INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/19/6

BETWEEN

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

Claimants

and

THE REPUBLIC OF COLOMBIA

Respondent

CLAIMANTS' POST HEARING BRIEF

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21 July 2022

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I. INTRODUCTION

1. Angel Samuel Seda, JTE International Investments, LLC, Jonathan M. Foley, Stephen J. Bobeck, Brian Hass, Monte G. Adcock, Justin T. Enbody, Justin T. Caruso, and The Boston Enterprises Trust (together, "Claimants") submit this Post Hearing Brief ("Claimants' PHB") in respect of their claims against the Republic of Colombia ("Colombia" or "Respondent"), arising from Colombia's expropriation and unlawful treatment of the Claimants' investments. Claimants submit this PHB in accordance with Procedural Order No. 11, dated 15 July 2022, and pursuant to the International Centre for Settlement of Investment Disputes ("ICSID") Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules").

2. The Claimants' PHB is submitted with:

   (a) An Updated Table of Select Abbreviations and Defined Terms;

   (b) An Updated Dramatis Personae; and

   (c) A consolidated Post-Hearing Brief Index.

3. For ease of reference, the Claimants adopt the same definitions contained in their Memorial dated 15 June 2020 (the "Memorial") and Reply dated 19 September 2021 (the "Reply"), including the Table of Select Abbreviations and Defined Terms submitted therewith. To the extent not expressly admitted herein, Claimants do not accept the allegations made by the Respondent in its Counter Memorial dated 16 November 2020 (the "Counter Memorial"), its Rejoinder submitted on 16 February 2022 ("Rejoinder") and during the oral hearing that took place between 2 May and 6 May 2022 ("Hearing"). Claimants reserve the right to expand upon their arguments herein in response to Colombia's Post-Hearing Brief due on 25 August 2022.

II. EXECUTIVE SUMMARY

4. Fifteen years ago, in 2007, Mr. Angel Seda, an American investor, moved to Colombia, with plans to develop a luxury lifestyle brand real estate company in the country.[1] Mr. Seda saw tremendous beauty and untapped opportunity that he intended to harness as Colombia emerged from its decades-long conflict and began to see higher levels of security and economic prosperity.[2] With a burgeoning middle class and plummeting crime rates, as well as plentiful

[1] *See* Memorial, ¶ 32; Reply, ¶ 27(a); Seda 1 WS, ¶¶ 7-11; **Day 2 Tr.** 441:11-14 (Seda Cross).

[2] *See* Memorial, ¶ 33; Reply, ¶ 27(a); Seda 1 WS, ¶¶ 7-11; **Day 2 Tr.** 445:8-9 (Seda Cross) ("*I thought I was being part of something, of the rebuilding of a country.*"); **Day 5 Tr.** 1249:6-12 (JLL Opening) ("*And I think that, you know, this because there was trust in the macroeconomic stability, there was trust in the security, the peace accord*

natural beauty, Mr. Seda chose the city of Medellín as his base of operations.[3] His first venture, The Charlee, a lifestyle hotel in the center of the city, was instantly and phenomenally successful.[4] It remains to this day a wildly popular destination for tourists and locals alike, and indeed many of Claimants' counsel and experts have personally enjoyed stays at the hotel.[5]

5. Mr. Seda sought to build on his success. He attracted more foreign investment, including from the Luxé Claimants in this case,[6] and embarked on his second project in Colombia, Luxé by The Charlee ("Luxé"), a multi-phase luxury resort and residential complex, which was equally successful and quickly sold out.[7] In addition to being popular, his projects received wide acclaim from some of the most well-respected travel reporters, such as the New York Times[8] and Conde Nast.[9]

6. Mr. Seda's third venture was a landmark mixed-use community project called the "Meritage Project." Situated in the Medellín suburbs, the Project was precisely the type of investment Colombia wished to attract with instruments like the TPA: The Project would have consisted of 430 residential apartments, single family homes and commercial storefronts, anchored by a luxury hotel with long-term stay suites.[10] Once operational, it would have employed 390 people, and its construction and development alone provided jobs for approximately 570 Colombians.[11]

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looked like it was imminent, and there was a very targeted fiscal policy in Colombia to try to stimulate growth of the tourism and hospitality industry.").

3 *See* Memorial, ¶ 33; Reply, ¶ 27(a); Seda 1 WS, ¶¶ 7-11.

4 Memorial, ¶¶ 35-55; Reply, ¶ 27(c); Seda 1 WS, ¶¶ 15-20.

5 **Day 1 Tr.** 14:14-17 (Claimants' Opening) ("*I have stayed* [at the Charlee] *myself. I have been to the roof deck that you see on the bottom left, which has a beautiful view of all of Medellín, which is in a valley.*");

6 Justin Tate Caruso, Stephen John Bobeck, Brian Hass, Monte Glenn Adcock, and Justin Timonthy Enbody are citizens of the United States who have made an investment in Colombia through shareholdings in Luxé SAS. *See* Memorial, ¶ 340.

7 *See* Memorial, ¶ 46; Counter Memorial, ¶ 25; Reply, ¶ 8(c).

8 *See* **Exhibit C-141**, Nell McShane Wulfhart, *36 hours in Medellín*, Colombia, THE NEW YORK TIMES, 13 May 2015.

9 **Exhibit C-016bis**, *Hot List 2012*: *Best New Hotels Under $300*, CONDE NAST TRAVEL, 16 April 2012, https://www.cntraveler.com/galleries/2012-04-16/best-affordable-new-luxury-hotels-deals-hot-list-2012, p. 0002.

10 Seda 1 WS, ¶ 57.

11 *See* Memorial, ¶ 7.

7. However, on 3 August 2016, a Colombian prosecutor, Ms. Alejandra Ardila Polo, seized the land on which the Meritage Project was being built and shut down development of the Meritage Project.[12] [redacted] His claims were false. There was no kidnapping[14] and he was not a prior owner of the plot of land, but a legal representative of a company that owned a precursor of the Meritage Property over twenty years prior, and which had since changed both its name and legal representative, thereby effectively hiding López Vanegas's association from the chain of title.[15] But Ms. Ardila took his accusations at face value, two years after he made them. And despite having an affirmative obligation to "*safeguard*" good faith third parties who might be affected by her actions,[16] she seized the Meritage Property without so much as considering whether the current owners or developers, including Claimants' investment vehicle, Newport, had acted in good faith.

8. In fact, Newport had acted in good faith when it acquired the Property. It had vetted the company from which it was buying the Property, La Palma Argentina.[17] It had also engaged the nation's leading fiduciary, Corficolombiana, and hired the firm recommended by Corficolombiana to conduct a title study.[18] While the title study went back 10 years, as was customary at the time,[19] Corficolombiana pulled together a comprehensive list of all the individuals and legal entities that had owned the Meritage Property or its precursor dating back

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12 *See* **Exhibit C-165**, Certificate of Seizure of the Meritage Property, 3 August 2016; López Montoya WS, ¶¶ 26-35.

13 *See* **Day 3 Tr.** 848:15-20 (Ardila Cross); [redacted]

14 *See, e.g.*, **Reply**, ¶ 27(mm).

15 *See, e.g.*, **Reply**, ¶ 27(pp).

16 **Exhibit C-003bis**, Law No. 1708, art. 87.

17 *See* **Day 2 Tr.** 455:3-5 (Seda Cross) (Colombian counsel noting that Otero & Palacio "*also concluded the corporate study of the seller, La Palma Argentina, finding no issues*.").

18 *See* Seda 1 WS, ¶ 49.

19 **Exhibit C-219**, Testimony of Margarita María Betancourt Guzmán in Pinturas Prime Arbitration, 18 September 2018, p. 13 ("*QUESTION: If you know or have evidence thereof, who determined that the title study would go back 10 years? ANSWER: The title study goes back 10 years because the title study is conducted for the civil side of things* [. . .] *Since the statute of limitations on civil actions runs out after 10 years, that's why we go back 10 years. QUESTION: But you didn't answer my question: Who instructed or determined that the title study would go back 10 years? ANSWER: In the FIDUCIARY we go back 10 years.* [. . .] *COUNSEL FOR THE RESPONDENT RESUMES HIS EXAMINATION. QUESTION:* ***In other words, that title study was satisfactory for the FIDUCIARY? ANSWER: Yes, it was complete*** [. . .]."); **Exhibit C-216**, Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018, p. 3 ("*the title study is done going back 10 years, considering the statute of limitations provided for in Colombian law for titles of purchase*.").

to 1955 and sent that list to the Attorney General's Office to verify that none of the previous owners had been connected with any criminal activity.[20] Because López Vanegas was not a prior owner of the Property, he was not on the list. He was, rather, a legal representative of an entity that had 20 years prior owned the Meritage Property's parent but that, in 1997, had changed its name and legal representative.[21] The Attorney General's Office received this list from Corficolombiana and certified that none of the individuals or legal entities on that list had any known criminal activity associated with them.[22] It was only after Corficolombiana and Newport received this document that they established the trusts, in October 2013, that would enable the development of the Meritage Project to proceed. But Ms. Ardila considered none of this when she seized the Meritage Property.[23] [redacted]

9. Even after Ms. Ardila shut down a multi-million dollar development, she and then her successor on the file, Mr. Caro, failed to assess whether Newport had acted in good faith and accordingly abjectly failed in their responsibility to uphold the rights of good faith third parties. At the Hearing, they both shirked this responsibility, claiming that the courts would resolve this so they need not have bothered.[25] But the Asset Forfeiture Law expressly ascribes specific responsibilities to the Prosecutors to "*identify, locate, gather, and file the elements of proof*" on whether affected parties had acted in good faith.[26] Yet neither Ms. Ardila nor Mr. Caro did this in any serious manner, instead, applying an impossible—and legally incorrect—standard that would require property buyers to somehow be aware of facts the Government only became aware of after years of investigation using the powers of the State.[27] As a result, the Asset

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

21 *See* Reply, ¶ 52; Memorial, Appendix F.

