ICSID CASE NO. ARB/19/6

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,

v.

THE REPUBLIC OF COLOMBIA

Respondent.

RESPONDENT'S REJOINDER

16 February 2022

Counsel for the Respondent
GAILLARD BANIFATEMI SHELBAYA DISPUTES
AGENCIA NACIONAL DE DEFENSA JURÍDICA DEL ESTADO

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I. INTRODUCTION

1. The Claimants initiated these arbitral proceedings against the Respondent in connection with the Respondent's commencement of Asset Forfeiture Proceedings against a plot of land (the Meritage Lot). The Meritage lot *(i)* has an illicit origin, *(ii)* has been the object of multiple physical transformations and *(iii)* [redacted] *(iv)* who had transferred it via successive simulated transactions using front men, who lacked the financial means to purchase the property. These facts are undisputed.

2. It is also undisputed that the Asset Forfeiture Proceedings regarding the Meritage Lot are ongoing and that Newport's appeals of the decisions issued in the Asset Forfeiture Proceedings are still pending. Simply put, there has been no final determination on the status of Newport in the proceedings either on its condition as affected party, nor on its alleged condition as a *bona fide* without fault third-party under Law 1708 of 2014.

3. Yet, the Claimants contest that the Respondent's adoption of this measure, which was taken in exercise of its sovereign powers, has been taken in violation of the Respondent's international obligations under Chapter 10 of the Colombia – United States TPA.

4. The Respondent has debunked the Claimants' allegations according to which (i) Newport displayed a level of due diligence in accordance with that required from a bona fide third-party and yet it has not been recognized as a bona fide third party in the proceedings, been hence deprived of the possibility to intervene, contradict and present evidence in the proceedings (ii) that the Asset Forfeiture Proceedings have been marred with irregularities and (iii) that the Prosecutors in the Asset Forfeiture Unit allegedly would be in collusion with Mr. Ivan Lopez Vanegas.

5. The Respondent has also demonstrated that there have been no "irregularities" in the Asset Forfeiture Proceedings, and that the contested decisions made by the Prosecutors in the proceedings have been subject to legality controls as provided by the law.

6. Left without arguments to support its allegations of the Respondent's wrongdoing, the Claimants have attempted to buttress their contentions on vapid allegations of acts of corruptions orchestrated between Mr. Ivan Lopez, his lawyers, and the Prosecutors of the Asset Forfeiture Unit. Yet, they have been unable to specify what was the alleged act or commission tainted by

corruption, nor have they been able to evince any direct or, for that matter, indirect request for payment by the Prosecutors. Conscious that their allegations hold no water, the Claimants have attempted via document production to gain access by means of requests in these arbitral proceedings to documents that are confidential in nature and to which they would not have the right to access under Colombian law.

7. In so doing, and following the Tribunal's orders to produce extremely sensitive documentation covered by confidentiality under Colombian law, the Claimants have forced the Respondent to expend hundreds of hours and display extraordinary efforts to obtain it, in particular given that under Colombian law, the independence of the Judiciary (which includes the Prosecutors) must be respected and it is the Prosecutors' decision whether to lift confidentiality provided by law regarding criminal and disciplinary ongoing investigations in view of the interests at stake.

8. Similarly, the Claimants have articulated a media strategy feeding their version of the facts to the media and filtering information to the media to then use in support of their case without any regard for the consequences that such actions entail, not only for the ongoing investigations, [redacted] but for the good name and life of the individuals investigated, victims, informers, the Prosecutors and the lawyers working in those matters.

9. After nearly a year of continued efforts and communications with each of the Prosecutors in charge of all the files the Claimants have requested access to, the real dimension of what is at stake in these proceedings has been recently revealed.

10. The Claimants are asking the Tribunal to pass judgment on one of the most important measures available under Colombian law to fight against organized crime, drug-trafficking and money laundering in Colombia. There is a real, imminent risk for Colombia to be deprived of a quintessential tool in the investigation and further sanction of one of the major criminal organizations that has been a risk for the essential security interests of the Colombian State for decades.

11. Against this factual backdrop, the Respondent invokes the exception of essential security provided by the US-Colombia TPA, by virtue of which the invocation of Article 22.2.b falls outside of the scope of the Tribunal's jurisdiction **(II.A.)**. The exception of essential security enshrined in

the provision is a self-judging clause and it follows from its interpretation that the Tribunal must automatically refrain from adjudicating the dispute once the exception is invoked by a State party.

12. Alternatively, should the Tribunal consider it has jurisdiction over the present dispute, the Respondent met all requirements for the exception of essential security to apply **(II.B.)**. The language of Article 22.2.b establishes that the Tribunal must grant a large margin of appreciation for the State in both the determination of its essential security interests and the choice of measures the State considers necessary for the protection of such interests. There is no doubt that [redacted] and the Asset Forfeiture Proceedings were applied to protect the Colombian State from the serious risks of that it entails. Therefore, Article 22.2.b of the US-Colombia TPA applies, and the Respondent has not breached its treaty obligations.

13. The context in which the Claimants decided to make their alleged investment informs not only the risks they took but the level of due diligence incumbent to them. The areas where the Claimants allege to have made an investment and which Royal Property advertises as a unique investment opportunity that will provide yields of 400% and even 1000% are lands devasted by violence, [redacted] (**III.A.**). As the Respondent shows, targeting the profits of crime is the only manner effectively to target criminality and all the Violence it feeds. Colombia's asset Forfeiture has proved to be the most effective tool in its fight against the drug trafficking and money laundering. [redacted] (**III.B.**). In the case of the Meritage lot, its illicit origin cannot be contested. As proven by the Attorney General's Office, [redacted] (**III.C**). More recently, the Respondent has established that [redacted]

[redacted]

14. Newport contends that it has ownership rights over the Meritage Lot, that is wrong. Newport has no rights in rem over the Lot (**III.D.**). Based on the evidence collected, the Prosecutors and the Judge of the Second Criminal Court of Medellin, have determined that Newport's due diligence was patently insufficient for it to allege that it is a bona fide third party. The reasons that render Newport's alleged due diligence highly insufficient have been amply demonstrated by the Respondent. Nonetheless, the Claimants now rely on decision C-327 of 2020 rendered by the Colombian Constitutional Court alleging that the question of Newport's due diligence is moot. Fatally for the Claimants, the decision of the Colombian Constitutional Court concerns the constitutionality of Articles 10.16 and 10.17 of the Asset Forfeiture Law. The Articles concern Asset Forfeiture of "licit" assets, which is undisputedly not the case of the Meritage Lot (**II.E.**).

15. As the Respondent demonstrates the Attorney General's Office allowed Newport's intervention in the proceedings and Newport presented its opposition and arguments, both before the Attorney General's Office, and before the competent courts (**III.F.**). Newport also presented other petitions. Therefore, and contrary to the Claimants' arguments, Newport was allowed to intervene during the Initial Phase of the Proceedings before the Prosecutors. There has been also no violation of its due process rights by the Courts, since the decision of the Judge of the Second Criminal Court of Asset Forfeiture in Medellin finding that Newport had *no rights in rem* and hence under Law 1708 of 2014 it cannot be considered an affected party is reasoned and motivated. The decision has been appealed by Newport and the appeal is pending. Hence, Newport has been accorded all guarantees of due process and opportunities to present its claims. Critically, whether Newport is or not a *bona fide* third-party, under Colombian law, will be determined by the Courts and the determination has not been made. This is uncontested.

16. To bolster their allegations, the Claimants now rely on surreptitious recordings -to claim that prosecutors from the Attorney General's Office have acknowledged the Claimants' claims in this arbitration as regards their corruption allegations and their standing as bona fide third parties without fault. [redacted] Moreover, the Claimants' out of context interpretation of the

recordings is based on a gross misconstruction of the roles assigned to each prosecutor within the Attorney General's Office and their knowledge on the Meritage case (**III.G**).

17. As stated above, the Claimants' strategy has been to "create" a case of corruption to buttress their position in this arbitration. [redacted] In fact, Mr. Seda's vague and ever-changing arguments about a corrupt organization comprised by Mr. Lopez Vanegas, his lawyers and Ms. Malagon and Ms. Ardila are completely incongruous (**III.H**).

18. Finally, the Claimants attempt to position Mr. Seda in the role of the victim, developing a narrative in which Mr. Seda is shown as a naïve foreigner who suffers the abuses of a vindictive Colombian State, is baseless and predicated on Mr. Seda's purposefully incomplete rendition of the facts and his own actions to impede the progress of the Prosecutors' investigations of Mr. Seda's various complaints (**III.I**).

19. Further, the tribunal lacks jurisdiction over the Claimants and their claims are inadmissible, since the Claimants do not have a protected investment as required under the TPA and the ICSID Convention (**IV.A**) and the vast majority of the claims do not concern the Meritage Project (**IV.B**). Particularly, Mr. Hass does not have standing to bring claims before this Tribunal (**IV.C.**) and The Boston Enterprises Trust is barred from seeking investment protection before this Tribunal (**IV.D.**).

20. Contrary to the Claimants' allegations, assuming *quod non* that the Claimants are protected investors, and therefore entitled to substantive protections under the TPA, the Respondent has not breached its obligations regarding the Claimants under the TPA. As the Respondent shall demonstrate, the Respondent did not expropriate the Claimants' investment (**V.A.**), accorded the Claimants a treatment in line with the National Treatment obligations under the FTA (**V.B.**), treated the Claimant's alleged investment fairly and equitably (**V.C.**), and fulfilled its obligations to accord the Claimant's alleged investment full protection and security (**V.D.**).

21. In sum, the Respondent has acted in exercise of its sovereign powers, and in accordance with the law in pursuing an asset of illicit origin which, [redacted] the very same company that entered into a

Sale Promise Agreement with Newport and is the trustor in the La Palma Argentina Meritage Trust. The real dimension of this case and the connotations it has regarding the State's power to investigate criminals and their illicit gains has now been fully revealed. Against this backdrop and given that, as demonstrated by the Respondent, the Claimants' contentions of wrongdoing are unavailing, the Respondent respectfully requests, that in the event that the Tribunal decides to uphold its jurisdiction, the Tribunal dismisses the Claimants' claims.

22. Respondent also calls the attention of the Tribunal to the conduct of the Claimants with regards to this arbitration proceedings, including the improper use and dissemination of confidential information to the media- the Claimants should not be allowed to install a trial by media, against all tenants of good faith and due process.

II. PRELIMINARLY, THE RESPONDENT INVOKES THE EXCEPTION OF ESSENTIAL SECURITY OF ARTICLE 22 OF THE US-COLOMBIA TRADE PROMOTION AGREEMENT

23. The Respondent structures its defense on the grounds of essential security in two parts. First, the present dispute is not justiciable on the grounds of art. 22.2 of the US-Colombia TPA, pursuant to which the Tribunal manifestly lacks jurisdiction over the present dispute (**A**). Second, and only in the alternative, should the Tribunal decide that it has jurisdiction over the present dispute, the Respondent argues that the exception of essential security enshrined in art. 22.2 of the US-Colombia TPA applies. It follows that the Respondent has not breached its treaty obligations (**B**).

A. PURSUANT TO THE TERMS OF ART. 22 OF THE US-COLOMBIA TPA, THE TRIBUNAL MANIFESTLY LACKS JURISDICTION OVER THE PRESENT DISPUTE

24. The Respondent argues that the Tribunal lacks jurisdiction to review Colombia's invocation of article 22.2.b, which is immune from scrutiny by arbitral tribunals established on the basis of the US-Colombia TPA. The Respondent's plea is based on the language of article 22.2, which carves out from the Tribunal's jurisdiction the measures a Party considers necessary for the protection of its own essential security interests:

> **Article 22.2: Essential Security**
>
> Nothing in this Agreement shall be construed:
>
> (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

> (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[2] [1]

25. In other words, by virtue of the ordinary meaning of the language of Article 22.2 of the TPA, the Tribunal has no power to decide whether the conditions for invoking the provision are met.

26. The Respondent relies on the well-established[2] rules of interpretation of public international law codified in Article 31 of the Vienna Convention on the Law of the Treaties ("**Vienna Convention**"), according to which "[a] treaty shall be interpreted 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."[3]

27. The ordinary meaning to be given to the terms of Article 22.2 is in fact provided by the provision itself. Footnote number 2 Article 22.2.b[4] provides that whenever a party invokes it in an arbitration under Chapter Ten of the agreement, the Tribunal is bound to apply the exception automatically:

> [2] For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute

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1 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 22.2 (Emphasis added).

2 *See Camuzzi v. Argentina (I),* ICSID Case No. ARB/03/2, Decision on Jurisdiction, 11 May 2005 (**Exhibit RL-162**), ¶ 133 ("The Tribunal also agrees with the Respondent that the rules for a correct interpretation are those of the Vienna Convention, which are also those that were followed in customary international law"); *Nicaragua v. Colombia,* ICJ Judgment on Preliminary Objections, 17 March 2016 (**Exhibit RL-183**), ¶35 ("it is well established that Articles 31 to 33 of the [Vienna Convention on the Law of Treaties] reflect rules of customary international law"); *Guinea-Bissau v. Senegal*, ICJ Judgment, 12 November 1991 (**Exhibit RL-153**), ¶48; *Islamic Republic of Iran v. United States of America*, ICJ Judgment on Preliminary Objection, 12 December 1996 (**Exhibit RL-156**), ¶ 23; *Libyan Arab Jamahiriya v. Chad*, ICJ Judgment, 3 February 1994 (**Exhibit RL-155**), ¶41; *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 (**Exhibit CL-181**), ¶ 88.

3 Vienna Convention on the Law of the Treaties (**Exhibit RL-221**), Article 31.1.

4 Pursuant to Article 23.1 of the US-Colombia TPA, there is no doubt that footnote number 2 to Article 22.2.b is part of the treaty itself: "The Annexes, Appendices and footnotes to this Agreement constitute an integral part of this Agreement." United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 23.1.

> Settlement), the tribunal or panel hearing the matter shall find that the exception applies.[5]

28. Thus, the drafters of the US-Colombia TPA have already determined the clear meaning of Article 22.2, and no room for interpretation if left for the Tribunal: once the exception of essential security is invoked by a party to the treaty in arbitral proceedings initiated under Chapter Ten, the exception applies. It is undisputed that this is an arbitration initiated by the Claimants under Chapter Ten of the US-Colombia TPA.

29. It follows that that Article 22.2.b and its interpretative footnote are crystal clear: the Tribunal lacks jurisdiction to adjudicate the legality of measures that the State considers necessary for the protection of its own essential security interests. On this ground, the Tribunal must decline jurisdiction over the present dispute.[6]

30. In other words, Article 22.2.b mandates that Colombia is not precluded from taking measures it considers necessary for the protection of its own essential security interests. Plainly stated, the exception of essential security also applies to the Respondent's international obligation to submit the disputes arising from the US-Colombia TPA to international arbitration.[7]

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5 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 22.2, footnote 2 (Emphasis added).

6 *See Wintershall Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/04/14, Award, 8 December 2008 (**Exhibit RL-169**), ¶¶ 78-79, 82 ("The carefully-worded formulation in Article 31 is based on the view that the text must be presumed to be the authentic expression of the intention of the parties. The starting point of all treaty-interpretation is the elucidation of the meaning of the text, not an independent investigation into the intention of the parties from other sources […] Judgments of international tribunals (the PCIJ and ICJ) contain pronouncements to the effect that where the ordinary meaning of words (the text) is clear and they make sense in the context, there is no occasion at all to have recourse to other means of interpretation. […] The ICJ has often stressed that it is not the function of interpretation to revise treaties or to read into them what they do not contain expressly or by implication; that the terms (the text) of a treaty must always be adhered to, for the reason that a treaty expresses the mutual will of the Contracting States").

7 *See, CMS Gas Transmission Company v. Argentina Republic,* ICSID Case No. ARB/01/08, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentina Republic, 25 September 2007 (**Exhibit RL-168**), ¶ 129 (when interpreting Article XI of the US-Argentina investment treaty – which has a different language to the US-Colombia TPA, the arbitral tribunal explained that, "if [the exception] applie[d], the substantive obligations under the Treaty do no apply." Similarly, in *Continental v. Argentina*, the arbitral tribunal stated that "[a]rt. XI [of the US-Argentina BIT] restricts or derogates from the substantial obligations undertaken by the parties to the BIT in so far as the conditions of its invocation are met. In fact, Art. XI has been defined as a safeguard clause; it has been said that it recognizes "reserved rights," or that it contemplates "non-precluded" measures to which a contracting state party can resort." *See Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, (**Exhibit RL-164**), ¶ 164. For the avoidance of doubt, as stated previously,

31. It bears noting that Article 10.2 of the US-Colombia TPA expressly provides the prevalence of Chapter 22 over Chapter 10 of the Treaty. Therefore, it is undisputable that the exception of essential security applies:

> **Article 10.2: Relation to Other Chapters**
>
> 1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.[8]

32. A reading of the treaty as a whole,[9] and an interpretation "in accordance with the ordinary meaning of the terms [of Article 22.2.b]"[10] thus lead to the conclusion that the State Parties to the US-Colombia TPA have not vested the Tribunal with the power to adjudicate disputes when the exception of essential security is invoked.

33. The Respondent cannot overstate the importance of the Article 22.2.b. A comparison between the US-Colombia TPA and other investment treaties concluded by Colombia shows that the language of Article 22.2.b is unique and purposeful. In light of the *effet utile* principle,[11] the interpretation of Article 22.2.b as provided by the treaty has to be given effect.

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differently from Article XI of the US-Argentina BIT, there are no conditions to the invocation of Article 22.2.b. The consequence is that its invocation implies an automatic derogation from the treaty obligations). *See also*, C. Henckels, "Scope Limitation of Affirmative Defense? The Purpose and Role of Investment Treaty Exception Clauses", *in Exceptions and Defenses in International Law*, 2018 (**Exhibit RL-217**), p. 372 ("the exception confirms the drafters' intention that such measures will not be captured by the treaty obligations").

8 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.2.

9 *See Garanti Koza v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection for Lack of Consent, 3 July 2013 (**Exhibit RL-178**), ¶ 39 ("Nevertheless, Article 8 may not be interpreted in isolation from the other provisions of the U.K.-Turkmenistan BIT, because the BIT must be read as a whole"); *Addiko Bank v. Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020 (**Exhibit RL-200**), ¶ 279.

10 Vienna Convention on the Law of the Treaties (**Exhibit RL-221**), Article 31.1.

11 *See Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010 (**Exhibit CL-077**), ¶ 223 ("the Tribunal will employ generally accepted rules of interpretation […] : (i) the tribunal should not interpret that which has no need of interpretation; (ii) effect should be given to every provision of an agreement; and (iii) a provision must be interpreted so as to give it meaning rather than so as to deprive it of meaning."); *Murphy Exploration & Production Company International v. Republic of Ecuador*, PCA Case No. 2012-16 (formerly AA 434), UNCITRAL, Partial Award on Jurisdiction, 13 November 2013 (**Exhibit RL-179**), ¶ 171 ("The Tribunal shall also be guided by the principle of *effet utile*, which requires tribunals to interpret treaty provisions 'so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text'").

34. Several investment treaties signed by Colombia present a stricter language than the US-Colombia TPA. To mention a few examples, the Respondent refers to: (*i*) the 2007 BIT between Colombia and Peru;[12] (*ii*) the 2008 BIT between China and Colombia;[13] (*iii*) the 2009 BIT between Colombia and India;[14] (*iv*) the 2010 BIT between Colombia and the United Kingdom;[15] (*v*) the 2011 BIT between Colombia and Japan;[16] (*vi*) the 2012 Trade Agreement Between the European Union, Colombia, Peru and Ecuador;[17] (*vii*) the 2013 FTA between Colombia and Israel;[18] (*viii*) the 2013 BIT between Colombia and Singapore;[19] (*ix*) the 2014 BIT between Colombia-France;[20] and, (*x*) the 2014 BIT between Colombia and Turkey[21]. Some of these treaties allow for the adoption of measures "necessary" for the protection of a State's essential security interests (as opposed to the measures the State "*considers* necessary").[22] Others will lay down a list of circumstances under which the State may apply measures for the protection of its essential security interests.[23]

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12 Agreement Between the Government of the Republic of Peru and the Government of the Republic of Colombia on Promotion and Protection of Investments, 11 December 2007 (**Exhibit RL-224**), Article 8 (4) (b).

13 Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the People's Republic of China, 22 November 2008 (**Exhibit RL-148**), Article 12 (1).

14 Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and the Republic of India, 10 November 2009 (**Exhibit RL-149**), Article 13 (4).

15 Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia, 17 March 2010 (**Exhibit RL-150**), Article IV.

16 Agreement Between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment, 9 September 2011 (**Exhibit RL-225**), Article 15 (2).

17 Trade Agreement Between the European Union and Its Member States, of the One Part, and Colombia and Peru, of the Other Part, 26 June 2012 (**Exhibit RL-227**), Article 295 (1) (b).

18 Free Trade Agreement Between the State of Israel and the Republic of Colombia, 30 September 2013 (**Exhibit RL-231**), Article 10.11.

19 Agreement Between the Government of the Republic of Singapore and the Government of the Republic of Colombia on the Promotion and Protection of Investments, 12 July 2013 (**Exhibit RL-229**), Article 28 (1) (b).

20 Agreement Between the Government of the Republic of Colombia and the Government of the French Republic on the Reciprocal Promotion and Protection of Investment, 10 July 2014 (**Exhibit RL-151**), Article 14.

21 Agreement Between the Government of the Republic of Colombia and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, 28 July 2014 (**Exhibit RL-232**), Article 6 (2) (b).

22 *See*, *e.g.*, Agreement Between the Government of the Republic of Colombia and the Government of the French Republic on the Reciprocal Promotion and Protection of Investment, 10 July 2014 (**Exhibit**

35. By contrast, the choice to not limit or qualify the situation in which the contracting parties can invoke the exception is straightforward in other treaties. That is the case for the US-Colombia TPA, the 2013 FTA between Colombia and Korea,[24] the 2013 FTA between Colombia and Panama,[25] and the 2015 BIT between Colombia and Brazil[26], which leave no doubt about the non-justiciability of the measures adopted on the basis of the exception of essential security. This is no accident, but a deliberate decision of the contracting parties that must be given effect by the Tribunal. The terms of these treaties make it explicitly clear that the State parties intended to retain the right to unilaterally determine the legality of such extraordinary measures, which thus cannot be subject to judicial adjudication.

36. The fact that Article 22.2.b is a "self-judging" clause[27] is also supported by arbitral case law.

37. Arbitral tribunals have accepted to recognize the self-judging nature of essential security exceptions when the treaty provides for "clear textual or contextual indications."[28] As stated by the tribunal in *CMS v. Argentina*:

RL-151), Article 14; Free Trade Agreement Between the State of Israel and the Republic of Colombia, 30 September 2013 (**Exhibit RL-231**), Article 10.11; Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and Republic of Colombia, 17 March 2010 (**Exhibit RL-150**), Article IV.

23 *See*, *e.g.*, Agreement Between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment, 9 September 2011 (**Exhibit RL-225**), Article 15 (2); Agreement Between the Government of the Republic of Peru and the Government of the Republic of Colombia on Promotion and Protection of Investments, 11 December 2007 (**Exhibit RL-224**), Article 8 (4) (b); Agreement Between the Government of the Republic of Singapore and the Government of the Republic of Colombia on the Promotion and Protection of Investments, 12 July 2013 (**Exhibit RL-229**), Article 28 (1) (b); Agreement Between the Government of the Republic of Colombia and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments, 28 July 2014 (**Exhibit RL-232**), Article 6 (2) (b); Trade Agreement Between the European Union and Its Member States, of the One Part, and Colombia and Peru, of the Other Part, 26 June 2012 (**Exhibit RL-227**), Article 295 (1) (b). The Protocol of Accession for Ecuador was signed in November 2016 and has been provisionally applied since 1 January 2017.

24 *See* Free Trade Agreement between the Republic of Colombia and the Republic of Korea, 21 February 2013, (**Exhibit RL-228**), Article 21.2 (b).

25 *See* Free Trade Agreement Between the Republic of Colombia and the Republic of Panama, 20 September 2013 (**Exhibit RL-230)**, Article 14.

26 *See* Cooperation and Investment Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Colombia, 9 October 2015 (**Exhibit RL-233)**, Article 12.

27 *See* S. Schill, R. Briese, "'If the State Considers': Self-Judging Clauses in International Dispute Settlement", *Max Planck Yearbook of United Nations Law*, 2009 (**Exhibit RL-216**); H. Schloemann, S. Ohlhoff, "'Constitutionalization' and Dispute Settlement in the WTO: National Security as an Issue of Competece", *American Journal of International Law*, 1999 (**Exhibit RL-213**).

> The Tribunal is convinced that when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treat, they do so expressly.[29]

38. This is precisely the case here, since Article 22.2.b of the US-Colombia TPA contains explicit language that grants "full discretion to the State to determine what it considers necessary for the protection of its [own essential] security interests."[30] As demonstrated above, the text of the US-Colombia TPA itself expressly states that, "if a Party invokes Article 22.2 in an arbitral proceeding […], the tribunal […] hearing the matter shall find that the exception applies."[31]

39. In *Russia – Traffic in transit*, a dispute arising from the GATT[32] between Ukraine and Russia, a WTO Panel was called upon to decide on the legality of certain commercial unilateral restrictive measures adopted by Russia against Ukraine. Russia invoked the security exception of Article XXI (b) (iii) of the GATT, claiming that the Panel lacked jurisdiction to review Russia's invocation of the provision.[33] The Panel considered that "the mere meaning of the words and the grammatical construction"[34] of Article XXI (b) of the GATT suggested that it was a self-judging clause.[35]

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28 *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, (**Exhibit RL-164**), ¶ 187. *See also*, *LG&E Energy Corp. and others v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (**Exhibit RL-166**), ¶ 212; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, (**Exhibit RL-163**), ¶ 370; *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (**Exhibit RL-174**), ¶ 590; *Mobil Exploration and Development Argentina Inc. Suc. Argentina and other v. Argentina*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013 (**Exhibit RL-177**), ¶ 1037.

29 *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, (**Exhibit RL-163**), ¶ 370. *See also*, *Deutsche Telekom AG v. The Republic of India,* PCA Case No. 2014-10, Interim Award, 13 December 2017 (**Exhibit RL-188**), ¶ 231.

30 *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 Jurisdiction and Merits, 25 July 2016 (**Exhibit RL-184**), ¶ 219.

31 TPA, Article 22.2.b, footnote 2. (Emphasis added).

32 *See* General Agreement on Tariffs and Trade, 1994 (**Exhibit RL-222**), Article XXI (b).

33 *See Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019 (**Exhibit RL-192**), ¶ 7.57.

34 *Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019 (**Exhibit RL-192**), ¶ 7.65.

35 *Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019 (**Exhibit RL-192**), ¶¶ 7.62-7.65. *See also*, *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, WTO, WT/DS567/R, 16 June 2020 (**Exhibit RL-201**), ¶ 7.244; *Case concerning military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14 (**Exhibit RL-152**), ¶ 222.

40. In *Ukraine v. Russia*, the Panel ended up rejecting Russia's submissions that the exception of national security of the GATT was a self-judging clause because the wording of the treaty at stake provided for an exhaustive list of circumstances in which the State could invoke the exception:

> Paragraph (b) of Article XXI includes an introductory part (chapeau), which qualifies action that a Member may not be prevented from taking as that "which [the Member] considers necessary for the protection of its essential security interests". The text of the chapeau of Article XXI(b) can be read in different ways and can thus accommodate more than one interpretation of the adjectival clause "which it considers". The adjectival clause can be read to qualify only the word "necessary", i.e. the necessity of the measures for the protection of "its essential security interests"; or to qualify also the determination of these "essential security interests"; or finally and maximally, to qualify the determination of the matters described in the three subparagraphs of Article XXI(b) as well. The Panel starts by testing this last, most extensive hypothesis, i.e. whether the adjectival clause "which it considers" in the chapeau of Article XXI(b) qualifies the determination of the sets of circumstances described in the enumerated subparagraphs of Article XXI(b). […] As mentioned above, the mere meaning of the words and the grammatical construction of the provision can accommodate an interpretation in which the adjectival clause "which it considers" qualifies the determinations in the three enumerated subparagraphs. But if one considers the logical structure of the provision, it is apparent that the three sets of circumstances under subparagraphs (i) to (iii) of Article XXI(b) operate as limitative qualifying clauses; in other words, they qualify and limit the exercise of the discretion accorded to Members under the chapeau to these circumstances.[36]

41. In the case at hand, the US-Colombia TPA establishes no limitative circumstances to the exercise of the discretion given to the contracting parties under Article 22.2. This becomes evident when the provisions are put side to side:

Art. 22.2.b of US-Colombia TPA	Art. XXI of the GATT of 1994
"Nothing in this Agreement shall be construed: […] (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[2]	"Nothing in this Agreement shall be construed […] (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived;

36 *Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019 (**Exhibit RL-192**), ¶¶ 7.62-7.65 (Emphasis added). *See also*, *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, WTO, WT/DS567/R, 16 June 2020 (**Exhibit RL-201**), ¶ 7.244; *Case concerning military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14 (**Exhibit RL-152**), ¶ 222.

[2] For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies."[37]	(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or […]."[38]

42. Therefore, as opposed to the GATT, not only Article 22.2.b of the US-Colombia TPA does not establish any limits to a State party to invoke the Article 22.2 – it also provides a clarifying footnote (which is part of the agreement itself)[39] as so to bar any misinterpretations of the exception of essential security.

43. The Respondent requests the Tribunal to take proper note of the clear intention of the State parties to the US-Colombia TPA in this regard, and refrain from adjudicating this dispute by virtue of Article 22.2.b of the US-Colombia TPA. It is the Respondent's submission that the Tribunal's scope for review of Colombia's invocation of the exception is strictly circumscribed to an examination of whether the exception of essential security of Article 22.2.b has been invoked in good faith by Colombia.[40] This is, obviously, the case.

44. The Claimants try to portray this dispute as a simple investment case of alleged unlawful expropriation.[41] This is entirely false. As the case has unfolded, it has become clear that the Claimants are asking the Tribunal to pass judgment on the most important measure available to the Colombian State to fight organized crime, money laundering and drug-trafficking in the country. In other words, there is a latent risk for Colombia to be deprived of a quintessential sovereign tool to investigate and punish major criminal organizations that have been jeopardizing the essential security of the Colombian State for decades.

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37 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 22.2.b.

38 General Agreement on Tariffs and Trade, 1994 (**Exhibit RL-222**), Article XXI (b).

39 *See* United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 23.1.

40 *See CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, (**Exhibit RL-163**), ¶ 374.

41 *See* Claimants' Reply, ¶ 4.

45. At this stage, it bears clarifying that only recently have the true dimensions of this dispute been revealed. For nearly a year, the Respondent has engaged in multiple and continuous efforts to obtain access to the documents requested by the Claimants, which are under legal privilege pursuant to Colombian law which only the Public Prosecutors have the power to lift.[42] The National Agency for the Legal Defense of the State ("**ANDJE**") and the Respondent's legal counsel have invested hundreds of hours contacting the Prosecutors handling each and every one of the case files that the Claimants have requested, as well as engaging incommensurable efforts to obtain such documents.[43] However, both the ANDJE and Respondent's legal team are bound by the independence and autonomy of the Prosecutors under the Colombian law.[44]

46. It is only recently, on 14 February 2022, that the ANDJE and the Respondent's legal counsel were given access to sensitive case files. Once access was granted to these documents, the Respondent's representatives and legal counsel were able to assess the seriousness of the Colombian interests at stake in this dispute, both in terms of criminal organizations and criminal individuals involved.[45] The Respondent is mindful of the legal consequences of the invocation of the exception of essential security and would not have invoked the exception frivolously. The good faith of the invocation of the exception of essential security of Article 22.2.b of the US-Colombia TPA by the Respondent can hardly be challenged in these circumstances.[46]

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42 *See* Letter from Respondent to the Tribunal dated 6 July 2021.

43 *See, e.g.,* [redacted]

44 *See* Letter from Respondent to the Tribunal dated 6 July 2021.

45 *See above*, Section III.A.

46 Furthermore, it bears recalling that Colombia's actions are all presumed to be of good faith. *See Fisheries Jurisdiction* (Spain v. Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998, p. 432, Dissenting Opinion of Vice-President Weeramantry, 4 December 1998 (**Exhibit RL-158**), ¶ 37 ("There is a presumption of good faith in all State actions"); *Whaling in the Antarctic (*Australia v. Japan: New Zealand intervening*),* Judgment, ICJ Reports 2014, p. 226, Dissenting Opinion of Judge Abraham, 31 March 2014 (**Exhibit RL-180**), ¶ 28 ("there is a generally accepted presumption of good faith."); *Renée Rose Levy de Levi v. Republic of Peru,* ICSID Case No. ARB/10/17, Award, 26 February 2014 (**Exhibit RL-66**), ¶ 153 ("the Tribunal fully agrees with the Respondent about the importance of good faith in international law […] and it is a well-known and accepted fact that bad faith cannot be presumed").

47. In light of the above, the Tribunal lacks jurisdiction to adjudicate the present dispute by virtue of Article 22.2.b of the US-Colombia TPA.

B. ALTERNATIVELY, THE EXCEPTION OF ESSENTIAL SECURITY APPLIES AND THE REPUBLIC OF COLOMBIA HAS NOT BREACHED ITS TREATY OBLIGATIONS

48. In the alternative, should the Tribunal find that it has jurisdiction to adjudicate the invocation of Article 22.2.b of the US-Colombia TPA, the exception of essential security is applicable, and the Asset Forfeiture Proceedings fall within the scope of the exception. On that basis, the Respondent has not breached any of its treaty obligations.[47]

49. To recall, Article 22.2.b of the US-Colombia TPA provides that "[n]othing in this Agreement shall be construed […] to preclude a Party from applying measures that it considers necessary for […] the protection of its own essential security interests."[48]

50. It follows from the wording of Article 22.2.b that, for the exception to apply, the Respondent must: (*i*) adopt measures that (*ii*) it considers necessary; (*iii*) that these measures were adopted for the protection of the (*iv*) State's own essential security interests. In this regard, the Respondent has met all the requirements for the measures to fall within the scope of the Article 22.2.b. The Respondent demonstrates the fulfilment of each one of the requirements in turn below.

51. The Respondent adopted "measures" within the meaning of Article 22.2.b. Pursuant to Article 1.3 of the US-Colombia TPA,[49] it is indisputable that the Asset Forfeiture Proceedings challenged by the Claimants in this arbitration constitute a "measure" under the Treaty. The Respondent will not expand on in this evident point.

52. The Respondent considers the Asset Forfeiture Proceedings to be a necessary measure. In this regard, by virtue of the language of the Article 22.2.b, there is no doubt that it is for Colombia to determine the necessity of the measures to be adopted for the protection of its own essential

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47 *See below*, Section V.

48 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 22.2.b.

49 *See* United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 1.3 ("**measure** includes any law, regulation, procedure, requirement, or practice").

security interests.[50] Thus, the "necessity" of the measure cannot be subject to this Tribunal's review. Rather, the Tribunal shall "recognize a margin of deference to the host state's determination of necessity, given the state's proximity to the situation, expertise and competence."[51] This means that it is up to Colombia to decide whether or not the Asset Forfeiture Proceedings are a necessary measure within the meaning of Article 22.2.b.

53. The necessity of asset forfeiture proceedings in the fight against criminal organizations, drug-trafficking and money laundering in Colombia can hardly be denied,[52] [redacted]

54. The Respondent adopted the Asset Forfeiture Proceedings for the protection of its essential security interests. The Asset Forfeiture Proceedings against the Meritage Project constitute a measure adopted for the protection of Colombia's essential security interests.

55. *First*, as to the definition of Colombia's "own essential security interests", it is generally accepted that it is entirely for a State to define what it deems to constitute its "essential security interests."[53] The Respondent thus enjoys full discretion to define what constitutes its essential security interests, to the extent that such definition is done in good faith.[54] Here, the Respondent identifies its "essential security interests" as being those related to the "quintessential functions of the [Colombian State], namely, the protection of its territory and its

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50 *See Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019 (**Exhibit RL-192**), ¶ 7.146.

51 *Deutsche Telekom AG v. The Republic of India,* PCA Case No. 2014-10, Interim Award, 13 December 2017 (**Exhibit RL-188**), ¶ 238.

52 *See, e.g.,* C. Lamm, H. Pham, *et al*., "Fraud and Corruption in International Arbitration", *in Liber Amicorum Bernardo Cremades*, 2010, (**Exhibit CL-205**), pp. 706-707.

53 *Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019 (**Exhibit RL-192**), ¶ 7.131. *See also*, D. Akande, S. Williams, "International Adjudication on National Security Issues: What Role for the WTO", *Virginia Journal of International Law* (**Exhibit RL-219**), p. 398.

54 *See Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019 (**Exhibit RL-192**), ¶ 7.132.

population […], and the maintenance of law and public order internally."[55] The position of the Republic of Colombia in this arbitration is that it seeks, through asset forfeiture proceedings, to fight against organized crime, money laundering, and drug trafficking, thus ultimately protecting its population from the threats of paramilitary and marginalized groups that have been ravaging the country for years.

56. *Second*, the measure challenged by the Claimants (*i.e.*, the Asset Forfeiture Proceedings against the Meritage) was adopted for the protection of its essential security interests. The asset forfeiture proceedings are thus "plausible as measures protective" of Colombian essential security interests.[56]

57. In this respect, the WTO Panel in *Ukraine v. Russia* determined that the State's burden of proof as to the plausibility of the measures for the protection of its essential security interests is one of good faith. Thus, the Tribunal's assessment is limited as to whether the Asset Forfeiture Proceedings against the Meritage "are so remote from, or unrelated to" the essential security interests Colombia is intending to protect.[57] As it becomes clear from **Section III.C.1** below, the Asset Forfeiture Proceedings were launched for the purposes of investigating and later sanctioning [redacted]

III. CONTRARY TO THE CLAIMANTS' ASSERTIONS, THE RESPONDENT DOES DISPUTE THE CLAIMANTS' RENDITION OF THE FACTS AND THEIR CONSEQUENCES

58. Contrary to the Claimants' bold assertion, the Respondent does dispute the Claimants' rendition of the facts of the case and their consequences. As the Respondent shall demonstrate, the Claimants' purported investment may only be correctly analysed after having established the context in which it was made, [redacted]

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55 *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, WTO, WT/DS567/R, 16 June 2020 (**Exhibit RL-201**), ¶ 7.281.

56 *Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019 (**Exhibit RL-192**), ¶ 7.138.

57 *Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019 (**Exhibit RL-192**), ¶ 7.139.

[redacted] (**A**). In fact, the real estate sector, in which the Claimants' allegedly invested, is considered a high-level risk for money laundering operations in Colombia, which risk has been effectively addressed by the asset forfeiture proceedings (**B**).

59. Further, contrary to the Claimant's simplistic portrayal of the facts, the Attorney General's Office had sufficient evidence of the Meritage Lot's unlawful origin for the initiation of the Asset Forfeiture Proceedings (**C**).

60. The Claimants' objections as to the conduct of the Asset Forfeiture Proceedings are also to no avail. As the Respondent shall prove, the decision of the Second Criminal Court that Newport had no *in rem* rights over the Meritage Lot was reasoned and duly supported by Colombian law (**D**). In addition, the due diligence conducted by the Meritage Claimants over the Meritage Lot was patiently insufficient, for which reason they cannot be considered bona fide third parties free from fault (**E**). The Claimants were also given a due process at all times during the Asset Forfeiture Proceedings, which have been conducted with strict adherence to the law (**F**).

61. Faced with the weaknesses of its own arguments, the Claimants' resort to improperly recorded conversations to "build" a corruption case and to "demonstrate" their alleged status as good faith third parties- the Claimants' strategy is, to say the least, misguided (**G**), as are the Claimants' purposeful efforts to build a corruption case in the absence of any evidence whatsoever (**H**).

62. Finally, the Claimants' harassment allegations are unsubstantiated, and are mostly attributable to Mr. Seda's own conduct (**I**).

A. [redacted]

63. [redacted]

64. [redacted]

65. [redacted]

66. [redacted]

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58 [redacted]

59 [redacted]

60 [redacted]

61 [redacted]

62 [redacted]

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83 [redacted]

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84 [redacted]

85 [redacted]

[redacted]

B. THE REAL ESTATE SECTOR IS CONSIDERED AS HIGH-LEVEL RISK FOR MONEY LAUNDERING IN COLOMBIA AND THE ASSET FORFEITURE PROCEEDINGS ARE THE MOST EFFECTIVE MEANS TO COMBAT MONEY LAUNDERING AND CRIME INCENTIVES

79. The efficacy of the Asset Forfeiture Proceedings to tackle criminality and money laundering is undisputable. Money Laundering, defined by Article 3.1 of the Vienna 1988 Convention as "the conversion or transfer of property, knowing that such property is derived from any offense(s), for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in such offense(s) to evade the legal consequences of his actions" is an inherent element to crime.[86]

80. In the words of GAFI "the goal of a large number of criminal acts is to generate a profit for the individual or group that carries out the act. Money laundering is the processing of these criminal proceeds to disguise their illegal origin. This process is of critical importance, as it enables the criminal to enjoy these profits without jeopardising their source".[87] Therefore, "targeting the money laundering aspect of criminal activity and depriving the criminal of his ill-gotten gains means hitting him where he is vulnerable. Without a usable profit, the criminal activity will not continue".[88] That is why Anti-Money Laundering is the "Achilles Hill" of criminality.[89]

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86 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (**Exhibit RL-223**), Article 3.1.

87 Financial Action Task Force (FATF), What is Money Laundering?, (https://www.fatf-gafi.org/faq/moneylaundering/#:~:text=What%20is%20Money%20Laundering%3F,to%20disguise%20their%20illegal%20origin.), accessed on 16 February 2022 (**Exhibit R-183**).

88 Financial Action Task Force (FATF), What is Money Laundering?, How does fighting money laundering help fight crime?, (https://www.fatf-gafi.org/faq/moneylaundering/#:~:text=What%20is%20Money%20Laundering%3F,to%20disguise%20their%20illegal%20origin.), accessed on 16 February 2022 (**Exhibit R-183**)

89 Financial Action Task Force (FATF), What is Money Laundering?, How does fighting money laundering help fight crime?, (https://www.fatf-gafi.org/faq/moneylaundering/#:~:text=What%20is%20Money%20Laundering%3F,to%20disguise%20their%20illegal%20origin.), accessed on 16 February 2022 (**Exhibit R-183**)

81. Colombia's Law and implementation of Asset Forfeiture Proceedings have been considered by the Latin American Group for Financial Action (in Spanish, *Grupo de Acción Financiera de Latinoamérica*, hereinafter "GAFILAT" for its Spanish acronym), to constitute a solid and effective mechanism to target Money Laundering and hence, crime.[90]

82. This is in line with the statement of Ms. Liliana Donado, an internationally recognised expert in Asset Forfeiture and current Director of the Asset Forfeiture Unit, on how Colombia's Asset Forfeiture Proceedings target the illicit gains resulting from crime, hence aiming at destroying the very incentive for crime.

> It was understood then that a very efficient way to counteract these criminal activities consisted in preventing the use of ill-gotten gains, with asset forfeiture being an appropriate means to do so, and which is based [on the rationale] that the crime does not pay and cannot generate ownership. [It was considered that] while consideration should be given to those who have acted in good faith without fault, allowing them the possibility to bring actions against those who have criminally obtained the assets and transferred them in a cunning manner, these actions do not entail the legalization of what has been illegally obtained.[91]

83. As underscored in the GAFILAT Mutual Evaluation Report on the Republic of Colombia, "[t]he Main threat of Terrorist Financing in Colombia are the criminal activities of the Organized Criminal Organizations (Grupos Armados Organizados - GAO by its acronym in Spanish). The main source of funds of domestic criminal organizations are drug trafficking and other criminal activities".[92] According to the 2017 evaluations of the Information and Financial Analysis Unit – or UIAF for its Spanish acronym - the sectors with high risks regarding Money Laundering are arms traffic, commerce and real estate agents.[93] The real estate sector in Colombia comprises the higher amount of assets in the economy, with value of approximate USD 18.6 billion.[94] Given the extraordinary rise in real estate prices, experienced in Colombia's biggest cities, namely Bogota, Medellin and Cali, between 2005 and 2016, which amounted to 200 per cent in nominal terms

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90 *See* GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶ 7.

91 Dr. Pinilla Expert Report, ¶ 15.

92 GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶ 1.

93 *See* GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶ 119.

94 *See* GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶ 28.

and 110 per cent in real terms, real estate transactions present a high risk of Money Laundering, which is facilitated by real estate agents, lawyers, notaries, and accountants.[95]

84. The GAFILAT Report explains how Colombia has a main objective to combat crime by persecuting "its profits", and considers a very important policy to dismantle criminal organizations via persecution of assets.[96] Accordingly, it has applied the Asset Forfeiture Proceedings in a successful manner with important results.[97] Moreover, the GAFILAT Report remarks Colombia's effective system to administer the products of crime with the Rehabilitation, Social Investment and Fight Against Organized Crime Fund (in Spanish *Fondo para la Rehabilitación, Inversión Social y Lucha contra el Crimen Organizado* or FRISCO) and the Special Assets Association (in Spanish *Sociedad de Activos Especiales* or SAE) managing a great quantity of assets of different nature and with important results and underscored that both entities keep complete statistics.

85. As regards investigations into Money Laundering, the GAFILAT Report states that the investigations carried out by the Attorney General's Office are in line with the Money Laundering threats in the country and that a high number of investigations regarding Money Laundering result in Asset Forfeiture Investigations.[98] It also underscores that most of the financial investigations also result in Asset Forfeiture proceedings.[99]

86. The Report positively remarks the manner in which Asset Forfeiture Proceedings are applied, in particular how the proceedings follow the assets, not the individual who committed the crime allowing for the proceedings to be conducted even in the absence of a criminal conviction. Additionally, the Report considers that the precautionary measures in Asset Forfeiture Proceedings are adopted efficiently.[100]

87. The use of land property as a vehicle for money laundering has been the object of joint investigations by various authorities including the Support Working Group for Management of Land Policy, the Judicial Police, and the Attorney General's Office, which have recognised

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95 *See* GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶ 28.

96 *See* GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶ 165.

97 *See* GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶¶ 99-100.

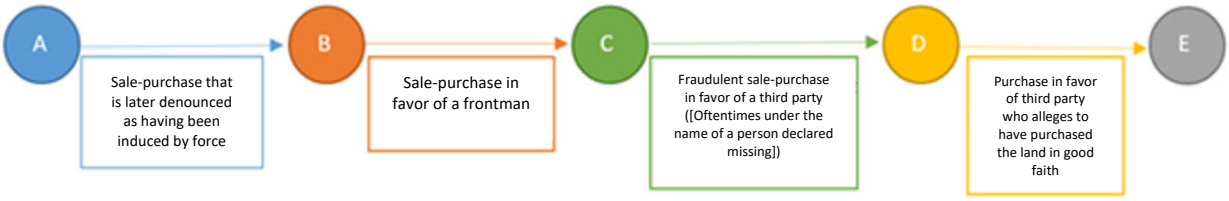
98 *See* GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶ 139.

99 *See* GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶ 139.

100 *See* GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶ 165.

patterns and typologies used by criminals to hide their illicit profits and money laundering operations.[101] Amongst the typologies identified the following are worth mentioning:

a. Typology Five: Armed Groups buy properties via a family member (individual A) who will appear as the owner of the property, then the property will be sold to a relative of A (individual B) who in turn will register new (successive) sale(s) of the property to give the appearance of legality (individuals C, D). Thereafter, making use of Law 1448 of 2011 "by which measures of attention, assistance, and integral reparation are set forth for the victims of the internal armed conflict and other provisions are established",[102] which regulates property restitution, a claim will be made stating that A was forced to sell the property to B and hence demand the return of the property. Several of the sales are conducted between "collaborators" of the Money Laundering scheme ensuring that the property remains in the hands of the group. Oftentimes one of the buyer-seller in the chain could be an individual who has been supplanted.[103]



b. Typology Six: In order to hide the illicit gains from crime, members of criminal organizations acquire properties through family members. An investigation on the economic capacity of the family members, who appear as owners, reveals that they lack the economic capacity to buy the property:

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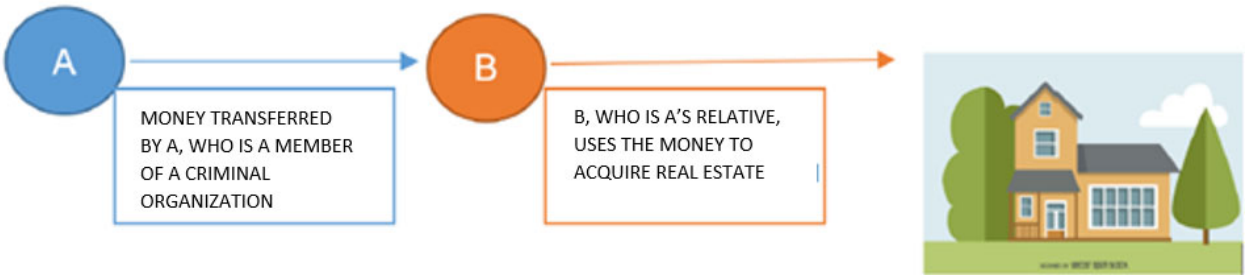
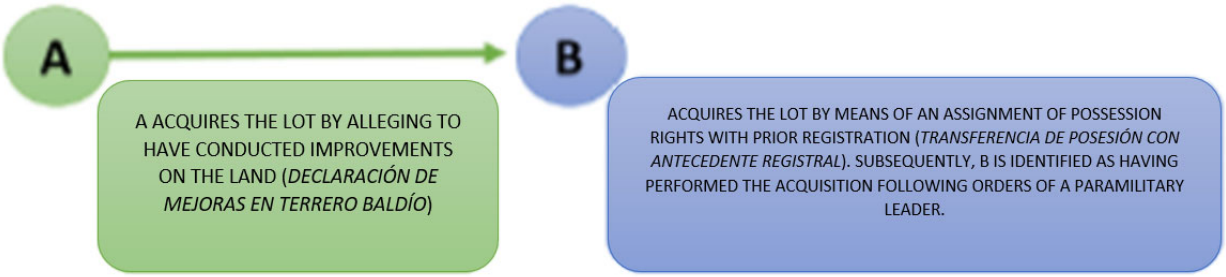
101 *See* Internal Support Working Group for Management of Land Policy, "Typology Report by the ISWGMLP", August 2021 (**Exhibit R-155**), p. 1.

102 Law No. 1448 of 2011 (**Exhibit R-22**) ("Introducing measures of attention, assistance and integral reparation for the victims of the internal armed conflict, as well as other provisions") ("*Por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones*").

103 *See* Internal Support Working Group for Management of Land Policy, "Typology Report by the ISWGMLP", August 2021 (**Exhibit R-155**), p. 6.

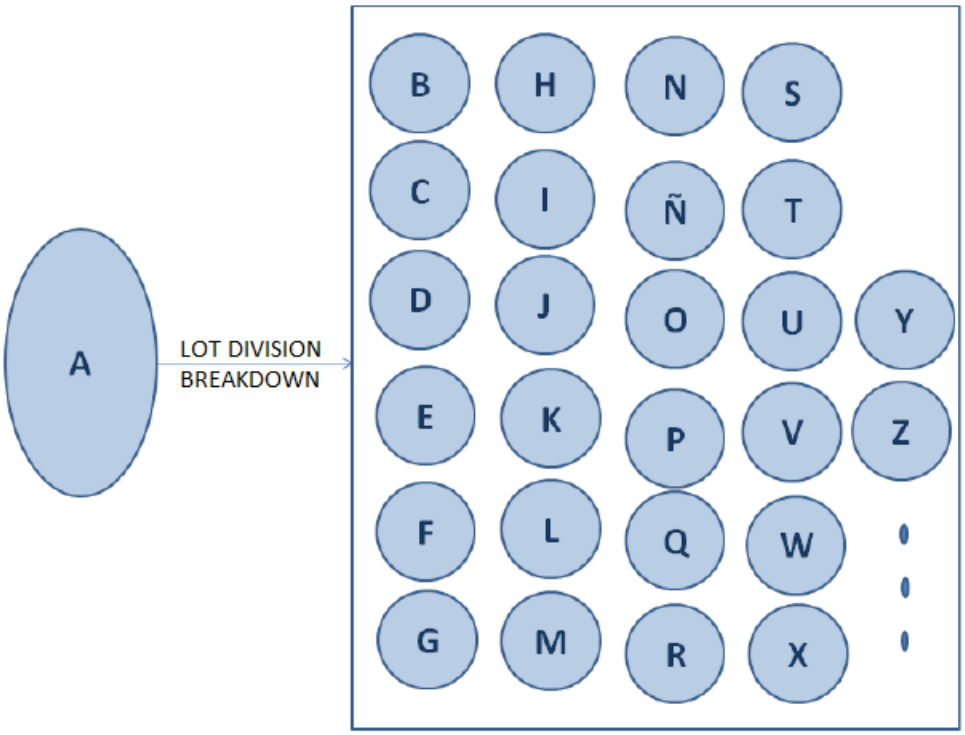


c. Typology Seven: Purchase of "*baldíos*", that is vacant lots, which belong to the Nation and can be adjudicated (legalised) to the occupier by the competent authorities, should the occupier comply with certain conditions. Under this modality, the criminals buy through collaborators "*baldíos*" with a "*falsa tradición*" (false transfer). False transfer means that the "seller" has no ownership title because he has not been recognised as such by the authorities. The "seller" only has possession of the land. The collaborators then register the transfer of the possession and allege that they have made improvements in the land. This typology brings to mind the Royal Realty Group's advertising as regards the profits that will result form acquiring land on which the Tierra Bomba Project was developed, and its experience in "legalizacion" of property titles. No doubt a very risky activity, to say the least.



d. Typology Nine: Large extensions of land are subdivided with the purpose of constructing condominiums, hence combining licit and illicit money. In other words, by subdividing a large property into smaller parcels, criminals are able to cancel the registry entry corresponding to the large property and create several new registry

entries for the smaller parcels which will be held by a great number of different individuals.[104]t



C. CONTRARY TO THE CLAIMANTS' OVERLY-SIMPLISTIC NARRATIVE, THE ATTORNEY GENERAL'S OFFICE HAD SUFFICIENT EVIDENCE OF THE MERITAGE LOT'S UNLAWFUL ORIGIN FOR THE INITIATION OF THE ASSET FORFEITURE PROCEEDINGS

88. The Claimants begin their Reply by accusing Colombia of launching the Asset Forfeiture Proceedings against the Meritage Lot "based on little more than the testimony of a known drug trafficker, Iván López Vanegas".[105] This is wrong. The evidence collected by the Attorney General's Office during its investigations led to a single conclusion: there were enough reasons for the Colombian government to pursue asset forfeiture actions, based on the unlawful origin of the Meritage Lot, the irregularities in its chain of transfer (including forged signatures and the use of front men, who lacked the means to acquire the property), [redacted] and the physical and legal transformations

104 *See* Internal Support Working Group for Management of Land Policy, "Typology Report by the ISWGMLP", August 2021 (**Exhibit R-155**), p. 9.

105 *See* Claimants' Reply Memorial, ¶ 4.

of the Lot which are hallmarks of money laundering operations. The Claimants' refusal to acknowledge the evidence does not change the facts. In fact, as demonstrated below, these irregularities continue to this date.

89. The Claimants have been unable to rebut that the Attorney General's Office had sufficient evidence under the applicable standard of proof to begin Asset Forfeiture Proceedings against the Meritage Lot (**III.C.1**). Moreover, evidence collected after the initiation of the Asset Forfeiture Proceedings confirms that [redacted] (**III.C.2**).

1. The Attorney General's Office had sufficient evidence on the illegal origin of the Meritage Lot to impose Precautionary Measures and initiate the Asset Forfeiture Proceedings

90. Contrary to the Claimants' contentions, the actions adopted by the Attorney General's Office against the Meritage Lot were based on profuse evidence demonstrating the unlawful origin of the property, in accordance with the standard of proof required by the Asset Forfeiture Law. In this section, the Respondent addresses the legal standard of proof required by the Asset Forfeiture Law for the imposition of Precautionary Measures and the initiation of Asset Forfeiture Proceedings (**III.C.1.a**) and demonstrates how these standards were duly satisfied by the Attorney General's Office, following the extensive investigations conducted with regards to the Meritage Lot, which were merely kickstarted by Mr. López Vanegas' complaint (**III.C.1.b**).

a. *The Asset Forfeiture Law requires compliance with a progressive standard of proof towards the issuance of a final decision by the competent judge*

91. It is undisputed that asset forfeiture was enshrined in the 1991 Colombian Constitution "as an instrument for the pursuit of assets acquired through illicit enrichment".[106] The purpose of asset forfeiture is "to fight organized crime through the rejection of wealth originating in illicit activities, such as drug trafficking" and,[107] by attacking organized crime, to "obtain social and economic stability in the country".[108] To this effect, ownership over assets which result from

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106 *See* Medellín Expert Report, ¶ 18.

107 *See* Martínez Expert Report, ¶ 17.

108 *See* Claimant's Reply, ¶ 240; Medellín Expert Report, ¶ 18; Reyes Expert Report, ¶ 19. *See also* Martínez Expert Report, ¶ 17.

"illegal activities" must be transferred to the State "by judgment, without compensation of any kind for the affected party".[109]

92. Naturally, the issuance of the judgment on the merits of an asset forfeiture claim requires the completion of a series of stages, designed to grant all the parties involved the required guarantees, without compromising the proceeding's efficacy as a tool against organized crime.

93. As explained by the Respondent in its Counter Memorial,[110] pursuant to the Asset Forfeiture Law, asset forfeiture proceedings involve two stages: (i) an Initial Phase or Pre-procedural Phase, which comprises (1) the investigations and gathering of evidence by the Attorney General's Office, (2) the Provisional Determination of the Claim by the Attorney General's Office, and (3) the Request for asset forfeiture (*Requerimiento*) or the request for dismissal presented by the Attorney General's Office to the Court, and (ii) the Phase before the Courts, starting with the Request filed by the Attorney General's Office.[111]

94. During the initial phase of the proceedings, the role of the Attorney General's Office is of crucial importance, since it is charged with building the basis for the forfeiture request, securing the assets that are the object of the request, and submitting the request before the competent judge.[112] Pursuant to Article 87 of the Asset Forfeiture Law, the Attorney General's Office may adopt precautionary measures upon the issuance of the Provisional Determination of the Claim, with the objective of preventing the assets involved from being "concealed, negotiated, encumbered, removed, transferred or suffer[ing] any deterioration, misdirection, or destruction", among other grounds.[113] In addition, the Asset Forfeiture Law exceptionally allows prosecutors to order precautionary measures prior to the Provisional Determination of the Claim, "in cases of apparent urgency or when serious grounds have been established which make it possible to consider them indispensable and necessary to achieve the purposes described in Article 87".[114] In the last scenario, the measures adopted by the Attorney General's Office may

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109 *See* Law 1708 of 2014 (**Exhibit C-003bis**), Article 15.

110 *See* Claimants' Reply Memorial, ¶ 27(j).

111 Law 1708 of 2014 (**Exhibit C-003bis**), Article 116.

112 Liliana Patricia Donado Sierra, *Sujetos Procesales, Intervinientes, Jurisdicción y Competencia* (UNDOC, 2015) (**Exhibit R-106**), p. 37.

113 Law 1708 of 2014 (**Exhibit C-003bis**), Article 87.

114 Law 1708 of 2014 (**Exhibit C-003bis**), Article 89.

have a maximum duration of six months. Within said term, the prosecutor must decide whether it should go ahead and issue the Provisional Determination of the Claim or whether it should close of the proceedings.[115]

95. As is only reasonable, the applicable standard of proof evolves together with the proceedings. As explained by Dr. Reyes in his first expert report, the level of proof required by the Asset Forfeiture Law for each of the stages is different. In his words: "[a]s the proceedings progress, the evidentiary requirements become more demanding, until the certainty required to pass sentence is reached".[116] This is consistent with the general understanding of legal proceedings as a series of progressive activities towards establishing a factual situation to which legal consequences are assigned.[117]

96. In this vein, Dr. Reyes distinguishes between the legal standards of proof applicable to each one of the distinct stages in the asset forfeiture proceedings:[118]

a) Initial or pre-procedural stage: information considered "serious and reasonable", from which the Attorney General's Office can "infer the probable existence of assets whose origin or destination is part of the causes" of the asset forfeiture";[119]

b) Anticipated precautionary measures: "serious grounds for considering their imposition indispensable and necessary";[120]

c) Provisional determination of the claim: "when the evidence collected during the initial phase indicates that the conditions for the asset forfeiture are met";[121]

d) Asset forfeiture order (final decision on the merits): requires that one of the causes established in Article 16 of the Law 1708 as grounds for asset forfeiture be met.[122]

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115 Law 1708 of 2014 (**Exhibit C-003bis**), Articles 89, 124.

116 Dr. Reyes First Expert Report, ¶ 20.

117 Dr. Reyes First Expert Report, ¶ 21.

118 Dr. Reyes First Expert Report, ¶ 22.

119 Law 1708 of 2014 (**Exhibit C-003bis**), Article 117.

120 Law 1708 of 2014 (**Exhibit C-003bis**), Article 89.

121 Law 1708 of 2014 (**Exhibit C-003bis**), Article 126.

97. Thus, to successfully complete each of the stages towards asset forfeiture, the prosecutors from the Attorney General's Office must: first, reasonably establish that there existed "serious grounds" for considering the imposition of Precautionary Measures as "indispensable and necessary", second, obtain evidence that reasonably "indicated" that the conditions for asset forfeiture (in this case, the unlawful origin of the Meritage Lot) were met for issuing the Provisional Determination of the Claim and filing the Request for Asset Forfeiture (*Requerimiento*),[123] and finally, convince the judge that one of the causes for asset forfeiture provided by the Law has been met. As will be further explained below, these requirements in each of the phases of the Asset Forfeiture Proceedings were amply satisfied the Attorney General's Office, and solidly grounded on the evidence obtained in their investigations.

b. *Mr. López Vanegas's complaint merely kickstarted an in-depth investigation into the Meritage Lot, which provided sufficient basis for the Asset Forfeiture Proceedings*

98. In their Reply, the Claimants state that "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".[124] Further, the Claimants boldly assert that "[e]ven 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".[125]

99. These statements, including the Claimants' mischaracterization of Mr. Caro's testimony, misconstrue the facts and attempt to distract from the in-depth investigations carried out by the Attorney General's Office prior to the Precautionary Measures and the Asset Forfeiture Proceedings, of which Mr. López Vanegas's complaint was but the tip of the iceberg. In fact, what the Claimants intend to portray as the sole basis for the Asset Forfeiture Proceedings, was simply its trigger. As has been already argued by Colombia, the Asset Forfeiture Proceedings do not concern the alleged kidnapping of Mr. Sebastián López, but rather the unlawful origin of the

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122 Dr. Reyes First Expert Report, ¶ 22; Law 1708 of 2014 (**Exhibit C-003bis**), Articles 16, 148.

123 Note that Law 1708 of 2014 does not provide different standards of proof for the Provisional Determination of the Claim and the Request for Asset Forfeiture. *See* Law 1708 of 2014 (**Exhibit C-003bis**), Articles 126, 131, 132.

124 Claimants' Reply Memorial, ¶ 86.

125 Claimants' Reply Memorial, ¶ 199.

Meritage Lot revealed during the investigations that ensued and the serious irregularities demonstrated in the Meritage Lot's chain of tradition, which have been described in detail by the Respondent in its Counter Memorial.[126]

100. However, faced with the Claimants' iteration of their misrepresentations of the origin and purpose of the Asset Forfeiture Proceedings, it is necessary for the Respondent to briefly summarize the cumulative findings that led to the imposition of the Precautionary Measures (**II.D.1.b(i)**) and the Provisional Determination of the Claim (**II.D.1.b(ii)**).

(i) The findings leading to the imposition of the Precautionary Measures

101. As is undisputed, on 3 July 2014, Mr. López Vanegas filed a declaration before Specialized Prosecutor 24 of Medellin where he related the occurrence of certain facts relating to the property of the Meritage Lot.[127] Namely, Mr. López Vanegas denounced that his son had been forced to hand over a signed blank document that was used by members of the *Oficina de Envigado* illicitly to transfer the Meritage Lot to them, as payment for an outstanding debt. According to Mr. López Vanegas's testimony, this ruse was the explanation behind Deed No. 1762 of 16 September 2004, by which Sebastián López, on behalf of Sierralta López y Cía., had purportedly sold Santa María de las Palmas to Mr. Luis José Varela Arboleda for 464.000.000 Colombian Pesos.[128]

102. [redacted]

126 Respondent's Counter Memorial, ¶ 140 et seq.

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

128 *See* Deed No. 1762, 16 September 2004 (**Exhibit C-080**).

129 [redacted]

130 [redacted]

131 [redacted]

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[redacted]

104. As explained below,[139] pursuant to the Asset Forfeiture Law, the Attorney General's Office was under a legal obligation to pursue the Asset Forfeiture Proceedings against the Meritage Lot. [redacted]

105. Notably, Mr. López Vanegas's complaint was initially received and investigated by Prosecutor 24 of the Organized Crime Unit, Ms. Marisabel Correa Torres, giving rise to a criminal investigation for the crime of conspiracy (*conspiración para delinquir*).[141] Ms. Correa subsequently referred Mr. López Vanegas's complaint to the Money Laundering Unit, which later transmitted the relevant documents to the Asset Forfeiture Unit.[142] As informed by Ms. Correa in her reply to the petitions filed by Mr. López Vanegas before the Attorney General's Office relating to the alleged lack of progress in the criminal investigations:

> [T]he Asset Forfeiture Unit is currently in charge of the matter […], since it has personnel from the Judicial Police who have the required seriousness, suitability and capabilities to carry out to fruition the rigorous investigations of the deeds, falsehoods and other elements that might be necessary for the successful completion of the investigation.[143]

106. Once again, the facts belie the Claimants' attempts to portray a complex extortion scheme concocted between Mr. López Vanegas and certain officers from the Asset Forfeiture Unit (particularly Prosecutor 44, Ms. Alejandra Ardila).

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138 [redacted]

139 Respondent's Counter Memorial, ¶ 535; Reyes Expert Report, ¶¶ 11-12; Pinilla Expert Report, ¶¶ 37-38.

140 [redacted]

141 [redacted]

142 Iván López Vanegas Tutela Action, 6 May 2016 (**Exhibit C-037bis**), p. 52.

143 Iván López Vanegas Tutela Action, 6 May 2016 (**Exhibit C-037bis**), p. 52.

107. In compliance with its legal obligation to investigate, the Asset Forfeiture Unit requested a division of the Judicial Police assigned to the Superintendence of Notaries and Registry to investigate the transfers of the Meritage Lot denounced.[144] At this point, no asset forfeiture file was created. During these investigations, as explained by the Respondent in its Counter Memorial,[145] the Delegate for the Protection, Restitution and Formalization of Lands carried out expansive inspections including 19 Notaries throughout Medellín to review the notary protocols of the 52 deeds mentioned by Mr. López in his complaint. The results of this investigation, as described in the Report of 8 April 2016, revealed a series of grave irregularities involving the Meritage Lot:

- Irregularities with the signatures of the deeds, including signatures unmatching those registered in the respective ID cards, amongst them, that of Mr. Sebastián López;[146]
- Several public deeds containing scratches, scuffs and corrections without having been duly amended, as required by law;
- Powers of attorney without the necessary legal requisites;
- Irregularities regarding the dates in which the deeds were created and their registration in the notary protocols, some of which had been incorporated among the protocols pertaining to a different year altogether;
- Issuance of powers of attorney in favor of individuals who were authorized to act on behalf of both the seller and the buyer to a transaction, which according to the Superintendence of Notaries and Registry could entail defect in the parties' consent to the transaction resulting in it being invalid; and
- Sellers represented by agents without a mandate ("*Agente Oficioso*"), whose actions were not subsequently ratified.[147]

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144 *See* Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 3; Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 2.

145 *See* Respondent's Counter Memorial, ¶ 155.

146 *See* Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 34; Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 33.

147 *See* Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), pp. 5-35; *see also* Respondent's Counter Memorial, ¶ 155.

108. Importantly, the Superintendence of Notaries and Registry found that the signature of Mr. Sebastián López Betancur (Mr. López Vanegas's son) in the deeds by which, on behalf of Sierra Alta Lopez y Cia, he had sold Lot 001-71999 to Mr. Luis José Arboleda and, later, 75% of Lot 001-720000 to José Ignacio Cardona, presented different characteristics from the signature appearing on his identity card.[148]

109. Contrary to the Claimants' iterated allegations, it was this Report of 8 April 2016, not Mr. López Vanegas' complaint, which immediately led to the creation of the file in which the investigation leading to the Asset Forfeiture Proceedings would unravel, identified as No. 110016099068201613641. In fact, the Report of 8 April of 2016 is the basis to Resolution No. 125 of 2016 by which file No. 13641 was created and assigned to Prosecutor 44, Ms. Alejandra Ardila.[149]

110. After she was assigned file No. 13641, Ms. Ardila proceeded to conduct a series of additional investigations, including the collection of information from the Chambers of Commerce of Aburrá Sur and Medellín about the companies involved in the sale-purchase transactions relating to the Meritage Lot.[150]

111. Further, during this initial stage, Ms. Ardila received a second report from the Superintendence of Notaries and Registry regarding the proceedings followed against Mr. López Vanegas in the United States, following which he had been indicted for drug trafficking and sentenced in the first instance. The decision was later revoked on appeal based on grounds of lack of jurisdiction of the courts of the United States, since the facts for which Mr. López Vanegas had been condemned related to the transportation of drugs from Venezuela to France. Moreover, the report noted Mr. López Vanegas's involvement with the "Usuga Group", a Colombian criminal organization conducting large-scale drug trafficking in Medellín. Based on these findings, the Superintendence

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148 Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), pp. 32-34.

149 Attorney General's Office Resolution No. 125, 18 April 2016 (**Exhibit C-153**).

150 Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 49.

of Notaries and Registry recommended that copies of the proceedings in the United States be requested to be incorporated to the Asset Forfeiture Proceedings.[151]

112. It must be noted that, at this stage of the investigation, Prosecutor 44 already had knowledge of the testimony of Mr. Luis José Varela Arboleda, who had apparently acquired Lot 001-719999 for the price of 464.000.000 Colombian Pesos, having declared to have worked as a street vendor of mangos and whose occupation at the time of his declaration was caring for motorcycles and vehicles outside a stadium in the municipality of Envigado.[152] As explained below, this testimony was crucial for the Provisional Determination of the Claim and the *Requerimiento*, since the use of figureheads is considered a signature mark of money laundering operations.[153]

113. In addition, [redacted]

151 Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), pp. 50-53.

152 *See* Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 73.

153 *See* Superintendence of Notaries and Registry, "Typology Report by Internal Work Group for Support of Land Policy Management", August 2021 (**Exhibit R-64**), p. 20.

154 [redacted]

[redacted]

114. In addition, Prosecutor 44 also noted that, after having reviewed Mr. Sebastián López's travel records, she had verified that he had not been in Colombia between 24 May 2001 and 10 April 2016, for which reason he could not have signed, on behalf of Sierra Alta López & Cía., the deed by which the company sold Lot 001-720000 to Mr. José Cardona.[156] As noted above, the Superintendence of Notaries and Registry was also alerted to have observed that Mr. López Betancur's signature on the deed differed from his registered signature.[157]

115. As a result of the foregoing, Ms. Ardila's conclusion for this stage was that there existed "reasonable grounds that justify the precautionary measure", founded on the evidence in the file that allowed to infer that the assets had been acquired by unlawful means.[158]

116. Contrary to the Claimants' misguided attempts to undermine the legitimacy and adequacy of the Precautionary Measures,[159] as described in further detail above, Colombian courts confirmed the legality of the decision adopted by Ms. Malagón in accordance with the applicable standard of proof. In fact, the very excerpt from the decision by the Asset Forfeiture Court on Corficolombiana's control of legality petition on which the Claimants rely proves this very point:

[redacted]

155 [redacted]

156 Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 72.

157 *See above,* Section III.A.

158 Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 84.

159 Claimants' Reply Memorial, ¶ 336.

> 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, 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.[160]

117. The decision of the Bogota Superior Court on appeal is equally apposite in this regard:

> [T]he Court found that the evidence gathered justified the probable cause alleged by the Attorney General's Office, since it was likely that the real property was linked to grounds for asset forfeiture affecting the real property on which the Meritage Luxury Community project is being built. […] this is different from affirming that the weight of the evidence at this time required a finding of the admissibility of asset forfeiture under the terms of Article 148 of Law 1708 of 2014, which would require further knowledge of the case.[161]

118. In sum, the extent of the investigations carried out by Ms. Ardila leaves no doubt as to the collection of reasonably sufficient evidence at the time to comply with the standard of proof required by the Asset Forfeiture Law for the imposition of Precautionary Measures: (i) the links to Mr. López Vanegas had been proven beyond doubt, as his criminal activities in Colombia and the United States, (ii) the existence of irregularities in the deeds documenting the subsequent sales and purchases over the Meritage Lot showed, including the apparent forgery of Mr. Sebastián López'a signature, and (iii) [redacted]

119. Needless to say, the Claimants' assertions that "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"[162] is a ludicrous misrepresentation of Colombia's arguments regarding this issue.

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160 Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016 (**Exhibit C-044bis**), pp. SP-0018 – SP-0020 (emphasis added); *See* Claimants' Reply Memorial, ¶ 336.

161 Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017 (**Exhibit C-047bis**), p. 5 (emphasis added).

