent authority—judicial or otherwise—has yet reviewed her patently unlawful decision.

348. Though Newport’s due diligence was tied up with Corficolombiana’s here, Newport sought repeatedly to try and make itself heard.⁸⁵⁶ After several unanswered requests, Newport filed a *tutela*⁸⁵⁷; it was only then, in response to a court’s decision ordering her to respond, that Ms. Ardila finally responded denying Newport good faith status on grounds that were substantially similar to those offered in respect of Corficolombiana.⁸⁵⁸ Since then,

⁸⁵³ See *supra* ¶ 336.

⁸⁵⁴ See *supra* ¶ 27.pp.

⁸⁵⁵ Compare **Exhibit C-23bis**, Attorney General’s Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, pp. SP-0034 – SP-0110 with **Exhibit C-24bis**, Attorney General’s Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, pp. SP-0033 – SP-0116.

⁸⁵⁶ See Memorial, ¶¶ 218-19, 242-44.

⁸⁵⁷ **Exhibit C-052bis**, Newport *Tutela* Action, 17 February 2017.

⁸⁵⁸ See Memorial, ¶¶ 244-46; **Exhibit C-054bis**, Attorney General’s Office Asset Forfeiture Unit Response to Newport’s Petitions, 4 March 2017.

Claimants have been mired in a procedural dispute about whether they have standing as affected good faith third parties without fault.⁸⁵⁹ Contrary to Colombia's contentions, Claimants prosecution of its procedural rights under domestic law cannot be reframed as fulfilling Claimants' right to be heard.⁸⁶⁰ On the contrary, Claimants are fighting to have their right to be heard acknowledged in the first instance. The distinction cannot be ignored. Claimants have thus been precluded from affirmatively challenging the measures that have destroyed the value of their investment in Colombia.

349. Thus, Colombia's attempts to rely on the *Glencore v. Colombia* tribunal's findings are unavailing. The claimant in *Glencore* had standing, and was affirmatively litigating a claim.⁸⁶¹ Claimants position is not comparable. Similarly, while Colombia declares the situation in *Deutsche Bank v. Sri Lanka* (where a decision was issued for political reasons)⁸⁶² as being a "far cry" from its conduct,⁸⁶³ it in fact hits very close to home. Colombia's own witness, Mr. Hernández, has affirmed that the decision to initiate and prosecute the Asset Forfeiture Proceedings against the Meritage Property was made in an "irregular" way through the exercise of an "abuse of power."⁸⁶⁴

⁸⁵⁹ See *supra* ¶ 27.vv.

⁸⁶⁰ Counter Memorial, ¶ 453.

⁸⁶¹ **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶¶1340-41.

⁸⁶² **Exhibit CL-087**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, ¶¶ 476-79.

⁸⁶³ Counter Memorial, ¶ 454, n. 726.

⁸⁶⁴ **Exhibit C-374**, Audio Transcript, 25 June 2010, pp. 3-4.

e. **Colombia Frustrated Claimants' Legitimate Expectations**

350. Claimants held a legitimate expectation that the Meritage Property's chain of title was unencumbered by illegality, and any subsequent purchasers would be considered good faith third parties. Claimants' reasonable expectation arose from specific representations made by the Asset Forfeiture Unit of the Attorney General's Office:

- a. On 22 August 2013, Corficolombiana (on behalf of the Meritage Project) asked the Attorney General's Office to "*identify whether there are actions underway against the real properties or their current or former owners.*"⁸⁶⁵ This request was made "*to take measures for prevention of Asset Laundering and Asset Forfeiture for the possible future transaction with the [Meritage Property].*"⁸⁶⁶
- b. On 9 September 2013, the Attorney General's Office responded with the Certification of No Criminal Activity and made a specific representation that: "*there is no evidence of any type of investigation related to this property or its owners in the database of that unit.*"⁸⁶⁷

351. In reliance upon this specific representation, Claimants invested in the Meritage Project. On 17 October 2013, Newport and Corficolombiana concretized the Meritage Project through a series of trust agreements,⁸⁶⁸ shortly after which pre-sales began. However,

⁸⁶⁵ **Exhibit C-031bis**, Petition for Information from Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013, p. SP-0002.

⁸⁶⁶ **Exhibit C-031bis**, Petition for Information from Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013, p. SP-0001.

⁸⁶⁷ **Exhibit C-032bis**, Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Corficolombiana, 9 September 2013, p. SP-0001 (emphasis added).

⁸⁶⁸ See *supra* ¶ 41; Memorial, ¶ 453.

Claimants legitimate expectations were frustrated when the Attorney General's Office initiated Asset Forfeiture Proceedings against the Meritage Property because the chain of title was affected by illegality, and refused to recognize the Claimants as affected good faith third parties.⁸⁶⁹

352. Colombia misrepresents Claimants claim for breach of legitimate expectations, and attempts to set up a strawman argument where Claimants allegedly “*expected Colombia [to be precluded] from initiating asset forfeiture proceedings should the legal grounds for such proceedings be found.*”⁸⁷⁰ That was plainly not Claimants’ contention. Rather, Claimants’ claim is narrowly tailored to Colombia’s specific representation regarding the status of the Meritage Property’s chain of title at the time the Claimants made their investment. Claimants contend that by making a specific representation to Claimants that the Meritage Project was not tainted by illegality, the Claimants should have been accorded good faith status by Colombia, particularly given that Newport itself was involved in no criminal activity.

353. Colombia admits that writing to the National Anti-Money Laundering and Asset Forfeiture Unit of the Attorney General’s Office seeking information of enforcement actions “*against the real properties or their current or former owners*”⁸⁷¹ was an acceptable diligence step, but that because the Certification of No Criminal Activity⁸⁷² from the Attorney General

⁸⁶⁹ See *supra* ¶ 27.qq.

⁸⁷⁰ Counter Memorial, ¶ 465.

⁸⁷¹ **Exhibit C-031bis**, Petition for Information from Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013.

⁸⁷² Colombia quibbles with the Claimants’ characterization of the Asset Forfeiture Unit’s response as a certification. See Counter Memorial, ¶ 466. However, Colombia does not explain why its response should not reasonably have been understood to be a specific representation. A formal request was made to Colombia, including a statement explaining why the request was being made, and Colombia responded addressing the request. Colombia cannot

was “*circumscribed and qualified*”⁸⁷³ Newport could not rely on it as conclusive evidence of anything. This because the Certification caveated that “*there may be a criminal investigation in some other unit of the Attorney General’s Office in the country.*”⁸⁷⁴

354. But this caveat is beside the point. Corficolombiana consulted the Asset Forfeiture Unit of the Attorney General’s Office because it would have been this Unit’s investigations that would have flagged the Property for asset forfeiture. Indeed, it is unclear what error Colombia charges here. This particular unit, as Dr. Medellín indicates, “*has jurisdiction at a national level over asset forfeiture issues.*”⁸⁷⁵ This is not a case where Corficolombiana consulted, for example, the Tax Unit of the Attorney General’s Office to obtain information about an asset forfeiture matter, or where it consulted an office with jurisdiction over the wrong territory.

355. Reduced to its essence, Colombia is saying that the database of the unit in charge of asset forfeiture proceedings cannot be relied upon to have the information relating to whether the land has been infected by criminal activity, but an investor who relies upon the information in this database should be liable for supposed lack of diligence. This position is simply untenable. Effectively (and remarkably), Colombia’s position relegates a response by its own agency as untrustworthy and unreliable.⁸⁷⁶

disagree with the content of the Asset Forfeiture Unit’s response, which states clearly and without caveat that it found “*no evidence of any type of investigation related to this property or its owners in the database of [the Asset Forfeiture] unit.*” **Exhibit C-032bis**, Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Corficolombiana, 9 September 2013, p. SP-0001.

⁸⁷³ Counter Memorial, ¶ 73.

⁸⁷⁴ Reyes Report, ¶ 55.

⁸⁷⁵ Medellín 2 Report, ¶ 85.

⁸⁷⁶ In this vein, Colombia’s position that asking for a certification of no criminal activity was not uncommon and that it had been used by criminal organizations in the past is striking and unhelpful to Colombia’s case. Counter

356. Moreover, the Certification of No Criminal Activity issued by the Attorney General’s Office in this case was not *sui generis*. Making such a request, and obtaining a corresponding certification, was “*good practice in prudence and as a demonstration of their concern for ensuring that the assets they are acquiring do not originate from illegal activities.*”⁸⁷⁷ However, it was not mandatory for the Attorney General’s Office to provide the requested information. Its decision to respond thus is meaningful. Mr. Martínez explains:

*“Newport and Corficolombiana asked the Attorney General’s Office whether the properties or the persons in the title chain were involved in asset forfeiture processes. That Office responded that they were not. It could have ignored the information request or it could have responded that it was unable to provide the information for reasons of legally required confidentiality. Whatever the case, both Newport and Corficolombiana acted prudently in asking; that action reveals their concern for acting legally, i.e., their good faith without fault. And, of course, when the State speaks through its official agencies, a citizen has a right to place reasonable trust in the information provided to him [or her].”*⁸⁷⁸

357. Accordingly, Claimants’ reliance was objectively reasonable in the context of real estate development in Colombia at the time and the request was made precisely because Claimants had done their due diligence and understood the risk of asset forfeiture proceedings. Officials within the Attorney General’s Office, including former Head of the Asset Forfeiture Unit Catalina Noguera, have likewise confirmed that Claimants reliance on the Certification was objectively reasonable:

Memorial, ¶ 84; Reyes Report ¶ 58. If asking for such confirmation from the Asset Forfeiture Unit was common and had been misused by criminal organizations in the past, the Asset Forfeiture Unit would have even more reason to furnish comprehensive responses. Indeed, Colombia does not appear to impugn the credibility of the contents of the Certification of No Criminal Activity. But Colombia nevertheless insists that Claimants could not rely on it.

⁸⁷⁷ Martínez 2 Report, ¶ 62(a).

⁸⁷⁸ Martínez 2 Report, ¶ 62(b).

Noguera: “*The issue is that [. . .] you have a thing called a right [. . .] there is a concept in the law that is legitimate reliance. You acquired the lot because they told you, look, the lot doesn’t have anything [. . .]*”

Espinosa: “*It was the state itself, man [. . .]*.”⁸⁷⁹

358. Indeed, while Colombia complains of the designation of its letter as a “*certification*” by Claimants, the former Head of the Asset Forfeiture Unit names it precisely thus herself.⁸⁸⁰

359. Colombia’s expert, Mr. Reyes, notes following a scandal involving the Cali Cartel in 1994 where the Cartel allegedly used documents similar to the Certification as proof “*that no criminal investigations were underway against them [. . .] the Attorney General’s Office has been very careful in the way it responds to these rights of petition.*”⁸⁸¹ Thus, the “*very careful*” way the Certification was put together only makes the resulting document even more credible and reliable.

360. In addition, after the Meritage Project, the Attorney General’s Office has now revised its practice and no longer provides such certifications. The Attorney General’s Office’s revised letter to similar requests now refuses to provide any information and introduces a caveat nowhere to be found in the Certification of No Criminal Activity at issue:

“It simply states that it is NOT possible to agree to provide information of any kind on the cited legal grounds.

Per the above terms, your request is deemed to be answered, and you are reminded that this document DOES NOT CONSTITUTE CERTIFICATION, nor is it an obstacle to an extinction process being brought forward in the

⁸⁷⁹ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 5.

⁸⁸⁰ **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, p. 4 (“*But, what’s the issue there? It’s the issue of the certification, that you undertook all your due diligence with your companies and all of that. Right?*”) (emphasis added).

⁸⁸¹ Reyes Report, ¶ 58.

*future, in the event that any of the causes of the Extinction of Ownership Code coincide.”*⁸⁸²

361. Finally, Colombia contends that the information contained in the Certification of No Criminal Activity is only accurate as at the time it is produced, and it does not “*guarantee that months, weeks, days, or even hours after it has been provided, and investigation will not be initiated against these persons or goods.*”⁸⁸³ It is beyond dispute that a certification of the criminal history of persons or properties does not predict the future. Claimants do not suggest that it does. However, when the Certification was sought in respect of the Meritage Property, the Attorney General’s Office was not being asked to predict whether any particular person or entity would break the law in the future; the request merely asked whether any of the persons identified in the Property’s chain of title had been implicated in misconduct that could affect such title. Due diligence is necessarily a contemporaneous activity that is limited to the information available at that time.⁸⁸⁴

362. Finally, Colombia’s attempts to call into question Mr. Seda’s response to Mr. López Vanegas’ initial threats are in vain. Mr. López Vanegas’ threats in 2014 and 2016 occurred

⁸⁸² **Exhibit C-331**, Letter from Public Prosecutor Office to Daniel Zea Giraldo, 30 September 2020.

⁸⁸³ Reyes Report ¶ 56.

⁸⁸⁴ Martínez 2 Report, ¶ 62(a) (“*The determining factor in good faith without fault is the information available at the time a legal transaction is conducted, because it is based on that information that legal and economic agents make decisions in real life. It is an easy excuse to assess good faith based on information currently available, completely ignoring the limitations or defects in the information that was actually available to individuals at the time they conducted their legal transaction.*”) (emphasis added); Medellín 2 Report, ¶ 86 (“*[O]bviously[,] the information provided by the Attorney General’s Office refers to the precise moment when the response was issued and not subsequent thereto. This is not a limitation if one considers that what is of interest to the information’s requester is to know the status of the real property asset at the time of conducting the transaction, in order to be aware of possible hidden defects. As such, demanding that the requests for information, whose value is being discredited, continue to be made subsequent to the signing of the commercial trust agreement entered into in the year 2013, is to demand that the person who already holds patrimonial rights to an asset indefinitely conduct due diligence over an asset over which it already has a legitimate interest. As I stated before, the analysis must be ex ante.*”)

well after the title study and Certification of No Criminal Activity, in reliance on which Claimants decided to invest in 2013.⁸⁸⁵ Mr. López Vanegas’ threats in 2014 are thus plainly temporally irrelevant to assessing the reasonableness of Claimants’ expectations at the time of their investment.⁸⁸⁶ And moreover, as explained in **Sections III.C and III.D**, Mr. Seda’s response to Mr. López Vanegas’ threats was beyond reproach. Mr. Seda made these allegations known to Corficolombiana and ventilated them publicly to disabuse any rumors that could undermine the Project. Indeed, even the Attorney General’s Office did not take Mr. López Vanegas’ allegations seriously at the time, as it proceeded to do nothing with his complaint until Ms. Malagón and Ms. Ardila picked it up again in 2016, the day after Mr. López Vanegas renewed his extortion threats to Mr. Seda.