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

23 *See* **Day 3 Tr.** 848:6-852:6 (Ardila Cross).

24 [redacted]

25 *See* **Day 4. Tr.** 977:17-20 (Caro Cross) ("*But let me reiterate, I don't decide that right now. That will be decided upon by a judge in an Asset Forfeiture Trial.*").

26 **Exhibit C-003bis**, Law No. 1708, art. 152.

27 *See* **Day 3 Tr.** 938:17-22 (Caro Cross) ("*Q. I ask one more time. Show me in this document where you do the analysis of Newport's good-faith status. A. The thing is the analysis to establish whether it is a good-faith third*

Forfeiture Proceedings and the seizure of the Meritage Project has continued now for over six years, completely destroying the Project and any value associated with it.

10. Egregiously, while ignoring Newport's good faith, the Attorney General's Office has admittedly failed to seize any of the other properties owned by Colombians with precisely the same "*defects*" that it alleges tainted the Meritage Project. These include, most remarkably, the Meritage's Sister Property, which shares almost the same title history as the Meritage Property, and certainly all the alleged "*defects*" as the Meritage Property. Likewise none of the properties belonging to the alleged criminals and front men involved in prior transfers of the Meritage Property have been seized, nor has Colombia seized any of their proceeds from their alleged transfers of the Meritage Property. [redacted]

11. [redacted]

party or not was done in respect of the property."); *compare* Ardila WS, ¶ 48 ("*Subsequently, through an order of 17 August of the 2017, the same Second Specialized Judge of Asset Forfeiture of Antioquia, who was in charge of the trial, decided not to recognize Newport S.A.S. as an affected party,* ***based on the reasons contained in the file.***") with **Day 3 Tr.** 779:15-19 (Ardila Direct) ("*Q. Ms. Ardila,* [. . .] *did you include Newport as an affected party? A. Of course.*").

28 [redacted]

29 [redacted]

30 [redacted]

31 [redacted]

[redacted]

Whether Colombia's refusal to prosecute other similar properties was a mistake or intentional, it was discriminatory, as the other properties and proceeds of crimes are largely owned by Colombians and have clearly been treated more favorably than the Meritage Project, which was majority-owned and fully developed by U.S. nationals.

12. In addition to being discriminatory, the Attorney General's Office's targeting of the Meritage Claimants, as opposed to the proceeds of those it alleges had unlawfully transferred the lot, was arbitrary and unreasonable. Fundamentally, Colombia's actions cannot have served the public purpose of the Asset Forfeiture Law, which, according to Colombia, is to "*fight organized crime*."[34] No members of organized crime gangs have been touched in relation to this case. Colombia has not seized their property as a result of the Asset Forfeiture Proceedings. The only ones who have lost their investments are those who invested in the Meritage Project without even having had their good faith assessed.

13. It has since come to light why Ms. Ardila was so eager to proceed against the Meritage Project but not other similar properties, despite having the evidence right in front of her. Even though López Vanegas had filed a complaint with the Attorney General's Office in 2014, there was little movement on the file until April 2016. Then, on 7 April 2016, López Vanegas reinitiated his attempts to extort Mr. Seda.[35] The very next day, Ms. Ardila was assigned to the case by

[redacted]

32 [redacted]

33 [redacted]

34 Counter Memorial, ¶ 428. *See also* Rejoinder, ¶ 608 ("*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.*"). Colombia's Opening, slide 189. **Day 1 Tr.** 308:4-309:12 (Colombia's Opening).

35 *See* Seda 1 WS, ¶ 75; *see also* **Exhibit C-151**, Letter from Víctor Mosquera Marín to Angel Samuel Seda, 7 April 2016.

the then Head of the Asset Forfeiture Unit, Ms. Malagón, who simply disregarded the already existing investigation assigned to a different prosecutor.[36] Over the next several months, López Vanegas, through his representatives, asked Mr. Seda for a payout, bragging about their connections with and influence over Ms. Malagón and Ms. Ardila. During this time, Mr. Seda was approached several times by individuals claiming to represent the Attorney General's Office, asking him to pay to make the case go away. Mr. Seda persistently refused these demands. Colombia did not challenge Mr. Seda's testimony on this during the Hearing. Three days after Mr. Seda finally and forcefully rejected López Vanegas's demands, Ms. Ardila showed up at the Meritage Property with a seizure order. [redacted]

14. [redacted]

[36] **Exhibit C-153**, Attorney General's Office Resolution No. 125, 8 April 2016; *see also* Memorial, ¶ 120.

[37] [redacted].

[38] [redacted]

[39] [redacted]

[40] [redacted]

[redacted]

15. Colombia's other strategy to attempt to shield itself from liability has been to invoke, for the first time with its Rejoinder, Article 22.2(b) of the TPA. Colombia now claims that its actions are being taken to protect a security interest "*to fight organized crime*" and therefore the Tribunal must divest itself of jurisdiction and/or refuse to find Colombia liable for its actions. That is of course not what the TPA provides. When interpreted properly under the VLCT, Article 22.2(b) permits Colombia to maintain its measures if it considers them necessary for its essential security but the provision does not automatically extinguish this Tribunal's jurisdiction or Colombia's liability to pay compensation. And moreover Colombia accepts that its essential security interest did not exist at the time it undertook the Asset Forfeiture Proceedings, thus under its own position, Article 22.2(b) does not apply here. Further, Colombia's late-stage invocation of an exception that it alleges has such far-reaching consequences was not made in good faith as Colombia invented the essential security purpose for this arbitration only once it became clear that its other defenses were likely to fail. In any event, Colombia's stated interest to fight organized crime was in no way served by the Asset Forfeiture Proceedings here.

41 [redacted]

42 [redacted]

43 [redacted]

44 [redacted]

16. While the Asset Forfeiture Proceedings now continue (indefinitely) in Colombian courts, Claimants' investment has been irrevocably lost. Moreover, as the Asset Forfeiture Proceedings have tainted all those associated with the Meritage Project, including most notably Mr. Seda, Claimants' other projects also came to a grinding halt. Most notably, the Luxé Project, where the hotel's construction was over 70% complete at the time of the measures, lost its source of financing as banks were no longer willing to work with Mr. Seda. His other projects that were in development too lost financing, investment, and other business support. Claimants are accordingly owed damages in excess of the amount of USD 255.8 million.[45] Claimants' industry and damages experts have provided a reasonable, market-based approach to calculate the damages owed to Claimants. On the other hand, Colombia's damages expert acknowledged little expertise in hospitality and real estate and has never even stepped foot in Colombia, and Colombia's industry experts' half-baked, unsupported and cherry-picked survey is of little help in these proceedings.

17. In sum, Colombia has unquestionably breached its obligations under the TPA for which Claimants are owed compensation. Claimants' PHB proceeds in the following parts:

(a) Section I outlines Colombia's breaches of the TPA;

(b) Section II establishes the compensation Claimants are owed;

(c) Section III confirms that the Tribunal has jurisdiction over the dispute;

(d) Section IV addressed Colombia's invocation of Article 22.2(b); and

(e) Section V states Claimants' requests for relief.

III. COLOMBIA HAS BREACHED ITS OBLIGATIONS UNDER THE TPA

18. Colombia's actions have breached its obligations under the TPA to lawfully expropriate, and accord fair and equitable treatment ("FET"), national treatment ("NT") and full protection and security ("FPS"). Below Claimants set out how Colombia has:

(a) Unlawfully expropriated the Meritage Property without compensation;

(b) Discriminated against Claimants and Claimants' investment in breach of the TPA's national treatment, FET and expropriation provisions;

(c) Initiated and conducted the Asset Forfeiture Proceedings in an arbitrary and unreasonable manner, lacking due process, in breach of the TPA's FET and expropriation obligations;

[45] *See* BRG Opening, slide 9.

(d) Initiated and conducted the Asset Forfeiture Proceedings unconnected to any legitimate public purpose, thereby breaching the TPA's FET and expropriation obligations;

(e) Breached a specific representation in its Certificate of No Criminal Activity that gave rise to Claimants' good faith status, violating the TPA's FET provision;

(f) Put Claimants' Other Projects "*in the line of fire*" in breach of the TPA's FET provision; and

(g) Breached the TPA's FPS obligations by bringing retaliatory and harassing measures against Mr. Seda.

III.A. Colombia Has Unlawfully Expropriated The Meritage Property Without Compensation

19. Colombia does not (and cannot) dispute that: *(i)* if the Tribunal finds Colombia has expropriated Claimants' investment, it must pay Claimants compensation or the expropriation will be unlawful;[46] and *(ii)* no compensation has been paid to Claimants. Rather its position is that "*no compensation was – or is – due to the Claimants*."[47] Below Claimants set out that *(i)* Colombia's actions have resulted in an indirect expropriation of Claimants' investments in the Meritage Project and *(ii)* the expropriation is unlawful.

III.A.1. The Asset Forfeiture Proceedings Have Indirectly Expropriated Claimants' Investment

20. Colombia's treatment of the Claimants' investment resulted in an indirect expropriation of *(i)* the Meritage Claimants' interest in the Newport shares; and *(ii)* Mr. Seda's interest in Royal Realty's management contract for the Meritage Project.[48]

21. Pursuant to Article 3(a) in Annex 10-B of the TPA, whether an action constitutes an indirect expropriation "*requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action* [. . .] *(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action*."[49] Colombia's actions here patently amounted to an indirect expropriation of the Meritage Claimants' investments.