162 Claimants' Reply Memorial, ¶ 279.

(ii) Further investigations leading to the Provisional Determination of the Claim

120. As a further step in the investigations, the Attorney General's Office interviewed the individuals involved in the chain of transfer of the Meritage Lot: Jose Ignacio Cardona Rodríguez, Tatiana Gil Muñoz, Mónica Marcela Rendón Gil, Luis Jose Varela Arboleda, John Jairo Vélez Arredondo, Carmen Alicia Gallego Saldarriaga and Lina Beatriz Echeverri Gómez (former wife of Mr. Jaime Alberto Orozco Vanegas).[163] As described in detail in the Respondent's Counter Memorial,[164] these interviews revealed a series of tell-tale signs regarding the sale and transfer of the Meritage Lot, including the notorious lack of economic capacity of several individuals who appeared as buyers. As explained in this Rejoinder, these transactions correspond exactly to some of the typologies of money laundering involving real estate frequently used by criminal organizations.[165]

121. In this sense, Mr. Javier Arboleda, who had purportedly bought the Lot from Mr. Sebastián López, candidly explained that he had worked as a street vendor of mangos for the last 30 years, and that he had been threatened by three individuals to attend the Notary Office 2 of Envigado to sign the relevant deeds for acquisition of the Meritage Lot.[166]

122. Further, Ms. Tatiana Gil revealed that she had worked as a model since 1999 and had savings at the time in the amount of 55 million Colombian Pesos[167] and that her cousin, Ms. Rendón, a dental technician, had saved 5 million Colombian Pesos, which she wished to invest.[168] However, the purchase price of the Meritage Lot, as acquired by Mses. Rendón and Gil per Deed No. 3338, was of 450 million Colombian Pesos.[169] According to Ms. Gil, the difference was covered by her

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163 Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), pp. 72-74, 85-100, 103-106.

164 Respondent's Counter Memorial, ¶¶ 160-165, 171, 199.

165 Internal Support Working Group for Management of Land Policy, "Typology Report by the ISWGMLP", August 2021 (**Exhibit R-155**). *See also* Section III.A.

166 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 73.

167 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 93.

168 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 92.

169 *See* Deed No. 3338, 4 October 2006 (**Exhibit R-19**).

then-partner, Mr. Guillermo Arango, *aka* "*Guru*",[170] who had been also identified by Mr. López Vanegas in his complaint.[171] [redacted]

123. In addition, Ms. Gil candidly acknowledged that the negotiations over the Meritage Lot had been conducted by three sales agents, one of which she identified as Mr. Jesús María Velázquez, *aka* "*Borracho*",[173] who had also been mentioned by Mr. López Vanegas in his deposition.[174] As regards the seller, Ms. Gil stated that it appeared to be "a person [] whose name is Hector, who is known as Perra Loca".[175] Unmistakably, the person that Ms. Gil identified as the seller was no other than Hector Restrepo Santamaría, *aka* "Perra Loca". [redacted] It is also telling that, as recounted by Lopez Vanegas,

170 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 94.

171 *See* Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 4.

172 [redacted]

173 Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 93.

174 Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), pp. 121-122.

175 Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 93.

176 Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 36.

177 [redacted]

Perra Loca was amenable to negotiating the Meritage Lot and to give Lopez Vanegas another property in Cartagena in compensation.[178]

124. Moreover, all of the testimonies revealed that none of the individuals who had appeared as sellers and buyers to the deeds relating to the transfer of the Meritage Lot had participated in the corresponding negotiations. Further to these findings, Prosecutor 44's conclusion was apposite:

> [T]he evidence gathered throughout this investigation allows to reasonably infer that the origin of the assets seized by the Attorney General's Office [is] unlawful (drug dealing) and that after Mr. Iván López Vanegas' extradition, a series of facts unraveled in which persons links to the criminal organization *Oficina de Envigado* have been involved.[179]

125. Other investigations conducted during this stage of the proceedings included obtaining information from public sources regarding Mr. López Vanegas's criminal activities in Colombia,[180] as well as obtaining financial information of the individuals and companies involved in the Meritage Lot's chain of domain or named by Mr. López Vanegas in his complaint: [redacted]

The immigration records for the same individuals were also collected and incorporated in the investigation.[183] All of these investigative actions, among others, are described in detail in the Respondent's Counter Memorial.[184]

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178 - Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014 (**Exhibit C-130**).

179 Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 119.

180 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 70.

181 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), pp. 75-76, 79-80, 101-103.

182 *See above*, Section III.A.

183 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 106.

184 *See* Respondent's Counter Memorial, ¶¶ 152-165.

126. Notably, during this stage, Ms. Ardila already considered Fiduciaria Corficolombiana's arguments regarding its status as third party in good faith without fault, concluding that Corficolombiana had not used the adequate means at its disposal to verify the origin of the Meritage Lot. According to Ms. Ardila, had Corficolombiana resorted to the tools within its power, it would have known that Mr. Ivan López Vanegas, legal representative of Sierralta López y Cia (later Inversiones Nueve S.A.), who had sold the Meritage Lot to Mr. Arboleda in 2004, had served time for drug trafficking in the United States.[185] Further, Corficolombiana could have also verified that Mr. Arboleda lacked any products in the financial system, had never acquired a similar asset and did not report any economic activity whatsoever, which would have allowed Corficolombiana to reasonably infer that he lacked the financial capacity to lawfully acquire the Meritage Lot. [186]

127. Thus, the investigations conducted by the Asset Forfeiture Unit during the Initial Phase of the Asset Forfeiture Proceedings provided sufficient elements to reasonably infer the "indications" required by the Asset Forfeiture Law to proceed with the Provisional Determination of the Claim.[187] In particular, as it was shown that Mr. López Vanegas had acquired the Meritage Lot, that he had been involved in criminal activities associated to drug trafficking, and that the subsequent deed chain was simulated [redacted]

128. In sum, the Claimants have incessantly tried to convince the Arbitral Tribunal that the Attorney General's Office based its actions against the Meritage Lot solely on the disproven testimony of Mr. López. To the contrary, as documented in the record, Mr. López' complaint was merely the starting point of a complex investigation involving the technical expertise of a highly specialized unit, such as the Superintendence of Notaries and Registry, the first-hand testimonies of at least seven witnesses, and an expansive search of private and public databases. The Claimants' self-serving assertion in this arbitration that the Asset Forfeiture Proceedings were solely based on

185 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 128.

186 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 128.

187 *See above,* Section III.A.1.

188 [redacted]

Mr. López Vanegas's debunked testimony stands no analysis when faced with the sheer depth and scope of the thorough investigations conducted by the Attorney General's Office.

2. [redacted]

129. [redacted]

130. [redacted]

131. [redacted]

189 [redacted]

190 [redacted]

191 [redacted]

192 [redacted]

193 [redacted]

[redacted]

132. [redacted]

133. [redacted]

a. [redacted]

134. [redacted]

135. [redacted]

194 [redacted]

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196 [redacted]

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136. [redacted]

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138. [redacted]

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b. [redacted]

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146. [redacted]

[redacted]

147. [redacted]

148. [redacted]

218 [redacted]

[redacted]

149. [redacted]

D. THE DECISION OF THE SECOND CRIMINAL COURT THAT NEWPORT HAS NO *IN REM* RIGHTS OVER THE MERITAGE LOT IS REASONED AND SUPPORTED BY LAW

150. Among the grounds for stating that "[t]he [action forfeiture] action was in plain contravention of the legal and procedural guarantees enshrined under the Colombian Constitution and the Asset Forfeiture Law", the Claimants cite "the lack of [] recognition of Newport as an affected party."[221] However, a correct assessment of the Asset Forfeiture Law applicable to the Asset Forfeiture Proceedings and the facts can only lead to the dismissal of the Claimants' allegations.

151. As a preliminary matter, it must be underscored that the Claimants are effectively utilising these proceedings as a second appeal of the Second Criminal Court's *Avocamiento* order. The Tribunal should not allow this. The decision on Newport's appeal of the Second Criminal Court's decision on this specific point is pending before the Asset Forfeiture Chamber of the Superior Tribunal of Bogota.

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219 [redacted]

220 [redacted]

221 Claimants' Reply, ¶ 84.

152. The Second Criminal Court's decision was reasoned and duly supported by Colombian law and cannot be considered "manifestly" erroneous.[222]

153. As the Respondent demonstrates, the Claimants' entire argument regarding its standing as *afectado* in the Asset Forfeiture Proceedings is based on a flawed premise: contrary to what the Claimants have argued in the domestic proceedings and in this arbitration, to be considered as an *afectado* in Asset Forfeiture Proceedings over real property governed by Law 1708 of 2014 – as is the case of the Meritage lot - the party claiming to be an *afectado* must hold *in rem* rights (**1**), which requirement is not met by Newport under the contractual structure of the Meritage Project (**2**); and, contrary to what the Claimants argue, Newport's situation is distinguishable from that of La Palma Argentina, who was found to hold *in rem* rights over the Meritage Lot (**c**).

1. The Second Criminal Court reasonably found that the law applicable to the Asset Forfeiture Proceedings is Law 1708 of 2014, which requires *afectados* to hold in rem rights

154. According to the Claimants, "the court's denial of standing to Newport was manifestly erroneous [] because, among other things: (i) the definition of affected party under the Asset Forfeiture Law is intentionally broad and must be read holistically".[223] As their main basis to this claim, the Claimants cite to the Second Expert Report of Dr. Carlos E. Medellin Becerra. However, the conclusions reached by Dr. Medellín in his Second Expert Report in this regard are inapposite, since they are based on his interpretation of the Asset Forfeiture Law as amended by Law 1849 of 19 July 2019, which was not applicable to the Asset Forfeiture Proceedings.

155. The applicability of Law 1780 to the Meritage proceedings was precisely the basis for the *avocamiento* order issued by the Second Criminal Court Specialized in Asset Forfeiture of Antioquia ("Second Criminal Court") on 17 August 2017 (the *Avocamiento* order).[224]

156. As demonstrated by the Respondent in its Counter Memorial,[225] the concept of *afectado* is governed by Article 30 of Law 1708 of 2014, which defines the term as "any person, whether an individual or a legal entity, who claims to be the holder of rights regarding one of the assets

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222 Claimants' Reply, ¶ 88.

223 Claimants' Reply, ¶ 88.

224 *See* Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**).

225 Respondent's Counter Memorial, ¶ 215.

subjected to forfeiture proceedings" and specifies that "in the case of tangible assets, whether movable or immovable [i.e., real estate]", an *afectado* is "any person, whether an individual or a legal person, who claims to have in rem rights ("*derecho real*") over the assets that are the subject of the asset forfeiture proceeding".[226]

157. As noted by the Court,[227] Article 30 was amended by Law 1849 of 19 July 2019, which substituted the reference to "*in rem* rights" with the term "patrimonial rights"- this is the final text of the provision which was analysed by Dr. Medellín in his Second Expert Report, on which the Claimants rely to support their argument.[228] However, as underscored by the Respondent's expert, Dr. Reyes, in his Report,[229] Law 1849 is not applicable to the Asset Forfeiture Proceedings, as correctly found by the Court.[230]

158. Indeed, the temporal scope of the application of Law 1849 of 2019 is provided in its Article 57, which states: "[t]hose proceedings in which a Provisional Determination of Claim has been rendered at the date of entry into force of this law will continue to be governed by the procedure established in Law 1708 of 2014, except as regards the administration of assets".[231] Thus, the reason why Law 1849 of 2019 is not applicable to the Meritage Asset Forfeiture Proceedings is straightforward: the Provisional Determination of the Claim of asset forfeiture regarding the Meritage Lot was issued on 25 January 2017[232] and Law 1849 of 2017 came into force on 19 July 2017.[233] The inevitable conclusion is that the Meritage Asset Forfeiture Proceedings will continue to be governed by procedure established in Law 1708 of 2014, in accordance with

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226 *See* Asset Forfeiture Court *Avocamiento* Order 17 August 2017 (**Exhibit C-057bis**), pp. 16-17.

227 Asset Forfeiture Court *Avocamiento* Order 17 August 2017 (**Exhibit C-057bis**), p. 16.

228 Second Expert Report of Dr. Medellin, ¶ 39.

229 Dr. Reyes Expert Report, ¶ 32 ("The amendment is important, because within the genre of "patrimonial rights" are the categories of "in rem rights", "personal rights" and "intellectual rights". This means that in the original text of Law 1708 of 2014 the concept of affected was much more limited, as it was reduced to the holder of "in rem rights" over the goods subject to the action for asset forfeiture")

230 Asset Forfeiture Court *Avocamiento* Order 17 August 2017 (**Exhibit C-057bis**), p. 16.

231 Asset Forfeiture Court *Avocamiento* Order 17 August 2017 (**Exhibit C-057bis**), p. 16, *see also* Respondent's Respondent's Counter Memorial, ¶ 216; Law 1849 of 2017, 19 July 2017 (**Exhibit C-046bis**), Article 57.

232 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023-bis**).

233 Law 1849 of 2017, 19 July 2017 (**Exhibit C-046bis**).

Article 57 of Law 1849 of 2017.[234]After concluding that the Asset Forfeiture Proceedings were governed by Law 1708 of 2014,[235] the Court focused its analysis on who was a holder of a "derecho real" (in rem right) regarding the Meritage Lot.

2. The Second Criminal Court found that Newport lacked *in rem* rights based on a reasoned analysis of the Meritage Project's contractual structure

159. Based on an in-depth analysis of the Meritage Project's contractual structure pursuant to Colombian law, as has been described in detail by the Respondent in its Counter Memorial, the Second Criminal Court concluded that Newport lacked *in rem* rights under the Promise Agreement with La Palma Argentina (**a**) and the Meritage Trust Agreement (**b**).

a. *Newport has no in rem rights over the Meritage Lot under the Promise Agreement*

160. By stating that "[t]he Parties agree that Royal Realty entered into a Sales-Purchase Agreement with La Palma in November 2012 to purchase the Meritage Plot",[236] the Claimants grossly mischaracterize the Sale-Purchase Promise Agreement (the "Promise Agreement") between La Palma Argentina and Royal Realty, as well as the Respondent's position regarding the rights conferred under said Agreement to Newport. This apparently simple statement by the Claimants is deliberately equivocal, since the Agreement between La Palma Argentina and Royal Realty is not a purchase agreement, but rather promise agreement. This point is crucial to understanding the agreement's scope, and its legal effect.

161. *First*, as regards the Promise Agreement's scope, and as explained by the Respondent in its Counter Memorial,[237] on 1 November 2012, Royal Realty S.A.S. entered into a Sale-Purchase Promise Agreement with La Palma Argentina y Cia. Ltd. ("La Palma Argentina"), pursuant to which La Palma Argentina promised to sell Royal Realty a plot of land with an area of 556,676,000 m^2 in El Perico, municipality of Envigado, registered with the real estate number

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234 Expert Report of Dr. Reyes, ¶¶ 33-34.

235 Asset Forfeiture Court *Avocamiento* Order 17 August 2017 (**Exhibit C-057bis**), p. 21.

236 Claimants' Reply, ¶ 39.

237 Respondent's Counter Memorial, ¶ 53.

001-930485 ("Plot 001-930485" or the "Meritage Plot").[238] In the Promise Agreement, the parties expressly agreed that the lot would be used for Royal Realty to develop a project comprising residential units, an apart-hotel and commercial facilities that would be developed in 9 phases. Royal Realty could acquire subdivisions of Plot 001-930485 according to the project's development, and make payment to La Palma Argentina for the parcels once it had achieved a point of equilibrium regarding the presales of units of the project-[239] as will be further explained, however, the Promise Agreement was never applied in such a way, since the transfer of property was rather governed by the Trust agreements described below. In addition, Royal Realty had an option to buy the whole of the property within a certain time period.[240] As is undisputed, on 9 May 2013, Real Royalty assigned its rights under the Promise agreement to Newport.[241]

162. For the sake of clarity, Colombia clarifies that it is not its position to state that promise agreements are contrary to Colombian law, as the Claimants suggest in their Reply.[242] This allegation by the Claimants' clearly shows that they miss the mark regarding the Respondent's position: the Respondent does not object the legality of the Promise Agreement, but merely object to the Claimants' forceful attempts to give the Promise Agreement legal effects that it does not and could not have under Colombian law:

163. The distinction between a promise agreement and a sale agreement is crucial under Colombian law. Promise agreements are considered "preliminary" or "preparatory" agreements, which are characterized by their specific function of obliging the contracting parties to execute, in the future, a definitive contract.[243] As stated by the Colombian Supreme Court of Justice:

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238 *See* Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012 (**Exhibit C-019bis**).

239 *See* Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012 (**Exhibit C-019bis**), Clause First, p. 2.

240 *See* Sales-Purchase Agreement Between Royal Realty and La Palma Argentina 1 November 2012 (**Exhibit C-019bis**), Clause Third p. 3.

241 Agreement between Royal Realty S.A.S. and La Palma Argentina Y CIA. LTDA., 9 May 2013 (**Exhibit C-103**), p. SP-0002, cl. 1.

242 Claimants' Reply, ¶ 40.

243 Colombian Civil Code (**Exhibit R-90**), Article 1495; *see also* Fernando Hinestrosa, *Contratos preparatorios. El contrato de promesa*, (Revista de derecho privado, n.º 11, 2006) (**Exhibit R-91**), p. 35; Jorge Oviedo Albán, *Apuntes sobre el contrato bilateral de promesa en el derecho privado colombiano*, (UNIVERSITAS) (**Exhibit R-185**), p. 621.

> There can be no confusion, due to the existence of notorious and substantive differences, between the promise to execute a sales and purchase agreement and the agreement to which the promise refers. […] The promise is not an act of "sale", since it does not consist of a deed that can transfer ownership, nor does it generate an obligation to deliver a certain good, nor is it directed towards modifying *in rem* rights.[244]

164. Hence, by its very nature and purpose, the Promise Agreement was not meant to generate *in rem* rights over the Meritage Lot in favor of Newport. Therefore on the basis of the Promise Agreement Newport cannot claim under the Asset Forfeiture Law to be *afectado* in relation to the Meritage Lot.

165. *Second*, considering *quod non* that the Promise Agreement could have placed Newport in the category of *afectado,* its failure to comply with the minimum formal requirements would have prevented it from having any legal effects. In this regard, the Claimants mistakenly aver that, by arguing that the Promise Agreement was invalid, "Colombia conflates the "*legal validity*" of a contract—that is, its existence and enforceability—with whether the performance of such contract has been concluded."[245] Once again the Claimants' fail to comprehend the Respondent's position, since the alleged conflation on which the Claimants rely is inexistent: pursuant to Article 89 of Law 153 of 1887, a promise to enter into a contract does not produce any legal effect, unless it complies with the following requirements: (i) it must be made in writing; (ii) the contract regarding which the promise is entered into must not be deemed ineffective by law because it does not meet the requirements provided for in Article 1511 of the Civil Code;[246] (iii) the promise must set forth a time period or condition establishing when the contract is to be entered into; and (iv) the contract [which contract] must be drafted in such manner that only the transfer of the asset or compliance with the legal formalities remain pending.[247]

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244 Colombian Supreme Court of Justice, cited by Jorge Oviedo Albán, *Apuntes sobre el contrato bilateral de promesa en el derecho privado colombiano*, (UNIVERSITAS) (**Exhibit R-185**), p. 642 (emphasis added)

245 Claimants' Reply, ¶ 40.

246 Colombian Civil Code, (**Exhibit R-90**), Article 1511 ("An error of fact also vitiates consent when the substance or essential quality of the object that is the subject matter of the transaction or agreement is different from what it is believed to be; as if one of the parties were to suppose that the object is a silver ingot but it is actually a mass of some other similar metal. An error regarding any other quality of the thing does not vitiate the consent of contracting parties, but only when that quality is the main reason why one of the parties enters into the contract, and that reason was known to the other party").

247 Law 153 of 1887 (**Exhibit C-408**), Article 89; *see also* Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 48.

166. As explained by the Respondent in its Counter Memorial, it was within this framework that the Second Criminal Court concluded that the Promise Agreement did not comply with the material requirements set forth under Colombian the law for its validity, as set out above. In particular, the Court remarked the lack of clarity, financial and managerial disarray of the clauses, terms and conditions on payment and time for conclusion of the sale and remarked that the provisions are "driven more by the zeal to legalize a plot of land and ratify the return of sums of money, as profits, than by the transparency of a legitimate legal transaction that respects due time and procedures".[248]

167. *Third*, the Respondent also objects to the Claimants' contentions regarding Newport's rights relating to the Meritage Lot on the basis of the non-performance of the Promise Agreement; that is, even assuming *ex hypothesis* the Promise Agreement's validity under Colombian law, it did not transfer any property from La Palma Argentina to Royal Realty. As explained by the Respondent in its Counter Memorial,[249] under Colombian law, as well as in most civil law systems, the transfer of in rem rights over real estate property requires two acts, known as "title" (título) and mode ("modo").[250] The "title", defined as "the act that confers the possibility or vocation to acquire ownership or other in rem rights",[251] is materialized through the execution of the sale and purchase deed (not a promise contract); the "mode", defined as "the act which produces the acquisition of ownership in favour of a specific person",[252] requires the deed to be registered before the corresponding office.[253] Both elements are essential to the transfer of ownership

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248 *See* Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 110.

249 Respondent's Counter Memorial, ¶ 56.

250 *See* Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-57**), p. 115.

251 Alessandri Rodríguez, A., Somarriva, M. and Vodanovic, Tratado de los Derechos Reales. 5ta ed. Temis, Bogotá, 1993, cited by Nelson Santiago Ramírez y Mariana Uribe Suárez, "Título y El Modo: Definición, Evolución y su Relación con las Fuentes de las Obligaciones" (Revista Estudiantil de Derecho Privado, Universidad de Externado) (https://red.uexternado.edu.co/titulo-y-el-modo-definicion-evolucion-y-su-relacion-con-las-fuentes-de-las-obligaciones#:~:text=De%20acuerdo%20con%20Alessandri%2C%20%E2%80%9CEl,la%20posibilidad%20de%20adquirir%20el), accessed on 16 February 2022 (**Exhibit R-256**)

252 Alessandri Rodríguez, A., Somarriva, M. and Vodanovic, Tratado de los Derechos Reales. 5ta ed. Temis, Bogotá, 1993, cited by Nelson Santiago Ramírez y Mariana Uribe Suárez, "Título y El Modo: Definición, Evolución y su Relación con las Fuentes de las Obligaciones" (Revista Estudiantil de Derecho Privado, Universidad de Externado) (https://red.uexternado.edu.co/titulo-y-el-modo-definicion-evolucion-y-su-relacion-con-las-fuentes-de-las-obligaciones#:~:text=De%20acuerdo%20con%20Alessandri%2C%20%E2%80%9CEl,la%20posibilidad%20de%20adquirir%20el), accessed on 16 February 2022 (**Exhibit R-256**)

253 *See* Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-57**), p. 115.

rights under Colombian law. If any of the two requirements is absent, the transfer is inexistent. As explained by Colombia in its Counter Memorial,[254] in the case of the Meritage Lot, neither requirement was complied with. Indeed, no definitive Sales Agreement was executed, nor was the Meritage Lot registered under Newport's name. Thus, Newport's rights over the Meritage Lot fall squarely in what was stated by the Second Criminal Court: a sale-purchase of real estate is not "perfected under the law, without a public registered deed".[255] As understood by Prof. Juan Enrique Medina Pabón, one of the basic objectives of the real estate registry is "[t]o serve as the means for the transference of ownership over real estate property and other in rem rights, in accordance with Article 746 of the Civil Code".[256]

168. In sum, the Second Criminal Court's reasoning that the Promise Agreement granted no *in rem* rights had a solid basis in Colombian law, which (i) requires the completion of certain requirements that were not met by Newport and La Palma Argentina and (ii) requires the execution of a definitive contract and the registration of the corresponding deed before the competent authorities for the effective transfer of ownership. The consequences are clear: Newport cannot claim to hold right *in rem* rights by virtue of the Promise Agreement.

b. *Newport had no in rem rights over Phases 1 and 6 of the Meritage Project under the Meritage Trust Agreement*

169. Newport's position in relation to the Meritage Administration and Payment Trust, does not confer Newport *in rem* rights over the Meritage Lot and its subdivisions, including Phases 1 and 6 of the Meritage Project.

170. *First,* to recall, the contractual structure relating to the land plots on which the Meritage Project was developed by a series of agreements: after the execution of Promise Agreement in 2012, Newport and Corficolombiana entered into an Administration and Payment Trust Agreement on

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254 Respondent's Counter Memorial, ¶¶ 42-54.

255 *See* Asset Forfeiture Court *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), pp. 115-117. *See also* Article 1857 of the Colombian Commercial Code ("A sale is deemed to be concluded when the parties have agreed on the object and the price, except in the following cases: the sale of real estate, easements and hereditary successions, which are not deemed to be concluded as long as a public deed has not been issues").

256 Juan Enrique Medina Pabín, "El Estudio de Títulos" in "Extinción del Derecho de Dominio en Colombia" (UNODC, 2015) (**Exhibit R-107**), pp. 327-328.

17 October 2013 (the "Meritage Trust Agreement") ("*Contrato de Fiducia Mercantil Irrevocable Inmobiliaria de Administracion y Pagos - Fideicomiso Meritage*").[257]

171. Pursuant to the Meritage Trust Agreement, the Meritage Trust was to comprise monetary funds and the portions of Plot 001-930485,[258] which were supposed to be transferred to Corficolombiana by Newport, as Trustor.[259] However, this was legally impossible, since Newport could not have transferred Plot 001-930485 because, as explained above and in the Counter Memorial, Newport was never the owner of the plot (or any part thereof), because it only had the Promise Agreement with La Palma Argentina, and the definitive sale-agreement was not entered into. In other words, Newport could never transfer to Corficolombiana what it did not have.[260]

172. As recounted by the Respondent in its Counter Memorial, on 25 November 2014, Corficolombiana, Newport and La Palma Argentina, via a private document, entered into the Meritage La Palma Trust Agreement (referred to by the Claimants as the "Parqueo Trust Agreement") ("*Contrato de Fiducia Mercantil Irrevocable de Administración- Fideicomiso Meritage La Palma Argentina*").[261] According to the Meritage La Palma Trust Agreement, La Palma Argentina, as the owner of Plot 001-930485, was to transfer it in trust to Corficolombiana, as trustee, with the objective of parcelling, transferring and making it available to the beneficiary in order to develop the Project.[262] This meant that Corficolombiana, as the Trustee, would hold

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257 *See* Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028bis**), Clause 9**,** pp. 7-8.

258 *See* Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028bis**), Clause 6, p. 7.

259 *See* Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028bis**), Clause 8 and 9, pp. 7-8.

260 In fact, this flaw in the Meritage Trust Agreement was evidenced by the parties' practice. Indeed, as reflected in Deed No. 361, it was La Palma Argentina (acting as trustor), not Newport, who transferred the Meritage Lot to Corficolombiana, as trustee of the Meritage La Palma Trust. Further, pursuant to Deed No. 361, Corficolombiana, in its capacity as the trustee of the Meritage La Palma Trust, and not Newport, transfers the parcel of the Plot to develop Phases 1 and 6 of the Meritage Project to the Meritage Trust. *See* Deed No. 361, 12 February 2015 (**Exhibit C-140bis**), Transaction 3, Clause 1, p. 43.

261 *See* Parqueo Trust Agreement and Amendment, 25 November 2014 (**Exhibit C-029bis**); Respondent's Counter Memorial, ¶ 64.

262 *See* Parqueo Trust Agreement and Amendment, 25 November 2014 (**Exhibit C-029bis**), Clause 3.

legal title to the plot and put it at the disposal of the beneficiary, *i.e.* Newport, for the development of the project.[263]

173. In application of this structure, as described in the Respondent's Counter Memorial,[264] on 12 February 2015, Deed No. 361 was executed. 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 Plot 001-930485. In turn, Corficolombiana gave Plot 001-930485 to La Palma Argentina in gratuitous bailment (*comodato precario*). In addition, 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 Plot to develop Phases 1 and 6 of the Meritage Project. In turn, Corficolombiana was to give said parcel to Newport in gratuitous bailment (*comodato precario*), in the terms to be agreed in a separate gratuitous bailment agreement. For the avoidance of doubt, gratuitous bailments do not grant *in rem* rights under Colombian law.[265]

174. Deed No. 361 is a clear example of how *in rem* rights are transferred in accordance with the Meritage Project's contractual structure: La Palma Argentina transferred the land to Corficolombiana, as trustee of the Meritage La Palma Trust, who subsequently transferred it to the Meritage Trust, of which Cordifolombiana is also a trustee. Further, pursuant to the Meritage Trust Agreement, the units would be ultimately registered in favour of the unit buyers.[266] Crucially, at all times, the legal title over the assets was maintained by the Trustee under both trust agreements, Corficolombiana.[267] Newport, on the other hand, is nowhere to be seen in this sequence, for the simple reason that its relationship to the Meritage Project was simply as its

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263 *See* Parqueo Trust Agreement and Amendment, 25 November 2014 (**Exhibit C-029bis**), Whereas 3: "Additionally, by means of this contract the PARTIES intend that THE TRUSTEE manage the real estate property that will be transferred into the Trust established herein, retain its ownership, and make it available to THE BENEFICIARY for the development of the urban project BENEFICIARY intends to develop on the real property" and Article 3.1: "The purpose of this Contract is for the Trustee to hold ownership of the Trust Asset, to manage it in accordance to the instructions issued jointly by THE TRUSTOR and THE BENEFICIARY, and make it available to THE BENEFICIARY for developing the real estate project it intends to develop on the aforesaid real estate property".

264 Respondent's Counter Memorial, ¶ 67.

265 Código Civil Colombiano (**Exhibit R-1**), Article 2200.

266 *See* Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028bis**), Articles 7 and 20, 22(1), Clause 1(b).

267 *See* Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028bis**), Articles 7 and 20, 22(1), pp. 7, 14-16.

developer, not as an owner with *in rem* rights over the property, as required by the Asset Forfeiture Law.

175. *Second*, Newport's status as Beneficiary of the Meritage Trust does not give Newport *in rem* rights over the plots relating to Phases 1 and 6 of the Meritage Project, as the Claimants argue.[268] As clearly stated by Prof. Carlos Andrés González León: "[b]eneficiaries to a trust agreement do not have ownership rights over the assets transferred to the trust."[269] Hence, trust beneficiaries are only entitled to receive what the trustee has been instructed by the trustor to give, and is therefore subject to the terms and conditions established by the trustor in the documents governing the trustee's obligations.[270] That is, there are no ownership rights inherent to the status of beneficiary; whether or not a beneficiary of a trust acquires *in rem* rights shall depend on the terms of the Trust Agreement, and will be subject to the execution of the instruments required for the transfer of ownership. As stated above, Corficolombiana, as a trustee of the Meritage Trust, was instructed to transfer ownership over the units to the unit buyers, not to Newport.[271] Hence, Newport did not have and could not have had ownership rights over the completed units.

176. *Third*, according to the Claimants, "Newport had a contractual rights [sic] under the trust agreements that gave it an irrevocable right to title to Phases 1 and 6 of the Meritage Project."[272] The Claimants fail to define what the scope of the purported right to title held by Newport would be under Colombian law- this concept remains unclear. As explained above, in application of Law 1708 of 2014 governing the Asset Forfeiture Proceedings, the status of afectado was applicable only to parties demonstrating that they had in rem rights over the assets subjected to the forfeiture claim- this argument alone should suffice to dismiss the Claimants' submission, which relates to a "contractual right", in their own words.

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268 Claimants' Reply, ¶ 47.

269 Carlos Andrés González León, "Fiducia y patrimonios autónomos en Colombia: Un análisis desde la dogmática jurídica" (Universidad Libre, 2019) (**Exhibit R-137**), p. 90

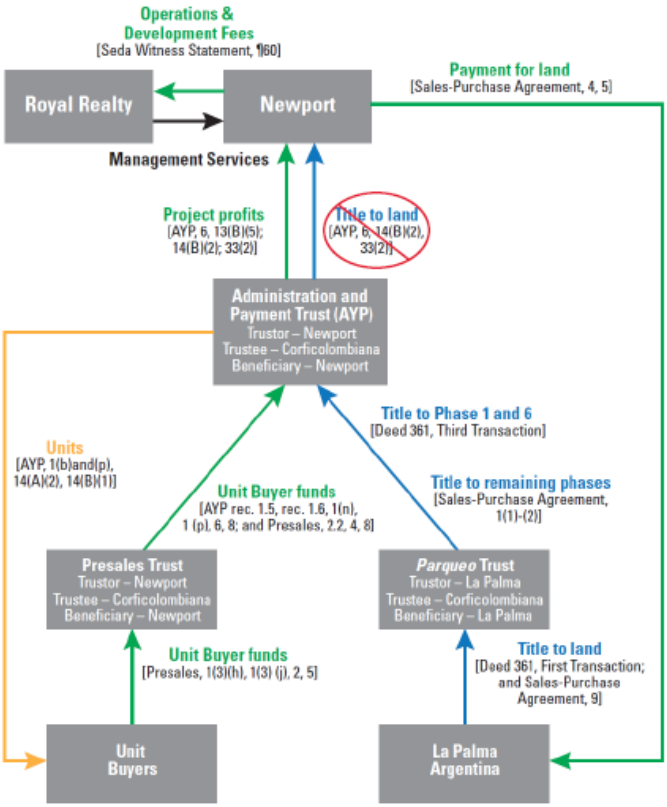
270 Carlos Andrés González León, "Fiducia y patrimonios autónomos en Colombia: Un análisis desde la dogmática jurídica" (Universidad Libre, 2019) (**Exhibit R-137**), p. 93.

271 *See* Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028bis**), Articles 7 and 20, 22(1), Clause 1(b).

272 Claimants' Reply, ¶ 88.

177. Moreover, as the Respondent shall explain, the Claimants' purported *right to title* was non-existent or, at the very best, limited to specific scenarios which did not occur.

178. As the basis for their argument, the Claimants cite to the Second Expert Report of Dr. Wilson Martínez, which states that "*Newport is holder of a personal right that gives it standing to demand from the trustee fulfillment of the obligation, consisting of transfer of ownership rights to the plots of land.*"[273] The statement is telling as Mr. Martinez commences by stating that Newport has "personal rights". In any event, perfunctory review of the provisions of the Meritage Trust Agreement which the Claimants refer to in support to their argument shows that Newport's alleged personal right to demand the transfer of ownership rights to the plots of land, was contingent to the fulfillment of specific conditions, which did not materialize in the present case. In fact, what the Claimants depict as the latter stage in the ownership structure explained in Annex D to their Reply never took place:



273 Second Expert Report of Dr. Martinez, ¶ 49.

179. Indeed, a closer look at the provisions of the Meritage Trust Agreement cited by the Claimants as the basis for the transfer of "title to land" from the Trust to Newport rapidly disproves their argument. First, the Claimants refer to Clause 6 of the Trust, which merely states that "[t]he Trust shall be comprised by the Funds and the Lot".[274] The sentence is simple: it states that Newport should transfer to Corficolombiana (the trustee) the Lot. As explained by the Respondent in its Counter Memorial,[275] and above, this obligation could not have had any effect under Colombian law. Hence, the only legal effect of this Clause is to describe the assets that compose the Trust's patrimony- not, as the Claimants aver, Newport's purported right to demand transfer of ownership. Moreover, and in any event, under Clause 6 Corficolombiana, not Newport, would be entitled to demand the transfer of the assets integrating the Trust's patrimony.

180. Further, as an alleged basis for Newport's "right to title", the Claimants refer to Clause 14(B(2)) of the Meritage Trust Agreement, which includes within the Trustee's obligations that of "[t]ransfer[ing] to the Trustor all remaining assets of the Trust, subject to fulfillment of the totality of the obligations for which the Trustor is responsible contained in this contract."[276] As per the Claimants' own admission, the Meritage Trust Agreement was never completed, since performance of the contract was suspended.[277] Hence, yet again, this clause was never applied

181. In addition, the Claimants rely on Clause 33(2) of the Administration and Payment Trust, which governs the Trust's eventual liquidation, providing that the Trustee "[s]hall return to the Trustor or the person indicated in writing by the Trustor, the real estate property remaining in the Trust, in the event that said property was not previously returned, without prejudice of the transfer of the land in favor of the Area Beneficiaries."[278] The provision cited by the Claimants is, yet again, inapposite; the Claimants have at no point argued, let alone proved, that the Administration and Payment Trust had been liquidated.

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274 Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028bis**), Clause 6.

275 Respondent's Counter Memorial, ¶ 60.

276 Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028bis**), Clause 14(B)(2).

277 Claimants' Reply, ¶ 47.

278 Administration and Payment Trust Agreement and Amendments, 17 October 2013 (**Exhibit C-028bis**), Clause 33(2).

182. To avoid this conundrum, Dr. Martinez brings forth an argument short of legal gymnastics. According to Dr. Martinez, the scenario provided under Clause 33(2) of the Administration and Payment Trust has materialized in the absence of the Trust's liquidation, since it "clearly provided that in the event the project could *not* be executed, the trust was to be liquidated and ownership of the asset was to pass to Newport."[279] This is unsupported as a matter of law and fact. *First*, since Dr. Martínez is reading into the Trust Agreement what is not written therein. Indeed, the Agreement makes no reference to the impossibility of the Agreement's fulfilment and; *second*¸ nor has it been demonstrated that the Meritage Project cannot be executed. As argued below, there has been no final decision regarding the *Requerimiento* filed by the Attorney General's Office, which remains pending. Further, as acknowledged by Corficolombiana itself, the Meritage Project remains viable to date.[280]

3. Newport does not have the same rights to Phases 1 and 6 of the Meritage Project as La Palma Argentina has in relation to Phases 2 through 5, 7 and 8

183. According to the is Claimants, "Newport was entitled to standing (i.e., 'afectado') status in the proceedings because, among other things: [] 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."[281] In the words of the Claimants' expert, Dr. Martinez: "There is no objective distinction that would allow for recognizing one but not the other."[282] This reasoning misguided.

184. As already described by the Respondent in its Counter Memorial and above,[283] on 25 November 2014, Corficolombiana, Newport and La Palma Argentina, entered into the Meritage La Palma Trust Agreement (referred to by the Claimants as the "Parqueo Trust Agreement") ("*Contrato de Fiducia Mercantil Irrevocable de Administración- Fideicomiso Meritage La Palma Argentina*").[284] According to the Meritage La Palma Trust Agreement, La Palma Argentina, as the owner of Plot 001-930485, was to transfer it in trust to Corficolombiana, as trustee, with the objective of

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279 Second Expert Report of Dr. Martinez, ¶ 55.

280 [redacted]

281 Claimants' Reply, ¶ 88.

282 Second Expert Report of Dr. Martinez, ¶ 55.

283 Respondent's Counter Memorial, ¶ 64.

284 *See* Parqueo Trust Agreement and Amendment, 25 November 2014 **(Exhibit C-029bis).**

parcelling, transferring and making it available to the beneficiary in order to develop the Project.[285]

185. According to the original Meritage La Palma Trust Agreement, Newport would be the beneficiary of the Trust. However, on 6 February 2015, an amendment was entered into by which La Palma Argentina was placed as the new beneficiary.[286]

186. Pursuant to Deed No. 361, as stated above, the parcels of the Meritage Lot on which Phases 1 and 6 of the Meritage Project would have been developed were transferred to the Meritage Trust,[287] while the remaining parcels of Plot No. 001-930485 continued to be held by Fiduciaria Colombiana as trustee under the Meritage La Palma Trust. Hence, the plots relating to Phases 1 and 6 were held by a Trust to which Newport was simultaneously the Trustor and the Beneficiary- which situation was mirrored for the remaining plots in relation to La Palma Argentina, by means of the Meritage La Palma Trust.

187. However, the conclusions withdrawn by Dr. Martinez from the similarity between both situations are flawed. There is a crucial difference between the rights held by La Palma Argentina and Newport in relation to the Meritage Lot. As explained above, Newport was never the rightful owner of the Meritage Lot, to the extent that it never held *in rem* rights over the land, which was never transferred by La Palma Argentina to Newport. To the contrary, La Palma Argentina, held *in rem* rights over the Meritage Lot, having been registered as such. It is precisely on this basis, *i.e.,* in consideration of La Palma's ownership over the Meritage Lot, that the Second Criminal Court determined that it needed no effort to conclude that La Palma Argentina was an affected party.[288]

188. In sum: as found by the Second Criminal Court in its *Avocamiento* order, Newport's involvement in the Meritage Project was merely as its developer and at the time of the decision, Newport did not have any *in rem* rights over the plots which would have granted him *afectado* status, since

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285 *See* Parqueo Trust Agreement and Amendment, 25 November 2014 (**Exhibit C-029bis**), Clause 3.

286 *See* Parqueo Trust Agreement and Amendment, 25 November 2014 (**Exhibit C-029bis**), Otrosí 1, Clause 4, p. 24.

287 Deed No. 361, 12 February 2015 (**Exhibit C-140bis**), Clause 1, p. 5.

288 *See* Asset Forfeiture Court Avocamiento Order, 17 August 2017 (**Exhibit C-057bis**), p. 55-56.

these which were transferred by La Palma Argentina to Corficolombiana, as the trustee of the Meritage La Palma Trust Agreement and, subsequently, of the Meritage Trust Agreement.

E. THE DUE DILIGENCE CONDUCTED OVER THE MERITAGE LOT WAS PATENTLY INSUFFICIENT

189. Contrary to what the Claimants appear to believe, constant repetition of a statement does not make an untrue concept true. The Claimants have constructed their case on the repetition of the purported extraordinary lengths they went through to ensure that the Meritage Lot had no illicit origin. Over and over again, the Claimants list the following three elements as sufficient, and beyond what could be expected from them, to ensure that the Meritage Lot could not be the object of Asset Forfeiture Proceedings, as well as their purported character as a *bona fide* buyer: (i) Title studies conducted by law firms on the chain of title going back 10 years in time; (ii) searches in the OFAC list and Clinton List; (iii) Petitions for Information to the Attorney General's Office on whether on the date of the petition, criminal investigations existed in connection with the Lot or regarding individuals that appear in the Lot's chain of title for the last 10 years.[289] Now they add a new element: (iii) the alleged "recognition" by individuals of the Attorney General's Office that Seda was a *bona fide* buyer.[290]

190. The Respondent has fully demonstrated in its Counter Memorial the reduced scope, and inappropriate nature of the title studies conducted by the Claimants and Corficolombiana.[291] It has demonstrated that the Claimants and Corficolombiana were aware that a 10-year long title study was insufficient as regards various potential liens and potential actions, including the Asset Forfeiture Proceedings.[292] Tellingly, the Claimants gloss over these facts and do not engage with the Respondent's demonstration.[293]

191. The Respondent does not intend to belabour the point but given the Claimants' repetition as to the extent of the due diligence allegedly required by a buyer, the Respondent considers essential to recall the following points:

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289 Claimants' Reply Memorial, ¶ 13.

290 Claimants' Reply Memorial, ¶¶ 119-135.

291 Respondent's Counter Memorial, ¶¶ 68-73.

292 Respondent's Counter Memorial, ¶¶ 67, 255.

293 Respondent's Counter Memorial, ¶ 75.

1. Asset Forfeiture Proceedings have no Statute of Limitation under Colombian Law

192. Indeed, as expressed by Dr. Reyes and as clearly provided under Article 21 of the Asset Forfeiture Law, "[t]he asset forfeiture action is not barred by statute of limitation".[294]

193. The Claimants knew, or should have known, and its legal advisors knew, that title studies spanning ten years were wholly insufficient for purposes of ensuring that, inter alia, whether the asset has an illicit origin. Therefore, the Claimants cannot allege their own negligence to avoid the consequences that the Asset Forfeiture Proceedings might entail for them. The special nature of the Asset Forfeiture Proceedings, and corollary non-applicability of a statute of limitations for commencing the proceedings, is at the core of Dr. Reyes' considerations when he states in his expert opinion that a title study spanning 10 year has a limited scope and purpose, namely to "verify that no civil [contractual] problems exist in the chain of title"[295] and cannot be equated with a proper due diligence regarding the legality of the origin of the asset. As Dr. Reyes recalls:

> To avoid any shadow of a doubt as of the fact that the Otero & Palacio law firm was not hired to analyze whether some goods could be related to illegal activities, it is worth remembering that lawyer Ana María Palacio, author of that study which has been invoked as proof of good faith exempt from fault by Newport S.A.S., has declared that she provided "a concept of the legal, civil, and possible defects of title that a real estate property may have, or if it were affected or subject to a lien, but not for matters regarding investigation, since those are beyond my reach".[296]

194. For this reason, Dr. Reyes concludes that the Claimants cannot disavow their responsibility in conducting a proper due diligence by stating, as they do, [297] that by hiring a law firm to conduct titles studies, they conducted a proper due diligence:

> If a law firm is hired in order to perform a title study "on the civil and possible defects of title that a real estate property may have", it cannot later be argued that the law firm was trusted to have performed an investigation on the legality of the operations in which that property was involved. As it was pointed out by

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294 Law 1708 of 2014, 20 January 2014 (**Exhibit C-003**), art. 21. *See also* Second Dr. Reyes Report, ¶ 13.

295 Dr. Reyes Expert Report, ¶ 59.

296 Second Expert Report by Dr. Reyes, ¶ 136 (emphasis added). *See also* Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018 (**Exhibit C-216**), p. 7.

297 Claimants' Reply Memorial, ¶ 14.

lawyer Ana María Palacio when referring to the content of her study, "those are beyond my reach".[298]

195. In any event, even assuming for the sake of argument (*quod non*) that Mr. Seda despite having several legal advisors did not know about Asset Forfeiture proceedings, ignorance of the law –let alone negligence in complying with it- is not an excuse under the law.[299]

2. [redacted]

196. [redacted]

197. [redacted]

298 Second Expert Report by Dr. Reyes, ¶¶ 7(t), 137; *See also* Second Expert Report by Dr. Reyes, ¶¶ 17-19; Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018, (**Exhibit C-216**), p. 6.

299 *See* Colombian Civil Code, 1887 (**Exhibit R-1**), Article 9.

300 [redacted]

301 [redacted]

302 [redacted]

303 [redacted]

198. [redacted]

199. [redacted]

304 [redacted]

305 [redacted]

306 [redacted]

307 [redacted]

3. The Claimants' attempt to utilise the answers of the Attorney General's Office as a shield from Asset Forfeiture Proceedings is a ruse which has been used by drug dealers illegally to hide behind a façade of a bona fide buyer

200. The Claimants have portrayed the responses of the Attorney General's Office to the rights of petition presented by La Palma Argentina in 2007 and by the lawyers of Corficolombiana in 2013, as the summum of their due diligence and of good faith. As stated in the Respondent's Counter Memorial, the Claimants' insistence on referring to them as "Certification of No Criminal Activity", does not change their nature as simple responses to a right of petition,[308] rendered by a single Unit of the Attorney General's Office in relation to the information that the specific unit holds at very specific point in time.

201. Moreover, the concept of a "Certification of No Criminal Activity" is non-sensical. The Attorney General's Office has no certification functions, neither does the Colombian Constitution (Article 250),[309] nor any norm in the Attorney General's Office Organic Statutory Law (Law 938 of 2004) provide that the Attorney General's Office can issue certifications regarding it is investigations, let alone "No Criminal Activity Certifications" regarding persons in the chain of title of a property. Different Units of the Attorney General's Office, could investigate an individual, without other Units having knowledge of it. In fact, without a strict division between the Attorney General's Office's Units and reserve of the Investigations, the success of investigations, as well as the rights of the victims and those investigated could be jeopardised.

202. Moreover, the Attorney General's Office is tasked with investigating and presenting charges, when applicable. Investigations are triggered when the Attorney General's Office learns of facts that could be characterized as a crime. It should be underscored that whilst the Asset Forfeiture Proceedings is not a criminal procedure in nature, when the Attorney General's Office investigates or pursues assets that have an illicit origin or destination, it does so on the basis that it has learned about the link between facts that could constitute a crime, or an actual crime, and the assets involved. Under, the Claimants' position once one of its Units responds to a petition right, the Attorney General's Office (and the State) would be liable if Asset Forfeiture proceedings are commenced over an asset connected with a crime. This will be contrary to the

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308 Respondent's Counter Memorial, ¶ 84.

309 *See* Political Constitution of Colombia, 1991 (**Exhibit R-238**), Article 250.

Constitution, the functions assigned by the Constitution and the Law to the Attorney General's Office and the law [310] as well as the objective of the Asset Forfeiture Proceedings.[311]

203. Crucially, drug dealers have utilised these very same kind of petitions to the Attorney General's Office in an attempt to cover assets with a veneer of legality in an attempt to avoid Asset Forfeiture of property with an illicit origin. These situations include the one referred by Dr. Reyes regarding the scandal in 1994 when the Cali Cartel attempted to use the Attorney General's Office's answers to rights of petition to claim to be bona fide buyers and, hence, the cautious approach of the Attorney General's Office since then.[312]

204. [redacted]

205. [redacted]

206. Importantly, the Attorney General's Office's response to La Palma's request is titled "Answer to a Right of Petition" and it is worded in the following restrictive terms:[315]

> It must be noted that the response issued is provided on the basis of the information kept by this Unit, which corresponds to the burden of procedures

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310 *See* Political Constitution of Colombia, 1991 (**Exhibit R-238**), Article 250; Decree 16 of 2014 (**Exhibit R-104**).

311 Law 1708 of 2014, 20 January 2014 (**Exhibit C-003**), Article 15.

312 *See* First Expert Report by Dr. Reyes, ¶ 58.

313 [redacted]

314 *See* Claimants' Memorial on Merits and Damages, ¶ 60.

315 *See* Answer to a Right of Petition (**Exhibit C-27bis**), ¶ 2 ("Sea del caso indicar que la respuesta ofrecida es tomada de la base de información que se lleva en esta Unidad, que corresponde a la carga de procesos que le han sido asignados en el marco de su competencia, y en consecuencia no se lleva información de las demás Unidades de Fiscalías instaladas en el territorio nacional").

> that have been assigned to it in its remit, and consequently no information from other Units of the Attorney General's Office is taken into account.[316]

207. The Claimants conveniently ignore this language.

208. Similarly unavailing is the Claimants' convoluted argument to turn Dr. Reyes' reference to the 1994 scandal on its head. Indeed, to state that Dr. Reyes' comment that the Attorney General's Office learned to be "careful" in light of the 1994 scandal, entails that the Attorney General's Office's answers on which the Claimants rely should be considered carrying even more weight, makes no sense.[317]

209. Why would a document carry more weight when it has not changed its nature? Moreover, both the 2007 and the 2013 responses are titled and worded in such a manner that they show their limited scope. The Attorney General's Office, as any other authority, is obliged under Colombian law[318] to respond to rights of petition regarding non-confidential information.[319]

210. To recall, Corficolombiana's lawyer, Mr. Francisco Sintura, who wrote the letter to the Attorney General's Office, asking for information, was the Prosecutor in 1994. In his letter, dated 22 August 2013, entitled "right of petition on information", which the Claimants quote selectively- Mr. Sintura states that he is requesting the information" with the exclusive purpose of complying with basic prevention measures, as a precaution in order not to be utilized in an Asset Laundering operation or in the Financing of Terrorism".[320] Filing a request as a "basic measure of prevention.[321] is the exact opposite of taking extraordinary measures, as the Claimants try to portray the requests.[322] Had Mr. Sintura intended to obtain a "certification" it would have worded it as a request for certification. However, Mr. Sintura knew better. The request was solely one basic step within a comprehensive due diligence that was required.

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316 *See* Answer to a Right of Petition (**Exhibit C-027bis**).

317 *See* Claimants' Reply Memorial, ¶ 359.

318 *See* Political Constitution of Colombia, 1991 (**Exhibit R-238**), Article 23; *See* Law 1755 of 2015 (**Exhibit R-105**), Articles 13-14.

319 *See* Political Constitution of Colombia, 1991 (**Exhibit R-238**), Article 23; *See* Law 1755 of 2015 (**Exhibit R-105**), Articles 13-14.

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

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

322 *See* Claimants' Memorial on Merits and Damages, ¶ 70.

211. Equally telling of the real nature and scope of the responses provided by the Attorney General's Office to petition rights are the words in the response provided to Corficolombiana by the Attorney General's Office 37 in 2013. Indeed, the Response is laconic and qualified: "That after consulting the internal consolidated system managed by this unit, TO THIS DATE NO record of natural or legal persons relating to the following shows up".[323] The letter adds at the end: "[i]n these terms we consider your request fulfilled, considering the competence this Office is granted".[324] The Upper Caps on "TO DATE" are included in the original version.

212. Finally, the Claimants rely on extracts of Mr. Seda's recording of the meetings with Ms. Noguera and Mr. Hernandez.[325] As the Respondent demonstrated, and as referred by Dr. Hernández, these meetings have a specific context, which raises several questions as to their propriety, as well as Dr. Hernandez' limited knowledge of asset forfeiture proceedings.[326] Further, the transcripts and Dr. Caro's Witness Statement evince that Ms. Noguera had no knowledge of the file on the Meritage Asset Forfeiture Proceedings,[327] and that Mr. Hernandez has specifically stated that he did not know about Asset Forfeiture Proceedings, and was simply echoing Mr Seda's and Ms. Noguera's assertions.[328]

213. In sum, the Claimants' alleged reliance on the answers of the Attorney General's Office to the right of petition for information requests are, at best, deceptive.

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323 Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Fiduciaria Corficolombiana, 9 September 2013 (**Exhibit C-032bis**), p. 2 ("Que consultado el sistema de información consolidado interno que administra esta unidad A LA FECHA NO aparece registro de las personas naturales y jurídicas que se relacionan a continuación").

324 Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Fiduciaria Corficolombiana, 9 September 2013 (**Exhibit C-032bis**), p. 4 ("[e]n estos términos damos por atendida su solicitud, teniendo en cuenta la competencia asignada a esta Oficina").

325 See Claimants' Reply Memorial, ¶ 98.

326 Second Witness Statement Dr. Hernández, ¶ 24-34, 43-44.

327 Second Dr. Caro Witness Statement, ¶ 37.

328 Second Dr. Hernandez Witness Statement, ¶¶ 12, 43-44.

4. Mr Seda's decision to continue with the Project after Mr. López Vanegas contacted him in 2014 was a temerity dictated by his desire for profit

214. The Claimants allegations that Mr Seda "rightly" ignored Mr. Ivan Seda's extorsion attempts and that his responses "were measures and responsible" are indefensible.[329] In fact, Mr. Seda's response is the paradigm of lack of responsibility and care. Any responsible person, whose primary interest is to safeguard the interests of those that have trusted him with their savings and to ensure that no avoidable problem can arise with a project, would have taken appropriate steps to ensure that Mr López prior ownership of the land would not lead to the commencement of Asset Forfeiture Proceedings. As the Respondent has demonstrated, and further shows below, the Claimants' allegation that the Respondent is improperly "victim blaming" Mr. Seda is a strawman argument.

215. *First,* in their Memorial, the Claimants recite the steps taken, and the contractual commitments made, by 2014 (when Mr. López approached Mr. Seda) in pursuance of the Meritage Project, namely, the contacts with La Palma and Corficolombiana, the existence of units available for presales, marketing efforts, entering into the Presales agreement with Corficolombiana as if having taken those steps somehow prevent Mr. Seda from taking appropriate action.[330] Their half-backed argument does not advance the Claimants' claim.[331] These preliminary steps towards the advancement of the project have no bearing on Mr. Seda's lack of appropriate response. In fact, what the Claimants' recitation of steps taken and contractual commitment made underscores is that no construction had taken place at that point in time and that any commitments or transactions could have been reversed and terminated. Yet, instead of halting the project to avoid damage to the Claimants and to buyers putting their trust in Mr. Seda, Mr. Seda decided to assume the risk, and went ahead with the Project.

216. *Second*, the Claimants' assertion that upon learning about Mr. López's claims Mr Seda did what "[a]ny reasonable developer in Colombia will do",[332] is, to say the least, farfetched. Critically, no "reasonable developer" in Colombia, nor "any reasonable person" in Colombia will continue

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329 Claimants' Reply Memorial, ¶ 48.

330 *See* Claimants' Reply Memorial, ¶ 16.

331 *See* Claimants' Reply Memorial, ¶ 16.

332 Claimants' Reply Memorial, ¶ 51.

sales and commence construction until it has obtained a judicial decision on the legality of the origin of the property.[333]

217. According to the Claimants, upon learning of Mr. López Vanegas' claims, Mr. Seda (i) "confirm that Mr. López Vanegas claims lacked credible basis",[334] (ii) contacted La Palma and Corficolombiana,[335] and (iii) publicly address Mr. López's claims to avoid any misinformation from spreading".[336] The Respondent analyses each of these allegations in turn.

218. As regards (i) the alleged "verification" on whether Mr. Seda had any connection with the Meritage project", the Claimants aver that Mr. López Vanegas' name did not appear in the chain of title studies conducted by the law firm and that Mr. López "had taken steps to ensure" that the name of his son rather than his own appeared in the deeds.[337] The Respondent has already rebutted this allegation in its Counter Memorial.[338] Not only the circumscribed 10-year title examination is completely insufficient but also that a proper search would have shown that Mr. López Vanegas was the legal representative of Sierralta López & Cia, later named Inversiones Nueve.[339]

219. In any event, Mr. López told Mr. Seda that his son Sebastian López, whose name the Claimants do not dispute appears in the chain of title, had been deprived of the property that was Mr. López's. Whether the claim of the kidnapping or not was true is irrelevant. The relevant information is Mr. López Vanegas' prior ownership of the lot. Therefore, even if Mr. Seda was, owing to a deficient due diligence, blissfully ignorant of the illegal origin of the lot, in August 2014[340] he was made fully aware of Mr. López Vanegas' prior ownership of the lot. What is more, Mr. Seda admits that he tasked his lawyer Juan Pablo Lopera to conduct a search on Mr. López, which revealed that Mr. López Vanegas had previously been convicted of drug dealing charges in

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333 *See* Second Expert Report by Dr. Reyes, ¶ 47.

334 Claimants' Reply Memorial, ¶ 51.

335 Claimants' Reply Memorial, ¶ 51.

336 Claimants' Reply Memorial, ¶ 51.

337 Claimants' Reply Memorial, ¶ 52.

338 *See* Respondent's Counter Memorial, ¶ 88.

339 *See* Respondent's Counter Memorial, ¶ 157; *See* Claimants' Reply Memorial, ¶ 264.

340 Second Mr. Seda Witness Statement, ¶ 5.

the United States[341]. Simply put, Mr Seda verified that Mr. López was involved in drug dealing but rather than this confirmation leading him to react as any "reasonable developer" will do, that is to acknowledge that there was a real possibility that the plot had had an illegal origin and could be forfeited under the law, Mr. Seda conveniently concluded that due to Mr. López Vanegas's past as a drug dealer his claim should be ignored.[342] The argument is ludicrous in light of the applicable laws, the Asset Forfeiture Law and Newport's own obligations under the law regarding money laundering and demonstrated failure to abide by the applicable laws and recommendations set forth in External Circulars.

220. The Claimants also aver that Mr. Seda communicated to Corficolombiana and La Palma Mr. López Vanegas' claims and that both the fiduciary and La Palma "similarly concluded that Mr. López Vanegas' claims were baseless and did not merit further attention". [343] The Claimants do not offer any direct testimony of either Ms. Giraldo (nor do they explain how Ms. Giraldo had allegedly gained knowledge about the status of the on-going investigations by the Attorney General's Office on Mr. López' complaint) nor Corficolombiana on the steps they took to reach the purported conclusion that Mr. López's claims should be ignored.[344] What is more important, neither the opinion of La Palma or Corficolombiana excuses Mr. Seda of its responsibility as promoter of the Project to ensure that the lot could not be subject to asset forfeiture proceedings.

221. In any event, it bears mentioning that in its response to a petition of information presented by Mr. Seda to Corficolombiana, dated 23 July 2017, Corficolombiana made clear that "In the particular case of establishing trusts related to the Meritage project, it is important to note that it was not Fiduciaria [Corficlombiana] but the Trustor NEWPORT S.A.S. which directly negotiated the acquisition of the Project's plots with the company LA PALMA ARGENTINA S.A.S, without intervention by Fiduciaria [Corficlombiana] in said pre-contractual stage".[345] Corficolombiana adds immediately "Nor must we lose sight, that according to Decree 1023 of 2012 and External Circular Letter 304-000001 of February 19, 2014 of the Superintendence of Companies, non-

341 Second Mr. Seda Witness Statement, ¶ 7.

342 Second Mr. Seda Witness Statement, ¶ 7.

343 Second Mr. Seda Witness Statement, ¶ 9.

344 Second Mr. Seda Witness Statement, ¶ 9. [redacted]

345 Petition Response from Corficolombiana to Newport, 26 July 2017, (**Exhibit C-033bis**), p. 4.

financial companies operating in Colombia are required to design and implement an adequate internal system of "Self-Control and Risk Management LA/FT," which includes but is not limited to 'due diligence in the knowledge of customers or counterparts".[346]

222. Corficolombiana's delimitation of its responsibility and statements regarding the due diligence incumbent on Newport as regards the acquisition of the land, and Newport's obligations regarding knowledge of its counterparts speaks volumes about what Corficolombiana itself considered Mr. Seda should have done in dealing with La Palma Argentina. Indeed, it was incumbent on Newport to implement an internal system of "Self-Control and Risk Management LA/FT".

223. Yet, Newport did not comply with these obligations and even failed to comply with the recommendations to counter Money Laundering risk provided by the Information and Financial Analysis Unit – or UIAF for its Spanish acronym-, available at their website.[347] Indeed, as Dr. Reyes explains in its expert opinion, Newport did not comply with its obligations regarding risk management and prevention of money laundering Money applicable to corporations supervised pursuant to External Circular 304-000001, issued by the Superintendency of Corporations, on 19 February 2014. Notably, External Circular 304-00000, provides the following regarding risk sources:

> **Risk sources**: These are the LA/FT (Asset Laundering or Financing of Terrorism) risk-generating agents in a company, and they must be taken into account when identifying situations that can generate said risk in operations, deals or contracts that the economic entity performs.
>
> As for the present Circular, the following shall be taken into account:
>
> **a) Counterparty**: Natural or legal persons with which the company keeps business relations, contractual or legal of any order. Meaning; shareholders, partners, employees, customers and suppliers of goods and services.
>
> **b) Products**: Goods and services that offer or purchase a company in performance of its corporate purpose.
>
> […]

346 Petition Response from Corficolombiana to Newport, 26 July 2017, (**Exhibit C-033bis**), p. 4.

347 *See* Second Expert Report by Dr. Reyes, ¶ 171.

> **d) Territorial jurisdiction**: Geographical areas identified as exposed to LA/FT risk where the businessperson offers or purchases its products.[348]

224. Evidently, acquiring a property in Envigado, a geographical area of risk, the potential buyer needs to make sure with whom it is dealing. The lack of compliance with is obligations regarding LA/FT risk controls are particularly grievous in view that La Palma is owned by Javier Garcia and Ruth Garcia.

225. As Dr. Reyes further explains, even if *ex hypothesis*, the obligations provided for in External Circular 304-000001, were not applicable to Newport, in view of its capital,[349] Newport did not follow the recommendation of the External Circular 304-000001 which provided that for all other corporations subject to supervision by the Superintendency of Corporations the content of the Circular "are recommendations that should be taken into account by in the adoption of good administration practices".[350] Dr. Reyes concludes:

> The aforementioned indicates that, even when hypothetically Newport S.A.S. were not obliged in 2014 by the Circular in question, neither did it follow the recommendations indicated in it as a "good administration practice". In other words, neither Mr. Ángel Samuel Seda nor Newport S.A.S. behaved as a good administrator in their place would have behaved, meaning, according to the standard that is used to measure the manner in which a person should have conducted themselves in a particular situation".[351]

226. Finally, as underscored by Dr. Reyes, External Circular 304-000001 provides: "corporations under the supervision of the Superintendency of Corporations that are not included in this Circular must comply with what is foreseen in External Circular 100-004 of 2009".[352]

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348 *See* External Circular No. 304-000001, Superintendency of Corporations, 19 February 2014 (**Exhibit R-254**), p. 5 ("*Fuentes de riesgo: Son los agentes generadores de riesgo de LA/FT en una empresa y se deben tener en cuenta para identificar las situaciones que puedan generarlo en las operaciones, negocios o contratos que realiza el ente econ6mico. Para efectos de la presente circular se tendrán en cuenta las siguientes: a) Contraparte: Personas naturales o jurídicas con las cuales la empresa tiene vínculos de negocios, contractuales o jurídicos de cualquier orden. Es decir; accionistas, socios, empleados, clientes y proveedores de bienes y servicios. b) Productos: Bienes y servicios que ofrece o compra una empresa en desarrollo de su objeto social. […] d) Jurisdicción territorial: Zonas geográficas identificadas como expuestas al riesgo de LA/FT en donde el empresario ofrece o compra sus productos*").

349 *See* Second Expert Report by Dr. Reyes, ¶ 165

350 *See* Second Expert Report by Dr. Reyes, ¶ 166.

351 Second Expert Report by Dr. Reyes, ¶ 167.

352 *See* Second Expert Report by Dr. Reyes, ¶ 168.

227. External Circular 100-004 of 2009 provides that it is the "responsibility of the partners, shareholders, administrators and tax auditors of the companies, to avoid that, shielded by the corporate purpose, laws be broken or damages be caused to society, reason why it is imperious that these people set effective measures internally to their organizations, so as to avoid them being used for said purposed".[353]

228. It further establishes that the importance of the recommendations established by the Information and Financial Analysis Unit – or UIAF for its Spanish acronym-, provided in its website www.uiaf.gov.co, which include the following:

> a. "Always ask about the origin of the goods and money with which you will do business".
>
> b. "Apply client knowledge mechanisms".
>
> c. "Identify alert signals, verify information".
>
> d. "If you know of suspicious operations you can report them via the web at www.uiaf.gov.co or at ros@uiaf.gov.co. The information is confidential".
>
> e. "Disclose the concepts mentioned in this Circular to pursue direct knowledge of the legal implications for participants of these behaviors to all personnel, and above all, so that partners, administrators, employees and tax auditors recognize the existence of these risks which can affect their companies".
>
> f. "Adopt good corporate governance practices".
>
> g. "Report unusual or suspicious operations performed by employees, customers, contractors or any other agent who has links with the company to the Ministry of Finance's Information and Financial Analysis Unit".[354]

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353 *See* Second Expert Report by Dr. Reyes, ¶ 169; External Circular of the Financial Superintendence No. 100-004 of October 2009 (**Exhibit R-89**).

354 External Circular No. 304-000001, Superintendency of Corporations, 19 February 2014 (**Exhibit R-254**) ("a. Siempre pregunte el origen de los bienes y dinero con los cuales va a hacer negocios"; b. "Aplique mecanismos de conocimiento del cliente"; c. "Identifique señales de alerta, verifique información"; d. "Si conoce operaciones sospechosas puede reportarlas por la web www.uiaf.gov.co o al correo electrónico ros@uiaf.gov.co. La información es confidencial"; e. "Divulgar los conceptos expuestos en esta circular para procurar un conocimiento directo de todo el personal sobre las implicaciones legales que surgen para los partícipes en esta clase de comportamientos y, por sobre todo, para que los socios, administradores, empleados y revisores fiscales, reconozcan la existencia de estos riegos que pueden afectar a sus empresas"; f. "Adoptar prácticas de buen gobierno corporativo"; g. "Reportar a la the Ministry of Finance's Information and Financial Analysis Unit, -UIAF- http://www.uiaf.gov.co y a las

229. In light of the above, Dr. Reyes concludes:

> None of these recommendations (existing since 7 October 2009) were followed by Newport S.A.S. nor by Ángel Samuel Seda. Quite to the contrary, when he became aware in 2014 of the information provided by Iván López Vanegas on the illegality of the real estate property on which he intended to develop a project, not only did he not inform the Information and Financial Analysis Unit – or UIAF for its Spanish acronym-, but he also proceeded to sign the irrevocable commercial fiduciary administration contract on November 25th, 2014, and carried on with the project, as it he had never received such information.[355]

230. As regards the Claimants' allegations that (iii) by addressing Mr. López' claims in the media, Mr. Seda took the appropriate measures upon learning of Mr. López' claims are equally unavailing. In fact, in his interview with W radio and in his comments to the press,[356] rather than stating that he has communicated Mr. López's claims to the authorities and that Newport would not continue the project until it had certainty that Mr. López Vanegas' claims will not jeopardize it, what Mr. Seda did was unduly to assure the public that there was no risk and make sure the buyers continued investing money in it. Moreover, what the media reports make patent is that Mr. Seda was fully aware that Mr. López Vanegas had owned the property at a given point in time.

231. In a final attempt to deny a conscious decision to privilege profits over compliance with the law, the Claimants' claim that the Respondent had not explained what Mr. Seda could have done or why Mr. Seda should have halted the construction once he knew of Mr. López Vanegas' claims.[357] The allegation misrepresents Colombia's position and is misguided.

232. *First*, Colombia does not need to offer "an alternative response" to the obvious conduct that the Claimants must have followed i.e. informing the Attorney General's Office of the situation and to inform UIAF. But so doing would have risked halting the project, precisely what Mr. Seda was minded to avoid at any costs. Simply put Mr. Seda failed to comply with its legal obligations and assumed the risk of an eventual Asset Forfeiture. Informing the authorities and halting the

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demás autoridades competentes, las operaciones inusuales o sospechosas realizadas por empleados, clientes, proveedores, contratistas o cualquier otro agente que tenga vínculos con la empresa").

355 *See* Second Expert Report by Dr. Reyes, ¶ 171.

356 W Radio, "Ángel Seda despeja dudas sobre lote en disputa para proyecto de construcción en Medellín", 5 August 2014 (https://www.wradio.com.co/escucha/archivo_de_audio/angel-seda-despeja-dudassobre-lote-en-disputa-para-proyecto-de-construccion-en-medellin/20140805/oir/2353698.aspx), accessed on 15 November 2020 (**Exhibit R-30**).

357 *See* Claimants' Reply Memorial, ¶ 55.

project would have actually prevented self-inflicted damages and damage to third parties who trusted the developer with their money.

233. In a half-backed argument, the Claimants suggest that informing the authorities would have not achieved anything since Mr. López Vanegas had already filed a complaint before the Attorney General's Office (regarding kidnapping, falsity in public documents, money laundering and other crimes). Mr. López Vanegas' complaint has no bearing on the actions that Mr. Seda should have taken. The criminal investigations regarding Mr. López's complaints for the above-referred crimes are independent from the Asset Forfeiture proceedings.[358] Yet, his claims led to Prosecutor 24 of the Attorney General's Office to send copies to the Asset Forfeiture Unit Proceedings to investigate the origin of the lot.[359]

234. Finally, the Claimants' claim that the Respondent's position vis a vis Mr. Seda's inappropriate conduct when he learned of Mr. López Vanegas' claim "amounts to charging Newport and others with knowledge that the Attorney General's Office did not even have at that time" contrary to what allegedly the Supreme Court have stated in not required, is sophistic. It is incumbent on to the buyer to conduct and adequate due diligence, not to the Attorney General's Office. Reversing the burden has no place in this matter. The universal principle of caveat emptor applies, the Attorney General's Office is neither an entity charged of conducting due diligences for the benefits of buyers, nor is it tasked with "certification" functions. In any event, the Claimants' argument misses the point: it is undisputed that by August 2014 Mr. Seda had full-knowledge that Mr. López Vanegas, who had been "convicted for drug dealing charges in the United States"[360] had owned the Meritage Lot. Yet, Mr. Seda turned a blind eye to the consequences of this fact.

5. The Claimants' attempt to create a new standard regarding the due diligence Incumbent on them is not supported either by the law or by the Constitutional Court's decision

235. The Respondent has demonstrated that under Colombian law the Claimants' due diligence was patently insufficient. Yet, the Claimants now place great reliance on the decision rendered by the

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358 *See* Respondent's Counter Memorial, ¶ 152.

359 López Vanegas Tutela Action, 6 May 2016 (**Exhibit C-037bis**), ¶ 115.

360 Claimants' Reply Memorial, ¶ 52.

Colombian Constitutional Court in October 2020, heralding it as directly applicable to the case at hand and alleging that it renders the discussion regarding the extent of due diligence required from a bona fide buyer moot.[361] This is false. Quite the opposite, the Claimants decontextualised the reading of the Constitutional Court's Decision C-327 does not support their case.

236. Indeed, as cogently explained by Dr. Reyes,[362] the decision of the Constitutional Court concerns only the constitutionality of asset forfeiture proceedings in two specific scenarios provided Articles 16.10 and 16.11 of Law 1708 of 2014. Articles 16.10 and 16.11 are plainly different and distinguishable from the scenario of the Meritage lot. To recall, Article 16 of Law 1708 provides:

> Article 16. Grounds. Forfeiture shall be declared under the following circumstances:
>
> 1. Assets which are the direct or indirect product of an illicit activity.
>
> 2. Assets which correspond to the material subject matter of the illicit activity, except where the law provides for their destruction.
>
> 3. Assets resulting from a partial or total physical or legal transformation or conversion of the product, tools, or material subject matter of illicit activities.
>
> 4. Assets which are a part of an unjustified increase of wealth, where there are elements of knowledge which make it possible to reasonably consider that they are the result of illicit activities.
>
> 5. Assets used as a means or tool for the performance of illicit activities.
>
> 6. Assets which, in accordance with the circumstances in which they were found or their particular characteristics, make it possible to establish that they are intended for the performance of illicit activities.
>
> 7. Assets representing revenues, income, fruits, profits, and other benefits arising from the above assets.
>
> 8. Assets of legal origin which are used to conceal assets of illicit origin.
>
> 9. Assets of legal origin which are physically or legally mixed with assets of illicit origin.
>
> 10. Assets of legal origin whose value is equivalent to any of the assets described in the preceding numbers whenever the action is inadmissible due to the recognition of the rights of a third party acting in good faith without fault.