3. Colombia’s Treatment Of Meritage Property Breached FET Obligations With Respect To Claimants’ Investments In Other Projects

363. The Asset Forfeiture Proceedings have not only impacted the Meritage Claimants, but have also had a severe impact on the viability of Luxé and the Development Projects. Colombia has thus inflicted damage on these investments without any legitimate purpose, breaching its obligations to accord them FET.
364. First, Colombia cannot absolve itself from the wholly foreseeable turmoil caused to the Claimants as a result of its unlawful conduct against the Meritage Property. Indeed,

⁸⁸⁵ See Memorial, ¶¶ 78-82.

⁸⁸⁶ See **Exhibit CL-192**, *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, ¶ 456 (“the relevant moment with respect to which one has to assess what was foreseeable to the investor or not must be the moment of making the investment.”); **Exhibit CL-193**, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, ¶ 482 (“it is important to identify precisely when a given Investment was made by the Claimants and what the promises or assurances were that were then relied upon as a matter of fact”).

Colombia was obliged to ensure that its unlawful conduct did not place Luxé and the Development Projects “*directly or indirectly in the line of fire.*”⁸⁸⁷ As Claimants have demonstrated above, the Asset Forfeiture Proceedings were wrongfully initiated as part of a corrupt and extortionate scheme. The Attorney General’s Office’s own correspondence and public documentation recognizes that being linked to Asset Forfeiture Proceedings can affect linked persons “*fundamental rights of privacy and good name.*”⁸⁸⁸ The Attorney General’s Office also subsequently opened a frivolous investigation against Mr. Seda for money laundering, and baselessly contended that Mr. Seda could be linked to an assortment of drug dealers and was a member of the Office of Envigado.⁸⁸⁹ The investigation has come to naught, but Mr. Seda concerningly received a copy from an individual who is not even an employee of the Attorney General’s Office—evidencing the disregard with which the Attorney General’s Office has treated sensitive personal information involving him.⁸⁹⁰ This conduct cumulatively cannot be characterized as anything but a systematic assault against Mr. Seda.

365. Second, as Claimants explain below, there is a sufficient causal link between Colombia’s conduct with respect to the Meritage Property and Claimants’ loss of their investment in Luxé and the Development Projects.⁸⁹¹ Colombia accepts that if Claimants adduce evidence showing that the other projects were impacted as a result of the Asset Forfeiture

⁸⁸⁷ **Exhibit CL-089**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 279.

⁸⁸⁸ **Exhibit C-331**, Letter from Public Prosecutor Office to Daniel Zea Giraldo, 30 September 2020.

⁸⁸⁹ **Exhibit C-369**, Specialized Directorate Against Money Laundering of the Attorney General’s Office, Registration No. 6020 (SIJUF 6020), 19 December 2018.

⁸⁹⁰ Seda 2 WS, ¶ 29.

⁸⁹¹ *See infra* ¶¶ 384-402.

Proceedings, a causal link will be established.⁸⁹² Claimants have discharged this burden and adduced documentary and testimonial evidence proving that as a result of the Asset Forfeiture Proceedings, Mr. Seda's "good name" was destroyed in Colombia and for each of his projects he could no longer obtain financing, attract investors, or sell real estate.⁸⁹³ Prior to the measures, however, he was successfully doing all three.⁸⁹⁴

366. Thus, Colombia failed to treat Claimants who had invested in other projects headed by Mr. Seda fairly and equitably, such as Luxé, because by wantonly dragging his name through the mud by instituting the Asset Forfeiture Proceedings, Colombia knowingly and foreseeably destroyed the value of their investments as well. Such conduct is particularly egregious in circumstances such as these, where corrupt prosecutors in Colombia orchestrated the Proceedings as part of an attempt to extort Mr. Seda, and despite his complaints to Colombian authorities, those same authorities continue to target him instead of the corrupt government officials.

* * *

367. Thus, among other actions, by seizing the Meritage Project and initiating the Asset Forfeiture Proceedings based on a known fib, without regard for Newport's and Corficolombiana's good faith status (though it was required under Colombian law), all arising from an extortive scheme orchestrated by two corrupt officers, Colombia violated its obligation to accord fair and equitable treatment to Claimants.

⁸⁹² Counter Memorial, ¶¶ 474-75.

⁸⁹³ See *infra* ¶¶ 388-396.

⁸⁹⁴ See *supra* ¶¶ 30-31.

D. Colombia Breached Its Obligation To Accord Claimants' Investment Full Protection And Security

368. Colombia's conduct also breaches its obligation to accord full protection and security ("FPS") under the TPA. Colombia misrepresents the scope of this protection once again in a bid to avoid liability. Claimants first address Colombia's submissions on the appropriate standard of treatment. Second, Claimants show that Colombia has breached the FPS standard by failing to protect Claimants investment from a corrupt extortion racket, and by failing to protect Claimants and their investments from unlawful conduct committed by third parties.

1. FPS Standard

369. Article 10.5 of the TPA requires Colombia to provide "*full protection and security*" to Claimants' investments, which Article 10.5.2(b) notes is the obligation "*to provide the level of police protection required under customary international law.*" The FPS standard has thus been interpreted to require the host State to guarantee a legally stable and secure investment environment, both physical and economic.⁸⁹⁵ Colombia's attempts to mischaracterize the standard fail.

370. First, Colombia attempts to draw a distinction between protection granted to investments *vis-à-vis* investors under the TPA.⁸⁹⁶ As a number of tribunals with similarly worded FPS protections have recognized, no such distinction exists and the investor, who makes the

⁸⁹⁵ See Memorial, ¶¶ 467-68.

⁸⁹⁶ See *supra* ¶¶ 311-312.

investment, is implicitly incorporated in the meaning of “*investment*.”⁸⁹⁷ Moreover, the tribunal’s decision in *Al-Warraq v. Indonesia* does not embody a general principle, and instead reflects that in that case by the time the claimed conduct affecting the investor occurred, the investment had already “*concluded*” and there was therefore “*no concomitant effect on the investment*.”⁸⁹⁸

371. Second, Colombia attempts to rewrite the treaty standard by interpreting the Contracting Parties’ agreement to provide “*police protection under customary international law*” to mean that the “*provision protects against physical damage or interference only*.”⁸⁹⁹ This is not true. The weight of arbitral jurisprudence indicates that FPS extends beyond the obligation to ensure the physical security of an investment, and includes the guarantee of commercial and legal security.⁹⁰⁰ In the minority of cases Colombia cites, the tribunals

⁸⁹⁷ See **Exhibit CL-014**, *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 85(b) (finding a breach of FPS where the host State failed to take reasonable steps to protect farm staff from being killed); **Exhibit CL-30**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 152 (“An investor whose local staff had been assaulted by the police while at work could well claim that its investment was not accorded ‘treatment in accordance with international law, including [. . .] full protection and security’ if the government were immune from suit for the assaults.”); **Exhibit CL-198**, *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016, ¶ 352-56 (noting that the FPS standard required the host State to “ensure the protection of persons and property,” and finding a breach of FPS where the CEO was physically assaulted); **Exhibit RL-76**, *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 821, (“The Tribunal refers to a jurisprudence constante according to which the standard of constant protection and security does not imply strict liability but rather obliges States to use due diligence to prevent harassment and injuries to investors”) (emphasis added).

⁸⁹⁸ **Exhibit CL-098**, *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, ¶ 629.

⁸⁹⁹ Counter Memorial, ¶ 503.

⁹⁰⁰ See **Exhibit RL-29**, *Biwater Gauff (Tanzania) Limited. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 728-30 (“It would in the Arbitral Tribunal’s view be unduly artificial to confine the notion of ‘full security’ only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.”) (emphasis in original). See also **Exhibit CL-043**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 408 (observing that FPS “is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view”). As the tribunal in *National Grid v. Argentina* stated, there is “no rationale for limiting the application of a substantive protection of the Treaty to a category of assets—physical assets—when it was not restricted in that fashion by the Contracting Parties.” **Exhibit CL-063**,

engaged only in a sparse analysis of the ordinary meaning of the standard.⁹⁰¹ Indeed, the definition of “*investment*” in the TPA includes intangible assets,⁹⁰² which are equally protected under the full protection and security provision,⁹⁰³ but are not prone to physical harm; rather it is the commercial and legal security of those investments that is of concern. Thus, the TPA contemplates a positive obligation under the FPS standard to grant commercial and legal security in addition to physical security.

372. Colombia’s arguments that Claimants conflate the FPS standard with the FET standard likewise fail: FET is concerned “*with the process of decision-making by organs of the*

National Grid P.L.C. v. Argentine Republic, UNCITRAL, Award, 3 November 2008, ¶ 187. See also **Exhibit CL-052**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶¶ 7.4.15-7.4.17.

⁹⁰¹ Counter Memorial, ¶ 504. In *Saluka, Gold Reserve, BG, and Rumeli*, the tribunals do not so much as refer to the ordinary meaning of the provision and merely state that the standard refers to physical harm. See **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 483-84; **Exhibit CL-097**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 622; **Exhibit CL-056**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 324-26; **Exhibit CL-060**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 668; **Exhibit RL-25**, *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, ¶¶ 202-03; **Exhibit RL-96**, *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, ¶¶ 8.44-8.46; **Exhibit RL-42**, *Gemplus S.A., SLP S.A. & Gemplus Industrial S.A. de C.V. v. The United Mexican States and Talsud S.A. v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, ¶ 9-12. In *Crystallex v. Venezuela*, the tribunal states, but does not explain why, “*full protection and security*” should be read to mean “*physical protection and security*.” See **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 632. In reaching its conclusion, the tribunal in *Crystallex* was motivated, at least in part, by its finding that a more expansive reading of the FPS standard would result in an overlap with its interpretation of other treaty protections, including FET. See **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 634. See also **Exhibit RL-109**, *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Final Award, 29 March 2019, ¶ 267 (relying on the reasoning of the *Crystallex* tribunal).

⁹⁰² See **Exhibit CL-001**, TPA, art. 10.28. See also *supra* ¶ 223.

⁹⁰³ See **Exhibit CL-048**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 303 (“*It is difficult to understand how the physical security of an intangible asset would be achieved.*”).

State” whereas FPS is “*principally concerned with the exercise of police power.*”⁹⁰⁴ Thus while the standards overlap, they serve distinct purposes.

373. Third, while Parties agree that the FPS standard requires a host State to exercise due diligence and take all reasonable measures to protect an investor’s investment,⁹⁰⁵ Colombia attempts to dilute its obligation by invoking the resources of the host State. But there is an important distinction between “*general insecurity*” and “*specific instances of harassment.*”⁹⁰⁶ Though it may be reasonable for an investor to expect some degree of general insecurity, “*specific harassment*” especially when the government apparatus is already involved, requires a heightened degree of diligence.⁹⁰⁷
374. Fourth, the threshold for breaching the FPS standard is not “*extremely high*” as averred by Colombia, and instead “*should be assessed in light of the circumstances of each case.*”⁹⁰⁸ For example, the tribunal in *Biwater v. Tanzania* found a breach of the FPS standard where the host State engaged in conduct that was “*unnecessary and abusive*” in removing

⁹⁰⁴ Exhibit RL-136, Campbell McLachlan et al., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2017), ¶ 7.242 (“*In contrast to fair and equitable treatment, however, full protection and security is typically concerned not with the process of decision-making by the organs of the State. Rather, it is concerned with failures by the State to protect the investor’s property from actual damage caused by either miscreant State officials, or by the actions of others, where the State has failed to exercise due diligence. It is thus principally concerned with the exercise of police power.*”). See also Exhibit CL-078, *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award, 12 November 2010, ¶ 296 (“*full protection and security obliges the host state to provide a legal framework that grants security and protects the investment against adverse action by private persons as well as state organs, whereas fair and equitable treatment consists mainly of an obligation on the host state’s part to desist from behaviour that is unfair and inequitable.*”); Exhibit CL-071, Christoph Schreuer, *Full Protection and Security*, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2010), p. 14.

⁹⁰⁵ Counter Memorial, ¶¶ 508-509; Memorial, ¶ 467.

⁹⁰⁶ Exhibit RL-76, *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶ 824.

⁹⁰⁷ See Exhibit CL-042, *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2016, ¶ 484 (“*the standard obliges the host State to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners*”).

⁹⁰⁸ Counter Memorial, ¶ 510.

management from an investor's offices without the use of force.⁹⁰⁹ In *CME v. Czech Republic*, the tribunal found a breach of FPS where the host States conduct was “targeted to remove the security and legal protection of the Claimant's investment in the Czech Republic” through the amendment of laws and arbitrary conduct by the host State.⁹¹⁰ In *Tatneft v. Ukraine*, the tribunal found a breach of FPS where a series of acts—including a discontinued investigation by a prosecutor—were “sufficient to conclude that indeed the Respondent failed to provide the appropriate police protection.”⁹¹¹

2. Colombia's Conduct Breached The FPS Standard

375. Colombia failed in its duty to protect Claimants and their investments, thus breaching the FPS obligation under the TPA.
376. First, Colombia failed to protect the Claimants from an extortion racket perpetrated by officials within the Attorney General's Office.⁹¹² Colombia contests the existence of corruption and contends that it has conducted an “exhaustive investigation.” As Claimants have shown above, representatives of the Attorney General's Office acted corruptly in their dealings with the Meritage Property.⁹¹³ Moreover, Colombia's refusal to produce the relevant documents together with the limited documents it has produced indicate that Colombian authorities utterly failed to take into account Mr. Seda's criminal complaint

⁹⁰⁹ Exhibit RL-29, *Biwater Gauff (Tanzania) Limited. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 731.