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46 *See* **Exhibit CL-202**, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Interim Decision, 17 January 2017, ¶ 147 ("*The Tribunal stated that the requirement of compensation was one of the necessary conditions for an expropriation to be 'lawful'*").

47 Rejoinder, ¶ 570. *See also* Counter Memorial, ¶ 287.

48 Memorial, ¶¶ 369-80; Reply, ¶¶ 225-33; **Day 1 Tr.** 82:9-96:11 (Claimants' Opening); Claimants' Opening, slides 119-26.

49 **Exhibit CL-001**, TPA, Annex 10-B, art. 3(a).

22. First, the economic impact of the Asset Forfeiture Proceedings has been devastating. Newport's shares, whose value is inextricably linked to the success of the Meritage Project, have been rendered worthless.[50] Colombia incorrectly contends that an indirect expropriation requires total and permanent deprivation, and this has not occurred here because the Meritage Claimants could still, possibly, build the Meritage Project if the (thus far laggard) court proceedings recognize the illegality of the Asset Forfeiture Proceedings.[51] Colombia is legally incorrect as there is no requirement of permanence in the TPA and a number of tribunals have held that even a temporary deprivation can amount to an indirect expropriation.[52]

23. But in any case, the deprivation here is not "*temporary*" as there is no end in sight of when the Asset Forfeiture Proceedings might conclude and what their outcome will be. It has taken over six years for Newport even to be recognized as an affected party, let alone litigate its position and offer up evidence of good faith.[53] But even if the deprivation could be considered "*temporary*" because, according to Colombia, the Asset Forfeiture Proceedings are still ongoing, what Claimants stand to inherit is a dilapidated site, with construction that has been abandoned for over six years. It is worth absolutely nothing.

24. Moreover, the Asset Forfeiture Proceedings have made it impossible for Mr. Seda to seek financing or investments for his Projects. [redacted]. Thus, the idea that the Meritage Claimants could still complete the Meritage Project is fanciful at best. Even

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50 Memorial, ¶ 375; Reply, ¶ 226.

51 Counter Memorial, ¶¶ 354, 360; Rejoinder, ¶ 577.

52 **Exhibit CL-024,** *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶ 99 ("*Egypt has suggested that this deprivation was merely "ephemeral" and therefore did not constitute an expropriation. The Tribunal disagrees. Putting aside various other improper actions,* ***allowing an entity (over which Egypt could exert effective control) to seize and illegally possess the hotels for nearly a year is more than an ephemeral interference 'in the use of that property or with the enjoyment of its benefits***.'"); **Exhibit CL-043**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 313 ("*There is no specific time set under international law for measures constituting creeping expropriation to produce that effect*.")

53 *See* **Day 3 Tr.** 902:9-903:1 (Tribunal Question) ("*ARBITRATOR PONCET: Can you help me understand, when we have a seizure in August 2016, and the Court Decision in April 2022, that is 69 months later, if I compute rightly granting that a measure like this can be extremely useful, can be necessary, has all sorts of justifications, if there is polluted money or funding in the acquisition or in the trade involved, can you explain why, in your view it could have taken 69 months for a court to say that it was an interested person because it would seem that such a long waiting period is hardly compatible with due process or with what we call fair and equitable treatment in international terms. I'm very perplexed. Do you have an explanation?*").

the evidence Colombia relies on makes clear that while the project is "*technically*" feasible, it would essentially be necessary to raze the entire investment and start again from nil.[54]

The photographs below show for reference the state of the Project as of three years ago, making it clear that the Project is in no shape to simply be "*restarted*."

Exhibit C-269: Photographs of the Meritage Lot (July 2019)

26. Second, Newport and the Meritage Claimants held a reasonable, investment-back expectation that the Meritage Property would not be subject to asset forfeiture proceedings because: *(i)* Newport had acquired rights in the Meritage Property via the Sale Purchase Agreement with La Palma, and execution of the trust structure to develop the Project, after conducting more due diligence than was required under Colombian law;[55] and *(ii)* Newport had obtained the required

[54] Rejoinder, ¶ 578, *citing* [redacted] See also Memorial, ¶ 227; Reply, ¶ 227; Seda 1 WS, ¶ 152; López Montoya WS, ¶¶ 40, 43.

[55] *See infra* section III.D.2.b.

permits from Colombia, including construction and urbanization permits, to develop the Project.[56]

27. Third, it is undisputed that Colombia's conduct resulting in the indirect expropriation had the character of a government action. Colombia itself accepts that "*it is undisputed that the Asset Forfeiture Proceedings* [were] *a governmental action*" but nevertheless asserts that it was an application of general legislation that is exempt.[57] This is incorrect as the Precautionary Measures Resolution was a discretionary exercise of governmental action against the Meritage Property and not a measure of general application. Moreover, as discussed further below, the Asset Forfeiture Proceedings themselves were initiated in an irregular, discriminatory and improper manner in contravention of Colombian legislation.[58]

28. Accordingly, Colombia has indirectly expropriated the Meritage Project under the terms of the TPA.

III.A.2. Colombia's Indirect Expropriation Is Unlawful

29. Article 10.7.1 of the TPA provides that:

> *No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation* [. . .] *except:*
>
> *(a) for a public purpose;*
>
> *(b) in a non-discriminatory manner;*
>
> *(c) on payment of prompt, adequate and effective compensation; and*
>
> *(d) in accordance with the due process of the law and Article 10.5*.

30. There is no dispute that Colombia has not offered any compensation for its actions. Colombia's indirect expropriation is therefore patently unlawful. Moreover, as discussed below, Colombia's actions were unconnected to any rational policy purpose (Section III.D), were undertaken in a discriminatory manner (Section III.B), and lacked due process (Section III.C).

31. Colombia's compensation obligation also does not disappear if this Tribunal concludes that its expropriatory conduct constitutes a regulatory measure taken for a public purpose.[59] The TPA

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[56] **Exhibit C-020bis**, Resolutions from Municipality of Envigado, 23 December 2014, 4 December 2015, 28 December 2016.

[57] Counter Memorial, ¶ 358.

[58] *See* Sections III.A, III.B, III.C, III.D, III.E, III.F, III.G.

[59] *See* Reply, ¶ 273; Memorial, ¶ 382.

expressly provides that an expropriation will only be lawful where it is done for a public purpose, is non-discriminatory, is done in accordance with due process and prompt, adequate and effective compensation is paid.[60] To find otherwise would "*creat*[e] *an unqualified exception from the duty of compensation for all regulatory measures*" and this "*would be hardly compatible with the language of non-expropriation provisions of investment treaties* [. . .] *which require compensation for direct and indirect expropriation even if the measures at issues are for a public, purpose, non-discriminatory and compatible with due process of law*."[61]

32. Here, even if Colombia can establish (which it cannot)[62] that it acted for a public purpose, in a non-discriminatory manner, and in accordance with due process, it nevertheless has failed to pay the Claimants compensation. Accordingly, Colombia has breached the TPA by failing to compensate Claimants for expropriating their investment in the Meritage Project.

33. Colombia argues that its actions are justified because they were taken in the exercise of its police powers. That is not correct. This is a limited exception pursuant to which only "*a* bona fide *exercise of the State's right to regulate is exempt from the duty to provide compensation*."[63] Host State conduct which is for a public purpose does not qualify for this defense—as compensation would still be required—and the State must discharge a higher threshold to excuse its compensation obligation.[64] Colombia's indirect expropriation cannot be characterized as a legitimate exercise of regulatory or police powers.[65] While the TPA recognizes that in limited circumstances the application of "*non-discriminatory regulatory actions*" that are "*applied to protect legitimate public welfare objectives*"[66] would not constitute an indirect expropriation (and would eliminate the need to pay compensation), this exception does not apply in this case. As a preliminary matter, Colombia's actions were discriminatory.[67]

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60 *See* **Exhibit CL-001bis**, TPA, arts. 10.7(1)(c) ("*No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ('expropriation'), except:* [. . .] *(c) on payment of prompt, adequate, and effective compensation*"); *see also* **Exhibit CL-001bis**, TPA, arts. 10.7(2)-(4) (outlining the method for calculating compensation).

61 **Exhibit CL-168**, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, ¶ 364. *See also* Reply, ¶ 273, n. 686.

62 *See supra* Sections III.A, III.B, III.C.

63 **Exhibit CL-168**, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, ¶ 364.

64 **Exhibit CL-168**, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, ¶¶ 364-65.

65 *See* Reply, ¶¶ 234-70; **Exhibit CD-1**, slides 129-35.

66 **Exhibit CL-001bis**, TPA, Annex 10-B.

67 *See infra* section III.B.

34. Moreover, Colombia's measures were not applied to protect a "*legitimate public welfare objective.*" In this regard, a host State's conduct is only "*exempt from the otherwise applicable duty of compensation*" in two circumstances: *(i)* "*measures of police powers that aim at enforcing existing regulations against the investor's own wrongdoings*"; and *(ii)* "*measures aimed at abating threats that the investor's activities may pose to public health, environment or public order*."[68] Neither of those circumstances apply in the case before the Tribunal.

(a) Colombia has expressly acknowledged that "*the Asset Forfeiture Proceedings were not initiated in connection with any 'wrongdoing' of which Mr. Seda was personally accused*"[69] and "*the Asset Forfeiture Proceedings were initiated and conducted against the Meritage Lot – and not against any of the Claimants*."[70] Accordingly, the initiation of the Asset Forfeiture Proceedings cannot be "*measures of police powers that aim at enforcing existing regulations against the investor's own wrongdoings*"[71] because no wrongdoing has been alleged against the Meritage Claimants.