361 *See* Claimants' Reply Memorial, ¶ 243.

362 Second Expert Report of Dr. Reyes, ¶¶ 7(x)-(aa).

> 11. Assets of legal origin whose value corresponds or is equivalent to that of assets being the direct or indirect product of an illicit activity when the location, identification, or physical assignment of the same is not possible.
>
> Paragraph. Forfeiture also operates in respect of assets covered by succession as a result of death when covered by any of the grounds set forth in this law".[363]

237. In its Decision C-327, the Constitutional Court explains this provision as follows:

> Article 16 of Law 1708 of 2016 establishes a closed set of hypothesis in which the State is allowed to permanently suppress the right to private property on specific goods. In general, the rule allows this over two kinds of goods: firstly, those over which it has a link or connection that is direct and immediate, or indirect and mediate, with illegal activities, and secondly, those which, without having said connection or link, do not even belong or have belonged indirectly to the same people who have benefitted economically from the illegal activities.[364]

238. The Court underscores that Law 1708 comprises two categories of assets. On the one hand assets described in paragraphs 1 to 9 of Article 16 and includes, on the one hand, assets which origin is illicit, namely paragraphs 1, 2, 3, and 7.[365] On the other hand, assets which origin is not illicit but which "destination" is illicit, that is they are utilised to incentivise, promote, or hide assets which have an illicit origin or which are comingled, legally or materially, with the assets of illicit origin, namely paragraphs 4, 5, 6, 8 and 9.[366]

239. The Court then analyses the assets provided for in paragraphs 10 and 11 and states:

> In contrast, paragraphs 10 and 11 of Article 16 permit the State, subsidiary, to pursue assets that have no connection with illicit activities, neither by their

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363 Law No. 1708, 20 January 2014 (**Exhibit C-0003bis**), Article 16 (emphasis added).

364 Constitutional Court of Colombia, Decision C-327/20, 19 August 2020, (**Exhibit C-329**), pp. 1, 35 (emphasis added). ("El artículo 16 de la Ley 1708 de 2016 consagra un catálogo cerrado de hipótesis en las que el Estado se encuentra habilitado para suprimir definitivamente el derecho de propiedad de los particulares sobre determinados bienes. En general, la disposición lo permite sobre dos tipos de bienes: primero, sobre aquellos que tiene una relación de conexidad, directa e inmediata, o indirecta y mediata, con las actividades ilícitas, y segundo, sobre aquellos que, sin tener esta relación de conexidad, ni siquiera indirecta pertenecen o han pertenecido a los mismos sujetos que se han lucrado o beneficiado de las actividades ilícitas").

365 *See* Constitutional Court of Colombia, Decision C-327/20, 19 August 2020 (**Exhibit C-329**), p. 35.

366 *See* Constitutional Court of Colombia, Decision C-327/20, 19 August 2020 (**Exhibit C-329**), p. 35.

> origin, nor for its destination, not even in an indirect manner, but which have the same value of those that have an illicit origin or destination.[367]

240. It then illustrates the hypothesis in paragraphs 10 and 11 of Article 16 as follows:

> It might be the case, for instance, that a person who has links with criminal organisations simultaneously has a labour relationship, and that the income resulting from its work is destined, though a payroll loan or a mortgage loan, to directly acquire real estate, whilst the assets illegally obtained by the person are hidden or transfer to bona fide third parties. It can also be the case that this same person inherits form a relative a property or another asset, that were purchased [by the relatives] with money obtained from perfectly legal activities and which are used for licit purposes under the law. Hence, these assets are assets that have no taint of illegality.[368]

241. And concludes: "[i]t is precisely against this group of assets, which have no connection with the illicit activities that Asset Forfeiture Proceedings seeks to disincentivize that the constitutionality claim [at stake] is directed to".[369]

242. Specifically, Articles 16.10 and 16.11 concern assets which have a licit origin in direct contraposition with assets that have an illicit origin. It is undisputed that the ground for commencement of Asset Forfeiture Proceedings in the case of the Meritage Lot is its illicit origin.[370] It is also undisputed that the Meritage lot was owned by Mr. López Vanegas, a drug-dealer extradited to the US,[371] [redacted]

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367 *See* Constitutional Court of Colombia, Decision C-327/20, 19 August 2020 (**Exhibit C-329**), pp. 35-36 ("En contraste, los numerales 10 y 11 del artículo 16 habilitan al Estado para, de manera subsidiaria, perseguir activos que no tienen ninguna relación de conexidad con actividades ilícitas, ni por su origen ni por su destinación, ni siquiera de manera indirecta, pero que tienen el mismo valor de aquellos que tiene 1. Puede ocurrir, por ejemplo, que una persona que tiene vínculos con organizaciones al margen de la ley simultáneamente mantenga una relación laboral, y que los ingresos derivados del trabajo se destinen directamente, a través de un crédito de libranza o un crédito hipotecario, a la adquisición de un inmueble, mientras que los bienes adquiridos ilegalmente son escondidos o transferidos a terceros de buena fe. De igual modo, puede ocurrir que esta misma persona herede de algún familiar un inmueble u otro tipo de activos que, en su momento, fueron adquiridos con dineros originados en actividades productivas perfectamente lícitas, y que, además, se destinen a fines que se enmarcan en el ordenamiento jurídico. Se trata entonces de activos que carecen de todo viso de ilegalidad").

368 Constitutional Court of Colombia, Decision C-327/20, 19 August 2020, (**Exhibit C-329**), pp. 35-36.

369 Constitutional Court of Colombia, Decision C-327/20, 19 August 2020, (**Exhibit C-329**), p. 35.

370 *See* Respondent's Counter Memorial, ¶ 101; *See* Claimants' Reply Memorial, ¶ 204.

371 *See* Respondent's Counter Memorial, ¶ 153; *See* Claimants' Reply Memorial, ¶ ¶ 199, 209.

372 [redacted]

[redacted]

243. Therefore, the scenarios (under Articles 10.16 and 10.17) analysed by the Court and in relation to which the Court find the Article constitutional (in a conditionally manner) in Decision C-327 of 2020 are completely different from the scenario of the Meritage Lot.

244. Moreover, as stated the court decision in C-327 is not in contradiction with C-1007 of 2002, which provides that "qualified Good faith requires two elements: a subjective and an objective one: this second one "demands that [the person claiming to be a qualified bona fide purchaser] must have the security that the seller is truly the owner, which requires additional enquiries proving that situation […] a qualified bona fide necessitates consciousness and certainty".[377]

F. CONTRARY TO THE CLAIMANTS' UNSUPPORTED CLAIMS, THE ASSET FORFEITURE PROCEEDINGS HAVE BEEN CONDUCTED WITH STRICT ADHERENCE TO THE LAW

245. The Claimants' allegations that the Asset Forfeiture Proceedings were marred with procedural deficiencies and attempts to play down the guarantees provided for control and appeal under Colombian law are unsupported. Contrary to what the Claimants have argued, the Colombian Attorney General's Office had no choice under Colombian law but to move forward with the Asset Forfeiture Proceedings once the unlawful origin of the Meritage Lot had been demonstrated by Dr. Caro (**1**).

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373 [redacted]

374 [redacted]

375 [redacted]

376 *See* above, Section III.C.2.a.

377 Decision C-1007/02 of the Colombian Constitutional Court, 18 November 2002 (**Exhibit R-14**).

246. Moreover, the Claimants' attempts to downplay Dr. Caro's involvement in the Asset Forfeiture Proceedings at the stage of the *Requerimiento* as a "rubber-stamp" are unavailing: Dr. Caro's involvement was not only to provide a stamp of approval over the actions previously undertaken by Prosecutor 44 (**2**).

247. Further, notwithstanding the Claimants' attempts to portray themselves as defenceless victims of a deeply flawed judicial system, Newport has not been denied a due process of law. Quite to the contrary, Newport has once and again been provided the chance of presenting its case, albeit unconvincingly (**3**).

248. Finally, the Claimants' attempts to downplay the review by Colombian courts of the actions of the Attorney General's Office grossly misrepresent the role of the Judicial Branch in the Asset Forfeiture Proceedings. Contrary to what they have argued, the legality control and the two instances of judicial review are not simple rubber-stamp proceedings (**4**).

1. After having found evidence of the unlawful origin of the Meritage Lot, the Attorney General's Office had no choice but to start the Asset Forfeiture Proceedings

249. According to the Claimants, Colombia "seeks to portray its prosecutors as somehow handcuffed in their ability to do anything except press forward with an asset forfeiture action".[378] The Claimants continue to explain that the "Colombian asset forfeiture law specifically provides prosecutors procedural opportunities to dismiss or withdraw an asset forfeiture".[379] This is misleading.

250. *First*, the Attorney General's Office must comply with the Asset Forfeiture Law, which sets forth in mandatory terms the actions to be undertaken by prosecutors with regards to the asset forfeiture proceedings. In this sense, Article 29 of the Asset Forfeiture Law, which sets for the functions of the Attorney General's Office, establishes among them "[t]o investigate and determine whether the assets subject to the proceedings are within the scope of the grounds for

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[378] Claimants' Reply, ¶ 81.

[379] Claimants' Reply, ¶ 81.

asset forfeiture" and to "submit before the competent judges the request for asset forfeiture [(requerimiento)] or the declaration of non-prosecution."[380]

251. Second, pursuant to the Asset Forfeiture Law, asset forfeiture is legally characterized as a "public action",[381] due to the public interest in the persecution of assets that have been unlawfully obtained with the proceeds of crime. According to the Colombian Constitutional Court:

> [T]he Colombian legal order only protects ownership arising from honest work and, therefore, the State, and the community as a whole, encourage an expectation of forfeiture of assets obtained by unlawful deeds, since said forfeiture protects higher interests of the State such as public property, the public Treasury and social morale.[382]

252. Therefore, the pursuit of assets regarding which there is evidence of unlawful origin, such as the Meritage Lot, is a matter of public interest under Colombian law. This is only natural given the importance of asset forfeiture as a means for combatting organized crime in Colombia.[383]

253. *Third,* as a corollary of the foregoing, the Claimants' assertions that prosecutors have discretion to dismiss an asset forfeiture action is based on a gross misrepresentation.[384] Pursuant to Article 123 of the Asset Forfeiture Law, "Upon completion of the investigative work ordered during the initial stage, a resolution regarding the *archivo* of the case or the provisional determination to proceed with the asset forfeiture claim shall be rendered".[385] First, the Claimants grossly misconstrue this provision's temporal scope. Article 123 of the Asset Forfeiture Law enables the Attorney General, or his delegates, to dismiss an asset forfeiture investigation prior to its submission before the competent courts, once the initial investigation within the Attorney General's Office has been completed without sufficient evidence of the illegal origin or destination of the asset- contrary to the case of the Meritage Lot.[386] Hence, the Claimants' assertion that prosecutors' discretion enables them "to withdraw the proceedings altogether" is

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380 Asset Forfeiture Law (**Exhibit C-003bis**), Article 29.

381 Asset Forfeiture Law (**Exhibit C-003bis**), Article 17.

382 Colombian Constitutional Court, Decision C-740 of 2003, 28 August 2003 (**Exhibit R-15**), p. 53.

383 *See above,* Section III.B.

384 Claimants' Reply, ¶ 81

385 Asset Forfeiture Law (**Exhibit C-003bis**), article 123 (emphasis added).

386 *See above*, Section III.C.

simply untrue- once an asset forfeiture petition has been filed, only the competent judge may order its dismissal.[387]

254. Moreover, the Claimants also misconstrue the scope of Article 123. The Spanish word used in the Asset Forfeiture Law, *archivo*, is not adequately translated as "dismissal"- rather, it indicated a decision to provisionally archive an investigation. In fact, as explained by Dr. Reyes, it merely implies the suspension of investigations, which may be reactivated at any time, should there appear new elements of justice that enable the basis for the suspension of the investigations.[388] As clearly expressed by Article 124 of the Asset Forfeiture Law: "the decision to archive an investigation shall not have force of res judicata".[389] Dr. Reyes is conclusive: the definitive dismissal of an asset forfeiture action, pursuant to Article 136 and 145 of the Asset Forfeiture Law, may only be adopted in the form of a judicial decision, which may only be issued by the competent judge.[390] In his own words:

> These provisions can leave no doubt as to that asset forfeiture proceedings may only be ended by a judge, by means of a judicial decision; never by a prosecutor by resolving to provisionally archive the investigation.[391]

255. For the avoidance of doubt, Article 131 of the Asset Forfeiture Law enables prosecutors to submit before a judge a request for the dismissal of an asset forfeiture action. This provision is clear regarding the fact that the Attorney General's Office is not competent to resolve said dismissal; rather, when a prosecutor considers that the proceedings should be terminated, he or she should request the competent judge to issue this decision.[392]

256. *Fourth*, as omitted by the Claimants, it is peacefully accepted that, once the request for asset forfeiture has been submitted before the courts, the Attorney General's Office's role within the proceedings is to support his or her request. As understood by Ms. Liliana Patricia Donado Sierra, current Director for Asset Forfeiture, once the asset forfeiture proceedings are submitted before the judge, "the prosecutor becomes a defender of his or her provisional claim or his or her

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387 Claimants' Reply, ¶ 83.

388 Second Expert Report of Dr. Reyes, ¶ 12; Asset Forfeiture Law (**Exhibit C-003bis**), article 125.

389 Asset Forfeiture Law (**Exhibit C-003bis**), article 124.

390 Second Expert Report of Dr. Reyes, ¶ 14.

391 Second Expert Report of Dr. Reyes, ¶ 14.

392 Second Expert Report of Dr. Reyes, ¶ 15.

petition of asset forfeiture being considered by the courts and, therefore, his or her actions must always be directed towards the consolidation of said claim or petition before the competent judge".[393] As pointed out by Dr. Reyes, this is only a natural consequence of the adversarial nature of asset forfeiture proceedings, in which the prosecutor plays the role of the plaintiff.[394] According to this logic, the role of the prosecutor is to support his request, thus preventing him from withdrawing it once the trial phase has begun.[395]

257. *Fifth*, the Attorney General's Office, or its delegates, may only resolve to withdraw an asset forfeiture investigation once the initial investigation has been concluded based on certain specific grounds set forth under Article 124 of the Asset Forfeiture Law, which were not present in the case of the Meritage Lot.

258. In light of Article 123, said circumstances must be construed at the end of the initial investigations carried out by the Attorney General's Office. This was precisely the analysis conducted by Prosecutor 44 in her response to Newport's request to be considered as a third party in good faith without fault, dated 4 March 2017.[396] In this document, Prosecutor 44 clearly explains that the initial stage is not the appropriate occasion to fully consider whether an applicant may be considered a third party in good faith in the sense of the Asset Forfeiture Law- said determination shall ultimately correspond to the competent judge, after all evidence has been fully considered. However, Prosecutor 44 proceeds to analyze Newport's request under the standard applicable at that stage of the investigation process, concluding that there is sufficient evidence to reasonably infer that Newport's petition should be dismissed based on its defective due diligence.[397]

259. Specifically, Prosecutor 44 considered the enhanced due diligence that financial entities supervised by the Financial Superintendence must apply regarding their clients, in line with the

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393 Liliana Patricia Donado Sierra, "Sujetos Procesales, Intervinientes, Jurisdicción y Competencia" en Manual de Extinción de Dominio (UNODC, 2015) (**Exhibit R-106**), p. 38.

394 Asset Forfeiture Law (**Exhibit C-003bis**), article 28; Second Expert Report of Dr. Reyes, ¶ 38.

395 Second Reyes Export Report, ¶ 21.

396 Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017 (**Exhibit C-054bis**); Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**).

397 Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017 (**Exhibit C-054bis**), pp. 3-8.

findings of the Colombian Constitutional Court in this aspect, concluding that (i) financial entities must design and apply the Anti-Money Laundering and Counter Terrorism Financing Risk Management System (SARLAFT, for its acronym in Spanish) in accordance with the minimum criteria and international parameters established in this regard and (ii) Corficolombiana failed to utilize all adequate methods within its reach to verify the proceedings of the asset received by means of the Trust Agreement. According to Prosecutor 44:

> [H]ad [Fiduciaria Corficolombiana] used [said methods], it would have noticed that Mr. Iván López Vanegas, legal representative of Sierralta López y Cía (the owner of rights in 1994), was in prison for the crime of drug trafficking in the United States of America. It could have performed this verification by simply using open-source information.[398]

260. Moreover, as clearly expressed by Prosecutor 44, after the provisional determination of the claim, the withdrawal of the precautionary measures may exclusively be resolved by the competent judge.[399]

261. As demonstrated , the Claimants' attempt to distort the rationale and the clear text of the Asset Forfeiture Law fails to change the situation described by the Respondent in its Reply: presented with the findings of the investigations conducted at the initial stage of the Asset Forfeiture Proceedings, the Attorney General's Office had no responsible choice under Colombian law other than to proceed with the submission of the asset forfeiture petition before the competent courts, which it diligently did.

2. Dr. Caro's involvement in the Asset Forfeiture Proceedings at the stage of the *Requerimiento* did not merely imply a stamp of approval over the actions previously undertaken by Prosecutor 44

262. In its continued attempt to delegitimize the actions of the Attorney General's Office and its officials, the Claimants boldly aver that "Colombia attempts to but cannot seek refuge behind Dr. Caro." Further, they claim that Dr. Caro's "rubber stamp on the Determination of the Claim,

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398 Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 128.

399 Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017 (**Exhibit C-054bis**), p. 8 ("It is important to note that **after the asset forfeiture pretension has been fixed, it is no competence of the Prosecutor's Office to lift the precautionary measures, as such decision is exclusive of the competent Judge**, by means of the declaratory of inadmissibility of the action, or through the declaratory if illegality of the precautionary measures, pursuant to that provided in Law 1708/2014") (emphasis in original).

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".[400] The Claimants' arguments are wrong and illustrate their ignorance of the practice and regulation of asset forfeiture proceedings at the time, as well as of the scope and purpose of each of its stages, in particular the provisional determination of the claim and the petition of asset forfeiture (*requerimiento*).

263. *First*¸ for the sake of clarity, it is important to describe the content of the Determination of the Claim as a procedural stage under Law 1708 of 2014. Indeed, pursuant to former Article 126 of the Asset Forfeiture Law, "[p]rior to filing the petition for forfeiture with the judge and in order to guarantee the right to adversarial proceedings, the Attorney General of Colombia or his or her delegate shall proceed to set provisionally the asset forfeiture claim, provided the elements of proof collected during the initial stage indicate that there are grounds for the forfeiture of assets".[401] Pursuant to this provision, the provisional determination of the claim comprised (i) the factual and legal bases for the claim; (ii) the identification of the assets and (iii) the evidence on which the claim was based. Further, the provisional determination of the claim should contain the prosecutor's order for precautionary measures, in the event that these had not yet been carried out.[402]

264. Under the Asset Forfeiture Law, the content of the Determination of Claim is nearly identical to the basic requirements for the petition submitted to the judge, as set out by Article 132 of the Asset Forfeiture Law. These requirements include the mandatory content of the provisional determination of the claim, as well as two further additions, namely: (i) the determination to proceed with the asset forfeiture claim and (ii) the identification and place of notification of affected persons recognized during the process.[403]

265. Thus, the Claimants' argument that "a review of the relevant findings between the Determination of Claim and Requerimiento reveal that little of substance was changed by Dr.

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400 Claimants' Reply, ¶ 301.

401 Asset Forfeiture Law (**Exhibit C-003bis**), Article 126.

402 Asset Forfeiture Law (**Exhibit C-003bis**), Article 126.

403 Asset Forfeiture Law (**Exhibit C-003bis**), Article 132.

Caro"[404] is hardly a revelation- quite to the contrary, it merely follows from the rationale behind the structure of the proceedings as set forth by the Asset Forfeiture Law itself. In fact, the Determination of the Claim by Prosecutor 44 already contained the elements required under Article 132 of the Asset Forfeiture Law for the petition of asset forfeiture- it is therefore only reasonable for Dr. Caro to have used this document as his basis for the *Requerimiento*.[405]

266. *Second,* as indicated by Dr. Caro himself, this was the practice at the time.[406] In fact, the Determination of the Claim was later deemed a superfluous stage in the asset forfeiture proceedings, leading to its removal by one of the amendments to the Asset Forfeiture Law introduced by Law 1849 of 2017.[407] As explained by the Subcommittee appointed by the House to inform on the bill submitted by the Attorney General's Office, which later became Law 1849 of 2017, the purpose behind the provisional determination of the claim was to guarantee the right to contest of the parties affected by the decision, prior to the submission of the petition before the competent courts.[408] However, in practice, its existence did not contribute either to the efficiency of the proceedings, nor from the perspective of the strategy followed by the Attorney General's Office nor by the affected parties.[409]

267. *Third*, the Claimants' arguments in the sense that "Dr. Caro relies exclusively on evidence collected by Ms. Ardila and effectively copies and pastes her findings on good faith"[410] are to no avail: this is only natural given that, in order to comply with its purpose of guaranteeing the affected parties' right of defense ,the provisional determination of the claim was conceived to contain the strongest factual, legal and evidentiary basis of the Attorney General's Office subsequent forfeiture petition.[411] Thus, upon its issuance, Dr. Ardila had already collected abundant evidence to support the Attorney General's Office's asset forfeiture request which, as

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404 Claimants' Reply, ¶ 301.

405 Mr. Caro Second Witness Statement, ¶ 15.

406 Mr. Caro Second Witness Statement, ¶ 16.

407 Law 1849 of 2017, 19 July 2017 (**Exhibit R-122**).

408 Colombian Congress Gazette Nº 140, 10 March 2017 (**Exhibit R-120**), pp. 5-6.

409 Colombian Congress Gazette Nº 140, 10 March 2017 (**Exhibit R-120**), p. 6.

410 Claimants' Reply, ¶ 301.

411 Gilmar Giovanny Santander Abril, "La Nueva Estructura del Proceso de Extinción de Dominio" *in* Manual de Extinción de Dominio en Colombia (UNODC, 2015) (**Exhibit R-108**), p. 82.

explained above, does not require a higher standard of proof than the Determination of the Claim. This is consistent with Dr. Caro's testimony:

> Only exceptionally, there would exist deviations between the *Requerimiento* and the provisional determination of the claim or additional evidence, only in those cases where the prosecutor understanding in the *Requerimiento* noted the existence of gross mistakes in the previous investigation. This was not the case regarding the investigations conducted by Prosecutor 44 in relation to the Meritage Lot prior to my involvement in the case.[412]

268. Naturally, this is not the same as stating, as the Claimants more than insinuate,[413] that Dr. Caro did not study the case in-depth, nor that he lacked his own opinion as to the merits of the Attorney General's Case. Quite to the contrary, it simply means that, after having reviewed Ms. Ardila's investigation and the findings resulting therefrom, he shared her conclusions.[414] Under the Claimants' logic, Dr. Caro should have re-written the *Requerimiento* merely to paraphrase Ms. Ardila with no practical effect whatsoever, to preempt any doubt on his independent analysis and conclusions. This is non sensical and contrary to all tenants of procedural efficiency.[415]

269. Finally, the Claimants aver that Dr. Caro "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".[416] The Claimants' contention serves no purpose other than advancing their unsupported allegations that the proceedings lacked basis and were commenced by corruption. It also ignores the allocation of responsibilities within the Attorney General's Office. Dr. Caro, a prosecutor belonging to the Asset Forfeiture Unit, had no reason to be aware of the corruption investigations instructed at the time by Prosecutor 56, Delegate before the Superior Court of Bogotá,[417] which were completely alien to his functions and subject to strict confidentiality.[418] Moreover, Dr. Caro's eventual knowledge of the corruption investigations being undertaken

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412 Mr. Caro Second Witness Statement, ¶ 16; Second Expert Report of Dr. Reyes, ¶ 32.

413 Claimants' Reply, ¶ 301.

414 Mr. Caro Second Witness Statement, ¶ 15.

415 Mr. Caro Second Witness Statement, ¶ 15.

416 Claimants' Reply, ¶ 301.

417 [redacted]

418 *See also* Second Hernandez Expert Report, ¶¶ 4-12.

against Mses. Ardila and Malagón would have had no bearing on his appraisal of the documental and witness evidence that formed part of the file relating to the Meritage Lot prior to the submission of the *Requerimiento*.

270. In conclusion, an analysis under an accurate understanding of the Asset Forfeiture Law and its practice of the Claimants' brazen attempts to downplay Dr. Caro's involvement in the Asset Forfeiture Proceedings shows that, contrary to the Claimants' allegations, Dr. Caro's involvement in the Asset Forfeiture Proceedings was yet another guarantee of the procedure's legality, which the Claimants unsuccessfully attempt to downplay.

3. Contrary to the Claimants' claims, Newport has not been denied due process and had multiple opportunities to present its claims and evidence before Colombian courts

271. According to the Claimants, the Asset Forfeiture Proceedings were "in plain contravention of the legal and procedural guarantees enshrined under the Colombian Constitution and the Asset Forfeiture Law", among them, due process.[419] This is wrong.

272. Indeed, contrary to what the Claimants allege, the Meritage Claimants through Newport have had numerous opportunities to fully submit their case and present evidence before the competent administrative authorities at the Attorney General's Office (**III.F.3.a**) and the competent asset forfeiture courts (**III.F.3.b**). What the Claimants attempt to portray as a "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 without fault protection afforded by law"[420] is in fact nothing other than their refusal to accept that their arguments have no basis under Colombian law, as concluded once and again by the competent asset forfeiture courts.

a. *Newport's administrative petitions and Tutela*

273. Regardless of Newport's allegations as to the supposed violations of its rights of due process, it presented its case before the Attorney General's Office through various petitions, which were responded by Prosecutor 44, as well as by its opposition to the Determination of the Claim.

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419 Claimants' Reply, ¶ 84.

420 Claimants' Reply, ¶ 84.

274. On 7 December 2016, Newport submitted to the Attorney General's Office for the first time its arguments regarding its standing as a good faith third party without fault-[421] over four months after the Precautionary Measures had been applied.[422] In this submission, Newport requested the Attorney General's Office to recognize it as a good faith third party without fault, insisting that in its capacity as grantor – promoter under the Meritage Trust, it should be considered as such. Thus, Newport contested the Precautionary Measures and requested that they be lifted.[423] As basis for its allegations, Newport filed before the Attorney General's Office over 200 pages worth of documentary evidence.[424]

275. Newport supplemented its petition on 14 December 2016, providing letters from Corficolombiana regarding the advanced disbursements of contributions ("*anticipos de restitución de aportes*") made by Corficolombiana, as trustee and administrator of the Meritage Trust, to Newport, that were purportedly used by Newport to pay for the Lot. Newport further argued that the Attorney General's Office had failed to gather evidence on Newport's alleged good faith.[425] As already demonstrated, that is untrue.

276. On 23 January 2017, Newport once again filed a petition with the Attorney General's Office Prosecutor 44, this time asking that the Precautionary Measures be lifted. Newport argued that the six-months statute of limitations provided in Article 89 of Law 1708 of 2014[426] had elapsed.[427] It bears recalling in this respect that the six-month statute of limitation provided for in Article 89 of Law 1708 of 2014 for the Attorney General's Office to issue a Provisional Determination of Claim, or decide that the proceedings should be archived, starts running from the date of the actual imposition of the measures, not from the date in which the Attorney General's Office

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421 Newport's First Petition to Attorney General's Office Asset Forfeiture Unit, 7 December 2016 (**Exhibit C-048bis**).

422 Certificate of Seizure of the Meritage Property, 3 August 2016 (**Exhibit C-165bis**), p. 25.

423 Newport's First Petition to Attorney General's Office Asset Forfeiture Unit, 7 December 2016 (**Exhibit C-048bis**).

424 Newport's First Petition to Attorney General's Office Asset Forfeiture Unit, 7 December 2016 (**Exhibit C-048bis**), p. 18.

425 Newport's Supplement to Petition to Attorney General's Office Asset Forfeiture Unit, 14 December 2016 (**Exhibit C-049bis**).

426 Law No. 1708, 20 January 2014 (**Exhibit C-003bis**), Article 89.

427 Newport's Third Petition to Attorney General's Office Asset Forfeiture Unit, 23 January 2017 (**Exhibit C-050bis**).

orders their impositions. In this case, as arises from the Certificate of Seizure and as acknowledged by the Claimants,[428] the measures materialized on 3 of August 2016, not on 22 July 2016 (date in which they were authorized).[429] Therefore, by 23 January 2017, the Attorney General's Office was well within the term to decide on whether to proceed with the Determination of the Claim or archive the proceedings, and was not obliged to lift the measures.

277. Further, Newport resolved to resort to the Colombian Courts. Thus, on 17 February 2017, Newport filed a Tutela Action claiming that the Attorney General's Office lack of response to its requests of 7 December 2016, 14 December 2016 and 23 January 2017, violated its fundamental rights of access to administration of justice and due process.[430] In its decision, the Supreme Court of Justice stated that the *tutela* action is a subsidiary action aimed at protecting the petitioners' fundamental rights, not to substitute existing proceedings and in particular those which are still pending, as is the case of the Asset Forfeiture Proceedings. Moreover, the Supreme Court stated that the Asset Forfeiture Proceedings were still in an initial phase, which meant that the alleged affected parties could propose their objections, oppositions and evidence before the Attorney General's Office.[431] The Court remarked that on 27 February, the period to have access to the file, present an opposition and present evidence had already started to run.[432] Hence, the parties interested in making submissions regarding the proceedings were able to do so immediately. Further, even if Newport's petitions were not to be accepted at that stage, pursuant to Articles 141 and subsequent of Law 1708 of 2014, there were other opportunities during the trial for it to request evidence and present its objections, should the Attorney General Office proceed to Request the Asset Forfeiture.[433] As shall be further described, these were precisely the opportunities that Newport had to file its arguments before Colombian asset forfeiture courts.

278. At this point, it is important to note that petitions such as filed by Newport before the Attorney General's Office are additional to those provided in the Asset Forfeiture Law to contest the

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428 Claimants' Reply, ¶ 27(ee).

429 Certificate of Seizure of the Meritage Property, 3 August 2016 (**Exhibit C-165bis**), p. 25.

430 Newport *Tutela* Action, 17 February 2017 (**Exhibit C-052bis**).

431 Decision on Newport's Tutela Action, 28 February 2017 (**Exhibit C-053bis**), pp. 12-13.

432 Decision on Newport's Tutela Action, 28 February 2017 (**Exhibit C-053bis**), p. 14.

433 Decision on Newport's Tutela Action, 28 February 2017 (**Exhibit C-053bis**), p. 14.

legality of precautionary measures ordered by the Attorney General's Office. Pursuant to Article 111 of the Asset Forfeiture Law, the precautionary measures ordered by the Attorney General or his or her delegate may be submitted to the competent asset forfeiture judges for procedural legality control- including whether or not these measures should have been enacted considering the existence of third parties in good faith without fault. As further explained below, this is precisely what Corficolombiana did.

279. Notwithstanding its acknowledgment of the existence of further opportunities for Newport to adequately present its case, the Supreme Court resolved regarding Newport's *tutela* ordering the Attorney General's Office to provide a response in this regard within 48 hours.[434] For the avoidance of doubt, the Supreme Court clarified that this order did not necessarily entail a favorable response to Newport's request from the Attorney General's Office.[435]

280. Thus, on 4 March 2017, the Attorney General's Office answered Newport's petitions by denying recognition of Newport as a good faith third party without fault, stating that the initial phase of the Asset Forfeiture Proceedings was not the proper stage to decide on Newport's allegations about this status, as already stated by the Supreme Court in its *Tutela* decision.[436] Notwithstanding the foregoing, the Attorney General's Office also addressed the merits of Newport's position, stating that there was evidence enough on the basis of which it was reasonable to believe that Newport had not conducted a proper due diligence on the title.[437]

281. In this regard, the Attorney General's Office recalled that Mr. López Vanegas, whose extradition had been requested by the U.S. authorities in connection with the crime of drug trafficking, had acquired the property in 1994 through Deed No. 1554, and that several subsequent sales in the chain of transfers were proved to be simulated.[438] Indeed, the transfer of the property from Sebastián López Betancur allegedly perfected by Deed No. 815 of 6 May 2005 had been forged, as according to the immigration report, Mr. López Betancur was traveling from Medellín to

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434 Decision on Newport's *Tutela* Action, 28 February 2017 (**Exhibit C-053bis**), p. 19.

435 Decision on Newport's *Tutela* Action, 28 February 2017 (**Exhibit C-053bis**), pp. 18-19.

436 Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017 (**Exhibit C-054bis**).

437 Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017 (**Exhibit C-054bis**), pp. 2-3.

438 Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017 (**Exhibit C-054bis**), pp. 3-4.

Miami on that date.[439] The alleged buyer of the property, Mr. Arboleda, had confirmed that he never paid for the property, as he lacked the means, nor did he know Mr. López Betancur.[440] Further transactions evinced the same pattern: among others, the acquisition by Ms. Mónica Rendón and Ms. Tatiana López Gil, who confirmed that she participated in the alleged purchase through her then-partner, Mr. Guillermo Arango "Guru", and an individual affiliated with the cartel known as "Borracho" who was mentioned by Mr. López Vanegas as a member of the *Oficina de Envigado*.[441]

282. Further, the Attorney General's Office recalled that since the Provisional Determination of Claim had been issued, it no longer had jurisdiction to lift the Precautionary Measures, which decision would be within the Asset Forfeiture Court's remit.[442] However, Prosecutor 44 recognized Newport's procedural standing regarding the Asset Forfeiture file in the Attorney General's Office.[443]

283. Finally, on 9 March 2017, Newport submitted its opposition to the Provisional Determination of the Claim, which was also based on its initial statement that the Meritage Lot had been legitimately acquired in good faith, with proceeds from lawful activities, and that it had a legitimate interest to oppose the asset forfeiture claim. Although the General Attorney's Office was not legally obliged to reply to Newport's opposition, Newport's allegations were adequately addressed in the Request for Asset Forfeiture.[444]

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439 Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017 (**Exhibit C-054bis**), p. 4.

440 Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017 (**Exhibit C-054bis**), p. 5.

441 Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017 (**Exhibit C-054bis**), p. 6.

442 Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017 (**Exhibit C-054bis**), p. 8.

443 Witness Statement of Dr. Ardila, ¶ 46.

444 Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**).

b. *Newport's submissions before the asset forfeiture courts*

284. Further, Newport also had the opportunity to fully present its case before the Colombian asset forfeiture courts, submit evidence and appeal the judicial decisions to which it objected, namely the *Avocamiento* order and the Second Criminal Court's decision to accept the *Requerimiento*.

285. As clearly put by Dr. Reyes, the Asset Forfeiture Law does not grant a procedural right for a party to be admitted as a bona fide third party without fault in any proceedings. Rather, it provides a right for parties to request being recognized as such, which only includes the parties' rights to submit a request in this regard, providing its arguments to do so, and the right to challenge any decision resulting therefrom.[445] These rights were fully granted to Newport in the Asset Forfeiture Proceedings:

286. *First*, on 17 August 2017, the Second Criminal Court Specialized in Asset Forfeiture of Antioquia ("Second Criminal Court") rendered its *Avocamiento* order. Among other findings, described in detail in the Respondent's Counter Memorial,[446] the Second Criminal Court found that, as regards Newport, the documentary evidence provided evinced that Newport was not even a beneficiary of the Fiducia, as it had been eliminated via a private document entered into between the parties. As such, there is no basis to recognise Newport as an affected party. In particular, the Court found that Newport did not have an *in rem* rights over the Meritage Lot.[447]

287. Thus, on 24 August 2017, Newport appealed the Court's *avocamiento* decision,[448] alleging that under Public Deed No. 361, Newport had eventual rights as beneficiary of the lots to be transferred from the Parqueo Trust Agreement ("*Contrato de Fiducia Mercantil Irrevocable de Administración-Fideicomiso Meritage La Palma Argentina*") to the Meritage Trust ("*Fideicomiso Meritage La Palma Argentina*"), and that by the time of the Court decision, Lot number 001-1198464 associated with Phases 1 and 6 of the Project had already been transferred from the Parqueo to the Meritage Trust.

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445 Second Expert Report of Dr. Reyes, ¶ 90.

446 Counter Memorial, ¶¶ 213-241.

447 Newport's Appeal Against the *Avocamiento* Order, 24 August 2017 (**Exhibit C-195bis**).

448 Newport's Appeal Against the *Avocamiento* Order, 24 August 2017 (**Exhibit C-195bis**).

288. Further, on 11 September 2017, Newport filed a supplemental brief to its appeal, adding further clarifications.[449] Both the appeal and the supplemental brief were accepted by the Court, and decision on appeal is still pending. As explained by Dr. Reyes, this point is crucial in order to correctly assess the Claimants' arguments regarding the court's alleged denial of Newport's right to participate of the Asset Forfeiture Proceedings. In the words of Dr. Reyes:

> This means that so far there is no final decision on the unaffected status of Newport S.A.S., but the issue remains under discussion within the process. The precision is important because it indicates that it is not true that Newport S.A.S. has been deprived of the right to intervene in the trial stage of the action for asset forfeiture since, strictly speaking, it will begin when the appeal filed by the representative of Newport S.A.S. against the decision that denied that company recognition as affected is resolved.[450]

289. Moreover, even under a broader interpretation according to which the "trial stage" begins when a judge takes cognizance of the action for asset forfeiture, according to Dr. Reyes "it is undeniable that Newport [] has been able to intervene", since it has (i) presented its considerations before the Second Criminal Court and (ii) appealed the decision by which said considerations were dismissed.[451]

290. *Second*, on 14 June 2019, the Second Criminal Court accepted the amended *Requerimiento* submitted by Dr. Caro, in the understanding that it had satisfied the requirements provided under Article 132 of the Asset Forfeiture Law.[452] The Second Criminal Court denied Newport's request to access the proceedings as an *afectado*, on the basis of his lack of in rem or patrimonial rights over the Meritage Lot, after an extensive review and analysis of the Meritage Project's contractual structure.[453] According to the Second Criminal Court, Newport could not be considered an *afectado* to the extent that it did not have any in rem rights over the Meritage Lot.[454]

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449 Newport's Memorial Complementing Its Appeal, 11 September 2017 (**Exhibit C-196**).

450 Second Expert Report of Dr. Reyes, ¶ 81.

451 Second Expert Report of Dr. Reyes, ¶ 82.

452 Specialized Asset Forfeiture Court's Decision on Second Amended Requerimiento, 14 June 2019 (**Exhibit C-236**), pp. 8-9.

453 Specialized Asset Forfeiture Court's Decision on Second Amended Requerimiento, 14 June 2019 (**Exhibit C-236**), pp. 102-146.

454 Specialized Asset Forfeiture Court's Decision on Second Amended Requerimiento, 14 June 2019 (**Exhibit C-236**), p. 328.

291. On 20 June 2019, Newport appealed this decision, insisting on its arguments as to its purported status as *afectado* regarding the Meritage Lot and the Precautionary Measures.[455] Newport's appeal is pending.

292. In sum, Newport has (i) presented its arguments before the asset forfeiture courts prior to the *Avocamiento* and the *Requerimiento*, submitting all accompanying evidence, and (ii) appealed both these decisions, which appeals are being considered by the competent courts.

293. In any event, as referred, Newport's appeals are still pending which means once more that it has had the benefit of due process under the law including its right to contradiction and to have a second instance review the first instance decision. The fact that the Attorney General' Office and the Court of First Instance, after an extensive analysis of the evidence and arguments of Newport and Corficolombiana, do not share the position of the Claimants is not, as the Claimants attempt to portray, a violation of due process. Simply put, due process under the law does not mean that the court ought to decide in favor of the Claimants.

4. The *Avocamiento* order, the admission of the *Requerimiento* and the two instances of the legality control of the Precautionary Measures are not simple rubber stamp proceedings

294. Faced with the reality that their multiple and reiterated interventions before the Colombian courts in the Asset Forfeiture Proceedings have not led to the results they want. the Claimants aver "the Colombian courts' supposed approval of Colombia's actions do not cure the lack of due process in the initiation of the proceedings either".[456] However, what the Claimants intend to portray as mere rubber-stamp proceedings with no consideration of the merits of the case, consisted instead of sophisticated proceedings with all due process guarantees, in which the courts carefully analysed each of the legal issues submitted before them, including their unsupported allegation as to the lack of due process in the initiation of the proceedings.

295. *As regards the Avocamiento order*: In their Reply, the Claimants assert that the *Avocamiento* order "is unavailing to the propositions for which Colombia offers it", citing two main reasons for this: (i) that the Second Criminal Court erroneously denied Newport *afectado* status and (ii) that

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455 Newport's Appeal Against Decision to Accept Corrected Requerimiento, 20 June 2019 (**Exhibit C-237**).

456 Claimants' Reply, ¶ 302.

it failed to analyse whether Newport could be considered a third party in good faith without fault.[457]

296. *First*, the Claimants attempt to transform this arbitration into a second appeal of the *Avocamiento* decision. As has been explained, the *Avocamiento* order's appraisal of Newport's lack of standing as an *afectado* was based on a reasoned application of the requirements set forth by the Asset Forfeiture Law's to this effect. To arrive at this decision, the Second Criminal Court conducted a thorough examination of each of the arguments submitted by the alleged *afectados*, including a detailed analysis of the intricate contractual structure behind the Meritage project in order to take into consideration the specific rights assisting each of the parties.[458] The Claimants' assertion that **"**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"[459] is ludicrous, when confronted with the well-reasoned judicial decision mostly devoted to an in-depth analysis of the rights held by Royal Realty, Newport and Fiduciaria Corficolmbiana, respectively

297. *Second*, the *Avocamiento* order did not specifically address the issue of whether Newport could be considered a third party in good faith without fault simply because it was not the adequate procedural moment for the court to do so. In this regard, it is important to note that according to Article 137 of the Asset Forfeiture Law, the purpose of the *Avocamiento* decision is to determine the initiation of the Asset Forfeiture Proceedings;[460] hence, it would not be feasible nor appropriate from a procedural perspective for the court to decide all matters relating to the proceedings, including the existence of third parties in good faith, in that single decision. Rather, the purpose of the *Avocamiento* is to determine whether the petition filed by the Attorney General's Office is acceptable, and to identify the parties to the proceedings.

298. Interestingly, Newport seems to have been well aware of this circumstance: in fact, its appeal of the *Avocamiento* order does not contest the decision for failing to address the issue of whether Newport could be considered as a third party in good faith. Rather, the appeal limits itself to

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457 Claimants' Reply, ¶¶ 88-90.

458 Asset Forfeiture Court *Avocamiento* Order 17 August 2017 (**Exhibit C-057bis**), pp. 54-122.

459 Claimants' Reply, ¶ 302.

460 Asset Forfeiture Law (**Exhibit C-003bis**), Article 137.

stating Newport's discrepancies with the Second Criminal Court's appraisal of its status as *afectado* questioning, mainly the Court's appraisal of the asset forfeiture law applicable to the case.

299. *In relation to the legality control of the Precautionary measures*: on 26 September 2016, Fiduciaria Colombiana, filed a request for the control of legality of the Precautionary Measures before the First Criminal **Court** of the Specialized Circuit for Asset Forfeiture of Antioquia that sought to declare have the seizure of the Meritage Lot illegal.[461] As fiduciary of the Meritage Lot, Fiduciara Corficolombiana had the representation of the independent set of assets under the trust and is tasked with responding and speaking on behalf of that independent set of assets did. This is in line with the provisions under the Colombian Commercial Code applicable to trusts, according to which ownership of the assets that are included in the trust is autonomous from the trustor's own property.[462] In addition. The Colombian Commercial Court charges trustees with the duty of representing the trust for the protection and defense of the trust's assets.[463] Notably, as a clear acknowledgment of its lack of standing, Newport did not file a request for legality control of its own. The legality of the Precautionary Measures was twice upheld by Colombian courts, on the first instance[464] and on appeal.[465]

300. The Claimants charge against the decisions regarding the control of legality over the Precautionary Measures, stating that the courts conducted no substantive review of the issue.[466] This new attempt by the Claimants to downplay the guarantees afforded by the judicial control over the Asset Forfeiture Proceedings is to no avail.

301. *First*, the Claimants' argument fails when confronted with the very text of the Asset Forfeiture Law itself, whose Article 112 provides that "[t]*he purpose of procedural legality control shall be to review the formal and material legality of the precautionary measure*,"[467] for which purpose the

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461 Corficolombiana's Control of Legality Petition, 26 September 2016 (**Exhibit C-043**).

462 Colombian Commercial Code (**Exhibit R-2**), Article 1233.

463 Colombian Commercial Code (**Exhibit R-2**), Articles 1234(4).

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

465 Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017 (**Exhibit C-47**).

466 Claimants' Reply, ¶ 85.

467 Asset Forfeiture Law (**Exhibit C-003bis**), Article 112 (emphasis added).

competent judge may base its decision on the following grounds: (i) insufficient minimum elements of judgment to consider that the assets; (ii) whether the material performance of the precautionary measure is not shown to be necessary, reasonable, and proportional in order to achieve its ends; (iii) whether the decision to impose the precautionary measures has not been duly justified and; (iv) whether the decision was based on evidence obtained illegally. Thus, the Claimants' contention that the courts do not analyse the merits of the request is at odd with the Asset Forfeiture Law, which provides for the control of both, the formal and material legality of the measures.

302. Second, the Claimants' allegation that "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"[468] is, simply, incorrect. As stated by the Asset Forfeiture Law, the judicial decisions issued in the context of asset forfeiture proceedings are independent and autonomous.[469]

303. *Third,* as evinced in its decision, the First Criminal Court analyses the arguments submitted by the Attorney General's Office to determine whether or not they allow for the conclusion that there is a probability that the Meritage Lot is compromised by one of the grounds for asset forfeiture.[470] As expressed by the Court, this does not entail a decision on the substance of the asset forfeiture request, i.e. whether the assets should or should not be forfeited by the Colombian State- naturally, this would require a much higher degree of knowledge, to be dealt with during the remaining stages of the asset forfeiture proceedings. [471] As explained by Dr. Reyes, this is a natural consequence of the legal process conceived as a progressive activity in establishing a factual situation and assigning legal consequences to it. In this sense, while the standard of proof for the imposition of precautionary measures is that of "serious grounds for considering their imposition indispensable" and necessary,[472] the sentence that orders the asset forfeiture requires that one of the causes enshrined in Article 16 of the Asset Forfeiture Law be

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468 Claimants' Reply, ¶ 302.

469 Asset Forfeiture Law (**Exhibit C-003bis**), Article 9.

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

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

472 Asset Forfeiture Law (**Exhibit C-003bis**), Article 89.

demonstrated.[473] The foregoing does not entail that there is no substantive analysis of the arguments of the Attorney General's Office at the stage of the imposition of precautionary measures but, simply, that the applicable standard differs.

304. *In relation to the decision admitting the Requerimiento:* interestingly, in their Reply, the Claimants conveniently omit any evaluation regarding the decision by the Second Criminal Court to admit the second amended *Requerimiento* of 14 June 2019. This decision, spanning over 300 pages, analyses in detail the investigation and the arguments submitted by the Attorney General's Office as the basis for its asset forfeiture petition. Further, the Court once again addressed the arguments submitted by all those alleging to be purported *afectados* and bona fide third parties without fault, continuing to delve into the intricacies of the contractual structure behind the Meritage Project. As part of this decision, the Second Criminal Court also specified that its understanding regarding the status of *afectados* is notwithstanding the rights of the third parties in good faith free from fault, which shall be the object of the final decision on the matter.[474] Despite the Claimants' conveniently glossing over the court's decision to admit the asset forfeiture petition, its importance pursuant to the Asset Forfeiture Law cannot be downplayed. As understood by a prominent scholar who participated in the drafting process of the Asset Forfeiture Law, the admission of the *Requerimiento* may not be seen as a mere formality, since:

> [The judge] acts as a constitutional guarantor of the acts carried out during the investigation, for which reason it is under an obligation to deny recognition of the legitimacy of the acts conducted by the investigating authority is it is found that the prosecution has breached the fundamental rights and constitutional guarantees.[475]

305. Hence, by accepting the submission of the *Requerimiento*, the Second Criminal Court duly supervised and approved the proceedings carried out by the Attorney General's Office.

306. Finally, the Claimants attempt to minimize the role of the Colombian courts by alleging that they "did not have the benefit of any investigation by the prosecutor of the corruption scheme that

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473 Reyes Expert Report, ¶ 22.

474 Specialized Asset Forfeiture Court's Decision on Second Amended *Requerimiento* (**Exhibit C-236**), 14 June 2019, p. 154.

475 Gilmar Giovanny Santander Abril, "La Nueva Estructura del Proceso de Extinción de Dominio" en Manual de Extinción de Dominio en Colombia (UNODC, 2015) (**Exhibit R-108**), p. 88.

have rise to the proceedings".[476] Once again, the Claimants' attempt to tarnish the extent of the courts' supervision misses the mark entirely. Pursuant to Colombian law, corruption cases are subject to a thorough investigation before being submitted before the competent courts which, eventually, would not even be the same asset forfeiture courts that intervened in the Asset Forfeiture Proceedings. Rather, the eventual judicialization of the corruption investigation currently being instructed within the Attorney General's Office would be before the competent criminal courts, with a different remit altogether. Moreover, the very object of the Asset Forfeiture Proceedings is completely unrelated to the Claimants' corruption allegations. Rather, its purpose is to obtain a decision regarding the forfeiture of the Meritage Lot. This appeared to have been clear to Corficolombiana and Newport when conducting their submissions before the asset forfeiture courts since, interestingly, they did not make any corruption allegations at the time.

307. To conclude, the Claimants' strategy to reduce the lengthy investigations and reasoned decisions of the Prosecutors to nothing fails in view of the fact that the Colombian courts: (i) analysed and dismissed Newport's arguments as to its standing as *afectado* in the *Avocamiento* order; (ii) confirmed on two separate instances the legality of the Precautionary Measures; (iii) admitted the *Requerimiento*, thus validating the investigations conducted by the Attorney General's Office. The Asset Forfeiture Law has been commended for its guarantees, and these have proven their worth in the present case, despite the Claimants' misguided allegations.

G. [redacted]

308. [redacted]

476 Claimants' Reply, ¶ 302.

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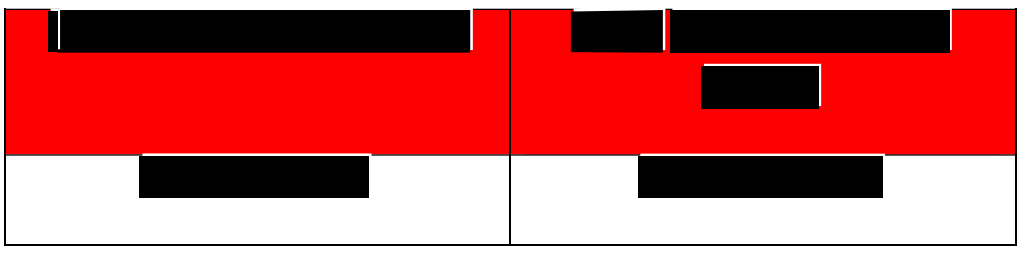

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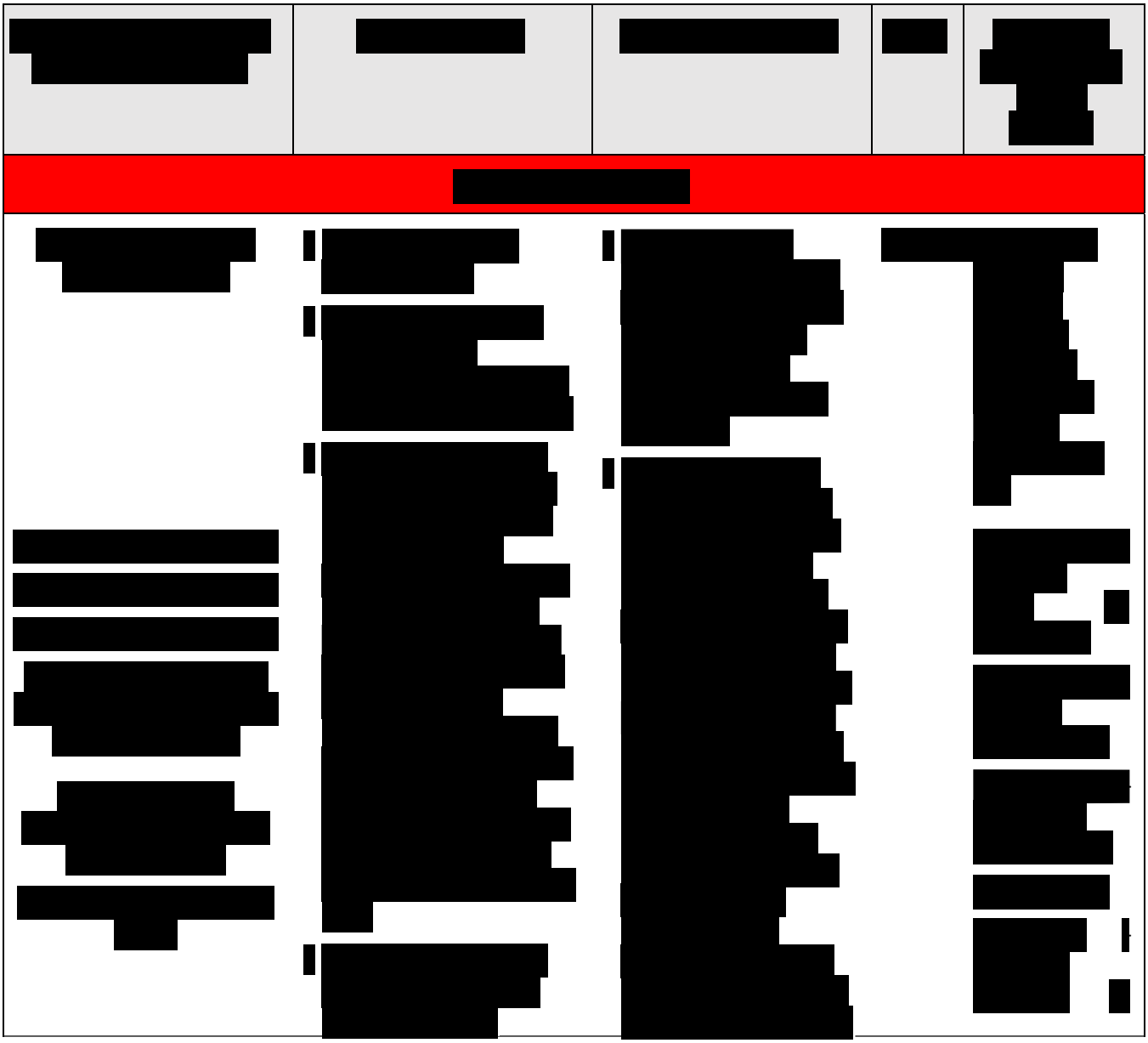

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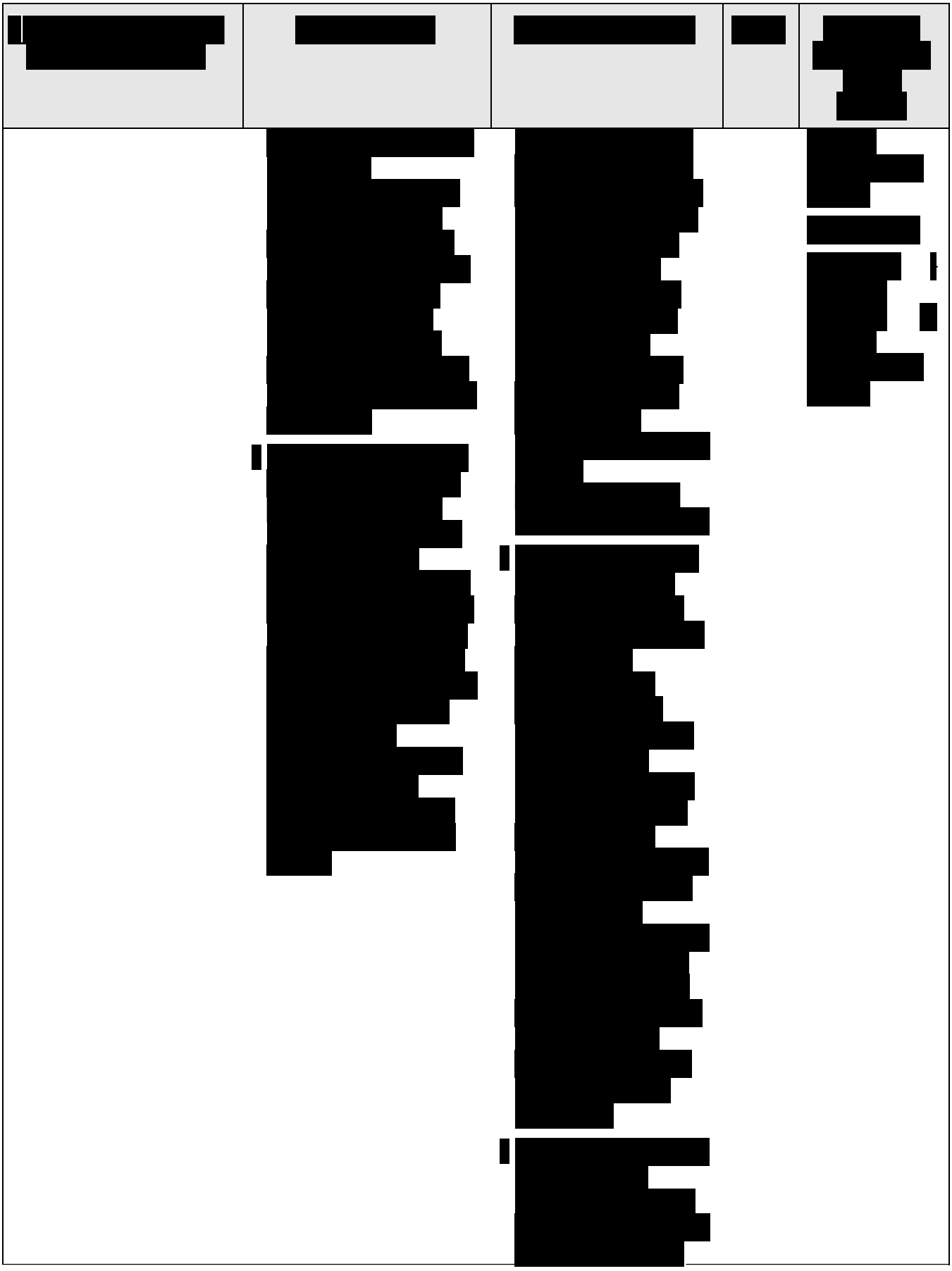

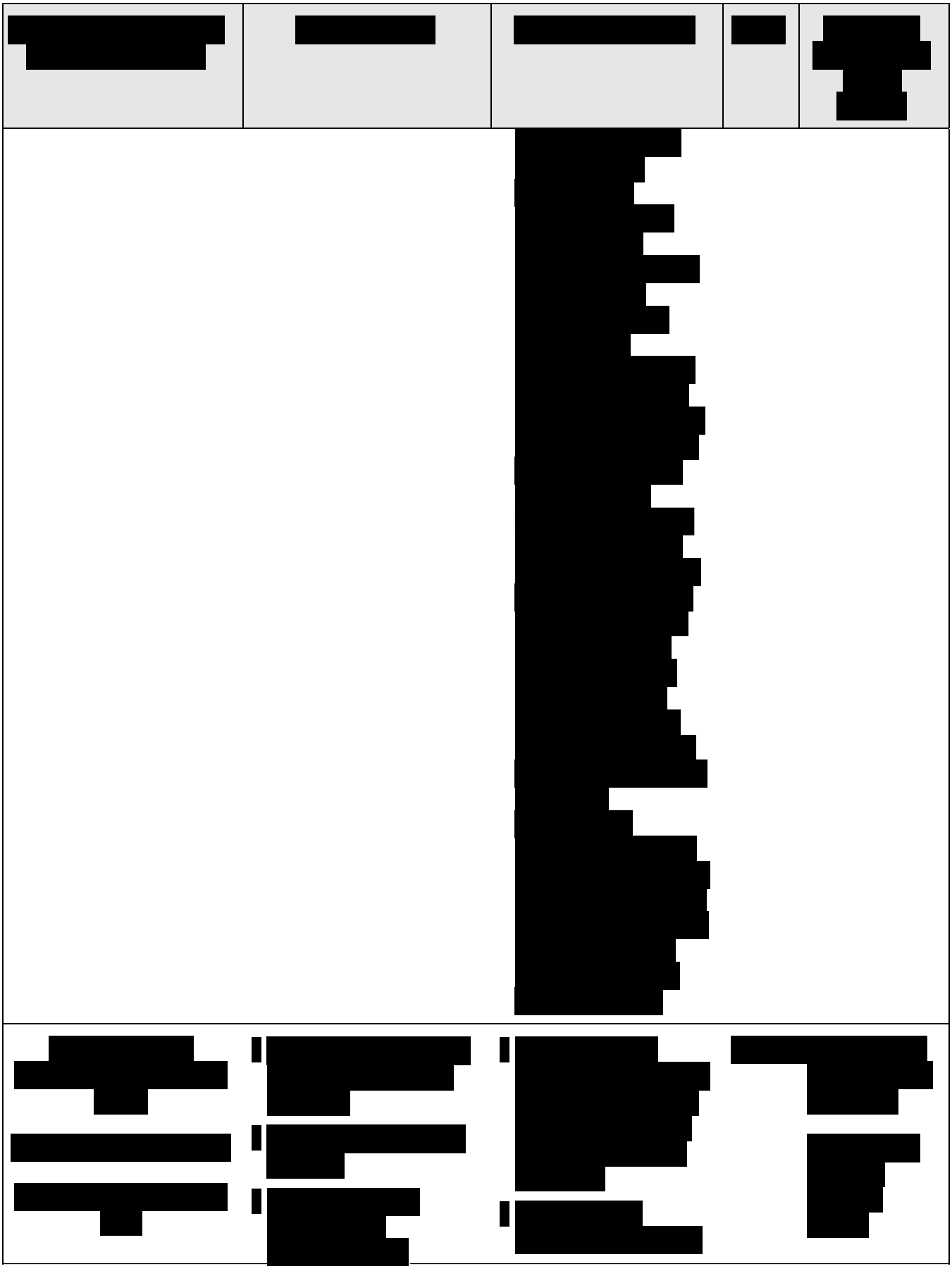

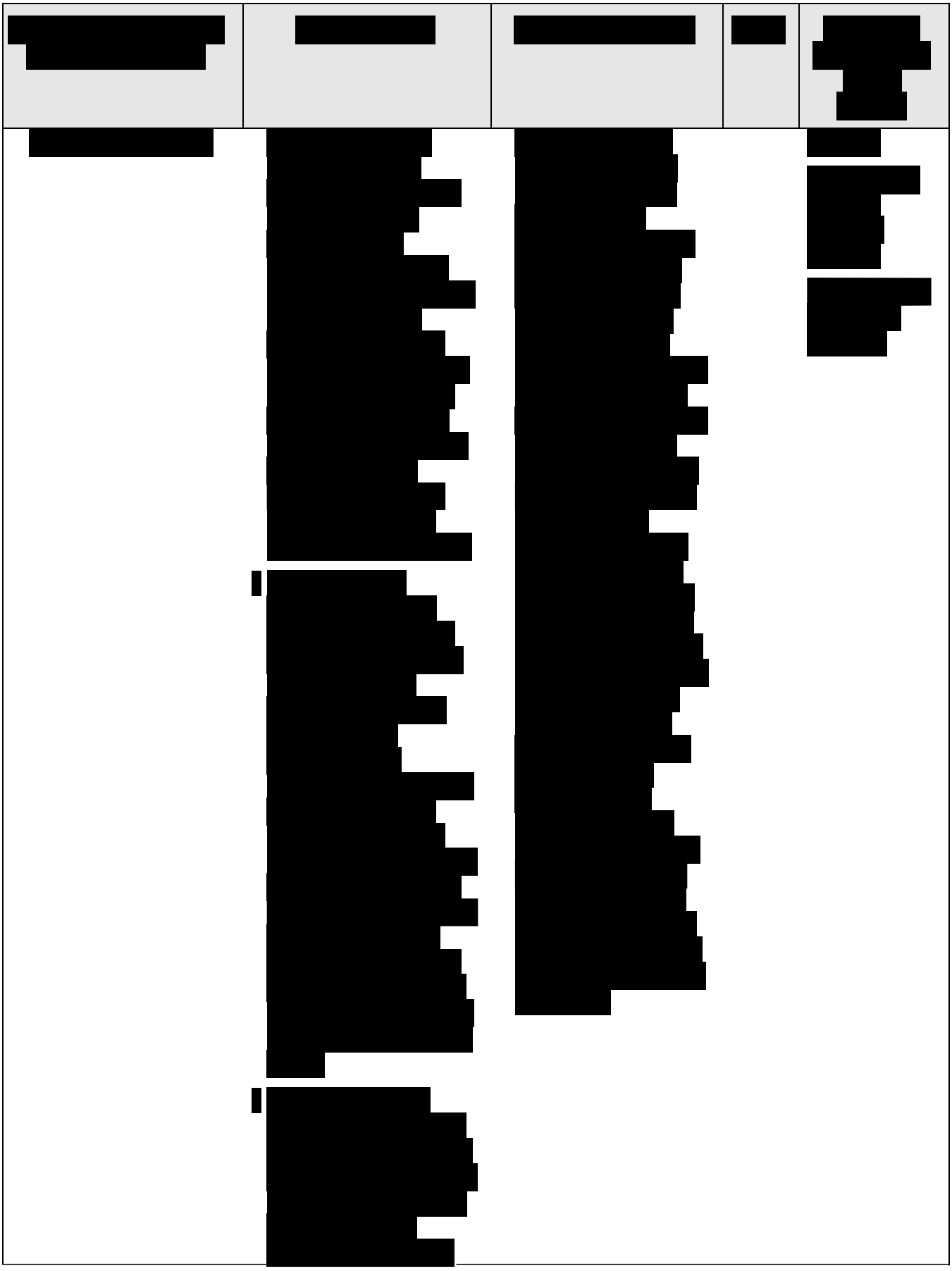

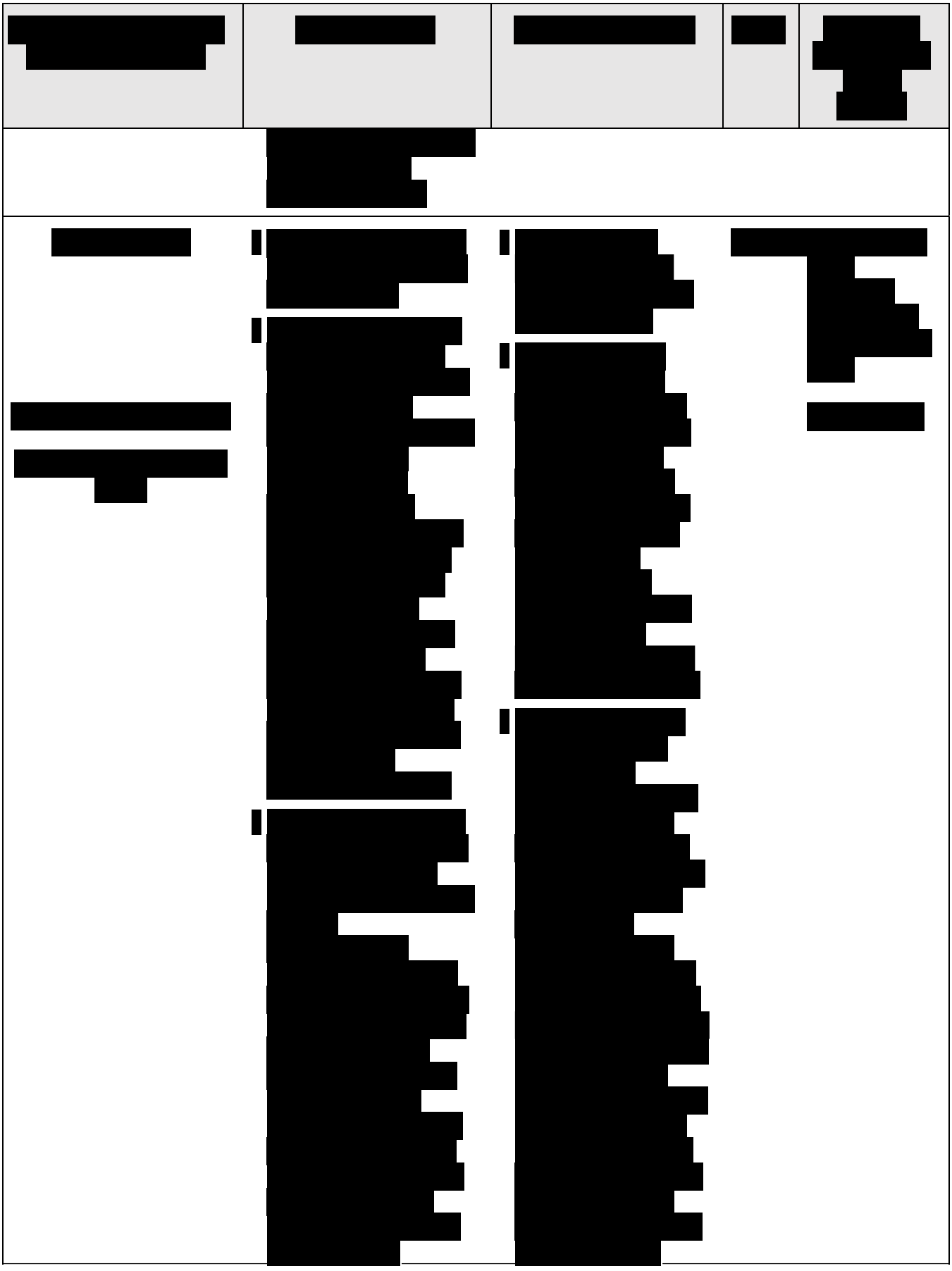

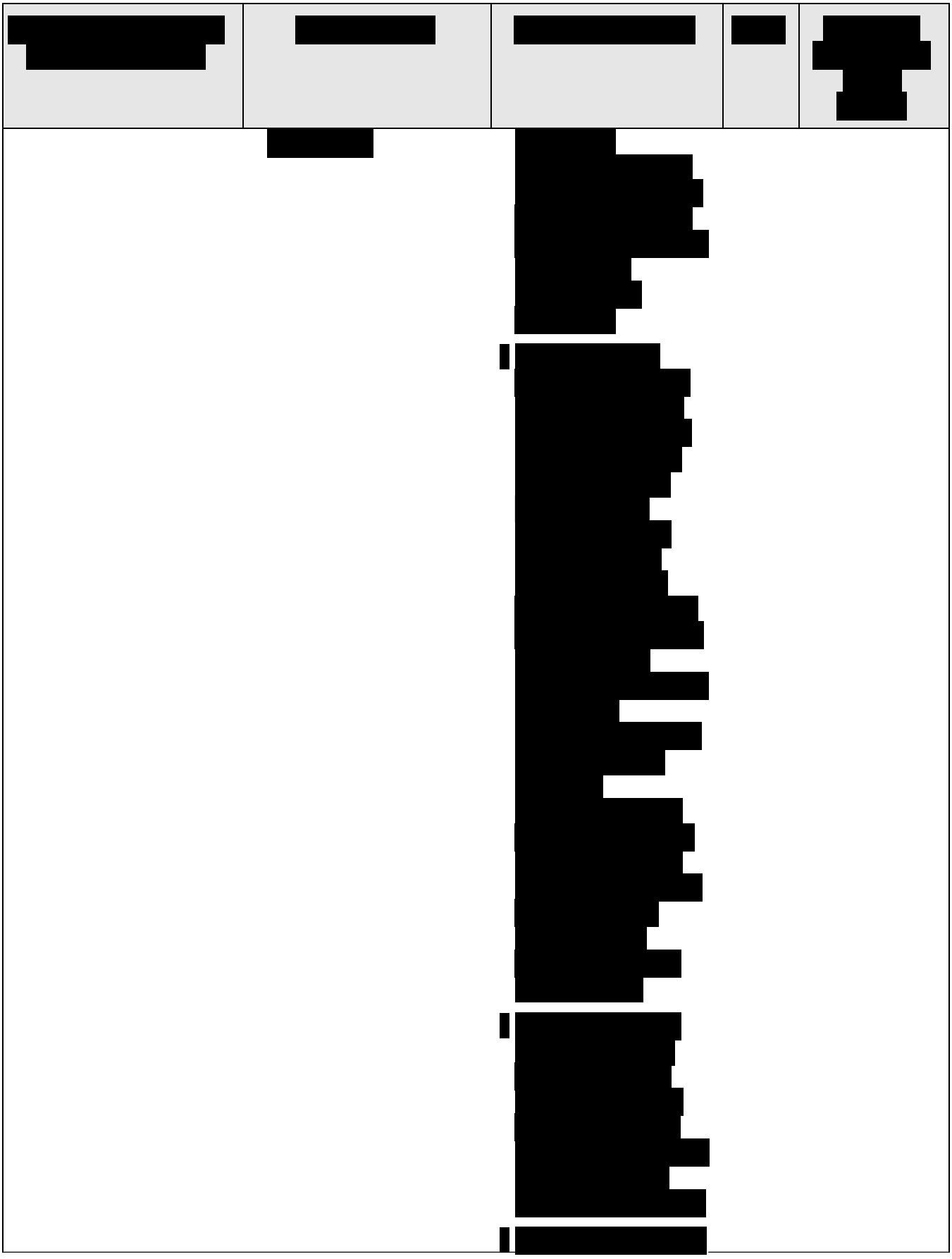

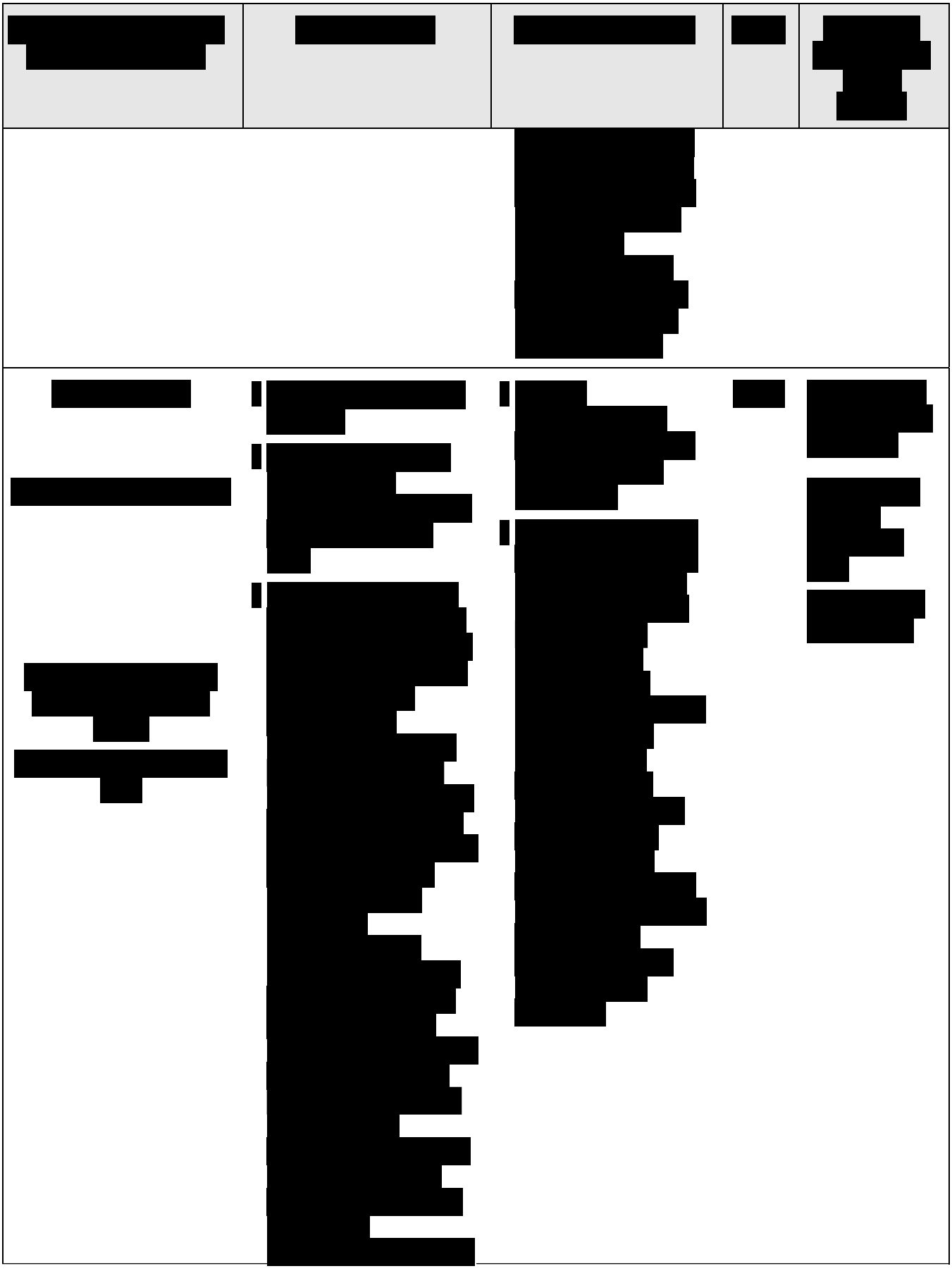

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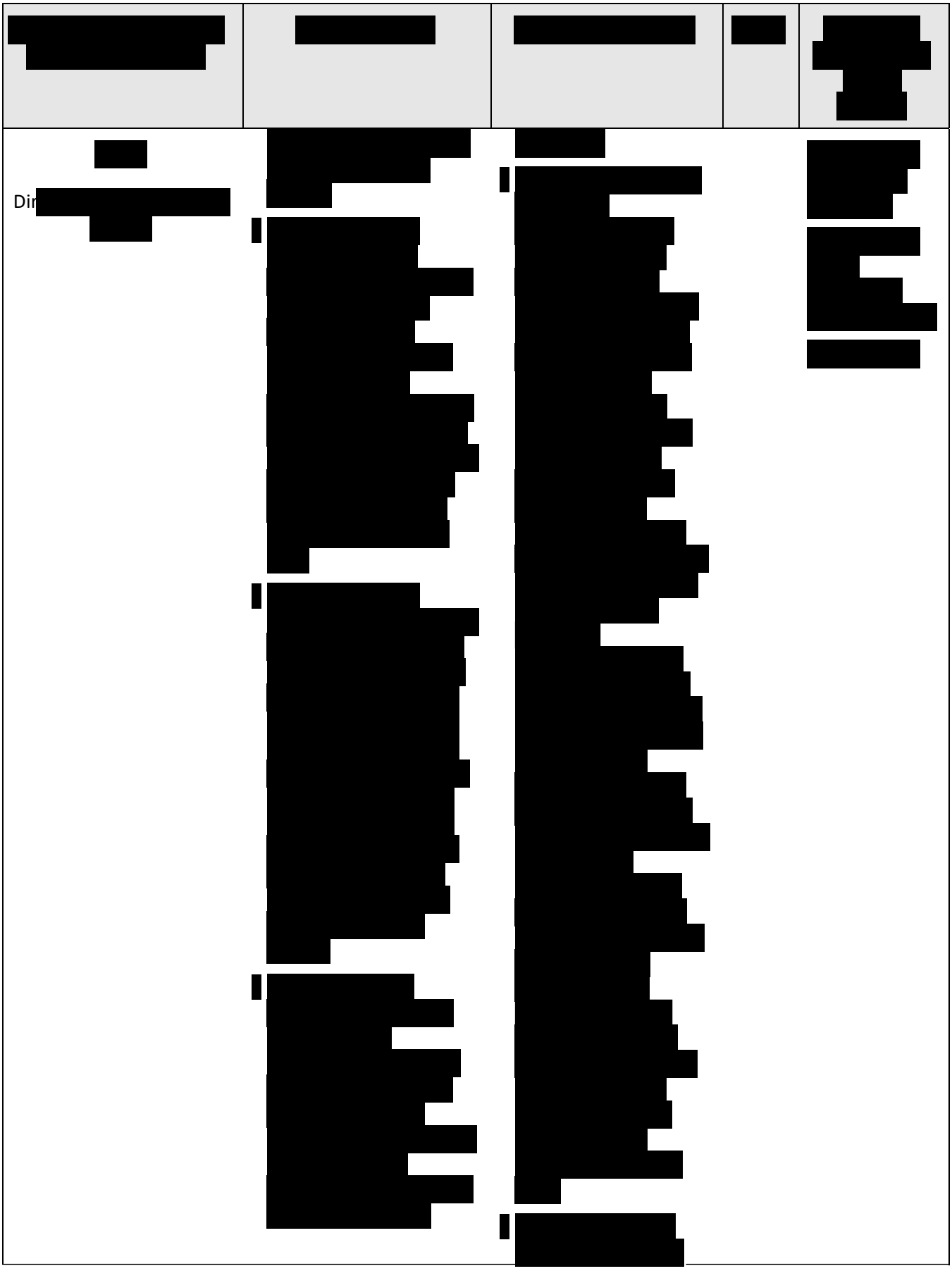

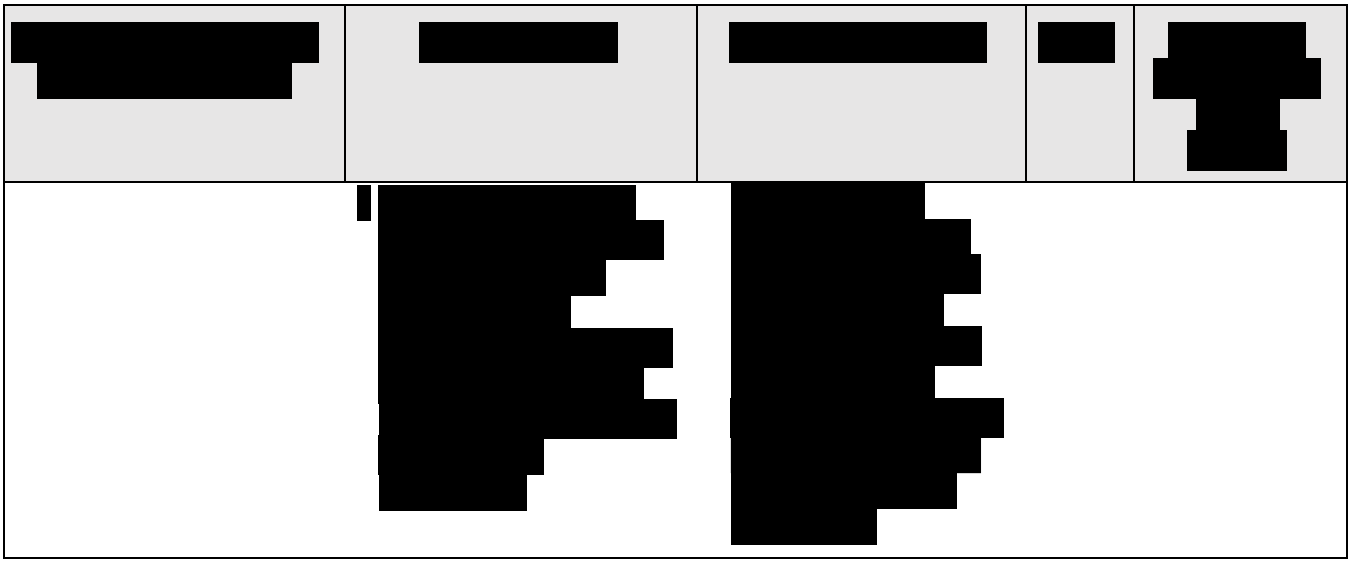

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I. THE CLAIMANTS' ALLEGATIONS AS TO THE RESPONDENT'S HARASSMENT ARE UNSUBSTANTIATED

480. In their Reply, the Claimants assert that Mr. Seda has been subjected to a "continuing campaign of harassment by the State", referring that "he has been extorted, his family has been threatened, there was an attack on his life which Colombian authorities refused to investigate."[682] As the Respondent shall explain, all of the purported grounds cited by the Claimants to support their harassment allegations stand no analysis when confronted with the facts documented in the record.