⁹¹⁰ Exhibit CL-027, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 613.

⁹¹¹ Exhibit CL-194, *OAQ Tatneft v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014, ¶ 428.

⁹¹² Memorial, ¶¶ 469-70.

⁹¹³ See *supra* ¶¶ 10-15.

against the Prosecutors at the time and instead allowed the Asset Forfeiture Proceedings to progress unhindered.⁹¹⁴

377. Colombia's failure to properly and promptly investigate and prosecute Mses. Malagón and Ardila has had a serious impact on Claimants' ability to continue to develop the Meritage Project. The Precautionary Measures Resolution, halting construction and sales, was prepared by Ms. Ardila. So was the Provisional Determination of the Claim⁹¹⁵ and the denial of Newport's petition for the recognition of its good faith status.⁹¹⁶ It is therefore totally false for Colombia to say that the imposition of the Asset Forfeiture Proceedings was valid "*independently of the role played by Mses. Ardila and Malagón.*"⁹¹⁷ Instead of acting on Mr. Seda's allegations in a serious manner at the time, the Attorney General's Office barreled ahead with Asset Forfeiture Proceedings that had been spearheaded by prosecutors who were colluding with Mr. López Vanegas to extort Mr. Seda—nothing these prosecutors found in their so-called investigations can be relied upon in light of their acknowledged corruption. That Mr. Caro approved these findings does little to rehabilitate them as he was not involved in making those findings; the investigation was complete by the time Mr. Caro inherited the case.⁹¹⁸

378. Second, Colombia has systematically failed to protect Mr. Seda and his family from escalating threats of violence to the detriment of his investments. As set out in the

⁹¹⁴ See *supra* ¶¶ 10-13.

⁹¹⁵ Exhibit C-023bis, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, p. SP-0130.

⁹¹⁶ Exhibit C-054bis, Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017, p. SP-0008.

⁹¹⁷ Counter Memorial, ¶ 535.

⁹¹⁸ See *supra* ¶ 301.

Memorial, Mr. Seda was subject to a terrifying assassination attempt,⁹¹⁹ and his daughter was also threatened by unknown individuals.⁹²⁰ The threats escalated to such a degree that Mr. Seda was forced to leave the country for a year and a half.⁹²¹

379. Mr. Seda was moreover apparently made the subject of an entirely frivolous investigation into his alleged involvement in drug trafficking and money laundering.⁹²² Colombia has also refused to renew Mr. Seda's investor visa without cause and as a result he is currently prohibited from conducting any business or carrying out any banking transactions for his development companies.⁹²³

380. Colombia's failure to protect Mr. Seda had a direct and concomitant impact on his ability to act as CEO of Royal Realty. He was quite literally chased out of Colombia because of fears to his life. In this time he was unable to conduct business on behalf of his business entities and these entities suffered a direct loss. For example, because Mr. Seda was not in Colombia, Royal Realty was unable to operate the completed cabanas in Luxé.⁹²⁴ In a similar situation in *Biwater v. Tanzania*, the tribunal found that removal of an enterprises' staff, due to threats and physical violence, breached the FPS standard.⁹²⁵

⁹¹⁹ Memorial, ¶ 320; **Exhibit C-202**, Angel Seda Statement attached to Request for Police Protection, 11 October 2017.

⁹²⁰ Seda 1 WS, ¶ 139.

⁹²¹ Seda 1 WS, ¶ 140.

⁹²² Seda 2 WS, ¶ 29.

⁹²³ Seda 2 WS, ¶ 46.

⁹²⁴ Seda 2 WS, ¶ 69 .

⁹²⁵ See **Exhibit RL-29**, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 509 (citing cases where “*usurpation of management by a State* [. . .] *has been analysed as an expropriation.*”).

381. In light of its clear FPS breaches, Colombia castigates Claimants for “invest[ing] in [. . .] a region which had been severely affected by drug cartels and organized crime,”⁹²⁶ This of course ignores both the fact that in the aftermath of the infamous drug trade, beginning in the 2000s, Colombia had adopted a number of steps to increase investor confidence in its ability to maintain law and order, including through legal reforms, tax incentives, and relaxing construction regulations.⁹²⁷ It was in this context that Mr. Seda decided to invest in the region.⁹²⁸ Moreover, recognizing the region’s turbulent past, Mr. Seda and the other Claimants only invested in Luxé and the Meritage Projects after conducting significant due diligence.⁹²⁹ Thus, while Colombia’s duty to accord FPS is an objective standard that does not depend on investors’ expectations,⁹³⁰ it is worth noting that Colombia failed to protect Claimants’ investments that had brought significant economic benefits to the formerly troubled region, including housing, commercial storefronts, luxury amenities, and employment of approximately 700 people.⁹³¹ Moreover, Colombia failed to discharge its duty even though it had provided a specific assurance that the land on which the Meritage Project was to be built had no known criminal activity associated with it.⁹³²

⁹²⁶ Counter Memorial, ¶ 514.

⁹²⁷ Memorial, ¶¶ 25-30.

⁹²⁸ Memorial, ¶¶ 31-34.

⁹²⁹ Memorial, ¶¶ 25-34.

⁹³⁰ **Exhibit CL-014**, *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 77. (“A number of other contemporary international law authorities noticed the ‘sliding scale’, from the old ‘subjective’ criteria that takes into consideration the relatively limited existing possibilities of local authorities in a given context, towards an ‘objective’ standard of vigilance in assessing the required degree of protection and security with regard to what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State”) (emphasis added).

⁹³¹ Seda 1 WS, ¶ 96.

⁹³² **Exhibit C-032bis**, Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Fiduciaria Corficolombiana, 9 September 2013.

VI. CLAIMANTS ARE ENTITLED TO FULL REPARATION

382. Colombia has breached its obligations to Claimants and their investments in Colombia. Accordingly, Claimants are entitled to full reparation under the TPA and international law. As reflected in the tables below, BRG has valued Claimants’ losses as of the date of valuation of 25 January 2017 as USD 255.8 million, updating it with additional pre-award interest, and further to some amendments⁹³³ to the model.⁹³⁴

	Updated Total Damages
Projects in Construction	
The Meritage	64.0
The Luxé	44.3
Total, Projects in Construction	108.3
Projects in Development	
Cartagena Tierra Bomba	26.0
450 Heights	13.5
Santa Fé de Antioquia	41.0
Total, Projects in Development	80.5
Expansion Projects	14.8
Total, All Projects as of January 25, 2017	203.6
Pre-Award Interest up to September 17, 2021	52.2
Total, All Projects as of September 17, 2021	255.8

⁹³³ Specifically, BRG has made certain mechanical adjustments, which increased the value of Claimants’ damages before interest by USD 11.9 million, and updated the tax calculation, which decreased the value of Claimants’ damages before interest by USD 70.0 million. BRG 2 Report, ¶¶ 63, 65-67.

⁹³⁴ BRG 2 Report, Table 1 at ¶¶ 24-25.

Table 1 Total Damages to Mr. Seda (USD million)

	Updated Loss in Mr. Seda's Equity	Updated Loss in Fees	Updated Total Damages to Mr. Seda
	[a]	[b]	[c] = [a] + [b]
Projects in Construction			
The Meritage	29.1	28.2	57.3
The Luxé	19.9	17.9	37.8
Total, Projects in Construction	49.0	46.2	95.1
Projects in Development			
Cartagena Tierra Bomba	12.9	13.2	26.0
450 Heights	4.8	8.7	13.5
Santa Fé de Antioquia	23.2	17.8	41.0
Total, Projects in Development	40.8	39.7	80.5
Incremental Value of Future Expansions in Real Estate			14.8
Total, All Projects as of January 25, 2017	89.8	85.8	190.4
Pre-Award Interest up to September 17, 2021			48.8
Total, All Projects as of September 17, 2021			239.2

Table 2 Updated Loss in Equity Value to Other Claimants (USD million)

	Updated Loss in Other Claimants' Equity
Projects in Construction	
The Meritage	6.7
The Luxé	6.5
Total, Projects in Construction	13.2
Total, All Projects as of January 25, 2017	13.2
Pre-Award Interest up to September 17, 2021	3.4
Total, All Projects as of September 17, 2021	16.6

383. Colombia accepts that if Claimants' allegations are successful, Colombia must compensate Claimants under the TPA as of 25 January 2017. Colombia, however, claims that: (a) Claimants' losses were not caused by Colombia's breaches; (b) Claimants are not entitled to full reparation; (c) Claimants' damages must be valued using a historical costs approach; (d) Colombia should not have to pay any pre-award interest, or (e) undertake not to charge additional taxes on the award, or (f) pay moral damages. Claimants address each of Colombia's arguments in turn.

A. Colombia's Actions Caused Claimants' Losses

384. Claimants explained in their Memorial and in this Reply how the unlawful application of the Asset Forfeiture Proceedings nullified the value of Claimants' investments.⁹³⁵ Colombia does not dispute that the Meritage Project is no longer viable. Colombia also does not dispute that the remaining Claimants' Projects remain undeveloped. Indeed, Colombia is at a loss to explain what other seismic event could have abruptly shut down Mr. Seda's entire pipeline of projects. Colombia nonetheless denies that the Asset Forfeiture Proceedings led to this outcome. Below Claimants (i) define and (ii) apply the legal standard applicable to the quantum of damages owed to Claimants.

1. Applicable Legal Standard

385. The TPA authorizes claims from a claimant who "*has incurred loss or damage by reason of, or arising out of, that breach.*"⁹³⁶ Thus, contrary to Colombia's assertions, the TPA

⁹³⁵ Memorial, ¶¶ 307-18.

⁹³⁶ **Exhibit CL-001**, TPA, art. 10.16(1)(a)(ii), (b)(ii) (emphasis added).

does not require the breach to directly cause or even be the sole cause of the loss. Rather, by its plain language, it contemplates coverage of all losses stemming from or because of the breach. As Colombia and the United States in its NDPS acknowledge, this causal link must be “sufficient” and not “too remote” but does not require more.⁹³⁷ As the *Feldman v. Mexico* tribunal put it, the loss must simply be “adequately connected” to the breach.⁹³⁸

The *Lemire v. Ukraine II* tribunal further explained that:

*“Proof of causation requires that (A) cause, (B) effect, and (C) a logical link between the two be established.”*⁹³⁹

*“If it can be proven that in the normal course of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other.”*⁹⁴⁰

386. Tribunals have frequently assessed in this regard whether the “*the wrongdoer could have foreseen that through successive links the irregular acts finally would lead to the damage.*”⁹⁴¹ The *CME* tribunal, for example, held that the State’s actions caused the injury as the State’s Media Council “*must have understood the foreseeable consequences of its actions.*”⁹⁴²

⁹³⁷ Counter Memorial, ¶ 559; U.S. NDPS, ¶ 58.

⁹³⁸ **Exhibit CL-031**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 194.

⁹³⁹ **Exhibit RL-047**, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶ 157.

⁹⁴⁰ **Exhibit RL-047**, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶ 169.

⁹⁴¹ **Exhibit RL-047**, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶ 170. See also **Exhibit CL-013**, *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. The Republic of Indonesia*, ICSID Case No. ARB/81/1., Award, 31 May 1990, ¶ 172 (“[T]he loss must be attributable to the wrongful act and foreseeable”).

⁹⁴² **Exhibit CL-027**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 585.

387. In sum, under the TPA, all Claimants must show is the value of their Projects was destroyed “by reason of, or arising out of” Colombia’s seizure of the Meritage Project followed by the Asset Forfeiture Proceedings. Claimants have unquestionably met this bar.

2. The Asset Forfeiture Proceedings Destroyed The Value of Claimants’ Projects

388. As Claimants set out in their Memorial, the development of Claimants’ Projects ceased as a result of the Asset Forfeiture Proceedings against the Meritage Project because no funders, investors or prospective business partners were willing to work with Mr. Seda or his businesses anymore.⁹⁴³ Colombia does not question that the Meritage Project is no longer viable. As soon as Colombia imposed precautionary measures on the Project, construction came to a halt,⁹⁴⁴ sales were stopped,⁹⁴⁵ Banco de Bogotá accelerated the loan it had just granted to the Project,⁹⁴⁶ Unit Buyers refused to make further payments on the units they had purchased,⁹⁴⁷ and later even brought an arbitration claim against Newport and Corficolombiana.⁹⁴⁸ But Colombia unconvincingly (and without alternative explanations) denies that banks, funders and business partners similarly pulled out of Claimants’ other Projects as a result of these Proceedings.

⁹⁴³ Memorial, ¶¶ 308-18.

⁹⁴⁴ See López Montoya WS, ¶ 40; **Exhibit C-041bis**, Letter from Angel Samuel Seda to Jorge Humberto Díaz, 8 August 2016.

⁹⁴⁵ Seda 1 WS, ¶ 102; López Montoya WS, ¶ 40.

⁹⁴⁶ **Exhibit C-168**, Letter from Jaime Andrés Toro Aristizabal to Angel Samuel Seda, 11 August 2016, attaching Letter from Juan Maria Robledo Uribe to Jaime Alberto Sierra Giraldo, 10 August 2016; López Montoya WS, ¶ 39.

⁹⁴⁷ See, e.g., **Exhibit C-263**, Letter from Luis Alberto Jaramillo Estrada to Newport S.A.S., 30 August 2016; **Exhibit C-262**, Letter from John José Alexander Cadena Sánchez to Newport S.A.S., 4 August 2016.

⁹⁴⁸ **Exhibit C-062bis**, *Pinturas Prime S.A. et al. v. Fiduciaria Corficolombiana S.A., Meritage Trust and Newport S.A.S.*, Medellín Chamber of Commerce, Demand for Arbitration, 1 August 2017.