(b) There is no allegation that development of the Meritage Property posed any threat to "*public order*" in Colombia. Colombia's nominated public welfare objective is to "*fight organized crime*."[72] However, any alleged irregularities related to prior owners of the Meritage Property began long before Mr. Seda began to develop the Project. Moreover, seizing the Project—as opposed to tracing the assets of those persons actually accused of participating in money laundering—cannot reasonably contribute to fighting organized crime in Colombia. The Meritage Project was instead contributing to economic growth (with approximately 570 people employed to construct the project and a further 390 people employed to operate the project once construction was complete),[73] and attendant social stability of a region that, as Colombia acknowledges,[74] had been long plagued by violence and narco-trafficking.

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68 **Exhibit CL-168**, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, ¶ 366.

69 Rejoinder, ¶ 342, n. 846. *See also* Counter Memorial, ¶¶ 565 ("*The Claimants acknowledge that 'Mr. Seda was not accused of any wrongdoing (and, indeed, he could not be.'*")), 632 ("*Yet the Claimants themselves acknowledge (as it could be otherwise, given the nature of the asset forfeiture proceedings under Colombian law) that Mr. Seda was not personally accused of any wrongdoing*"). *See also* **Day 1 Tr.** 182:22-183:5 ("*Another point that is important, these are not procedures that are criminal in nature. They are civil, so they are not charging the person because there's criminal conduct. They are charging the asset—doesn't matter who has it at that moment—because of the origin of the asset.*"), 228:12-16 ("*ARBITRATOR PONCET: What is the legal status of the Meritage Lot today from a criminal point of view? MS. HERRERA: There is no criminal question there, sir. It's a civil situation.*") (Colombia's Opening Statement); **Day 2 Tr.** 660:9-661:6 (confirming Mr. Seda has never been charged criminally in either Colombia or the United States) (Seda Redirect).

70 Rejoinder, ¶ 342, n. 846.

71 **Exhibit CL-168**, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, ¶ 366.

72 Colombia's Opening Statement, slide 189. *See also* **Day 1 Tr.** 180:4-14 ("*the only way that criminality can be effectively combated and that is targeting the kings, and that's the whole point of dealing with money-laundering and trying to target the kings to stop the incentive criminality. In fact, asset forfeiture proceedings and the Colombian asset forfeiture proceedings have been internationally recognized as an effective tool to fight criminal activities and to deprive criminal enterprises of their illicit assets.*") (Colombia's Opening Statement).

73 Seda 1 WS, ¶ 31.

74 Counter Memorial, ¶¶ 43-51; Rejoinder, ¶¶ 63-78; **Day 2 Tr.** 432:11-13 (Seda Cross) ("*was it paradise for the people living in Medellín and being killed by the drug gangs?*").

As Mr. Seda noted, the Claimants' investments were contributing to the "*rebuilding of the country*".[75]

35. In any event, the host State's conduct "*must be justified, meet the international standards of due process, and inter alia be proportional to the threat to public order to which it purports to respond*" in order to be covered by the public purpose exception.[76] As detailed below, Colombia's application of the Asset Forfeiture Law in connection with the Meritage Project was discriminatory,[77] arbitrary,[78] and lacked due process,[79] such that it cannot amount to a legitimate exercise of regulatory power and remains an indirect expropriation.

36. In sum, Colombia's indirect expropriation of the Meritage Project was not through a *bona fide* regulatory measure and therefore its compensation obligation remained extant. As a result, Colombia's admitted failure to pay the Meritage Claimants compensation for the indirect expropriation of the Meritage Project renders the expropriation unlawful and in breach of the TPA.

III.B. Colombia Has Seized Only The Meritage Property In A Discriminatory Manner

37. Colombia's expert, Dr. Reyes testified that "*it is not me … but the law*" that says that "*it is an obligation*" for the Attorney General's Office to initiate the action for asset forfeiture "*when the conditions set out in the law are met*."[80] Accordingly, if the Attorney General's Office unearthed grounds to pursue asset forfeiture against the Meritage Project and those same grounds existed in respect of other plots, sharing the same alleged faults, then the Attorney General's Office was "*obligated*" to pursue forfeiture proceedings against the other tainted plots. As the Hearing confirmed, Colombia did not do this.

38. Instead, Colombia has seized only the Meritage Property while scrupulously avoiding the seizure of any other properties owned by Colombians. This includes, most notably, the Sister

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75 **Day 2 Tr.** 445:8-10, 444:7-9 (Seda Cross) ("When you see a beautiful lake and you see a beautiful landscape, and you see improved security, you're seeing that there is some sort of disparity.").

76 **Exhibit CL-172**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award, 23 December 2019, ¶ 230. *See also* Colombia's Opening Statement, slide 188 (noting that "[n]*on-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives do not constitute expropriation*" where the actions are "*1. Legitimate public welfare objective 2. Due process of law 3. Non-discriminatory 4. Bona fide*").

77 *See infra* Section III.B.

78 *See infra* Section III.C.1.

79 *See infra* Sections III.C.2, III.C.3, III.C.4.

80 **Day 4 Tr.** 1214:6-7, 1216:14-15 (Reyes Cross). *See also* Reyes 1 Report, ¶ 8.

Property,[81] which shares a nearly identical history of title transfers with the Meritage Property, and includes all the supposedly fraudulent transfers that justified the Asset Forfeiture Proceedings. [redacted] Indeed, Colombia has refused to seize the assets of and proceeds collected by the suspected criminals and front men ("Alleged Criminals' Property") whose alleged connection with the Meritage Property's chain of title is what Colombia declares prompted it to initiate the Asset Forfeiture Proceedings.

39. While Colombia cannot (and does not) dispute its differential and singular seizure of the Meritage Property, Colombia claims that it was justified in treating Claimants or their investment differently. Colombia's *post hoc* and inconsistent explanations for why it has thus far failed to seize the Sister Property, [redacted] or other Alleged Criminals' Property demonstrates that Colombia has no reasonable justification. In any event, intent of discrimination is unnecessary to establish a breach of the TPA.

40. Below, we set out *(i)* the indisputable fact that Colombia treated the Meritage Property differently from all López Properties and Alleged Criminals' Property; and *(ii)* this differential treatment breaches Colombia's obligations to accord NT and FET, and to conduct lawful expropriations.

III.B.1. Colombia Has Not Seized The Sister Property, López Properties or Alleged Criminals' Properties

41. The Hearing confirmed that:

(a) Colombia has not initiated asset forfeiture proceedings against or otherwise seized the Sister Property;

(b) Colombia has not initiated asset forfeiture proceedings against or otherwise seized other López Properties; and

(c) Colombia has not initiated asset forfeiture proceedings against or otherwise seized other Alleged Criminals' Property.

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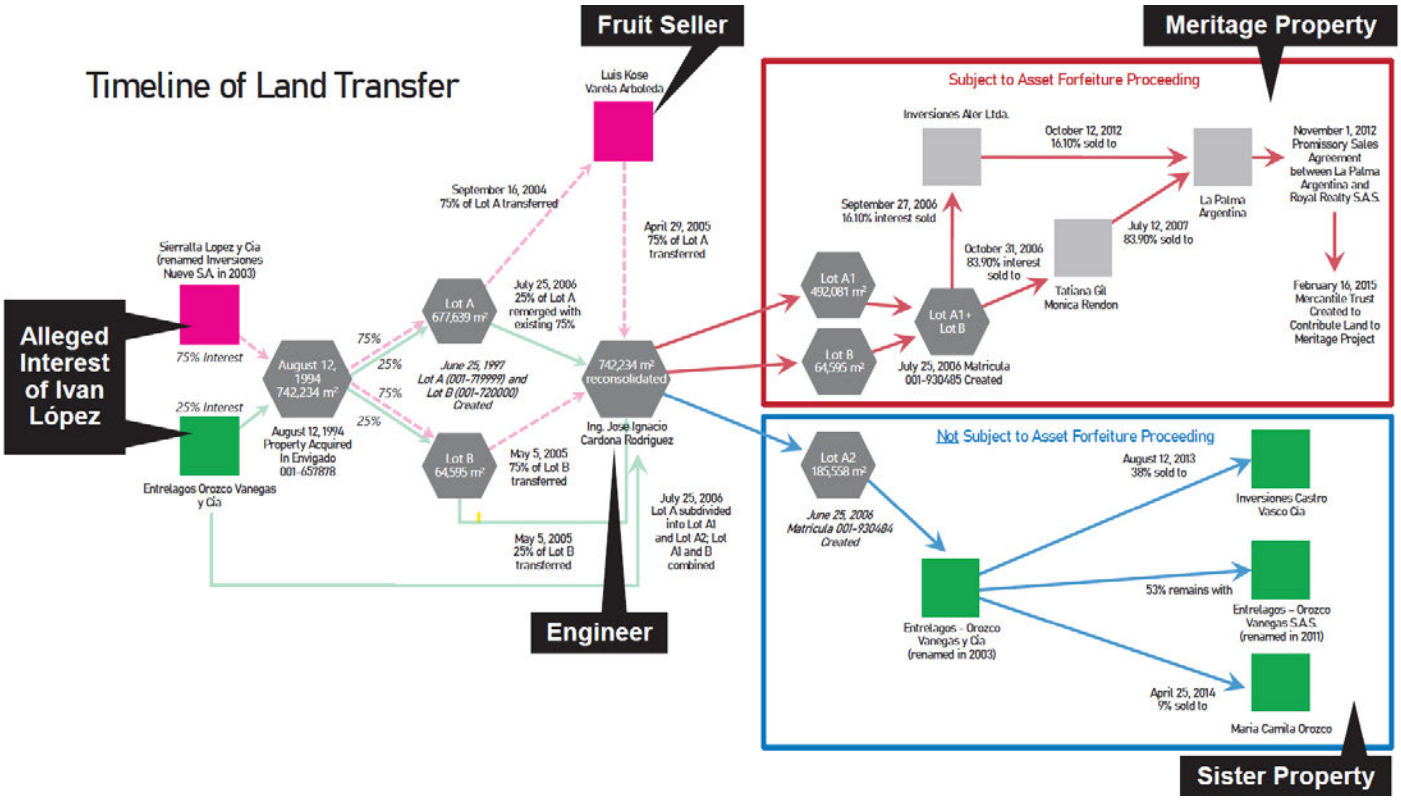
[81] The Sister Property is the parcel of land adjacent to the Meritage Property. The Meritage Property and the Sister Property were subdivided from the same parent lot.