481. As shall be shown below, notwithstanding the Claimants' selective portrayal of the facts, truth remains that what the Claimants and Mr. Seda seek to portray under false pretense Colombia's acts of retaliation, are nothing but the consequences of Mr. Seda's own omissions. Further, contrary to what the Claimants have argued, Colombia has afforded Mr. Seda reasonable protections to his security and that of his family.

482. During this section, the Respondent shall demonstrate that: Colombia did not grant Mr. Seda's investor visa as a result of Mr. Seda's own conduct (**a**); Colombia duly investigated Mr. Seda's complaints relating to the threats he had allegedly suffered, regardless of Mr. Seda's lack of

682 Reply, ¶ 456.

cooperation (**b**) and what Mr. Seda portrays as retaliatory investigations are in fact related to a request for investigation sent to Colombia by his own government, acting through the Federal Bureau of Investigation (**c**).

1. The reason for the denial of Mr. Seda's visa was his own negligence

483. The Claimants' paranoia goes as far as to claim that "Colombia has retaliated against [Mr. Seda] for filing this Arbitration by among other things, declining to renew my investor visa".[683] Unsurprisingly, this allegation is simply incorrect. Mr. Seda's visa application was not rejected as part of a harassment scheme, but rather as a result of Mr. Seda's own negligence.

484. [redacted]

485. [redacted]

683 *See* Seda Second Witness Statement, ¶ 46. *See also* Claimants' Reply, ¶ 452.

684 [redacted]

685 [redacted]

686 Claimants' Reply, ¶ 452.

[redacted]

486. [redacted] Against this backdrop, the Claimants' allegation that the Respondent "*recently declined to extend* [Mr. Seda's] *investor visa on spurious grounds*" is disingenuous.[689]

487. Yet again, Mr. Seda intends to shift the burden of his own negligence and omissions onto Colombia's shoulders, in plain collision with the facts. Mr. Seda should not be allowed to rely on the consequences of his own failure to submit the relevant documents and even his geographical location to accuse Colombia of retaliation.

2. Mr. Seda was offered protection by the Colombian government, and his complaint was investigated regardless of his own lack of cooperation

488. Further, the Claimant's allegations as to the attack on his life and the Colombian authorities' purported refusal to investigate the alleged attack on his life are also unavailing.[690] As a preliminary question, it is important to highlight that the Claimants have failed to point at one piece of evidence linking the alleged attack on Mr. Seda's life to the Meritage case, save for Mr. Seda's speculations as to the involvement of Mr. López Vanegas, as reflected in his complaint.[691] As to the Claimants' arguments regarding the Colombian authorities' purported deliberate refusal to investigate, these should also be rejected.

489. *First,* the Claimants' allegations are disproven by the evidence in the record. As demonstrated in the Counter Memorial, following Mr. Seda's complaint regarding the alleged "terrifying assassination attempt" against Mr. Seda[692] and the alleged threats against his daughter, the Attorney General's Office issued an order to the Police Commander to "adopt the necessary

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687 [redacted]

688 Claimants' Reply, ¶ 452.

689 Claimants' Reply, ¶ 452.

690 Reply, ¶ 456.

691 Angel Seda Statement attached to Request for Police Protection, 11 October 2017 (**Exhibit C-202**).

692 Claimants' Reply, ¶ 378

measures for the protection of Mr. Seda and his family".[693] The protection order expressly stated that it was not subjected to any expiration date.[694]

490. [redacted]

491. Against this background, the Claimants' allegations based solely on Mr. Seda's self-serving statements and representations are untenable.

492. In their Reply, the Claimants allege that Mr. Seda "was quite literally chased out of Colombia because of fears to his life".[698] Once again, the Claimants' excessive argumentative zeal results in a claim that is plainly inconsistent with the facts.

493. [redacted]

693 Counter Memorial, ¶ 542.

694 Angel Seda Statement attached to Request for Police Protection, 11 October 2017 (**Exhibit C-202**).

695 Respondent's Counter Memorial, ¶ 543.

696 [redacted]

697 [redacted]

698 Claimants' Reply, ¶ 379.

[redacted]

494. Moreover, during the meetings that Mr. Seda recently held with members of the Attorney General's Office (as registered in the transcripts on which the Claimants so heavily rely) Mr. Seda himself plainly reassured all attendees of his interest in continuing to invest in Colombian real estate in the future.[700] Clearly, an intention completely incompatible with the purported intention to flee from Colombia portrayed by the Claimants in their Reply.

3. Colombia's investigations involving Mr. Seda respond to Colombia's duty to investigate complaints or reports of unlawful conduct

495. Finally, the Claimants' suggestions that Mr. Seda was "apparently made the subject of an entirely frivolous investigation into his alleged involvement in drug trafficking and money laundering" is again belied by the evidence.[701]

496. *First,* Colombia has investigated Mr. Seda based on complaints received by the Attorney General's Office regarding complaints of unlawful conduct by Mr. Seda, which Colombia is obliged to diligently investigate through the Attorney General's Office and its Judicial Police corps. However, some of these complaints were filed prior to the initiation of this arbitration; therefore, the allegation that these investigations constitute a retaliation for having commenced these proceedings is untenable.[702]

497. As regards other investigations commenced after this arbitration began, they respond simply to Colombia's duties to investigate complaints filed by individuals. Naturally, Colombia is not responsible for the decisions by private parties to submit complaints before the Attorney General's Office. [redacted]

699 [redacted]

700 [redacted]

701 Claimants' Reply, ¶ 379.

702 [redacted]

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500. In sum, the Claimants' attempts to portray Mr. Seda as a victim of an abusive State are to no avail- a brief review of the facts suffices to show that the acts portrayed by Mr. Seda as alleged harassment by Colombia are nothing but the result of his own omissions; this, and not a purported strategy to retaliate against Mr. Seda, is the reason why he was denied his incorrect visa application and why the investigations regarding his complaint have stalled, as pointed out by the very Prosecutor responsible for these investigations. As to the "frivolous" investigations conducted against him, it is curious that Mr. Seda submits these claims in this arbitration, when these investigations have only consisted of Colombia's response to a request by Mr. Seda's own government.

IV. THE ARBITRAL TRIBUNAL LACKS JURISDICTION OVER THE CLAIMANTS AND THEIR CLAIMS ARE INADMISSIBLE

501. As demonstrated in the Respondent's Counter Memorial, the Arbitral Tribunal's jurisdiction is based on, and subject to, the consent of the Parties. In this case, the Claimants brought claims against the Respondent on the basis of the ICSID Convention and the TPA. Accordingly, the Claimants bear the burden of proving that the jurisdictional requirements set out in both the ICSID Convention and the TPA are met.[711]

502. The Claimants do not – and could not – dispute these basic principles of international adjudication. Yet, the Claimants insist on the Tribunal's jurisdiction to decide the dispute, even though the jurisdictional requirements set forth in neither the ICSID Convention nor the TPA have been met. In particular, the Claimants have not made an "investment" as required under the TPA and the ICSID Convention (**IV.A**) and, in any case, the vast majority of the claims do not concern the Meritage Project (**IV.B**). In any event, neither Mr. Brian Hass (**IV.C**) nor the Boston Enterprises Trust are entitled to bring investment claims before this Tribunal (**IV.D**).

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709 [redacted]

710 *See above,* Section III.A.

711 *See* Respondent's Counter Memorial, ¶¶ 242-243.

503. For the sake of good order, the Respondent confirms that the Claimants have now provided (i) new copies of the passports of Messrs. Stephen John Bobeck,[712] Monte Glenn Adcock[713] and Timothy Enbody;[714] (ii) more recent certificates of existence and good standing of Royal Realty[715] and Newport;[716] and (iii) a certificate of good standing of JTE International Investments.[717] The Respondent, however, strongly objects to the Claimants' representation that they were reticent to disclose the information necessary to establish jurisdiction "[o]wing to Colombia's retaliatory measures against Mr. Seda".[718] As demonstrated below, the Claimants' allegations that Colombia adopted "retaliatory measures" against Mr. Seda is unsubstantiated.

504. As a preliminary matter, the Respondent contests the Claimants' assertion that the the United States filed a non-disputing party submission in this Arbitration on 26 February 2021 pursuant to Article 10.20.2 of the TPA (the "US NDPS"),[719] is not a binding interpretation of the TPA in the terms of Article 10.22.3 of the TPA.[720] The Claimants' allegation that the Tribunal "should give

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712 *See* United States Passport of Stephen Bobeck, 18 April 2012 (**Exhibit C-349**); United States Passport of Stephen Bobeck, 16 March 2007 (**Exhibit C-085**); Respondent's Counter Memorial, ¶ 245. We note the new version of Mr. Bobeck's passport produced with the Claimants' Reply (**Exhibit C-349**) was issued in 2017, five years before the expiration of his previous passport (**Exhibit C-085**). The year of birth seems to differ between the two versions (1960 in Exhibit C-085, 1950 in Exhibit C-349).

713 *See* United States Passport of Monte Adcock, 3 December 2020 (**Exhibit C-348**); United States Passport of Monte Adcock, 1 September 2000 (**Exhibit C-076**); Respondent's Counter Memorial, ¶ 245.

714 *See* United States Passport of Justin Enbody, 28 January 2015 (**Exhibit C-350**); United States Passport of Justin Enbody, 20 May 2005 (**Exhibit C-082**); Respondent's Counter Memorial, ¶ 245.

715 *See* Royal Realty S.A.S. Certificate of Existence and Good Standing, 29 December 2020 (**Exhibit C-356);** Royal Realty S.A.S. Certificate of Existence and Good Standing, 20 December 2017 (**Exhibit C-012bis**); Respondent's Counter Memorial, ¶ 245.

716 *See* Newport S.A.S. Certificate of Existence and Good Standing, 8 May 2019 (**Exhibit C-357**); Newport S.A.S. Certificate of Existence and Good Standing, 6 October 2017 (**Exhibit C-014bis**); Respondent's Counter Memorial, ¶ 245.

717 *See* JTE International Investments, LLC Certificate of Existence and Good Standing, 1 May 2021 (**Exhibit C-353**); JTE International Investments, LLC Organizational Meeting of the Member, 30 June 2013 (**Exhibit C-354**); Letter from the Internal Revenue Service to JTE International Investments, LLC, 12 June 2013 (**Exhibit C-355**); Respondent's Counter Memorial, ¶ 245.

718 *See* Claimants' Reply, ¶ 162.

719 *See* Submission of the United States of America, 26 February 2021, ¶ 1.

720 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.22.3 ("A decision of the Commission declaring its interpretation of a provision of this Agreement under Article 20.1.3 (Free Trade Commission) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision").

limited weight, if any" to the US NDPS and similar submissions filed by the United States in other arbitrations where the same or similar treaties were applicable is unavailing.[721]

505. It is not disputed that the US NDPS as such is not binding on this Tribunal. Neither is it disputed that "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".[722] Yet, contrary to the Claimants' allegations, that does not render the interpretation of the TPA by the non-disputing contracting Party worthless. In fact, the US NDSP should be considered by the Tribunal when interpreting and applying the TPA.

506. To recall, Article 31 of the Vienna Convention on the Law of Treaties ("VCLT") sets out the general rule of treaty interpretation. In its relevant part, Article 31 of the VCLT provides as follows:

> 1. A treaty shall be interpreted 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.
>
> […]
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

507. To the extent that both contracting parties to the TPA coincide in the interpretation of certain rules – *i.e.*, as expressed by the United States in its NDPS and by Colombia – this should be regarded as evidence of an agreement of the contracting parties regarding the interpretation of the treaty or the application of its provisions. Moreover, the US NDPS may be evidence of subsequent practice in the application of the TPA, in particular with respect to those issues regarding which the United States has historically and publicly (*e.g.*, in previous NDPSs) held a

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721 *See* Claimants' Reply, ¶¶ 313-314.

722 *The Renco Group Inc v. Republic of Peru,* UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (**Exhibit CL-180**), ¶156, as cited in Claimant's Reply, ¶ 313.

consistent position. In either case, the Tribunal should take into account the US NDSP when interpreting the TPA.

508. Moreover, to the extent that the US NDPS reflects customary international law (or the lack thereof) on many points, these principles of international law identified by the United States are binding on the Tribunal as part of the "applicable rules of international law" to be considered by the Tribunal when deciding the issues in dispute.[723]

A. THE CLAIMANTS HAVE NOT MADE AN "INVESTMENT" AS REQUIRED UNDER THE TPA AND THE ICSID CONVENTION

509. In its Counter Memorial, the Respondent demonstrated that the Tribunal lacks jurisdiction over the dispute because the Claimants have not made an "investment" under the TPA and the ICSID Convention. In particular, the Claimants have not made any economic contribution or commitment of capital or resources and did not assume an investment risk.[724]

510. While the Claimants agree that, under the TPA, an asset must have the "characteristics of an investment" in order to be afforded investment protection,[725] they argue that the TPA incorporates a "broad definition" of "investment" and that none of the characteristics listed in the TPA's definition of "investment" is "indispensable", so "a global assessment" is to be performed to determine whether an asset is to be afforded investment protection.[726] The Claimants further argue that the ICSID Convention does not impose additional jurisdictional requirements beyond those included in the TPA. Therefore, the Claimants claim to have made an investment comprised of a "bundle of rights".[727]

511. As demonstrated below, there are two independent reasons to conclude that the Claimants have not established that they have made a protected investment under the TPA and the ICSID Convention: *first*, the Claimants' purported "investment" does not have the "characteristics of an

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723 *See* United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.22.1 ("Subject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law").

724 *See* Respondent's Counter Memorial, ¶¶ 247-266.

725 *See* Claimants' Reply, ¶ 167.

726 *See* Claimants' Reply, ¶ 169.

727 *See* Claimants' Reply, ¶¶ 164-178.

investment" (**IV.A.1**), and *second*, the extent of the Claimants' rights over Royal Realty, Newport and Luxé has not been duly established (**IV.A.2**).

1. The Claimants' purported "investment" does not have the "characteristics of an investment"

512. As demonstrated in the Counter Memorial and further below, the Claimants' purported "investment" does not have the "characteristics of an investment" and, therefore, cannot qualify for protection under the TPA and the ICSID Convention.

513. *First*, as shown in the Counter Memorial, arbitral case law has confirmed in a reiterated manner that the term "investment" in Article 25 of the ICSID Convention has an inherent meaning and implies, at least a contribution by the investor, a certain duration, and an assumption of risk.[728]

514. Thus, as held by the tribunal in *Seo v. Korea* on which the Claimants rely, if an investor chooses to resort to ICSID arbitration, "this does not affect the interpretation of the term 'investment' within the meaning of the [investment treaty], but rather adds an additional requirement whereby there must also be an investment within the meaning of the ICSID Convention."[729]

515. *Second*, even assuming that the ICSID Convention does not impose an autonomous definition of "investment", the Claimants would still need to show that their purported investment has "the characteristics of an investment", including the commitment of capital, the expectation of gain or profit and the assumption of risk.

516. Investment tribunals that rejected the autonomous meaning of the term "investment" in Article 25 of the ICSID Convention, have referred to the definition of "investment" agreed upon in the relevant instrument of consent.[730] It is undisputed that the instrument of consent in this

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728 *See* Respondent's Counter Memorial, ¶ 252.

729 *See Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019 (**Exhibit CL-134**), ¶ 100. Notably, the case was administered by the Hong Kong International Arbitration Centre and the UNCITRAL Rules applied. The tribunal expressly pointed out that the ICSID Convention was not applicable in that case and, hence, the *Salini* criteria were inapposite.

730 *See*, *e.g.*, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 (**Exhibit CL-141**), ¶ 130 ("in most cases—including, in the Tribunal's view, this one—it will be appropriate to defer to the State parties' articulation in the instrument of consent (*e.g.* the BIT) of what constitutes an investment"); *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018 (**Exhibit CL-142**), ¶ 193 ("in most cases, including this one, it is appropriate to defer to the State parties' definition

Arbitration, *i.e.* the TPA, requires that for an asset to be considered an "investment" it must have "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".[731] Yet, the Claimants argue that none of the "characteristics of an investment" listed in the TPA is "indispensable", but that a "global assessment" is required to determine whether an asset is to be considered an investment.[732] The Claimants rely solely on the findings in *Seo v. Korea*.

517. Notably, in that case the tribunal stressed that the global assessment to determine whether an asset is to be considered an "investment" should start with all the "characteristics of an investment" expressly listed in the relevant treaty:

> [T]he prudent course of action is a global assessment of which characteristics are present and how strongly they show in the asset in question. In doing so, one should start with the three listed characteristics because they were deemed particularly important by the drafters of the [treaty], before looking into any other characteristics that may also be present.[733]

518. The *Seo v. Korea* tribunal also noted that in addition to assessing the three characteristics expressly included in the Korea-US FTA, *i.e.* a commitment of capital, expectation of gain or profit

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of investment as supplied in the BIT"); *Hassan Awdi, Enterprise Business Consultants, Inc., and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015 (**Exhibit RL-73**), ¶ 197 ("the Tribunal considers that the principal legal framework to determine the existence of an 'investment' must lie in the will of the Parties as set forth in the definition of an 'investment' under the BIT as long as such will is compatible with Article 25 of the ICSID Convention"); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 Noevmber 2010 (**Exhibit CL-77**), ¶¶ 313, 315 ("in most cases - including, in the Tribunal's view, this one – it will be appropriate to defer to the States' definition of investment in a BIT or a contract. […] the Tribunal shall proceed on the basis that, where a claimed investment satisfies the UABIT's definition of investment (as we have held above that it does here), it is also consistent with the ICSID Convention's understanding of investment"); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012) (**Exhibit CL-136**).

731 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10-28. Notably, an "investment" under the TPA may take diverse forms, provided that it has the "characteristics of an investment". This means that the assessment of the "characteristics of an investment" should prevail over the form of the asset. See, *e.g.*, footnotes 12 and 14. This was further confirmed by the United States: "The enumeration of a type of an asset in Article 1, however, is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess 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".

732 *See* Claimants' Reply, ¶ 169.

733 *See Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019 (**Exhibit CL-134**), ¶ 96 (emphasis added).

and assumption of risk, "there is force to the argument that the further, undefined 'characteristics of an investment' within the meaning of [the investment treaty] permits consideration of at least one other criterion mentioned in Salini": certain duration.[734]

519. Ultimately, the *Seo v. Korea* tribunal found that a purported investment that only had one characteristic, *i.e.*, "some contribution of capital", and where "both the expectation of gain or profit and the assumption of risk are very weak", did not meet the requirements under the Korea-US FTA.[735]

520. *Third*, adopting the "global assessment" test to the Claimants' purported investment would lead to the same conclusion as in *Seo v. Korea*: that the Claimants do not own or control a protected investment.

521. Before conducting the "global assessment", it should be noted that in order for an asset to qualify as a protected investment, the "characteristics of an investment" present in that asset "must go beyond the features that any asset automatically has. Otherwise, the requirement of the asset showing the characteristics of an investment would be rendered meaningless".[736] With this in mind, the Respondent will demonstrate that the Claimants' purported investment does not have any of the "characteristics of an investment":

2. <u>*Commitment of capital or other resources*</u>: the Claimants have still not provided any evidence that they made any significant contribution of capital or other own resources into the Meritage Project. In fact, it has been demonstrated that the Claimants' do not even possess *in rem* rights over the Meritage Lot, against which the Asset Forfeiture Proceedings were initiated.[737]

522. As noted in the Counter Memorial, while the financial statements of Newport record less than USD 2 million paid by "the shareholders" between 2013 and 2017, there is no evidence that this

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734 *See Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019 (**Exhibit CL-134**), ¶ 101. *See also The Carlyle Group L.P. and others v. Kingdom of Morocco*, ICSID Case No. ARB/18/29, Submission of the United States of America, 4 December 2020 (**Exhibit RL-204**), ¶ 13 (noting that the word "including" in the provision indicates that the list of "characteristics of an investment" is not an exhaustive list and additional characteristics may be relevant).

735 *See Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019 (**Exhibit CL-134**), ¶¶ 138-139.

736 *See Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019 (**Exhibit CL-134**), ¶ 130.

737 *See above,* Section III.A.

amount was "contributed" by any or all the Claimants or in what proportion. The Claimants did not even make an attempt at clarifying this point in their Rejoinder.[738] On the contrary, it is clear that the Claimants intended to finance the Meritage Project with third party resources, including bank loans and presales of units. As such, the Claimants have failed to meet their burden of establishing the Tribunal's jurisdiction.

523. Even assuming that the nearly USD 2 million were indeed provided by *all* the Claimants (a fact that has not been proven), the alleged contribution is still insignificant. As noted by the *Seo v. Korea* tribunal:

> [I]t is relevant how significant the commitment of capital or other resources is. [I]f the capital or resources committed are incapable, because of their insignificance, of contributing in any meaningful way to the objectives of the [investment treaty], this will usually make it very difficult for the investor to demonstrate that such commitment was intended to be afforded protection under the [investment treaty].[739]

524. Moreover, the Claimants' contribution of "'other resources' beyond an injection of capital"[740] is also negligible. Indeed, both the alleged "know how and brand value" are highly overstated and, if anything, were only "contributed" by Mr. Seda and not by any of the other Claimants. As acknowledged by the Claimants, Mr. Seda had so far developed only one hotel in Colombia: the Charlee Hotel. Most of the Claimants have not proven any link to the Charlee Hotel. More importantly, the Meritage Project has no proven link to the Charlee Hotel and was a very different project in scope and nature, so that neither the know how acquired nor the brand value would have contributed to the success of the Meritage Project.[741]

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738 *See* Respondent's Counter Memorial, ¶ 156.

739 *See Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019 (**Exhibit CL-134**), ¶¶ 104-105.

740 *See* Claimants' Reply, ¶ 176.

741 [redacted]

525. *Assumption of risk*: as demonstrated in the Counter Memorial and uncontested by the Claimants, the investment risk is closely connected to the contribution of value.[742] The risk has to be qualified and strictly related to the investment. Certain general risks, such as "the risk of an asset declining in value",[743] the risk of an asset being expropriated,[744] or the risk of being subject to the laws of the host State[745] are not considered an "investment risk". Conversely, an "investment risk" implies subjecting assets to the sovereign authority of the host State, as noted by the tribunal in *Casinos Austria v. Argentina*:

> The specific risk in question arises out of the fact that certain long-term forms of economic involvement in a host State (which are termed "foreign investment") require foreign nationals to place their economic activities and assets upfront under the sovereign authority of the host State in order to recoup economic returns over time. It is the investment-specific risk stemming from the non-synallagmatic nature of investor-State relations that the ICSID Convention aims, if not to minimize, at least to make more manageable by

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742 *See* Respondent's Counter Memorial, ¶ 261. *See also KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 (**Exhibit RL-65**), ¶ 219 ("in the absence of any contribution of some economic value it is difficult to identify an investment risk").

743 *See Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019 (**Exhibit CL-134**), ¶ 130 ("the Claimant invoked the risk that the value of the Property would decline after the purchase. While this may certainly be a risk that is relevant to a property owner, the Tribunal agrees with the Respondent that for the purpose of the KORUS FTA, this risk alone cannot be sufficient because it is inherent in the purchase of *any* asset. Article 11.28 of the KORUS FTA is clear in that an asset only qualifies as an investment if it has certain characteristics, such as the assumption of risk. Those characteristics, including the assumption of risk, must go beyond the features that any asset automatically has. Otherwise, the requirement of the asset showing the characteristics of an investment would be rendered meaningless. Therefore, the risk of an asset declining in value cannot be the type of risk that the drafter of the KORUS FTA had in mind").

744 *See Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019 (**Exhibit CL-134**), ¶ 131 ("the Claimant submitted that by acquiring the Property, she assumed the risk of it being expropriated. In the Tribunal's view, if one acquires an asset in another State, this always creates the risk of such asset being expropriated. As a consequence, the reasoning from the previous paragraph applies. If one found that this type of risk qualifies for the purposes of Article 11.28 of the KORUS FTA, the characteristic of an assumption of risk would be rendered meaningless. The Tribunal does not accept that this was the intention of the drafters of the KORUS FTA").

745 *See Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019 (**Exhibit CL-134**), ¶ 132 ("at the Hearing, the Claimant added that a further risk materialized when an execution officer entered the Claimant's house to serve the Seoul Western District Court's injunction on her. According to the Claimant, this hostile incident led her to waive the rent otherwise payable to her by [redacted]. The Tribunal accepts that by acquiring the Property, the Claimant assumed the risk of being subject to Korean laws (which in this case apparently allowed for that entry into her house). However, once again, this is a risk inherent in any asset acquired in the host State. Accordingly, the Tribunal finds it difficult to accept that the risk of being subject to the laws of the host State qualifies as a risk within the meaning of Article 11.28 of the KORUS FTA").

> providing a mechanism for settling disputes between investors and host States.[746]

526. The Claimants contend that they "assumed the risk that they could not receive an amount equal to or greater than their invested capital".[747] As noted by the *Seo v. Korea* tribunal, this "*cannot be the type of risk that the drafter of* [an investment treaty] *had in mind*".[748]

527. In any event, the Claimants have failed to show that they have made any significant contribution, so the risk undertaken, if any, is negligible.

528. *Expectation of gain or profit*: in the absence of any commitment of capital and other resources and assumption of risk, a mere expectation of gain or profit cannot be sufficient to establish an investment. The contrary would mean that buying a lottery ticket or gambling in a casino – both activities performed with the expectation of gain or profit – are to be considered protected investments. Clearly, this could not have been the intention of the treaty drafters and it cannot be endorsed by the Tribunal.

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746 *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018 (**Exhibit RL-190**), ¶ 188 (emphasis added). See also Romak S.A. v. The Republic of Uzbekistan, PCA Case No. AA280, Award, 26 November 2009 (**Exhibit RL-39**), ¶¶ 229-230 ("All economic activity entails a certain degree of risk. As such, all contracts - including contracts that do not constitute an investment - carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction. An "investment risk" entails a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is "risk" of this sort, the investor simply cannot predict the outcome of the transaction").

747 *See* Claimants' Reply, ¶ 178.

748 *See Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 24 September 2019 (**Exhibit CL-134**), ¶ 130 ("the Claimant invoked the risk that the value of the Property would decline after the purchase. While this may certainly be a risk that is relevant to a property owner, the Tribunal agrees with the Respondent that for the purpose of the KORUS FTA, this risk alone cannot be sufficient because it is inherent in the purchase of *any* asset. Article 11.28 of the KORUS FTA is clear in that an asset only qualifies as an investment if it has certain characteristics, such as the assumption of risk. Those characteristics, including the assumption of risk, must go beyond the features that any asset automatically has. Otherwise, the requirement of the asset showing the characteristics of an investment would be rendered meaningless. Therefore, the risk of an asset declining in value cannot be the type of risk that the drafter of the KORUS FTA had in mind").

2. The extent of the Claimants' rights over Royal Realty, Newport and Luxé has not been duly established

529. According to the Claimants, their investment was "comprised of shares in Colombian enterprises as well as contractual and property rights emanating from these enterprises" and owned through those enterprises.[749] Despite this allegation, the Claimants have not shown that they have any unencumbered rights over the shares in Royal Realty, Newport and Luxé.

530. By the time the request for arbitration was filed on 25 January 2019, most of the shares that the Claimants allegedly hold in Newport and Luxé had been pledged as a collateral in favour of Downie North LLC.[750] Even though the Claimants were ordered to produce "Documents reflecting, containing, evidencing or relating to the circumstances under which many of the Claimants' shares in Newport and Luxé have been pledged as a collateral in favour of Downie North LLC",[751] the only documents produced by the Claimants confirm that Mr. Seda pledged all of his shares in Royal Realty, as well as any other share in Royal Realty that Mr. Seda would receive in the future, in favor of Downie North, LLC.[752] No further documents were produced by the Claimants to show the circumstances under which the shares were pledged, the extent of the rights transferred to Downie North, LLC, the motives underlying the pledges or the nationality of Downie North, LLC.

531. Having failed to provide any evidence to clarify the role and extent of the rights of Downie North, LLC, over the Claimants' alleged investment, it cannot be assumed that the Claimants had, at all

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749 *See* Claimants' Reply, ¶ 167.

750 *See* Royal Realty S.A.S. Share Ledger, 13 December 2016 (**Exhibit C-180**), p. SP-0004 (the pledge was registered on 26 February 2018); Newport S.A.S. Share Ledger, 15 January 2019 (**Exhibit C-227**), pp. SP-0003, SP-0004, SP-0008, SP-0013 (the pledge of Royal Realty's shares was registered on 24 April 2018 and cancelled on 6 November 2018, JTE International Investments LLC and Mr. Foley registered the pledge of their shares on 6 November 2018); Luxé By The Charlee S.A.S. Share Ledger, 15 January 2019 (**Exhibit C-226**), pp. SP-0002, SP-0012, SP-0021, SP-0022 (the pledge Royal Realty's shares was registered on 9 March 2018, of the shares of Messrs. Bobeck, Enbody, and Adcock on 6 November 2018, and of Mr. Caruso's shares on 18 December 2018 and of the shares of Haystack Holdings LLC on 27 December 2018).

751 *See* Procedural Order No. 2, 18 February 2021, Request 11.

752 *See* Notification from Confecamaras to Downie North, LLC on the Inscription Form for the Initial Inscription, 6 March 2018 (**Exhibit R-128**); Inscription Form for the Initial Inscription, 6 March 2018 (**Exhibit R-129**).

relevant times, control over the shares they claim to hold in Royal Realty, Newport and Luxé.[753] Conversely, and despite the Claimants' active efforts to hide/downplay its role, Downie North seems to be an important actor within the Claimants' structure. In fact, the few relevant documents produced by the Claimants in document production show that the insurance against adverse costs was made in favor of Downie North Investments, Ltd., a company domiciled in Cayman Islands.[754]

532. Against this background, and given the Claimants' lack of transparency as to the role of Downie North in the structure and its rights over the Claimants' alleged investment (assuming *quod non* that they had made a protected investment), the Claimants have failed to establish that they had any relevant rights over their shares in Royal Realty, Newport and Luxé at the time they initiated this arbitration against the Respondent.

B. THE VAST MAJORITY OF THE CLAIMS DO NOT CONCERN THE MERITAGE PROJECT

533. In its Counter Memorial, the Respondent objected to the Tribunal's jurisdiction over the Claimant's claims that do not directly concern the Meritage Project.[755] As noted, only 25% of the Claimants' damages claims concern damages in connection with the Meritage Project – the remaining claims fall outside the Tribunal's jurisdiction.

534. The Claimants do not contest that only one quarter of the claims concern the Meritage Project. However, they argue that the remaining claims fall within the Tribunal's jurisdiction because the Asset Forfeiture Proceedings against the Meritage Project had "an impact" on the Claimants'

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753 For example, under Colombian law, the pledgee could replace the shareholders, including with respect to the shareholders' inherent rights. *See* Colombian Commercial Code, 1971 (**Exhibit R-2),** Article 411 ("pledge shall not confer to the creditor the rights inherent to the shareholders, except by virtue of an express stipulation or agreement. The document including the corresponding agreement will be sufficient to exercise the rights conferred to the creditor; and when it comes to bearer shares, said document will be sufficient for the debtor to exercise the shareholder rights not conferred to the creditor") ("*La prenda no conferirá al acreedor los derechos inherentes a la calidad de accionistas sino en virtud de estipulación o pacto expreso. El escrito o documento en que conste el correspondiente pacto será suficiente para ejercer ante la sociedad los derechos que se confieran al acreedor; y cuando se trata de acciones al portador, dicho documento será suficiente para que el deudor ejerza los derechos de accionista no conferidos al acreedor*").

754 *See* Legal Expenses Insurance Policy (**Exhibit R-235**); Attachment to Legal Expenses Insurance policy (**Exhibit R-236**).

755 *See* Respondent's Counter Memorial, ¶¶ 263-266.

other projects (in particular the Luxé project) and Colombia "did not take any steps to minimize or mitigate" such impact.[756]

535. The Claimants' arguments contradict the plain text of the TPA and the ICSID Convention.

536. Pursuant to Article 25 of the ICSID Convention, the jurisdiction of the Centre extends to "any legal dispute arising directly out of an investment".[757] As interpreted by the tribunal in Fedax v. Venezuela, the term "directly" relates to the dispute and not to the investment, so "jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction".[758] In this case, the dispute arises out of measures with respect to the Meritage Project. Therefore, even if the Other Projects could be considered as protected investments (which is not the case, as most of the Other Projects were at very early stages of development and in some cases not even the land had been purchased[759]), to the extent that the dispute does not "directly" arise out of those purported investments, any claim with respect to the Other Projects falls outside of the Tribunal's jurisdiction.

537. A similar conclusion is reached under the TPA. Article 10.1.1. of the TPA provides that Chapter Ten (Investment) applies to "measures adopted or maintained by a Party relating to: (a) investors of another Party [or] (b) covered investments".[760] In *Methanex v. United States*, the tribunal

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756 *See* Claimants' Reply, ¶¶ 180-181.

757 ICSID Convention, Article 25.

758 *See Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997 (**Exhibit RL-157**), ¶ 24. *See also CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003 (**Exhibit RL-161**), ¶ 26 ("The ICSID Convention and the jurisdiction of the tribunal established under it were conceived as a system of adjudication of legal disputes arising directly out of an investment, a premise that is specifically included in Article 25(1) of that Convention. This definition excludes quite clearly two kinds of disputes. First, it excludes non-legal questions and, second, it excludes disputes that do not arise directly out of the investment concerned"); *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006 (**Exhibit RL-159**), ¶ 73 ("The requirement that the dispute arises directly from an investment is surely met when, as in the present case, the Claimant challenges some measures of the host State that affected directly the investment, in that they were applicable and were applied to such an investment").

759 *See*, *e.g.*, *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019 (**Exhibit RL-195**), ¶¶ 150-152; *Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award, 5 March 2020 (**Exhibit RL-198**), ¶¶ 301-302.

760 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.1.1, (emphasis added).

interpreted the phrase "relating to" to require "something more than the mere effect of a measure on an investor or an investment […] it requires a legally significant connection between them".[761]

538. This was confirmed by the United States in its non-disputing party submission:

> The 'relating to' requirement cannot be satisfied by the mere, or incidental, effect that a challenged measure had on a claimant. Rather, there must have been a "legally significant connection" between the measure and the investor or its investment. Otherwise, untold number of domestic measures that simply have an economic impact on a foreign investor or its investment would pass through the Article 10.1 threshold. As the Methanex tribunal aptly observed when interpreting the corollary scope provision of the NAFTA, "[a] threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all."[762]

539. The United States further confirms that the "legally significant connection" requirement is not satisfied by merely invoking a "[n]egative impact of a challenged measure on a claimant, without more", but rather "a more direct connection between the challenged measure and the foreign investor or investment" is required.[763]

540. In this case, the Claimants have failed to show such "legally significant connection" between the measure – the Asset Forfeiture Proceedings against the Meritage Project – and the vast majority of the Claimants and claims: many of the Claimants do not even have a connection to the

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761 *See Methanex Corporation v. United States of America*, UNCITRAL, First Partial Award, 7 August 2002 (**Exhibit RL-160**), ¶ 147 (emphasis added). The *Methanex* tribunal explained that this interpretation of the phrase "relating to" contemplated "the ordinary meaning of this phrase within its particular context and in the light of the particular object and purpose" of the investment treaty. *See also Bayview Irrigation District and Others v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007 (**Exhibit RL-167**), ¶ 101 (noting that "[t]he simple fact that an enterprise in one [] State is affected by measures taken in another [] State is not sufficient to establish the right of that enterprise to protection under [an investment treaty]: it is the relationship, the legally significant connection, with the State taking those measures that establishes the right to protection, not the bare fact that the enterprise is affected by the measures"); *William Ralph Clayton, Bilcon of Delaware, Inc., et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (**Exhibit CL-100**), ¶ 240 (describing the risks of overlooking the "relating to" requirement: "to relate to investors of another Party, it [is] not enough for a measure to have an economic impact on an investor. Such an approach would expose host states to claims not only from an investor affected directly by a government measure, but also for example, the investor's suppliers, the suppliers to the investor's suppliers, and so on"); *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, NAFTA, Award, 25 August 2014 (**Exhibit RL-71**), ¶ 6.13 (noting that "something more than a mere "effect" from the measure is required to overcome the jurisdictional threshold").

762 *See* Submission of the United States of America, 26 February 2021, ¶ 3 (emphasis added).

763 *See* Submission of the United States of America, 26 February 2021, ¶ 4.

Meritage Project, but only hold shares in Luxé; and many of the damages claimed by Mr. Seda concern his alleged losses in connection with his purported investments in other projects, most of which were in preliminary stages of development.[764]

541. As rightly pointed out by the Claimants,[765] these circumstances also affect the Claimants' claim to damages (due to lack of causation) and has been duly addressed in the Counter Memorial[766] (and will be further addressed below).[767] However, to the extent that the Claimants have failed to show a legally significant connection between most of the Claimants, their claims and the measures adopted by the Respondent, *i.e.*, the Asset Forfeiture Proceedings against the Meritage Project, the claims also fall outside of the Tribunal's jurisdiction.

542. The contrary would impose an unbearable burden on the Respondent, who would need to check, before initiating any asset forfeiture proceeding, all the other commercial projects in which the owners (nationals or foreigners) of the assets subject to asset forfeiture proceedings are involved, identify their business partners in all those projects, and take steps to minimize or mitigate any potential negative impact on any of them, lest any of them (or their shareholders) would feel entitled to bring a treaty claim against the Respondent (despite the clear lack of causation). Clearly, this could not have been the intention of the Contracting Parties when entering into the TPA.

543. Therefore, even if some of the Claimants would have experienced an economic impact following the initiation of the Asset Forfeiture Proceedings against the Meritage Project (which is denied), this "does not satisfy the standard" under Article 10.1.1.[768] Accordingly, assuming that the Tribunal has jurisdiction at all – which the Respondent respectfully denies – it could only render a decision concerning the Claimants' claims directly in connection with the Meritage Project. The Tribunal's jurisdiction does not extend to the Claimants' claims in connection with the Other Projects.

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764 *See* Respondent's Counter Memorial, ¶¶ 264-264.

765 *See* Claimants' Reply, ¶ 182.

766 *See* Respondent's Counter Memorial, Section V.B.

767 *See below,* Section VI.A.

768 *See* Submission of the United States of America, 26 February 2021, ¶ 4.

C. MR. HASS DOES NOT HAVE STANDING TO BRING CLAIMS BEFORE THIS TRIBUNAL

544. In its Counter Memorial, the Respondent showed that the Claimants had not met their burden of proof in connection with the claims brought by Mr. Hass. In fact, the only piece of evidence submitted by the Claimants along with their Memorial in support of Mr. Hass's standing in this Arbitration, raised more questions than answers.[769]

545. In an attempt to demonstrate Mr. Hass's standing in this Arbitration, the Claimants submitted additional documents along with their Reply.[770] While the new evidence provides clarity as to the structure of Mr. Hass's alleged investment in Luxé, it also confirms that Mr. Hass does not have standing in this Arbitration.

546. Pursuant to the new documents, Mr. Hass and Andrea Hass are the Settlors of The Hass Family Investment Trust, established under the laws of the Bahamas.[771] The Trustee, The Private Trust Corporation Limited, is the sole "member" of Haystack Holdings LLC, a limited liability company incorporated under the laws of Nevis.[772] Haystack Holdings LLC, in turn, holds 2 million shares in Luxé (2%).[773]

547. The new evidence also shows that the Hass Family Investment Trust was constituted as a discretionary trust.[774] Among others, this means that "no Beneficiary [] has any ascertainable right, title, or interest to any portion of the Trust Estate [] and the Trustees have the discretion to completely withhold distributions from any one Beneficiary".[775] Moreover, the Trustee has the

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769 *See* Respondent's Counter Memorial, ¶¶ 275-277.

770 *See* Claimants' Reply, ¶¶ 183-185.

771 *See* Trust Agreement of the Hass Family Investment Trust, 15 November 1999 (**Exhibit C-362**).

772 *See* Membership Certificate of Haystack Holdings LLC, 2 March 2005 (**Exhibit C-361**).

773 *See* Luxé By The Charlee S.A.S. Share Ledger, 15 January 2019 (**Exhibit C-226**), p. 22.

774 *See* Trust Agreement of the Hass Family Investment Trust, 15 November 1999 (**Exhibit C-362**), Article IV.A. (expressly setting out that "This is a discretionary trust").

775 *See* Trust Agreement of the Hass Family Investment Trust, 15 November 1999 (**Exhibit C-362**), Article IV.A. See also Third Schedule, pursuant to which "the Settlors 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 Settlors as the Settlors may from time to time jointly request in writing". Notably, Ms. Hass, who is also a Settlor and Beneficiary of the Trust, is not a Party to the arbitration.

power to "at any time [] declare that any Person or Persons [] be excluded from the class of the Beneficiaries for all the purposes of this Settlement".[776]

548. The situation at hand is very different to the one analyzed by the tribunal in *Blue Bank v. Venezuela*, on which the Claimants rely. As acknowledged by the Claimants, in that case the tribunal declined jurisdiction over the trustee on the basis that "[t]he party that would come closest to satisfying the requirements of 'ownership'" [was] the beneficiary".[777] Among others, the tribunal considered that the trustee's powers over the trust assets were "extremely limited"[778] as the trustee "ha[d] no power and no discretion over the trust assets".[779] In this case, however, even though Mr. Hass is referred to in the Trust Agreement as "Beneficiary" (notably, the terms "ultimate beneficial owner", "ultimate beneficiary" or "beneficial interest" are not used in the Trust Agreement), "this is a mere matter of semantics"[780] and cannot in itself grant standing to Mr. Hass.

549. On the contrary, the situation is very similar to the one analyzed by the tribunal in *Agarwal v. Uruguay*. In that case, the tribunal concluded that as discretionary beneficiaries of a discretionary trust, the claimants could not be considered as having made a protected investment.[781] This is because the rights of the claimants were subject to the decisions of a third party, the trustee, so the claimants did not have any direct right or interest over the trust assets, but a mere expectation. As noted by the *Agarwal* tribunal "an expectation is not an asset",[782] so it cannot be deemed a protected investment. Similarly, any rights that Mr. Hass may have over the Trustee Estate are subject to the trustee's discretion. As such, Mr. Hass's had nothing but an "expectation", which cannot be considered as a protected investment under the TPA.

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776 *See* Trust Agreement of the Hass Family Investment Trust, 15 November 1999 (**Exhibit C-362**), Article VII.C.2.

777 *See* Claimants' Reply, footnote 489.

778 *See Blue Bank International & Trust (Barbados) Ltd. V. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017 (**Exhibit CL-149**), ¶ 167.

779 *See Blue Bank International & Trust (Barbados) Ltd. V. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017 (**Exhibit CL-149**), ¶ 171.

780 *See Blue Bank International & Trust (Barbados) Ltd. V. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017 (**Exhibit CL-149**), ¶ 168.

781 *See Prenay Agarwal, Vinita Agarwal and Ritika Mehta v. Oriental Republic of Uruguay*, PCA Case No. 2018-04, Award, 6 August 2020 (**Exhibit RL-202**), ¶ 229.

782 *Prenay Agarwal, Vinita Agarwal and Ritika Mehta v. Oriental Republic of Uruguay*, PCA Case No. 2018-04, Award, 6 August 2020 (**Exhibit RL-202**), ¶ 224.

550. Moreover, contrary to the Claimants' allegations, the fact that Mr. Hass may have been granted a power of attorney in relation to Haystack Holdings[783] is irrelevant. *First*, a power of attorney cannot grant the status of protected investor to an individual that does not otherwise fall within the scope of protection of an investment treaty. *Second*, even if a power of attorney would be enough to acquire the status of protected investor, this is not the case for Mr. Hass, as his powers under the power of attorney seem to be limited to "making investments" on behalf of the company.[784] *Finally*, as attorney-in-fact, Mr. Hass is required to report to the Trustee.[785] This confirms the limited powers of Mr. Hass *vis-à-vis* the Trust and Trustee.

551. Therefore, the Tribunal should reject the claims made on behalf of Mr. Hass.

D. THE BOSTON ENTERPRISES TRUST IS BARRED FROM SEEKING INVESTMENT PROTECTION BEFORE THIS TRIBUNAL

552. In its Counter Memorial, the Respondent objected to The Boston Enterprises Trust seeking protection under the ICSID Convention and the TPA because (i) it does not qualify as a "national of another Contracting State" under Article 25 of the ICSID Convention, and (ii) the circumstances of its establishment and acquisition of shares in Newport and Luxé raised serious doubts as to whether it had a genuine interest in the Arbitration.

553. In their Reply, the Claimants disclosed the identity of the settlor, trustee and beneficiary of the Boston Enterprises Trust, [redacted], and provided a copy of his passport confirming that he is (and has been at least since 2005) a United States national. The Claimants allege that he decided to transfer his shares in Newport and Luxé to the Boston Enterprises Trust and not to reveal his name in this Arbitration out of fear of persecution by the Colombian State.[786]

554. The decision of [redacted] to hide behind the Boston Enterprises Trust and to avoid releasing his name in this Arbitration has legal consequences: the Boston Enterprises Trust does not have standing before this Tribunal constituted under the ICSID Convention and the Tribunal does not have jurisdiction over its claims.

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783 *See* Claimants' Reply, ¶ 184.

784 *See* Letter from Business Management Limited, 18 January 2021 (**Exhibit C-363**).

785 *See* Form of Acknowledgement (**Exhibit C-364**).

786 *See* Claimants' Reply, ¶ 191.

555. *First*, the Respondent strongly contests the reasons that allegedly led [redacted] to transfer his shares in Newport and Luxé to the Boston Enterprises Trust a few weeks before filing the Request for Arbitration, *i.e.*, on 9 August and 8 November 2018 respectively. As demonstrated in the Counter Memorial and further below, Colombia did not employ "retaliatory and intimidatory tactics"[787] against Mr. Seda or any of the other Claimants.

556. *Second*, pursuant to Article 10.16 of the US-Colombia TPA, in order to submit an investment claim to arbitration, a claimant must own or control the investment at the time of the purported breach (as well as at the time of the submission of a claim to arbitration and at the time of the resolution of the claim).[788] This was confirmed by the US in its non-disputing party submission.[789]

557. The Boston Enterprise Trust, claimant in this arbitration, did not own or control any shares in Newport and/or Luxé at the time of the alleged breach. In fact, it was not constituted until 9 August 2018, *i.e.*, over two years following the imposition of the precautionary measures over the Meritage Lot. The Boston Enterprise Trust therefore lacks standing to bring claims in connection to an alleged breach that took place years before its constitution.

558. *Third*, the Claimants do not deny that The Boston Enterprises Trust has no legal personality of its own. Yet, they insist that this is not an impediment for the trust to seek investment protection before this Tribunal. The Claimants' attempts to extend the protection of the ICSID Convention and the TPA to the Boston Enterprises Trust must fail. [790]

559. The Claimants' reference to the *travaux preparatoires* of the ICSID Convention is unavailing.[791] As noted by Prof. Schreuer, one of the main commentators of the ICSID Convention, the fact that the ICSID Convention does not define 'juridical person' "indicates that legal personality is a requirement for the application of Art. 25(2)(b)".[792] This is a plain interpretation of Article 25 of the ICSID Convention – which limits the jurisdiction of the ICSID Convention to natural and

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787 *See* Claimants' Reply, ¶ 191.

788 *See* United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.16 (**Exhibit CL-1**).

789 Submission of the United States of America, 26 February 2021, ¶ 16. *See also* ¶ 15.

790 *See* Respondent's Counter Memorial, ¶¶ 267-270.

791 *See* Claimants' Reply, ¶ 187.

792 Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) (**Exhibit RL-129**), ¶ 690.

juridical persons – rather than an attempt to "import[] additional conditions", as the Claimants suggest.[793]

560. Moreover, the case law on which the Claimants rely is inapposite and, in any event, supports the Respondent's position. For example, in *Tenaris v. Venezuela*, the tribunal rejected Venezuela's attempt to interpret the applicable BITs by importing additional conditions based upon Article 25 of the ICSID Convention.[794] *A fortiori*, the Claimants' attempt to interpret the ICSID Convention – a multilateral treaty which entered into force in 1966 – in light of the TPA – a bilateral treaty which entered into force almost 50 years later, in 2012 – should be rejected. In other words, the definition of 'investor of a Party' provided by the TPA cannot be used to dilute or stretch the jurisdictional requirements set in the ICSID Convention, including the requirement that claims may only be brought by juridical (or natural) persons with legal personality.

561. This is confirmed by the writings of Prof. Schreuer:

> Some bilateral investment treaties include associations without legal personality in their definition of "investor". But for purposes of the [ICISD] Convention the quality of legal personality is inherent in the concept of "juridical person" and is part of the objective requirements for jurisdiction.[795]

562. This same excerpt was quoted by the tribunal in *Impregilo v. Pakistan* to conclude that the consent to arbitration contained in the relevant BIT could not cover claims by a joint venture which had no legal personality under Swiss law, because the joint venture "is not a 'juridical person' for the purposes of the ICSID Convention".[796]

563. *Finally*, while the TPA includes 'trusts' within the definition of 'enterprise', this is not enough for this Tribunal – constituted under the aegis of the ICSID Convention – to exercise jurisdiction over

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793 *See* Claimants' Reply, ¶ 188.

794 *See 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 (**Exhibit CL-104**). In *Rompetrol v. Romania*, the question was whether the claimant had the nationality of an ICSID Contracting State other than the respondent State. The tribunal acknowledged that under international law, the contracting parties to a BIT have the sole power to determine nationality criteria of persons and entities under their own laws. *See Rompetrol Group N.V. v. Romania,* ICSID Case No. ARB/06/03, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008 (**Exhibit CL-151**), ¶ 81.

795 Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) (**Exhibit RL-129**), ¶ 693.

796 *Impregilo, S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (**Exhibit RL-18**), ¶¶ 119, 134.

claims brought by trusts. Indeed, it is undisputed that the Claimants must meet all the jurisdictional requirements under both the ICSID Convention and the TPA.[797] Therefore, while The Boston Enterprise Trust may be entitled to bring investment claims under other fora available under the TPA,[798] it does not have standing to bring claims before this Tribunal constituted under the ICSID Convention.

V. THE RESPONDENT HAS NOT BREACHED ITS INTERNATIONAL OBLIGATIONS *VIS-À-VIS* THE CLAIMANTS

564. Even assuming, *quod non*, that this Tribunal has jurisdiction, the Tribunal should reject the Claimants' claims on the merits because the Respondent has not breached its international obligations *vis-à-vis* the Claimants.

565. As a preliminary matter, the Respondent notes that the Claimants' claims are largely based on their mantras that the Asset Forfeiture Proceedings were based on "the debunked gossip of a drug trafficker" and "a corrupt scheme" involving State officials.[799] As extensively demonstrated by the Respondent, both allegations are simply wrong. The Asset Forfeiture Proceedings against the Meritage Lot have been commenced and conducted with strict adherence to Colombian law, including the Asset Forfeiture Law. Having demonstrated that the very basis of the Claimants' claims on the merits is wrong, it is only reasonable to conclude that said claims are baseless and, accordingly, should be dismissed.

566. In any event, the Respondent sets out below the legal reasons why the Claimants' claims must fail. In particular, the Respondent shows that it did not expropriate the Claimants' alleged investment (**V.A**) and did not breach its obligation to accord National Treatment to the Meritage Project and the Claimants (**V.B**). Moreover, the Respondent treated the Claimants' alleged investment fairly and equitably (**V.C**) and fulfilled its obligation to accord full protection and security to the Claimants' alleged investment (**V.D**).

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797 *See* Respondent's Counter Memorial, ¶ 243; Claimants' Reply, ¶ 336.

798 *See* United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.16.3.

799 Claimants' Reply, ¶¶ 11, 12, 105, 137, 278, 298.

A. THE RESPONDENT DID NOT EXPROPRIATE THE CLAIMANTS' INVESTMENT

567. In the Counter Memorial, the Respondent demonstrated that by initiating and conducting the Asset Forfeiture Proceedings against the Meritage Lot, Colombia did not expropriate the Claimants' purported investment in Meritage. In particular, the Respondent demonstrated that (i) the Asset Forfeiture Proceedings initiated by Colombia against the Meritage Lot are a legitimate exercise of Colombia's regulatory powers,[800] and (ii) in any event, the acts of the Colombian authorities are not expropriatory in nature.[801]

568. In the Reply, the Claimants rehash to a large extent their arguments in the sense that by initiating and implementing the Asset Forfeiture Proceedings "against the Meritage Project", Colombia unlawfully expropriated the Claimants' purported investment in the Project. Moreover, while the Claimants acknowledge that the legitimate public welfare objective of the Asset Forfeiture Law were to fight organized crime and protect good faith third parties without fault, the Claimants argue that the Asset Forfeiture Proceedings against the Meritage Lot "contradicted the purpose of the law" and, therefore, were not a legitimate exercise of Colombia's regulatory powers.[802]

569. The Claimants' claims should be assessed in light of the two important considerations below:

a) *First*, asset forfeiture is widely recognized and adopted in "several leading States", including the United Kingdom, Canada and Australia.[803] The Claimants' expert, Dr. Martínez Sánchez (who claims to have "personal knowledge of the context in which [the Asset Forfeiture Law] was developed"[804]), acknowledged that the Asset Forfeiture Law was drafted in adherence to "international standards included in the model law for asset forfeiture for Latin America", to ensure that "the Colombian legal framework would meet the international standards in this area".[805] Similarly, Dr. Caro explained that the Asset Forfeiture Law was enacted in

800 *See* Respondent's Counter Memorial, ¶¶ 301-345.

801 *See* Respondent's Counter Memorial, ¶¶ 350-360.

802 *See* Claimant's reply, Section V.B.1.c.ii.

803 *See* Claimants' Reply, ¶ 246.

804 Dr. Martínez Sánchez First Expert Report, ¶ 19.

805 Dr. Martínez Sánchez First Expert Report, ¶ 25(a).

compliance with Colombia's international obligations to search, seize and confiscate the proceeds of crime, in particular drug trafficking, corruption and organized crime.[806]

b) *Second*, asset forfeiture is also recognized in Article 34 of the Colombian Constitution, pursuant to which asset forfeiture applies when assets have been the result of an illicit enrichment and acquired in violation of social mores or in a manner harmful to the public treasure. Notably, the Constitution distinguishes asset forfeiture from confiscation, on the basis that in the case of asset forfeiture proceedings, there is no acquired right as no right can be acquired in violation of the law.[807] Therefore, asset forfeiture proceedings are, in their very nature, not expropriatory.[808]

570. As demonstrated in the Counter Memorial and further below, in this specific case, the Respondent did not expropriate the Claimants' investment because the Asset Forfeiture Proceedings are not expropriatory in nature (**V.A.1**). In fact, the Asset Forfeiture Proceedings are a legitimate exercise of Colombia's regulatory powers (**V.A.2**A.2**V.A.1**). Accordingly, no compensation was – or is – due to the Claimants.

1. The Asset Forfeiture Proceedings are not expropriatory in nature

571. As demonstrated in the Counter Memorial, paragraph 1 of Annex 10-B of the TPA sets a *condition sine qua non* for an action or series of actions to constitute an expropriation: it has to interfere "with a tangible or intangible property right or property interest in an investment".[809] In other words, "[t]here cannot be an expropriation unless the investor had a property right or interest with which the State measure interfered".[810] Notably, not every interference with the

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806 *See* Dr. Caro Second Witness Statement, ¶¶ 8-10.

807 *See* Political Constitution of Colombia (**Exhibit C-005bis**), Article 34 ("The punishments of exile, life imprisonment, and confiscation are prohibited. However, assets acquired by illegal means to the detriment of the Treasury or resulting in severe deterioration of social morals shall be subject to forfeiture by judicial order").

808 *See* Dr. Pinilla Expert Report, ¶¶ 17-18.

809 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Annex 10-B, ¶ 1.

810 Respondent's Counter Memorial, ¶ 292. *See also* ¶ 293.

investors' property rights is to be regarded as expropriatory: an expropriation requires the total and permanent deprivation of property rights.[811]

572. In addition, it is uncontested that the TPA sets out three non-exhaustive factors to be considered as part of the case-by-case, fact-based inquiry to determine whether an action or series of actions constitutes an indirect expropriation: (i) the economic impact of the government measure, (ii) its interference with reasonable investment-backed expectations, and (iii) the character of the government action.[812]

573. The Claimants do not appear to contest the applicable legal standard. Yet, they claim that the Asset Forfeiture Proceedings had an effect "equivalent to direct expropriation".[813] As demonstrated in the Counter Memorial and further below, the Respondent's acts do not constitute an expropriation – let alone an unlawful expropriation – of the Claimants' alleged investment in the Meritage Project.

574. *First*, as demonstrated by the Respondent, the Claimants do not have rights *in rem* neither over the Meritage Project nor over the Meritage Lot.[814] In other words, Newport was never the rightful owner of the Meritage Lot, which was never transferred by La Palma Argentina to Newport. This is also true with respect to Phases 1 and 6 of the Meritage Project, with respect to which the Claimants claim to have "an indirect 'property right' over the land" and "at a minimum, a 'property interest'".[815] As explained, Newport's position in relation to the Meritage Administration and Payment Trust does not confer Newport *in rem* rights over the Meritage Lot and its subdivisions, including Phases 1 and 6 of the Meritage Project.

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811 *See* Respondent's Counter Memorial ¶¶ 295-298. *See also Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 (**Exhibit RL-206**), ¶ 943 ("Claimants have failed to show how these various actions, even if proved, deprived or contributed to depriving Claimants of the value of their investment and amounted or constituted indirect expropriation").

812 *See* Respondent's Counter Memorial, ¶ 294; Claimants' Reply, ¶ 225.

813 Claimants' Reply, ¶ 217.

814 Respondent's Counter Memorial, ¶¶ 349-351. Paragraph 351 of the Respondent's Counter Memorial should be read as stating that "*Newport had no rights in rem over the Meritage Project, but had only entered into a sale-purchase promise agreement regarding the Meritage Lot, that is, it had no rights in rem*". The Respondent invertedly omitted the word "*no*", but the intended meaning of the paragraph is clear from its context and from Section II.F.10 to which the Respondent refers in footnote 571.

815 Claimants' Reply, ¶ 224.

575. With respect to the remaining portions of the Meritage Lot, the Claimants should be prevented from invoking any *in rem* rights because, as they admit, Newport was removed from the Meritage La Palma Trust Agreement and deprived from the rights it had under the Trust invoking "tax planning and efficiency purposes".[816]

576. To the extent that the Claimants had any rights in connection with the Meritage Project, such as shares or contractual rights (*quod non*),[817] it is not disputed that under the TPA, both tangible or intangible property is capable of expropriation.[818] However, taking into account the "bundle of rights" the Claimants allege to have, none of these have been affected by the Asset Forfeiture Proceedings, as explained below.

577. *Second*, by their very nature, none of the measures adopted by the Respondent, and in particular the precautionary measures and the Asset Forfeiture Proceedings (which are ongoing) resulted in the total and permanent deprivation of the Claimants' property rights (if any).

578. The Claimants acknowledge that the Respondent's measures only resulted in the "suspension of the power of disposition, attachment and seizure" of the Meritage Project.[819] Yet, they claim that the Meritage Project is "dead" and that any rights they may have had to "develop and operate the Project have been extinguished".[820] This is fully unsubstantiated and contradicted by the Claimants' own conduct, as well as by the statements of Corficolombiana. [redacted]

816 *See* Seda Witness Statement, ¶ 69. Notably, the Second Criminal Court Specialized in Asset Forfeiture of Antioquia has carefully analyzed the issue in the *Avocamiento* order and concluded that because Newport does not have *in rem* rights over the Meritage Lot, it cannot be regarded as an affected party in the Asset Forfeiture Proceedings. *See* Asset Forfeiture *Avocamiento* Order, 17 August 2017 (**Exhibit C-057bis**), pp. 59-60. An appeal on this decision is pending. The Claimants cannot be allowed to use this Arbitration as a second opportunity to appeal the *Avocamiento* order.

817 *See* Claimants' Reply, ¶ 222.

818 *See* Claimants' Reply, ¶ 223.

819 Claimants' Reply, ¶ 217.

820 Claimants' Reply, ¶ 218.

[redacted]

579. More importantly, the Claimants own acts show that they also believe that the Meritage Project is not "dead" and that it may be resumed (and be economically viable). Indeed, the Claimants allege (but provide no evidence) to have incurred costs "as part of their efforts to mitigate damages", including paying taxes, maintenance fees and security guards.[822] Moreover, after the Precautionary Measures were imposed, the Claimants were still in negotiations with "some builders" that were interested in buying the Meritage Project.[823] Needless to say, no reasonable and good faith investor would have incurred costs with respect to a project it considers to be "dead", nor would it have engaged in negotiations with third parties to sell a "dead" project.

580. In a desperate attempt to portray the non-permanent measures as expropriatory, the Claimants allege that "the property has been taken on and off Colombia's 'early sale' multiple times" and the Government "could have sold [the Meritage Lot] at any moment through early sale".[824] The fact remains, however, that the Meritage Lot has not been sold and, if the seizure is lifted, the Claimants could continue building the Project – and making profits.[825]

581. Against this background, the Claimants' allegation that they have been "*completely and permanently deprived* […] *of all value of the investment*" cannot be upheld: the Claimants still hold their shares in Newport, the Meritage Project is still viable and any contractual rights could potentially still be performed if the court decide against the asset forfeiture.

582. *Third*, contrary to the Claimants' allegations, a case-by-case, fact-based assessment of the factors set out in the TPA to determine whether an action or series of actions by a Party constitute expropriation, *i.e.* the economic impact of measure, extent of interference, and character of the

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821 [redacted]

822 Claimants' Reply, ¶ 445(c).

823 Email chain between A. Seda and V. Mosquera, 31 October 2016 (**Exhibit C-176**).

824 Claimants' Reply, ¶ 227.

825 Even if the early sale would move forward, if the court decides against the asset forfeiture, the funds obtained through the disposal of the asset would be restituted, as indicated in the Asset Forfeiture Law. *See* Asset Forfeiture Law (**Exhibit C-003bis**), Article 107. *See also* Asset Forfeiture Law (updated as of January 2022) (**Exhibit R-173**), Article 92, paragraph 2.

government action, leads to the conclusion that the acts of the Respondent do not constitute indirect expropriation.