389. Ignoring the evidence set out in Claimants’ Memorial, Colombia claims that Claimants rely on only a “*simplistic temporal argument*” to claim that the Asset Forfeiture Proceedings led to the losses in connection with the Luxé Project.⁹⁴⁹ But Claimants’ case is more than temporal—it is based on specific facts and evidence set out in detail in the Memorial.
390. Shortly after the imposition of the precautionary measures, Colpatría stopped disbursing loans to the Luxé Project, expressly citing the Asset Forfeiture Proceedings.⁹⁵⁰ As Mr. López Montoya, the Vice President of Construction of Royal Realty, testifies, one week after the seizure he received a call from the Construction Credit Manager at Colpatría, further to which he had several discussions with Colpatría representatives.⁹⁵¹ Ultimately Colpatría’s Construction Credit Managers told him that “*Colpatría would no longer formally approve any increases to the loan due to the ongoing asset forfeiture proceedings against the Meritage lot.*”⁹⁵² At the time, all the Project needed to commence operations was to complete construction of the hotel, which was over 70 percent complete.⁹⁵³ But this could not happen without bank funding. Indeed, it made no sense for Mr. Seda to halt construction if there would have been any way for the Project to be completed, given its advanced status.
391. Mr. Seda was also pursuing funding from other investors for the Luxé Project who also backed out because of Colombia’s measures. A large real estate investor, Paladin Realty

⁹⁴⁹ Counter Memorial, ¶ 569.

⁹⁵⁰ Seda 1 WS, ¶¶ 109-10; López Montoya WS, ¶¶ 44-48.

⁹⁵¹ López Montoya WS, ¶ 48.

⁹⁵² López Montoya WS, ¶ 48.

⁹⁵³ Seda 2 WS, ¶ 66; **Exhibit C-338**, Letter from Ochoa Arquitectos & Ingenieros S.A.S. to Luxé By The Charlee S.A.S., 21 August 2021; **Exhibit C-375**, Letter from José Luis Ochoa Yepes to Felipe López, 10 June 2015.

Partners, for example, halted funding discussions in August 2016 asking to “*wait until the Meritage issue is resolved.*”⁹⁵⁴ Even prosecutors from the Attorney General’s Office have acknowledged to Mr. Seda that banks would refuse to lend to Mr. Seda given his association with the Asset Forfeiture Proceedings.⁹⁵⁵

392. Similarly, ignoring the evidence on the record, Colombia alleges that Claimants have not established any “*reasonable connection between the Asset Forfeiture Proceedings and the failure*” of the Development Projects.⁹⁵⁶ This is again not true as set out below:

393. **Tierra Bomba:** Soon after the Colombia launched the Asset Forfeiture Proceedings, sellers of the land told Mr. Seda that “*they no longer wanted to work with Royal Realty due to reputational issues.*”⁹⁵⁷ Investors also divested their shareholding in the investment vehicle developing the Project.⁹⁵⁸ Reputational risk was particularly hazardous to those operating in Colombia’s tourism capital, as reflected in the message from another potential business partner in Cartagena to Mr. Seda: “*we have determined that we must put an end*

⁹⁵⁴ **Exhibit C-379**, Email from Alejandro Krell to Angel Seda, 8 August 2016.

⁹⁵⁵ See, e.g., **Exhibit C-322**, Audio Transcript, 24 January 2020, p. 10 (“*SEDA: [. . .] every financial institution thinks we are criminals. Because even so, with all of the news, doubt will remain. SALAZAR: Yes; NOGUERA: Yes, of course, of course.*”).

⁹⁵⁶ Counter Memorial, ¶ 572.

⁹⁵⁷ Seda 1 WS 1, ¶ 111. See **Exhibit C-193**, Cancellation of Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sánchez Vargas, 3 August 2017; **Exhibit C-194**, Cancellation of Promise to Purchase Contract between Angel Seda and Ramón Antonio Duque Marín, 15 August 2017; **Exhibit C-186**, Cancellation of Promise to Purchase Contract between Angel Seda and Jaime Francisco Martínez Pinilla and Edilia Rosa Sánchez Hoyos, 1 March 2017.

⁹⁵⁸ **Exhibit C-183**, Agreement between Royal Realty and Greenpark Trading & Maria Alvarez Y CIA, 3 January 2017.

*to the negotiation process for the operation of our hotel, given that we do not want the situation that is occurring with the Meritage project to affect us in the near future.”*⁹⁵⁹

394. **Santa Fe:** Similarly, banks Mr. Seda has approached for funding have refused loans citing the Asset Forfeiture Proceedings and his business partners have pulled out of the Project.⁹⁶⁰
395. **450 Heights:** The sellers of the land here also told Mr. Seda that that “they were not interested in continuing to move the deal forward due to reputational issues stemming from the Fiscalia’s imposition of precautionary measures on the Meritage.”⁹⁶¹
396. The Asset Forfeiture Proceedings have not only damaged Mr. Seda’s professional reputation, his creditworthiness has been irrevocably impugned. Both Colpatria and Banco de Bogotá have sued Mr. Seda personally for defaulting on their loans to the Luxé and Meritage Projects respectively.⁹⁶² Mr. Seda must disclose these suits every time he applies for a loan, making it nearly impossible for him to secure any business loans in Colombia.
397. The facts—which Colombia does not seriously challenge—abundantly demonstrate that (i) the Luxé and Development Projects were progressing before Colombia’s seizure of the Meritage Project; (ii) development on these Projects halted after the seizure because investors, banks, business partners and land owners pulled out of the Projects; and (iii) these third parties told Claimants that they no longer wanted to be associated with Mr. Seda due to the Asset Forfeiture Proceedings. Accordingly, the losses incurred by the closure

⁹⁵⁹ **Exhibit C-197**, WhatsApp chain between Manager of Tierra Bomba Hotel Owner and Angel Seda, 13 September 2017.

⁹⁶⁰ Seda 1 WS, ¶¶ 112-13.

⁹⁶¹ Seda 1 WS, ¶ 114.

⁹⁶² Seda 2 WS, ¶ 91; **Exhibit C-382**, Statement of Defense filed on behalf of Luxé SAS and Angel Seda in Lawsuit Against Colpatria, 25 January 2018; **Exhibit C-383**, Judgment of Civil Court 14 of the Medellín Circuit, 19 April 2021; **Exhibit C-384**, Letter from Corficolombiana to Newport S.A.S., August 2021.

of Luxé and the Development Projects were “*by reason of or arising out of*” Colombia’s seizure of the Meritage Project.

398. Faced with these facts, Colombia tries to distance itself from the consequences of its actions by claiming that it could not have been responsible for ruining Mr. Seda’s reputation because it did not publish the details of the proceedings to the press.⁹⁶³ As a preliminary matter, Mr. Seda did not disclose the fact of the seizure to the press; there was no reason for him to jeopardize his own reputation or that of the Project and, in fact, he was abroad when the seizure occurred.⁹⁶⁴ In reality, the seizure of the Meritage Project was in itself a public event—no “*leakage*” of details to the press was required. Prosecutor Ardila Polo arrived on the site of the Project in broad daylight on a Wednesday and shut it down.⁹⁶⁵ Indeed, within minutes of Ms. Ardila’s arrival at the Meritage Property, a reporter from *El Tiempo* called the Royal Realty office requesting a statement.⁹⁶⁶ Mr. Seda and his employees had to accordingly notify the contractors, the Unit Buyers, Corficolombiana and all other stakeholders immediately of the seizure.⁹⁶⁷ Colombia’s suggestion that it is not responsible for the consequences of the public seizure of one of the largest and most well-known developments in the Country is thus simply farcical.

399. Colombia further alleges that it should not be held responsible for tarnishing Mr. Seda’s reputation because it has not accused Mr. Seda of wrongdoing and that Mr. Seda was

⁹⁶³ Counter Memorial, ¶ 565.

⁹⁶⁴ Seda 1 WS, ¶¶ 97, 101.

⁹⁶⁵ Memorial, ¶¶ 136-39.

⁹⁶⁶ López Montoya WS, ¶ 36. *See also* Seda 1 WS, ¶ 99.

⁹⁶⁷ Memorial, ¶¶ 187-88.

responsible for the downfall of his own reputation because he gave an interview in 2014 about Mr. López Vanegas' initial threats.⁹⁶⁸ This of course underscores the absurdity of Colombia's decision to seize the Meritage Property—if Colombia accepts that Mr. Seda was not guilty of any wrongdoing, then why did Colombia seize the Meritage Project instead of targeting the real criminals?⁹⁶⁹ That aside, Colombia's accusations fall flat given that after Mr. Seda's 2014 interview, investors, fiduciaries, Unit Buyers and other stakeholders, all continued to work with Mr. Seda. His interview in 2014 ventilated experiences that were unfortunately common in Colombia at this time and served to quell any rumors that could have otherwise erupted.⁹⁷⁰ It was rather Colombia's seizure of the Meritage Project in 2016 that undermined Mr. Seda's standing in the business community as no one was willing to work with someone targeted by the Government, lest the Government find that they too were tainted by association under its now boundless interpretation of the Asset Forfeiture Law.⁹⁷¹ As Mr. Seda noted:

“Given the unfortunate history of Medellín with drug cartels, I knew that having a Project associated in any way with a forfeiture proceeding was a mark that would not be easy to erase, and would affect not just the Meritage Project but also other projects with which I was involved. Any bank considering financing, or other third party considering doing business with me would now fear that the Fiscalía would be able to target them as a result of the asset forfeiture proceedings against the Meritage Project.”⁹⁷²

400. Indeed, this is precisely what had happened with other real estate projects that had been wrongfully seized. For example, another large scale project unrelated to Claimants, Soler

⁹⁶⁸ Counter Memorial, ¶¶ 565-66.

⁹⁶⁹ See *supra* ¶ 7.

⁹⁷⁰ See Seda 2 WS, ¶¶ 6, 12.

⁹⁷¹ See Seda 2 WS, ¶ 92.

⁹⁷² Seda 1 WS, ¶ 100.

Gardens, had been mistakenly seized by the Attorney General's Office but even after that Office corrected its mistake and removed the measures, the project failed as a result of the reputational damage already done.⁹⁷³

401. Moreover, it has since come to light that Colombia has been pursuing baseless, retaliatory investigations against Mr. Seda.⁹⁷⁴ While these investigations appear to have gone nowhere, they have left an indelible mark on his record. For instance, Mr. Seda must now disclose the fact that he was investigated to every financial institution with which he interacts as part of their Know Your Customer process. This has further impeded Mr. Seda from conducting business, even outside Colombia.
402. The substantial consequences of the unlawful and discriminatory Asset Forfeiture Proceedings launched against the Meritage Project were entirely foreseeable to Colombia. Colombia cannot plead innocence as it should have (and did) know that the seizure was bound to have significant adverse impacts on Mr. Seda and the projects in development with which he was associated.⁹⁷⁵

⁹⁷³ López Montoya WS, ¶ 38.

⁹⁷⁴ Seda 2 WS, ¶ 29, **Exhibit C-369**, Specialized Directorate Against Money Laundering of the Attorney General's Office, Registration No. 6020 (SIJUF 6020), 19 December 2018.

⁹⁷⁵ Colombia argues in a footnote that because the Charlee Hotel and the cabanas in Luxé are operational, Claimants are overstating the impact of Colombia's measures. But Colombia misses the point. These projects were already built and self-sustaining; they did not need additional injections of capital. By contrast, Mr. Seda's projects that were still in development were stopped in their tracks as stakeholders pulled out in response to the Asset Forfeiture Proceedings. See Seda 2 WS, ¶¶ 91-92.

B. Claimants Are Entitled To, At A Minimum, The Fair Market Value Of Their Investment

403. Colombia accepts that, if successful, Claimants are due compensation that is worth, at least, the fair market value (“**FMV**”) of Claimants’ investments under Article 10.7 of the TPA.⁹⁷⁶

“If the Tribunal finds that Colombia has expropriated the Claimants’ investment in breach of Article 10.7 of the FTA [i.e., the fair market value], the compensation standard provided for in that article should be applied. If the Tribunal finds Colombia liable for other breaches of the FTA, it should still apply the compensation standard set forth in Article 10.7.”

404. Colombia further argues that the same standard should apply to compensation for non-expropriation claims under the TPA:

“For purposes of determining the amount of compensation due to an injured investor [. . .] ‘the exact obligation breached by the respondent State appears to be irrelevant.’ Thus, the maximum compensation for a non-expropriatory claim should be the same as that for an expropriation claim, i.e., compensation for the ‘fair market value’ only.”⁹⁷⁷

405. Colombia spills much ink arguing that Claimants’ recovery is limited to the fair market value of their investment; and thus Claimants are not due “*full reparation.*”⁹⁷⁸ Colombia appears to imply that insofar as there is any difference between the full reparation standard and the standard of compensation for a lawful expropriation under the TPA, the latter caps compensation due to Claimants. In fact, the converse is true: compensation for Colombia’s unlawful acts “*cannot be lower than*” the standard stipulated by the TPA for lawful

⁹⁷⁶ Counter Memorial, ¶ 576.

⁹⁷⁷ Counter Memorial, ¶ 583 (emphasis added).

⁹⁷⁸ Counter Memorial, ¶¶ 578-84.

expropriation.⁹⁷⁹ Thus, the fair market value of Claimants’ investments serves as the floor of compensation due to Claimants, not the ceiling.

406. In any case, Colombia’s distinctions are irrelevant here. Claimants’ expert, BRG, value their damages using a discounted cash flow (“**DCF**”) analysis based on a comparison of Claimants’ investments’ actual value with a but-for scenario. This methodology captures the full reparation owed to Claimants that is also equivalent to the FMV of Claimants’ investments.⁹⁸⁰ Strikingly, however, the methodology chosen by Colombia’s expert, Dr. Hern of NERA—sunk costs valuation—does not calculate the FMV of Claimants’ investment.⁹⁸¹ Accordingly, as per Colombia’s own interpretation of the TPA, Dr. Hern’s calculations are irrelevant to the question of the quantum of compensation in this case.