[82] [redacted]

III.B.1.a. Sister Property

42. As is apparent from the history of the Meritage Property, its Sister Property, which was subdivided from the same parent property, suffers from precisely the same alleged "*defects*" in title that Colombia alleges infect the Meritage Property. The diagram below[83] shows the property history of the Meritage and its Sister Property, which Colombia accepts and adopts in its Opening.



43. The above diagram makes clear that the alleged "*defects*" in the Meritage Property, including association with López Vanegas,[84] involvement of the fruit seller,[85] and the consolidation by the Engineer,[86] equally impact Lot A2, the Sister Property, that is currently held by López Vanegas's family members. Indeed, Colombia adopted this diagram in its own opening to highlight that "*Mr. Cardona consolidated the lots and reparcelled the land*" after "*acquiring the land from Mr. Arboleda* [the "Fruit Seller"], *Inversiones Nueve S.A. (Sebastian López* [son of Ivan López Vanegas]*) and Entrelagos Orozco Vanegas S.A.S. (Jaime Orozco* [López

83 **Exhibit CD-1**, slide 106; Memorial, Appendix F.

84 **Exhibit CD-1**, slides 107-109.

85 Rejoinder, ¶¶ 112, 118, 121. *See also* **Exhibit CD-1**, slide 110.

86 Rejoinder, ¶ 683. *See also* **Exhibit CD-1**, slide 111.

Vanegas's half-brother]*) in April and May 2005*."[87] Colombia went on: "*you will see that there's several subdivisions back and forth, property consolidates, and yes, the properties go through the—through the same frontmen.*"[88] Accordingly, Colombian counsel acknowledged that the Sister Property and the Meritage Property share the same history and thus the same alleged "*defects*."

44. [redacted] During the Hearing, Mr. Caro also confirmed that no Asset Forfeiture Proceedings have been initiated against the Sister Property:[90]

> *Q. Yes, the one that's owned by the half-brother of Iván López. Have you taken--have you commenced Asset Forfeiture Proceedings against them, against that property?*
> *A. With respect to that property, no Asset Forfeiture Proceeding has been initiated in respect of that lot.*

45. Colombian counsel and Ms. Ardila declared that investigations had been initiated against the Sister Property but these declarations were inconsistent and contradictory and unsupported by any documentary evidence. [redacted]

87 Colombia's Opening, slide 36; Demonstrative Exhibit D.

88 **Day 1 Tr.** 196:3-6 (Colombia's Opening).

89 [redacted] *See also* **Day 1 Tr.** 197:17-20 (Arbitrator Poncet: "*I understood you to say that Lot A2 was actually put under attachment as well, or was it not? Ms. Herrera: No. No.*").

90 **Day 3 Tr.** 928:8-14 (Caro Cross).

91 [redacted]).

92 [redacted]).

93 [redacted]).

94 [redacted]

[redacted]

46. [redacted].

47. [redacted]. And as Colombia has proceeded irrationally and in a discriminatory fashion, its conduct breaches the TPA as discussed below.[99]

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95 [redacted].

96 [redacted]

97 [redacted]

98 [redacted]

99 *See infra* Sections III.B, III.D.

48. Colombia and its witnesses have attempted different justifications at various times as to why two properties with the same history and that passed through "*the same frontmen*"[100] have been treated very differently. None make sense.

49. Initially, Colombia declared that only the Meritage Property was seized because it had an ongoing development. This makes little sense—if the Attorney General's Office was aware that there were potentially a number of good-faith third parties who stood to lose substantial sums of money (as they eventually did), this should have given a reasonable Prosecutor pause. Under the Asset Forfeiture Law, they were required to "*seek and collect evidence*" of good faith.[101] So rather than act as an accelerant, the presence of a development should have cautioned Colombia to act with deliberation. But even if the presence of an active development justified the imposition of precautionary measures on the Meritage Property, it does not explain why the Sister Property still remains unseized, more than six years later. Indeed, no purported "*investigation*" was required to show that the Sister Property shared the exact same history as the Meritage Project. [redacted].

50. During the Hearing, Colombia introduced a novel attempt to justify its lack of action against the Sister Property. [redacted] That excuse also makes no sense because even if Mr. Orozco acquired his portion of the property in 1994 legally, he then consolidated his land with the tainted Property from López Vanegas. Accordingly, he owned 25% of an entire property

100 **Day 1 Tr.** 196:3-6 (Colombia's Opening).

101 **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0057 (listing its obligation to "[s]*eek and collect evidence that may lead to a reasonable inference that there has been an absence of good faith without fault*").

102 [redacted]

103 [redacted]

104 [redacted]

that López Vanegas is said to have had a 75% interest in. On Colombia's case, how the entire lot, including Orozco's interest in it, was not tainted at this stage is incoherent (to put it mildly). Under Colombia's reading of the Asset Forfeiture Proceedings, any transaction touching López Vanegas is tainted; accordingly, the 1994 purchase of the consolidated property tainted his brother-in-law's supposedly clean property from that point forward.

51. Even if one were to treat the splitting of the consolidated property in 1997 as a cleansing act for Lot B (which it is not), the lots were consolidated again between 2005-2006 through a series of transactions, including:

(a) The transfer of 75% of Lot A to the Fruit Seller who then sold it to the Engineer;

(b) The transfer of the remaining 25% of Lot A to the Engineer; and

(c) The transfer of Lot B over the course of three transactions to the Engineer.

52. [redacted]

53. [redacted]

105 [redacted]

106 [redacted]

107 [redacted]

[redacted]

54. Indeed, Entrelagos Orozco Vanegas y Cia, Mr. Orozco's company, repurchased a portion of Lot A from this consolidated tainted lot, (which had been co-owned with Sierralta López y Cia ("Sierralta")), which the diagram designates Lot A2. To be clear, Lot A2 did not originate from Mr. Orozco's plot; it originated from the plot he allegedly co-owned with López Vanegas was a legal representative. Accordingly, under Colombia's theory, Lot A2 was unquestionably tainted.

55. Thus, while faulting Corficolombiana for supposedly failing to Google search every legal representative of every company in the chain of title going back in time forever,[108] Colombia inexplicably turned a blind eye to Mr. Orozco's purchase of Lot A, which he had previously (according to Colombia) co-owned along with his half-brother. Colombia's efforts to distinguish the Meritage Property from the Sister Property are therefore completely in vain. There was no justifiable reason to give a Colombian property owner, Mr. Orozco, the benefit of the doubt, and fail to take any demonstrable action against the Sister Property, while seizing the property on which U.S. investors were developing the Meritage Project. There are few (if any) clearer cases of discrimination in investment treaty jurisprudence.

56. Finally, Colombia has previously (though not at the Hearing)[109] defended its differential treatment by claiming that it did not have enough resources to pursue every lead. Again, this excuse is farcical given that Colombia has known about the Sister Property and its involvement in the same alleged tainted transfer since the time it initiated the Asset Forfeiture Proceedings.

[redacted]

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108 *See* **Day 3 Tr.** 846:7-8. *See also* **Day 4 Tr.** 1034:17-21 (Caro Cross) ("*PRESIDENT SACHS: Is it your position that the acquiring Party should Google every legal representative of any company that appears on the chain of title? THE WITNESS: Yes* [. . .].").

109 *See* **Day 1 Tr.** 228:8-11 (Colombia's Opening) ("*Ms. Herrera: The proceedings take their time.* ***I'm <u>not</u> going to say they take time because their resources are scarce****, but usually it would have taken about three years.*").

110 [redacted]).

111 [redacted]).

57. [redacted]. But moreover it appears to confirm what Claimants have been saying all along and undermines Colombia's contorted attempts to differentiate the Properties. Of course, the initiation of an investigation over six years after the Asset Forfeiture Proceedings does not cure Colombia's discriminatory treatment of Claimants, who continue to be deprived of their investments while Colombians are six years later still enjoying theirs.

58. In sum, there is no dispute between the Parties that Colombia has not initiated Asset Forfeiture Proceedings against the Sister Property, which shares the same (relevant) history with the Meritage Property. As discussed below, the Claimants were entitled to the same more favorable treatment in relation to the Meritage as that received by the Sister Property (and its investors).

III.B.1.b. López Properties

59. [redacted] Colombia also points out that "[t]*he drug-dealing past of Mr. Vanegas was uncontroversial*."[114] Accordingly, Colombia cannot offer (and has not offered) any reasonable basis to explain why it has failed to seize even a single López Property, including those on which López was directly and personally included in the chain of title.