583. Economic impact: as demonstrated above, other than the Claimants' allegations that the Respondent "*effectively destroyed the Meritage Project*",[826] there is no evidence that the Asset Forfeiture Proceedings had a permanent economic impact on the Meritage Project (and by no means that it has caused the exaggerated damages claimed by the Claimants[827]). The contrary is true: the measures adopted are temporary in nature and the Meritage Project could be resumed by the Claimants if the courts decide against the asset forfeiture asset forfeiture.[828]

584. Therefore, the Claimants have failed to demonstrate that the Asset Forfeiture Proceedings "destroyed all, or virtually all, of the economic value of [their] investment, or interfered with it to such a similar extent and so restrictively as 'to support a conclusion that the property has been 'taken'"".[829]

585. In any event, assuming (*quod non*) that the Asset Forfeiture Proceedings had an "*economic impact*" on the Claimants, the TPA clearly states that the alleged "adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred".[830]

586. Reasonable investment-backed expectations: contrary to the Claimants' allegations, they could not have had "*reasonable investment-backed expectations*" that the Colombian authorities would refrain from initiating asset forfeiture proceedings if the grounds for such proceedings were identified. *First*, the Claimants knew, or should have known, that asset forfeiture

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826 Claimants' Reply, ¶ 226.

827 *See above,* Section VI. To recall, the standard to assess the economic impact of a measure is whether "the economic value of an investment [is] reasonably ascertainable, and not speculative, indeterminate, or contingent on unforeseen or uncertain events". *See* Respondent's Counter Memorial, ¶ 294.

828 *See above,* Section VI.

829 *See* Submission of the United States of America, 26 February 2021, ¶ 25.

830 *See* United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Annex 10-B, paragraph 3(a)(i). *See also*, *e.g.*, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020 (**Exhibit RL-203**), ¶ 472 ("absent any established right that was abrogated by Government interference, the fact that Government conduct may have impacted a company business plan does not itself amount to expropriation, even if the end result ultimately is that the company was unable to survive financially").

proceedings are not subject to any statute of limitations ("*imprescriptible*")[831] and cannot be waived in advance by the State officials. *Second*, in fact, between 2011 and 2014 (when Mr. Seda was approached by Mr. López Vanegas), almost 150 decisions were issued on asset forfeiture proceedings in connection with almost 1.000 assets.[832] *Third*, the Claimants' reliance on their purported "extensive due diligence before acquiring the lot" is unavailing. As explained above, Newport's due diligence was highly deficient, amongst other reasons, because (*i*) it was based on the civil study of the chain of titles limited to 10 years, which is completely insufficient given that asset forfeiture has no statute of limitation [redacted] (*ii*) as remarked by Corficolombiana, Newport did not do conduct a LA/FT regarding La Palma Argentina [redacted] (*iii*) Newport's reliance on the answers to the rights of petition presented by La Palma Argentina and Corficolombiana in 2007 and 2013 are no shields to asset forfeiture proceedings and are known to have been used by drug dealers as a ruse improperly to claim status as *bona fide* buyers (as indeed was the practice of the García siblings);[835] (*iv*) Corficolombiana, which as a financial institution is subject to a heightened standard of due diligence, also failed to conduct a proper due diligence as amply demonstrated by the Respondent and, in any event, the Claimants cannot hide behind Corficolombiana's alleged due diligence to justify their own defective due diligence; and (*v*) even after being contacted by Mr. López Vanegas, to whom the Claimants refer as a "convicted drug trafficker",[836] the Claimants decided to turn a blind eye to Mr. López Vanegas's allegations and proceed with the pre-sales and construction of the Meritage Project, without conducting any further inquiry into the origin of the Meritage Lot or informing the Colombian authorities, Corficolombiana or even the unit buyers.[837] *Finally*, the statements by Ms. Noguera, which were

831 *See* Respondent's Counter Memorial, ¶ 355.

832 *See* GAFILAT Report, ¶ 181, table 18.

833 *See above*, Section III.E.

834 *See above*, Section III.E.

835 *See above*, Section III.E.

836 Claimants' Reply, ¶ 332.

837 *See also* Respondent's Counter Memorial, ¶¶ 356-357. [redacted]

recorded by Mr. Seda almost eight years after he had entered, through Royal Realty S.A.S., into the Sale-Purchase Promise Agreement with La Palma Argentina,[838] are irrelevant to assess the Claimants' alleged expectations at the time of their purported investment.

587. Character of government action: the Claimants' argument that this factor merely requires an assessment as to whether the measures "were carried out with the weight of State authority" is misconceived.[839] Following the Claimants' logic, any governmental action would be considered expropriatory. This cannot be the reasonable interpretation of the third factor included in paragraph 3(a) of Annex 10-B of the TPA.

588. As demonstrated in the Counter Memorial, this element requires to assess the nature and character of the government action. In this case, the Asset Forfeiture Proceedings were initiated and conducted in accordance with the Asset Forfeiture Law and the Colombian Constitution, which expressly notes (in accordance with internationally recognized principles governing asset forfeiture) that asset forfeiture proceedings are not exprorpriatory in nature.

589. Moreover, it is undisputed that the Asset Forfeiture Proceedings are still pending before the Colombian courts. In its submission, the United States confirmed that "[d]ecisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants [] do not give rise to a claim for expropriation under Article 10.7.1."[840] *A fortiori*, the Asset Forfeiture Proceedings, which are still pending, could not be considered as having expropriated the Claimants' rights (if any).

590. In sum, the Claimants are not entitled to compensation because the Asset Forfeiture Proceedings are not expropriatory in nature.

[redacted]

838 *See* Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012 (**Exhibit C-19 bis**).

839 Claimants' Reply, ¶ 233.

840 *See* Submission of the United States of America, 26 February 2021, ¶ 29.

2. The Asset Forfeiture Proceedings are a legitimate exercise of Colombia's regulatory powers

591. The Claimants' expropriation claim should also be rejected for an additional and independent reason, that is, that the Asset Forfeiture Proceedings are a legitimate exercise of Colombia's regulatory powers and, as such, do not constitute indirect expropriation.

592. The Claimants do not (and cannot, based on the express provisions of the TPA and customary international law) dispute that a measure which is designed and applied to protect legitimate public welfare objectives does not constitute expropriation, even if it interferes with the investor's ownership rights.[841] Neither do they dispute that the Asset Forfeiture Law was designed to protect legitimate public welfare objectives.[842] Yet, the Claimants allege that Colombia's conduct was not a legitimate exercise of its regulatory powers because the Asset Forfeiture Proceedings against the Meritage Lot were *de facto* discriminatory, not a *bona fide* application of the Asset Forfeiture Law, did not meet the minimum due process standards mandated by international law, lacked reasonable justification, and not proportionate to purported need for public order.[843]

593. Moreover, the Claimants rely on the findings of the tribunal in *Magyar v. Hungary* to allege that only certain type of State measures may be regarded as a legitimate use of the host State's regulatory powers.[844] The Claimants' attempt to restrict the application of the regulatory powers doctrine to measures falling within the two groups set by the *Magyar v. Hungary* tribunal[845] is misconceived. To begin with, it is contrary to paragraph 3(b) of Annex 10-B of the TPA, which expressly states that non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives would only constitute indirect expropriation "in rare circumstances":

> Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives,

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841 *See* Respondent's Counter Memorial, ¶¶ 286-291.

842 *See* Claimants' Reply, ¶ 239.

843 *See* Claimants' Reply, ¶¶ 235-236.

844 *See* Claimants' Reply, ¶ 236.

845 *See* Claimants' Reply, ¶ 236.

> such as public health, safety, and the environment, do not constitute indirect expropriations.[846]

594. The Claimants' attempt to restrict the application of the State's regulatory powers is contradicted by the practice of investment tribunals, even in the absence of explicit provisions such as the one in paragraph 3(b) of Annex 10-B of the TPA. For example, in *Muhammet v. Turkmenistan* the tribunal found that the seizure and sealing of the claimants' offices, warehouse, equipment, computes and documents as well as a construction site for a cultural center project were not an unlawful interference with the claimants' investment in Turkmenistan "and in any case, they did not amount or contribute to the indirect expropriation of Claimants' investment".[847] To the contrary, the tribunal held that the Prosecutors had acted in accordance with Turkmen law and within the police powers of the State:

> [T]he Tribunal concludes that the actions of the different Prosecutors under all contracts set out above were a legitimate exercise of regulatory authority. They were conducted following alleged irregularities or violations of Sehil. Further, the Prosecutors' power to oversee and inspect the site projects was provided for by Turkmen law. The same holds true for the Prosecutors' authority to initiate and participate in court proceedings.
>
> […]
>
> To the extent that the Turkmenistan tax authority sealed the construction sites at which Sehil was working and Sehil's place of business and sold Sehil's assets to meet its tax liabilities, the evidence shows that this was carried out within the limits of the law of Turkmenistan. These actions were not expropriatory or a contribution to the expropriation of Claimants' investment but were carried out within the police powers of the State.[848]

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846 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Annex 10-B, paragraph 3(b). Even if the Tribunal were to consider that – despite the clear language of the TPA – only measures falling within the "narrow set of circumstances" described in *Magyar v. Hungary* may be exempted from the duty of compensation, the measures adopted by the Respondent fall squarely within the first category, *i.e.*, "generally accepted measures of police powers that aim at enforcing existing regulations against the investor's own wrongdoings". While it is true that the Asset Forfeiture Proceedings were not initiated in connection with any "wrongdoing" of which Mr. Seda was personally accused, the Asset Forfeiture Proceedings were initiated and conducted against the Meritage Lot – and not against any of the Claimants – due to the multiple and severe irregularities in the chain of title. As also demonstrated, the Claimants' defective due diligence prevents them from being considered as good faith third parties.

847 *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 (**Exhibit RL-206**), ¶ 916.

848 *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 (**Exhibit RL-206**), ¶¶ 941, 968.

595. As demonstrated in the Counter Memorial and further below, the Asset Forfeiture Proceedings do not constitute indirect expropriation but a legitimate exercise of the Respondent's police powers as they were initiated and conducted on a non-discriminatory basis to protect legitimate public welfare objectives (**V.A.2.a**) and they were not a gross misuse of the powers of the State (**V.A.2.b**).

a. *In initiating and conducting the Asset Forfeiture Proceedings against the Meritage Lot, the Respondent legitimately exercised its regulatory powers*

596. As demonstrated in the Counter Memorial and further below, the Asset Forfeiture Proceedings do not constitute indirect expropriation as they were initiated and conducted to protect a legitimate public welfare objective and in *bona fide* application of the Asset Forfeiture Law (**V.A.2.a(iii)**), following the due process of law (**V.A.2.a(iv)**) and in a non-discriminatory manner (**V.A.2.a(v)**).

(iii) The Asset Forfeiture Proceedings was a proportionate measure to protect a legitimate public welfare objective and in *bona fide* application of the Asset Forfeiture Law

597. As noted, it is undisputed that the Asset Forfeiture Law has a legitimate public welfare objective, *i.e.*, "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'*".[849] As a corollary, asset forfeiture proceedings initiated and conducted in accordance with the Asset Forfeiture Law, must be regarded as measures adopted to protect those legitimate public welfare objectives.

598. Disregarding all the evidence available, the Claimants allege that "*Colombia has not shown that the Asset Forfeiture Proceedings were a legitimate exercise of regulatory power*".[850] The Claimants' allegations are belied by the evidence in the record, which clearly shows that the Asset Forfeiture Proceedings have been conducted (and are still being conducted) with strict adherence to the Asset Forfeiture Law and in accordance with its legitimate public welfare objectives.

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849 Claimants' Reply, ¶ 240.

850 Claimants' Reply, ¶ 253.

599. As demonstrated by the Respondent, following Mr. López Vanegas's complaint in July 2014, the Attorney General's Office launched an extensive investigation into the Meritage Lot and the circumstances surrounding Mr. López Vanegas's complaint. The investigation disclosed the illegal origin of the Meritage Lot and the series of grave irregularities in the chain of transfers of the Meritage Lot, including (among other irregularities) the successive transfers of the lot by multiple figureheads [redacted] In the Determination of the Claim, Prosecutor 44 clearly explained this *modus operandi*:

> Members of the criminal organization known as the "Envigado Office," with the aim of acquiring property rights of very valuable real property strategically located in the Medellin metropolitan area, Department of Antioquia, resorted to a pattern of extortive kidnappings, coercing the holders of property rights of the real property into executing transfers, or by falsifying their signatures or those of their legal representatives. Likewise, they use front men to give the appearance of legality to these acquisitions and undertake real property projects to give the appearance of legality to these acquisitions, consistent with the crime of money laundering."[852]

600. Having examined the Meritage Lot chain of title in light of the known *modus operandi* of the *Oficina de Envigado*, Prosecutor 44 concluded that the origin of the Meritage Lot was presumably unlawful:

> [T]he evidence gathered throughout this investigation allows to reasonably infer that the origin of the assets seized by the Attorney General's Office [is] unlawful (drug dealing) and that after Mr. Iván López Vanegas' extradition, a series of facts unraveled in which persons links to the criminal organization *Oficina de Envigado* have been involved.[853]

601. Thus, in lights of her findings that the Meritage Lot was "reasonably" related to criminal organizations (in particular, the *Oficina de Envigado*), the Attorney General's Office had the obligation, pursuant to Article 29 of the Asset Forfeiture Law, to "*submit before the competent judges the request for asset forfeiture* [(*requerimiento*)] *or the declaration of non-prosecution*".[854]

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851 [redacted]

852 Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 **(Exhibit C-23 bis)**, p. 34.

853 Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-23 bis**), p. 119.

854 Asset Forfeiture Law (**Exhibit C-003bis**), Article 29.

Once the Attorney General's Office files an asset forfeiture request before the competent court, only the court may order its dismissal. This has been clearly confirmed by Dr. Reyes:

> c. The inadmissibility of the asset forfeiture proceedings can only be declared by a judge by means of a judicial decision; not by a prosecutor.
>
> d. Asset forfeiture proceedings can only be terminated by a judge by means of a judicial decision; never by a prosecutor by means of a decision to provisionally suspend the case.
>
> e. Article 131 of Law 1708 of 2014 clearly states that the Attorney General's Office is incompetent to declare the inadmissibility of asset forfeiture proceedings. Instead, when the Attorney General´s Office considers that the proceedings should be terminated, it must request the competent judge to order the termination by means of a judicial decision.[855]

602. It is therefore clear that the Asset Forfeiture Proceedings were initiated in accordance with the Asset Forfeiture Law to pursue the public welfare objectives of the Asset Forfeiture Law: to fight organized crime and maintain social and economic stability in Colombia.

603. Moreover, the Asset Forfeiture Proceedings, and in particular the Precautionary Measures, were proportionate to the pursued public welfare objective. This was confirmed by the Asset Forfeiture Court which, after reviewing the analysis conducted by Prosecutor 44, concluded that the Precautionary Measures had been properly motivated, justified, proportional and urgent.[856] This decision was upheld in appeal by the Bogota Superior Court, the very last instance for asset forfeiture proceedings in Colombia.[857]

604. In the context of this arbitration, Dr. Reyes concluded – in line with the Colombian courts – that the Precautionary Measures were adopted in accordance with the Asset Forfeiture Law:

> There is nothing in the documents analysed that allows for a well-founded assumption that the precautionary measures imposed have been contrary to the purposes for which the legislator designed them, since in this case all the

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855 Dr. Reyes Second Expert Report, ¶ 7(c)-(e).

856 *See* Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016 (**Exhibit C-044bis**), p. 22. Notably, the Court recalled its duty to "protect the fundamental right of due process and, among others, the procedural guidelines and guaranties such as presumption of innocence, the right to be heard, defense, and natural judge".

857 *See* Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017 (**Exhibit C-047bis**), pp. 4-6, 15-16.

> guarantees that Law 1708 of 2014 designed to ensure that there were no abuses in the imposition of the precautionary measures, operated.[858]

605. In his second report, Dr. Reyes further confirms that the Precautionary Measures were "the most appropriate in the case in order to preserve the effectiveness of the asset forfeiture proceeding".[859] [redacted]

606. Against this background, the Claimants' claims that the Asset Forfeiture Proceedings "*contradicted the purpose of the Law*" and did not have a public purpose can only be sustained on the basis of the Claimants' mischaracterization of the facts and the Asset Forfeiture Law and applicable principles.

607. *First*, according to the Claimants, the Asset Forfeiture Proceedings against the Meritage Lot contravened public welfare because the Meritage Project was funded by U.S. investors and would bring "much-needed economic development and stability to the region".[861] The Claimants, however, do not dare demonstrating how a real estate project could in itself bring stability to the region, let alone a luxury real estate project that is being developed in a lot which is suspected of being tainted by illegality [redacted]

608. On the contrary, given the presumed illegal origin of the Meritage Lot and the series of grave irregularities in its chain of transfers, the Asset Forfeiture Proceedings commenced and conducted in accordance with the Asset Forfeiture Law must be regarded as measures adopted to protect the Respondent's *legitimate* public welfare objectives of fighting organized crime and obtaining social and economic stability in the Envigado region and the country.

609. *Second*, the Claimants' allegation that the Respondent has not "taken any action to seize or disgorge profits made from transfers of the Meritage Property by those Colombia alleged were guilty of criminal acts" does not hold water. As demonstrated, unlike criminal proceedings that are conducted against individuals suspected of having committed a crime, asset forfeiture

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858 Dr. Reyes Expert Opinion, ¶ 52.

859 Dr. Reyes Second Expert Report, ¶ 7(r).

860 [redacted]

861 Claimants' Reply, ¶ 253.

862 [redacted]

proceedings target, in principle, assets that have been tainted by illegality. To the extent that sufficient and convincing evidence has been found as to the illegalities tainting the Meritage Lot, the Meritage Lot fell squarely within the grounds for forfeiture set out in Article 16 of the Asset Forfeiture, *i.e.* the lot is "the direct or indirect product of an illicit activity" and "result[ed] from a partial or total physical or legal transformation or conversion of the product, tools, or material subject matter of illicit activities".[863]

610. In any event, it has been demonstrated that the Respondent has taken measures in connection with individuals in the chain of transfer of the Meritage Lot who are suspected of having been involved in criminal activities, [redacted]

611. *Third*, the Claimants allege that the Asset Forfeiture Proceedings were not a proper use of public powers because they did not prevent "innocent parties from wrongful seizures".[865] The Claimants' allegation is based on their assumption that Colombian law "seeks to protect [good faith third parties without fault] by exempting them from asset forfeiture altogether",[866] so when an asset tainted by illegality is in the hands of a good faith third party without fault, "the asset forfeiture proceeding may not be directed at the asset itself or at the good faith buyer".[867]

612. The Claimants' interpretation of the Asset Forfeiture Law fully distorts the very same objective of the asset forfeiture proceedings as established in the Asset Forfeiture Law, which is, precisely, to determine whether an asset is tainted by illegality and whether it is in the hands of a good faith third party without fault. As explained by Dr. Reyes, this determination can only be made by the competent court:

> The Prosecutor may search and collect evidence that would allow to reasonably infer the absence of good faith without fault, but the decision on whether a third party is in good faith or not can only be taken by the competent judge.[868]

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863 Asset Forfeiture Law (**Exhibit C-003bis**), Article 16(1) and (3).

864 [redacted]

865 Claimants' Reply, ¶ 247.

866 Claimants' Reply, ¶ 245.

867 Claimants' Reply, ¶ 243.

868 Dr. Reyes Second Expert Report, ¶ 7(g).

613. This was made clear to Newport following its request to be considered as a good faith third party without fault in file 13.641. In the response of 4 March 2017, Prosecutor 44 clearly explained that the initial stage was not the appropriate occasion to fully consider whether Newport should be considered a third party in good faith in the sense of the Asset Forfeiture Law, and that such determination was to be made by the competent judge, after considering all the evidence.[869] Yet, Prosecutor 44 made a preliminary assessment of Newport's request and concluded that there was sufficient evidence to reasonably infer that Newport was not to be considered as a good faith third party without fault due to its defective due diligence.[870] Therefore, contrary to the Claimants, allegations, the Attorney General's Office did not "refuse[] 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'".[871] Quite on the contrary, Prosecutor 44 did consider Newport's request to be considered a good faith third party without fault but concluded that (i) the evidence available to the Prosecutor did not support Newport's claim, and (ii) in any event, the final determination was to be made, in accordance with the Asset Forfeiture Law, by the competent court.

614. In any event, the Respondent has demonstrated that the Claimants' due diligence was neither reasonable nor appropriate.[872] Notably, Dr. Reyes also opined that due to Newport's insufficient due diligence, it could not be considered as a good faith third party without fault:

> Newport S.A.S. cannot be considered as a good faith third party without fault, since it did not do everything within its reach to ascertain the legal origin of the assets involved in the operation. In other words, I consider that Newport S.A.S. did not do what another person in its position and with its knowledge would have done, and this is the reason why I continue to believe that its behaviour was not diligent and, accordingly, it should not be recognised as a good faith third party without fault.[873]

615. This is confirmed by the evidence showing that Newport knew – or should have known – about the several irregularities affecting the Meritage Lot had it performed a proper due diligence,

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869 *See* Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017 (**Exhibit C-054bis**), pp. 3-8.

870 *See* Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017 (**Exhibit C-054bis**), pp. 3-8.

871 Claimants' Reply, ¶ 254.

872 *See above,* Section III.E.

873 Dr. Reyes Second Expert Report, ¶ 127.

[redacted]

Nevertheless, even when approached by a "convicted drug trafficker" publicly recognized as such, claiming that he was the owner of the lot and that he had been dispossessed of the lot in unclear circumstances,[875] the Claimants decided to turn a blind eye on these threats, engage in negotiations with Mr. López Vanegas and continue developing the project, without even warning Corficolombiana.[876]

616. *Fourth*, the Claimants allege that the objective of attaining "social and economic stability" can only be ensured if the Asset Forfeiture Law "do[es] not target good faith parties", in accordance with "axiomatic principle that innocence must be presumed and the innocent may not be punished".[877] The Claimants argument completely misses the point.

617. It is trite that the principle of innocence is applicable within criminal procedures. As explained, asset forfeiture proceedings are not criminal in nature but have a *sui generis* nature.[878] In any event, it is undisputed that the Asset Forfeiture Proceedings are ongoing and that one of the issues to be determined within said proceedings is whether there exist any good faith third party without fault and who qualifies as such.[879] As explained, Newport seems to have been well aware of this circumstance, as in its appeal of the *Avocamiento* order of August 2017 (and supplemented in September 2017), it did not complain about the fact that it had not been considered as a third party in good faith.[880] In stark contrast with its conduct in the Asset Forfeiture Proceedings, the Claimants now attempt to – in purported reliance of the Asset Forfeiture Law – escape the consequences of that very same law by invoking their alleged good faith before this Tribunal. However, it is widely acknowledged that investment tribunals cannot

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874 [redacted]

875 Claimants' Reply, ¶ 332.

876 [redacted]

877 Claimants' Reply, ¶ 241.

878 *See* Dr. Reyes Second Expert Report, ¶ 7(k).

879 To this extent, the Claimants' logic would lead to the absurd consequence that any asset forfeiture proceedings would contravene the principle of innocence.

880 *See above,* Section III.F.

act as appeal courts with respect to domestic court decisions, let alone replace the competent domestic courts by interpreting and applying the Asset Forfeiture Law in a case that is pending before the domestic courts.

618. But even if it were for this Tribunal to decide on whether or not Newport was a good faith third party without fault, the evidence in the record shows that it was not. As demonstrated above, the highly defective due diligence conducted by Newport, followed by its lack of reaction to all the subsequent developments that clearly indicated the irregularities affecting the Meritage Lot (including the express claims of Mr. López Vanegas over the lot) show that the Newport cannot be regarded as a good faith third party without fault. In the words of Dr. Reyes:

> The joint analysis of the actions displayed by Mr. Ángel Samuel Seda and Newport S.A.S. is precisely what allows me to conclude that their behaviours (considered as a whole) were not diligent and, therefore, they cannot be recognised as good faith third parties in the asset forfeiture proceeding which is under analysis.[881]

619. In sum, the Asset Forfeiture Proceedings were initiated and are conducted in accordance with the Asset Forfeiture Law to protect a legitimate welfare objective and were proportionate to the protected objective. Pursuant to the Asset Forfeiture Law, the competent Colombian court will determine – after hearing the parties to the proceedings and assessing all the evidence – whether the Meritage Lot has been tainted by illegality and the status of any good faith third party without fault.

(iv) The Asset Forfeiture Proceedings were initiated and conducted in accordance with the due process of law

620. As demonstrated,[882] the Asset Forfeiture Proceedings were initiated and conducted in accordance with the due process of law and the principle of proportionality. In particular, the Claimants' expert, Dr. Medellín Becerra, acknowledged that the Asset Forfeiture Law establishes "fundamental guarantees, principles" and procedural mechanisms, including precautionary

881 Dr. Reyes Second Expert Report, ¶ 128.

882 *See above,* Section III.F. and Respondent's Counter Memorial, ¶¶ 320-328.

measures and legal controls.[883] All such procedural mechanisms and controls were not only available, but were used by Corficolombiana and Newport.[884]

621. Yet, the Claimants contend that "*Colombia's actions violated substantive and procedural due process obligations by initiating the Asset Forfeiture Proceedings*".[885] Once again, the Claimants refer to "the debunked gossip of a drug trafficker" and "a corrupt scheme" involving State officials as the sole rationale for the Asset Forfeiture Proceedings.[886] As extensively demonstrated by the Respondent, both allegations are simply wrong.[887] Given that the very basis of the Claimants' claim has been proven wrong, the Claimants' claims must fail.

622. For the sake of completeness, the Respondent recalls that the Claimants, through Newport, had multiple opportunities to present their case and submit evidence before the Attorney General's Office and the asset forfeiture courts.[888] In fact, Newport's claims to be afforded standing as a good faith third party without fault were heard multiple times by the Attorney General's Office.[889] However, as explained above and was made clear to Newport in the Prosecutor 44's response of 4 March 2017, such determination was to be made by the competent judge, after considering all the evidence.[890]

623. Newport also filed two submissions before the Colombian courts to appeal the Court's *avocamiento* order finding that Newport was not to be considered as an affected party in the Asset Forfeiture Proceedings because it did not have neither *in rem* right over the Meritage

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883 Medellín Expert Report, ¶ 24.

884 *See above,* Section III.F.

885 Claimants' Reply, ¶ 278.

886 Claimants' Reply, ¶ 278.

887 *See above,* Section III.H. Particularly outrageous is the Claimants' allegation that "the only testimony that drove the Attorney General's Office [] to halt a multi-million dollar development were those of a drug trafficker and his son". *See* Claimants' Reply, ¶ 279. The evidence produced in this Arbitration by the Claimants themselves show the extensive investigations conducted by different Government agencies on the basis of which the Attorney General's Office concluded that the grounds for asset forfeiture set in the Asset Forfeiture Law had been met.

888 *See above,* Section III.F.

889 *See above,* Section III.F.

890 *See* Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017 (**Exhibit C-054**), pp. 3-8.

Lot.[891] Both the appeal and the supplemental brief were accepted by the Court, and decision on appeal is still pending. As explained by Dr. Reyes, this means that Newport's due process rights cannot be deemed to have been breached:

> This means that so far there is no final decision on the unaffected status of Newport S.A.S., but the issue remains under discussion within the process. The precision is important because it indicates that it is not true that Newport S.A.S. has been deprived of the right to intervene in the trial stage of the action for asset forfeiture since, strictly speaking, it will begin when the appeal filed by the representative of Newport S.A.S. against the decision that denied that company recognition as affected is resolved.[892]

624. In his second report, Dr. Reyes further confirmed that Newport did not have a right to be considered an affected party in the Asset Forfeiture Proceedings, but the right to request the courts to be recognized as such and to appeal any decision on the contrary:

> Denying the condition of affected party within an asset forfeiture proceeding does not imply a violation of a person's purported right to be recognised as such. A person does not have the right to be recognised as an affected party within an asset forfeiture proceeding. What a person does have is the right to request to be recognized as an affected party and to challenge a decision denying such condition.[893]

625. Not only did Newport have the right to appear before the courts to request to be recognized as an affected party; it did exercise the right the right to be heard when it appeared before the competent court to appeal the decision not to recognize it as an affected party:

> The expert Medellín Becerra, by recognising in his second opinion that Newport S.A.S. filed an appeal against the decision which denied its condition as an affected party within the proceeding under analysis, is admitting that Newport did have the opportunity to intervene in the trial stage of the asset forfeiture proceeding. I reiterate then what I had stated in paragraph 41 of my previous

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891 *See* Newport's Appeal Against the *Avocamiento* Order, 24 August 2017 (**Exhibit C-195**); Newport's Memorial Complementing Its Appeal, 11 September 2017 (**Exhibit C-196**). *See* Respondent's Counter Memorial, ¶¶ 213-241 for a detailed explanation of the content of the *Avocamiento* Order.

892 Dr. Reyes Expert Report, ¶ 41.

893 Dr. Reyes Second Expert Report, ¶ 91 *See also* ¶ 90 ("There is no right to be recognized as a good faith third party without fault. What does exist is a right to request said recognition, which implies not only the right to file a request in that sense, but also the right to present the arguments on which that request is based, the right to challenge the potential arguments against such request, the right to provide evidence in support of said request, and the right to appeal an eventual rejection of the request. All of these rights have been exercised in this case by Newport S.A.S., as shown by the fact that at this very moment an appeal Court is evaluating Newport S.A.S.'s appeal against the decision in first instance pursuant to which its condition as an affected party within the procedure was denied").

> opinion in the sense that "it is not true that Newport S.A.S. has been deprived of the right to intervene in the trial stage of the action for asset forfeiture".[894]

626. Against this background, the Claimants' allegation that the courts were "unwilling[] to recognize Newport as an affected party in the asset forfeiture proceedings" despite Newport's alleged contractual rights under the trust agreements is unmeritorious.[895] Newport had and used every opportunity to request such recognition, but due to Newport's own acts – *i.e.*, it renounced its condition as the beneficiary of the Meritage La Palma Trust "for tax planning and efficiency purposes"[896] – it was considered not to be an affected party in the Asset Forfeiture Proceedings (a decision which, as noted, is subject to appeal):

> Newport S.A.S.'s waiver to its condition as beneficiary of the irrevocable commercial trust agreement for the administration and payments of Meritage La Palma Argentina, was what led Antioquia's 2nd Criminal Court Specialized in Asset Forfeiture to deny it the condition as affected party within the asset forfeiture proceeding which is being carried out against the lot to which the trust agreement refers.[897]

627. In any event, and regardless of whether the decision was or not favourable to Newport, it cannot be denied that Newport's right to be heard were respected at all times, as confirmed by Dr. Reyes:

> It is precisely the theoretical possibility that proceedings could be decided in favor of one of the parties and against the interests of the other what characterizes adversarial judicial proceedings; but the fact that this double possibility of resolving a dispute exists does not imply that the losing party has been deprived of its right to expose their arguments.[898]

628. In addition to Newport's direct exercise of its procedural rights, the Claimants acknowledge that Corficolombiana, in its capacity of fiduciary of the Meritage Lot, also initiated the legality control proceedings available under Article 111 of the Asset Forfeiture Law with respect to the Precautionary Measures.[899] In first instance, the Asset Forfeiture Court reviewed the analysis conducted by Prosecutor 44 and concluded that Prosecutor 44 had properly motivated and

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894 Dr. Reyes Second Expert Report, ¶ 84.

895 Claimants' Reply, ¶ 304.

896 Seda Witness Statement, ¶ 69.

897 Dr. Reyes Second Expert Report, ¶ 80.

898 Dr. Reyes Second Expert Report, ¶ 88.

899 *See* Claimants' Reply, ¶¶ 281-282.

justified the need, proportionality and urgency of the Precautionary Measures, so the Asset Forfeiture Proceedings were in accordance with Article 250 of the Colombian Constitution and the Asset Forfeiture Law.[900] This decision was upheld in appeal (*i.e.* the last instance available) by the Bogota Superior Court, which referred to the findings of the Attorney General's Office investigations showing irregularities in the chain of transfer of the Meritage Lot and concluded that Prosecutor 44 had sufficient elements to infer that the origin of the Meritage Lot was illicit.[901]

629. Moreover, in response to Corficolombiana's request to be recognized as a good faith third party without fault, both the Asset Forfeiture Court and the Bogota Superior Court held that the initial phase of the Asset Forfeiture Proceedings was not the appropriate phase for this determination.[902]

630. Therefore, the Claimants (through Newport) had more than "a reasonable chance" to be heard by independent judges, in accordance with the procedural opportunities offered in the Asset Forfeiture Law and the Colombian Constitution and have used such chances extensively. In the absence of any procedural impropriety, the sole fact that the Claimants were unhappy with the decisions (which were rendered in accordance with Colombian law, as demonstrated) cannot amount to a breach of due process. Neither does the fact that Newport and Corficolombiana were not recognized as good faith third parties without fault amount to a breach of due process: while they had all the opportunities to be heard on their demands to be accorded that status, under the Asset Forfeiture Law such determination would be done by the competent court in a subsequent stage of the Asset Forfeiture Proceedings.

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900 *See* Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016 (**Exhibit C-044bis**), p. 22. Notably, the Court recalled its duty to "protect the fundamental right of due process and, among others, the procedural guidelines and guaranties such as presumption of innocence, the right to be heard, defense, and natural judge".

901 *See* Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017 (**Exhibit C-047bis**), pp. 4-6, 15-16.

902 *See* Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016 (**Exhibit C-044bis**), p. 24; Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017 (**Exhibit C-047bis**), p. 6.

(v) The Asset Forfeiture Proceedings were initiated and conducted in a non-discriminatory basis

631. The Claimants agree with the Respondent that the assessment of whether a measure is discriminatory is fact-specific and based on a three-pronged test, *i.e.* whether "(i) similar cases are (ii) treated differently (iii) without reasonable justification".[903] The Claimants also seem to agree with the findings of the tribunal in *Cargill v. Mexico* that in order to be relevant, the different treatment "*has* to be relevant in the context of the particular measure being imposed" and "in light of the rationale for the measure and its policy objective".[904]

632. On this basis, the Claimants allege that the Respondent "has clearly acted in a discriminatory manner" when it pursued Asset Forfeiture Proceedings against the Meritage Lot but not against other properties "associated with Mr. López Vanegas López (sic), and in particular the Sister Property".[905] The Claimants' arguments are misconceived.

633. As demonstrated in the Counter Memorial[906] and further below in connection with the Claimants' allegations that the Respondent breached the national treatment standard,[907] the Respondent did not discriminate against the Claimants.

634. *First*, the Meritage Lot is not in a comparable situation (or in "like circumstances") to the other lots allegedly belonging (or having belonged) to Mr. López Vanegas, including the improperly called "Sister Property". Much on the contrary, the multiple irregularities found in the chain of domain of the Meritage Lot gave the Colombian authorities strong indications that the lot was closely related to the *Oficina de Envigado*.[908] Moreover, the fact that money was being collected through the pre-sales of units made it necessary to adopt measures to protect prospective buyers and the general public.[909] As explained in the Precautionary Measures Resolution:

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903 *See* Claimants' Reply, ¶ 274.

904 Claimants' Reply, ¶ 274, partially quoting *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (**Exhibit CL-68)**, ¶ 206.

905 Claimants' Reply, ¶ 275.

906 *See* Respondent's Counter Memorial, ¶¶ 308-319.

907 *See above,* Section V.B.

908 *See above,* Section V.B. As further explained below, some of the so-called López Vanegas Properties were similar or other irregularities had been identified, have also been subjected to investigations.

909 *See above,* Section III.H.1.

> [T]he Prosecutor's Office considers that is necessary to order precautionary measures such as those provided for in § 88 of Law 1708, as it has not found any other measure that would produce the same desired end, which is **to prevent that the assets subject to forfeiture continue being transferred and negotiated as has happened since 2014 to this date. Also, to prevent that people unrelated to this situation continue acquiring real property in the construction project known as "MERITAGE," which is currently under construction, given that at this initial stage a minimum of evidence has been gathered which would suggest an illegal provenance of these assets.**[910]

635. *Second*, the Respondent has treated the Meritage Lot as it has treated other assets which may be considered in comparable situation (or in "like circumstances"), *i.e.* assets affected by comparable wrongful conduct.[911]

636. Moreover, as explained in the Counter Memorial, in order for an investment/investor to be treated differently to the identified comparator, there must be a discriminatory act or measure that produces "some not-insignificant negative impact".[912] This has not been disputed by the Claimants.

637. Rather, the Claimants claim to have suffered a "practical negative impact" as they allegedly lost the entirety of their investment and suffered "the stigma of the Proceedings" which resulted in the loss of Claimants' investment in its other projects. The Claimants allegations are not only false – as demonstrated by the Respondent[913] – but also completely miss the point. To the extent that the Claimants did suffer any loss in connection with the Asset Forfeiture Proceedings, it was unrelated to any differential treatment. In other words, as the Meritage Lot fell within the grounds established in the Asset Forfeiture Law to commence asset forfeiture proceedings, the Meritage Lot would still be subject to the Asset Forfeiture Proceedings regardless of the initiation or not of similar proceedings against other assets in similar conditions. Moreover, no negative impact of any kind can be said to derive from the fact that asset forfeiture proceedings were not commenced against other lots, even if also belonging to Ivan Lopez, and even if proximate to the Meritage lot.

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910 *See* Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 71 (emphasis in original).

911 *See above,* Section V.B.

912 *See* Respondent's Counter Memorial, ¶ 315.

913 *See above,* Section V.C.3; Respondent's Counter Memorial, ¶¶ 315-316.

638. *Third*, to the extent that any differential treatment could be identified, it was justified in light of the circumstances of the case. In particular, the precautionary measures were required to protect the unit buyers and the general public from continuing investing in the Meritage Project while the legal situation of the Meritage Lot got cleared.[914]

b. *The Claimants' contention that the Asset Forfeiture Proceedings were "a gross misuse of the powers of the State" is untenable*

639. The Claimants allege that the Asset Forfeiture Proceedings "are not *bone fide* applications of the State's police powers" but rather "a gross misuse of the powers of the State" because they were "launched in a corrupt and collusive fashion".[915] The Claimants' contentions are untenable, as demonstrated below.

640. The Respondent prefaces its responses to the Claimants' fabricated corruption allegations by stating the obvious: that Claimants are simply uncappable of specifying which crimes – if any – the Colombian authorities would have committed in the Asset Forfeiture Proceedings. This not only turns the Respondent's defense into a herculean task, but also sheds light on the absolute lack of seriousness in the Claimants' purported corruption theory. That said, the Respondent will now respond to the Claimants' accusations of corruption, but expressly reserves its rights to answer to the Claimants' last minute specific accusations.

641. *First*, it is undisputed that the Claimants bear the burden to prove that the Attorney General's Office acted in corruption in the Asset Forfeiture Proceedings.[916] In the event that the Tribunal applies the "red flags" and "connecting the dots" methodology suggested by the Claimants,[917] yet "the dots have to exist and they must be substantiated by relevant and probative evidence relating to the specific allegations made in the case before it."[918] This is simply not the case here.

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914 *See above,* Section V.B.; Respondent's Counter Memorial, ¶¶ 317-318.

915 Claimants' Reply, ¶¶ 248, 252.

916 *See* Claimants' Reply, ¶ 286.

917 *See 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 (**Exhibit CL-090**), ¶ 4.876.

918 *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 (**Exhibit CL-090**), ¶ 4.879. See also *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018 (**Exhibit CL-119**), ¶ 7.114 ("with a case dependent

642. In this regard, it is plain that the red flags methodology is meant to be used in good faith, so that it is not impossible for the alleging party to prove corruption. It should not, however, be used as means to circumvent the alleging party's obligation to meet its evidentiary burden – which seems to be the case at hand. Contrary to the Claimants' arguments, the Claimants have never produced "substantial evidence"[919] of corruption in the Asset Forfeiture Proceedings. Rather, Claimants provided the Tribunal with a fake corruption story.

643. Each and every purported "red flag" indicated by the Claimants was already refuted in Respondent's **Section III.H**, where the Respondent extensively showed that the Claimants' narrative of corruption in the Asset Forfeiture Proceedings is fabricated and unsubstantiated. The Respondent thus limits itself to provide a brief recap of its arguments.

644. Purported coincidences in timing. On this point, the Respondent refers the Tribunal to **Appendix A** to this Rejoinder. There is no link whatsoever between the launch of the Asset Forfeiture Proceedings and the extorsions of which Mr. Seda claims to be a victim. In a nutshell, this is mainly because the Asset Forfeiture Proceedings were initiated much before Mr. López Vanegas' allegedly attempted to extort Ms. Seda with asset forfeiture proceedings over the Meritage lot.[920]

645. Even if the Tribunal considers that there were sufficient "coincidences in timing" that would amount to a "red flag" – there are not – a mere chronological order of events remains unreliable in itself, since it is impossible to connect such events through a link of cause and effect.[921]

646. Purported extortion attempts. The Claimants have failed to prove that there was any connection between Ms. Ardila, Ms. Malagón and Mr. López Vanegas. If Mr. Seda was indeed victim of extorsion attempts as he claims, there is no proof that Ms. Ardila's and Ms. Malagón's activities in the Asset Forfeiture Proceedings have anything to do with that.[922] [redacted]

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upon circumstantial evidence (as in the present case), it is often a question of joining up the dots; but there have first to be dots in the evidence adduced before the tribunal").

919 *See* Claimants' Reply, ¶ 249.

920 *See above,* Section III.H. *See also*, [redacted]

921 *See Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019 (**Exhibit CL-125**), ¶ 729.

922 *See above*, Section III.H.

[redacted] On this point, the Respondent refers to the tribunal in *Glencore v. Colombia*, which stated that "the Colombian criminal prosecutor and the Colombian criminal courts [] have a much higher capacity for investigation than this Arbitral Tribunal."[926]

647. Moreover, Mr. Seda himself acknowledged in his conversations with Ms. Noguera and Mr. Hernández that he never received any requests from Ms. Malagón and Ms. Ardila.[927]

648. Other charges against Ms. Malagón and Ms. Ardila. Faced with the impossibility to put forward any evidence that Ms. Malagón and Ms. Ardila would have acted corruptly in the Asset Forfeiture Proceedings, the Claimants desperately tried to fabricate a corruption case on the basis of events completely unrelated to the Meritage lot.[928] However, here again, the Claimants' corruption allegations do not stand. [redacted]

649. As a result, there is no evidence of corruption on the record. The Claimants' purported corruption allegations in the Asset Forfeiture Proceedings were fabricated for the purposes of this arbitration. On this basis alone, no finding of corruption may follow.[930]

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923 [redacted]

924 [redacted]

925 *See above*, Section III.H.2.

926 *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019 (**Exhibit CL-125**), ¶ 738.

927 Transcription of Meeting between Ángel Seda, Daniel Hernández, Catalina Noguera and others dated 5 January 2022 (**Exhibit C-322**), p. 34.

928 *See above*, Section III.H.

929 [redacted]

930 *See Karkey Karadeniz v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**Exhibit CL-114**), ¶ 543.

650. Additionally, the Claimants refer to the tribunal's findings in *Glencore v. Colombia*, claiming that, different from what happened in that case, the Tribunal should find that Ms. Ardila and Ms. Malagón acted corruptly.[931] The Claimants attempt to distinguish the *Glencore v. Colombia* case from ours by saying that, here, the Respondent refused to provide a "complete and honest disclosure of all required documents by claimants", and that the Respondent has not given "reasonable explanations […] backed by documentary and testimonial evidence" to refute the Claimants' corruption allegations.[932]

651. If this was ever credible (*quod non*), Claimants' arguments fell to the ground, [redacted]

652. [redacted]

931 *See* Claimants' Reply, ¶ 286.

932 Claimants' Reply, ¶ 287.

933 [redacted]

934 [redacted]

935 [redacted]

936 [redacted]

653. [redacted]

654. The Respondent cannot overstate that <u>all files</u>, related to or anyhow arising from the pending criminal investigations <u>are subject to the Parties' confidentiality undertakings</u>. However, the Republic of Colombia is extremely concerned that the pending criminal investigations may be affected by the serious risks of leaks of confidential information provided in these proceedings, for the reason as follows.

655. [redacted]

937 [redacted]

938 [redacted]

939 [redacted]

[redacted]

656. Some points should be made in this regard. *First*, it is clear to the Respondent that the Claimants are resorting to guerilla tactics in order to disturb the Respondent's works in preparation of its defenses and to influence the outcome of this arbitration. [redacted] This is irresponsible, odious, and dangerous. *Second*, the Claimants' behavior testifies to the fact that there are serious risks that the confidential information contained in the pending criminal investigations, which the Respondent is willing to show now, might also be leaked, and that will most certainly affect Colombia's sovereign powers to investigate and punish monstruous criminal activities.

657. In light of the above, the Respondent calls upon the Tribunal to reinforce its Procedural Order no. 5, since it has clearly not been taken seriously by the Claimants. In particular, the Respondent requests the Tribunal to enforce its procedural orders pertaining to confidentiality of the proceedings, and to advise the Claimants that any filtration and/or leaking of confidential documents and information contained therein will be heavily sanctioned by this Tribunal. The

940 [redacted]

941 [redacted]

942 [redacted]

943 [redacted]

Respondent also requests the Tribunal to issue an injunction order for the Claimants to refrain from continuing to leak confidential information to the press or any other person unrelated to this arbitration, in an irresponsible manner for the sole purpose of building their case and in total disregard for the security of the State and of individuals. The injunction order should not be interpreted as a waiver of the Respondent's rights to seek damages arising from any leaks of confidential information by the Claimants, their representatives, experts and witnesses in this arbitration. The Respondent reserves all its rights in this regard.

658. Furthermore, the Respondent's decision to evidence certain ongoing criminal investigations shall not, under no circumstances, be interpreted as a waiver of the Respondent's position in this arbitration. These are, and they remain, criminal investigations that are legally privileged. However, as a result of the Tribunal's procedural orders, and for the reasons aforementioned, the Respondent is exhibiting such documents, as long as they had been made available to the Defense.[944]

659. The Respondent wishes to call the Tribunal's attention to the extreme sensitivity and the repercussions that a decision regarding Colombia's actions in the Asset Forfeiture Proceedings in this case would entail in [redacted] and (*ii*) preventing the Colombian State to attack

944 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Chapter 22.

945 [redacted]

the sources of financing of organized armed groups, thereby frustrating the effectiveness of criminal investigation to punish extremely grave and prejudicial crimes, such as money laundering and drug-trafficking.[946] That, *per se*, would be contrary to the US-Colombia Trade Promotion Agreement.[947] But also, as a matter of international public policy, the Tribunal shall not impede Colombia's efforts to combat money laundering and organized crime in its territory. To decide otherwise would not only be legally unsustainable in light of principles of international arbitration,[948] but also morally unacceptable.

660. While assessing the evidence on the record of the present proceedings, the Tribunal must take into account the fact that, the Republic of Colombia's decision to disclose the content of pending criminal investigations, comes, of course, at a very serious risk that such criminal investigations will be hindered by Mr. Seda's behavior – which is already happening.

661. Still, and evincing the Respondent's full cooperation with the Tribunal to exercise its duty to fight corruption, the Republic of Colombia is not willing to take the risk – even the slightest – for the Claimants' corruption theory to be left unrebutted. Even though the Claimants' purported corruption case was never anything but a fabrication – and now it is even less so, given the content of the documents evidenced with this Rejoinder – it will come with no surprise to the

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[redacted]

946 *See* C. Lamm, H. Pham, *et al*., "Fraud and Corruption in International Arbitration", *in Liber Amicorum Bernardo Cremades*, Wolters Kluwer España; La Ley 2010, (**Exhibit CL-205**), pp. 706-707 ("Universally, "certain activities are regarded as contra *bonos mores* […] including: 'piracy, terrorism, genocide, slavery, smuggling, drug trafficking,' trading of stolen property, and trafficking of human organs"). Emphasis added.

947 *See above*, II.

948 *See* E. Gaillard, "The emergence of transnational responses to corruption in international arbitration", *Arbitration International*, 2019, (**Exhibit RL-218**), p. 28; *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, (**Exhibit RL-89**), ¶ 72 ("the right, even the duty, to conduct criminal investigations and prosecutions is a prerogative of any sovereign State"). *See also*, United Nations Convention Against Corruption, 2004 (**Exhibit RL-215**), arts. 1, 14; Inter-American Convention Against Corruption, 1996 (**Exhibit RL-211**), art. 1; United Nations Convention Against Transnational Organized Crime, 2004 (**Exhibit RL-214**); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (**Exhibit RL-223**); United Nations General Assembly Resolution A/RES/S-20/4, 21 October 1998 (**Exhibit RL-212**); OECD, "Essential Security Interests under International Investment Law", *International Investment Perspectives: Freedom of Investment in a Changing World*, 2007 (**Exhibit R-251**), p. 105. *See also*, Section II.

Tribunal that the Republic of Colombia has engaged in a major battle against drug mafia structures for decades.[949] This "war on drugs" and fight against criminal organizations have been at the heart of Colombian essential interests, and must not be put in jeopardy.

662. Hence, the Claimants have not met its evidentiary burden, whether it is one of "direct evidence" or "compelling circumstantial evidence".[950]

663. *Second*, the Claimants' pleadings are moot as to what standard of proof is applicable to our case.

664. Nevertheless, and for the sake of completeness, the Respondent takes the view that, in light of the seriousness of the Claimants' corruption allegations, and considering what is at stake in this arbitration,[951] the only possible approach is that "clear and convincing" evidence of corruption is put forward. In the words of the *Karkey Karadeniz v. Pakistan*, on which the Claimants relied:

> The Tribunal finds that the seriousness of the accusation of corruption in the present case, including the fact that it involves officials at the highest level of the Pakistani Government at the time, requires clear and convincing evidence. There is indeed a large consensus among international tribunals regarding the need for a high standard of proof of corruption. [952]

665. As widely accepted in international arbitration, arbitrators enjoy "wide discretion in matters of fact-finding and power to freely evaluate evidence without rigid adherence to any particular standard of proof."[953] It follows that the Tribunal will find no obstacles to require a higher

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949 *See* Speech of President of the Republic of Colombia at the United Nations General Assembly 69th Regular Session, 25 September 2014 (**Exhibit R-252**), pp. 2-3 of the PDF ("[w]ith regards to the illicit drug problem, we agreed to continue dismantling the drug mafia structure […]. A fuel of conflict in Colombia and around the world is, without a doubt, drug trafficking"); General Secretariat for the Special General Assembly of the Organization of American States, *The OAS Drug Report: 16 months of debates and consensus*, 2014 (**Exhibit R-253**), p. 5 of the PDF ("*Colombia has been one of the countries with the liveliest drug policy debates*").

950 *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 (**Exhibit CL-090**), ¶ 4.876.

951 *See above*, Section II, III.A-B.

952 *Karkey Karadeniz v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**Exhibit CL-114**), ¶ 492. *See also, EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (**Exhibit CL-070**), ¶ 221. Submission of the United States of America in *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case no. ARB/19/6, 26 February 2021, ¶ 61.

953 E. Gaillard, "The emergence of transnational responses to corruption in international arbitration", *Arbitration International*, 2019, (**Exhibit RL-218**), p. 4. *See also*, *Metal-Tech Ltd. v. The Republic of Uzbekistan,* ICSID Case No. ARB/10/3, Award, 4 October 2013 (**Exhibit CL-091**), ¶¶ 237-238 ("[…] the

threshold in order to make a determination on corruption, particularly when the consequences of a finding on corruption might ending up giving the apparency of legality to a criminal transaction, or even worse – preventing the Republic of Colombia to fight against corruption.[954]

666. In any event, even if the Tribunal applies a "less demanding standard of proof",[955] from the evidence adduced by the Respondent above,[956] the Tribunal cannot conclude that the Asset Forfeiture Proceedings are tainted by corruption.

667. In sum, Claimants' contention that Respondent breached its treaty obligations for launching "[Asset Forfeiture] proceedings […] in a corrupt and collusive fashion"[957] do not hold water. The Asset Forfeiture Proceedings are not tainted by corruption. The Claimants have failed to demonstrate the contrary. As a matter of fact, the Asset Forfeiture Proceedings was a reasonable measure adopted in accordance with Colombian law and due process of law, and were designed and applied to protect legitimate public welfare objectives – which include the fight against major criminal activities.

668. Even assuming, *quod non*, that the Asset Forfeiture Proceedings were improperly initiated by State agents acting "corruptly and collusively"[958] (which, as extensively demonstrated, is not the case), it is undisputed that it was Mr. Caro – and not Mses. Malagón or Ardila – that signed and filed the petition to asset forfeiture in April 2017, after being assigned the case in early 2017.[959] As explained above, Mr. Caro – whose integrity has not been questioned – did not "rubber-

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Tribunal has relative freedom in determining the standard necessary to sustain a determination of corruption.").

954 *See above*, Section II. *See also*, *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 (**Exhibit CL-090**), ¶¶ 4.872-4.873.

955 *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (**Exhibit RL-207**), ¶ 181.

956 *See above*, III.H.

957 Claimants' Reply, ¶ 252.

958 Claimants' Reply, ¶ 249.

959 *See* Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 (**Exhibit C-024bis**); Dr. Caro First Witness Statement, ¶ 11.

stamp" the request but rather reviewed and ratified the findings that motivated the Asset Forfeiture Proceedings against the Meritage Lot.[960]

669. In any event, to the extent that the Asset Forfeiture Proceedings are still under review before the competent court in Colombia, any finding of "gross misuse of the powers of the State" is premature (and unsubstantiated).

* * *

670. In sum, as was the case in *Eco Oro v. Colombia*, in this case as well "the Challenged Measures were adopted in good faith, are non-discriminatory and designed and applied to protect [Colombia's legitimate public welfare objectives] such that they are a legitimate exercise of Colombia's police powers and do not constitute indirect expropriation".[961] Therefore, "[g]iven the measures were adopted as a part of Colombia's valid and legitimate exercise of its police powers […] under international law, no compensation is payable".[962]

B. THE RESPONDENT DID NOT BREACH ITS OBLIGATION TO ACCORD NATIONAL TREATMENT TO THE MERITAGE PROJECT AND THE CLAIMANTS

671. The Claimants claim that the Respondent breached its obligation to accord national treatment to the Meritage Claimants and their alleged investment.

672. As demonstrated in the Counter Memorial, the purpose of the national treatment standard is to ensure a level playing field between domestic and foreign investors.[963] This has been confirmed, for example, by the recent decision in *Pawlowski v. Czech Republic*, where the tribunal clearly

960 *See above*, Section III.F.

961 *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 (**Exhibit CL-175**), ¶ 699.

962 *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 (**Exhibit CL-175**), ¶ 698. Notably, in *Eco Oro v. Colombia*, the tribunal assessed whether the measures adopted by Colombia "amount to a measure that is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith?". As in this case, the answer was that "the necessary element of severity is [not] present given the undoubted *bona fide* purpose of these Challenged Measures and the overall proportionality of the [measures]".

963 Respondent's Counter Memorial, ¶ 483.

held that the national treatment standard "prohibit[s] discrimination based on nationality".[964] The standard, however, is not intended to place foreign investors in a more favourable situation than that accorded to domestic investors.

673. It has also been shown that in order to succeed in the national treatment claim, the Claimants must show that (i) a foreign investor, (ii) has received treatment less favorable, (iii) than other investors in "like circumstances", and (iv) the different treatment is not justified.[965] This is uncontested.[966] The burden of proving these elements lie with the Claimants.[967]

674. The parties mainly disagree as to whether the Meritage Project and the Claimants were in "like circumstances" with other domestic investors and, to the extent that they were treated differently, whether that treatment is justified.

675. As demonstrated in the Counter Memorial and further below, the Respondent cannot be deemed to have breached the national treatment standard *vis-à-vis* the Claimants because it has

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964 *See Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (**Exhibit RL-209**), ¶ 309, 539 (the tribunal found that the fact that national investors had also been affected by the measure "is sufficient to dispose of any notion that the Czech Republic singled out Mr. Pawlowski because he was a foreigner"). *See also Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 , **(Exhibit RL-80)**, ¶ 467 ("*the Claimant was targeted not because of his nationality but because, rather than adhering to the terms of his permits, he 'decided to embark on a materially different operation outside the Jebel Wasa*"); *Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic,* ICSID Case No. ARB/15/3, Decision on Jurisdiction, Liability and Certain Aspects of Quantum, 25 June 2018 (**Exhibit RL-189**), ¶ 926 ("The underlying principle behind National or MFN Treatment is nationality based discrimination. […] In the Tribunal's view, if the host State provides satisfactory evidence that the alleged discrimination was not due to nationality reasons, then a claim for breach of the National or MFN Treatment Standard will not be maintainable"); ***Total S.A. v. Argentine Republic,*** ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (**Exhibit CL-079**), ¶ 213 ("different treatment between foreign and national investors who are similarly situated or in like circumstances must be nationality- driven. Accordingly, a foreign investor who is challenging measures of general application as de facto discriminatory under Article 4 of the BIT has to show a prima facie case of nationality-based discrimination").

965 Respondent's Counter Memorial, ¶ 484.

966 *See* Claimants' Reply, ¶ 194.

967 *See Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (**Exhibit RL-209**), ¶ 534; *Anglo American PLC v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019 (**Exhibit RL-191**), ¶ 497 (even though Venezuela had not "*produced documentation pertaining to 'hundreds of others exporters'*", the tribunal found that it had produced enough evidence showing that Venezuela "*treated exporting taxpayers in similar situations equally and that taxpayers in different situation* […] *were treated differently*", whereas the claimant had failed to prove its claim of discrimination); *Adel A Hamadi Al Tamimi v. Sultanate of Oman,* ICSID Case No. ARB/11/33, Award, 3 November 2015 **(Exhibit RL-80)**, ¶ 464.

treated the Meritage Lot as it has treated other lots in "*like circumstances*" (**V.B.1**), and, to the extent that any differential treatment may be identified, it is justified in the circumstances of the case (**V.B.2**). In any event, the Claimants did not suffer any unjustified harm as a result of the Asset Forfeiture Proceedings (**V.B.3**).

676. As a preliminary matter, the Respondent notes that the Claimants' allegations should be dismissed *prima facie* because there were no measures adopted by the Respondent against a foreign investor, let alone any differential or discriminatory treatment *due to* the foreign nationality of an investor. In fact, the Asset Forfeiture Proceedings were initiated against the Meritage Lot, a lot located in the municipality of Envigado (Colombia) and owned by La Palma Argentina and Corficolombiana as trustee of the Meritage La Palma Trust, both of which are – undisputedly – Colombian companies. In other words, the Claimants do not own – or have any *in rem* rights – over the Meritage Lot. Therefore, any measure adopted with respect to the Meritage Lot, including the Asset Forfeiture Proceedings, cannot be legally linked to the Claimants.[968] On this basis alone, the Tribunal should reject the Claimants' claims that the Asset Forfeiture Proceedings were discriminatory. The arguments that follow are made only for the sake of completeness.

1. The Respondent has treated the Meritage Lot as it has treated other lots in "*like circumstances*"

677. In their Reply, the Claimants aver that the Respondent did not investigate other López Vanegas Properties (including the so-called "Sister Property"), which according to the Claimants were in "*like circumstances*" with the Meritage Lot. Two main reasons disprove this assertion: *first*, that the López Vanegas properties, including the so-called "Sister Property", and the Meritage Lot are not in "like circumstances" (a) and *second*, that the Respondent has treated the Meritage Lot as it has treated other lots which may be considered in "like circumstances" (b).

a. *The so-called "Sister Property" and the other López Vanegas properties are not in "like circumstances" with the Meritage Lot*

678. The Claimants' entire reasoning as to the purported breach by the Respondent lies on the erroneous premise that the so-called "Sister Property" and the other López Vanegas' properties are in "like circumstances" with the Meritage Lot. However, as demonstrated in the Counter

968 *See* Respondent's Counter Memorial, ¶ 491.

Memorial and below, the Meritage Lot and the other lots allegedly belonging to Mr. López Vanegas or his family cannot be deemed to be in "like circumstances" and therefore may not be considered adequate comparators for the purpose of establishing whether the Respondent has breached its obligation to accord national treatment to the Meritage Claimants and their alleged investment.

679. *First*, the Claimants' allegations that the Meritage Lot is in "like circumstances" with other unrelated lots only because of "the common ownership of the plots of land by Mr. López Vanegas"[969] is based on a fallacy, *i.e.*, that the Asset Forfeiture Proceedings were initiated, and continued up to this day, due to "López Vanegas' criminal history".[970] On this basis, the Claimants argue that any other lot "that originally belonged to Mr. López Vanegas" should have been subjected to asset forfeiture proceedings. This is a disingenuous attempt to belie the fact that several irregularities found during the investigations conducted by the Attorney General's Office were unique to the Meritage Lot. These numerous sources of objective and readily discernible illicit origin are unique to the Meritage lot, and are absent, for example, with respect to the so-called "Sister Property".

680. Contrary to the Claimants' allegations, while it is true that the Attorney General's Office first learnt about the irregular situation of the Meritage Lot as a result of Mr. López Vanegas' complaint, the investigation of the Meritage Lot disclosed a series of serious irregularities in the chain of sale-purchases.[971] As has been further described by the Respondent,[972] and as noted by the Attorney General's Office in its Determination of the Claim and *Requerimiento*, the evidence collected during the initial stage of the asset forfeiture investigations demonstrated that the Meritage Lot's chain of domain was tainted, since (i) the individuals who had appeared as owners clearly lacked the financial capacity to acquire the lot and (ii) several of these individuals showed close ties with members of the *Oficina de Envigado*.[973]

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969 Claimants' Reply, ¶ 198.

970 Claimants' Reply, ¶ 199.

971 *See above*, Section III.C.

972 Section III.C.; Respondent's Counter Memorial, ¶¶ 160-165

973 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 **(Exhibit C-23 bis)**, p. 122; *See also* Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017 **(Exhibit C-24 bis)**, p. 132.

681. As it is clear from the Timeline of Land Transfer produced by the Claimants,[974] many of these irregularities, [redacted] are exclusively found in the Meritage Lot's chain of domain.[976]

682. For example, in her deposition, Ms. Tatiana Gil declared that she had worked as a model since 1999 and had savings at the time in the amount of 55 million Colombian Pesos,[977] while her sister Ms. Rendón, a dental technician, had saved 5 million Colombian Pesos, which she wished to invest.[978] However, the purchase price of the Meritage Lot, as acquired by Mses. Rendón and Gil per Deed No. 3338, was of 450 million Colombian pesos.[979] According to Ms. Gil, the difference was covered by her then-partner, Mr. Guillermo Arango, *aka "Guru"*,[980] who had been also identified by Mr. López Vanegas in his complaint.[981] [redacted]

683. In addition, Ms. Gil candidly acknowledged that the negotiations over the Meritage Lot had been conducted by three sales agents, one of which she identified as Mr. Jesús María Velázquez, *aka*

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974 *See* Claimants' Memorial, Appendix F. The Claimants refer to Appendix F for illustrative purposes only but do not confirm the information contained therein. For an accurate and detailed account of the historical transactions involving the Meritage Lot, the Respondent refers to Appendix A to the Respondent's Counter Memorial.

975 [redacted]

976 *See* Respondent's Counter Memorial, Appendix A.

977 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-23 bis**), p. 93.

978 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-23 bis**), p. 92.

979 *See* Deed No. 3338, 4 October 2006 (**Exhibit R-19**).

980 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-23 bis**), p. 94.

981 *See* Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014 (**Exhibit C-130**), p. 3.

982 [redacted]

"Borracho",[983] who had also been mentioned by Mr. López Vanegas in his deposition.[984] As regards the seller, Ms. Gil stated that it appeared to be "*a person* [] *whose name is Hector, who is known as Perra Loca*".[985] Unmistakably, the person that Ms. Gil identified as the seller was no other than Hector Restrepo Santamaría, *aka "Perra Loca"* – [redacted]

684. [redacted]

685. As is widely known, maneuvers such as described are typical of money laundering operations.[991] Indeed, as remarked by a specialized prosecutor of the Attorney General's Office Anti Money

983 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-23 bis**), p. 93.

984 *See* Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-23 bis**), pp. 121-122.

985 Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-23 bis**), p. 93.

986 [redacted]

987 [redacted]

988 [redacted]

989 [redacted]

990 [redacted]

991 *See above,* Section III.A-B.

Laundering Unit, funds obtained from unlawful activities by organized crime groups are often invested in the purchase and construction of real estate such as land, commercial centers, hotels and similar properties.[992] Notably, a report by the Internal Work Group for the Support of Land Policy Management within the Superintendence of Notary Office has identified as maneuvers for asset concealment, among others: the acquisition of assets by family members lacking sufficient financial capacity, the division of big surfaces to constitute horizontal property and subsequent sale of the resulting plots; or the purchase of land by a parallel structure to the criminal organization, using individuals who would seemingly appear as good faith third parties.[993] It is no coincidence that all of these tell-tale signs ring familiar in relation to the Meritage Lot.

686. Indeed, as noted by Dr. Caro and plainly (and conveniently) passed over by the Claimants, the extensive investigations conducted led to the conclusion that the lot on which the Meritage Project was being built "in fact belonged to members of the so-called *Oficina de Envigado*".[994]

687. The statements of Dr. Caro are fully in line with his reasoning in the *Requerimiento*, dated May 2018:

> These illicit circumstances make it possible to state that the tarnish of illegality on the land that is the subject of this matter underwent several physical and legal transformations, which in no way cleanse or cure the faults or defects of this asset's spurious history of transfers, with the latter transferors forgetting that an asset that is the object of illicit activities never receives the constitutional and legal protection provided by the Colombian State to property acquired in those special circumstances; and all history of transfers regarding it is held to be null.[995]

688. In sum: the Claimants' attempts to compare the Sister Property and other López Vanegas should be disregarded, since they are ultimately based in an attempt to distract from the fact that several of the irregularities found during the investigation process affect only the Meritage Lot. Therefore, even assuming, as the Claimants assert, that "the choice of a domestic comparator

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992 *See* Periódico Contexto, "Los modos de lavar activos en Medellín", 23 April 2020 (https://periodicocontexto.wixsite.com/contexto/single-post/2020/04/23/los-modosde-lavar-activos-en-medellín), accessed on 15 November 2020 (**Exhibit R-54**).

993 Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), pp. 3 et seq.

994 Dr. Caro First Witness Statement, ¶ 21.

995 Newport's Supplement to Petition to Attorney General's Office Asset Forfeiture Unit, 14 December 2016 **(Exhibit C-49 bis)**, p. 4.

must have a nexus with the challenged measures",[996] the Claimants have not shown any relevant domestic comparator.

689. *Second*, as demonstrated, the circumstances of the Meritage Lot and other lots also differ in that Newport and Corficolombiana (both of them Colombian entities) were actually selling units in the Meritage Project to third parties and collecting money through the pre-sales of units.[997] The measures adopted, therefore, aimed at protecting prospective buyers of the units and the general public.[998]

690. *Third*, the Claimants' argument that investment tribunals "have assessed comparable business or economic sectors in a broad and fact-specific manner" is unavailing.[999] The Claimants have failed to show that the so-called Sister Property and the Meritage Lot are "competing entities 'in the same business or economic sector'"[1000] even if this comparison is "broadly" made.

691. *Fourth*, that the unlawful origin of the Meritage Lot and the many issues with its chain of title came to the attention of the authorities that decided to initiate the Asset Forfeiture Proceedings does not mean that other properties are not being investigated and that they may be subject to asset forfeiture proceedings eventually, once the requisite evidence is collected. In any event, as has been previously stated by the Respondent, the documents relating to these investigations may not be disclosed on the basis of applicable legal impediment, compelling grounds of confidentiality and compelling political and/or institutional sensitivity (Articles 9.2(b), 9.3, 9.2(e) and 9.2(f) of the IBA Rules).[1001]

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996 Claimants' Reply, ¶ 200.

997 *See* Respondent's Counter Memorial, ¶ 491.

998 *See* Dr. Reyes Expert Report, ¶ 49; Dr. Reyes Second Expert Report, ¶ 7(q)(r) ("If the Prosecutor had allowed that business to carry on through the application of a precautionary measure such as seizure of the seller's profits (as suggested by the expert Martínez Sánchez in his previous report), that precautionary measure would have been ineffective since the real estate property would have been diluted in dozens of new good faith owners, which would have made it almost impossible to pursue asset forfeiture against it. That is why, in my view, the decision made by the Attorney General's Office regarding the precautionary measures was not only one of the valid alternatives according to the law, but it was also the most adequate one in the case under analysis in order to preserve the effectiveness of the asset forfeiture proceeding"); Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016 (**Exhibit C-44 bis**), pp. 22-23.

999 Claimants' Reply, ¶ 201.

1000 Respondent's Counter Memorial, ¶ 490.

1001 *See* Respondent's Objections to the Claimants' Document Requests dated 1 January 2021, pp. 32-35.

692. *Finally*, in an attempt to show that they have been discriminated on account of their foreign nationality, the Claimants refer to the Project Quartier, which they allege is also being developed in a plot of land that belonged to Mr. López Vanegas.[1002] While the Claimants seem to have invested important resources to disclose the chain of transfer of the Quartier lot, the only conclusion that may be drawn from the documents obtained by the Claimants is that the Quartier lot is *not* in "like circumstances" with the Meritage Lot. Much to the contrary, other than the fact that Mr. López Vanegas owned the part of the originary lot, none of the other irregularities disclosed in the Meritage Lot chain of transfer is evident from the documents filed by the Claimants in support of their claim.[1003] In any event, [redacted]

693. Interestingly, what the Quartier Project does have in common with the Meritage Lot is the participation of foreign investors. In fact, according to publicly available information, American investors seem to be the owners of at least 50% of the lot on which the Quartier Project is being developed.[1005]

b. *The Respondent has treated the Meritage Lot as it has treated other lots which may be considered in "like circumstances"*

694. The Claimants acknowledge that the "like circumstances" "must be assessed in relation to the wrongful conduct in question"[1006] and considering, among others, "the location of the comparators".[1007] Precisely an assessment of other assets considering (i) the same or comparable wrongful conduct in question, and (ii) in the same location as the Meritage Lot, shows that the

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1002 *See* Claimants' Reply, ¶ 203.

1003 *See* Title Study for Development on Property No. 001-719319, 1 June 2015 (**Exhibit C-341**); Certificate of Title of Lot 001-462801, 22 February 2018 (**Exhibit C-336**); Certificate of Title of Lot 001-719319, 3 April 2018 (**Exhibit C-337**).

1004 [redacted]

1005 *See* Andes Investment Website (https://www.andesinvestments.com/Cont%C3%A1ctenos.html) (**Exhibit R-233**).

1006 Claimants' Reply, ¶ 195.

1007 Claimants' Reply, ¶ 201.

Respondent did accord to the Meritage Lot a similar treatment that it did to other assets in "like circumstances", *i.e.*, assets linked to organized crime in the municipality of Envigado.

695. For example, [redacted]

696. At a national level, a report prepared by the Financial Action Task Force of Latin America (*Grupo de Acción Financiera de Latinoamérica* or GAFILAT) shows that by 2018 there were 3.492 ongoing asset forfeiture proceedings in Colombia.[1010] 292 decisions had been issued on asset forfeiture proceedings between 2011 and 2016 (*i.e.* an average of 48 per year), resulting in 1.405 assets being forfeited.[1011] Moreover, between 2014 and May 2017, 13.941 assets were subject to precautionary measures in the context of asset forfeiture proceedings, 6.449 of those in 2016, *i.e.* the year when the precautionary measures were imposed on the Meritage Lot.[1012]

697. It is therefore clear that, far from being an exceptional measure targeting the Claimants due to their foreign nationality, asset forfeiture proceedings are a widely used mechanism to fight organized crime in Colombia and in the municipality of Envigado in particular. Against this background, the Claimants' allegations of discrimination do not hold water. In particular, there is no basis to assert that the Claimants were discriminated on the basis of their foreign nationality.

698. The findings of the tribunal in *Pawlowski v. Czech Republic* are exactly on point. In that case, the tribunal held that the fact that similar treatment was accorded to national investors "is sufficient to dispose of any notion that the [host State] singled out the [claimant] because he was a

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1008 [redacted]

1009 [redacted]

1010 GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶ 183.

1011 *See* GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶181 and table 18.

1012 *See* GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶ 181 and table 19.

foreigner".[1013] Therefore, to the extent that the Meritage Lot was treated exactly as other assets belonging to Colombian nationals (and the Meritage Lot was, as a matter of fact, also owned by Colombian nationals), any claims of nationality-based discrimination should be dismissed.

699. Similarly apposite is the decision of the arbitral tribunal in *Al Tamimi v. Oman*, which the Claimants unavailingly disregard as irrelevant (alleging that in that case the claimant had not met the burden of proof with respect to the differential treatment). In that case, the tribunal held that for a breach of national treatment to crystalize "the Claimant must point to evidence that a domestic operator which possessed the same or substantially similar approvals as the Claimant, and carried out the same or substantially similar material conduct (including the Claimant's repeated violations of the terms of those approvals) was treated less harshly or according to a different standard".[1014] In this case, the Claimants have equally failed to prove that their alleged investment was treated in a different manner to domestic investors in like circumstances. Much to the contrary, as demonstrated, hundreds of properties of Colombian nationals have been, or are, the object of Asset Forfeiture proceedings.

700. In fact, there are tenths of Colombian nationals that are very much in the same situation as the Claimants: the unit buyers in the Meritage Project. As the Claimants, the unit buyers have been impacted by the Asset Forfeiture Proceedings. Also, as the Claimants, they had personal (and not *in rem*) rights with respect to the Meritage Project and, on this basis, were not recognized as affected parties in the Asset Forfeiture Proceedings – in accordance with the Asset Forfeiture Law, as demonstrated above.[1015] Unlike the Claimants, most of the unit buyers were Colombian

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1013 *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (**Exhibit RL-209**), ¶ 539. *See also Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (**Exhibit RL-171**), ¶ 215 ("*As to the differential treatment of different sectors of Argentina's economy (even if an inter-sector comparison would be admissible), Total failed to prove that such differential treatment was nationality-based. In this respect, the Tribunal notes that a national investor such as TECHINT (an investor in TGN like Total) was accorded the same treatment by Argentina in respect of its investment in TGN, as Total was accorded*")**.**

1014 *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**Exhibit RL-80**), ¶ 463.