⁹⁷⁹ **Exhibit CL-057**, Sergey Ripinsky and Kevin Williams, *DAMAGES IN INTERNATIONAL INVESTMENT LAW* (2008), p. 245 (“*It has to be borne in mind that, logically, compensation for unlawful expropriation cannot be lower than that for a lawful one.*”) See also **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶¶ 481-85 (“*in the present case the BIT does not stipulate any rules relating to damages payable in the case of an unlawful expropriation. The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation. This would have been possible if the BIT expressly provided for such a position, but this does not exist in the present case.*”); **Exhibit CL-052**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶¶ 8.2.2-8.2.5; **Exhibit RL-029**, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 775; **Exhibit CL-066**, *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 539; **Exhibit CL-152**, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, ¶ 201; **Exhibit CL-120**, *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, ¶¶ 511-12; **Exhibit RL-054**, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2020, ¶ 305.

⁹⁸⁰ See, e.g., **Exhibit RH-004**, *GAR Guide to Damages in International Arbitration, Income Approach and Discounted Cash Flow Methodology*, A. Demuth, 2018, p. 215 (“[the] *comparison of the actual with a hypothetical cash flow but for the wrongful act* [. . .] *implicitly considers all financial impacts, including consequential damages and mitigating factors.*”)

⁹⁸¹ See *infra* **Section VI.C.4**.

C. Income- And Market-Based Valuation Methodologies Are Appropriate Here

407. Claimants' expert, BRG, calculates damages owed to Claimants using an income and market based approach. With respect to Claimants' real estate development portion of the Projects, BRG first conducts a DCF assessment for each of Claimants' Projects based on contemporaneous underwriting models.⁹⁸² BRG then validates the inputs in these models to market-based cost and price inputs provided by the world's leading real estate experts: JLL.⁹⁸³ With respect to Claimants' hospitality projects, BRG first conducts a DCF assessment based on contemporaneous appraisal models; BRG then validates these assessments with a market-based valuation methodology using sale transactions of ownership stakes in hotels in Latin America comparable to Claimants' hospitality projects.⁹⁸⁴
408. Colombia argues that because Claimants' projects were pre-operational, an income-based methodology to calculate damages using a discounted cash flow ("**DCF**") analysis would be too speculative.⁹⁸⁵ Colombia advances an alternative "*cost-based approach*" under which its expert, Dr. Hern of NERA, estimates the value of Claimants' Projects based on "*historical costs incurred by each project.*"⁹⁸⁶ Colombia's approach muddles distinct valuation principles and concepts, and substantially undercompensates Claimants.
409. Claimants explain below that (*i*) an income based methodology using a DCF assessment is the most technically and legally sound way to compensate Claimants for the FMV of their

⁹⁸² BRG 1 Report ¶¶ 122-27; BRG 2 Report § II (heading).

⁹⁸³ BRG 1 Report ¶¶ 112, 123-27; BRG 2 Report ¶ 35.

⁹⁸⁴ BRG 1 Report ¶¶ 113(e), 115; BRG 2 Report ¶ 36.

⁹⁸⁵ Counter Memorial, ¶¶ 595-605.

⁹⁸⁶ Counter Memorial, ¶¶ 627-29.

investments; and (ii) a historical costs based methodology is inapplicable because it does not value the FMV of Claimants' investments.

1. The DCF Methodology Is Appropriate

410. As noted above, Colombia agrees that Claimants are due the FMV of their investment. The FMV is “*the price that a seller is willing to accept and a buyer is willing to pay on the open market in an arm’s length transaction.*”⁹⁸⁷ Financial theory provides that the price of a business “*reflects the cash flows it is expected to generate over its operative life.*”⁹⁸⁸ It is only if the business “*do[es] not have any income-generating capacity per se, [that it] cannot be valued on the basis of expected cash flows.*”⁹⁸⁹ Thus, “*theoretically the strongest*” and by far the most-commonly used method⁹⁹⁰ to determine the FMV of a business is an income-based approach that calculates the present value of a business based on its anticipated cash flows using a DCF analysis.⁹⁹¹ While there may be some uncertainty on the precise value of the cash flows, this uncertainty does not preclude the use of an income-based methodology altogether. Rather, the valuation itself can account for the uncertainty through various controls, including by appropriately discounting the cash flows

⁹⁸⁷ **Exhibit CL-057**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 183, citing Black’s Law Dictionary.

⁹⁸⁸ **Exhibit CL-057**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), pp. 192-93.

⁹⁸⁹ **Exhibit CL-057**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 193.

⁹⁹⁰ **Exhibit CL-057**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 193.

⁹⁹¹ **Exhibit CL-057**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 193.

and performing cross-checks with comparable market data. This is precisely what BRG has done in this case.

411. Both economic and legal sources support the use of DCF in this case, as explained below.

a. Economic And Financial Sources Support Use Of DCF

412. Colombia claims that it is “uniformly accepted by economic and financial literature that the DCF method is inappropriate to assess the value of early stage businesses with no track record of commercial operations.”⁹⁹² Colombia cites to only one source for this bald assertion—its own expert, Dr. Hern. Dr. Hern, in turn, points to two sources: The World Bank Guidelines and the Global Arbitration Review (“GAR”) Guide to Damages.⁹⁹³ This hardly constitutes a “uniform” view and, in any case, Dr. Hern’s references actually support BRG’s approach, as discussed below.

413. As a preliminary matter, the DCF valuation methodology models cash flows based on certain cost and revenue drivers and then accounts for risk to lower the ultimate value. The key question for valuers is thus to ascertain sources of cost and revenue drivers, and capture the sources of risk. While, as Colombia notes, existing operations can provide reliable estimates for DCF inputs, they are not the only source for reliable inputs; a similar level of certainty can be reached for pre-operational projects with appropriate forecasting and adjustments. This is why numerous authoritative economic texts and valuation experts support the use of DCF analysis for valuing pre-operational or early-stage businesses that do not have a history of profits. For instance:

⁹⁹² Counter Memorial, ¶ 595.

⁹⁹³ NERA Report, ¶ 76.

- a. Professor Damodaran of New York University’s Stern School of Business has written a seminal text on the valuation of young companies, in which he recommends using the DCF analysis with certain adjustments to account for the specific uncertainties associated with valuing such companies.⁹⁹⁴ BRG follows his approach in their valuation.⁹⁹⁵
- b. Certified valuation experts Messrs. Mellen and Evans in their treatise on corporate valuation state that “[t]he reality is that all valuation methods are more speculative for start-ups than for established companies, but the fundamentals of valuation remains the same [. . .] [i]n the end, the income approach, using a DCF analysis, is an effective way to value a start-up company.”⁹⁹⁶

414. The GAR articles cited by Dr. Hern also support BRG’s DCF valuation approach, including its reliance on Claimants’ underwriting and appraisal models.⁹⁹⁷

- a. An article by FTI Consulting notes that when assessing lost profits, “[t]he but-for scenario may well rely on contemporaneous forecasts” and it is up to the damages expert to determine whether the forecasts are sufficiently reliable based on a range of factors.⁹⁹⁸ It adds that when estimating future cash flows, “[a] contemporaneous business plan and forecast of profitability” can be compelling evidence of a robust

⁹⁹⁴ NERA Report, ¶ 77; n. 50.

⁹⁹⁵ BRG 1 Report, ¶108; n. 167. See BRG 2 Report ¶ 29.

⁹⁹⁶ Exhibit CL-153, Chris M. Mellen & Frank C. Evans, Valuation for M&A: Building Value in Private Companies 295 (2d ed. 2010).

⁹⁹⁷ One of these articles relates to damages for construction dispute (which this is not). See Exhibit RH-006, Neal Mizrahi, Compensation in Complex Construction Disputes (2011).

⁹⁹⁸ Exhibit RH-004, GAR Guide to Damages in International Arbitration, Income Approach and Discounted Cash Flow Methodology, A. Demuth, 2018, p. 185.

and defensible futures cash flow, particularly “[i]f infrastructure was already in place and agreements signed with future customers.”⁹⁹⁹

- b. Another article Dr. Hern references affirms that “a lack of historical operating data does not necessarily preclude the use of a DCF method.”¹⁰⁰⁰
- c. The chapter in the GAR Guide on Valuation, which Dr. Hern omits to reference, provides that “[t]he income approach is the usual starting point for the valuation of an entire or controlled entity, whether that entity is a company, a business or a project. This is because the owner or controller of the entity is likely to have the detailed information needed to undertake a realistic assessment of expected future cash flows.”¹⁰⁰¹

415. Indeed, most start-ups are valued based on their expected future growth and profits. This is because the value attributed to the business comes from its expected future cash flows; not money sunk into the venture.

416. In this context, Dr. Hern’s reliance on the World Bank Guidelines is misplaced. The Guidelines provide that DCF is an appropriate way to value a “*going concern*,” and acknowledge the method’s applicability in valuing companies generally that have “*income producing capacity*.”¹⁰⁰² Under the World Bank guidelines, however, Mr. Seda’s

⁹⁹⁹ **Exhibit RH-004**, GAR Guide to Damages in International Arbitration, Income Approach and Discounted Cash Flow Methodology, A. Demuth, 2018, p. 185.

¹⁰⁰⁰ **Exhibit RH-004**, GAR Guide to Damages in International Arbitration, Income Approach and Discounted Cash Flow Methodology, A. Demuth, 2018, p. 206.

¹⁰⁰¹ **Exhibit RH-004**, GAR Guide to Damages in International Arbitration, Income Approach and Discounted Cash Flow Methodology, A. Demuth, 2018, p. 170.

¹⁰⁰² The World Bank Guidelines provide in full: “*For a going concern, i.e. an enterprise consisting of income-producing assets and already in existence for a sufficient period of time to generate the data necessary for proving its profitability and the calculation, with reasonable certainty, of its income in future years (on the assumption*

businesses satisfied the criteria of “going concern” as they (i) owned “income producing assets” (as of the date of valuation, the Meritage Project had successfully pre-sold Phase 1 and Luxé had completed and sold Phases 1, 2, and 5) and (ii) had “been in operation” for sufficient time to “generate the data required for the calculation of future income which could have been expected with reasonable certainty if the taking had not occurred” (the Projects had underwriting and appraisal models on which BRG has relied).¹⁰⁰³ And, of course, Mr. Seda has a substantial history of successful operations in Colombia with the Charlee Hotel, which is used as a reference point by BRG in assessing damages. Setting aside that Mr. Seda’s business were clearly a “going concern” within the meaning of the Guidelines, as noted by Professor Marboe, “the existence of a ‘going concern’ is not a

*that the taking did not occur), Section 6 of Guideline IV suggests that discounted cashflow may represent an acceptable method of valuation. This method values an income-producing asset by estimating the net cash flow which the asset could be realistically expected to generate over the course of its life, and then discounting that net cash flow by a factor that reflects the time value of money, expected inflation and the risk associated with the cash flow. This method is regarded as appropriate for valuing enterprises with a firmly established income-producing capacity because it recognizes that the economic value of such an enterprise to its owner is a function of the cash that the enterprise can be expected to produce in future. However, particular caution should be observed in applying this method as experience shows that investors tend to greatly exaggerate their claims of compensation for lost future profits. Compensation under this method is not appropriate for speculative or indeterminate damage, or for alleged profits which cannot legitimately accrue under the laws and regulations of the host country.” **Exhibit CL-154**, The World Bank Group, “Legal Framework for the Treatment of Foreign Investment, Volume II: Guidelines,” Foreign Investment Law Journal, 1992, Chapter IV Expropriation and Unilateral Alterations of Termination of Contracts, pp. 26-27 (emphasis added).*

¹⁰⁰³ **Exhibit CL-154**, The World Bank Group. “Legal Framework for the Treatment of Foreign Investment, Volume II: Guidelines,” Foreign Investment Law Journal. 1992, Chapter IV Expropriation and Unilateral Alterations of Termination of Contracts, p. 42 (the full definition of a going concern is: “an enterprise consisting of income-producing assets which has been in operation for a sufficient period of time to generate the data required for the calculation of future income and which could have been expected with reasonable certainty, if the taking had not occurred, to continue producing legitimate income over the course of its economic life in the general circumstances following the taking by the State”). See also **Exhibit CL-156**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Quantum, 13 October 2020, ¶¶ 531, 537.

*condition for the application of an income based valuation method” and the Guidelines are “recommendations and do not have a binding character.”*¹⁰⁰⁴

2. Arbitral Jurisprudence Confirms DCF Is Appropriate

417. International arbitration tribunals have roundly recognized that DCF is the gold-standard for valuation purposes and have routinely used DCF to value pre-operational projects.¹⁰⁰⁵ These tribunals have found the existence of prior business plans and models, the claimants’ track record and external validation of the inputs (all of which apply here) to be of particular importance. Some illustrative decisions include:

- a. *CC/Devas v. India*: The tribunal used a DCF to value the claimants’ investment in a telecommunications company that had entered into a contract with an Indian State entity to provide multimedia services. The State entity annulled the contract before claimants could commence operations. The tribunal there adopted the DCF method to value claimants’ damages because, *inter alia*, the DCF model relied on an internal contemporaneous business plan developed prior to the dispute, which, to that tribunal, “represent[ed] a rare and unique source of evidence about Devas’s value” as it was

¹⁰⁰⁴ **Exhibit CL-155**, Irmgard Marboe, *CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL LAW* (2d ed. 2017), ¶¶ 4.35, 5.93.

¹⁰⁰⁵ **Exhibit CL-157**, *Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listrik Negara*, Final Award, 4 May 1999, ¶¶ 357-72 (tribunal used DCF analysis when damages arose after improper termination of electricity purchase agreement); **Exhibit CL-158**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, ¶¶ 553-61, 599, 604-39 (tribunal applied a DCF model to value contractual rights); **Exhibit CL-097**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 830; **Exhibit CL-048**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 355-57.

developed by the company’s management “*well before any dispute with India arose, and represents Devas’s actual plans for the implementation of its business.*”¹⁰⁰⁶

- b. *Tethyan Copper Company Limited v. Pakistan*: The tribunal found that it was appropriate to use DCF in circumstances where the tribunal had found that but for the respondent’s breaches, the project would have been operational and profitable.¹⁰⁰⁷ The tribunal further found that the feasibility study and other testing confirmed the reliability of the cash flow inputs.¹⁰⁰⁸
- c. *SD Myers v. Canada*: The tribunal found that the enterprise was likely to be profitable even though it was a start-up venture in light of the claimant’s track record and extensive preparatory work.¹⁰⁰⁹ This included the claimant’s “*successful experience of seizing market opportunities*” in the United States and work done in setting up a Canadian subsidiary, including its “*intensive marketing campaign*” and work done to set up “*first mover advantage.*”¹⁰¹⁰ Accordingly, it determined that the appropriate measure of damages was “*the value of the lost and delayed net income streams.*”¹⁰¹¹

¹⁰⁰⁶ **Exhibit CL-156**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Quantum, 13 October 2020, ¶ 541.