60. [redacted]

[redacted]

112 [redacted]

113 [redacted]

114 Rejoinder, ¶ 361.

115 [redacted]

116 [redacted]).

61.

62. This reasoning makes no sense because López Vanegas was convicted for criminal activities that allegedly began in 1998; there are no records of him engaging in any criminal activity as of 1994.[119] This reasoning, however, appears nowhere in the forfeiture documents.[121] In fact, based on this reasoning, it would have been impossible for Corficolombiana, the title agencies, and certainly Mr. Seda to identify when López Vanegas engaged in criminal activity. A Google search of López Vanegas certainly does not indicate when he engaged in criminal activity. And there is no guidance out there telling companies to check 4-5 years prior to the criminal activity. Indeed, Ms. Ardila's experiential "*timeline*" appears to have been contrived specifically to attempt to explain the glaring lack of investigations into López Properties. But even then, as of April 2016 the Attorney General had identified a number of López Properties acquired or sold after 1994, none of which have been seized, as Ms. Ardila acknowledged.[122]

63. Confronted with a property López Vanegas had sold in 2007, during the time period Ms. Ardila deemed relevant,

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117 Rejoinder, ¶ 361.

118).

119 *See* **Exhibit C-036**, *United States v. Lopez-Vanegas*, 493 F.3d 1305 (11th Cir. 2007).

120

121 *See generally* **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016; **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017; **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017.

122 *See infra* n. 83.

[redacted]

64. [redacted]

65. [redacted] Notably, it is precisely Colombia's position that based on Corficolombiana's alleged error in not identifying López Vanegas's name as then-legal representative to a company on the chain of title 20 years ago, Corficolombiana and therefore

123 [redacted]).

124 [redacted]

125 [redacted]

126 [redacted]

127 [redacted]).

128 [redacted]

129 [redacted]

130 [redacted]1.

131 [redacted]).

132 [redacted]

Newport loses its good-faith status. If this drug trafficker was such an obvious red flag to Colombia, it should have immediately seized all López Properties. Ms. Ardila's excuses are patently pretextual.

66. [redacted]

67. In fact, Mr. Caro stated that he had "*no reason to investigate all the* [López] *properties*".[135] While he too claims that other investigations were initiated into López Properties, Colombia has failed to produce any records of such investigations. For example, [redacted]

68. Even if investigations were initiated at the time (which Colombia has failed to prove), it is clear that they have been dormant. It is undisputed that Colombia has not seized any López Property thus far. The case of the Quartier Project confirms that Colombia's so-called investigation into Other López Vanegas Properties was ineffectual, even if it did get off the ground. [redacted] it took no action against the Quartier Project, which has successfully developed and been sold by Colombian developers since 2016.[137] [redacted]

133 [redacted]).

134 [redacted]).

135 **Day 3 Tr.** 930:19-20 (Caro Cross).

136 [redacted]

137 Reply, ¶¶ 203, 205, 275.

138 **Exhibit C-337**, Certificate of Title of Lot 001-719319 ("*Promotora Sierra Alta Ltda. Acquired the Property In Additional Amount Through Purchase from Ivan López Vanegas, Pursuant to Instrument 974 Of 05-18-94.*").

[redacted] Notably, Promotora Sierra Alta Ltda., whose name bears striking resemblance to Sierralta, the company that owned the precursor to the Meritage Property in 1994, further subdivided the Quartier property in 1997.[140] [redacted] Likewise, Mr. Caro declared he had no familiarity with the Quartier property.[142] Indeed, no one at Colombia's Attorney General's Office appears to have bothered investigating López Vanegas following Ms. Ardila's supposed referral, as the continued development and sale of units of the Quartier Project in the direct aftermath of the Asset Forfeiture Proceedings against the Meritage Project demonstrates. [redacted] The Quartier Project's development also fully puts to bed Colombia's argument that it did not pursue López Properties because of the lack of active developments on them.[144]

69. In sum, there is no dispute that even though [redacted] and "[t]*he drug-dealing past of Mr. Vanegas was uncontroversial*,"[146] it has refrained from seizing López Properties. [redacted] It is accordingly clear that no investigations into the López Property were actually conducted prior to or in the wake of the seizure of the Meritage Property, as demonstrated by the lack of seizures against López Properties over six years later, including projects with active developments such as Quartier.

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139 [redacted].

140 **Exhibit C-336**, Certificate of Title Lot 001-462801, pp. 4-5.

141 [redacted]).

142 **Day 3 Tr.** 930:14-15 (Caro Cross).

143 [redacted]].

144 *See* Counter Memorial, ¶¶ 308-19; Rejoinder, ¶¶ 631-38.

145 [redacted]).

146 Rejoinder, ¶ 361.

147 [redacted]

[redacted]

III.B.1.c. Other Alleged Criminals' Properties

70. It is also undisputed that Colombia has not seized other Alleged Criminals' Properties even though, on Colombia's logic, anyone that allegedly benefitted from the sale or purchase of the Meritage property since 1994 should have the value of that benefit seized. These include assets belonging to the Fruit Seller, Engineer, and numerous other individuals whom the Attorney General's Office identified as acting as front men or potentially involved with narcotrafficking or connected with the property since it was owned by Sierralta the company of which López Vanegas was the legal representative. [redacted] In other words, the Asset Forfeiture Proceedings against the Meritage Property has not resulted in the seizure of any Other Alleged Criminals' Properties. Colombia failed to offer any evidence during the Hearing to indicate otherwise.

71. [redacted].

72. The purpose of the Asset Forfeiture Law, Colombia submits, is to fight organized crime and narcotrafficking. So it is baffling that instead of seizing the proceeds of crime from the alleged criminals who were associated with the chain of title of the Meritage Property, Colombia has instead indefinitely seized a real estate development that was bringing significant economic benefits to the area, and whose owners have no criminal ties whatsoever. As Dr. Martínez testified, the "*correct course of action would have been to attach the payment rights (the profits) of the trustee and to identify who was a good faith buyer without fault and who was not.* [. . .] *the proper thing to do is to follow the chain of title history backwards to find the illegality*" and seize that person's assets.[150] Yet those individuals, while possibly under investigation, have so

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148 *See* **Exhibit C-450**, Letter from Fanny Giraldo, 30 May 2022.

149 [redacted]

150 Martínez 2 Report, ¶ 34.

far retained their proceeds from the transfer of the Meritage Property and likely long since disposed of them.

III.B.2. Colombia's Discriminatory Actions Breach Its Obligations Under the TPA

73. Colombia's differential treatment of Claimants and their investment in the Meritage Project violates Colombia's obligations under the TPA.

III.B.2.a. National Treatment

74. Colombia's conduct constitutes a violation of its NT obligation. Article 10.3 of the TPA provides:[151]

> "*1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*
>
> *2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.*"

75. The Parties agree that this standard requires a showing 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.[152] There is no dispute over *(i)* and *(ii)*: *(i)* Claimants are foreign investors and *(ii)* being subjected to forfeiture is less favorable than not. Colombia confirmed this in its Rejoinder: "*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.*"[153]

76. Claimants have established that they were in like circumstances with Colombians whom Colombia treated more favorably. According to Colombia, "*like circumstances*" includes

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[151] **Exhibit CL-001bis**, TPA.

[152] Reply, ¶ 194; Rejoinder, ¶¶ 673-74.

[153] Rejoinder, ¶ 674.

investors whose "*assets* [are] *affected by comparable wrongful conduct.*"[154] On this view, the most directly "*comparable wrongful conduct*" is the association of the title with López Vanegas and its further subdivision and consolidation by front men such as the Fruit Seller and Engineer. The Sister Property, other López Properties and other Alleged Criminals' Properties are unquestionably "*affected by comparable wrongful conduct.*"

77. Sister Property. Entrelagos Orozco Vanegas y Cia (now Entrelagos – Orozco Vanegas S.A.S.), and its owners, Mr. Orozco and his family (who are Colombians), as well as other Colombians, are owners of the Sister Property, which shares a near-identical property history with the Meritage Project, and which indisputably shares the same alleged "*defects*" in title as the Meritage Project. [redacted]. Thus the Sister Property undoubtedly is "*affected by comparable wrongful conduct*"; in fact, it is "*affected by*" identical "*wrongful conduct*" as compared to the Meritage Property.

78. López Properties. Colombians, including the current owners of the Quartier Project,[155] are owners of López Properties that Colombia has known since 2016 had been bought or purchased by López Vanegas, and therefore was affected by the same "*wrongful conduct*" as the Meritage Property.

79. Other Alleged Criminals' Properties. The alleged narcotraffickers and front men, all of whom are Colombian, caused the Meritage Property to be "*affected by wrongful conduct*". Other assets belonging to these alleged criminals must therefore also be "*affected by wrongful conduct.*" Indeed, [redacted]

[154] Colombia's Opening, slides 192, 205.

[155] In its Rejoinder Colombia attempted to argue that the Quartier Project is not owned by Colombians, based on a screenshot of a clearly different company incorporated in the U.S. to the one that is developing the Quartier Project. *See* Rejoinder, ¶ 693; **Exhibit R-233**, Andes Investment Website. Colombia rightly appears to have dropped this argument during the Hearing.

[redacted]

80. Colombia asserts that some Colombians were also harmed by the Asset Forfeiture Proceedings.[157] But whether some Colombians may also have been harmed by Colombia's actions is not relevant to the Claimants' National Treatment claim, which arises from Colombia's preferential treatment of the comparators identified above, who are unquestionably in "*like circumstances.*" In other words, even if the Claimants were in "*like circumstances*" with other Colombians who invested in the Meritage Project, this does not erase the fact that they were unquestionably in "*like circumstances*" with the comparators identified above. Indeed, there can be more than one set of comparators in "*like circumstances*" and Claimants are entitled to treatment no less favorable than the treatment accorded to each of those comparators.