1015 *See above,* III.D.

nationals. Yet, the Claimants have strategically turned a blind eye on the most obvious comparators to look for "less like comparators" that would better fit their case.[1016]

701. Against this background, the Claimants' allegation that the Meritage Project "presented an opportunity to extort a U.S. real estate developer on a high-profile project; an opportunity enthusiastically seized upon by corrupt members of its Asset Forfeiture Unit whom Colombia has often investigated".[1017] This assertion is not only unsubstantiated but also inherently contradictory with the undisputed facts: that the Asset Forfeiture Proceedings mainly affected domestic investors, *i.e.*, the unit buyers.

702. In sum, the Respondent has not only treated assets in "like circumstances" (*i.e.*, related to crime) in a similar manner (*i.e.*, by initiating asset forfeiture proceedings), but also treated the Claimants as it has treated other Colombian investors (to the extent that the Asset Forfeiture Proceedings against the Meritage Lot could be regarded as a treatment of the Claimants, which the Respondent denies).

2. To the extent that any differential treatment could be identified, it was justified in light of the circumstances of the case

703. The Claimants argue that "Colombia can point to no reasonable explanation for [the] disparate treatment" of the Meritage Lot and the so-called "Sister Property" and other lots associated with Mr. López Vanegas.[1018] This is misconceived.

704. As demonstrated above, while investments and investors in different circumstances have been treated differently, other lots in "like circumstances" with the Meritage Lot (regardless of the nationality of their owners) and other Colombian investors in "like circumstances" with the Claimants, were subject to equal treatment.[1019]

705. Even assuming (*quod non*) that the Meritage Lot was in "like circumstances" with the so-called Sister Property or any other asset associated with Mr. López Vanegas, the differential treatment

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1016 *See* Claimants' Reply, ¶ 201, relying on *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 (**Exhibit CL-55**), ¶ 202.

1017 Claimants' Reply, ¶ 210.

1018 Claimants' Reply, ¶ 204.

1019 *See above,* Section V.B.

is justified in this case. As stated above, several irregularities found by the Attorney General's Office [redacted]

706. Further, it is undisputed that despite Mr. López Vanegas' claims over the Meritage Lot since 2014, the Claimants continued with the project and selling units to third parties[1021] – most of whom presumably ignored the threats to the project until it gained public status with the Precautionary Measures in 2016.

707. It is precisely this threat – as well as the Claimants' lack of reaction to the threat – that required the Respondent to prioritize its limited resources for the protection of third parties and the general public from further damage (even if this entailed an undesired impact to the third-party unit buyers that had already invested in the Meritage Project ignoring the threats). As clearly stated by Dr. Reyes, the Precautionary Measures adopted by the Respondent were necessary in order to prevent more people from investing in a project that was tainted at its inception.[1022] This is in line with the findings of the First Asset Forfeiture Court in its Decision on Control of Legality Petition, which concluded that the Precautionary Measures were necessary and urgent to "avoid the ongoing trading or transfer [of properties] to third parties outside the investigation who are unaware of the origin that is being investigate".[1023]

708. Therefore, the circumstances of the case justified the difference in treatment (if any).[1024]

1020 [redacted]

1021 *See* Respondent's Counter Memorial, ¶¶. 318, 491; Claimants' Reply, ¶ 205.

1022 *See* Dr. Reyes First Expert Report, ¶ 49. In his second report, Dr. Reyes further notes that latest when the Claimants found out about Mr. López Vanegas's claims over the Meritage Lot, they should have call into question the results of the alleged due diligence and dig into the Mr. López Vanegas's claims. *See also* Dr. Reyes Second Expert Report, ¶ 98.

1023 Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016 (**Exhibit C-44 bis**) pp. 22-23.

1024 To recall, the threshold applied to establish whether a State's conduct is justified has been low. *See Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (**Exhibit RL-209**), ¶ 546.

3. The Claimants did not suffer any unjustified harm as a result of the Asset Forfeiture Proceedings

709. Even assuming (*quod non*) the Claimants were treated differently and that the differential treatment is not justified in light of the circumstances, the Claimants did not suffer any significant practical negative impact as a result of the alleged differential treatment. In the words of the tribunal in the *Apotex v. United States* case: "the treatment complained of must have some not-insignificant practical negative impact"[1025] in order for it to be considered in breach of the investor's rights. Since the Claimants have failed to prove this, their claim that they were not accorded national treatment must fail.

710. The Claimants argue that it is "beyond doubt" that they suffered a "practical negative impact" because as a result of the Asset Forfeiture Proceedings, they lost their investment in the Meritage Project and were subject to "stigma" that resulted in the loss of their other development projects.[1026] This is not only unsubstantiated (as explained below),[1027] but it also misses the point entirely.

711. *First*, as demonstrated above, the situation of the Meritage Lot fell squarely within the grounds for asset forfeiture included in the Asset Forfeiture Law.[1028] This means that, regardless of whether measures were adopted against other assets, the Meritage Lot was subject to asset forfeiture proceedings due to its illicit origin. The Claimants did not – and could not – show that the adoption of measures against other assets would have affected the Claimants' situation in any meaningful way. In other words, even if asset forfeiture proceedings would have been initiated against the so-called Sister Property (or any other property, to these effects), the Asset Forfeiture Proceedings would have still been initiated against the Claimants, presumably with the

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1025 *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, NAFTA, Award, 25 August 2014 (**Exhibit RL-71**), ⁋ 8.21

1026 Claimants' Reply, ¶ 211.

1027 As demonstrated, there is no evidence that the "Claimants lost the entirety of their investment in the Meritage Project". On the contrary, the fact that the Claimants continue to pay for maintenance costs and security guards shows the Claimants' clear understanding that the Meritage Project has a value that is significant enough to keep. Similarly, there is no evidence that the Claimants lost their investment in the Other Projects as a result of the Asset Forfeiture Proceedings. *See below,* Section VI.F.

1028 *See above,* III.C.

same effects (if any).[1029] Moreover, no negative impact of any kind can be said to derive from the fact that asset forfeiture proceedings were not commenced against other lots, even if also belonging to Mr. López Vanegas, and even if proximate to the Meritage lot.

712. *Second,* the Meritage Lot has not yet been forfeited by the Colombian State, regardless of the adoption of Precautionary Measures. Quite to the contrary: Precautionary Measures are, by definition, provisional, as they are directed precisely at safeguarding assets until their legal situation is duly resolved by the competent authorities. In this case, the *Requerimiento* is still under consideration of the Second Criminal Court Specialized in Asset Forfeiture, pending a final decision on the matter. Therefore, a final decision with a definitive effect on the Meritage Claimant's property rights has not yet been rendered; to date, the *Requerimiento* has only been admitted by the Court[1030] pursuant to the Asset Forfeiture Law, it should be follow ed by an evidentiary phase and closing arguments.[1031] In fact, the decision by the Second Criminal Court has been appealed by Newport, which is currently pending resolution thus, the decision could even be overturned.[1032] Eventually, any final decision resulting from the Asset Forfeiture Proceedings may also be appealed by the affected parties before becoming definitive.[1033]

713. *Third*, pursuant to Colombian law, the acquisition of property of unlawful origin, in the context of the Asset Forfeiture Law, is invalid from its inception. As expressed by Dr. Caro:

> [T]he action of asset forfeiture is not an expropriation since unlike the expropriation, where an acquired right does exist, in the asset forfeiture there is not a loss as of a right of property since the asset was never acquired by the person who appears to be the owner.[1034]

714. As pointed out by Dr. Caro, this has been consistently understood by the Colombian Constitutional Court as from its Decision C-374 of 1997:[1035]

1029 *See* Respondent's Counter Memorial, ¶ 316.

1030 *See* Specialized Asset Forfeiture Court's Decision on Second Amended *Requerimiento*, 14 June 2019 (**Exhibit C-236**).

1031 *See* Asset Forfeiture Law (**Exhibit C-003bis**), Articles 137 to 147.

1032 *See* Newport's Appeal Against Decision to Accept Corrected *Requerimiento*, 20 June 2019 (**Exhibit C-237**).

1033 *See* Asset Forfeiture Law (**Exhibit C-003bis**), Article 147.

1034 Dr. Caro Witness Statement, ¶ 8.

1035 *See* Decision No. C-374 of the Colombian Constitutional Court, 13 August 1997 (**Exhibit R-12**).

> [I]n the case of asset forfeiture as set forth pursuant to paragraph 2 of article 34 of the Constitution, the foundational principle for reparation disappears, due to the original defect that tarnishes the property rights, to the point that it prompts the State to declare the extinction of those property rights from their origin.[1036]

715. Consequently, the Meritage Claimants could not reasonably claim, in accordance with Colombian law, that they suffered the loss of an asset which was never theirs to begin with.

716. Therefore, the Claimants have failed to show that they suffered any significant practical negative impact as a result of the alleged differential treatment.

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717. The Claimants assert that under the TPA they "were entitled to the same, more favorable treatment Colombia accorded to domestic investors".[1037] A treatment equivalent to that accorded to domestic investors is exactly what the Claimants got, to the extent that the Asset Forfeiture Proceedings affected both Colombian nationals and foreign investors alike. Further, the Meritage Lot was subject to the Asset Forfeiture Proceedings, as were many other assets that fell within the grounds established in the Asset Forfeiture Law. What the Claimants did not get – and were not entitled to get – is a more favourable treatment than that accorded to national investors in "like circumstances" – *i.e.* they were not exempted from the application of the Asset Forfeiture Law. This cannot be admitted under the TPA.

C. THE RESPONDENT TREATED THE CLAIMANTS' ALLEGED INVESTMENT FAIRLY AND EQUITABLY

718. In the Counter Memorial, the Respondent demonstrated that by initiating and pursuing the Asset Forfeiture Proceedings against the Meritage Lot, the Respondent did not breach the FET standard in Article 10.5 of the TPA, neither with respect to the Claimants' purported investment in the Meritage Project nor with respect to any other projects in which the Claimants may have been involved. This conclusion is based on an analysis of "all the facts, context and circumstances of [this] particular case"[1038] in light of the appropriate legal standard under the TPA, as set out in the Counter Memorial.

1036 Decision No. C-374 of the Colombian Constitutional Court, 13 August 1997 (**Exhibit R-12**), p. 61.

1037 Claimants' Reply, ¶ 196.

1038 Respondent's Counter Memorial, ¶ 365.

719. In their Reply, the Claimants accuse the Respondent of "recast[ing] the standard [] to evade liability".[1039] Nothing further than the true. It is the Claimants, in fact, that misrepresent the scope and threshold of the FET standard under Article 10.5 of the TPA, because only under the extremely lenient standard suggested, could the Claimants argue (still, to no avail) that the Respondent breached its obligation to treat the claimants fairly and equitably.

720. The Respondent addresses below the multiple inaccuracies and misrepresentations made by the Claimants in connection with the applicable legal standard (**V.C.1**).[1040] The Respondent further demonstrates that even if the Tribunal were to interpret and apply the FET standard in the TPA as broadly as suggested by the Claimants, the Claimants' alleged investments in the Meritage Project (**V.C.2**) and the Other Projects (**798**) were treated fairly and equitably and in accordance with Article 10.5 of the TPA at all times.

1. The legal standard

721. To recall, in the Counter Memorial, the Respondent demonstrated that (i) a fact-specific assessment is required to determine whether the host State's conduct is in accordance with the fair and equitable treatment standard,[1041] (ii) on its face, Article 10.5 of the TPA requires that "covered investments" be treated in accordance with the minimum standard of treatment,[1042] (iii) the threshold for finding a breach of FET is high, so only the conduct that is "gross", "manifest", "complete" or that "offend[s] judicial propriety" would constitute a breach of FET,[1043] (iv) the determination of a breach of the FET standard must be made in light of the high measure of deference that host States have to regulate their internal matters,[1044] (v) the Claimants' should have been familiar with the laws of Colombia and cannot rely on the TPA as an insurance against

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1039 *See* Claimants' Reply, ¶ 306.

1040 For further details, the Respondent refers to the extensive considerations set out in the Counter Memorial regarding the FET standard in general (Respondent's Counter Memorial, ¶¶ 364-383), the standard concerning unreasonable, discriminatory and arbitrary treatment (Respondent's Counter Memorial, ¶¶ 384-396), the standard concerning transparency and due process (Respondent's Counter Memorial, ¶¶ 397-411) and the standard concerning legitimate expectations (Respondent's Counter Memorial, ¶¶ 412-426).

1041 *See* Respondent's Counter Memorial, ¶¶ 365-367.

1042 *See* Respondent's Counter Memorial, ¶¶ 368-370.

1043 *See* Respondent's Counter Memorial, ¶¶ 371-375.

1044 *See* Respondent's Counter Memorial, ¶¶ 376-377. *See also* Submission of the United States of America, 26 February 2021, ¶ 36.

business risk or poor business decisions,[1045] and (vi) a causal link is required between the State's measures and the alleged harm suffered by the investor.[1046]

722. In their Reply, the Claimants insist on an overly broad interpretation of Article 10.5(1) of the TPA, to cover protection against (i) unreasonable, arbitrary and discriminatory treatment, (ii) State conduct that is not transparent or in breach of due process, and (iii) conduct that does not "honor an investor's legitimate expectations at the time of investment".[1047] The Claimants' interpretation of the FET standard disregards the plain wording of the TPA, as well as its object and purpose.

723. *First*, the Claimants' allegation that the Respondent "attempts to draw a false distinction"[1048] between the minimum standard of treatment and the FET standard are incomprehensible in light of the clear language of the TPA:

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; […]
>
> 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.[1049]

1045 *See* Respondent's Counter Memorial, ¶¶ 378-381.

1046 *See* Respondent's Counter Memorial, ¶¶ 382.

1047 Claimants' Reply, ¶ 308.

1048 Claimants' Reply, ¶309.

1049 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.5 (**Exhibit CL-001**).

724. Thus, on its face, the provision is limited to "the customary international law minimum standard of treatment" and does not require "treatment in addition to or beyond that which is required by that standard".[1050]

725. Given the clear wording of the TPA, it is not surprising that the Parties' clear intent was "to establish the customary international law standard of treatment as the applicable standard in Article 10.5":

> This text demonstrates the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 10.5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. The standard establishes a minimum "floor below which treatment of foreign investors must not fall.[1051]

726. Had the parties wished to extend the protections beyond that required by customary international law, they could have done so. However, the clear intention of the contracting parties to the TPA was the exact opposite: to expressly restrict the treaty standard to the minimum standard of treatment under customary international law.[1052]

727. As explained by the United States, customary international law "has crystallized to establish a minimum standard of treatment in only a few areas", including denial of justice.[1053] However, "the concepts of legitimate expectations, non-discrimination, and transparency are not component elements of 'fair and equitable treatment' under customary international law".[1054]

728. Interpreting a similar provision in the Oman-United States FTA,[1055] the tribunal in *Al Tamimi v. Oman* held that the treaty language "makes it very clear that the State Parties intended to

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1050 As explained by the tribunal in *Lemire v. Ukraine*, the proposition that the FET standard should be reduced to the customary international law minimum standard was adopted in the 2004 US Model BIT and follows the understanding of the NAFTA Free Trade Commission in its binding interpretation of Article 1105(1) of NAFTA of 31 July 2001. *See Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**Exhibit CL-072**), ¶¶ 250-251.

1051 Submission of the United States of America, 26 February 2021, ¶ 32.

1052 *See* United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.5; Submission of the United States of America, 26 February 2021, ¶ 37.

1053 Submission of the United States of America, 26 February 2021, ¶ 38.

1054 Submission of the United States of America, 26 February 2021, ¶ 38.

1055 *See* Article 10.5 of the US-Oman FTA provides, in relevant part: "1. Each Party shall accord to covered investments in accordance with customary international law, including fair and equitable treatment

impose only the minimum standard of treatment under customary international law". The tribunal further stressed that "[w]hether other treaties impose a different standard of requisite treatment is not the concern of the present Tribunal".[1056]

729. Against this background, many of the decisions on which the Claimants rely to argue that "the treatment under customary international law [] has converged with the autonomous FET standard" are not only inapposite[1057] but render the text of the TPA entirely meaningless. In this sense, it bears recalling that "arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of

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and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investors. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights". *See Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**Exhibit RL-80**), ¶ 181.

1056 *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**Exhibit RL-80**), ¶ 386.

1057 For example, in *Saluka v. Czech Republic* the tribunal noted that "the case law reveals different formulations of the relevant thresholds" and that "an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied" (*see Saluka Investments BV (The Netherlands) v. The Czech Republic,* UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CL-42**), ¶ 291). Notably, contrary to the Claimants' representation, the tribunal in *Saluka v. Czech Republic* did distinguish between the customary minimum standard ("in order to violate that standard, States' conduct may have to display a relatively higher degree of inappropriateness") and the FET standard ("in order to violate the standard, it may be sufficient that States' conduct displays a relatively lower degree of inappropriateness") (¶¶ 292-293). In *CMS v. Argentina*, the tribunal acknowledged that "the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes", but found that was not the case under the Argentina-United States BIT, which does not link the FET standard to the minimum standard of treatment (*CMS Gas Transmission Company v. The Argentine Republic,* ICSID Case No. ARB/01/8, Award 12 May 2005 (**Exhibit CL-39**), ¶ 284). Also, in *Murphy v. Ecuador*, the tribunal stated that it did not "find it necessary to determine for the purposes of the present case whether the FET standard reflects an autonomous standard above the customary international law standard" (*Murphy Exploration & Production Company – International v. The Republic of Ecuador,* UNCITRAL, PCA Case No. 2012-16, Partial Final Award 6 May 2016 (**Exhibit CL-107**), ¶208). For the sake of completeness, the Respondent notes that none of the Canada-Venezuela BIT applicable in *Rusoro v. Venezuela*, Mexico-Spain BIT applicable in *Tecmed v. Mexico*, Czech Republic-Netherlands BIT applicable in *Saluka v. Czech Republic*, the Ecuador-United States BIT applicable in *Murphy v. Ecuador* restrict the FET standard to the minimum standard of treatment (as the TPA does). *See Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award 22 August 2016 (**Exhibit CL-108**), ¶ 520; *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 12 14 November 2014 (**Exhibit CL-132**), ¶ 152; *Saluka Investments BV (The Netherlands) v. The Czech Republic,* UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CL-42**), ¶ 295; *Murphy Exploration & Production Company International v. The Republic of Ecuador,* UNCITRAL, PCA Case No. 2012-16, Partial Final Award 6 May 2016 (**Exhibit CL-107**), ¶ 208.

customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 10.5".[1058]

730. Conversely, investment tribunals interpreting treaty provisions linking the FET standard to the customary standard of treatment confirm that the customary standard of treatment is more restrictive than the autonomous FET standard may be and, regardless of the evolution of the standard, it has not moved beyond the minimum standard of treatment.

731. For example, in *OI v. Venezuela* (on which the Claimants also rely on this point) the tribunal hesitated that "it is quite possible that currently the minimum customary standard and the FET envisaged in the treaties have converged",[1059] it also upheld a restrictive interpretation of the FET standard:

> FET represents an indeterminate legal concept, which imposes a minimum standard of conduct on all States with respect to foreign nationals. A State violates it when it takes an action or a chain of actions that are demonstrably unlawful or fail to recognize the basic requirements of the rule of law.[1060]

732. Similarly, in *Glamis Gold v. USA* (on which the Claimants also rely on this point) the tribunal confirmed that the customary international law minimum standard "is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community".[1061] The tribunal further confirmed that "the standard for finding a breach of the customary international law minimum standard of treatment" has not evolved and "remains as stringent as it was under *Neer*":[1062]

1058 Submission of the United States of America, 26 February 2021, ¶ 37. *See also*, *e.g.*, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 (**Exhibit CL-42**), ¶ 294.

1059 *See OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 (**Exhibit CL-099**), ¶ 489.

1060 *See OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 (**Exhibit CL-099**), ¶ 491. Notably, the tribunal did not interpret the FET standard in abstract but considered that the treaty provision "should serve as a starting point in the task of unravelling the current meaning of the standard". *See also*, ¶ 490.

1061 *Glamis Gold, Ltd. v. The United States of America,* UNCITRAL, Award, 8 June 2009 (**Exhibit RL-34**), ¶ 615.

1062 *Glamis Gold, Ltd. v. The United States of America,* UNCITRAL, Award, 8 June 2009 (**Exhibit RL-34**), ¶ 322. Notably, even assuming that the minimum standard of treatment has evolved to include the autonomous FET standard, the threshold for finding a breach of the FET standard remains high. *See* Respondent's Counter Memorial, ¶¶ 371-375.

> [T]he Tribunal finds that the evidence provided by Claimant does not establish such evolution. This is evident in the abundant and continued use of adjective modifiers throughout arbitral awards, evidencing a strict standard. *International Thunderbird* used the terms "*gross* denial of justice" and "*manifest* arbitrariness" to describe the acts that it viewed would breach the minimum standard of treatment. *S.D. Myers* would find a breach of Article 1105 when an investor was treated "in *such an unjust or arbitrary* manner." The *Mondev* tribunal held: "The test is not whether a particular result is surprising, but whether the *shock or surprise* occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome".[1063]

733. The Claimants' attempt to expand the scope of the TPA's FET protection by importing the provision of Article 4.2 of the Colombia-Swiss BIT through the MFN door is unavailing.

734. As a matter of treaty interpretation, the Claimants' interpretation also contradicts the plain language of Article 10.5 of the TPA, pursuant to which the concept of fair and equitable treatment "do[es] not require treatment in addition to or beyond that which is required by the [customary international law minimum standard of treatment], and do not create additional substantive rights".[1064] As noted in the Counter Memorial, importing a treatment beyond that expressly agreed upon by the contracting parties to the TPA through the MFN provision would render Article 10.5 meaningless and contravene the widely recognized *effet utile* principle, pursuant to which a legal text should be interpreted in such a way that a reason and meaning can be attributed to every word in the text.[1065]

735. Moreover, the MFN provision in Article 10.4 of the TPA is restricted to treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other dispositions of investments". To the extent that the provision is expressly restricted to the life cycle of the investment, under the principle of "*ejusdem generis*", no other rights other than those falling within the limits of Article 10.4 of the TPA could be claimed under the MFN

1063 Respondent's Counter Memorial, ¶ 614.

1064 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.5.2.

1065 *See*, *e.g.*, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005 (**Exhibit CL-041**), ¶ 248 ("It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective"). This same argument was made in the Counter Memorial in response to the Claimants' attempt to extend the scope of the "full protection and security" obligation under Article 10.5 of the TPA by importing Article 2(3) of the Colombia-Spain BIT. The Claimants do not expressly dispute this in the context of the FPS, so it is not clear why in their Reply they try to import the FET protection from a different treaty.

provision.[1066] This intention has been confirmed by both parties in separate instruments. In its 2017 Colombia Model BIT, the Respondent expressly noted with respect to a similar MFN provision that it intends to exclude "substantive standards of treatment".[1067] Similarly, in its non-disputing party submission in *Omega v. Panama*, the United States confirmed as follows:

> Article 10.4 [cannot] be used to alter the substantive content of the fair and equitable treatment or full protection and security obligations under Article 10.5. As noted in the submissions on Article 10.5 below, Article 10.5.2 clarifies that the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. Article 10.5.3 further clarifies that a "breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article." [1068]

736. *Second*, the Claimants' attempts to extend the treaty's FET protection to investors is in plain contradiction with (i) the language of the TPA, (ii) the contracting party's understanding of the TPA and (iii) the very decision in *Bridgestone v. Panama*, on which the Claimants rely.

737. Regarding (i), unlike other provisions of the TPA that apply to both investors and covered investments,[1069] the protection of Article 10.5 of the TPA extends only to "covered investments". This is perfectly in line with the rationale of FET provisions, as explained by Newcombe and Paradell:

> The fair and equitable treatment standard in IIAs typically applies only to 'investments' or 'investments of investors' but not to investors alone. It is unlikely that an individual investor would be able to claim a breach of fair and

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1066 *ICS Inspection and Control Services Limited v. The Argentine Republic (I),* PCA Case No. 2010-09, Award on Jurisdiction, 10 February 2012 (**Exhibit RL-52**), ¶ 297 ("The next relevant aspect of the MFN provision at Article 3(2) is its reference to the "management, maintenance, use, enjoyment or disposal of" investments. In order to further elucidate the meaning of "treatment" intended by the Contracting Parties, this passage must be interpreted in accordance with the principle of ejusdem generis to determine what class of matters the MFN clause relates to and can therefore attract from other treaties").

1067 2017 Colombia Model BIT.

1068 *Omega Engineering and Rivera v. Panama,* ICSID Case No. ARB/16/42, Submission of the United States of America, 3 February 2020 (**Exhibit RL-197**), ¶ 10.

1069 *See*, *e.g.*, United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.6 ("each Party shall accord to investors of another Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife"); Article 10.12 ("A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor"), 10.4 and 10.5.

> equitable treatment for measures that affect the individual investor personally with no concomitant effect on the investment. IIAs are designed to promote and protect investment and not to protect the individual human rights of the foreign investor, who generally will have to seek recourse under other applicable mechanisms. […] While compensation might be claimed for the unfair treatment of the investment, the individual investor would not be able to obtain personal damages.[1070]

738. Regarding (ii), as noted in the Counter Memorial, in its oral and written submissions in *Bridgestone v. Panama*, the United States confirmed that a similarly-worded provision extends only to covered investments.[1071] Contrary to the Claimants' assertion that "[t]he United States has not made a similar submission in this Arbitration",[1072] the United States has made it clear in its non-disputing party submission filed in this arbitration that Article 10.5 of the TPA requires the Parties to accord FET only to covered investments, and not to investors:

> Some obligations in the U.S.-Colombia TPA require a Party to accord treatment to both investors and covered investments, whereas other obligations in the Agreement only require a Party to accord treatment to a covered investment. For example, the Article 10.5 requires the Parties to accord "fair and equitable treatment" and "full protection and security" only to covered investments, not to investors. In contrast, Article 10.3 requires the Parties to accord "national treatment" to both investors and covered investments. In accordance with this distinction, for the Agreements' obligations which only extend to covered investments, a claimant (*i.e.*, an investor) must establish that a Party's treatment was accorded to the covered *investment* and violated the relevant obligation.[1073]

739. Therefore, as explained by the United States, the Claimants "must establish" that the Respondent's treatment in alleged violation of the FET standard was accorded to their purported investments.

740. Finally, regarding (iii), the findings of the tribunal in *Bridgestone v. Panama* do not support the Claimants' position. As expressly stated by the tribunal, the case before the tribunal was not whether the claimant (*i.e.* as an investor) had suffered a denial of justice "but whether the trademark that constitutes its investments in Panama have been denied fair and equitable

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1070 Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009) (**Exhibit RL-128**), pp. 262-263.

1071 *See* Respondent's Counter Memorial, ¶ 369.

1072 Claimants' Reply, ¶ 312.

1073 Submission of the United States of America, 26 February 2021, ¶ 5.

treatment by reason of a denial of justice".[1074] Notably, the tribunal expressly referred – with approval – to the United States' argument that the FET standard in the applicable treaty applied only to covered investments and not to investors:

> As the United States have pointed out, Article 10.5.1 of the TPA is dealing with the treatment that must be accorded to *the covered investment not to the investor*.[1075]

741. Therefore, to the extent that the Claimants' clams concern treatment accorded to them – and not to their purported investments – these claims should be immediately rejected without further consideration as to the merits of the claims.

742. *Third,* it is undisputed that "what amounts to a breach of the FET standard should be assessed against the facts of the particular case".[1076] However, the facts should be assessed in light of the applicable legal standard. As demonstrated, even assuming that the minimum standard of treatment has evolved to include the FET standard as alleged by the Claimants (which is not the case, as demonstrated above),[1077] the threshold for finding a breach of the FET standard remains high.[1078]

743. The Claimants allegation that the Respondent's position is "not supported by the weight of authority" is incorrect.[1079] In fact, even the authorities cited by the Claimants in their Reply confirm that a high threshold is required for a State conduct to be considered in breach of the FET standard.[1080] For example, in *Teco v. Guatemala*, the tribunal noted that it "is mindful of the

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1074 *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Award, 14 August 2020 (**Exhibit CL-178**), ¶ 167.

1075 *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Award, 14 August 2020 (**Exhibit CL-178**), ¶ 165 (emphasis in original).

1076 Claimants' Reply, ¶ 317.

1077 *See above.*

1078 *See above; see also* Respondent's Counter Memorial, ¶¶ 371-375.

1079 Claimants' Reply, ¶ 315.

1080 Notably, some of the authorities cited by the Claimants are absolutely not on point. For example, neither in *World Duty Free v. Kenya* (*World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award 4 October 2006 (**Exhibit CL-046**), cited in fn. 777) nor in the decision on jurisdiction in *Siemens v. Argentina* (*Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction 3 August 2004 (**Exhibit CL-203**), cited in fn. 778) the tribunals addressed an alleged breach of the FET standard.

deference that international tribunals should pay to a sovereign State's regulatory powers",[1081] and set the limits of such deference at "behaviors that are manifestly arbitrary, idiosyncratic, or that show a complete lack of candor in the conduction of the regulatory process".[1082] The tribunal concludes that international tribunals should only sanction "decisions that amount to an abuse of power, are arbitrary, or are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters".[1083]

744. Conversely, in its Counter Memorial the Respondent has referred to a series of cases that show that the threshold for finding a breach of the FET standard is high and that international tribunals have recognized the "high measure of deference" or "margin of appreciation" that host States enjoy to regulate matters within their borders.[1084]

745. As demonstrated below, the Claimants' claims do not satisfy the high threshold required for the Respondent's conduct to constitute a breach of the autonomous FET standard – let alone the customary standard of treatment under Article 10.5 of the TPA.

2. The Respondent treated the Claimants' alleged investment in the Meritage Project fairly and equitably

746. In an attempt to unduly seek compensation from the Respondent, the Claimants rehash their unsubstantiated allegations that by initiating and conducted the Asset Forfeiture Proceedings, the Respondent breached its FET obligations *vis-à-vis* the Claimants. The Claimants' claims are mostly based on the series of mantras that have been debunked, *i.e.* that there was a corruption scheme orchestrated against the Claimants and that the Meritage Lot was sought after due to Mr. López Vanegas's criminal past.

1081 *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award 19 December 2013 (**Exhibit CL-95**), ¶ 490. *See also*, *e.g.*, the decision of the majority in *Philip Morris v. Uruguay*, recognizing "the margin of appreciation enjoyed by national regulatory agencies when dealing with public policy determinations". *See 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, Award, 8 July 2016 (**Exhibit RL-088**), ¶ 388.

1082 *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award 19 December 2013 (**Exhibit CL-95**), ¶ 492. *See also*, *e.g.*, *GAMI Investments Inc. v. United Mexican States*, UNCITRAL, Final Award 15 November 2004 (**Exhibit CL-165**), ¶ 104 (the tribunal noted that the claimant had not been able to show "outright and unjustified repudiation" of the relevant regulations).

1083 *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award 19 December 2013 (**Exhibit CL-95**), ¶ 493.

1084 *See* Respondent's Counter Memorial, ¶¶ 376-377.

747. As demonstrated in the Counter Memorial and further below, the Claimants' allegations made on the basis of these mantras must fail. Contrary to the Claimants' claims, the Respondent has treated the Claimants fairly and equitably (and *a fortiori* in accordance with the customary minimum standard of treatment) at all times. In particular, the Asset Forfeiture Proceedings were not arbitrary or unreasonable and were initiated and conducted in accordance with the fundamental procedural protections (**V.C.2.a**) or discriminatory (**V.C.2.b**). Moreover, the Respondent acted transparently (**V.C.2.c**) and in accordance with the due process of law (**V.C.2.d**). Finally, the Respondent did not violate the Claimants' expectations (if any) (**V.C.2.e**).

a. *The Asset Forfeiture Proceedings were not arbitrary or unreasonable and were initiated and conducted in accordance with the fundamental procedural protections*

748. The Claimants allege that the Asset Forfeiture Proceedings were arbitrary, unreasonable and discriminatory because they were initiated "on the basis of a false story contrived by a convicted drug trafficker" and "through prosecutors with an established pattern of corruption".[1085] The Claimants' claim fail as the Asset Forfeiture Proceedings were initiated and conducted in accordance with Colombian law and in pursuit of legitimate welfare objectives.

749. In the Counter Memorial, the Respondent set out the principles that should guide the assessment of whether the Respondent's conduct *vis-à-vis* the Claimants was arbitrary, reasonable or discriminatory.[1086] Among others, the Respondent demonstrated that the threshold for a finding that a State has acted arbitrarily is particularly high, as set by the ICJ in the ELSI case and widely adopted by investment tribunals.[1087] Similarly high is the threshold to find that a conduct is unreasonable and discriminatory.[1088] In this sense, while "measures adopted in pursuit of rational policy objective have been deemed not to be unreasonable or discriminatory",[1089] investment tribunals have found that conduct involving a "deliberate

1085 Claimants' Reply, ¶ 332.

1086 *See above,* Section V.C.1.

1087 *See* Respondent's Counter Memorial, ¶¶ 384-387.

1088 *See* Respondent's Counter Memorial, ¶¶ 388-391.

1089 *See* Respondent's Counter Memorial, ¶ 395.

repudiation of the purpose and objectives of a State policy" would contravene the FET standard.[1090]

750. The Claimants do not dispute that the standard in "high" but claim that "an assessment of the specific facts of the underlying conduct" is required.[1091] Moreover, the Claimants note that conduct has been found to be arbitrary where "inconsistent and chaotic" approaches are taken by State agencies, decisions are "not founded on reason or fact", are "contrary to basic principles of legal reasoning and financial logic", not adopted "in pursuit of rational policy objective[s]"[1092] or "in willful disregard of due process and proper procedure".[1093] As aptly summarized by the *Lemire v. Ukraine* tribunal, "the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law".[1094]

751. As demonstrated, the Respondent's conduct has not been arbitrary, unreasonable or "in willful disregard of due process and proper procedure". Much on the contrary, the Asset Forfeiture Proceedings were initiated and carried out in accordance with Colombian law and "the rule of law" and "in pursuit of rational policy objective[s]".

752. While the Claimants selectively focus on the fact that the investigations of the Meritage Lot were launched following Mr. López Vanegas' complaint, they plainly (and conveniently) omit the fact that the investigations disclosed a series of irregular transactions that suggest that the lot was related to criminal activities, including money laundering.[1095] In the words of Prosecutor Dr. Caro, who signed and filed the petition to asset forfeiture in April 2017:

1090 Respondent's Counter Memorial, ¶ 393, by reference to *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017 (**Exhibit RL-90**).

1091 Claimants' Reply, ¶ 320.

1092 Claimants' Reply, ¶ 320.

1093 Claimants' Reply, ¶ 319.

1094 Respondent's Counter Memorial, ¶ 387. Conversely, as noted by the tribunal in *Cargill v. Mexico*, "*an actionable finding of arbitrariness must not be based simply on a tribunal's determination that a domestic agency or legislature incorrectly weighed the various factors, made legitimate compromises between disputing constituencies, or applied social or economic reasoning in a manner that the tribunal criticises*". *See Cargill, Incorporated v. United Mexican State*s, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (**Exhibit CL-068**), ¶ 292.

1095 *Sse above,* Section III.V.. *See also* Respondent's Counter Memorial, ¶¶ 433-434.

753. Moreover, it has been shown that, contrary to the Claimants' allegations, the Asset Forfeiture Proceedings were not initiated or conducted "on the basis of corrupt conduct" and that there were no "corrupt motives" underlying the Precautionary Measures.[1100]

754. Finally, the Claimants' argument that the Respondent relies on its domestic courts to "somehow cure[] the breach" completely misses the point.[1101] To begin with, there is no breach to cure. But even assuming (*quod non*) any impropriety in the Attorney General's Office conduct, the acts of the Prosecutors have been – and still are being – reviewed by the Colombian courts. As demonstrated, at the request of Newport and Corficolombiana, Colombian courts have (i) analysed (and dismissed, in a well-reasoned decision subject to appeal) Newport's arguments as to its standing as *afectado* in the *Avocamiento* order and Newport's appeal of the decision of

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1100 Claimants' Reply, ¶ 334.

1101 Claimants' Reply, ¶ 321.

the Second Criminal Court Specialized in Asset Forfeiture of Antioquia (currently pending);[1102] (ii) analysed (and dismissed, in a well-reason decision) Newport's *Tutela* action;[1103] (iii) confirmed on two separate instances the legality of the Precautionary Measures;[1104] and (iv) admitted the *Requerimiento*, thus validating the investigations conducted by the Attorney General's Office.[1105]

755. None of the courts involved has been "disavowed at the international level",[1106] and in fact the Claimants have not even claimed that they had been denied justice by the Respondent. Much to the contrary, the Claimants' trust in the Colombian judicial system is apparent from their selective reliance on the inapposite decision of the Constitutional Court in an unrelated case (while despising the courts' authority and scope of review with respect to the Asset Forfeiture Proceedings).[1107] Against this background, the Claimants' attempts to use the arbitration as an appeal of the decisions of the Colombian courts (or, even worse, to prematurely and *de facto* prevent the courts from ruling on the Asset Forfeiture Proceedings) must be rejected.[1108]

756. In sum, contrary to the Claimants' assertions, the Respondent had legitimate reasons to initiate and conduct the Asset Forfeiture Proceedings against the Meritage Lot, which were aimed at implementing the Respondent's legitimate objectives of fighting organized crime and ensuring peace, security and social and economic stability in the Envigado region.

1102 *See above*, Section III.C.; Respondent's Counter Memorial, ¶¶ 232-241.

1103 *See above*, Section III.C.; Respondent's Counter Memorial, ¶¶ 189-194.

1104 *See above*, Section III.C.; Respondent's Counter Memorial, ¶¶ 169-179.

1105 See above, Section III.C.; Respondent's Counter Memorial, ¶ 212. The conduct of Prosecutors Malagón and Ardila has also been thoroughly investigated by the Respondent, which has found no evidence of impropriety or criminal conduct in connection with their involvement in the Asset Forfeiture Proceedings. *See above,* Section III.H.

1106 Respondent's Counter Memorial, ¶ 396, referring to *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award 1 November 1999 (**Exhibit RL-6**)**,** ¶ 97. *See also 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 (**Exhibit RL-98**), ¶¶ 318, 366; *Luigiterzo Bosca v. The Republic of Lithuania,* PCA Case No. 2011-05, Award, 17 May 2013 (**Exhibit RL-63**), ¶ 198.

1107 *See aboge,* Section III,E,

1108 *See* Claimants' Reply, ¶ 336.

b. *The Asset Forfeiture Proceedings were not discriminatory*

757. The Claimants' allegation that the Asset Forfeiture Proceedings were discriminatory are based exclusively on their mantra that the Asset Forfeiture Proceedings were motivated solely by "Mr. López Vanegas' criminal conduct". As extensively demonstrated by the Respondent, the Claimants' allegations of discriminatory treatment on the basis that no asset forfeiture proceedings have been initiated against Mr. López Vanegas's other properties is based on a mischaracterization of the law and facts.

758. First of all, it has been confirmed by the United States that the minimum standard of treatment in Article 10.5 of the TPA does not incorporate a general prohibition against discrimination:

> [T]he customary international law minimum standard of treatment set forth in Article 10.5 does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination. As a general proposition, a State may treat foreigners and nationals differently, and it may also treat foreigners from different States differently. […] Moreover, investor-State claims of nationality-based discrimination are governed exclusively by the provisions of Chapter Ten that specifically address that subject (Articles 10.3 and 10.4), and not Article 10.5.1.[1109]

759. Even assuming that Article 10.5 incorporates a prohibition against discriminatory treatment, it has been demonstrated that the threshold for finding a breach of the prohibition against discrimination is high and requires, for example, a "capricious, irrational or absurd differentiation".[1110] This has not been contested by the Claimants. Moreover, the parties agree that a fact-specific three-pronged analysis is to be conducted in order to determine whether a measure is discriminatory. The analysis involves assessing whether the investment (i) was in like

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1109 Submission of the United States of America, 26 February 2021, ¶ 41. *See also*, *e.g.*, *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, UNCITRAL Award, 12 January 2011 (**Exhibit CL-166**), ¶¶ 208-209 ("*The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection.* […] [N]*either Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments*"); *Mercer Int'l Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 (**Exhibit RL-100**), ¶ 7.58 ("*So far as concerns the Claimant's claims of 'discriminatory treatment' contrary to NAFTA Article 1105(1), the Tribunal's [sic] agrees with the non-disputing NAFTA Parties' submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1)*").

1110 Respondent's Counter Memorial, ¶ 390.

circumstances with the identified comparator, (ii) was treated differently to the comparator, and (iii) no reasonable justification exists for the different treatment.[1111]

760. As demonstrated in the Counter Memorial and above,[1112] the Respondent did not discriminate against the Claimants. Much to the contrary, (i) the comparators used by the Claimants to allege discriminatory treatment, *i.e.*, other properties that have allegedly belonged to Mr. López Vanegas, are not in like circumstances with the Meritage Lot, (ii) the Meritage Lot was accorded the same treatment as other assets in like circumstances, and (iii) the Asset Forfeiture Proceedings were fully justified and, to the extent that any differential treatment may be identified (*quod non*), it is justified in light of the circumstances.

c. *The Respondent acted transparently at all times*

761. The Claimants allege that the Respondent acted non-transparently by "shifting rationale" for the Asset Forfeiture Proceedings and providing "conflicting explanations" regarding the alleged corruption scheme. The Claimants' claims are unsupported by the law and facts.

762. Regarding the scope of Article 10.5 of the TPA, the Claimants plainly (and conveniently) gloss over the explicit scope of the TPA provision to allege that the Respondent "attempt to limit the scope of its obligations by reference to the minimum standard of treatment".[1113] In fact, it is the Claimants that attempt to broaden the scope of the minimum standard of treatment expressly provided for in Article 10.5 of the TPA, to include protections that exceed the customary minimum standard of treatment, such as transparency.

763. In this sense, the United States has noted that there is no general and consistent State practice and *opinio juris* to establishing that host States must act transparently as part of the minimum standard of treatment:

> The concept of "transparency" also has not crystallized as a component of "fair and equitable treatment" under customary international law giving rise to an independent host-State obligation. The United States is aware of no general

1111 *See* Respondent's Counter Memorial, ¶ 391; Claimants' Reply, ¶ 274.

1112 *See above*, Section V.B.; Respondent's Counter Memorial, ¶¶ 442-445.

1113 Claimants' Reply, ¶ 322.

> and consistent State practice and opinio juris establishing an obligation of host-State transparency under the minimum standard of treatment.[1114]

764. A similar approach has been adopted by investment tribunals. For example, in *Feldman v. Mexico*, the tribunal held that "it is doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law"[1115] and in *Merril v. Canada* the tribunal stater that "a requirement for transparency may not at present be proven to be part of the customary law standard".[1116]

765. Even the tribunals that have included transparency within the minimum standard of treatment, have set an extremely high standard. For example, in *Waste Management v. Mexico*, on which the Claimants rely, the tribunal held as follows:

> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or 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.[1117]

766. The Claimants further acknowledge that the obligation to act transparently (if any) "*cannot mean that [the host State] has to act under complete disclosure*", but rather that the authorities "*shall act in a way to create a climate of cooperation in support of investment activities*".[1118]

767. In any event, Colombia has acted transparently at all times. Contrary to the Claimants' allegations, Colombia has not "*backtrack*[ed]" on its contemporaneous statements as to the motives for the Asset Forfeiture Proceedings.[1119] Much to the contrary, the Precautionary Measures were ordered in July 2016 on the basis of "reasonable grounds [] supported by the

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1114 Submission of the United States of America, 26 February 2021, ¶ 42.

1115 *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award 16 December 2002 (**Exhibit CL-031**), ¶ 133.

1116 *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA, ICSID Case No. UNCT/07/1, Award, 31 March 2010 (**Exhibit RL-41**), ¶ 208.

1117 *Waste Management, Inc. v. United Mexican States,* NAFTA, UNCITRAL, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (**Exhibit RL-14**), ¶ 98. *See also* Respondent's Counter Memorial, ¶¶ 399-400.

1118 Claimants' Reply, ¶ 323, with reference to to *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 (**Exhibit CL-110**), ¶ 628.

1119 Claimants' Reply, ¶ 339.

evidence included in the file" that the origin of the Meritage Lot was unlawful[1120] and in order "to prevent that the assets subject to forfeiture continue being transferred and negotiated as has happened since 2014 to this date".[1121] The additional information obtained following the thorough investigations into the Meritage Lot confirmed its unlawful origin, the multiple irregularities in the chain of transfer [redacted]

768. Moreover, the Attorney General's Office attempted at all times to "create a climate of cooperation" including by meeting Mr. Seda to seek his collaboration with certain investigations as regards potential cases of corruption by individuals within the Attorney General's Office.[1123] However, Mr. Seda took advantage of this "climate of cooperation" to improperly obtain information to build his case in the Arbitration, [redacted]

769. Finally, the Claimants' allegations that Prosecutor Ardila "refused to provide a copy of the Precautionary Measures Resolution" totally miss the point. As noted by the Respondent in the Counter Memorial, assuming the Claimants' allegations are true, the alleged refusal did not have any practical consequence: Colombia granted every opportunity under Colombian law to challenge the Precautionary Measures.[1125] But in any case, the Claimants' allegation that Prosecutor Ardila acted non-transparently by refusing to provide copies of the Precautionary Measures Resolution is simply wrong. [redacted]

1120 Attorney General's Office, Asset Forfeiture Unit,Precautionary Measures Resolution 22 July 2016 (**Exhibit C-022**), p. 84.

1121 Attorney General's Office, Asset Forfeiture Unit,Precautionary Measures Resolution 22 July 2016 (**Exhibit C-022**), p. 84.

1122 [redacted]

1123 *See above,* Section III.G.

1124 [redacted]

1125 *See* Respondent's Counter Memorial, ¶ 340.

1126 [redacted]

d. *The Asset Forfeiture Proceedings were conducted in accordance with due process*

770. The Claimants allege that the Respondent has violated its "due process obligations under the FET standard" by "instigating the Asset Forfeiture Proceeding on the basis of a corrupt plot" and by not considering Newport as a good faith third party without fault.[1127] Again, the Claimants' allegations stand only on the basis of an improper interpretation of the legal standard and a mischaracterization of the facts.

771. As demonstrated in the Counter Memorial, under the TPA, a breach of due process only amounts to a breach of the FET standard when it results in denial of justice.[1128] This means, as noted by the United States, that there is no international breach as long as the domestic system of law "conforms to 'a reasonable standard of civilized justice' and is fairly administered".[1129] "Civilized justice" means, in turn, "[f]air courts, readily available to aliens, administering justice honestly, impartially, [and] without bias or political control".[1130]

772. Conversely, a denial of justice may occur "in instances such as when the final act of a State's judiciary constitutes a 'notoriously unjust' or 'egregious' administration of justice 'which offends a sense of judicial propriety'",[1131] or when there is a "systematic failure of the State's justice system"[1132] or "the failure of a national system as a whole to satisfy minimum standards".[1133]

773. While the Claimants accuse the Respondent of "not point[ing] to any language in the TPA", neither do the Claimants.[1134] This is not surprising, as the language of the TPA is clear that the treaty obligation to provide FET "included the obligation not to deny justice in criminal, civil or

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1127 Claimants' Reply, ¶ 343.

1128 Respondent's Counter Memorial, ¶ 401.

1129 Submission of the United States of America, 26 February 2021, ¶ 45.

1130 Submission of the United States of America, 26 February 2021, ¶ 45.

1131 Submission of the United States of America, 26 February 2021, ¶ 46.

1132 Respondent's Counter Memorial, ¶ 402, *Cf. Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DRCAFTA, 31 May 2016 (**Exhibit RL-86**), ¶ 254.

1133 *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic,* UNCITRAL, Final Award, 23 April 2012 (**Exhibit RL-53**), 273.

1134 Claimants' Reply, ¶ 325.

administrative adjudicatory proceedings in accordance with the principle of due process".[1135] The express reference to denial of justice in the TPA would be deprived of any meaning if the provision were to be interpreted so as to extend to any breach of due process regardless of its significance. The Respondent has also referred to the findings of the tribunal in *Aven v. Costa Rica* which confirmed this point.[1136] Contrary to the Claimants' allegations,[1137] the rulings of the *Aven v. Costa Rica* tribunal is precisely on point, as it interprets denial of justice "[i]n customary international law rules and minimum standard of treatment".[1138]

774. Even if it were to be understood that a breach of the more stringent denial of justice is not required for a breach of FET to take place under the TPA, it is widely agreed that "not every process failing or imperfection" could amount to a breach of the FET standard.[1139] On the contrary, only severe due process violations constitute a breach of the FET standard, including, for example, "serious defects in the adjudicative process, such as violations of equal treatment of the parties, the right to be heard or other core rights of litigants"[1140] or "a wilful disregard of due process of law or an extreme insufficiency of action".[1141]

775. Moreover, arbitral tribunals "*are not empowered to be supranational courts of appeal on a court's application of domestic law*" so the decisions of domestic courts "*are not subject to*

1135 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.5.2(a).

1136 Respondent's Counter Memorial, ¶ 401.

1137 Claimants' Reply, ¶ 325.

1138 *David R. Aven and Others v. Republic of Costa Rica,* ICSID Case No. UNCT/15/3, Award, 18 September 2018 (**Exhibit RL-105**), ¶ 354. *See also* ¶¶ 355-357. Notably, in the recent decision in *Pawlowski v. Czech Republic*, the tribunal interpreting an FET provision that "*simply obliges the Contracting States to ensure 'fair and equitable treatment' to investments of protected investors*" held that such obligation may only be breached by the State's judicial system "*when it is responsible for a denial of justice which affects the investment*". *See Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award of 1 November 2021 (**Exhibit RL-209**), ¶ 291.

1139 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award 23 September 2010 (**Exhibit CL-076**), ¶ 9.3.40. *see also*, *e.g.*, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (**Exhibit RL-53**), ¶ 299.

1140 *Krederi Ltd. v. Ukraine,* ICSID Case No. ARB/14/17, Award, 2 July 2018 (**Exhibit RL-103**), ¶ 461

1141 *Alex Genin, Eastern Credit Ltd., Inc. and AS Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/23, Award, 25 June 2001 **(Exhibit RL-7)**, ¶ 371. *See also Belenergia S.A. v. Italian Republic,* ICSID Case No. ARB/15/40, Award of 6 August 2019 (**Exhibit RL-193**), ¶ 609 ("*the standard for a finding of procedural impropriety is a high one under the FET*"); Respondent's Counter Memorial, ¶¶ 403-407.

review by international tribunals absent a denial of justice under customary international law".[1142] On this basis, the United States clearly states that:

> [J]udicial measures may form the basis of a claim under the customary international law minimum standard of treatment under Article 10.5.1 only if they are final and if it is proved that a denial of justice has occurred. Were it otherwise, it would be impossible to prevent Chapter Ten tribunals from becoming supranational appellate courts on matters of the application of substantive domestic law, which customary international law does not permit.[1143]

776. This does not mean that the Claimants are required to exhaust local remedies in Colombia. However, as held by investment tribunals, as long as the Claimants have the opportunity to challenge the measures before the local courts, there cannot be a violation of the FET standard.[1144] As aptly summarized by the tribunal in *Aven v. Costa Rica*:

> Certainly, for the admissibility of a claim within DR-CAFTA, it is not necessary to have exhausted domestic remedies, but to establish the merits on the basis of denial of justice it is necessary to evidence that the State which receives the investment breaches its international obligation to provide investors of the other Parties to the Treaty, access to justice and due process for the resolution of their rights and obligations through competent, independent and impartial courts, under generally recognized international standards.[1145]

777. The Claimants have acknowledged that they did not claim a denial of justice.[1146] On this basis alone, their claims that the Respondent has violated "its due process obligations" must be rejected as they could not constitute a breach of the FET standard in the TPA.[1147]

1142 Submission of the United States of America, 26 February 2021, ¶ 46. *See also* Respondent's Counter Memorial, ¶ 411.

1143 Submission of the United States of America, 26 February 2021, ¶ 47.

1144 *See*, *e.g.*, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award 27 August 2009 (**Exhibit CL-067**), ¶¶ 347-348; *Ronald S. Lauder v. Czech Republic,* UNCITRAL, Final Award, 3 September 2001 (**Exhibit RL-8**), ¶ 314; *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award 27 August 2019 (**Exhibit CL-125**), ¶ 1319; *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 (**Exhibit CL-090**), ¶ 4.805.

1145 *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018 (**Exhibit RL-105**), ¶ 357.

1146 *See* Claimants' Reply, ¶ 325 ("*Claimants here have not advanced a denial of justice claim in name or content*").

1147 Claimants' Reply, ¶ 343.

778. Even assuming, *quod non*, that the TPA contains a more lenient standard in connection with due process violations, the Claimants' allegations fail because the Respondent has acted at all times in accordance with the due process of law both under Colombian law and international law (assuming, for the sake of argument, that such distinction artificially created by the Claimants exists).[1148]

779. As demonstrated by the Respondent, the Asset Forfeiture Proceedings were (and still are) conducted in accordance with the Asset Forfeiture Law, Colombian law and the due process of law. In fact, contrary to the Claimants' allegations,[1149] a "substantive legal procedure" is ongoing, this is, the Asset Forfeiture Proceedings. As explained by Dr. Reyes, as part of that procedure the Attorney General's Office may gather evidence as to the non-existence of good faith, "but the decision as to whether a third party is or not a good faith third party without fault can only be made by the competent judge".[1150] This is exactly what had happened in this case.[1151]

780. More importantly, the Claimants expressly acknowledge that "Newport sought repeatedly to try and make itself heard".[1152] And it was heard – in the multiple opportunities it used to present its case and submit evidence before the Attorney General's Office and the competent courts, including with respect to the claim to be recognized as affected parties and as good faith third parties without fault.[1153] What the Claimants disagree with is with the results of such procedure(s) – but that is not a matter of due process, let alone of denial of justice (which is not even alleged).[1154] Rather, it shows the Claimants' improper attempt to use this Arbitration as an appeal instance of the procedures being conducted by the domestic courts in accordance with the Asset Forfeiture Law.

1148 Claimants' Reply, ¶ 345.

1149 Claimants' Reply, ¶ 347.

1150 Dr. Reyes Second Expert Report, ¶ 20.

1151 In fact, not only one, but two Prosecutors, reviewed the case and considered there were sufficient grounds to request the asset forfeiture against the Meritage Lot. Contrary to the Claimants' allegations that Dr. Caro "copy-past[ed]" Ms. Ardila's findings into the *Requerimiento*, Mr. Caro's was actively involved in the Asset Forfeiture Proceedings. *See above*, Section III.F.

1152 Claimants' Reply, ¶ 347.

1153 *See above*, Sections III.C., V.A.

1154 *See* Dr. Reyes Second Expert Report, ¶ 81 ("I do disagree with expert Medellín Becerra on that said decision would imply that Newport S.A.S. would be deprived of its "rights" to access the procedure, presumption of good faith, filing and challenging evidence and presenting arguments that support its opposition to the action and its request to be recognized as a good faith third party without fault").

781. Assuming, for the sake of argument, that the Respondent is subject to a more stringent due process standard "pursuant to international law and independent of any rights Claimants may or may not have under domestic law" (which has not been established),[1155] the Respondent has also fulfilled its due process obligations under the standard set by the Claimants.

782. In this sense, the Claimants allege that the Respondent had "to 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'"[1156] and that the obligation to provide due process includes "the right to be heard, the right to present evidence, the right to equality of arms, and the right to receive a reasoned decision".[1157] All these rights, which are equally recognized under Colombian law, have been afforded to the Claimants, as demonstrated above.[1158]

783. In sum, the Claimants' due process rights were respected at all times as its investment vehicle in Colombia, Newport, was had access to the Colombian courts, was rendered court decisions that were duly reasoned and subject to appeal and the Colombian courts have not committed a denial of justice.

e. *The Respondent did not frustrate the Claimants' expectations*

784. The Claimants allege that by initiating the Asset Forfeiture Proceedings, the Respondent frustrated their "legitimate expectations" that the chain of title of the Meritage Lot "was

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1155 Claimants' Reply, ¶ 345.

1156 Claimants' Reply, ¶ 345.

1157 Claimants' Reply, ¶ 346.

1158 As explained, the Claimants' reliance of Mr. Hernández's statements (*see* Claimants' Reply, ¶ 349) is unavailing. Dr. Hernández´s statements are clearly hypothetical ("Apparently, they undertook an asset forfeiture action against you in an irregular manner—let's call it that—") in the context that he was trying build rapport to obtain evidence from Mr. Seda precisely regarding the corruption allegations against Mses. Malagón and Ardila. In the excerpts selectively quoted by the Claimants, Dr. Hernández says that due to the irregularities in the chain of transfer of the Meritage Lot, he cannot "attack the prosecutors who took those decisions for abuse of power … I couldn't!" (*see* Transcript of Audio File and Audio File of 25 June 2020 (**Exhibit C-374**), p. 3). Following a thorough investigation (which included the interviews with Mr. Seda, where no evidence of corruption was obtained), Dr. Hernández still could not file charges against Mses. Malagón or Ardila because he did not find any evidence of corruption.

unencumbered by illegality, and any subsequent purchasers would be considered good faith third parties".[1159]

785. As a preliminary issue, the Claimants' claim must fail because the concept of "legitimate expectations" is not considered as an element of the FET standard under the TPA.[1160] This has been confirmed the United States:

> The concept of "legitimate expectations" is not a component element of "fair and equitable treatment" under customary international law that gives rise to an independent host State obligation. The United States is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required. An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.[1161]

786. In the same line, investment tribunals have held that the mere frustration of the investor's legitimate expectations cannot, without more, amount to a breach of the FET standard (as an autonomous standard and not restricted by the minimum standard of treatment, as in the TPA). For example, in interpreting Article 10(1) of the ECT, the tribunal in *Infracapital v. Spain* noted that:

> To meet the high threshold of a breach of the FET standard something more is required. As the 9Ren tribunal said, "in addition to deciding that its legitimate expectations have been frustrated by the host State, a claimant must also prove a breach of the FET standard". For that to occur, the conduct must meet the threshold of arbitrariness or unreasonableness under the international standard.[1162]

1159 Claimants' Reply, ¶¶ 350-351.

1160 Respondent's Counter Memorial, ¶ 413.

1161 Submission of the United States of America, 26 February 2021, ¶ 40. *See also*, *e.g*, *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Submission of the United States of America, 18 March 2016 (**Exhibit RL-85**), ¶13; *Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17*, Second Submission of the United States of America, 12 June 2015 (**Exhibit RL-70**), ¶ 8.

1162 *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain,* ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum of 13 September 2021 (**Exhibit RL-208**), ¶ 568. *See also 9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award of 31 May 2019, ¶ 308 ("*in addition to deciding that its legitimate expectations have been frustrated by the host State, a claimant must also prove a breach of the FET standard. The former does not necessarily lead to the latter. 'Legitimate expectations' based upon a specific representation are only 'a relevant factor' in assessing whether or not the Respondent violated the FET standard in Article 10(1) of the ECT*"); *AWG*

787. The *ad hoc* Committee in *MTD v. Chile* confirmed that the investor's expectations cannot impose on the host State obligations beyond those in the applicable investment treaty and that a tribunal holding the contrary would exceed its powers:

> The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.[1163]

788. Even assuming that Article 10.5 of the TPA affords protection against the frustration of the investor's expectations, that protection could only extend to the investor's objectively reasonable expectations, arising from the host State's specific promises or commitments.[1164] The investor's expectations must be assessed in light of "an objective understanding of the legal framework within which the investor has made its investment", the overall conditions in the host State at the time the investment was made and the State's legitimate regulatory interests.[1165] This has been recently confirmed by the tribunal in *Pawlowski v. Czech Republic*:

> The legitimacy or reasonableness of the investor's expectations must be assessed in conjunction with the political, socioeconomic, cultural and historical conditions in the host State, and in particular, balancing the right of the State under international law to regulate within its borders.[1166]

Group v. Argentina, UNCITRAL, Decision on Liability, 30 July 2010, Judge Nikken's Separate Opinion (**Exhibit RL-170**), ¶ 3 ("*The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms "fair and equitable." Therefore, prima facie, such a conception of fair and equitable treatment is at odds with the rule of interpretation of international customary law expressed in Article 31.1 of the Vienna Convention on the Law of Treaties*").

1163 *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007 (**Exhibit RL-24**), ¶ 67.

1164 See Respondent's Counter Memorial, ¶¶ 414-419. *See also Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award of 21 January 2020 (**Exhibit RL-196**), ¶ 517 ("*The expectations of the Claimants have to be based on the facts in this arbitration and it must be viewed objectively. The Claimants' expectation must be assessed at the time the investment was made and the Claimants' investment must originate from some affirmative action of Spain in the form of specific commitments made by Spain to the investor, or by representations made by Spain, which encouraged the investment*").

1165 Respondent's Counter Memorial, ¶¶ 420-425.

1166 *Pawlowski AG and Project Sever s.r.o. v. Czech Republic,* ICSID Case No. ARB/17/11, Award of 1 November 2021 (**Exhibit RL-209**), ¶ 290. The tribunal further noted that "*In evaluating the State's conduct, the Tribunal must balance the investor's right to be protected from improper State conduct*

789. In light of these principles, which are largely agreed among the Parties,[1167] the Claimants' claims must fail.

790. *First*, the Respondent did not make any specific representation or commitment that it would refrain from initiating asset forfeiture proceedings should the legal grounds for such proceedings arise. Instead, the Claimants refers to what they call "Colombia's specific representation regarding the status of the Meritage Property's chain of title".[1168] The Claimants refer, in particular, to two documents in response to requests for information regarding the chain of title of the Meritage Lot.[1169] The Claimants did not ask – and the Respondent did not volunteer (and it could not) – any specific commitment regarding the non-application of the Asset Forfeiture Law or the exclusion of asset forfeiture proceedings if the grounds for such proceedings were met. Indeed, under Colombian law the State could not have given any such commitment.

791. As explained in the Counter Memorial and above, the documents could not give rise to legitimate expectation.[1170] On their face, the so-called "certifications" are not actually certifications: they were rendered by a single Unit of the Attorney General's Office in relation to the information that the specific unit holds at very specific point in time.[1171] The Claimants' attempt to dilute the relevance of the caveats included in the documents by mischaracterizing the opinion of Dr. Reyes is misconceived: those caveats can only confirm the limited scope of the certificates.[1172]

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against other legally relevant interests and countervailing factors". Among others, the tribunal stressed that "*it is the investor's duty to perform an appropriate pre-investment due diligence review and to conduct itself in accordance with the law both before and during the investment*". See ¶ 293.

1167 Claimants' Reply, ¶¶ 330-331.

1168 Claimants' Reply, ¶ 352.

1169 Respondent's Counter Memorial, ¶ 466.

1170 *See above,* Section III.E.

1171 *See above,* Section III.E., Respondent's Counter Memorial, ¶ 360.

1172 Dr. Reyes Expert Report, ¶ 58 (noting that following the use of such certificates by the Cali Cartel to shield their unlawfully obtained assets from legal proceeding, "the Attorney General's Office has been very careful in the way it responds to these rights of petition, making it clear that they only refer to information from the Unit that issues them and specifying that they do not imply that after their issuance no investigations could have been initiated against the persons or property to which the documents refer"). The Claimants' argument that the Attorney General's Office "has now revised its practice and no longer provides such certifications" (Claimants' Reply, ¶ 360) only confirms the Respondent's conclusion. Contrary to the Claimants' representation, the nature of the documents was

792. More importantly, it is clear that in responding to a right of petition as regards pending proceedings in connection with the lot and persons in the chain of title, the Colombian State is not providing any promise or commitment not to apply the Asset Forfeiture Law. And it could not have done so. As explained by Dr. Caro, "The National Direction of Asset Forfeiture does not have as function established in the law, nor can be it be understood that it is in its nature to be, an 'asset cleaning' office".[1173] This would have been known to "any person even minimally familiar with asset forfeiture proceedings and with the structure and functioning of the Attorney General's Office",[1174] as Mr. Sintura certainly was.[1175]

793. A finding on the contrary would, in practice, legitimize the *modus operandi* of several drug cartels and criminal organizations, [redacted] that have tried to use these certificates to "appear as *bona fide* buyers".[1176] This cannot be admitted.

794. In any event, latest as of July 2014, when Mr. Seda was approached by Mr. López Vanegas in July 2014, he should have adopted additional due diligence measures and not proceed, as if nothing had happened, with the development of the Meritage Project.[1177] In the words of Dr. Reyes:

> When on 3 July 2014 Ángel Samuel Seda became aware through Iván López Vanegas of the illicit origin of the asset, any belief he might have had up to that moment as regards the asset's lawful origin should have vanished.
>
> From that moment on, he could not have trusted that the certifications issued by the National Unit for Asset Forfeiture and Money Laundering on 30 October 2007 and 9 September 2013 were still valid.[1178]

795. *Second*, an objective understanding of the legal framework within which the Claimants' made their purported investment call for the rejection of their claim. The Asset Forfeiture Law sets out

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not changed, but additional caveats were incorporated to avoid future buyers to misuse the documents – as the Claimants are attempting to do.

1173 Dr. Caro First Witness Statement, ¶ 43. *See above,* Section III.E.

1174 Dr. Caro Second Witness Statement, ¶ 30.

1175 *See above,* Section III.E.

1176 *See above,* Section III.E.

1177 *See above,* Section III.E.

1178 Dr. Reyes Second Expert Report, ¶¶ 142-143. *See also* ¶ 161 ("In addition to ignoring the information provided by Iván López Vanegas on the illicit origin of the asset when concluding the commercial trust agreement, Mr. Angel Samuel Seda also breached his contractual duty to annually update the information relating to anti money laundering. This is not the way in which someone with the information Mr. Ángel Samuel Seda had would have behaved in 2014").

the grounds for asset forfeiture, including when (i) the assets were the direct or indirect product of an illicit activity, (ii) the provenance of the assets is the legal or physical, transformation or partial or total conversion, of material products, instruments or objects of illicit activities, and (iii) the assets form part of an unjustifiable increase in wealth, provided there are elements of knowledge, which allow reasonably to consider that the assets' provenance is illicit activities.[1179] Moreover, when deciding to develop the Meritage Project the Claimants knew – or should have known – that Asset Forfeiture Proceedings are not subject to any statute of limitations ("imprescriptible").[1180] Therefore, the Claimants could not have reasonably expected Colombia not to initiate the Asset Forfeiture Proceedings once the legal grounds to initiate such proceedings had been met, in particular, considering the need to protect the unit buyers and the general public from continuing investing in the Meritage Project while the legal situation of the Meritage Lot [redacted] got cleared.

796. *Third*, as demonstrated in the Counter Memorial, the Claimants' expectations should also be assessed in light of the speculative nature of the Claimants' project in Antioquia, a region marred with drug dealing activities [redacted] the highly deficient due diligence conducted by the Claimants,[1182] the structure through which they decided to develop the Meritage Project – including removing Newport as a beneficiary of the Meritage La Palma Trust for "tax planning and efficiency purposes" – and their inaction when they became aware of Mr. López Vanegas's claims over the Meritage Lot.[1183]

1179 *See* Law No. 1708, 20 January 2014 (**Exhibit C-003bis**), Article 16 ("Forfeiture shall be declared under the following circumstances: 1. Assets which are the direct or indirect product of an illicit activity (…) 3. Assets resulting from a partial or total physical or legal transformation or conversion of the product, tools, or material subject matter of illicit activities. 4. Assets which are a part of an unjustified increase of wealth, where there are elements of knowledge which make it possible to reasonably consider that they are the result of illicit activities")

1180 *See* Law No. 1708, 20 January 2014 (**Exhibit C-003bis**), Article 21 ("The asset forfeiture action is not barred by statute of limitation. Asset forfeiture shall be declared regardless of whether the grounds for its applicability have occurred prior to the entry into force of this law"). See also Decision C-740/03 of the Colombian Constitutional Court, 28 August 2003 (**Exhibit R-15**), p. 67.

1181 [redacted]

1182 *See above,* Section III.E.

1183 *See* Respondent's Counter Memorial, ¶ 468. The Claimants' lack of reaction to Mr. López Vanegas's threats show their negligence (or lack of due diligence) and the fact that for years before the Asset Forfeiture Proceedings were initiated, they were aware of Mr. López Vanegas's links to the Meritage

797. Against this background, the Claimants cannot be allowed to rely on the two certifications as a shield against the Asset Forfeiture Proceedings. The contrary would mean that any buyer could preempt the Colombian State from initiating asset forfeiture proceedings by seeking a certification from the Asset Forfeiture Unit before buying any asset. This would clearly frustrate the object and purpose of the Asset Forfeiture Law and render this important mechanism to fight organized crime fully futile.

798. In sum, the Claimants could not have had any objective reasonable expectations that the Respondent would refrain from initiating asset forfeiture proceedings in accordance with the Asset Forfeiture Law. The Claimants' subjective expectations, to the extent that existed, are not protected by the TPA.

3. The Respondent did not breach the FET obligations with respect to the Claimants' alleged investments in the Other Projects

799. In the Counter Memorial, the Respondent demonstrated that, whatever impact the Asset Forfeiture Proceedings had on other projects in which the Claimants were involved, it cannot constitute a breach of FET. In particular, the Respondent showed that the Claimants' allegations were based on a misrepresentation of the fact as a "'systematic assault' targeting Mr. Seda or his investments"[1184] and that there is no causal link between the Asset Forfeiture Proceedings against the Meritage Lot and the development of any other project related to the Claimants.[1185]

800. In the Reply, the Claimants insist that the Asset Forfeiture Proceedings "had a severe impact on the viability of Luxé and the Development Projects"[1186] and constituted a breach of the FET standard "with respect to Claimants' investments in other projects".[1187] The Claimants' allegations are to no avail.

Lot and still decided not to take any action, thus undertaking the risk of a potential asset forfeiture proceedings against the lot. *See also* Dr. Reyes Second Expert Report, ¶¶ 142-143.

1184 Respondent's Counter Memorial, ¶¶ 471-472.

1185 Respondent's Counter Memorial, ¶¶ 473-475.

1186 Claimants' Reply, ¶ 363.

1187 Claimants' Reply, Section V.C.3.

801. *First*, it has been demonstrated that Article 10.5 of the TPA extends only to "covered investments" and not to investors.[1188] On this basis alone, the Claimants' allegation that Colombia "failed to treat Claimants who had invested in other project headed by Mr. Seda fairly and equitably"[1189] should be *prima facie* rejected, as it is beyond the scope of protection of the TPA.

802. *Second*, and in any event, the Claimants' claim is based on a set of facts that have been proven wrong by the Respondent. As demonstrated, the Asset Forfeiture Proceedings were initiated and conducted in accordance with Colombian law and Colombia's international obligations.[1190] Notably, the Asset Forfeiture Proceedings were initiated against the Meritage Lot and did not affect the owners of the lot, let alone the Claimants, who did not possess any *in rem* rights over the plot. Moreover, the Claimants' allegation that Mr. Seda was personally subjected to "a systematic assault" is based solely on Mr. Seda's self-serving statement and misrepresentations, but fully unsupported (and in fact contradicted) by the evidence available.[1191]

803. *Third*, the Claimants do not deny that a causal link must exist "between the State's conduct and the harm allegedly suffered by the investor".[1192] Yet, the Claimants allege, without providing additional evidence, that there exists 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".[1193] The Claimants go as far as to accuse the Respondent of "knowingly and foreseeably destroy[ing] the value of their investments", again, without providing any evidence.[1194]

804. Having failed to provide any evidentiary support as to the wrongful acts and the claimed losses – let alone the causal link between the Respondent's conduct and the alleged losses – the Claimants' have failed to discharge their burden of proof as to the alleged impact of the Asset

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1188 *See above,* Section IV.

1189 Claimants' Reply, ¶ 366.

1190 *See above*, Section III.C.

1191 *See,* Section V.D. and VI.F.

1192 *See* Respondent's Counter Memorial, ¶ 474; Claimants' Reply, ¶ 364.

1193 Claimants' Reply, ¶ 365.

1194 Claimants' Reply, ¶ 366.

Forfeiture Proceedings (or any other measure) on the Claimants' Other Projects.[1195] Thus, in the words of the tribunal in *Silver Ridge v. Italy*, "in the absence of evidence establishing the necessary causal nexus, the Respondent cannot be held responsible under international law for the failure of"[1196] the Claimants' projects other than the Meritage Project.

* * *

805. In sum, the Respondent has treated the Claimants fairly and equitably (and *a fortiori* in accordance with the customary minimum standard of treatment) at all times. In particular, the Asset Forfeiture Proceedings were not arbitrary, unreasonable or discriminatory, and were initiated and conducted in accordance with the fundamental procedural protections or discriminatory. Moreover, the Respondent acted transparently and in accordance with the due process of law and did not frustrate the Claimants' expectations (if any).

D. THE RESPONDENT FULFILLED ITS OBLIGATION TO ACCORD FULL PROTECTION AND SECURITY TO THE CLAIMANTS' ALLEGED INVESTMENT

806. In their Memorial, the Claimants allege that Colombia breached the FPS standard by not protecting the Claimants' investments from the unlawful actions of State organs and third parties, and by not protecting Mr. Seda and his family against the threats and attacks from third parties.[1197]

807. The Respondent showed, in its Counter Memorial, that the Claimants' FPS claims are fully unsupported by the facts and, in any event, do not meet the legal standard for a violation of the obligation to provide FPS under the TPA.[1198]

808. In the Reply, the Claimants allege that the Respondent "misrepresents" the scope of the FPS standard under the TPA and rehash their arguments that the Respondent breached the FPS standard by "failing to protect Claimants investment from a corrupt extortion racket, and by

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1195 As demonstrated below, the evidence shows that there is no causal link between any measure adopted by the Respondent and the losses claimed by the Claimants. *See below*, Section VI.A.