¹⁰⁰⁷ **Exhibit CL-159**, *Tethyan Copper Company Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1741.

¹⁰⁰⁸ **Exhibit CL-159**, *Tethyan Copper Company Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 1734, 1741.

¹⁰⁰⁹ **Exhibit CL-160**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, ¶¶ 89, 113-16, 174, 222, 300-301.

¹⁰¹⁰ **Exhibit CL-160**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, ¶¶ 173, 170-71.

¹⁰¹¹ **Exhibit CL-160**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, ¶ 222.

- d. *Lemire v. Ukraine*: The tribunal awarded damages based on DCF for radio stations that never became operational on the basis of pre-dispute business projections and plans made by the investor, finding it important that the claimant “*had the financial strength and the necessary know how to successfully*” implement the business plan.¹⁰¹²

418. Indeed, such cases abound.¹⁰¹³ In contrast, Colombia cites to just three 20-year old investment arbitration decisions—*Metalclad*, *Tecmed* and *Wena*—to argue against the use of DCF.¹⁰¹⁴ All three cases are inapposite.

- a. In *Metalclad* and *Tecmed*, there was no indication that the DCF model was based on pre-dispute data prepared in the ordinary course of business.¹⁰¹⁵ Moreover, claimants in those cases were not able to verify the reliability of the DCF inputs based on comparable market data.¹⁰¹⁶ In addition, the respondent in these cases challenged the

¹⁰¹² **Exhibit RL-047**, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶¶ 59-62, 205, 254, 296-98.

¹⁰¹³ See also **Exhibit CL-157**, *Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listrik Negara*, Final Award, 4 May 1999, ¶¶ 357-72 (tribunal used DCF analysis when damages arose after improper termination of electricity purchase agreement); **Exhibit CL-158**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, ¶¶ 553-61, 599, 604-39 (tribunal applied a DCF model to value contractual rights); **Exhibit CL-097**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 830; **Exhibit CL-048**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 355-57; **Exhibit CL-085**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 690; **Exhibit CL-109**, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, ¶ 426.

¹⁰¹⁴ Counter Memorial, ¶ 597.

¹⁰¹⁵ **Exhibit CL-021**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 113-25; **Exhibit CL-032**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. Arb (AF)/00/2, Award, 29 May 2003, ¶¶ 183-200.

¹⁰¹⁶ **Exhibit CL-021**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 113-25; **Exhibit CL-032**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. Arb (AF)/00/2, Award, 29 May 2003, ¶¶ 183-200.

experience and ability of the claimant to build and operate a landfill business.¹⁰¹⁷ No similar challenge has been (or indeed could be) made regarding Mr. Seda’s knowhow and experience.

- b. In *Wena*, the hotel operator did not have any successful history of operations in the country¹⁰¹⁸ and there was “*some question whether Wena had sufficient finances to fund its renovation and operation of the hotels.*”¹⁰¹⁹ Here, Mr. Seda had a demonstrated track record of operating one of the most lucrative hotels in Medellín, which commanded revenues per available room that were among the highest in Colombia’s luxury hotel market,¹⁰²⁰ and there were no gaps in the funding of Claimants’ Projects.

419. As noted by the Crystallex tribunal, in deciding whether to use a DCF “[t]he question to assess is whether: ‘(i) it is sufficiently certain that the Claimant would have made profits; and (ii) if yes, whether the Claimant has provided the Tribunal with a reasonable basis to assess such loss of profits.’”¹⁰²¹ Claimants’ Projects satisfy both criteria:

420. Claimants’ Projects were shepherded by Mr. Seda who had a demonstrated track record, know-how and substantial reputation in the Colombian real estate market. The rapid velocity of presales of the Luxé and Meritage units substantiate the high demand for these

¹⁰¹⁷ **Exhibit CL-021**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 113-25; **Exhibit CL-032**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. Arb (AF)/00/2, Award, 29 May 2003, ¶¶ 183-200.

¹⁰¹⁸ **Exhibit CL-024**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶ 124.

¹⁰¹⁹ **Exhibit CL-024**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶ 124.

¹⁰²⁰ BRG 2 Report, ¶ 114.

¹⁰²¹ **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 876.

Projects, which capitalized on the success of the Charlee Hotel. In fact, most real estate projects in developing economies like Colombia succeed as economic growth translates to greater spending power and demand. Unsurprisingly, JLL has calculated the failure rate of real estate and hospitality projects in Colombia to be just over 10 percent.¹⁰²² Indeed, Colombia does not (and cannot) challenge the likelihood of Claimants' Projects earning a positive return.

421. Rather, Colombia's complaints are primarily that the inputs to the DCF model are unreliable. But here too, Colombia's complaints miss the point. Absolute certainty is not possible with any valuation.¹⁰²³ However, BRG has taken reasonable steps to account for any uncertainty, including by making comparisons to market data from third party real estate experts. We address the DCF inputs and Colombia's critiques in more detail below.

3. BRG's DCF Inputs Are Reliable

422. The cash flow inputs that BRG uses for its DCF analysis provide a reasonable and reliable estimate of the FMV of Claimants' Projects. Colombia and Dr. Hern present a laundry list of concerns with the inputs underlying BRG's DCF analysis. These quibbles, however, do not preclude the use of DCF altogether. Rather, they can be accounted for by adjusting the various inputs. Moreover, Colombia's and Dr. Hern's critiques ring hollow when they have failed to offer up their own views on what they consider to be reasonable inputs for a

¹⁰²² See BRG 2 Report, ¶ 178; JLL 2 Report, slide 11.

¹⁰²³ As noted by Dr. Ripinsky, "[v]aluation experts note that there is uncertainty associated with valuation and that it is unrealistic to expect or demand absolute certainty." **Exhibit CL-057**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 189 citing to A Damodaram, *Investment Valuation* (John Wiley & Sons, London 2002).

valuation exercise. In any event, Colombia's and Dr. Hern's complaints are unfounded for the reasons set out below.

423. First, Colombia avers that the probability of success rate BRG applied to the Development Projects is “*highly speculative and unsupported*” and that “*there is no objective evidence to determine the Claimants' failure rate.*”¹⁰²⁴ This is untrue. As BRG explained in its First Report, it derived the success rate based on Professor Damodaran's methodology.¹⁰²⁵ Indeed, Dr. Hern cites Professor Damodaran's success rates in his own report.¹⁰²⁶ Thus, far from being unsupported, Dr. Hern acknowledges that the source of BRG's rates is credible.
424. What Dr. Hern disagrees with is not the existence of objective data, but with the applicability of this data, derived from U.S. sources, to the Colombian market.¹⁰²⁷ In similar circumstances, other tribunals have also turned to the same U.S. Bureau of Labor Statistics data to estimate the probability of success of U.S. investors in foreign countries.¹⁰²⁸ In any event, with this submission JLL has estimated a failure risk rate for the real estate and hospitality market in Colombia based on the ratio of comparable unfinished to finished projects.¹⁰²⁹ JLL's calculated failure rate (10.1 percent) came to about half the rate BRG had used in its first report for the Development Projects (23.5 percent) and a quarter of the

¹⁰²⁴ Counter Memorial, ¶ 601-602.

¹⁰²⁵ BRG 1 Report, ¶¶ 99-106.

¹⁰²⁶ See NERA Report, Table 4.1, p. 36.

¹⁰²⁷ See NERA Report, ¶ 94. Dr. Hern also asserted that a failure rate should have been applied to the valuations of the Meritage and Luxé Projects. BRG have addressed these concerns in their Second Report. See BRG 2 Report, ¶ 178.

¹⁰²⁸ See **Exhibit CL-156**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Quantum, 13 October 2020, ¶ 571.

¹⁰²⁹ See BRG 2 Report, ¶ 178.

rate BRG applied to Expansion Projects (39 percent).¹⁰³⁰ It is not surprising that the failure rate for real estate projects in Colombia is lower than in the U.S. given the rapid development of theits economy, and in particular its tourism industry, in recent years.

425. And indeed, Claimants' Projects were far more likely to succeed than the average Colombian real estate development in light of their advanced stage of development. Mr. Seda had done a significant level of preparatory work to build the Projects. He had not only identified promising opportunities,¹⁰³¹ but had taken substantial steps to design the Projects, set up development vehicles for the Projects, develop business plans with an underwriting model, attract third party investors, enter loan agreements with banks, identify and purchase the land following the required due diligence, secure permits, enter into fiduciary agreements to oversee development of the Projects, conduct extensive marketing efforts to enable presales, and enter into agreements to manage construction and operation of the Projects.¹⁰³² Indeed, Royal Realty employed a large team to conduct preparatory and planning work for the Projects.¹⁰³³

426. Colombia also complains that BRG does not apply a probability of success rate to the Meritage and Luxé Projects. But that is simply because the Meritage and Luxé Projects were well advanced, as Mr. Seda had not only completed all the steps mentioned above, but had progressed significantly with pre-sales and construction of these Projects. As of the date of valuation, all of the 152 Phase 1 units (as well as 21 Phases 4 and 6 units) of the

¹⁰³⁰ See BRG 2 Report, ¶¶ 104, 178; JLL 2 Report, slide 11.

¹⁰³¹ See Seda 1 WS, ¶¶ 38-43, describing his process with respect to the Meritage Project.

¹⁰³² See Seda 1 WS, ¶¶ 21-25, 29-37, 49-61, 66-74.

¹⁰³³ See Seda 1 WS, ¶ 37.

Meritage Project had been sold and 26 percent of construction costs had been met.¹⁰³⁴ As of the same date, construction and sale of Phases 1, 2, and 5 of Luxé (which included 17 residential lots, 18 apartments, and 45 houses) were complete, and construction of the hotel associated with the Project was over 70 percent complete.¹⁰³⁵ Given that these Projects were on the cusp of operations, there is little reason to doubt that they would have made it.

427. Indeed, at no point until the date of valuation was funding of the Projects under any serious doubt, as Mr. Seda had either already secured the required funding or had demonstrated the ability to secure the necessary funding. Specifically, Mr. Seda had already secured funding to complete the remainder of the Luxé Project¹⁰³⁶ and had already sourced more than 70 percent of expected funding required for the Meritage Project.¹⁰³⁷ In fact, by approving loans, the banks were validating Claimants' views on the probability of success of these Projects.

428. Second, Colombia asserts, without support, that just because Claimants Projects' were pre-operational, any estimations of future cash flows would necessarily be "*highly speculative and unreliable*."¹⁰³⁸ This again is not true. As discussed above, the consensus valuation methodology used by economic and financial professionals is DCF. Numerous

¹⁰³⁴ See BRG 1 Report, ¶ 54, citing **Exhibit BRG-001**, Corficolombiana Sales Report, 17 August 2016, p. 2; **Exhibit BRG-034**, Meritage Cash Flows Control Phase 1 by Ochoa Architects, p. 1.

¹⁰³⁵ See BRG 1 Report, ¶ 61, citing Seda 1 WS, ¶¶ 25, 109-10; Seda 2 WS, ¶ 66.

¹⁰³⁶ See **Exhibit C-135**, Loan Approval Letter from Colpatria, 23 September 2014; **Exhibit C-137**, Amended Loan Approval Letter from Colpatria, 11 December 2014; Seda 1 WS, ¶ 72; Seda 2 WS, ¶ 68.

¹⁰³⁷ See BRG 2 Report, ¶ 173. **Exhibit C-150**, Letter from Banco de Bogotá to Angel Seda and Jaime Andrés Toro, 5 April 2016; **Exhibit C-158**, Banco de Bogotá Promissory Note, 4 May 2016. See also Seda 1 WS, ¶¶ 73-74; Seda 2 WS, ¶¶ 59(b), 86.

¹⁰³⁸ Counter Memorial, ¶ 603.

investment tribunals have recognized this and adopted a DCF valuation for pre-operational companies.¹⁰³⁹

429. BRG’s DCF analysis in this case is based on the cash flows contained in the Projects’ underwriting models that were available as of the valuation date.¹⁰⁴⁰ These models present objective, contemporaneous and accurate estimates of the cash flows expected by Claimants as they were prepared, not for the purposes of litigation, but for everyday business activities.¹⁰⁴¹ The models were developed by Mr. Seda and his team at Royal Realty, and drew from their actual historical data over time as well as other projects in the same markets, including their own experience with the Charlee Hotel.¹⁰⁴² Mr. Seda used them not just for internal operational purposes, but also externally for capital raising with investors, applications for bank financing, acquisition of property from sellers, and discussions with the project fiduciaries to set the point of equilibrium for specific phases.¹⁰⁴³
430. In fact, the forecasted cash flows had added certainty in light of the advanced nature of the development of Claimants’ Projects, in particular the Luxé and Meritage Projects.

¹⁰³⁹ See Memorial, ¶ 495.

¹⁰⁴⁰ See BRG 2 Report, ¶ 70.

¹⁰⁴¹ See **Exhibit CL-156**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Quantum, 13 October 2020, ¶ 541; **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 507; **Exhibit CL-159**, *Tethyan Copper Company Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 480 (“At the outset of its analysis on whether Claimant has established the accuracy of the estimation and classification of the mineral resources reported in the Feasibility Study, the Tribunal notes that the estimation and classification performed for the Feasibility Study was not conducted for the purposes of a damages valuation in contentious proceedings but rather for the purposes of determining whether the resources available could form the basis of successful mining operations at Reko Diq. As a general matter, the Tribunal therefore does not consider it plausible that Claimant and its owners would apply a ‘haphazard resource estimation technique to inflate the value of the mine,’ as Respondent alleges.” (emphasis in original)).