81. Claimants have also demonstrated that Colombia's more favorable treatment of Colombian investors was unjustified.

82. Sister Property. Colombia has been unable to offer any logical explanation for its lack of action against the Sister Property, more than six years after the Asset Forfeiture Proceedings. Colombia's excuses have varied over the course of the Arbitration, and each one was dismantled at the Hearing. [redacted]

83. Colombia then attempted to argue that it deliberately chose not to take action against the Sister Property because Mr. Orozco was not associated with criminal activity. But this pretext too was laid bare [redacted]. Indeed, there is no reasonable basis to justify Colombia's disparate treatment of two sister properties, afflicted with the same alleged "*defects*."

156 Colombia's Opening, slide 193.

157 Colombia's Opening, slides 205-206.

158 [redacted]

159 [redacted]

84. Several years on, by failing to seize the Sister Property, Colombia has allowed the owners of that property to continue to enjoy the rights they possess in that property. While Colombia found that Corficolombia's failure to determine the Meritage Property's connection with López Vanegas was fatal to Claimants' good faith status and/or called for an immediate seizure of the property without a determination of Claimants' (and/or Newport's) good faith status, Colombia apparently applied a vastly differently approach to Colombians like López Vanegas's family members, who were "*certainly*" aware of his criminal conviction. [redacted] Colombia has not (and cannot) justify applying a different approach to foreigners and Colombians.

85. López Properties. Colombia has also been unable to explain why no López Property has been seized, nor why the Quartier Project was able to proceed. [redacted].

86. Other Alleged Criminal Properties. Shockingly, Colombia has treated the alleged drug traffickers and front men it blames for the infection of the Meritage Property more favorably than Claimants. Again, [redacted] Of course, Colombia has no

160 [redacted]

161 [redacted].

162 **Exhibit C-450**, Letter from Fanny Giraldo, 30 May 2022.

justification for this. If Colombia believes these people are criminals, Colombia should go after them, not the Claimants.

87. Colombia identifies no "*legitimate objective*"[163] for its staggering failure to forfeit any property other than the Meritage Property that is allegedly connected to the same chain of alleged events, even though Claimants played absolutely no role in any of the allegedly illegal transfers. Accordingly, Colombia does not even attempt to argue that its differential treatment was justified. Rather, it simply argues that it was "*justified*" for it to launch the Asset Forfeiture Proceedings.[164] This misses the point—Colombia must justify its disparate, more favorable treatment of Colombians in like circumstances, which it fails to do.

III.B.2.b. Expropriation

88. In order to be lawful, an expropriation must be conducted in a non-discriminatory manner.[165] Colombia recognizes that the taking of Claimants' investment in a discriminatory manner constitutes an unlawful expropriation.[166]

89. The Parties agree that Tribunals will normally apply "*the three-pronged test*" to determine if State conduct is discriminatory: "*if (i) similar cases are (ii) treated differently (iii) and without reasonable justification*."[167] This standard is not substantially different from that for national treatment;[168] and in fact is broader as it requires the comparison of any "*similar cases*," not an analysis of whether the comparators are in "*like circumstances*." Notably, discrimination, just like the national treatment standard,[169] does not require a showing of discriminatory intent (and Colombia does not allege that it does).

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163 **Exhibit RL-027**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶¶ 368, 371.

164 Colombia's Opening, slide 208.

165 *See* **Exhibit CL-001bis**, TPA, art. 10.7 ("*1. No Party may expropriate or nationalize a covered investment either directly or indirectly . . . except: . . . (b) in a non-discriminatory manner;*").

166 *See* Colombia's Opening, slide 188.

167 *See* Colombia's Opening, slide 191.

168 Colombia uses national treatment language in its discussion of discrimination during the Hearing. Colombia's Opening, slides 192-193.

169 *See* **Exhibit CL-100**, *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, ¶ 719 (citing **Exhibit CL-031**, *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 181 ("[I]*t is not self-evident* [. . .] *that any departure from national treatment must be* explicitly *shown to be a result of the investor's nationality*")); **Exhibit CL-036**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 177 ("*In the present dispute the fact is that OEPC has received treatment less favorable than that accorded to national companies. The Tribunal is convinced that this has not been done with the intent of discriminating against foreign-owned companies.*"). *See also* **Exhibit CD-1**, slide 177.

90. Colombia raises similar objections to the discrimination claim as already discussed above. First, Colombia claims that the Meritage Property was not treated differently from other "*assets affected by comparable wrongful conduct*" because Colombia has generally initiated other asset forfeiture proceedings, some of which happen to be against other Colombians.[170] But again, this does not concern Claimants' claim. The Sister Property, [redacted] and Other Alleged Criminals' Properties are all "*affected by comparable wrongful conduct*" as the Meritage Property—the test Colombia imposes for the higher "like circumstances" threshold—but Colombia has failed to initiate any forfeiture proceedings against them. It does not matter that Colombia has discriminated against Claimants only vis-à-vis *some* Colombians. No discriminatory treatment is permitted.

91. Colombia again cannot offer any "*reasonable justification*" for its abject failure to pursue asset forfeiture proceedings against the Sister Property, [redacted], and Other Alleged Criminals' Properties. All it does is try to justify why it brought the Asset Forfeiture Proceedings against the Meritage Property but all those reasons apply equally to the "*similar cases*" and yet Colombia has done nothing.

III.B.2.c. FET

92. Colombia's discriminatory conduct also breaches its obligation to accord FET. Colombia contends that discrimination is not part of the FET standard. This is incorrect. Numerous tribunals have found that to accord FET, the State must not act in an unreasonable, arbitrary and discriminatory manner.[171] As discussed below, there is no distinction between the autonomous FET standard and the minimum standard of treatment.[172] This includes, as the *Eco Oro* tribunal recently found, "*refraining from taking arbitrary or discriminatory measures*."[173]

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170 Colombia's Opening, slide 192.

171 **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 307, 313, 407; **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 543 ("[T]*he Tribunal is of the view that FET comprises*, inter alia, *protection of legitimate expectations, protection against arbitrary and discriminatory treatment, transparency and consistency*"), 615-16; **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 754; **Exhibit CL-067**, *Bayindir Insaat Turizm Ticarat Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 178 (finding FET includes "*the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercise coercion or from frustrating the investor's reasonable expectations* [. . .]").

172 **Exhibit CL-107**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 208; **Exhibit CL-108**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 520; **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶¶ 752, 754.

173 **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 754.

The tribunal in *Saluka v. Czech Republic* likewise found a breach of FET where the host State adopted "*a discriminatory response to* [a] *bad debt problem*" such that it gave financial assistance to three of the four big banks in the State to the exclusion of the claimant's bank.[174] Here, Colombia has similarly exercised its discretion discriminatorily to initiate Asset Forfeiture Proceedings against the Meritage Project without targeting other properties with the same alleged deficiencies in title.

93. Colombia's defense of its discriminatory conduct in the FET context mirror those put forward in defense of its breach of the expropriation provision—namely, that the Meritage Property is not comparable to the Sister Property or [redacted]. However, for the same reasons described above,[175] Colombia's submissions are unavailing and it has discriminatorily expropriated Claimants' investment in the Meritage Project.

III.C. The Asset Forfeiture Proceedings Were Arbitrary And Denied Claimants Basic Due Process

94. In addition to being patently discriminatory (as discussed above), Colombia's actions also denied Claimants' investment basic due process. As detailed in this section:

(a) Colombia initiated the Asset Forfeiture Proceedings premised on a known lie, and more likely than not as part of an extortion scheme;

(b) Colombia seized Claimants' investment in Newport without considering whether Newport was a protected good faith third party whose rights are guaranteed under the Asset Forfeiture Law; and

(c) [redacted].

III.C.1. The Asset Forfeiture Proceedings Were Premised On A Known Lie, Likely In Pursuit Of A Corrupt Scheme

95. Colombia initiated the Asset Forfeiture Proceedings on the basis of a false story contrived by a convicted drug trafficker in furtherance of a corrupt extortion scheme. While in its pleadings, Colombia attempted to distance the basis of the Asset Forfeiture Proceedings from López Vanegas's false kidnapping story,[176] at the Hearing it became apparent that Ms. Ardila relied

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174 **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 347.

175 *See supra* ¶¶ 37-92.

176 *See, e.g.*, Counter Memorial, ¶ 63 ("*the Asset Forfeiture Proceedings are not – and were never – based on the kidnapping story.*"); Rejoinder, ¶ 368 ("*Whether Mr. López Vanegas' son was actually kidnapped or not is completely irrelevant for the purposes of the Asset Forfeiture Proceedings since, as demonstrated, the kidnapping was not the basis for their commencement.*").

almost exclusively on López Vanegas's version of events to initiate the Asset Forfeiture Proceedings.

96. At the Hearing, Ms. Ardila testified that she relied almost entirely on the word of a convicted drug trafficker to seize the Meritage Property. Ms. Ardila confirmed that she seized the Meritage Property after she reviewed very limited evidence. Specifically:

(a) The Judicial Police Report, dated 8 April 2016. The Judicial Police Report was ordered by the prosecutor assigned to an asset forfeiture investigation opened pursuant to the complaint filed by López Vanegas with the Attorney General's Office in 2014.[177] The asset forfeiture proceeding did not evolve for the next two years. Then suddenly, in April of 2016, the head of the Asset Forfeiture Unit opened a new investigation related to López Vanegas's complaint and assigned it to Ms. Ardila, without even referencing the previous investigation, which had been assigned to a different prosecutor. The new file was opened the day after López Vanegas reinitiated his extortion attempt by sending Mr. Seda a letter through his new lawyer, Victor Mosquera. To this day, Colombia has failed to explain why the initial asset forfeiture proceeding sat on ice for two years, or why a new investigation was opened and assigned to a different prosecutor.