1196 *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (**Exhibit CL-192**), ¶ 526

1197 *See* Claimant's Memorial, ¶¶ 369-374.

1198 *See* Respondent's Counter Memorial, ¶¶ 497-499.

failing to protect Claimants and their investments from unlawful conduct committed by third parties".[1199]

809. As demonstrated in the Counter Memorial, the Claimants' allegations are unsustainable both as a matter of law and fact. As further demonstrated below, an application of the appropriate legal standard for the determination of an alleged breach by the Respondent of its obligations under the TPA to accord the Claimant Full Protection and Security (**V.D.1**), leads to the conclusion that the Respondent has respected its obligation to accord FPS to the Claimants at all times (**V.D.2**).

1. The legal standard

810. In the Counter Memorial, the Respondent demonstrated that, on its face, Article 10.5 of the TPA limits the obligation to accord FPS to "covered investments"[1200] against physical damage or interference.[1201] Moreover, the FPS standard is one of due diligence[1202] and carries a very high threshold.[1203]

811. In their Reply, the Claimants accuse the Respondent of "mischaracterizing" the standard. However, it is the Claimants that attempt to unduly expand the scope of the FPS standard under the TPA.

812. *First*, on its face, the obligation to afford "full protection and security" under Article 10.5 of the TPA applies only with respect to "covered investments".[1204] This is fully consistent with the TPA's contracting parties' interpretation of the treaty, as confirmed by the USA in its non-disputing party submission:

> Some obligations in the U.S.-Colombia TPA require a Party to accord treatment to both investors and covered investments, whereas other obligations in the Agreement only require a Party to accord treatment to a covered investment. For example, the Article 10.5 requires the Parties to accord "fair and equitable treatment" and "full protection and security" only to covered investments, not to investors. In contrast, Article 10.3 requires the Parties to accord "national

1199 Claimants' Reply, ¶ 368.

1200 Respondent's Counter Memorial, ¶¶ 501-502.

1201 Respondent's Counter Memorial, ¶¶ 503-506.

1202 Respondent's Counter Memorial, ¶¶ 507-510.

1203 Respondent's Counter Memorial, ¶ 511.

1204 Respondent's Counter Memorial, ¶ 501.

> treatment" to both investors and covered investments. In accordance with this distinction, for the Agreements' obligations which only extend to covered investments, a claimant (*i.e.*, an investor) must establish that a Party's treatment was accorded to the covered *investment* and violated the relevant obligation.[1205]

813. The Claimants' attempt to extend the obligation to "investors" not only turns a blind eye to the TPAs' contracting parties' intention to restrict certain obligations only with respect to covered investments but is also unsupported by the case law on which the Claimants rely in support of their allegations on this same issue. In fact, none of the tribunals on which the Claimants rely found a breach of the FPS standard in connection with the host State's actions *vis-à-vis* the investor.[1206] Conversely, in *Al-Warraq v. Indonesia* the tribunal expressly held that when the treaty expressly creates the obligation to extend FPS "to the invested capital of the investor, i.e., the investment",[1207] "measures that affect an investor personally with no concomitant effect on the investment do not amount to a breach of that standard of protection".[1208]

1205 Submission of the United States of America, 26 February 2021, ¶ 5.

1206 In *AAPL v. Sri Lanka* the tribunal found Sri Lanka responsible under international law on the basis of a series of "*legal and factual considerations*", including Sri Lanka's "*inaction and omission* [] *to prevent the eventual occurrence of killings and property destructions*" (*Asian Agricultural Products Ltd. V. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award 27 June 1990 (**Exhibit CL-14**), ¶¶ 85(b), 86); in *Mondev v. USA*, the tribunal noted (while analyzing the distinction between a breach of NAFTA Article 1105(1) and tortious conduct) that an investor could claim that "*its investment was not accorded 'treatment in accordance with international law'*" if his local staff is assaulted by the police while at work and the government is immune from suit from the assaults (*Mondev International Ltd. V. United States of America*, ICSID Case No. ARB(AF)/99/2, Award 11 October 2002 (**Exhibit CL-30**), ¶ 152); in *MNSS v. Montenegro*, the tribunal found that even though the police failed to ensure "*the physical integrity of buildings and persons*", including the CEO who was "*physically assaulted*", the claimants did not suffer any damage so there was "*no basis for an award on damages in relation to the behavior of the police*" (*MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award 4 May 2016 (**Exhibit CL-198**),¶¶ 353, 355-356); in *Mamidoil v. Albania*, the tribunal concluded that the Respondent "*ha*[d] *not breached its obligation under Article 10.1 of the ECT to constantly protect and secure Claimant's investment*" (*Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 (**Exhibit RL-76**), ¶ 829).

1207 *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award 15 December 2014(**Exhibit CL-98**), ¶ 624.

1208 *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award 15 December 2014(**Exhibit CL-98**), ¶ 629. *See also* Campbell McLachlan et al., *International Investment Arbitration: Substantive Principles (OUP, 2017)* (**Exhibit RL-136**), ¶¶ 7.242 (Prof. McLachlan confirms that the FPS standard "*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*").

814. *Second,* as demonstrated in the Counter Memorial, the TPA expressly clarifies that the "full protection and security" standard "requires each Party to provide the level of police protection required under customary international law".[1209] The Claimants have failed to provide any reasonable meaning to the TPA's plain language. Instead, they rely on what they misleadingly call "the weight of arbitral jurisprudence" to assert that FPS "includes the guarantee of commercial and legal security".[1210] The Claimants' attempt to broaden the scope of the FPS standard beyond physical security is untenable.

815. Contrary to the Claimants' allegations, the predominant view is that the FPS standard ensures only physical, and not legal, security. This has been expressly confirmed, for example, by the tribunal in *Gold Reserve v. Venezuela:*

> While some investment treaty tribunals have extended the concept of full protection and security to an obligation to provide regulatory and legal protections, the more traditional, and commonly accepted view, as confirmed in the numerous cases cited by Respondent is that this standard of treatment refers to protection against physical harm to persons and property.[1211]

816. In any event, the decisions on which the Claimants rely are inapposite simply because the relevant treaty language significantly differs from the language of the TPA, which expressly confines the FPS standard to the parties' obligation to provide "the level of police protection required under customary international law".[1212] This was expressly acknowledged by the tribunal in *Azurix v. Argentina*:

> The Tribunal is aware that in recent free trade agreements signed by the United States, for instance, with Uruguay, full protection and security is understood to be limited to the level of police protection required under customary international law. However, when the terms "protection and security" are

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1209 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.5.2(b).

1210 Claimant's Reply, ¶ 371.

1211 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/(AF)/09/1, Award, September 22, 2014, (**Exhibit CL-097**) ¶ 622. *See also* Respondent's Counter Memorial, ¶ 504.

1212 In *Biwater v. Tanzania* the applicable treaty requires the host State to provide "full protection and security" (*Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008 (**Exhibit RL-29**), ¶¶ 586, 729); in *National Grid v. Argentina*, the applicable treaty requires the host State to provide "protection and constant security" (*National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award 3 November 2008 (**Exhibit CL-63**), ¶¶ 181, 187); and in *Vivendi v. Argentina* the treaty required the host State to accord "protection and full security in accordance with the principle of fair and equitable treatment referred to in Article 3 of this Agreement" (*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 (**Exhibit CL-52**), ¶ 7.4.13).

> qualified by "full" and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.[1213]

817. Precisely, in this case the standard is qualified: the TPA only requires the host State "to provide the level of police protection required under customary international law". Based on this restricted language, the USA in its non-disputing party submission confirmed that extending the treaty protection beyond physical protection would impermissibly extend the FPS standard:

> The obligation to provide "full protection and security" does not, for example, require States to: (i) prevent economic injury inflicted by third parties; (ii) provide for legal security; (iii) provide for stability of a State's legal environment; or (iv) guarantee that aliens or their investments are not harmed under any circumstances. Such interpretations would impermissibly extend the duty to provide "full protection and security" beyond the minimum standard under customary international law.[1214]

818. *Third*, it is not disputed that the FPS standard only requires a host State to exercise due diligence.[1215] The Claimants also acknowledge that investors should expect some degree of general insecurity.[1216] As noted by the tribunal in *Mamidoil v. Albania*, this is the case, in particular, when the claimants were aware of the situation of the host State and "decided to make [their] investment under these conditions of insecurity".[1217]

819. Conversely, the Claimants' allegation that a "heightened degree of diligence" is required in cases of "specific harassment" involving the government apparatus is fully unsupported. A good faith reading of the findings of the only case on which the Claimants rely, *Saluka v. Czech Republic*,

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1213 *Azurix Corp. v. The Argentine Republic,* ICSID Case No. ARB/01/12, Award 14 July 2006 (**Exhibit CL-43**), ¶ 408. *See also 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 (**Exhibit CL-52**), ¶ 7.4.15 ("*the Tribunal notes that the text of Article 5(1) does not limit the obligation to providing reasonable protection and security from "physical interferences", as Respondent argues. If the parties to the BIT had intended to limit the obligation to "physical interferences", they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment*"); *OAO Tatneft v. Ukraine,* PCA Case No. 2008-8, Award on the Merits 29 July 2014 (**Exhibit CL-194**), ¶ 428 (finding a breach of the FPS standard "*in the realm of police protection and physical security*").

1214 Submission of the United States of America, 26 February 2021, ¶ 44.

1215 Respondent's Counter Memorial, ¶¶ 508-510; *see also* Claimants' Reply, ¶ 373.

1216 Claimants' Reply, ¶ 373.

1217 *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania,* ICSID Case No. ARB/11/24, Award, 30 March 2015 (**Exhibit RL-76**), ¶ 823.

confirms the exact opposite: that the FPS standard aims to protect the physical integrity of an investment against physical attacks targeting foreigners or particular groups of foreigners:

> Accordingly, 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. The practice of arbitral tribunals seems to indicate, however, that the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force. In light of the following findings, it appears not to be necessary for the Tribunal to precisely define the scope of the "full security and protection" iclause in this case.

820. *Fourth*, as demonstrated in the Counter Memorial, the threshold for finding a breach of the FPS standard is extremely high.[1218] The Claimants, while disagreeing with the extremely high standard, do agree with the Respondent that when assessing the adequacy of a State's response under the "full protection and security" standard, the response "should be assessed in light of the circumstances of each case".[1219]

821. In any event, the Claimants may only be awarded damages in connection with an alleged breach of the FPS standard if they show that they suffered damage as a result of the Respondent's breach of the FPS standard. This has been confirmed by the cases on which the Claimants rely. For example, in *MNSS v. Montenegro* the tribunal found no basis for an award of damages, even though Montenegro was found to be in breach of the FPS standard:

> [T]he Claimants have failed to show that they suffered damage as a result of the Respondent's actions. As a consequence, while the standard in Article 3(1) of the BIT was breached, there is no basis for an award of damages in relation to the behavior of the police during the two strikes at the end of the year 2010.[1220]

822. Therefore, even assuming that the Respondent's actions breached the FPS standard *vis-á-vis* the Claimants and their alleged investments (which is not the case, as demonstrated in the Counter

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1218 Respondent's Counter Memorial, ¶ 511.

1219 Respondent's Counter Memorial, ¶ 510; Claimants' Reply, ¶ 374.

1220 *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro,* ICSID Case No. ARB(AF)/12/8, Award 4 May 2016 (**Exhibit CL-198**), ¶ 356. *See also Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award 27 June 1990 (**Exhibit CL-14**), ¶ 85(a) ("Though such admitted situation would have raised logically the question of whether there was during that period failure from the Government's part to provide "full protection and security" according to the objective standard suggested to be applicable, said question remains theoretical since there were no claimed "losses suffered" due to the lack of governmental protection throughout that period").

Memorial and below), to the extent that the Claimants have not shown any losses as a result of the Respondent's alleged breach of the FPS standard, the Claimants would not be entitled to an award on damages in this regard.

2. The Respondent's conduct did not breach its obligation to accord FPS to the Claimants' alleged investment

823. Having established the appropriate standard for the determination of an alleged breach by the Respondent of its obligations under the TPA to accord the Claimants Full Protection and Security, it is clear that its application fails to support the Claimants' claims in this arbitration. In particular, the Claimants allegations that the Respondent failed to protect them from an extortion scheme by State officials (**V.D.2.a**) and the threats and attacks by third parties (**V.D.2.b**) fail as a matter of law and fact. Moreover, the allegations that the Respondent harassed Mr. Seda and he was "chased out of Colombia" and unable to conduct business are contradicted by the evidence in the record, including Mr. Seda's own statements to members of the Attorney General's Office (**V.D.2.c**).

a. *The Claimants' allegation that the Respondent failed to protect the Claimants from "an extortion racket" perpetrated by State officials fails as a matter of law and fact*

824. It has been established that under the TPA, the FPS standard may only be breached when the host State fails to accord "the level of police protection required under customary international law". In other words, the FSP standard only obliges the host State to exercise due diligence to procure the physical security of the Claimants' investments.[1221] Accordingly, the Claimants' attempt to rehash and resubmit their legal arguments on corruption by baselessly expanding the scope of the FPS standard should be disregarded as a matter of law.

825. Even if the Tribunal were to understand that the FPS standard extends beyond physical security, the Claimants' allegations that the Respondent failed to protect the Claimants from "an extortion racket perpetrated by officials within the Attorney General's Office" is unavailing.[1222]

1221 *See above,* Section V.D.

1222 Claimants' Reply, ¶ 376.

826. To begin with, the Claimants have failed to show that representatives of the Attorney General's Office acted corruptly. As demonstrated above, the Claimants' reliance on circumstantial evidence is insufficient.[1223]

827. Moreover, the Claimants' allegation that the Respondent failed "to properly and promptly investigate and prosecute Mses. Malagón and Ardila" is simply not true.[1224] As demonstrated above, it was not until 19 December 2016, *i.e.* more than two years after the denounces facts, that Mr. Seda filed a formal complaint regarding the corruption allegations against Mses. Malagón and Ardila, only after being prompted by Dr. Hernandez himself to do so.[1225] This fact alone speaks volumes as to the merits of the Claimants' FPS claim.

828. Once filed, Mr. Seda's formal complaint triggered various extensive investigations with profuse evidence by several specialized divisions within the Attorney General's Office to establish the truth regarding the corruption allegations against prosecutors Malagón and Ardila.[1226] No incriminatory evidence was found against Mses. Malagón or Ardila.[1227]

829. Against this background, the Claimants' argument that Colombia failed to duly investigate the grave accusations against Mses. Malagón and Ardila is simply unsupported by the facts: Colombia diligently conducted all investigations within its capacities to assess whether Mses. Malagón and Ardila had been involved in criminal activities, in particular in connection with the Meritage Lot.[1228] The Claimants' unsubstantiated claims are merely based on their unwillingness to acknowledge that all the investigations led to the conclusion that there is no evidence of corruption, unlawful enrichment, or any suspicious communications among Mses. Ardila and Malagón, or between them and Mr. Seda.

1223 *See above,* Section III.H.

1224 Claimants' Reply, ¶ 377.

1225 *See* Angel Samuel Seda Complaint, 19 December 2016 (**Exhibit C-181**). *See also* Angel Samuel Seda First Witness Statement, 15 June 2020, ¶ 125.

1226 *See above,* Section III.H.

1227 *See above,* Section III.H.

1228 *See above,* Section III.H.

830. In any event, it should be noted that Mr. Seda has systematically refused to cooperate in the various investigations where his cooperation was requested by the Attorney General's Office.[1229] By refusing to appear to provide testimony as requested, Mr. Seda himself caused significant delays in the investigations of the alleged "extortion racket" that led to the Asset Forfeiture Proceedings against the Meritage Lot.[1230]

b. *The Claimants' allegation that the Respondent failed to protect Mr. Seda and his family from the threats and attacks from third parties also fails as a matter of law and fact*

831. As demonstrated, the FPS obligation under the TPA extends only to the protection of investments, not investors. On this basis alone, the claims that the Respondent breached the FPS standard by "fail[ing] to protect Mr. Seda and his family from escalating threats of violence to the detriment of his investments" should be rejected.[1231]

832. In any event, the Claimants allegations are unsupported by the evidence. As demonstrated in the Counter Memorial, following Mr. Seda's complaint regarding the alleged "terrifying assassination attempt" against Mr. Seda[1232] and the alleged threats against his daughter, the Attorney General's Office issued an order to the Police Commander to "adopt the necessary measures for the protection of Mr. Seda and his family".[1233] The protection order expressly stated that it was not subjected to any expiration date.[1234]

1229 *See above,* Section III.H.

1230 *See above,* Section III.H.

1231 Claimants' Reply, ¶ 378.

1232 Claimants' Reply, ¶ 378

1233 Counter Memorial, ¶ 542. [redacted]

833. The case was subsequently assigned to the unit of the Attorney General's Office in charge of crimes against the life, which in turn instructed the Judicial Police to identify the shooters. As part of the investigation, Mr. Seda was called to provide a statement but he failed to attend the scheduled meeting.[1235] In this sense, Prosecutor for Sectional 13 reported having attempted, and failed, to obtain Mr. Seda's testimony on three different occasions. In the words of the prosecutor, the investigation was held up by "[t]he initial difficulty in contacting the victim" and, even after Mr. Seda was contacted, "his reluctance to expand his complaint, since it is necessary to precisely determine the circumstances of time, manner and place in which the events happened, the context of previous threats, subsequent facts, etc., which requires information from the victim to clarify the facts and identify the presumptive culprits."[1236] The witness of the facts, Mr. Juan Pablo Lopera, also failed to present his testimony based on the understanding that it would not be necessary for him to expand on his previous declaration.[1237]

834. In any event, Mr. Seda himself has recognized that certain steps have been adopted by the Colombian authorities to protect him. For example, in his witness statement, he acknowledges that after he gave his testimony, Mr. Seda was immediately escorted by police officers back to his domicile.[1238]

835. Against this background, the Claimants' allegations based solely on Mr. Seda's self-serving statements are untenable.

[redacted]

1234 Angel Seda Statement attached to Request for Police Protection, 11 October 2017 (**Exhibit C-202**).

1235 [redacted]

1236 [redacted]

1237 [redacted]

1238 *See* Seda Witness Statement, ¶ 138.

c. *Mr. Seda's allegations that due to the Respondent's alleged breach of the FPS standard he was unable to conduct business in Colombia is contradicted by the evidence in the record, including his own statements to members of the Attorney General's Office*

836. In their Reply, the Claimants allege that Mr. Seda "was quite literally chased out of Colombia because of fears to his life".[1239] Once again, the Claimants' excessive argumentative zeal results in a claim that is plainly inconsistent with the facts.

837. [redacted]

838. Moreover, during the meetings that Mr. Seda recently held with members of the Attorney General's Office (as registered in the transcripts on which the Claimants so heavily rely) Mr. Seda himself plainly reassured all attendees of his interest in continuing to invest in Colombian real estate in the future.[1241] Clearly, his expressed intention is completely incompatible with the purported intention to flee from Colombia portrayed by the Claimants in their Reply.

839. Similarly unavailing are the Claimants' allegations that the Respondent breached its FPS obligation by "refus[ing] to renew Mr. Seda's investor visa without cause." This assertion is, again, simply not true.

840. [redacted]

1239 Claimants' Reply, ¶ 379.

1240 [redacted]

1241 [redacted]

[redacted]

841. Finally, the Claimants' suggestions that Mr. Seda was "apparently made the subject of an entirely frivolous investigation into his alleged involvement in drug trafficking and money laundering" is again belied by the available evidence.[1243] In fact, [redacted]

842. In light of the foregoing, it is unsurprising that the Claimants have not cited any source for their empty allegations, except for Mr. Seda's own testimony. Any such source is non-existent, simply because their statement is blatantly false.

* * *

843. In sum, the Claimant's allegations that the Respondent breached its obligation to accord Full Protection and Security should be dismissed by the Tribunal: in the best-case scenario, these allegations lack any foundation; in the worst, they are disproven beyond doubt by the facts as documented in the record. Further, even if the statements on which the Claimants premise their claims were true, they fail to satisfy the applicable FPS standard.

VI. THE CLAIMANTS ARE NOT ENTITLED TO THE DAMAGES CLAIMED

844. It is undisputed that in case the Tribunal were to find that it has jurisdiction and that the Respondent has breached its international obligations *vis-à-vis* the Claimants (all of which is denied by the Respondent), the Respondent would have to compensate the Claimants for the loss or damage incurred "by reason of, or arising out of" that breach. The Parties disagree as to

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1242 *See* [redacted]

1243 Claimants' Reply, ¶ 379. The Claimants' allegations that Mr. Seda "*was harassed by OFAC investigators as a result of false reports by the Colombian government*" has also been disproved by the U.S. Department of Treasury. *See* Letter from the Department of the Treasury of 11 January 2022 (**Exhibit R-175**).

1244 [redacted]

whether the Claimants are entitled to the damages claimed and the quantum of such damages.[1245]

845. In the Counter Memorial, the Respondent demonstrated that the Claimants are not entitled to recover damages because they did not meet their burden of establishing the existence and amount of losses and the fact that the claimed damages were caused by the Respondent's actions.[1246] Moreover, the Claimants' damages assessment is unreliable and grossly exaggerated.[1247] The Respondent also showed that none of the Claimants' requests for moral damages,[1248] interests,[1249] taxes[1250] and costs[1251] are justified in this case.

846. In their Reply, the Claimants allege that it was the Asset Forfeiture Proceedings that "destroyed the value of the Claimants' Projects" in Colombia[1252] and that they are entitled to, at a minimum, the fair market value of their investment,[1253] which BRG allegedly assessed using the DCF method.[1254] The Claimants further assert that they are entitled to pre-award interest at a 5.03% rate,[1255] and that the award should not be subject to taxes.[1256] Finally, the Claimants request that moral damages[1257] and all arbitration costs[1258] be paid by the Respondent.

1245 As noted in the Counter Memorial, the Respondent's arguments on damages and quantum are provided in the alternative, as it is the Respondent's main position that the Tribunal should reject the Claimants' claims on the basis that the Tribunal lacks jurisdiction over the claims and the claims are without merit.

1246 *See* Respondent's Counter Memorial, Section V.B.

1247 *See* Respondent's Counter Memorial, Section V.C.

1248 *See* Respondent's Counter Memorial, Section V.D. 1. To recall, the Claimants originally sought compensation in an aggregate amount of UD 309.2 million, including USD 246.1 million as compensation for the alleged damages to Mr. Seda, USD 18.6 million for the alleged losses by the Other Claimants and USD 47.3 million in pre-award interest. The Claimants also claimed 10% of the alleged damages for the purported moral damages suffered by Mr. Seda.

1249 *See* Respondent's Counter Memorial, Section V.E.

1250 *See* Respondent's Counter Memorial, Section V.F.

1251 *See* Respondent's Counter Memorial, Section V.G.

1252 *See* Claimants' Reply, Section VI.A.

1253 *See* Claimants' Reply, Section VI.B.

1254 *See* Claimants' Reply, Section VI.C.

1255 *See* Claimants' Reply, Section VI.D.

1256 *See* Claimants' Reply, Section VI.E.

1257 *See* Claimants' Reply, Section VI.F.

847. As demonstrated in the Counter Memorial and further below, the Claimants have not established the causal link between the Respondent's actions and most of the Claimants' alleged loss (**A**). On this basis alone, the Tribunal should dismiss most of the damages claimed by the Claimants. Moreover, the Claimants are not entitled to compensation in connection with the breach of obligations that only extend to covered investments (**B**) and, in any event, the amounts claimed are highly speculative and exaggerated and would overcompensate the Claimants in excess of the fair market value of their alleged investments (**C**). The Claimants are also not entitled to moral damages (**D**), interests (**E**), taxes (**F**) and costs (**G**).

A. THE CLAIMANTS HAVE FAILED TO ESTABLISH A DIRECT CAUSAL LINK BETWEEN THE RESPONDENT'S ACTIONS AND THE CLAIMANTS' ALLEGED LOSSES

848. It is undisputed that a causal link must exist in order for the claimed losses to be compensable.[1259] The Parties disagree, however, as to whether in this case there exists a causal link between the Claimants' alleged losses with respect to the real estate projects other than the Meritage Project (the "Other Projects") and the Asset Forfeiture Proceedings.[1260]

849. In the Counter Memorial, the Respondent demonstrated that the Claimants bear the burden of proving that any loss claimed in connection with their alleged investment was caused by the Respondent's alleged wrongful act and not by other extraneous causes.[1261] The Respondent further showed that the Claimants did not demonstrate the causal link between the Asset Forfeiture Proceedings, initiated against the Meritage Lot, and the over USD 175 million claimed as alleged losses with respect to the Other Projects.[1262]

850. In their Reply, the Claimants assert that a causal link exists between their alleged losses and the Asset Forfeiture Proceedings because the impact of the measure on the Other Projects was "entirely foreseeable to Colombia […] as it should have (and did) known that the seizure was

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1258 *See* Claimants' Reply, Section VI.G.

1259 *See* Claimants' Reply, ¶ 385.

1260 For the sake of clarity, the Respondent does not dispute the causal link with respect to any proven losses in connection with the Meritage Project. With respect to these losses, however, the Claimants' claims are too speculative and exaggerated, as explained in the Counter Memorial and further below.

1261 *See* Respondent's Counter Memorial, ¶¶ 556-562.

1262 *See* Respondent's Counter Memorial, ¶¶ 563-573.

bound to have significant adverse impacts on Mr. Seda and the projects in development with which he was associated".[1263] The Claimants' allegations must fail as a matter of law and fact.

851. As a preliminary matter, the Respondent recalls that it is the Claimants' burden to prove that the claimed losses were directly caused by the Respondent's alleged wrongful act and not by other extraneous causes.[1264] This has been confirmed by the most recent decisions rendered by investment tribunals.[1265] For example, in *El Jaouni v. Lebanon* the tribunal held that the claimant bears the burden of establishing a causal link between the respondent's conduct and the claimant's alleged losses, including (i) factual causation, *i.e.*, that "but for" the breach, the alleged losses would not have been suffered, and (i) legal causation, *i.e.*, that the respondent's actions were the proximate cause of the claimant's loss.[1266]

852. Against this background, the Claimants' attempt to shift their burden to the Respondent, expecting the Respondent to "explain what other seismic event could have abruptly shut down Mr. Seda's entire pipeline of projects",[1267] is unwarranted.

853. The fact remains, as demonstrated in the Counter Memorial and further below, that the Claimants have failed to establish the factual causation, let alone the legal causation, between their alleged losses and the Respondent's conduct.

854. *First*, the requirement of a direct causal link reflects a well-established rule of customary international law and has been incorporated in Article 31 of the ILC Articles on State Responsibility, which provides that reparation is due for damage "caused by [an] internationally

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1263 *See* Claimants' Reply, ¶ 402.

1264 *See* Respondent's Counter Memorial, ¶¶ 556-562.

1265 *See*, *e.g.*, *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (**Exhibit RL-209**), ¶ 728; *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (**Exhibit CL-192**), ¶ 526.

1266 *See*, *e.g.*, *Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic,* ICSID Case No. ARB/15/3, Award, 14 January 2021 (**Exhibit RL-205**), ¶¶ 61, 201. *See also Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (**Exhibit RL-209**), ¶ 728 ("The duty to make reparation extends only to those damages which have been proven by the injured party and which are legally regarded as the consequence of the wrongful act. It is a general principle of international law that injured claimants bear the burden of demonstrating: - That the claimed *quantum* of damage was actually suffered, and - that such damages flowed from the host State's conduct, and that the causal relationship was sufficiently close (i.e., not 'too remote')").

1267 Claimants' Reply, ¶ 384.

wrongful act of a State".[1268] As explained by the ILC, this means that "the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act".[1269]

855. This requirement has also been incorporated in Article 10.16.1 of the TPA, which refers to "loss or damage by reason of, or arising out of" a breach by the host State of its obligations *vis-à-vis* the investor. As explained by the United States, "the ordinary meaning of 'by reason of, or arising out of' requires an investor to demonstrate proximate causation".[1270] This means that the "loss or damage cannot be based on an assessment of acts, events, or circumstances not attributable to the alleged breach".[1271]

856. Applying a similar provision contained in the NAFTA, the *S.D. Myers v. Canada* tribunal held that a "sufficient causal link" requires "that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the *proximate* cause of the harm".[1272] Similarly, the *BG v. Argentina* tribunal held that the damage "must be the consequence or proximate cause of the wrongful act. Damages that are '*too indirect, remote, and uncertain to be appraised*' are to be excluded".[1273]

857. Contrary to the Claimants' allegations, foreseeability is only one of the elements to assess whether a loss is compensable or not. However, in and of itself, the element of foreseeability is not sufficient to establish causation; the element must be analyzed in addition to – and not instead of – the "proximate causation" analysis. As explained by the ILC in the commentaries to the Articles on International Responsibility:

> [C]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too

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1268 Respondent's Counter Memorial, ¶¶ 555-556.

1269 International Law Commission, *Draft Articles of Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) (**Exhibit CL-025**), Commentary 9 to Article 31 (emphasis added).

1270 Submission of the United States of America, 26 February 2021, ¶ 58 (emphasis added).

1271 Submission of the United States of America, 26 February 2021, ¶ 59.

1272 *See S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002 (**Exhibit CL-160**), ¶ 140.

1273 *See BG Group Plc. V. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007 (**Exhibit CL-056**), ¶ 428. *See also Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, 24 July 2008 (**Exhibit RL-29**), ¶¶ 779, 787.

> "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used, in others "foreseeability" or "proximity". But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule. […] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.[1274]

858. *Second*, the Claimants have failed to demonstrate the "proximate causation" between the Asset Forfeiture Proceedings – adopted against the Meritage Lot – and the damages claimed with respect to the Other Projects.[1275] Indeed, while the Claimants aver that their claims are "based on specific facts and evidence",[1276] the Claimants rely mostly on self-serving statements by Messrs. Seda and López Montoya, as demonstrated below.

859. **Luxé:** the Claimants claim that "[s]hortly after the imposition of the precautionary measures, Colpatria stopped disbursing loans to the Luxé Project, expressly citing the Asset Forfeiture Proceedings".[1277] The Claimants rely solely on the statements of Mr. López Montoya, the Vice President of Construction of Royal Realty, stating that he got a call from Colpatria telling him that "Colpatria would no longer formally approve any increases to the loan".[1278] The fact that a bank like Colpatria would communicate such a decision orally and without any written support is, in itself, surprising.[1279] Moreover, the Claimants have failed to show that Colpatria's purported

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1274 International Law Commission, *Draft Articles of Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) (**Exhibit CL-025**), Commentary 10 to Article 31.

1275 *See* Respondent's Counter Memorial, ¶¶ 563-572. With respect to the Meritage Project, while it is not disputed that construction was halted as a result of the precautionary measures on the Project, it has not been demonstrated that "the Meritage Project is no longer viable" (*see* Claimants' Reply, ¶ 388). [redacted]

1276 *See* Claimants' Reply, ¶ 389.

1277 *See* Claimants' Reply, ¶ 390.

1278 *See* Claimants' Reply, ¶ 390.

1279 *Cf.* Letter from James Andrés Toro Aristizabel to Angel Samuel Seda, 11 August 2016, *attaching* Letter from Juan Maria Robledo Uribe to Jaime Alberto Sierra Giraldo, 10 August 2016 (**Exhibit C-168**), including a letter by Banco de Bogotá informing Corficolombiana about the "acceleration of timeline of credit" in accordance with the promissory note and attaching the official certificates issued by the Superintendence of Notary Office reflecting the attachment of the Meritage Lot. *See also AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003 (**Exhibit CL-033**), ¶ 12.1.10 (the tribunal was similarly surprised by the

decision to halt financing was anyhow related to measures adopted by the Respondent against the Meritage Lot.

860. In the absence of any reliable evidence that (i) Colpatria decided to stop disbursing loans to the Luxé Project (or not to approve any increases to the loan), (ii) as a result of the Asset Forfeiture Proceedings or any other measure adopted by the Respondent, and (iii) the Luxé Project was halted – and losses were experienced by the Claimants – as a result of Colpatria's decision to stop disbursing loans, the "proximate causation" between the losses claimed in connection to the Luxé Project and the Asset Forfeiture Proceedings cannot be established. On this basis alone, the Tribunal should reject the Claimants' claims in connection with the Luxé Project.

861. For the sake of completeness, the Respondent notes that the scarce evidence in the record suggests that the losses claimed in connection with the Luxé Project could be more closely related to the Claimants' actions and inaction.[1280]

862. For example, by the time the precautionary measures were adopted against the Meritage Lot, Colpatria had disbursed over 90% of the credit granted to construct the Luxé Hotel in December 2014.[1281] Colpatria continued disbursing funds until 13 September 2016. Still, the Hotel was far from being completed within the expected timeline.[1282] Thus, Colpatria could have lost interest in financing the Luxé Hotel due to the significant delays in the construction which are not – and cannot be – attributed to the Respondent.[1283] Colpatria could have also lost interest in the Luxé

"complete absence of any evidence of Bank negotiations" for certain loans to finance the Claimants' projects).

1280 The Respondent notes, however, that it is not the Respondent's burden to establish that the alleged losses were caused by extraneous causes unrelated to the Respondent's measures.

1281 Statement of Defense filed on behalf of Luxé SAS and Angel Seda in Lawsuit Against Colpatria, 25 January 2018 (**Exhibit C-382**), p. 5.

1282 According to the Claimants, some 70% of the Hotel was constructed. *See* Claimants' Reply, ¶ 390. The Respondent notes that, pursuant to Exhibit BRG-004 (Luxe Project Accumulated Progress Control), the hotel was only 45% completed. In its second witness statement, Mr. Seda states that the progress report cited as BRG-004 related to only the *remaining* works at Luxé after construction had been restarted, and not to the entire project (*see* Mr. Seda Second Witness Statement, ¶ 66). Mr. Seda relies on a letter by Ochoa Arquitectos dated 28 August 2021 (**Exhibit C-338**).

1283 A report dated September 2015, *i.e.*, a year before the precautionary measures were adopted, shows that the project was expected to be delayed by at least 8 months. It also shows that the works, which had commenced in 2013, were suspended in November 2014 and re-started in April 2015 for reasons unrelated to the Respondent's measures (which were adopted over a year later) and that by September 2015 there was insufficient staff and "the number of workers engaged in finishing works should be increased". *See* **Exhibit BRG-097.**

Project due to the significant cost overruns in the Luxé Project which are also not – and cannot be – attributed to the Respondent.[1284] Colpatria could have also invoked "business reasons", as the Claimants allege was the case when they requested Colpatria to extend a loan to finance the Meritage Project.[1285] All these reasons are as plausible as the ones suggested by the Claimants.

863. It is also worth noting that Colpatria was not entitled to halt financing due to the Asset Forfeiture Proceedings. Unlike the promissory note issued in connection with the Banco de Bogotá loan to finance the Meritage Project, the Colpatria loan does not seem to allow for the acceleration of payments in case (i) "the assets of any of the debtors are attached" or (ii) if any of the debtors "is engaged in investigations related to terrorism, money laundering or crimes against public trust or property".[1286] But even if a similar provision would have been included within the loan agreement with Colpatria, Colpatria could not have accelerated payments and/or withdraw its financing of the Luxé Project because (i) none of the assets owned by the developer of the Luxé Project, Luxé by the Charlee S.A.S. were subject to attachment, and (ii) the Asset Forfeiture Proceedings was initiated against the Meritage Lot and not against Luxé by the Charlee S.A.S. or any of its shareholders. This means that if Colpatria would have halted its disbursements due to the commencement of the Asset Forfeiture Proceedings, it would have breached its obligations *vis-à-vis* Luxé by the Charlee S.A.S. This was even acknowledged by the legal representative of Luxé by the Charlee S.A.S. and Mr. Seda, who in domestic proceedings stated that "by unilaterally halting the payments under the credit agreement, [Colpatria] breached its obligations and abused its dominant position". She also stated that "between the December 2014 approval letter and the start of disbursements in January 2016 caused a cost overrun in the project which, added to the cessation of disbursements, led to the bankruptcy of my clients and the failure of

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1284 The September 2015 shows "[d]irect cost overrun projections over the suspension period in the amount of 500,000,0000", which were expected to continue increasing as a result of the delays in the project. The report also noted "cash-flows difficulties" and that the project "lack[ed] the resources required to move ahead". *See* BRG-097.

1285 To recall, the Claimants aver – also without evidence – that in 2016 Colpatria had declined a loan to the Meritage Project for "business reasons" given it "already had significant exposure to Royal Realty projects". *See* Seda First Witness Statement, 15 June 2020, ¶ 73.

1286 Letter from James Andrés Toro Aristizabel to Angel Samuel Seda, 11 August 2016, *attaching* Letter from Juan Maria Robledo Uribe to Jaime Alberto Sierra Giraldo, 10 August 2016 (**Exhibit C-168**), p. SP-0002. The Bank also submitted the official certificates issued by the Superintendence of Notary Offices reflecting the attachment of the Meritage Lot. *See also* Banco de Bogotá Promissory Note, 4 May 2016 (**Exhibit C-158**), p. 7.

the project".[1287] This is in stark contradiction to the Claimants' position in this proceedings that the alleged losses in connection with the Luxé Project were caused by the Asset Forfeiture Proceedings against the Meritage Lot.

864. Even if the Tribunal were to find that Colpatria was entitled to – and did – withdraw financing from the Luxé Project because of the imposition of the precautionary measures with respect to the Meritage Project, the Claimants still did not show that this was the cause of the losses suffered in connection with the Luxé Project. Indeed, the Claimants argue that the Luxé hotel was over 70% complete but they could not finish the works "without bank funding".[1288] The Claimants, however, have failed to show that they attempted to procure financing through alternative means to finalize the project. Had the project been as profitable as portrayed by the Claimants, the Claimants could have sold the project to third parties for what the Claimants represent was the fair market value.[1289] Yet, there is no indication whatsoever that the Claimants sought any reasonable means to move forward with the project and finalize what they want this Tribunal to believe was a highly lucrative hotel which construction was well-advanced.

865. In sum, while the Claimants seek to obtain the Tribunal's sympathy by arguing that "it made no sense for Mr. Seda to halt construction if there would have been any way for the project to be completed",[1290] they have not made any attempt at showing that it was actually impossible to complete the project, let alone that this impossibility was related to the Asset Forfeiture Proceedings.[1291]

1287 *See* Statement of Defense filed on behalf of Luxé SAS and Angel Seda in Lawsuit Against Colpatria, 25 January 2018 (**Exhibit C-382**), pp. 2-3 (emphasis added).

1288 Claimants' Reply, ¶ 390.

1289 *See* NERA Second Expert Report, ¶ 121.

1290 Claimants' Reply, ¶ 390.

1291 Notably, the Claimants also argue that Mr. Seda was also pursuing funding from Paladin Realty Partners, but that the discussions were halted in August 2016 "until the Meritage issue is resolved". *See* Claimants' Reply, ¶ 391. The Claimants, however, have not shown that Paladin Realty Partners intended to provide funding for the Luxé Project or what were the terms and conditions of the alleged intended funding. More importantly, by November 2016, i.e. three months *after* Paladin Realty Partners allegedly stated that they would halt discussions "until the Meritage issue is resolved", Mr. Seda and his team were involved in discussions with Paladin Realty Partners in connection with the Luxé Project. *See* Email from Alan Schneider to Alejandro Krell et al., 19 November 2016 (**Exhibit C-381**).

866. With respect to the damages claimed for the alleged losses in connection with Royal Realty not being able to manage the Luxé cabañas and collect fees and profits from rentals,[1292] the Claimants have not even attempted to show causation. Indeed, there is no reasonable direct link between the Asset Forfeiture Measures and the alleged losses – Royal Realty could have, without any problem, continued providing management services and collecting rentals. In fact, it has been demonstrated that the Claimants' allegations that "because Mr. Seda was not in Colombia, Royal Realty was unable to operate the completed cabanas in Luxé" is a sheer lie:[1293] between 2018 and 2021 Mr. Seda spent an average of 192 days per year in Colombia.[1294] Moreover, the Claimants admit that Royal Realty continues operating the Charlee Hotel. This claim should therefore be dismissed for lack of causation.

867. **Tierra Bomba:** the scarce evidence provided by the Claimants does not establish the proximate causation between the Asset Forfeiture Proceedings and the alleged losses in connection with the Tierra Bomba Project. For example, the sole piece of evidence on which the Claimants rely to claim that "[i]nvestors also divested their shareholding in the investment vehicle developing the Project" does not show that.[1295] Moreover, the Claimants' allegation that sellers of the land told Mr. Seda that "they no longer wanted to work with Royal Realty due to reputational issues"[1296] finds no support in the evidence available. As shown by the evidence, in 2014 Mr. Seda had entered into promise to purchase agreement with three separate individuals with the intention to acquire lots in Tierra Bomba.[1297] The prospective sellers were in possession of the lots but did not have legal title them. The termination of the agreements – which were made "by mutual consent and without any dispute whatsoever, upon reciprocal benefit"[1298] – seems to be more

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1292 *See* BRG Second Report, ¶ 133 et seq.

1293 Claimant's Reply, ¶ 380.

1294 *See above*, Section V.D.

1295 Claimants' Reply, ¶ 393.

1296 Claimants' Reply, ¶ 393.

1297 *See* Promise to Purchase Contract between Angel Seda and Jaime Francisco Martinez Pinilla and Edilia Rosa Sánchez Hoyos, 6 March 2014 (**Exhibit C-124**); Promise to Purchase Contract between Angel Samuel Seda and Ramon Antonio Duque Marín, 17 June 2014 (**Exhibit C-128**); Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sánchez Vargas, 19 September 2014 (**Exhibit C-134**).

1298 *See* Cancellation of Promise to Purchase Contract between Angel Seda and Ramon Antonio Duque Marín, 15 August 2017 (**Exhibit C-194**), p. SP-0003; Cancellation of Promise to Purchase Contract between Angel Seda and Jaime Francisco Martínez Pinilla and Edilia Rosa Sánchez Hoyos, 1 March 2017 (**Exhibit C-186**), Segundo; Cancellation of Promise to Purchase Contract between Angel Seda and Ramon Antonio Duque Marín, 15 August 2017 (**Exhibit C-194**), Cuarto.

related to the uncertain legal situation in which the lots were at the time the promises were signed than to the Asset Forfeiture Proceedings against the Meritage Lot:

a) Contract with Mr. Vargas: the termination of the promise seems to have been related to delays by the Municipality of Cartagena to "legalize the lots".[1299] Moreover, according to the promise agreement, Mr. Seda should have paid the full price for this lot by March 2016, *i.e.*, several months before the precautionary measures were imposed on the Meritage Lot.[1300] However, it seems that by August 2016 he had only paid 18% of the agreed price.[1301] The reason for this cannot be related to the Asset Forfeiture Proceedings.

b) Contract with Mr. Martínez and Ms. Sánchez: the promise agreement clearly indicates that the relevant lot was the object of a False Sale ("*Falsa Tradición*"), which means that the title was incomplete or that the seller was selling a lot he did not own.[1302] The promise agreement further provides that the parties would be exempted from complying with their obligations under the agreement if the prospective sellers did not acquire property rights to the lot by 20 February 2016, *i.e.* several months before the precautionary measures were imposed against the Meritage Lot.

1299 *See* Cancellation of Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sanchez Vargas, 3 August 2017 (**Exhibit C-193**). Note that the first part of Article Eleven is missing in the copy of the agreement produced by the Claimants.

1300 *See* Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sánchez Vargas, 19 September 2014 (**Exhibit C-134**), p. 5. This is without prejudice to the right of withdrawal expressly agreed by the Parties. *See* Colombian Civil Code, 1887 (**Exhibit R-90**) Article 1859 provides that "If the sale is with earnest money, that is, by pledging an asset to guarantee the execution of a contract, it is understood that each of the contracting parties has a right of withdrawal; the person who pledged the asset would lose the asset, and the person who received the pledged asset, would return it duplicated".

1301 Cancellation of Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sanchez Vargas, 3 August 2017 (**Exhibit C-193**), Séptimo; Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sánchez Vargas, 19 September 2014 (**Exhibit C-134**), Séptima.

1302 Promise to Purchase Contract between Angel Samuel Seda and Ramon Antonio Duque Marín, 17 June 2014 (**Exhibit C-128**).

c) Contract with Mr. Duque: the promise agreement clearly indicates that the relevant lot was also the object of a False Sale.[1303] In the termination agreement, the parties expressly noted that the termination was "due to the systematic breach by the Municipality of Cartagena of the procedure for the legalization and licensing of the lots, which exceeded the terms of the promise agreement".[1304]

868. The Claimants further refer to a WhatsApp message by a "potential business partner in Cartagena" who allegedly decided to "put an end to the negotiation process for the operation of our hotel".[1305] Assuming the message is authentic, it is irrelevant for the determination of the causal link between the alleged losses in connection with the Tierra Bomba Project and the Asset Forfeiture Proceedings because it is clear, on its face, that the "potential partnership" does not refer to the Tierra Bomba Project but rather to another hotel operated by the "potential business partner", with respect to which the "potential business partner" offered Mr. Seda to assist as a "consultant".[1306] It is also clear from the message that the discussions between Mr. Seda and the "potential business partner" were initiated in March 2017, *i.e.* after the Asset Forfeiture Proceedings had been initiated and become public.

869. **Santa Fé:** the Claimants' allegations that Mr. Seda "was refused loans citing the Asset Forfeiture Proceedings" and that "business partners have pulled out of the Project" due to the Asset Forfeiture Proceedings[1307] are based solely on Mr. Seda's self-serving statements. Actually, the evidence shows that investors who wanted to divest from Mr. Seda's other projects (for reasons that are not disclosed in the documents provided by the Claimants), accepted interests in the

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1303 Promise to Purchase Contract between Angel Samuel Seda and Ramon Antonio Duque Marín, 17 June 2014 (**Exhibit C-128**).

1304 Cancellation of Promise to Purchase Contract between Angel Seda and Ramon Antonio Duque Marín, 15 August 2017 (**Exhibit C-194**) ("It is stated, that the termination of the agreement outlined above results from the systematic breach, by the Mayor´s Office of Cartagena, upon the legalization and licensing of the real estate, which exhausted the terms of compliance of the obligations entered into in the purchase-sale promise agreement, seriously undermining the prospective buyer").

1305 WhatsApp chain between Manager of Tierra Bomba Hotel Owner and Angel Seda, 13 September 2017 (**Exhibit C-197)**.

1306 WhatsApp chain between Manager of Tierra Bomba Hotel Owner and Angel Seda, 13 September 2017 (**Exhibit C-197**).

1307 Claimants' Reply, ¶ 394.

Santa Fé Project.[1308] Given that Mr. Seda was behind both projects, the Claimants' attempts to establish causation must fail.

870. **450 Heights:** similarly, the Claimants' allegations concerning the causality between the Asset Forfeiture Proceedings and the alleged losses in connection with the 450 Heights Project are based solely on Mr. Seda's statements. The Claimants have failed to provide any objective evidence establishing the connection between the Respondent's conduct and the Claimants' alleged losses.

871. **Other Projects:** the Claimants' allegations that by "pursuing baseless, retaliatory investigations against Mr. Seda", the Respondent has impeded Mr. Seda from conducting business "even outside Colombia" are equally unsubstantiated.[1309] The Claimants have not shown any such failed business in Colombia or abroad, let alone any "proximate causation" between Seda's alleged failed business and the measures adopted by the Respondent.

872. In sum, the Claimants have not established a proximate causation between the losses claimed in connection with the Other Projects and the measures adopted by the Respondent in connection with the Meritage Lot. As in *Metalclad v. Mexico*, "[t]he causal relationship between [Colombia]'s actions and the reduction in value of [the Claimants'] other business operations are too remote and uncertain to support this claim", so the claims should be dismissed.[1310]

873. *Third*, even applying the "foreseeability" test as suggested by the Claimants[1311] (which, as explained, is not enough to establish a causal link), the Claimants' alleged losses would not be recoverable. This is simply because the claimed damages "could objectively not have been foreseen to ensue from the" Asset Forfeiture Proceedings.[1312]

1308 *See* Agreement between Royal Realty and Greenpark Trading Maria Alvarez Y CIA, 3 January 2017 (**Exhibit C-183**); Seda First Witness Statement, 15 June 2020, ¶¶ 111-112.

1309 Claimants' Reply, ¶ 401.

1310 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (**Exhibit CL-021**), ¶ 115. In that case, Metalclad sought compensation for the "negative impact" that the measures allegedly had on its other business operations.

1311 *See* Claimants' Reply, ¶ 402.

1312 *See*, *e.g.*, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015 (**Exhibit CL-103**), ¶ 383 ("a wrongful act may cause a particular damage as a matter of fact. However, if the factual link between the act and the damage is composed of an atypical chain of events that could objectively not have been foreseen to ensue from the act, the

874. To recall, in addition to the damages directly related to the Meritage Project, the Claimants claim damages in connection with four other Projects: (i) Luxé, which the Claimants represent was approximately 70% complete at the time of the seizure of the Meritage Lot,[1313] and (ii) Tierra Bomba, Santa Fé de Antioquia and 450 Heights, all of which were in very early stages of development. These projects were developed through special purpose vehicles (namely, Luxé by the Charlee S.A.S., RDP Cartagena S.A.S. and RDP Interpalmas S.A.S.), so neither Mr. Seda nor any of the other Claimants was the direct developer of these projects.

875. Thus, according to the Claimants, before initiating the Asset Forfeiture Proceedings against the Meritage Lot the Respondent should have checked who is behind the Meritage Project and what other projects they may have in Colombia (and abroad) – regardless of the stage of development – to foresee whether the Asset Forfeiture Proceedings – an *in rem* action against the Meritage Lot and not any of the Claimants –, would have negatively impacted the Claimants, many of whom are not even related to the Meritage Project. Clearly, any such loss would not only be unforeseeable, but also too remote and indirect.

876. The lack of foreseeability of the claimed losses is confirmed by the Claimants' own representations that the Charlee Hotel "maintain[ed] international acclaim"[1314] and "remains one of the top luxury hotels in Medellin".[1315] Had the Asset Forfeiture Proceedings have an impact on the reputation of Mr. Seda and his Charlee Brand, the first entity affected would have been the Charlee Hotel, the bearer of the brand. Yet, as confirmed by BRG, the Charlee hotel is "*a successful hotel in Medellin, not impacted by the Measures*".[1316]

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877. In sum, the Claimants could not discharge their burden of proof of establishing that the losses claimed with respect to the Other Projects were directly caused by the Respondent's alleged

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damage may not be recoverable. […] What matters in any event is that the wrongful act was objectively capable of causing the damage incurred in the ordinary course of events.").

1313 *See above*, ¶ 864. The damages claimed in connection with the Luxé project are mostly (close to 100%) driven by the alleged losses in relation to the Luxé hotel. The losses in connection with the cabañas phase 4 is very small, according to BRG,

1314 *See* Mr. Seda First Witness Statement, ¶ 27.

1315 Claimants' Reply, ¶ 27(b).

1316 BRG Second Expert Report, ¶ 135(a) (emphasis added).

wrongful act and not by other extraneous causes. Therefore, the Respondent cannot be held responsible under international law for the failure of the Claimants' Other Projects in Colombia.

B. THE CLAIMANTS ARE NOT ENTITLED TO COMPENSATION IN CONNECTION WITH THE BREACH OF OBLIGATIONS THAT ONLY EXTEND TO COVERED INVESTMENTS

878. In addition to the damages sought for the alleged expropriation of the Meritage Project, the Claimants seek compensation for the Respondent's alleged breaches of the obligations to accord national treatment, to treat the Claimants' alleged investment fairly and equitably and to accord the Claimants' alleged investment full protection and security. Most of these damages are not recoverable under the TPA.

879. As explained by the United States, an arbitral tribunal cannot award damages to a claimant with respect to violations of obligations that only extend to covered investments:

> [F]or TPA obligations that only extend to covered investments, a tribunal may only award damages for violations where the covered investment incurred damages. A tribunal has no authority to award damages that a claimant allegedly incurred in their capacity as an investor for violations of obligations that only extend to covered investments.[1317]

880. Pursuant to Article 10.5 of the TPA, the obligation to accord minimum standard of treatment, including fair and equitable treatment and full protection and security, only extends to "covered investments".[1318] Therefore, even assuming that the Tribunal found a breach of the minimum standard of treaty, the Respondent respectfully submits that it would not have the authority to award damages.

881. This is particularly relevant with respect to the Other Projects, as the Claimants only invoke a breach of the FET standard with respect to those. Therefore, assuming (*quod non*) that the Respondent's "treatment of Meritage Property breached FET obligations with respect to Claimants' investments in Other Projects"[1319] and that there is a causal link between the losses

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1317 *See* Submission of the United States of America, 26 February 2021, ¶ 62. The United States has consistently held this interpretation. *See*, *e.g.*, Submission of the United States of America in *Omega Engineering LLC and Mr. Oscar Rivera v. The Republic of Canada*, ICSID Case No. ARB/16/42, Submission of the United States of America, ¶¶ 46-47.

1318 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.5.

1319 *See* Claimants' Reply, Section V.C.3.

claimed in connection with the Other Projects and the Asset Forfeiture Proceedings, the Claimants – as investors – would still not be entitled to compensation.

882. Similarly, it has been demonstrated that the Respondent could not have breached its obligation to accord full protection and security with respect to its treatment of Mr. Seda, because the obligation to accord full protection and security extends only to covered investments and not to investors. However, even if the Tribunal were to find that the obligation to accord full protection and security was breached, any damages arising out of it (including, without limitation, moral damages[1320]), would not be compensable.

883. Similarly, with respect to the Claimants' allegation that the Respondent breached its obligation to accord national treatment, it must be noted that the Asset Forfeiture Proceedings were initiated against the Meritage Lot, *i.e.* the investment, and not against any of the Claimants. Accordingly, even if the Tribunal were to find that the Respondent breached its obligation to accord national treatment to the investment, the Claimants, as investors, are not entitled to claim damages for this violation.

884. Therefore, in the unlikely event that the Tribunal finds that the Meritage Project was not expropriated but the Respondent breached the FET or national treatment standards with respect the Meritage Lot, the Claimants could not be compensated for their losses in this regard.

C. THE CLAIMANTS' DAMAGES ASSESSMENT IS SPECULATIVE AND EXAGGERATED

885. It is undisputed that the Claimants bear the burden of establishing, with reliable evidence, the quantum of damages.[1321] In this case, the Claimants relied on the assessment made by BRG applying the discounted cash flow ("DCF") method.

886. In the Counter Memorial, the Respondent demonstrated that the DCF method is generally not appropriate to assess the value of early stage businesses with no track record of successful commercial operations.[1322] This is precisely why it is not applicable in this case: given the lack of track record of the Claimants' projects, BRG had to rely on a series of baseless assumptions

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1320 With respect to the Claimants' request for compensation for moral damages, *see* Section VI.F.

1321 *See* Claimants' Reply, ¶ 387. *See also AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003 (**Exhibit CL-033**), ¶ 12.1.10.

1322 *See* Respondent's Counter Memorial, ¶¶ 596-599.

(including exaggerated cash flow forecasts, unrealistically low discount rates and inexistent risk of project failure), thus resulting in an arbitrary and highly speculative assessment.[1323] The Respondent also showed that the cost-based approach used by Dr. Hern in his report is the only method capable of valuating the Claimants' projects based on objective data.[1324]

887. The unreliability of the Claimants' valuation became obvious in their Reply: the Claimants had to adjust their damages valuation to account for USD 70 million in taxes that had been plainly left out of their first assessment.[1325] Taking into account other adjustments made by BRG in its second report, this still resulted in a reduction of the amount of damages claimed by over USD 50 million (*i.e.*, almost 20 percent of their claim).[1326] Yet, the Claimants insist that the DCF approach is appropriate in this case and that the input used by BRG is reliable. The Claimants also disagree with the alternative approach suggested by the Respondent to value the Claimants' projects.[1327]

888. As demonstrated in the Counter Memorial and further below, the DCF method is not appropriate to assess the value of the Claimants' damages in this case (**VI.C.1**) and, even if it were to be applied, the Claimants' revised valuation is still unreliable, speculative and exaggerated (**VI.C.2**). The only method capable of valuating the Claimants' projects based on objective criteria is a cost approach, applied by Dr. Hern (**VI.C.3**).

1. The DCF method is not an appropriate method for calculating damages in this case

889. It is undisputed that, if any compensation is due to the Claimants (which the Respondent rejects), the "fair market value" of the alleged investments "captures the full reparation owed to Claimants".[1328] It is also undisputed that the DCF approach is a method used to calculate the fair market value of an investment.[1329] The Parties disagree as to whether the DCF approach is appropriate to assess the fair market value of the Claimants' alleged investments.

1323 *See* Respondent's Counter Memorial, ¶¶ 600-615.

1324 *See* Respondent's Counter Memorial, Section V.C.3.

1325 *See* BRG2, para. 70.

1326 *See* Claimants' Reply, ¶ 382. *Cf*. Claimants' Memorial, ¶¶ 504-505.

1327 *See* Claimants' Reply, Section VI.C.

1328 Claimants' Reply, ¶ 406.

1329 *See* Claimants' Reply, ¶ 406.

890. As demonstrated in the Counter Memorial[1330] and further below, the DCF method is not appropriate for calculating damages in this case.

891. *First*, it is widely accepted that, in principle, the fair market value of a going concern which has a history of profitable operation may be based on an estimate of future profits subject to a DCF analysis.[1331] By contrast, DCF is generally inappropriate if the company is not a going concern and lacks an established track record of profitability.[1332] This is because a DCF analysis requires

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1330 *See* Respondent's Counter Memorial, Section V.C.2(ii).

1331 *See Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (**Exhibit CL-021**), ¶ 119. The Claimants aver that the *Metalclad* decision is inapposite because "claimants in those cases were not able to verify the reliability of the DCF inputs based on comparable market data". *See* Reply, para. 418(a). Notably, neither did the Claimants in this case verify the reliability of the DCF inputs based on comparable market data. As demonstrated below, the Claimants' DCF valuation is based on speculation and exaggerated assumptions and a relevant market cross-check only confirms this.

1332 *See*, *e.g.*, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (**Exhibit CL-021**), ¶¶ 120-121; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 (**Exhibit CL-024**), ¶¶ 123-124 (considering that "Wena had operated the Luxor Hotel for less than eighteen months, and had not even completed its renovations on the Nile Hotel, before they were seized" and raising questions as to Wena's "sufficient finances to fund its renovation and operation of the hotels". Contrary to the Claimants' allegations in their Reply, ¶ 418(b), the Claimants' alleged "track record" in Colombia is irrelevant and there is no evidence that they had sufficient funding to develop the projects; *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Final Award, 27 May 2020 (**Exhibit RL-199**), ¶¶ 199-202, 283 ("a DCF valuation may be suited to assess the FMV of a going concern with a proven record of profitability […] DCF is generally inappropriate if the company is not a going concern and lacks an established record of profitability"); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (**Exhibit CL-032**), ¶ 186 ("[t]he non-relevance of the brief history of operation of the Landfill by Cytrar —a little more than two years— and the difficulties in obtaining objective data allowing for application of the discounted cash flow method on the basis of estimates for a protracted future, not less than 15 years, together with the fact that such future cash flow also depends upon investments to be made — building of seven additional cells— in the long term, lead the Arbitral Tribunal to disregard such methodology to determine the relief to be awarded to the Claimant"); *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (**Exhibit RL-176**), ¶ 576 ("the DCF methodology is not appropriate for a business that never operated and where a satisfactory basis for its projected revenues has not been demonstrated. Use of a DCF methodology in these circumstances gives an excessively speculative outcome"); *Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic (II),* PCA Case No. 2015-32, Award, 20 August 2019 (**Exhibit RL-194**), ¶ 760 ("the DCF approach advocated by the Respondent is not appropriate. Stans Energy was at an early stage of its business activities, and still far away from being an ongoing concern. Accordingly, a projection of future cash flows would be too speculative"); *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3, Award, 20 May 1992 (**Exhibit RL-154**), ¶ 188 ("the DCF method is not appropriate for determining the fair compensation in this case because the project was not in existence for a sufficient period of time to generate the data necessary for a meaningful DCF calculation. At the time the project was cancelled, only 386 lots—or about 6 percent of the total—had been sold. All of the other lot sales underlying the revenue projections in the Claimants' DCF calculations are hypothetical. The project was in its infancy and there is very little history on which

reliable business data to assess the expected cash flows as of the valuation date and forecast the projected cash flows if the Respondent's measures had not existed (*i.e.*, the "but for" scenario).[1333]

892. Thus, investment tribunals have refused to apply a DCF analysis to assess the value of early stage start-up businesses with no track record of successful commercial operations. For example, in *AIG v. Kazakhstan*, the tribunal held that a DCF valuation was inappropriate because "the enterprise did not exist as an income generating entity at all, and since it did not exist for a sufficient period of time, it could not generate business data necessary for proving its profitability with reasonable certainty".[1334] In other words:

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to base projected revenues"); *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICISD Case No ARB/05/15, Award, 1 June 2009 (**Exhibit CL-066**), ¶ 570 ("Points such as those just mentioned tend to reinforce the wisdom in the established reluctance of tribunals such as this one to utilise DCF analyses for 'young' businesses lacking a long track record of established trading. In all probability that reluctance ought to be even more pronounced in cases such as the present where the business is still in its relatively early development phase and has not trading history at all"); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Award, 27 September 2017 (**Exhibit CL-115**), ¶¶ 1094-1095 ("The Tribunal recognizes that the DCF method is widely accepted as an appropriate method to assess the lost profits of going concerns with a proven record of profitability. In this regard, it is worth mentioning the World Bank Guidelines, cited by both Parties, which suggest that the market value of an expropriated investment may be determined 'for a going concern with a proven record of profitability, on the basis of the discounted cash flow value'. […] However, in the opinion of the Tribunal, the Claimants have not convincingly established that CIOC ever was a going concern with a proven record of profitability"); *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania,* ICSID Case No. ARB/10/13, Award, 2 March 2015 (**Exhibit RL-73**), ¶ 514 ("The application of the DCF method relied upon by Claimants as 'the most appropriate way to determine the fair market value' is not justified in the circumstances. This is because Rodipet is not a going concern, it has a history of losses. There are moreover uncertainties regarding future income and costs of an investment in this industry in the Romanian market"); *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015 (**Exhibit CL-103**), ¶ 344 ("the DCF method is widely accepted as the appropriate method to assess the FMV of going concerns with a proven record of profitability. […] This approach has been endorsed by a large number of investment tribunals"); *Windstream Energy LLC v. The Government of Canada,* PCA Case No. 2013-22, Award, 27 September 2016 (**Exhibit CL-109**), ¶ 475 ("while the Claimant did have a FIT Contract and a grid connection, it did not yet have site control and the permitting process had not yet been completed. […] The Project must therefore be considered an early-stage project. Accordingly, […] the DCF method is not an appropriate method of valuation for the Project, given its early development stage and the related risks and uncertainties"); *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award (Excerpts), 18 April 2017 (**Exhibit RL-186**), ¶ 94.

1333 The Claimants themselves acknowledge that when applying the DCF method, "[t]he key question for valuators is thus to ascertain sources of cost and revenue drivers, and capture the sources of risk". *See* Claimants' Reply, ¶ 413.

1334 *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003 (**Exhibit CL-033**), ¶ 12.1.10.

> [T]he Project remained virtually unstarted, inoperative and generated no revenue at all (still less profit) leaving no basis whatever to calculate loss of profits. The forecast of costs and revenues distributed in time - particularly the latter - have no foundation at all to support a credible DCF valuation claim.[1335]

893. *Second*, exceptionally, the DCF method may be applied to investments that are not going concerns, if certain factors are present that allow for a reliable estimation of the investment's future profits.[1336] As noted by the tribunal in *Rusoro v. Venezuela*, these elements include:

> - The enterprise has an established historical record of financial performance;
>
> - There are reliable projections of its future cash flow, ideally in the form of a detailed business plan adopted in tempore insuspecto, prepared by the company's officers and verified by an impartial expert;
>
> - The price at which the enterprise will be able to sell its products or services can be determined with reasonable certainty;
>
> - The business plan can be financed with self-generated cash, or, if additional cash is required, there must be no uncertainty regarding the availability of financing;
>
> - It is possible to calculate a meaningful WACC, including a reasonable country risk premium, which fairly represents the political risk in the host country;
>
> - The enterprise is active in a sector with low regulatory pressure, or, if the regulatory pressure is high, its scope and effects must be predictable: it should be possible to establish the impact of regulation on future cash flows with a minimum of certainty.[1337]

1335 *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003 (**Exhibit CL-033**), ¶ 12.1.10.

1336 *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Final Award, 23 December 2019 (**Exhibit CL-172**), ¶ 438; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (**Exhibit CL-108**), ¶ 759.

1337 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (**Exhibit CL-108**), ¶ 759. *See also Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Final Award, 23 December 2019 (**Exhibit CL-172**), ¶¶ 438, 442 ("this methodology has also been applied under certain narrowly defined conditions to investments that are not going concerns. However, the DCF method has been used only if factors were proven that permitted reliable estimation of the investment's future profits. These include the existence of detailed business plans, substantiated information on the price and quantity of the products and services, on the availability of financing, and on the existence of a stable regulatory environment […] The Tribunal only has to decide whether it has received sufficient information to predict the potential economic development of Claimant's investment with sufficient certainty to use the DCF method for valuating the investment. The Tribunal notes that the application of the DCF method for the valuation of non-going concerns are the exception rather than the rule, since in most of such cases no sufficient objective criteria can be ascertained to reduce the speculative element in the DCF method"); *Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018 (**Exhibit CL-121**), ¶¶ 621-622;

894. As in *Rusoro v. Venezuela*, many of these elements are not present in this case. Thus, contrary to the Claimants' allegations, in this case the DCF method is unsuitable not "just because Claimants Projects' [sic] were pre-operational".[1338] The main obstacle to the application of a DCF valuation, as confirmed by Dr. Hern, is that "there is no objective data based on which we could estimate the key DCF valuation inputs with reasonable certainty", turning the valuation into a highly speculative exercise.[1339] In particular:

a) There is no track record of successful commercial operations by either the Meritage Project or any of the Other Projects.[1340] While the Claimants overemphasize the alleged progress of the real estate elements of the projects,[1341] 79% of the damages claimed are driven by the hotels[1342] – none of which was operational or had even been built. In fact, for some of the Other Projects the Claimants did not even have the financing and/or own the land on which the projects were to be developed (and neither did the prospective sellers[1343]) – all they had was an idea of a project. The Claimants' reliance on the alleged success of the Charlee Hotel, which is not part of BRG's damages assessment, is irrelevant. As explained by Dr. Hern, the hotels in the Meritage, Luxé, Tierra Bomba, 450 Heights and Santa Fé projects (which are responsible for the vast majority of the Claimants' alleged damages) were not even constructed and hence have zero operational history to inform future cash-flow projections. Moreover, these hotels have completely different characteristics than the Charlee Hotel in terms of location, size and type of accommodation, and hence the drivers of future cash-flows are completely different for those hotels as

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Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux) v. Argentine Republic (I), ICSID Case No. ARB/97/3, Award II, 20 August 2007 (**Exhibit CL-052**), ¶¶ 8.3.8-8.3.10 ("A claimant which cannot rely on a record of demonstrated profitability requires to present a thoroughly prepared record of its (or others) successes, based on first hand experience (its own or that of qualified experts) or corporate records which establish on the balance of the probabilities it would have produced profits from the concession in question in the face of the particular risks involved, other than those of Treaty violation").

1338 Claimants' Reply, ¶ 428.

1339 NERA Second Expert Report, ¶ 47.

1340 *See* NERA Second Expert Report, Section 3.1.1.

1341 *See* Claimant's Reply, ¶¶ 425-427, 430-432.

1342 *See* NERA Second Expert Report, para. 116.

1343 *See* above, ¶ 864.

compared to the Charlee Hotel.[1344] Similarly inapposite is the reference to the Luxé phases 1, 2 and 5 (completed) and Meritage phase 1 and Luxé phase 3 (in construction) as evidence of "track record", as there is no link in terms of cash-flow or profit generation between the real estate elements of the projects (*e.g.*, completed phases 1, 2 and 5 of the Luxé project or phase 1 (in construction) of the Meritage Project) and the hotel elements of these projects which drive the vast majority of BRG's damages calculation.[1345] If anything, the track record for the real estate phase 1 of the Meritage project has been one of losses: BRG's own calculations predict a 24 per cent loss for this phase.[1346]

b) There is no certainty around future revenues or cash-flows. Due to the nature of the hotel and real estate businesses, the revenues and cash flows depend on a variety of market factors "which cannot be easily quantified without any operational history for the projects".[1347] For example, unlike investments in the energy sector or extractive industries, the Claimants' projects do not produce a standardised "commodity-type" product with available market price forecasts that could be used in a DCF.[1348] There are also no contracts that would guarantee prices or sales volumes that could be used as a basis of forecasting revenues.[1349] On the contrary, the cash-flows for the Claimants' projects are driven by unique project specific location, market demand, willingness to pay and other competitive factors which are project specific.[1350]

c) There is uncertainty about the specific timing of construction, sales and ramp up operations. All these factors, which have a material impact on the project valuation,

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1344 *See* NERA Second Expert Report, ¶ 51(A).

1345 *See* NERA Second Expert Report, ¶ 51(B).

1346 *See* NERA Second Expert Report, ¶ 177; BRG Second Report, ¶ 76(B).

1347 *See* NERA Second Expert Report, ¶ 53(A).

1348 *See* NERA Second Expert Report, ¶ 53(A).

1349 The Claimants argue that "the construction costs for the Meritage and Luxe Projects had been largely locks in through contracts with various subcontractors and vendors". *See* Reply, para. 434. Other than Mr. Seda's testimony (which does not support the Claimants' allegations, *see* para. 49 to which the Claimants refer), the Claimant have not provided any evidence in support of this statement.

1350 *See* NERA First Expert Report, ¶ 98.

cannot be reliably estimated as they depend on different market factors for each location.[1351]

d) There is uncertainty regarding the availability of financing. The Claimants had failed to demonstrate that they had secured the necessary financing to complete the projects. For example, there is no evidence that the Claimants had secured financing for the construction of the Meritage hotel (phases 2 and 3), which accounts for 79% of the Meritage-related damages. Similarly, the Claimants have not shown that they had obtained financing for the Other Projects other than with respect to the Luxé Hotel (although the loan from Colpatria was insufficient to complete the hotel and the allegations that Colpatria had "orally" agreed to increase the loan are unsubstantiated).

e) Due to the early stages of the projects, they are subject to many risks, including "risks around permitting/legal risks, risks around financing, risks around construction cost overruns and timing , risks around whether the projects will become commercially viable (e.g. risks around demand for hotel rooms, customers' willingness to pay for rooms, costs of running the hotels) or execution risks associated with the intended 26-fold expansion of the Claimants' project portfolio in Colombia".[1352] These risks are difficult to quantify in the absence of comparator data available for projects exposed to similar types of risks.[1353]

f) The failure rates and discount rates are also uncertain in this case.[1354]

895. *Third*, the authorities on which the Claimants rely do not support the application of the DCF method in this case, as applied by the Claimants. For example:

a) The Claimants refer to the "seminal text" by Prof. Damodaran, where he "recommends using the DCF analysis with certain adjustments to account for the

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1351 *See* NERA Second Expert Report, ¶ 53(B); NERA First Expert Report, ¶ 99. Notably, as demonstrated, the construction of the Luxé project was significantly delayed. *See* NERA First Report, ¶ 167.

1352 *See* NERA Second Expert Report, ¶ 55.

1353 *See* NERA Second Expert Report, ¶¶ 57, 59.

1354 *See* NERA Second Expert Report, ¶ 57.

specific uncertainties associated with valuing such companies".[1355] In this case, however, it has been demonstrated that the assumptions by BRG are highly speculative and exaggerated, thus resulting in an exaggerated DCF valuation.[1356] This is not reasonably within the recommendation made by Prof. Damodaran.

b) As noted by the Claimants, Messrs. Mellen and Evans correctly point out that "valuation methods are more speculative for start-ups than for established companies".[1357] Thus, they assume that all valuation methods are equally speculative with respect to start-up companies as opposed to established companies. As explained above, however, in this case the DCF valuation by BRG is particularly speculative given the absolute lack of operating history and lack of certainty about future cash-flows,[1358] which prevents BRG from reaching the required "level of certainty [by resorting to] appropriate forecasting and adjustments".[1359]

c) Contrary to the Claimants' assertions, the "GAR articles cited by Dr. Hern" do not support BRG's DCF valuation. Indeed, the articles confirm that while the DCF method may be exceptionally applied to start-up companies, it is unsuitable when there is insufficient certainty about future cash flows.[1360] As demonstrated above, this has been consistently confirmed by investment tribunals. As also shown above, in this case there is no objective data on the basis of which a DCF valuation could be performed with reasonable certainty, so the application of a DCF method is highly speculative.

d) The cases on which the Claimants rely to represent that international tribunals have "routinely" used DCF to value pre-operational projects are inapposite.[1361] For example, in *Himpurna California v. PT*, the tribunal discussed the application of the

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1355 Claimants' Reply, ¶ 413(a).

1356 *See* Section VI.C.

1357 *See* Claimants' Reply, ¶ 413(b).

1358 *See* Section VI.C.