¹⁰⁴² See BRG 1 Report, ¶¶ 156-62; Seda 2 WS, ¶ 49; Memorial, ¶ 502 .

¹⁰⁴³ See Seda 2 WS, ¶ 50.

431. With respect to forecasted revenues, the Luxé and Meritage Projects had already achieved high level of pre-sales by the time of the Measures.¹⁰⁴⁴ These pre-sales were backed by contracts with the Unit Buyers—*i.e.*, revenue was committed.¹⁰⁴⁵ Likewise, fees that Royal Realty would have captured from the Projects were also locked in through pre-existing contracts.
432. Though pre-sales had not yet begun on the Development Projects, those Projects would have benefited from an unprecedented level of interest and demand, as demonstrated by the high velocity of pre-sales in the Meritage and Luxé Projects. Within three months, Mr. Seda had sold all lots, apartments and Phase 1 units for Luxé.¹⁰⁴⁶ Similarly, Mr. Seda was able to sell all 152 units associated with Phase 1 of the Meritage Project by August 2016.¹⁰⁴⁷ This affirmed a high level of interest in and demand for these Projects and reflected more broadly the brand value and appeal of Mr. Seda’s business. Given this track record, the Development and Expansion Projects were also well positioned to exploit high levels of demand.
433. Likewise, demand—and thus revenues—from the hospitality business could be reliably predicted based on Mr. Seda’s successful track record with the Charlee Hotel. As described in the Memorial, mere months after its opening, the Charlee Hotel quickly acquired domestic and international renown.¹⁰⁴⁸ Not only was the hotel highly rated, it was also

¹⁰⁴⁴ See Seda 2 WS, ¶ 51.

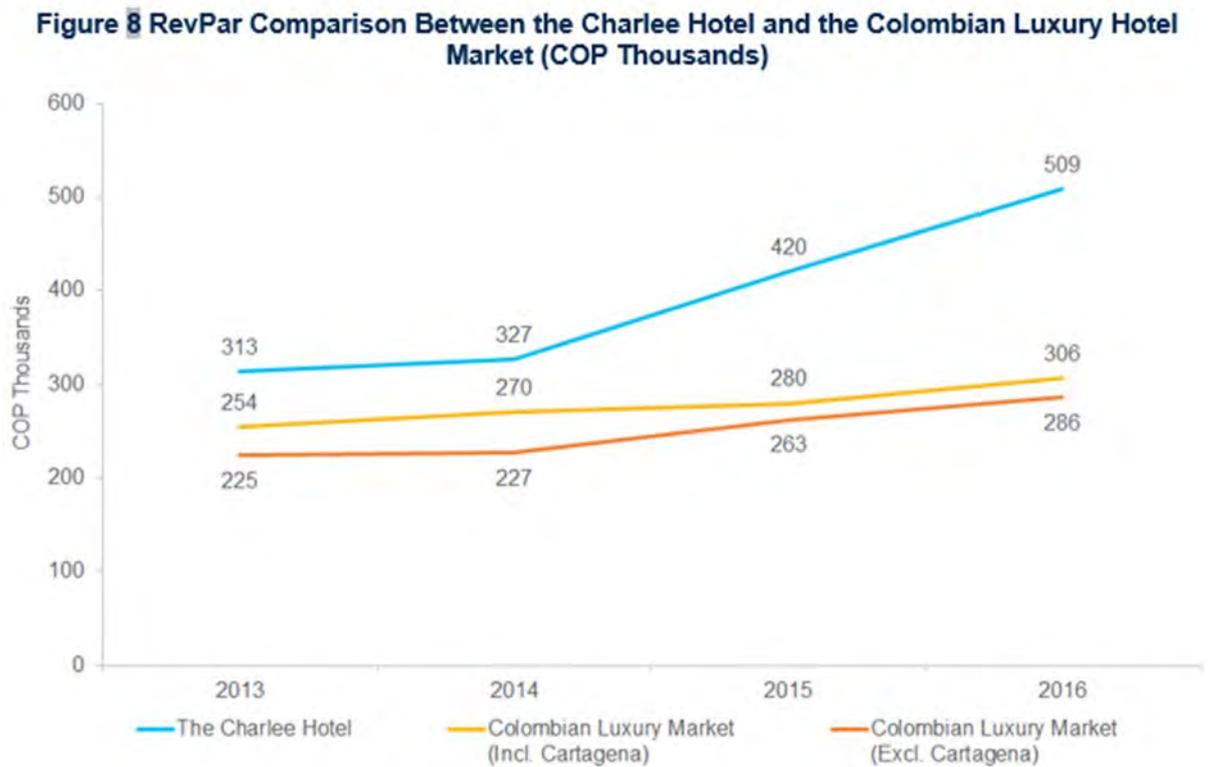
¹⁰⁴⁵ See Exhibit C-028bis, Administration and Payment Trust Agreement and Amendments, 17 October 2013, cls. 5, 8, 13.

¹⁰⁴⁶ See Seda 1 WS, ¶ 25.

¹⁰⁴⁷ See Seda 1 WS, ¶ 96, *citing* Exhibit C-170, Corficolombiana Certification of Phase 1, 17 August 2016. See also Seda 2 WS, ¶ 59(a).

¹⁰⁴⁸ See Seda 1 WS, ¶¶ 27-28.

highly profitable. The hotel was one of the first of its kind in Medellín, and soon outstripped performance not just with respect to the local market, but Colombia as a whole. The hotel’s occupancy rates in 2017, for example, were between 70 and 80 percent compared to average rates in Colombia that hover between 50 and 60 percent.¹⁰⁴⁹ Moreover, the Charlee Hotel captured revenues per available room (“**Revpar**”) that were significantly above the average for luxury hotels in Colombia.¹⁰⁵⁰ The Charlee Hotel even outperformed resort hotels in Cartagena, Colombia’s premier tourist destination with luxury hotels that significantly outperform their counterparts in Bogotá and Medellín.¹⁰⁵¹



¹⁰⁴⁹ See Seda 1 WS, ¶ 28, citing Exhibit C-015bis, Charlee Hotel Management Report, 2017, SP-0002.

¹⁰⁵⁰ See BRG 2 Report, ¶¶ 115-16.

¹⁰⁵¹ See BRG 2 Report, ¶ 116.

434. With respect to forecasted costs, the construction costs for the Meritage and Luxé Projects had been largely locked in through contracts with various subcontractors and vendors. Likewise, operating costs were based on existing relationships with vendors or quotes provided to Royal Realty in the course of its operations.¹⁰⁵² Accordingly, major components of the cash flow had verified and secure sources.
435. Critically, BRG verified the reliability of the values in Claimants’ underwriting models by comparing them with independent market-based inputs provided by JLL.¹⁰⁵³ Colombia dismisses JLL’s hospitality inputs as unreliable because they involve operational hotels instead of development-stage ones and because they include hotels in other parts of Latin America.¹⁰⁵⁴ But JLL supplies operational hotel metrics to serve as comparators to the forecasted cash flows of Claimants’ hotels, *i.e.* in the but-for scenario where Claimants’ hotels would have been operational. And JLL selected comparators for Claimants’ luxury hotels outside Colombia because there were no existing comparators in the country.¹⁰⁵⁵ In any event, as JLL explains, “[a]n *income-based valuation approach essentially includes the country specific factors into the rate per room; therefore, the broader external factors do not need to be separately analysed or included in the adjustments for rates per room.*”¹⁰⁵⁶
436. Colombia also criticizes JLL’s real estate sales prices and costs arguing that they “*do not reflect the key elements of a DCF valuation*” such as “*the risks of failure inherent to the*

¹⁰⁵² Seda 2 WS, ¶ 49.

¹⁰⁵³ See Memorial, ¶ 501.

¹⁰⁵⁴ See Counter Memorial, ¶¶ 617-18.

¹⁰⁵⁵ See JLL 2 Report, slide 49 (“As we explained, the sparsity of high-end hospitality developments within Colombia meant JLL had to expand the scope of its search for comparable transactions during the relevant time period from 2015-2019.”)

¹⁰⁵⁶ JLL 2 Report, slide 49.

specific real estate involved.”¹⁰⁵⁷ But it is precisely the prices and costs that underlie the cash flows used for a DCF analysis. And BRG accounts separately for the risks Colombia alleges are missing from JLL’s analysis. For instance, BRG uses a probability of success rate to address the risk of failure.¹⁰⁵⁸

437. While Colombia and Dr. Hern raise a number of (unwarranted) critiques of JLL’s inputs and methodology (which BRG and JLL address in further detail in their reports), the fact of the matter is that Colombia offers no real estate or hospitality expertise to buttress its allegations. By contrast, JLL provided figures based on decades of industry experience, including in Colombia, and access to proprietary data that it has collected from hundreds of transactions and field surveys over the years.¹⁰⁵⁹

438. Colombia claims instead that the appropriate market cross-check should be years-old capital contribution agreements from some (but not all of) Claimants’ Projects. However, none of the capital contribution agreements Dr. Hern points to were contemporaneous with the date of loss. For instance, the capital contribution agreements for Newport are from May 2013.¹⁰⁶⁰ Since May 2013, however, the Meritage Project advanced significantly. Newport conducted due diligence on and ultimately secured the property on which it was to be built, entered into fiduciary agreements to set up the management of the Project, conducted marketing, initiated pre-sales ultimately hitting the threshold for the equilibrium point of Phases 1 and 6 of the Project, and had completed construction of approximately

¹⁰⁵⁷ Counter Memorial, ¶ 619.

¹⁰⁵⁸ See BRG 1 Report, ¶¶ 157, 196.

¹⁰⁵⁹ See JLL 2 Report, slides 139-140.

¹⁰⁶⁰ See NERA Report, table 6.4.

25 percent of the Phases.¹⁰⁶¹ All this groundwork had been done, which is reflected by the much higher valuation of the company as of January 2017. Similarly, the prices cited by Dr. Hern in relation to the other projects also appreciated (albeit to a much lesser degree) as their development progressed from the date of transaction to the date of valuation.

439. Third, Colombia contends that the timeline of completion of the Projects is too uncertain.¹⁰⁶² But these again are not grounds to reject a DCF altogether. If Colombia believes a more conservative timeline is applicable (which it is not), the model can be shifted forward a few months. Moreover, as noted by Mr. Seda, the Luxé and Meritage Projects (which generate the most significant portion of damages) needed to be completed by the contemplated deadline to be able to capture the significant tax advantages.¹⁰⁶³ In an industry where catch-up is not only possible but a practical reality, Mr. Seda was both economically motivated and had the means to complete construction on time.¹⁰⁶⁴
440. Thus, none of Colombia's quibbles with the DCF inputs merit exclusion of the DCF methodology altogether. Rather, if warranted (and they are not), Colombia's critiques call for adjustments to the calculation (some of which BRG has already made in their sensitivities). Claimants further address Colombia's specific complaints with respect to BRG's valuation of each of the Projects in **Appendix J**.

¹⁰⁶¹ See Memorial, ¶¶ 56-84, 87-95.

¹⁰⁶² See Counter Memorial, ¶ 604.

¹⁰⁶³ See Seda 2 WS, ¶ 63.

¹⁰⁶⁴ See Seda 2 WS, ¶¶ 62-63.

4. Dr. Hern's Cost-Based Approach Does Not Value The FMV Of Claimants' Projects

441. While Colombia and Dr. Hern complain at length about BRG's methodology, they fail to offer an alternative FMV valuation of their own. Instead, Dr. Hern attempts to calculate the sum of the historical costs incurred by Claimants for the development of the Projects. This addition exercise is not a valuation. No reasonable purchaser determines the price of a prospective business by adding up the historical costs sunk into that business. Indeed, when economists refer to "*sunk costs*" they refer to money that has been spent and is not recoverable. Put differently, how much money has been spent on a Project generally has little to do with its commercial value. Though historically some tribunals have awarded sunk costs as compensation, as Dr. Ripinsky notes "*by measuring compensation on the basis of actual expenditure, tribunals are not – despite what they say – calculating the FMV of investment*".¹⁰⁶⁵

442. While, in limited circumstances, some valuation exercises might employ the use of an "*asset-based*" or "*costs-based*" approach to value a business whose main source of value stems from its assets,¹⁰⁶⁶ this approach has nothing to do with the historical costs of that Project. As noted by the GAR Guide on Damages (on which Dr. Hern relies extensively):

"The cost approach [. . .] is not the same as the historical cost of the entity or business - historical cost tells us the amount actually spent buying or building the asset at some past date or over a period of time, rather than

¹⁰⁶⁵ **Exhibit CL-057**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 231. See also *id.* p. 229-230 ("*it would be wrong to mechanically assume that the historic cost of an investment is a good indicator of its 'market value', ie the price for which the investment could have been sold. It is often the case that the amount invested is not indicative of the investment's market value.*")

¹⁰⁶⁶ "*The cost approach is suited to more limited circumstances, especially asset-based (rather than trading) entities and those that won readily replicable assets.*" **Exhibit RH-004**, GAR Guide to Damages in International Arbitration, Income Approach and Discounted Cash Flow Methodology, A. Demuth, 2018, p. 199.

the cost of buying or replicating the asset on the valuation date, which is better thought of as replacement cost. [. . .] When the cost approach is considered, historical cost is of little significance: more important are replacement cost and break-up value."¹⁰⁶⁷

443. Thus, Dr. Hern's attempt to sum up the historical costs tells us nothing about the FMV—which Colombia agrees is the least that must be due to Claimants—of the Projects.

444. In this case, Dr. Hern's sunk costs approach would not only fail to meet the standard for compensation under the TPA; it would also grossly undercompensate Claimants. His method fails to account for value generated by Mr. Seda's and Royal Realty's track record, reputation and recognition for developing luxury real estate and hospitality projects in Colombia.¹⁰⁶⁸ It also fails to capture the value created by Mr. Seda and Royal Realty through annual fees received from the development and management of Claimants' existing and future projects.¹⁰⁶⁹ As BRG notes, Dr. Hern's methodology is unsuitable for growing businesses as it fails to capture the value of the significant growth opportunities.¹⁰⁷⁰ In particular, the Meritage and Luxé Projects were substantially built and months away from operations that were poised to generate substantial returns, which Dr. Hern's methodology completely ignores.