1359 Claimants' Reply, ¶ 413.

1360 GAR Guide to Damages in International Arbitration, 2018 (**Exhibit RH-004), pp. 180, 205**.

1361 Claimants' Reply, ¶ 417.

DCF method for evaluating damages in the context of a contractual breach.[1362] The application of the DCF method to pre-operational projects was not an issue. Neither was this an issue in *Kardassopoulos v. Georgia*.[1363]

e) In *Gold Reserve v. Venezuela*, the tribunal used the DCF method to calculate compensation with respect to a "never functioning mine" that "did not have a history of cashflow" because the tribunal was persuaded that the DCF method could be used reliably due to the nature of the product as a commodity, which allowed for a "detailed cashflow analysis [to be] performed". The tribunal also noted that both parties' experts had agreed upon the use of the DCF model.[1364] Neither hypothesis is met in this case: the Parties' experts disagree on the use of the DCF model and the Claimants' alleged investment is not a commodity.

f) In *Siemens v. Argentina*, the tribunal held that "the DCF method is applied to ongoing concerns based on the historical data of their revenues and profits; otherwise, it is considered that the data is too speculative to calculate future profits".[1365] It is uncontested that most of the Claimants' projects are not ongoing concerns and that, in the case of the Meritage Project, its track record is one of losses (BRG's own calculations predict a 24 per cent loss for phase 1 of the project).[1366]

g) As acknowledged by the Claimants, the tribunal in *Devas v. India* found that a pre-dispute business plan made in the ordinary course of the Claimant's business was "a rare and unique source of evidence" about the Claimants' investment value, as it provided a "dependable business case of what a reasonable, arms-length investor

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1362 *See Himpurna California Energy Ltd. V. PT. (Persero) Perusahaan Listruik Negara*, UNCITRAL, Final Award, 4 May 1999 (**Exhibit CL-157**).

1363 *See Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010 (**Exhibit CL-158**).

1364 *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 (**Exhibit CL-097**), ¶ 830.

1365 *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007 (**Exhibit CL-048**), ¶ 355.

1366 *See* BRG Second Report, ¶ 76(b).

may have considered in a hypothetical purchase of [the investment]".[1367] Considering this, among other factors, the tribunal found that in that particular case, "the DCF method is more dependable *in this case* than it may have been in many [other cases]".[1368] The tribunal also considered, for example, (i) an arms-length transaction entered into after extensive due diligence and which indicated "the minimum value" of the Claimant's investment, (ii) that the Claimant's investment had "become something more than merely a start-up company with no prior history" and (iii) that "the projected cash flows had been subjected to expert scrutiny". None of these elements are to be found in the case before this Tribunal.[1369]

h) In *Tethyan Copper v. Pakistan*, the tribunal held that "the question whether a DCF method (or a similar income-based valuation methodology) can be applied to value a project which has not yet become operational depends strongly on the circumstances of the individual case".[1370] One of the key questions to apply the DCF method is that the tribunal "is convinced that it can, with reasonable confidence, determine the amount of these profits based on the inputs provided by the Parties' experts for this calculation".[1371] Conversely, the tribunal held that the DCF method cannot apply when there are "fundamental uncertainties" as to whether the project would have reached the operational stage and would have been able to generate profits, or when the tribunal "is not convinced by the inputs provided by the Parties' experts".[1372] The tribunal concluded that the DCF method could lead to "a sufficiently

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1367 *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 (**Exhibit CL-156**), ¶ 541.

1368 *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 (**Exhibit CL-156**), ¶ 539 (emphasis added).

1369 *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 (**Exhibit CL-156**), ¶ 539.

1370 *Tethyan Copper Company Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019 (**Exhibit CL-159**), ¶ 330.

1371 *Tethyan Copper Company Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019 (**Exhibit CL-159**), ¶ 330.

1372 *Tethyan Copper Company Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019 (**Exhibit CL-159**), ¶ 330.

reliable result" considering "the particular circumstances of [the] case" – which significantly differ from those in our case.[1373] Unlike in *Tethyan v. Pakistan*, in this case there is no reliable data so the BRG's DCF valuation relies on exaggerated assumptions and results in an overstated valuation, as demonstrated below.[1374]

i) In *Lemire v. Ukraine*, both parties agreed that the DCF was the appropriate methodology to establish the damage in the case.[1375] Yet, in assessing the damages the tribunal expressly avoided scenarios that were "too uncertain" or implied "an intolerable level of speculation".[1376] In this case, there is no such agreement between the Parties precisely because there is no available scenario to apply DCF without falling in "an intolerable level of speculation".[1377]

j) Finally, the Claimants misrepresent the findings of the tribunal in *Windstream Energy v. Canada*.[1378] In fact, the tribunal in that case concluded that "the DCF method is not an appropriate method of valuation for the Project, given its early development stage and the related risks and uncertainties".[1379] For exactly the same reasons as in *Windstream Energy*, the DCF method is not appropriate in this case.

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896. In sum, while the DCF method may be exceptionally applied to investments that are not going concerns, it is only appropriate if the DCF inputs can be "reliably supported", as acknowledged

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1373 *Tethyan Copper Company Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019 (**Exhibit CL-159**), ¶ 335.

1374 *See* Section VI.C.

1375 *See Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**Exhibit RL-47**), ¶ 254.

1376 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**Exhibit RL-47**), ¶ 261.

1377 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**Exhibit RL-47),** ¶ 261. Notwithstanding this, it is possible to correct some of the assumptions made by BRG to reach a more reasonable DCF value which can be verified by appropriate cross-checks, as demonstrated by Dr. Hern.

1378 Claimants' Reply, footnote 1013.

1379 *Windstream Energy LLC v. The Government of Canada,* PCA Case No. 2013-22, Award, 27 September 2016 (**Exhibit CL-109**), ¶ 475**.**

even by the Claimants' experts, BRG.[1380] This is precisely the problem with the application of the DCF method in this case: in the absence of reliable input, BRG made highly speculative and exaggerated assumptions that resulted in a highly exaggerated assessment, as demonstrated below.

2. Even if DCF applied, the Claimants' valuation is grossly exaggerated

897. The Claimants agree that compensation equivalent to the fair market value of the Claimants' investment would amount to full reparation.[1381] The Claimants also insist on the use of the DCF methodology.[1382] While it is undisputed that the DCF is one method to assess the fair market value of an asset, in this case it does not – and cannot – adequately assess the fair market value of the Claimants' alleged investments. In fact, due to the lack of objective data and grotesque assumptions made by BRG, the resulting valuation is but a caricature of a fair market value – by all means exaggerated and unreliable.[1383]

898. As demonstrated by Dr. Hern and summarized below (and in the Counter Memorial), in the absence of reliable data, BRG relies on exaggerated assumptions, thus resulting in an exaggerated market value (**a**). A relevant market cross-check confirms that BRG's valuation is grossly overstated (**b**).

a. *BRG's DCF assumptions are grossly overstated and result in an exaggerated market value*

899. In the Counter Memorial, the Respondent demonstrated that BRG's DCF valuation was grossly exaggerated because BRG had overstated the cash flow forecasts, assumed unrealistically low discount rates, largely ignored the risk of failure for each of the Claimants' projects and overlooked the effect of corporate taxation on the Claimants' alleged investments.[1384]

1380 *See* BRG Second Expert Report, ¶ 35.

1381 *See* Claimants' Reply, ¶ 406.

1382 *See* Claimants' Reply, ¶ 406.

1383 *See* Respondent's Counter Memorial, ¶¶ 606-615; *Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007 (**Exhibit CL-56**), ¶ 428 ("In line with this principle, the Tribunal would add that an award for damages which are speculative would equally run afoul of "full reparation" under the ILC Draft Articles").

1384 *See* Respondent's Counter Memorial, Section V.C.2(ii).

900. In the Reply, the Claimants rely on BRG's revised valuation, which according to the Claimants provides "a reasonable and reliable estimate of the FMV of Claimants' Projects".[1385] Notably, in its second report BRG revised its valuation to take into account some of the points raised by the Respondent and the Respondent's expert, Dr. Hern. In particular, BRG accounted for the applicable corporate taxes which had been left out of its first valuation and made other additional corrections. As a result, BRG's DCF valuation was reduced by over USD 50 million (*i.e.*, some 20% of the damages claimed by the Claimants in their Memorial). However, far from being "reasonable and reliable", BRG's DCF calculation is still grossly exaggerated and speculative.[1386]

901. *First*, BRG DCF's model is based on unverified assumptions provided to BRG by the Claimants. This means, as concluded by Dr. Hern, that the unverified information on which BRG relies, including models provided by the Claimants for the purpose of damages estimation, are unreliable and cannot be used as the basis for the DCF valuation.[1387]

902. With respect to the BRG's assumptions for hotel-related activities, BRG's assumptions come from spreadsheet models provided to BRG by the Claimants (except for the Santa Fé project, where BRG builds its own model, using the assumptions from the Luxé model). Not only is the context of these models unclear, but BRG (or the Claimants) has not provided any evidence that the models provide a reliable basis for estimating the hotel-related cash flows. What is more, the Meritage model on which BRG relied as a business plan is clearly irrelevant as it was prepared approximately a year after the Asset Forfeiture Proceedings were initiated and includes a sheet labelled "DAMAGES SUMMARY".[1388] Thus, contrary to the Claimants' assertions, the models are not "objective, contemporaneous and accurate estimates of the cash flows expected by Claimants".[1389] Moreover, these were blindly applied by BRG without verifying the accuracy of the projections and the reliability of the information contained therein.[1390]

1385 Claimants' Reply, ¶ 422.

1386 *See* NERA Second Expert Report, Section 4. Indeed, the Claimants acknowledge that further adjustments may be required to BRG's DCF calculations. *See* Reply, ¶ 440.

1387 *See* NERA Second Expert Report, Sections 5.2 and 5.3.

1388 NERA Second Expert Report, ¶ 134.

1389 Claimants' Reply, ¶ 429.

1390 *See* NERA Second Expert Report, ¶ 126.

903. Even though in his first report Dr. Hern raised similar concerns regarding the unreliability of the data underlying BRG's DCF calculations, the Claimants and BRG have failed to provide any relevant evidence that the key assumptions that drive the valuation of the Claimants' hotels are appropriate.

904. Against this background, BRG's attempt to validate its valuations (made on the basis on unverified assumptions) by relying on its market cross-checks is unavailing. As explained by Dr. Hern, the comparators used by BRG to perform their cross-checks (on the basis of the hotel transaction data provided by JLL) are not at all comparable to the claimants hotels.[1391]

905. With respect to the BRG's assumptions for the Claimants' real estate activities, as explained by Dr. Hern, BRG also relied on assumptions from spreadsheets provided by the Claimants to BRG (referred to as underwriting models).[1392] While BRG appears to have cross-checked some of these assumptions (*i.e.* prices and an element of direct construction costs) using data from JLL report, BRG did not verify the key driver of their damages assessment, *i.e.* the profits.[1393]

906. Despite the point being raised by Dr. Hern in his first report,[1394] the Claimants still failed to provide any relevant evidence that the key assumptions that drive BRG's valuation are appropriate. Moreover, the BRG's cross-checks based on the data provided by prices and construction costs raise several issues, as explained by NERA.[1395] For example, both the Meritage underwriting model and the JLL benchmarks materially overstate the actual prices and revenues achieved by the Claimants from the sale of units of phases 1 and 4-6.[1396] Moreover, Dr. Hern has shown that a straightforward cross check of the models reveals that the Meritage underwriting model has materially overstated the performance of phase 1 of the project.[1397]

1391 *See* NERA Second Expert Report, Section 4.1.

1392 *See* NERA Second Expert Report, ¶ 177.

1393 *See* NERA Second Expert Report, ¶¶ 181-183.

1394 *See* NERA First Expert Report, Section 5.1.

1395 *See* NERA Second Expert Report, ¶ 181.

1396 *See* NERA Second Expert Report, ¶ 182, Figure 5.4.

1397 *See* NERA Second Expert Report, ¶¶ 177, 179(C).

907. *Second*, as demonstrated by Dr. Hern, BRG's assumptions with respect to each of the key DCF valuation inputs used to determine the value of the Claimants' hotel-related activities (which, in turn, drive the vast majority of the Claimants' alleged damages) is exaggerated:

a) Hotels' EBITDA margin: BRG assumes an EBITDA margin for the Claimants' hotels of between 38 and 56 per cent.[1398] However, neither BRG nor JLL provide any quantitative evidence to support this assumption.[1399] By contrast, the quantitative evidence provided by Dr. Hern shows EBITDA margins for international luxury hotels, Colombia luxury hotels, hotel comparators in emerging markets and indeed the Charlee Hotel itself. As shown, all these range between 19 and 22 per cent, thus showing that BRG's assumptions on the EBITDA margins for the Claimants' hotels are grossly exaggerated.[1400]

   Using EBITDA margin assumptions supported by the quantitative evidence provided by Dr. Hern reduces BRG's DCF damages associated with the Claimants' hotel operations by USD 51 to 61 million (*i.e.* 66 to 79 per cent).[1401]

b) Hotel's discount rate: BRG assumes a WACC (nominal, post-tax) of 7.9 per cent for the Claimants' hotel related activities.[1402] As explained by Dr. Hern, BRG's WACC assumption is implausibly low, as it is lower than the actual cost of debt of the projects.[1403] A more plausible calculation of the WACC for the Claimants' hotels results in a range of between 12.5 and 18.9 per cent.[1404] Dr. Hern's estimations appear relatively conservative, considering that the Claimants themselves had

1398 *See* BRG Second Expert Report, ¶ 130.

1399 *See* NERA Second Expert Report, ¶ 132.

1400 *See* NERA Second Expert Report, ¶ 136.

1401 *See* NERA Second Expert Report, ¶ 137, Table 5.2.

1402 *See* BRG Second Expert Report, ¶ 138.

1403 *See* NERA Second Expert Report, ¶ 139; Appendix D.

1404 *See* NERA Second Expert Report, ¶ 142.

offered investors opportunities to invest in the Meritage, Luxé and 450 Heights Projects in March 2016 at internal rates of return (IRR) of 25 to 28 per cent.[1405]

Using Dr. Hern's estimated WACC of 12.5 to 18.9 per cent instead of BRG's implausibly low WACC estimates reduces BRG's DCF damages associated with the Claimants' hotel operations by USD 56 to 81 million (*i.e.*, 72 to 105 per cent).[1406]

c) Hotel failure rates: BRG assumes a zero-failure rate for the Meritage and Luxé hotels and a 23 per cent failure rate for the Tierra Bomba, Santa Fé and 450 Heights hotels.[1407] As demonstrated by Dr. Hern, given that none of the Claimants' hotels were operational (or even constructed), the Claimants' lack of history of successful commercial operations and the risks to which the projects were exposed, a 100 per cent success rate for the Meritage and Luxé hotels cannot be assumed.[1408] Similarly, the assumed failure rate in connection with the Tierra Bomba, Santa Fé and 450 Heights hotels, calculated by reference to US companies' failure rate after three years, is inapposite and over optimistic.[1409]

While it is clear that BRG understates the failure risks for the Claimants' projects, Dr. Hern notes the lack of objective data to estimate the failure rate (which turns the whole DCF valuation exercise into a highly speculative exercise). Still, for the sake of argument, Dr. Hern assumed a 50 per cent failure rate, which is consistent with the

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1405 Email from Michael Carlton to Angel Seda and James Evans, 4 April 2016 (**Exhibit C-380**), p.2. As explained by Dr. Hern, the projects' IRRs can be interpreted as the Claimants' own estimate of the appropriate discount rate (*i.e.*, WACC) for the projects.

1406 *See* NERA Second Expert Report, ¶ 143, Table 5.3.

1407 *See* BRG Second Expert Report, ¶ 144.

1408 *See* NERA Second Expert Report, ¶ 145.

1409 *See* NERA Second Expert Report, ¶ 151. Notably, in *Devas v. India* on which the Claimants rely (), the tribunal acknowledged the difficulty in determining a success/failure probability as statistics are "sample dependent". Still, in that case, the tribunal said to be "uneasy with a 61% probability of success" for a pre-operative company, even though it had achieved several milestones including four rounds of financing. Thus, the tribunal disregarded the rate based on the US BLS data as "somewhat optimistic in the full circumstances prevailing at the time" and instead estimated the probability of success at around 58% (*i.e.*, failure rate of about 42%). *See 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 (**Exhibit CL-156**), ¶¶ 572-573.

failure rates reported by Prof. Damodaran (on which the Claimants' rely as an authority on the matter).[1410]

Applying the more realistic 50 per cent failure rate, BRG's DCF damages associated with the Claimants' hotel operations are reduced by USD 35 million (*i.e.*, 45 per cent).[1411]

d) Hotel's average daily rate (ADR) and occupancy rates: BRG assumes ADR and occupancy rates for the Claimants' hotels that are higher than the average performance of the Colombian luxury hotel market.[1412] As explained by Dr. Hern, BRG's assumption of sustained outperformance of the Colombian market in perpetuity is an overly optimistic "best case" scenario, but in no way a reasonable central case scenario. In fact, BRG assumes that some of the Claimants' hotels will outperform the market by even more than the Charlee hotel, which itself had outperformed the market prior to the valuation date in terms of both ADR and occupancy rates (and is in any event not a relevant reference due to the difference as to location, type of accommodation and scale of operations).[1413] There is no basis to assume that the Claimants could achieve sustained market outperformance, as assumed by BRG.

Using reasonable ADR and occupancy rates assumptions based on available comparators reduces BRG's DCF damages associated with the Claimants' hotel operations by around USD 7 to 42 million (*i.e.*, 9 to 55 per cent).[1414]

908. In addition to exaggerating the key drivers of its DCF valuation of the Claimants' hotels, BRG also exaggerates other assumptions which further inflate its DCF valuation result:

1410 *See* NERA Second Expert Report, ¶ 153, Table 5.4. The Claimants' allegation that BRG's success rates are credible because they are "based on Professor Damodaran's methodology" is completely disingenuous. While BRG may have used the methodology proposed by Prof. Damodaran, they assess the probability of success or survival by reference to the US companies' failure rate after three years. These rates, as explained by Dr. Hern, make no sense in the circumstances of this case.

1411 *See* NERA Second Expert Report, ¶ 153.

1412 *See* BRG Second Expert Report, ¶ 119, Table 9.

1413 *See* NERA Second Expert Report, ¶¶ 155-161.

1414 *See* NERA Second Expert Report, ¶ 165.

e) Meritage tax holiday: despite the lack of evidence, BRG assumes that the Meritage hotel would be completed by the end of 2017 and, therefore, it would qualify for a 9 per cent corporate tax holiday for 30 years. As explained by Dr. Hern, this is highly optimistic (to say the least) in light of the circumstances, including the lack of financing and the Claimants' own experience in the construction of phase 1 of Meritage and the Luxé hotel, which was substantially longer for smaller construction projects.[1415]

Assuming the Meritage hotel would not have been completed before the end of 2017, and accordingly would not qualify for the corporate tax holiday, BRG's valuation of the Meritage hotel would be reduced by USD 5 million.[1416]

f) The Luxé completed cabañas phases 1, 2 and 5: BRG assumes that, but for the measures, Royal Realty would have collected the fees associated with managing the Luxé cabañas, which had been completed and sold by January 2017,[1417] as well as its share of profits from the cabañas rental. The Claimants, however, claim they were unable to do so as a result of the measures. BRG relies solely on Mr. Seda's statement. Other than that, there is no evidence to support the Claimants' allegations that Royal Realty would have managed the cabañas or that it was unable to collect its share of profits from the cabañas rentals, let alone of the causal link between the Asset Forfeiture Proceedings and the alleged losses of management fees and loss of cabañas rental profits.[1418]

In fact, Mr. Seda refers only to a management contract for the Luxé hotel.[1419] This contract, between Luxé by the Charlee and Royal Realty, does not refer to the cabañas. Notably, the current owners of the cabañas is not a party to the contract.

1415 *See* NERA Second Expert Report, ¶¶ 167, 169.

1416 *See* NERA Second Expert Report, ¶ 169.

1417 The Claimants have not provided any information regarding who bought the cabañas or how much money Royal Realty made from these cabañas prior to or following the Asset Forfeiture Proceedings.

1418 *See above,* Section VI.A.

1419 *See* Seda Second Witness Statement, ¶ 69. Management Contract between Luxé By The Charlee S.A.S. and Royal Realty S.A.S., 21 March 2013 (**Exhibit C-101**).

In any event, Mr. Seda's allegations that "following the seizure of the Meritage Project, it was impossible for [him] to run a hospitality management business, as I had to leave Colombia for fear of my safety" is mischievous. In fact, between 2018 and 2021, Mr. Seda spent 960 days in Colombia (*i.e.*, an average of 192 days per year).[1420] During this time, he continued operating the Charlee Hotel.

909. In sum, as demonstrated by Dr. Hern, aligning BRG's assumptions with the available evidence would dramatically reduce BRG's DCF damages related to the Claimants' hotel operations from USD 77 million to USD -12 to -2 million (*i.e.*, a reduction of 102 to 115 per cent).[1421]

910. Even assuming that BRG's DCF valuation result was correct (*quod non*), such an award would result in compensating the Claimants twice for the same loss in connection, in breach of the standard of compensation. This is because, as explained by Dr. Hern, once the Claimants realize the value of the projects through an award on damages, they could then use the award money to subsequently develop the hotels, thus realizing their value a second time.[1422]

911. *Third*, as explained by Dr. Hern, BRG's assumptions with respect to each of the key DCF valuation input used to determine the value of the Claimants' real estate-related activities is also exaggerated:

a) Real estate profit margin: BRG's assumptions on the profitability of the Meritage project, *i.e.* 47 per cent for phases 4-8 and 29 per cent overall including loss making phase 1, and the Tierra Bomba project, *i.e.* 42 per cent, are materially higher than the comparator evidence on profit margins for real estate developers in Colombia

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1420 *See above,* Section V.D.

1421 *See* NERA Second Expert Report, ¶ 175, Table 5.6.

1422 *See* NERA Second Expert Report, ¶ 120. Similarly, due to the premature character of the claims brought by the Claimants in this Arbitration and the technical viability of the Meritage Project [redacted] if the Tribunal were to award damages to the Claimants with respect to the Asset Forfeiture Proceedings and, subsequently, the competent domestic courts would find against the request for asset forfeiture, the Claimants would *de facto* be compensated twice for the same loss (or, more accurately, compensated for no loss at all).

and emerging markets of 16 to 19 per cent. The difference between BRG's assumptions on profit margins and those of the comparators is not justified.[1423]

Reducing the profitability for the Meritage and the Tierra Bomba projects to 19 per cent to align it with the top end of the comparator evidence reduces BRG's DCF valuation of the Claimants' real estate projects by USD 16 million (*i.e.*, 74 per cent).[1424]

b) Real estate discount rate: BRG assumes a WACC of 7.7 per cent for the Claimants' real estate related activities. As explained by Dr. Hern (and above, with respect to the hotel-related damages), BRG's WACC assumption for the Claimants' real estate projects is implausibly low, as it is lower than the actual cost of debt for the existing projects.[1425] A more plausible calculation of the WACC for the Claimants' real-estate projects results in a range of between 12.1 and 15.5 per cent.[1426] Dr. Hern's estimations appear relatively conservative, considering that the Claimants themselves had offered investors opportunities to invest in the Meritage, Luxé and 450 Heights Projects in March 2016 at internal rates of return (IRR) of 25 to 28 per cent.[1427]

Using Dr. Hern's estimated WACC of 12.1 to 15.5 per cent instead of BRG's implausibly low WACC estimates reduces BRG's DCF damages associated with the Claimants' real-estate operations by USD 5 to 8 million (*i.e.*, 22 to 40 per cent).[1428]

c) Real estate failure rates: BRG assumes a zero per cent failure rate for the Meritage project and the Luxé project, even though the real estate element had not even commenced pre sales as of the date of the Asset Forfeiture Proceedings.[1429] For the

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1423 *See* NERA Second Expert Report, ¶¶ 188-189.

1424 *See* NERA Second Expert Report, ¶ 191, Table 5.7.

1425 *See* NERA Second Expert Report, ¶ 193.

1426 *See* NERA Second Expert Report, ¶ 194; Appendix D.

1427 *See* Email from Michael Carlton to Angel Seda and James Evans, 4 April 2016 (**Exhibit C-380**), p.2. As explained by Dr. Hern, the projects' IRRs can be interpreted as the Claimants' own estimate of the appropriate discount rate (*i.e.*, WACC) for the projects.

1428 *See* NERA Second Expert Report, ¶ 196, Table 5.8.

1429 *See* NERA Second Expert Report, ¶¶ 197-199.

Tierra Bomba, 450 Heights and Santa Fé projects, all of which were in pre-development phase, BRG assumes a 23 per cent failure rate, based on the data on failure rates of US companies after 3 years (cross checked by data from JLL on failure rates of Colombian real estate projects allegedly supporting an even lower failure rate of 10 per cent).[1430] The Claimants allege that these rates are reasonable because, due to Mr. Seda's "significant level of preparatory work", the Claimants' projects "were far more likely to succeed than the average Colombian real estate project".[1431]

The Claimants' arguments are fully unsubstantiated and makes no economic sense. As a matter of facts, the Claimants have failed to demonstrate that Mr. Seda has conducted exceptional preparatory works that would justify a lower failure rate vis-à-vis any other real estate developer in Colombia. Rather, the steps identified by the Claimants[1432] – *i.e.*, identifying promising opportunities, taking steps to design the projects, setting up development vehicles, developing business plans, attracting investors, entering loan agreements, identifying and purchasing land, securing permits, entering into fiduciary agreements, conducting marketing efforts and entering agreements to manage construction and operation of the projects – are all normal steps that any real estate developer would adopt when conceiving a real estate project. In other words, the Claimants have not shown any exceptional action that would have guaranteed the projects' success.

From an economic point of view, BRG's understatement of the failure risks for the Claimants' real estate activities leads to overstated damages.[1433] For example, with respect to the Meritage project, all the damages associated with the real estate activities in BRG's calculations come from phases 4-8. As explained by Dr. Hern, there are several reasons why these phases – which had not even reached their equilibrium point – could fail,[1434] including failure to reach equilibrium, to reach

1430 *See* NERA Second Expert Report, ¶¶ 197-199.

1431 Claimants' Reply, ¶ 425.

1432 *See* Claimants' Reply, ¶ 425.

1433 *See* NERA Second Expert Report, ¶ 206.

1434 *See* NERA Second Expert Report, ¶ 198(A).

relevant profitability levels to become successful, increase in construction costs or delays. None of these risks is considered by BRG, who assumes the Meritage project will success with 100 per cent probability. The Luxé project was exposed to similar risks, as the real estate phase of the project had not even commenced pre-sales as of the date of the Asset Forfeiture Proceedings. These risks are equally ignored by BRG.

Similarly understated are the failure risks assumed by BRG for the Tierra Bomba, 450 Heights and Santa Fé projects. Indeed, Dr. Hern demonstrates that JLL's corrected calculations lead to failure rates of around 30 to 55 per cent for Medellín and 25-85 per cent for Cartagena, this is, significantly higher than JLL's purported 10 per cent and indeed BRG's own assumption of 23 per cent based on 3-year failure rates for US companies (which is not a relevant benchmark in any case).[1435]

Dr. Hern is of the opinion that given the lack of objective data to estimate the failure rates, is it speculative to estimate the risks of failure for the Claimants' real estate projects. Dr. Hern also assumed a 50 per cent failure rate, which is consistent with failure rates for companies in the leisure sector during the first 3-4 years of operations as reported by Prof. Damodaran (whom the Claimants regard as an authority on the matter). Assuming a 50 per cent failure rate reduces BRG's DCF damages associated with the Claimants' real-estate operations by around USD 9 million (*i.e.*, around 41 per cent).[1436]

d) Speed of sales of real estate units: BRG assumes a speed of sales of at least up to 5 times higher than has been the historical experience with Meritage phase 1 sales, which the Claimants themselves describe as having been sold quickly.[1437] BRG's assumption is not backed by any quantitative evidence.

Aligning the speed of sales for 450 Heights only (which is the project for which BRG assumes the greatest increase in the speed of sales relative to the Claimants' past experience) with the speed at which the phase 1 of the Meritage project was sold

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1435 *See* NERA Second Expert Report, ¶ 205.

1436 *See* NERA Second Expert Report, ¶ 207, Table 5.9.

1437 *See* BRG Second Expert Report, ¶ 208.

(*i.e.*, 4 units per month) reduces BRG's DCF damages associated with the Claimants' real-estate operations by USD 3 million (*i.e.*, around 15 per cent).[1438]

912. In sum, aligning BRG's assumptions with the available evidence reduces BRG's DCF damages related to the Claimants' real-estate operations from USD 21 million to USD -3 to 3 million (*i.e.*, around 84 to 112 per cent). [1439]

913. As explained above with respect to the hotels, even assuming that BRG's DCF valuation was correct (*quod non*), such an award would result in compensating the Claimants twice for the same loss, as the Claimants could use the money to develop the real estate projects, thus realizing their value a second time.[1440]

914. *Fourth*, BRG's DCF assessment also include lost fees for hotel and real estate services that Royal Realty would allegedly have provided to the projects. Given that BRG's calculation of lost fees are directly linked to the alleged losses with respect to the hotel and real estate operations, the exaggerated assumptions described above feed into BRG's calculation of the allegedly lost fees resulting, in turn, in exaggerated DCF calculations.[1441]

915. As demonstrated by Dr. Hern, aligning BRG's assumptions for the Claimants' hotel and real-estate projects with available evidence reduces BRG's DCF calculation of the lost fees from USD 86 million to USD 12 to 23 million (*i.e.*, by around 74 to 82 per cent).[1442] Yet, this still does not reflect an accurate calculation of the Claimants' compensable damages as (i) it assumes – without any supporting evidence (and even in contradiction to the scarce available evidence) – that the allegedly lost fees represent a pure profit for Royal Realty without any associated

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1438 *See* NERA Second Expert Report, ¶ 213, Table 5.10.

1439 *See* NERA Second Expert Report, ¶ 216, Table 5.11.

1440 *See* NERA Second Expert Report, ¶ 120. Similarly, due to the premature character of the claims brought by the Claimants in this Arbitration and the technical viability of the Meritage Project [redacted] if the Tribunal were to award damages to the Claimants with respect to the Asset Forfeiture Proceedings and, subsequently, the competent domestic courts would find against the request for asset forfeiture, the Claimants would *de facto* be compensated twice for the same loss (or, more accurately, compensated for no loss at all).

1441 *See* NERA Second Expert Report, ¶ 217.

1442 *See* NERA Second Expert Report, ¶ 219.

costs,[1443] and (ii) even assuming that the Other Projects failed as a result of the Respondent's measures (*quod non*), this did not affect Royal Realty's opportunities to generate fees from providing management services to other projects instead.[1444] Indeed, the Royal Realty brand does not seem to have been negatively impacted, as BRG acknowledges that the Charlee hotel remained "a successful hotel in Medellin, not impacted by the Measures"[1445] and the scarce evidence in the record shows that in September 2017 – *i.e.*, almost one year after the precautionary measures were adopted against the Meritage Lot – Mr. Seda was invited to work as a consultant for a hotel project in Tierra Bomba.[1446]

916. This means, in other words, that Royal Realty did not suffer any compensable damage in connection with the alleged lost fees for hotel and real estate services. If, and only if it could be demonstrated that the value of the Royal Realty brand is zero (which it is not, as it still owns the Charlee brand – which the Claimants' themselves portray as extremely valuable – and has received offers to provide consulting services for other projects), the damage should be calculated based on the historical costs of establishing the Royal Realty brand, *i.e.*, would be valued at some USD 2 million.[1447]

917. *Finally*, BRG includes in its assessment losses associated with hypothetical real estate projects which Mr. Seda would have allegedly developed in the future.[1448] These losses are not recoverable both as a matter of law, economics and facts.

918. As a matter of law, it is trite that Chapter Ten of the TPA affords protection to "covered investments", *i.e.*, assets that an investor owns or control, directly or indirectly, and that has the characteristics of an investment, including "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk".[1449] By definition, the Claimants' hypothetical projects do not bear any of these characteristics so, any losses related to these non-

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1443 *See* NERA Second Expert Report, ¶¶ 220-223.

1444 *See* NERA Second Expert Report, ¶¶ 224-227.

1445 BRG Second Expert Report, ¶ 135(a).

1446 *See* WhatsApp chain between Manager of Tierra Bomba Hotel Owner and Angel Seda, 13 September 2017 (**Exhibit C-197**).

1447 *See* NERA Second Expert Report, Section 6.1.2.

1448 *See* BRG Second Expert Report, ¶¶ 228-229.

1449 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.28.

existent projects (if any!), is not compensable under the TPA. Moreover, as clearly stated by the tribunal in *Christian Doutremepuich v. Mauritius*, "The role of the Tribunal is not to second-guess what possible future investments the Claimants might have made", let alone to award compensation for such any such "possible future investments".[1450]

919. As a matter of economics, Dr. Hern explains that BRG's inclusion of these hypothetical projects in the damages calculation does not make sense, not only because they are fully speculative, but also because assuming these opportunities in fact existed, the Claimants have not shown that as a result of the Asset Forfeiture Proceedings, they are unable to pursue them (either by financing the projects themselves or by selling the projects to other investors for their fair market value).[1451] As also demonstrated by Dr. Hern, an award in damages for these future hypothetical projects would result in double compensation for the Claimants.[1452]

920. As a matter of fact, it has been demonstrated that the Asset Forfeiture Proceedings were initiated against the Meritage Lot and not against the owners of the lot, let alone against any of the Claimants. Accordingly, the Claimants were free to develop any such hypothetical project they could have wished for in any "clean" lot, *i.e.*, in any lot not tainted by illegality.

921. Even if the Claimants were entitled to compensation for the alleged losses associated with hypothetical future projects, BRG's DCF valuation is driven by the same exaggerated assumptions used to assess the damages in connection with the hotel and real estate projects, thus resulting in an overstated valuation. Adapting BRG's exaggerated DCF assumptions to align them with available evidence produces a DCF value for the future hypothetical projects of USD 0.2 to 3 million.[1453] As explained by Dr. Hern, this is in line with the principle that the net present value of a project for which no investment has been made is expected to be zero.

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922. *In sum,* aligning BRG's DCF assumptions to the (scarce) evidence available significantly reduces BRG's DCF damages assessment. This revised quantum – resulting from a DCF assessment but

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1450 Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019 (**Exhibit RL-195**), ¶ 151.

1451 *See* NERA Second Expert Report, ¶¶ 230-231.

1452 *See* NERA Second Expert Report, ¶ 232; NERA First Report, Section 5.6.

1453 *See* NERA Second Expert Report, ¶¶ 233, 236.

applying reasonable assumptions – is in line with the cost-based calculation performed by Dr. Hern, as demonstrated below.

b. *An appropriate market cross-check confirms that BRG's DCF valuation is highly exaggerated*

923. The Claimants aver to have "validate[d] the inputs" of their DCF valuation with data provided by "the world's leading real estate experts", JLL.[1454] As demonstrated by Dr. Hern, the comparators used by BRG for its cross-check are highly irrelevant.

924. In order to cross-check its DCF valuation for hotels, BRG relies on a "market-based valuation"[1455] using transaction prices of fully operational hotels located in Latin American and the Caribbean, but not in Colombia, provided by JLL.[1456] This alleged "cross-check" is irrelevant for two main reasons:

a) <u>The Claimants' non-operational hotels are not comparable to fully operational hotels</u>: the prices of fully operational hotels are not comparable to those of the Claimants' hotels, all of which were in pre-development or early construction stage and, accordingly, inherently subject to pre-operational and pre-construction risks.[1457] As explained by Dr. Hern, market prices of fully operational hotels are not relevant to assess market prices of plans/projects to build hotels in the future.[1458] This principle does not seem to be disputed by BRG, that acknowledged that "the comparable market transactions selected by JLL refer to hotels in operation, and thus not exposed to the same risk of failure of the Claimants' hotels".[1459]

To overcome this lack of comparability, BRG compares only a part of its DCF model, *i.e.*, its assumed discounted cash-flows for the hotels after they are constructed and become fully operational, to the JLL data. This comparison, however, is irrelevant, as

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1454 Claimants' Reply, ¶ 407.

1455 Claimants' Reply, ¶ 407.

1456 *See* BRG First Expert Report, ¶ 19.

1457 *See* NERA Second Expert Report, ¶¶ 87-88.

1458 *See* NERA Second Expert Report, Section 4.1.1.

1459 BRG Second Expert Report, ¶ 199.

it fails to reflect the actual status of the Claimants' hotel projects, *i.e.*, the additional costs and the risks to which the Claimants' pre-operational projects were exposed.

b) The Claimants' hotels in Colombia are not comparable to hotels in JLL's sample in any case: the hotels used by BRG as comparators are located in countries which are lower risk than Colombia and which have stronger hospitality sectors on average. These factors increase the hotels' valuations *vis-à-vis* the Claimants' yet-to-be-built hotels in Colombia. Moreover, as demonstrated by Dr. Hern, the rates charged per room by JLL/BRG's comparator hotels are multiple times higher than room rates charged by 5 star hotels in Colombia, including the Claimants' Charlee hotel (which the Claimants allege outperforms the market). This implies that the "JLL/BRG comparators" are clearly not relevant comparators for valuing the Claimants' hotels and using them for such purpose leads to an overstated valuation.[1460]

The Claimants aver that JLL selected comparators outside of Colombia "because there were no existing comparators in the country".[1461] Yet, the fact that there are no comparator hotels in Colombia does not make the hotels in JLL's sample relevant comparators. On the contrary, it confirms that Dr. Hern has demonstrated and neither BRG nor JLL have disputed: that the alleged comparators used by BRG are not comparable at all and, as such, irrelevant.

925. Similarly irrelevant are the cross-checks applied by BRG to validate its DCF valuation of the real-estate elements of the projects, as it does not look at market prices or transaction prices of real estate projects in pre-development or early construction stage, as the Claimants' projects were.[1462] As a result, BRG's cross-checks also fail to take into account a number of relevant valuation drivers, such as construction costs, construction risks, discount rates or failure risks.[1463]

926. Conversely, a relevant market cross-check, presented by Dr. Hern, based on prices paid for shares in the Claimants' projects, confirms BRG's DCF valuation is grossly overstated. For example, in his first report, Dr. Hern compared BRG's DCF valuation result with the price paid by

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1460 *See* NERA First Expert Report, ¶ 211(B); NERA Second Expert Report, Section 4.1.2.

1461 Claimants' Reply, ¶ 435.

1462 *See* NERA Second Expert Report, ¶ 95.

1463 *See* NERA Second Expert Report, ¶ 96.

investors for shares in the Claimants' projects in the past, to show how the shareholders themselves valued the projects when purchasing an interest in them (in other words, the market value of the shares in the projects).[1464] This cross-check shows that BRG's DCF valuation (updated for its second report) assumed a 72-times increase in the value of the Meritage Project and between 3 and 13-times increase in the value of the Tierra Bomba, Santa Fé and 450 Heights projects. This difference in value cannot be justified by referring to the time lapse between the transactions and the valuation date, as the projects had made very little progress within that term (and, without question, no progress that would justify the outrageous difference in value *vis-à-vis* BRG's DCF valuation).[1465]

927. In his second report, Dr. Hern also presented additional cross-checks based on other historical transactions of shares in the Claimants' projects he was able to identify from the Claimants' document production.[1466] For example, it appears that in February 2016 (*i.e.*, months before the precautionary measures were imposed on the Meritage Lot), Royal Realty gave Mr. Roger Khafif the option to purchase 0.6 per cent of shares in the Meritage Project for COP 38 million.[1467] BRG's DCF valuation of the Meritage is 26-times higher than the value of the project implied from this document.[1468]

928. Similarly, the Royal Realty financial statements for 2014-2015 refer to two transactions of Luxé shares in 2015, one where a 52.227 per cent shareholding was bought for COP 7,422 million (*i.e.*, some USD 2.9 million at the historical exchange rate) and a second one where a shareholding of 20.37 per cent was sold for COP 5,666 million (*i.e.*, some USD 1.9 million at the historical

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1464 Indeed, the Claimants acknowledge that "the price of a business 'reflects the cash flows it is expected to generate over its operative life'", so it can only be inferred that they would not have paid more for the shares than the cash flows they expected the projects to generate. *See* Claimants' Reply, ¶ 410, quoting Sergey Ripinsky and Kevin Williams, Damages in International Investment Law (2008) (**Exhibit CL-57**), p. 192-193.

1465 *See* NERA Second Expert Report, ¶ 106, Table 4.1.

1466 The Respondent draws the Tribunal's attention to the fact that other than the two documents referred to in this paragraph and the following, the Claimants have failed to produce any document in response to Requests 51 and 52, *i.e.*, Documents relating to the historical transactions involving shares in the Claimants' projects. This document should exist and be in the Claimants' possession and control. For example, it is evident from the Luxé Shares Ledger that Royal Realty purchased and then sold shares in Luxé in 2015.

1467 *See* E-mail from James Evans to Roger Khafif (**Exhibit R-237**).

1468 *See* NERA Second Expert Report, ¶ 110.

exchange rate).[1469] BRG's DCF valuation of the Luxé project is 6-8 times higher than the value implied from the Luxé transactions.[1470]

929. Finally, it is worth noting that if BRG's DCF valuation of the Other Projects was correct, these projects would have been largely lucrative and attractive to the market. Thus, even if the Claimants were unable to develop these projects themselves due to lack of financing (of which there is no evidence, as demonstrated above[1471]), they could have sold the projects to other investors for a value equivalent to BRG's DCF valuation (*i.e.* which the Claimants allege was the fair market value).[1472]

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930. In sum, it has been demonstrated that even if the DCF method was appropriate in this case (which is not), the DCF valuation performed by BRG is based on grossly overstated assumptions thus resulting in a highly exaggerated valuation. Moreover, the cross-checks applied by BRG are irrelevant. Against this background, the Claimants' allegations that "BRG has taken reasonable steps to account for any uncertainty, including by making comparisons to market data from third party real estate experts" is disingenuous. The fact remains that the Claimants' damages claim is inappropriately speculative, unreliable and exaggerated.

3. The cost approach is the only reliable method to estimate the Claimant's alleged damages in this case

931. The Claimants allege that Dr. Hern's calculations are "irrelevant" because the methodology used, *i.e.*, cost approach, "does not calculate the FMV of Claimants' investment".[1473] The Claimants' claims are misconceived.

932. *First*, the cost approach is one of the three valuation approaches considered to estimate the fair market value for damages purposes.[1474] BRG itself acknowledged that the cost approach is one of

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1469 *See* NERA Second Expert Report, ¶ 108.

1470 *See* NERA Second Expert Report, ¶ 110.

1471 *See above,* Section VI.A.

1472 *See* NERA Second Expert Report, ¶ 121.

1473 Claimants' Reply, ¶ 406.

1474 *See* NERA Second Expert Report, ¶¶ 81-82. *See also*, *e.g.*, RH-004, pp. 202-204.

the "several approaches to determine the fair market value".[1475] It has also been confirmed by investment tribunals, holding that where the DCF method is considered inappropriate, the fair market value "is best arrived" by reference to the Claimants' actual investment.[1476]

933. *Second*, as demonstrated by Dr. Hern, the cost-based approach is not only one of the methods to determine the fair market value, but in this case is the only method capable of producing a valuation based on objective data.[1477] In this sense, Ripinsky and Williams, on whom the Claimants rely, explain that "[tribunals] have turned to the historic costs of investment as the relevant approach to valuation when the evidence necessary to apply an income-based method has been considered insufficient".[1478] This is the case, for example, when the alleged investments "not yet started to generate cash flows or where the history of such operations has been found too short to allow projection of future earnings".[1479]

934. This approach has been upheld by investment tribunals. For example, in *Deutsche Telekom v. India* the tribunal found that it was not in a position to determine the Claimants' future cash flows with sufficient certainty, so it concluded that "the sunk cost approach is the best available method to ensure full reparation by placing DT in the situation in which it would find itself had it never made its investment":[1480]

> [W]here other valuation methods proposed by a claimant are not supported by sufficient evidence to establish the quantum to a reasonable degree of certainty and thus prove inadequate under the circumstances, sunk costs may represent the best (or the only) alternative approach to determine the amount of damages incurred by the investor. In other words, if because of lack of evidence the Tribunal is incapable of determining the loss by reference to methods that normally would yield more accurately the value of the investment but for the breach, it may resort to sunk costs which restores the situation before the investment was made. […] However, where the Tribunal is incapable

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1475 BRG First Expert Report, ¶ 86(b).

1476 *See*, *e.g.*, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (**Exhibit CL-021**), ¶ 122; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 (**Exhibit CL-024**), ¶ 125.

1477 *See* NERA Second Expert Report, ¶ 66.

1478 Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (2008) (**Exhibit CL-57**), p. 227.

1479 Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (2008) (**Exhibit CL-57**), p. 227.

1480 *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10**,** Final Award, 27 May 2020 (**Exhibit RL-199**), ¶ 289.

> of determining the value of the investment through other methods because the evidence is insufficient, the award of damages equal to the funds actually expended may represent the best method to achieve full reparation.[1481]

935. Similarly, in *South American Silver v. Bolivia* the tribunal held that cost-based valuation methods are often used by international tribunals, in particular for pre-operational projects or if "the estimation of future cash flows would be whole speculative" or if "it is not a going concern and there are uncertainties regarding future income and costs" or if "there is a particularly large difference between the investments made and the compensation claimed".[1482] In this case, all of the hypotheses are met. Therefore, it is only appropriate that the alleged damages are estimated by applying a cost-based approach.

936. This has been confirmed by Dr. Hern, who – having assessed the speculative assumptions on which BRG based its DCF valuation and the lack of reliable information to adjust BRG's DCG valuation –concluded that in this case, a cost-based approach "is the only method capable of producing a valuation based on objective data".[1483]

1481 *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10**,** Final Award, 27 May 2020, ¶ 288 (emphasis added). *See also*, *e.g.*, *Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic (II)*, PCA Case No. 2015-32, Award, 20 August 2019 (**Exhibit RL-194**), ¶ 783 ("[t]he sunk cost approach has been used exactly in cases where tribunals have found the DCF method not to be applicable"); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 (**Exhibit RL-187**), ¶¶ 590, 604 ("[T]he calculation of Claimant's damages in the present case cannot be carried out by reference to the potential expected profitability of the Santa Ana Project and the DCF method. The Project remained too speculative and uncertain to allow such a method to be utilized. Instead, the Tribunal concludes that the measure of damages should be made by reference to the amounts actually invested by Claimant"); *PSEG Global Inc. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (**Exhibit CL-047**), ¶¶ 311, 316, 321 ("The Respondent convincingly invoked in support of its objections to this approach the awards in […] *Metalclad*, which required a record of profits and a performance record, just as the awards in *Wena*, […] refused to consider profits that were too speculative or uncertain. […] The third approach to compensation that the Claimants have put forth concerns the investments made and out of pocket expenses referred to above. […] [T]he Tribunal considers that the approach followed by Dr. Rosenzweig offers a solid basis on which to proceed").

1482 *South American Silver v. Bolivia,* PCA Case No. 2013-15, Award, 22 November 2018 (**Exhibit RL-107**), ¶¶ 859, 866 ("Cost-based valuation is not foreign to international investment arbitration. In various circumstances, tribunals have discarded other methods in favor of the valuation by reference to actual investments or cost of investment for reasons such as that the project is not in the production stage, or that, given the stage of the project, the estimation of future cash flows would be wholly speculative, or that there is an insufficiently solid basis on which to calculate profits or growth, or that it is not a going concern and there are uncertainties regarding future income and costs, or that there is a particularly large difference between the investments made and the compensation claimed").

1483 NERA Second Expert Report, ¶ 66.

937. *Third*, applying the cost-based approach results in maximum damages of USD 7,609,776, as follows: (i) USD 1,092,289 with respect to the Meritage project, (ii) 3,658,056 with respect to the Luxé project, (iii) USD 720,086 with respect to the Tierra Bomba project, and (iv) USD 2,139,346 with respect to the 450 Heights, Santa Fé and the Royal Realty brand.[1484]

Table 6.4: Summary of Damages for All Projects and Loss of Royal Realty Brand Value and Pre-award Interest (USD)

	Damages as of 25 January 2017 (USD)	Pre-Award Interest up to 14 February 2022 (USD)
Meritage	**1,092,289**	**67,763**
Mr Seda / Royal Realty	832,683	51,658
Boston Enterprises Trust	106,708	6,620
JTE Intl. Investments LLC	140,273	8,702
Jonathan Michael Foley	12,625	783
Luxé	**3,658,056**	**226,938**
Mr Seda / Royal Realty	2,583,161	160,254
Boston Enterprises Trust	300,832	18,663
Haystack Holding LLC	69,514	4,312
Stephen John Bobeck	306,851	19,036
Monte Glenn Adcock	223,666	13,876
Justin Timothy Enbody	125,143	7,764
Justin Tate Caruso	48,888	3,033
Tierra Bomba	**720,086**	**44,673**
Mr Seda / Royal Realty	720,086	44,673
450 Heights/Santa Fé/Royal Realty Brand	**2,139,346**	**132,721**
Mr Seda / Royal Realty	2,139,346	132,721
Total damages	**7,609,776**	**472,095**

Source: Hern Updated Damages Calculations.xlsx, ***RH-029****.*

938. As confirmed by Dr. Hern, in this case, the cost approach (as adjusted to reflect the new information provided by the Claimants[1485]) can be reconciled with the results of the DCF method as corrected.[1486] From an economics perspective, this is exactly what is expected to happen in a competitive market, like the hotel and real estate markets.[1487] Therefore, contrary to the Claimants' allegations, the method used by Dr. Hern to estimate the Claimants' alleged damages

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1484 *See* NERA Second Expert Report, Section 6.1, Table 6.3. To recall, it is the Respondent's position that only the damages claimed in connection with the Meritage project, *i.e.* USD 985,581, would be compensable damages (assuming the Asset Forfeiture Proceedings were in breach of the Respondent's international obligations vis-à-vis the Claimants, which were not).

1485 As explained, in his first report Dr. Hern had made his best efforts to calculate the Claimants' costs on the basis of the scarce information provided by the Claimants. *See* NERA First Expert Report, ¶ 241. In his second report, Dr. Hern revised his calculations on the basis of the additional information provided by the Claimants. In light of the Claimants' refusal to provide relevant information, their allegations that Dr. Hern does not refer to "contemporaneous" documents or "undervalues the historical costs incurred by Claimants" does not stand scrutiny. *See* Claimants' Reply, ¶¶ 438, 445.

1486 *See* NERA Second Expert Report, Table 5.13.

1487 *See* NERA Second Expert Report, ¶ 73.

would not "grossly undercompensate Claimants".[1488] Instead, it would compensate them exactly at the fair market value.

939. *Finally*, the Claimants' claim that Dr. Hern's valuation is "fraught with issues" is disingenuous.[1489] For example, the Claimants criticize Dr. Hern's calculations for not including the costs related to "outstanding unpaid loan balances" undertaken in connection with the Meritage and Luxé Projects. Yet, until the submission of their Reply, the Claimants had not submitted any evidence of these loans, so it was virtually impossible for Dr. Hern to include these in his calculations.

940. For the sake of completeness, the Respondent has instructed Dr. Hern to include these costs in the damages calculation in his second report.[1490] However, the Respondent disputes that these costs are due. This seems to be the opinion of the Claimants' own experts, BRG, as they have not considered these costs in their damages calculations.

941. Similarly unsubstantiated are the Claimants' claims for "ongoing expenses made by Claimants after the date of valuation as part of their efforts to mitigate damages", including costs of taxes, maintenance fees and security guards. The Claimants' allegations that they incurred these costs "as part of their efforts to mitigate damages" is based solely on Mr. Seda's self-serving statement;[1491] no supporting evidence of any such cost has been provided by the Claimants. This is not surprising, as no reasonable investor would have incurred costs with respect to a project it considers to be "dead".

942. The Claimants' unsubstantiated allegations are further bellied by the fact that the Colombian State has been financing several costs and expenses in connection with the maintenance, reparations and security of the Meritage Lot.[1492] This is in accordance with Colombian Law, according to which the Fund for the Rehabilitation, Social Investment and Fight Against Organized Crime (*Fondo para la Rehabilitación, Inversión Social y Lucha contra el Crimen*

1488 Claimants' Reply, ¶ 444. Rather, as an "element of common sense", it seems highly unlikely that any informed buyer would have been willing to pay the exaggerated amount claimed by the Claimants, which is multiple times higher than the costs of the projects, for the Claimants' projects that were at their initial stages. *See Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 2153 7/ZF/AYZ, Award, 7 November 2018 (**Exhibit CL-121**), ¶ 622.

1489 Claimants' Reply, ¶ 445.

1490 *See* NERA Second Expert Report, Table 6.5.

1491 Claimants' Reply, ¶ 445; Mr. Seda's Second Witness Statement, ¶ 92.

1492 Letter from the *Sociedad de Activos Especiales S.A.S.* dated 3 February 2022 (**Exhibit R-180**).

Organizado - FRISCO) has the duty to pay the maintenance and management costs for the assets that have been seized in connection with an asset forfeiture proceeding.[1493]

D. THE CLAIMANTS ARE NOT ENTITLED TO PRE-AWARD INTEREST AS CLAIMED

943. The Claimants claim to be entitled to both pre- and post-Award interest at a rate of 5.23 percent and 4.83 percent for the real estate and hospitality businesses respectively. These rates were determined by the Claimants on the basis of "the average cost of debt that would be faced by Claimants in operating their real estate and hospitality business but for" Colombia's measures.[1494]

944. In the Counter Memorial, the Respondent demonstrated that the Claimants are in principle not entitled to pre-award interest. Even if the Claimants were entitled to pre-award interest, the interest rate proposed by the Claimants is inappropriate: a US risk-free rate would be more appropriate in this case.[1495]

945. In their Reply, the Claimants insist on their claim of pre-award interest at a rate calculated on the basis of the Claimants' estimated average cost of debt, *i.e.* 5.03%.

946. As demonstrated in the Counter Memorial and further below, the Claimants are not entitled to pre-award interest as claimed.

947. *First*, as the Claimant acknowledges, the TPA calls for interest to accrue from the date of the breach until payment in the case of expropriation. Thus, Article 10.7(3) provides that interest will accrue "from the date of expropriation until the date of payment". Otherwise, the Claimants have failed to demonstrate that in the circumstances of this case, they are entitled to pre-award interest as their right to compensation.[1496] If any, interest will only accrue upon the declaration

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1493 Letter from the *Sociedad de Activos Especiales S.A.S.* dated 3 February 2022 (**Exhibit R-180**).

1494 *See* Claimants' Memorial, ¶ 508.

1495 *See* Respondent's Counter Memorial, ¶¶ 643-649.

1496 *See*, *e.g.*, *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 & ARB/07/15, Award, 3 March 2010 (**Exhibit CL-158**), ¶ 660 ("the awarding of interest depends on the circumstances of each case and, in particular, whether an award of interest is necessary in order to ensure full reparation"); *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000 (**Exhibit CL-020**), ¶ 103 ("the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness"); *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award, 18 July, 2014 (**Exhibit CL-164**), ¶ 1653.

by the Tribunal of any breach of the Respondent's obligations, as only at that point will the amount due have been fixed and the Respondent's obligation to pay established.[1497]

948. *Second*, when pre-award interest is applicable (*i.e.*, in case of expropriation), the TPA calls for it to be calculated at a "commercially reasonable rate". According to the Claimants, this can only be achieved by reference to the cost of debt of a real estate and hospitality project in Colombia. The Claimants rely, in support of their argument, on the findings of the tribunal in *Eco Oro v. Colombia*. The findings of that tribunal are, however, inapposite. As clearly stated by the *Eco Oro* tribunal, the US Treasury Bill rate was not a "commercially reasonable rate" in that specific case because it "d[id] not take account of the economic realities for Eco Oro".[1498]

949. As clearly explained by Dr. Hern, in this case the reasonable pre-award interest rate is the free-risk rate, as it reflects the opportunity cost of deferred receipt of a certain income:

> From an economic perspective, the Claimants are foregoing a receipt of a certain amount of money x (damages) as of the valuation date in exchange for receiving the same certain amount of money x (damages) in the future. As explained in my first report, the opportunity cost of receiving an amount of money x (damages) with certainty at a future date is the risk-free rate. The Claimants' own cost of debt is irrelevant in this context, as it does not represent compensation for the Claimants foregoing a certain amount of money x and receiving the same amount of money x in the future with certainty. The compensation (opportunity cost) associated with the "deferred" receipt of damages is the risk-free rate.[1499]

950. As further clarified by Dr. Hern, given that the damages are calculated in USD (rather than COP), the reasonable risk-free rate is the "US risk-free rate".[1500] This rate "provides compensation to the Claimants for the opportunity cost of foregoing the receipt of damages as of the valuation date in exchange for receiving the same amount of damages with certainty as of the date of the award".[1501] Conversely, the Claimants' proposed rate by reference to its own cost of debt is irrelevant, as it does not represent compensation for them foregoing a certain amount of money

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1497 *See* Respondent's Counter Memorial, ¶¶ 645-646.

1498 *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 (**Exhibit CL-175**), ¶¶ 907, 913.

1499 NERA Second Expert Report, ¶ 255.

1500 *See* NERA First Expert Report, ¶ 256.

1501 NERA Second Expert Report, ¶ 258.

and receiving such an amount in the future – precisely what the pre-award interest are intended to compensate.

E. TO THE EXTENT THAT ALL APPLICABLE TAXES HAVE BEEN ADEQUATELY ACCOUNTED FOR IN THE DAMAGES ASSESSMENT, THE AWARD WOULD NOT BE SUBJECTED TO TAXES IN COLOMBIA

951. The Claimants request that any amounts awarded to the Claimants not be subjected to taxes in Colombia.[1502]

952. As demonstrated in the Counter Memorial, the Claimants' request was speculative and premature. In particular, the Respondent demonstrated that the Claimants' damages assessment did not fully account for applicable corporate taxes, so the request that the award not be subjected to taxes was unacceptable.[1503]

953. As noted by the Claimants in their Reply, "in response to Dr. Hern's report, BRG has deducted additional taxes from its damages calculation".[1504] In fact, the Claimants' estimated damages have been reduced by over USD 50 million, largely as a result of BRG accounting for missing corporate taxes in its DCF calculations.[1505] Therefore, the Claimants insist that there is no basis to deduct additional taxes from a potential award on damages.

954. To the extent that all applicable taxes have been adequately accounted for in the damages assessment, the Respondent agrees that the award not be subjected to taxes in Colombia.

F. AN AWARD ON MORAL DAMAGES IS NOT JUSTIFIED IN THIS CASE

955. In their Memorial, the Claimants claimed some USD 29 million in moral damages allegedly suffered by Mr. Seda for "the personal and reputational harm he has incurred as a result of the State's actions".[1506]

956. The Respondent demonstrated in the Counter Memorial that an award on moral damages is not justified in this case because (i) there is no evidence that the alleged damage to Mr. Seda's credit

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1502 *See* Claimants' Memorial, ¶ 509; Claimants' Reply, ¶ 451.

1503 *See* Respondent's Counter Memorial, ¶¶ 651-655.

1504 Claimants' Reply, ¶ 451.

1505 *See* BRG Second Expert Report, p. 30, Figure 1.

1506 Claimants' Memorial, ¶ 510.

and reputation was caused by the Respondent's actions,[1507] (ii) an award on moral damages would result in compensating Mr. Seda twice for the same losses,[1508] (iii) in any case, the circumstances of this case do not warrant an award on moral damages,[1509] and (iv) the amount claimed is excessive and unjustified.[1510]

957. The Claimants dispute each of the points raised by the Respondent.[1511] The Claimants' attempts to portray Mr. Seda as the victim of a harassment scheme by the Colombian State that affected Mr. Seda's reputation is, however, based on sheer misrepresentations and unsubstantiated allegations. Not a single piece of evidence was provided by the Claimants in support of their claim that Mr. Seda is entitled to moral damages, let alone that the amount claimed (*i.e.*, 10 percent of the total damages claimed by Mr. Seda) is justified. On this basis alone, the claim for moral damages should be rejected.

958. For the sake of completeness, the Respondent further elaborates on each of the arguments to reject an award on moral damages in the terms requested by the Claimants.

959. *First*, other than rehashing that "Mr. Seda's reputation was ruined", the Claimants have not provided any reliable evidence in support of their allegations, let alone of the causal link between the alleged damage to Mr. Seda's reputation and the Respondent's actions.[1512] Much on the contrary, it is undisputed that the Asset Forfeiture Proceedings were initiated against the Meritage Lot only and not against any of the Claimants.[1513] It is also uncontested that the Respondent did not adopt any measures against any of the Other Projects, and that the Charlee Hotel owned by Mr. Seda remains operative and profitable.

960. Neither are the alleged extorsions and threats to Mr. Seda attributable to the Respondent. In fact, it has been demonstrated that once Mr. Seda reported the alleged threats by third parties against him and his family, the Attorney General's Office took immediate action, including issuing

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1507 *See* Respondent's Counter Memorial, ¶¶ 632-633.

1508 *See* Respondent's Counter Memorial, ¶¶ 634-635.

1509 *See* Respondent's Counter Memorial, ¶¶ 636-640.

1510 *See* Respondent's Counter Memorial, ¶ 641.

1511 *See* Claimants' Reply, ¶¶ 452-458.

1512 *See above*, Section VI.A.

1513 *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 20 May 2003 (**Exhibit CL-32**), ¶ 198.

an order to adopt measures for the protection of Mr. Seda and his family and investigating the alleged threats and attacks against Mr. Seda and his daughter.

961. [redacted]

962. The Claimants' paranoia goes as far as to claim that "Colombia has retaliated against [Mr. Seda] for filing this Arbitration by among other things, declining to renew my investor visa".[1517] This allegation, which follows the Claimants' pattern of making flamboyant allegations without providing any evidence (other than Mr. Seda's self-serving statements), is simply wrong. As explained above, [redacted] Against this background, the Claimants' allegation that the Respondent "recently declined to extend [Mr. Seda's] investor visa on spurious grounds" is disingenuous.

963. *Second*, as demonstrated in the Counter Memorial, investment tribunals have widely accepted that moral damages may only be awarded in exceptional circumstances where the State's conduct and the harm are grave and substantial.[1519] As aptly summarized by the *OI v. Venezuela*

1514 Claimants' Reply, ¶ 452.

1515 [redacted]

1516 [redacted]

1517 Mr. Seda Second Witness Statement, ¶ 46. *See also* Claimants' Reply, ¶ 452. The Claimants further refer to "a spurious criminal investigation" launched against Mr. Seda, without any further explanation or support whatsoever.

1518 *See above,* Section III.i.

1519 *See* Respondent's Counter Memorial, ¶¶ 637-639. *See also Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic*, ICSID Case No. ARB/15/3, Decision on Jurisdiction, Liability and Certain Aspects of Quantum, 25 June 2018 (**Exhibit RL-189**), ¶ 1216; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011 (**Exhibit RL-173**) (the claimant requested moral damages on the grounds that its local and international image, production, and solvency had been damaged after the tax

tribunal (fully in line with the findings in *Lemire v. Ukraine* and the many other tribunals referred to in the Counter Memorial):

> As a general rule, a party injured by the wrongful acts of a State cannot be awarded additional compensation for moral damages, unless it can prove the following:
>
> that the State's actions implied physical threat, illegal detention, or other ill - treatments in contravention of the norms according to which civilized nations are expected to act;
>
> and that such situation has caused serious damage to its physical health, grave mental suffering or a substantial loss of reputation.[1520]

964. The Claimants do not seem to dispute the standard. Yet, they claim damages for Mr. Seda's alleged reputational damage, "emotional and physical duress" and "a complete evisceration of his professional opportunities".[1521] The alleged damages are not only fully unsubstantiated (particularly surprising is the new and unsubstantiated claim – made in passing – that the Colombian State subjected Mr. Seda to "physical duress"), but in any event do not reach the high threshold to award moral damages,[1522] as the Respondent's actions did not imply "physical

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authorities froze the assets of the investment. The tribunal recognized that the actions of the State had caused anxiety to the investor, but decided that they had not reached the level of gravity and intensity required to conclude that exceptional circumstances existed. In particular, the tribunal noted that there was no physical threat or evidence of mental harm to the claimant); *Marco Gavazzi and Stefano Gavazzi v. Romania,* ICSID Case No. ARB/12/25, Award (Excerpts), 18 April 2017, ¶¶ 289, 292 ("Moral damages may be awarded in investment arbitration only in exceptional circumstances […] provided that - The State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act; - The State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and - Both cause and effect are grave or substantial").

1520 *OI European Group B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 (**Exhibit CL-099**), ¶ 910 (emphasis added). Confirming the very high threshold to award moral damages, the tribunal further noted that "The Full Physical Safety and Protection and Fair and Equitable Treatment standards have fewer requirements than those necessary in order to grant moral damages compensation". *See* ¶ 913.

1521 *See* Claimants' Reply, ¶ 456.

1522 *See Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic*, ICSID Case No. ARB/15/3, Decision on Jurisdiction, Liability and Certain Aspects of Quantum, 25 June 2018 (**Exhibit RL-189**), ¶ 1216 ("The Tribunal considers the remedy of moral damages to be one that may be granted only in exceptional circumstances. Given the exceptional nature of the remedy, the Tribunal considers the threshold for granting moral damages to be a high one. The State's conduct must be egregious and contrary to the norms according to which States are expected to act, and must have caused physical threat or harm to the investor or damage to the investor's reputation and credibility").

threat, illegal detention, or other ill-treatments in contravention of the norms according to which civilized nations are expected to act".[1523]

965. *Third*, it has been demonstrated that an award on moral damages would result, *de facto*, in Mr. Seda being compensated twice for the same loss, in plain breach of the customary international law standard of compensation. The Claimants' allegation that the Respondent "conflates two different heads of damages",[1524] is particularly striking given the Claimants' acknowledgment that moral damages (including "stress and anxiety the claimant suffered as a result of the respondent's actions") may be compensated by the award on material damages, as held by the tribunal in *Lemire v. Ukraine*.[1525]

966. *Fourth*, the Claimants claim that "their request for moral damages in the amount of 10 percent of the total damages owed in this case,[1526] is justified, proportionate and reasonable".[1527] Despite bearing the burden of proof with respect to their claims to damages,[1528] the Claimants rely solely on one single case, *Al Kharafi v. Libya*, in which the tribunal awarded USD 30 million in moral damages. The case, however, is inapposite as the law applicable in that case was Libyan Law and the Unified Agreement for the Investment of Arab Capital in the Arab States.[1529] Conversely, as

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1523 *OI European Group B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 (**Exhibit CL-099**), ¶ 910.

1524 Claimants' Reply, ¶ 454.

1525 Claimants' Reply, ¶ 455. *See also* Claimants' Reply, ¶ 455. *See also Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**Exhibit RL-47**), ¶ 344.

1526 The Respondent notes that in the Request for Relief, the claim for moral damages is in the amount equivalent to "10 percent of the total damages owed to [Mr. Seda]".

1527 Claimants' Reply, ¶ 458.

1528 *See*, *e.g.*, *Víctor Pey Casado and President Allende Foundation v. Republic of Chile,* ICSID Case No. ARB/98/2, (Resubmission) Award, 13 September 2016 (**Exhibit RL-185**), ¶ 243 ("a claim to damages of a moral character does not escape the burden of proof resting on a claimant"); *Sterling Merchant Finance Ltd v. Government of the Republic of Cabo Verde,* PCA Case No. 2014-33, Final Award, 27 November 2015 (**Exhibit RL-182**), ¶¶ 206-207 (noting that the claimant bears the burden of proof of the alleged moral damages, the amount and the causal link between the alleged injury and the unlawful conduct attributable to the respondent State); *Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic*, ICSID Case No. ARB/15/3, Decision on Jurisdiction, Liability and Certain Aspects of Quantum, 25 June 2018 (**Exhibit RL-189**), ¶¶ 1215-1217; *The Rompetrol Group N.V. v. Romania,* ICSID Case No. ARB/06/3, Award, 6 May 2013 (**Exhibit CL-089**), ¶ 292; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt***,** ICSID Case No. ARB/05/15, Award, 1 June 2009 (**Exhibit CL-066**), ¶ 547.

1529 *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. The Government of the State of Libya et al.*, Final Arbitral Award, 22 March 2013 (**Exhibit CL-088**), p. 3. While irrelevant to the matters in dispute, the

demonstrated in the Counter Memorial, tribunals such as in *Desert Line v. Yemen* and *von Pezold v. Zimbabwe* have awarded around USD 1 million in moral damages.[1530]

967. The Claimant's claim is particularly ludicrous when compared to the amounts awarded by the Interamerican Court of Human Rights (the "IACHR") to the victims of serious human rights violations, including the rights to life, humane treatment, fair trial and freedom of thought and expression. For example, in *Ituango Massacres Case v. Colombia*, the IACHR awarded just over USD 1.25 million (*i.e.* around 2% of the moral damages claimed by Mr. Seda) in connection with the execution of 19 adults, one minor, four children and 17 people who were forced to move their cattle and lost their property. Just USD 2.500 was awarded per each executed child, and USD 6.000 to those whose property was destroyed.[1531] In *Bedoya Lima and Others v. Colombia*, a total of USD 110.000 (*i.e.* less than 0.5% of the moral damages claimed by Mr. Seda) was awarded for the violations of the right to life, humane treatment and freedom of thought and expression against two victims.[1532]

968. The amount claimed by the Claimants is not only excessive,[1533] but also arbitrary, as it is clear from analyzing the Claimants' own requests. In the Memorial, the Claimants claimed "10 percent of the in total damages owed to [Mr. Seda]", *i.e.* USD 29.06 million. In the Reply (where, as explained, the Claimants revised their claim downwards by over USD 50 million not including moral damages), they state that a claim amounting to "10 percent of the total damages owed in this case", *i.e.* USD 25.58 million, is justified and proportional, but still in the request for relief they claim only "10 percent of the total damages owed to Mr. Seda", *i.e.* USD 23.92 million (this is, more than USD 5 million less than claimed in the Memorial).

969. In sum, while it is undisputed that the Tribunal has discretion to determine whether the Claimants are entitled to moral damages and in what amount,[1534] the Respondent respectfully submit that the Claimants have not shown that the exceptional circumstances to award moral

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Respondent notes that contrary to the Claimants' representation, the decision in *von Pezold v. Zimbabwe* is more recent than the decision in *Al Kharafi v. Libya*. *See* Claimants' Reply, ¶ 457.

1530 *See* Respondent's Counter Memorial, ¶ 641.

1531 Case of the *Ituango Massacres Case v. Colombia*, IACHR, Judgment, 1 July 2006 (**Exhibit RL-165**).

1532 *Case of Bedoya Lima y Otra v. Colombia*, IACHR, Judgment, 26 August 2012 (**Exhibit RL-175**).

1533 *See* Respondent's Counter Memorial, ¶ 641.

1534 *See* Claimants' Reply, ¶ 457.

damages have been met in this case, let alone that the almost USD 30 million claimed in moral damages are justified.

G. THE CLAIMANTS ARE NOT ENTITLED TO COSTS OR EXPENSES

970. The Claimants seek an award of their costs and expenses, including "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".[1535]

971. As demonstrated in the Counter Memorial and above, the Claimants have advanced unmeritorious, premature and abusive claims that have caused the Respondent to incur considerable and unnecessary costs to defend its rights in the Arbitration. One of the Claimants' many unmeritorious claims is, precisely, that Colombia made "needless applications to the Tribunal" and that Colombia's document production was "deficient".[1536]

972. Contrary to the Claimants' baseless allegations, the Respondent has made its best efforts to find responsive documents and, to the extent allowed under Colombian law, produce them to the Claimants. In fact, following the Claimants' requests, the *Agencia Nacional de Defensa Jurídica del Estado* has sent almost 60 information requests to over 20 State agencies, including the Attorney General's Office, *Sociedad de Activos Especiales*, the Colombian Congress, Colombian Migration Authority, Bogotá Superior Tribunal, Constitutional Court, National Army and Superior Judiciary Council.

973. Therefore, not only are the Claimants not entitled to any costs or expenses, but they should be directed to pay the entirety of the Respondent's costs (including legal fees and experts' fees), as well as the costs of the arbitration.

VII. THE CLAIMANTS' REQUEST FOR RELIEF

974. For the foregoing reasons, the Respondents respectfully requests that the Arbitral Tribunal issue an Award in the following terms:

1535 Claimants' Reply, ¶ 459.

1536 Claimants' Reply, ¶ 459.

a) Declare that, pursuant to Article 22.2(b) of the US-Colombia TPA, it manifestly lacks jurisdiction over the present dispute;

b) In the alternative, declare that the exception of essential security set forth in Article 22.2(b) of the US-Colombia TPA applies and the Republic of Colombia has not breached its treaty obligations;

c) In the alternative, declare that it lacks jurisdiction over the Claimants' claims for the reasons set forth in Section IV of this Rejoinder;

d) In the alternative, dismiss the entirety of the Claimants claims on the merits;

e) In the alternative, declare that the Claimants are not entitled to the damages they seek or to any damages;

f) Order the Claimants to separately and together pay to the Republic of Colombia all costs incurred in connection with this arbitration, including without limitation the costs of the arbitrators and ICSID, as well as the legal and other expenses incurred by the Respondent including the fees of its legal counsel, experts and consultants on a full indemnity basis, plus interest thereon at a reasonable rate; and

g) Grant such relief against the Claimants as the Tribunal deems fit and proper.

975. The Republic of Colombia reserves its right to amend and supplement its pleadings and request for relief.

16 February 2022

Respectfully submitted on behalf of the Respondent

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GAILLARD BANIFATEMI SHELBAYA DISPUTES