445. In any event, Dr. Hern's summation is fraught with issues (many of which he openly acknowledges) and significantly understates the true levels of investment made by

¹⁰⁶⁷ **Exhibit RH-004**, GAR Guide to Damages in International Arbitration, Income Approach and Discounted Cash Flow Methodology, A. Demuth, 2018, pp. 197-98.

¹⁰⁶⁸ BRG 2 Report, ¶¶ 49-50.

¹⁰⁶⁹ BRG 2 Report, ¶ 51.

¹⁰⁷⁰ BRG 2 Report, ¶ 53.

Claimants to develop the Projects. Indeed, Dr. Hern's analysis on its face undervalues the historical costs incurred by Claimants in many ways. Some examples include:

- a. Dr. Hern's cost estimate does not include the substantial cost of outstanding unpaid loan balances which continue to accrue interest and penalties that have not been repaid due to the cessation of the Projects.¹⁰⁷¹
- b. Dr. Hern, on the instruction of Colombia's counsel, excluded all costs and presales related to Phases 1, 2, and 5 of the Luxé Project.¹⁰⁷² However, Luxé's business model relied on expenditures incurred and revenues generated from these phases to fund the development of the hotels. Indeed, the units sold in these phases derived their value, in large part, from the positive externalities created by the hotel, such as common areas, spas, restaurants and bars, gymnasium etc.¹⁰⁷³
- c. Dr. Hern's analysis fails to consider ongoing expenses made by Claimants after the date of valuation as part of their efforts to mitigate damages. This includes costs such as paying taxes, maintenance fees, for security guards, etc.¹⁰⁷⁴
- d. As BRG notes, the update rate used by Dr. Hern is just the risk-free rate in Colombia and thus does not compensate Claimants' opportunity cost of capital.¹⁰⁷⁵

¹⁰⁷¹ See Seda 2 WS, ¶ 91; **Exhibit C-385**, Crowe Co S.A.S., Certification of Debt of Luxé SAS, 15 July 2021; **Exhibit C-386**, First Instance Judgment Colpatría Lawsuit, 27 August 2019; **Exhibit C-387**, Banco de Bogotá Construction Loan Extract, July 2021; **Exhibit C-382**, Statement of Defense filed on behalf of Luxé SAS and Angel Seda in Lawsuit Against Colpatría, 25 January 2018; **Exhibit C-383**, Judgment of Civil Court 14 of the Medellín Circuit, 19 April 2021; **Exhibit C-384**, Letter from Corficolombiana to Newport S.A.S., August 2021.

¹⁰⁷² NERA Report, ¶ 245.

¹⁰⁷³ See Memorial, ¶ 49.

¹⁰⁷⁴ See Seda 2 WS, ¶ 92.

¹⁰⁷⁵ BRG 2 Report, ¶ 21(b).

446. In sum, not only is Dr. Hern's calculation of historical costs irrelevant for the purposes of compensating Claimants in this case, it is very clearly wrong and substantially undervalues the costs actually incurred by Claimants. Under Colombia's own position, the Tribunal need not consider it.

D. Colombia Must Pay Claimants Interest

447. Colombia acknowledges that it must pay Claimants interest but claims that this should be limited to post-award interest of only the U.S. risk-free rate. Colombia's positions are untenable, and lack economic, legal and jurisprudential support.

448. First, the TPA plainly calls for interest to be applied from the date of the unlawful act, not the date of award. As stated above, Colombia accepts and even advocates for the standard of compensation for lawful expropriations under the TPA, which provides that interest shall "*accrue[] from the date of expropriation until the date of payment.*"¹⁰⁷⁶ Colombia proffers no argument on why the Tribunal should calculate interest in a manner that is less favorable than the TPA itself contemplates for lawful expropriations (which this was not), other than to cite two cases: *Lemire* and *LIAMCO*. Neither is apposite as in both cases damages were calculated only as of the date of the award, not the date of breach.¹⁰⁷⁷ Here, by contrast,

¹⁰⁷⁶ **Exhibit CL-001**, TPA, art. 10.7(3). Indeed, as Claimants have explained, the TPA standard reflects the well-established principle that interest must be awarded to put Claimants back in the position they would have occupied but for Colombia's breaches. See Memorial, ¶ 506.

¹⁰⁷⁷ **Exhibit RL-047**, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶¶ 362-63 (Claimants there "*ha[d] left the determination of the dies a quo rather vague, referring to the date on which the compensation is determined to have been due to Claimant*", which in that case the tribunal decided was the date of the Award.); **Exhibit CL-009**, *Libyan American Oil Company (LIAMCO) v. The Government of the Libyan Arab Republic Relating to Petroleum Concessions 16, 17 and 20*, Award, 12 April 1977, 20 I.L.M. 1, 12 April 1977 (finding that in the case of liquidated damages "*this Tribunal has to apply [interest] only from the time of the final assessment of damages at the date of this Award.*")

Claimants have sought damages as of the date of breach. And the decisive weight of jurisprudence has awarded interest as of the date of breach, including in cases with similar treaty language.¹⁰⁷⁸

449. Second, the TPA calls for interest to be calculated at a “*commercially reasonable rate*.”¹⁰⁷⁹ As Claimants noted, this should include “*both the passage of time and a risk premium*,” which BRG notes would be “*the average cost of debt that would be faced by Claimants in operating their real estate [. . .] and hospitality businesses but for Colombia’s unlawful conduct*.”¹⁰⁸⁰ The U.S. risk free rate advanced by Colombia is not “*commercially reasonable*” as it completely ignores the commercial enterprise in which Claimants were, in fact, invested. Put differently, the U.S. risk free rate does not fully compensate Claimants for their opportunity cost of borrowing.¹⁰⁸¹ In fact, a risk free rate would conver

¹⁰⁷⁸ Exhibit CL-021, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 128; Exhibit CL-026, *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, ¶ 90; Exhibit CL-031, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 205; Exhibit CL-055, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶ 299. See also Exhibit CL-014, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 114; Exhibit CL-029, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 175; Exhibit CL-035, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 247; Exhibit CL-048, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 397; Exhibit CL-056, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶ 457; Exhibit CL-062, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 308; Exhibit CL-063, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 294; Exhibit CL-161, *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, 11 October 2019, ¶ 525; Exhibit CL-162, *PL Holdings S.a.r.l. v. Republic of Poland*, SCC Arbitration No. V 2014/163, Final Award, 27 December 2017, ¶ 44; Exhibit CL-163, *Venezuela Holdings, et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014, ¶ 397; Exhibit CL-164, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award, 18 July 2014, ¶¶ 1669, 1677; Exhibit RL-83, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, ¶ 544.

¹⁰⁷⁹ Exhibit CL-001, TPA, art. 10.7(3).

¹⁰⁸⁰ Memorial, ¶ 508, citing BRG 1 Report, ¶¶ 179.

¹⁰⁸¹ See BRG 2 Report, ¶ 21.

any award into the cheapest loan Colombia has ever received. Indeed, the *Eco Oro* tribunal recently rejected use of the U.S. risk-free rate to compensate for investments in Colombia.¹⁰⁸²

450. Thus, Claimants maintain their request for a commercially reasonable interest rate that accounts for both the passage of time and a risk premium.¹⁰⁸³ BRG has calculated this amount using the average estimated cost of debt of the Claimants' real estate development and hotel operations in Colombia as 5.03 percent.¹⁰⁸⁴

E. Colombia May Not Deduct Additional Taxes From Award

451. As Claimants noted in their Memorial, BRG has already accounted for corporate taxes that Claimants would have paid Colombia had their Projects been allowed to develop. Indeed, in response to Dr. Hern's report, BRG has deducted additional taxes from its damages calculation.¹⁰⁸⁵ Thus, there is no basis for Colombia to deduct additional taxes from the Award so as to reduce compensation. Indeed, both the *Eco Oro* and *Glencore* tribunals in making awards against Colombia, ordered that the amount be net of taxes.¹⁰⁸⁶

¹⁰⁸² **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶¶ 912-13.

¹⁰⁸³ See Memorial, ¶ 508.

¹⁰⁸⁴ BRG 2 Report, ¶ 205.

¹⁰⁸⁵ BRG 2 Report, ¶¶ 214-15.

¹⁰⁸⁶ **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶¶ 1625-27; **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 916.

F. Colombia Must Pay Claimants Moral Damages

452. Colombia does not dispute the key events underlying Mr. Seda’s claim for moral damages. Colombia does not seriously dispute that Mr. Seda’s reputation was ruined, he was extorted but denied help by the State, his life was threatened, his family was threatened, and he was harassed by OFAC investigators as a result of false reports by the Colombian government.¹⁰⁸⁷ Indeed, Colombia continues to harass Mr. Seda—it recently declined to extend his investor visa on spurious grounds and appears to have launched a spurious criminal investigation into him.¹⁰⁸⁸
453. Colombia raises four arguments in defense. None are meritorious. First, it argues that Colombia is not actually responsible for sullyng Mr. Seda’s personal reputation.¹⁰⁸⁹ For the reasons discussed above, this is false.¹⁰⁹⁰
454. Second, Colombia claims that the request for moral damages is double dipping because Claimants claim for Mr. Seda’s Expansion Projects compensates him for loss of reputation.¹⁰⁹¹ Colombia however conflates two different heads of damages. Compensation for the FMV of Claimants’ Expansion Projects is separate from a claim for moral damages arising out of harm to Mr. Seda’s reputation. The harm to Mr. Seda personally extends beyond the economic harm to his real estate projects.

¹⁰⁸⁷ See Memorial, ¶¶ 512-19.

¹⁰⁸⁸ Seda 2, ¶ 46.

¹⁰⁸⁹ Counter Memorial, ¶ 632.

¹⁰⁹⁰ See, e.g., *supra* ¶¶ 398-399.

¹⁰⁹¹ Counter Memorial, ¶¶ 634-35.

455. Third, Colombia alleges that Mr. Seda’s circumstances are not sufficiently “grave or substantial” to warrant moral damages.¹⁰⁹² Colombia alleges—contrary to international law standards—that moral damages may not be awarded for reputational harm only, citing *Lemire*.¹⁰⁹³ In that case, the tribunal acknowledged the stress and anxiety the claimant suffered as a result of the respondent’s actions, but determined that the “significant amount of economic compensation” awarded by the tribunal in that case sufficiently addressed the claim for moral damages.¹⁰⁹⁴
456. Here, the compensation for the real estate projects does not compensate Mr. Seda for the other harm that he has suffered: he has been extorted, his family has been threatened, there was an attack on his life which Colombian authorities refused to investigate and which forced him to flee the country, and his opportunities to rebuild his business in Colombia or elsewhere have largely been nullified by the continuing campaign of harassment by the State.¹⁰⁹⁵ In short, Mr. Seda’s claim for moral damages is based not just on reputational harm, but also on substantial emotional and physical duress and a complete evisceration of his professional opportunities.
457. Fourth, Colombia claims that the amount requested is too high.¹⁰⁹⁶ Colombia does not reference any legal standard that should guide the Tribunal’s analysis other than to point to two cases where the tribunals awarded USD 1 million. Colombia however ignores a

¹⁰⁹² Counter Memorial, ¶ 637.

¹⁰⁹³ Counter Memorial, ¶ 638.

¹⁰⁹⁴ Exhibit RL-047, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶ 344.

¹⁰⁹⁵ Seda 1, ¶¶ 137-40; Seda 2, ¶¶ 5-21, 17.

¹⁰⁹⁶ Counter Memorial, ¶ 641.

more recent case—*Al Kharafi v. Libya*—where the tribunal awarded USD 30 million in moral damages incurred by the claimant for the wrongful cancellation of its tourist investment project in Libya.¹⁰⁹⁷ Ultimately, the Tribunal has discretion to determine an amount of moral damages that it deems appropriate in the circumstances.

458. Claimants accordingly submit that their request for moral damages in the amount of 10 percent of the total damages owed in this case, is justified, proportionate and reasonable in light of Colombia's sustained campaign of misconduct and harassment.

G. Colombia Must Compensate Claimants For All Costs Incurred In This Arbitration

459. In order to make Claimants whole, Colombia must pay the entire costs and expenses of the Arbitration, including Claimants' legal fees, the fees and expenses of any experts, the fees and expenses of the Tribunal, and ICSID's other costs. This includes additional fees spent in needless applications made by Colombia to the Tribunal despite the Parties' agreements, misrepresenting them; and also costs applying for relief as a result of Colombia's deficient document production. Claimants accordingly restate their requests for costs and expenses.

VII. REQUEST FOR RELIEF

460. On the basis of the foregoing, without limitation and reserving Claimants' right to supplement these prayers for relief, Claimant respectfully requests that the Tribunal:

¹⁰⁹⁷ **Exhibit CL-088**, *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. The Government of the State of Libya et al.*, Final Arbitral Award, 22 March 2013, p. 392.

- (a) **DECLARE** that Colombia has breached its obligations to Claimants under the TPA;
- (b) **ORDER** Colombia to pay Claimants in excess of USD 255.8 million to be updated as of the date of the Award;
- (c) **ORDER** Colombia to pay Mr. Seda 10 percent of the total damages owed to him in moral damages;
- (d) **ORDER** Colombia to pay the Award net of taxes;
- (e) **ORDER** Colombia to pay all of the costs and expenses of the Arbitration, including Claimants' legal fees, the fees and expenses of any experts, the fees and expenses of the Tribunal, and ICSID's other costs; and
- (f) **AWARD** such other relief as the Tribunal considers appropriate.

461. Claimants reserve their right to specify, supplement or amend the factual or legal claims and arguments contained herein, as well as the relief requested.

Dated: 19 September 2021

Gibson Dunn & Crutcher LLP

GIBSON, DUNN & CRUTCHER LLP