(b) Ivan López Vanegas's Tutela, dated 6 May 2016.[178]

97. Both documents relied heavily on López Vanegas's testimony. However, the Attorney General's Office knew that López Vanegas was a convicted drug trafficker and that his kidnapping story was a lie.[179]

98. Nevertheless, despite knowing that the kidnapping story was a lie, underlying court documents in the Asset Forfeiture Proceedings rely strongly on his version of events:

(a) In the Precautionary Measures Resolution in August 2016, Ms. Ardila started that "[t]*he existence of reasonable grounds supporting precautionary measures*" arose from the fact that the Meritage Property (and the Sister Property) "*were acquired through punishable conduct such as kidnapping, threats, and personal misrepresentation.*"[180] Ms. Ardila stated that it was therefore "*necessary to impose the SUSPENSION OF THE*

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[177] *See* **Exhibit C-130**, Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014; **Exhibit C-132**, Prosecutor 72's Response to Prosecutor 37's Request to Investigate Iván López Vanegas Complaint; **Exhibit C-133**, Judicial Police Report to Prosecutor 37, 4 September 2014.

[178] **Day 3 Tr.** 778:9-779:1 (Ardila Cross) ("*A. This case is particular. When it was admitted and opened before the Asset Forfeiture Unit, it was based on a detailed report on the real estate recordation documents in connection with those pieces of property in particular. When it was submitted to me, it was accompanied by a very detailed study. Amongst the evidence obtained, we got a tutela action that was submitted by Iván López together with other documents, and amongst those documents, there were some Title Studies that were conducted by two law firms. And we were able to determine that it was evident that the origin of those properties that were the subject of the Asset Forfeiture Action was illicit because of the drug-trafficking activities that had been conducted by Iván López Vanegas.*"). *See also* Exhibit C-152 / [redacted] Exhibit C-037bis.

[179] **Exhibit C-067bis**, Letter from Michael J. Burdick to Aimer Fredy Alonso Triana, 21 November 2016, p. SP-0001; **Exhibit C-167,** Transcript of TeleAntioquia Interview with Claudia Carrasquilla, 6 August 2018.

[180] **Exhibit C-022bis**, pp. SP-0028, SP-0084-SP-0086.

POWER OF DISPOSITION and ATTACHMENT OF THESE ASSETS [. . .] *until it can be ascertained that the statements by Mr. IVAN LÓPEZ VANEGAS are likely true*."[181]

(b) The subsequent Decisions of the Asset Forfeiture Court in October 2016 and February 2017 further confirmed that precautionary measures were imposed on the Meritage Property on the basis of the false kidnapping story:

(i) "*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. The result of the assessment of proof would be different for the merit which the Judge must assign to the same to conclude that it "leads" to actual extinction (Article 148, Law 1708/14), which requires a much higher degree of knowledge to issue a sentence, which is not the case under examination*."[182]

(ii) "*The particularities of the "title" held by Iván López Vanegas were reviewed with regard to the Santamaría de Las Palmas plot, with regard to the contents of public deed 1762 dated September 16, 2004, of tutela* [claim on constitutional grounds] *11001220400020160118300 filed by López against the Attorney General's Office, Sociedad La Palma Argentina y CIA S.A.S., Fiduciaria Corficolombia S.A. and Royal Property Group-Proyecto Meritage Luxury Comunity* [sic]*, setting forth details of the kidnapping of his son, which served as the basis for building the theory of the instant case*."[183]

99. The Attorney General thus unreasonably and arbitrarily initiated the Asset Forfeiture Proceedings on the basis of a known lie. Ms. Ardila's unquestioned reliance on the words of a known drug trafficker to unilaterally shutter a multi-million dollar Project—while ignoring the portion of the same lot that remained in the hands of the very family of that drug trafficker, is unusual, to say the least. Her motivation likely stems from her involvement in a corrupt extortion scheme, as demonstrated by the following "*red flags*"[184].

100. First, the timing of significant developments in the Asset Forfeiture Proceedings coincides suspiciously with López Vanegas's extortion attempts. As mentioned above, after López Vanegas filed a complaint in 2014, an asset forfeiture investigation was opened in September

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[181] **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, p. SP-0084-SP-0086 (emphasis added).

[182] **Exhibit C-044bis**, Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016, p. SP-0020.

[183] **Exhibit C-047bis**, Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017, pp. SP-0004, SP-0014.

[184] **Exhibit CL-091**, *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 293 ("*For the application of the prohibition of corruption, the international community has established lists of indicators, sometimes called 'red flags'*").

2014, which saw no movement for the next two years, until April 2016, when Ms. Malagón opened a new investigation and assigned it to a different prosecutor. She handed Ms. Ardila the case just two days after López Vanegas and his attorney reinitiated attempts to extort Mr. Seda.[185] Then, Ms. Ardila arrived at the Meritage Property and seized the Project just days after Mr. Seda firmly declined to engage with López Vanegas and his representatives' extortion demands, and immediately after López's attorney ominously told Mr. Seda—the day the precautionary measures resolution was signed—that: "*The negotiation chapter is closed.*"[186] Ms. Ardila further admitted that Ms. Malagón knew about and approved the imposition of precautionary measures before they were imposed.[187]

101. [redacted] This is unavailing given not only the number of so-called coincidences, but also that during this same time period, Mr. López Vanegas's attorney Mr. Mosquera was telling Mr. Seda that Ms. Malagón and Ms. Ardila would do what Mr. Mosquera asked, and seize the property if Mr. Seda did not give into the extortion and pay.[189] Moreover, Mr. Mosquera was abreast of developments in the Asset Forfeiture Proceedings that would otherwise have been confidential and tailored his threats accordingly.[190] Otherwise, why the sudden outreach to Mr. Seda just after Ms. Ardila signed the precautionary measures resolution, but before she actually imposed the precautionary measures? And even after the imposition of precautionary measures, Mr. Mosquera told Mr. Seda he could get them lifted if Mr. Seda would pay—a bargain that would have made no sense if he not been able to influence the proceedings.[191] Notably Colombia did not challenge Mr. Seda's testimony on these threats during the Hearing.

102. Moreover, the timing coincidences are striking:

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185 **Exhibit C-151**, Letter from Victor Mosquera Marin to Angel Samuel Seda, 7 April 2016; **Exhibit C-153**, Attorney General's Office Resolution No. 125, 8 April 2016; **Exhibit CD-01**, Claimants' Opening, slide 176.

186 **Exhibit C-163**, WhatsApp chain between Angel Seda and Gabriel Valderrama, 8 June – 25 July 2016; **Exhibit C-165**, Certificate of Seizure of the Meritage Property, 3 August 2016; **Exhibit CD-01**, Claimants' Opening, slide 177.

187 **Day 4 Tr.** 892:14-16 ("*Q. Did Ms. Malagón know about the Precautionary Measures Resolution in July of 2016? A. Clearly* [. . .].").

188 [redacted] *See also* Counter Memorial, ¶ 336; Rejoinder, ¶ 645.

189 *See* Seda 1 WS, ¶ 91.

190 *See* Seda 1 WS, ¶ 102.

191 *See* Seda 1 WS, ¶¶ 117-20.

(a) On 7 April 2016, Mr. Mosquera wrote to Mr. Seda claiming that Mr. López Vanegas was the "*legitimate owner*" of the Meritage Property.[192] Mr. Mosquera asked for a meeting with Mr. Seda "*with the aim of exploring an alternative resolution to the dispute, by means of direct negotiations*," and stated that if no agreement could be reached then Mr. López Vanegas was "*willing to begin the appropriate domestic or international legal actions*."[193] The very next day, on 8 April 2016, two years after Mr. López Vanegas had initially filed his complaint with the Organized Crime Unit, a different unit, the Asset Forfeiture Unit headed by Ms. Malagón suddenly assigned the case to Ms. Ardila.

(b) Similarly, on 25 July 2016, Mr. Valderrama tried to re-initiate contact with Mr. Seda and, when Mr. Seda refused, Mr. Valderrama replied that "[t]*he negotiation chapter is closed*."[194] Simultaneously, Ms. Ardila had prepared and signed the Precautionary Measures Resolution on 22 July 2016, and then seized the Meritage Property on 3 August 2016.[195] Ms. Ardila confirmed in her testimony that the decision to seize the Meritage Project was "*entirely up to* [her],"[196] and Ms. Malagón would have known about the Precautionary Measures Resolution.[197]

(c) Then, on 9 November 2016, before the Determination of Claim was filed, Mr. Mosquera sent Mr. Seda an email requesting COP 56 billion (USD 18 million) to "*settle this current situation*."[198] This offer would have made no sense unless Mr. Mosquera knew he could influence the proceedings.

103. Colombia further attempts to challenge the uncanny coincidences by pointing out that the Precautionary Measures Resolution was signed on 22 July 2016, a few days before Mr. Seda shut down communications with López Vanegas's attorney. But this argument completely ignores the fact that Ms. Ardila waited for seven days after the date on which the Resolution appears to have been signed to implement the seizure, and she only did so after Mr. Seda rejected López Vanegas's extortion attempts. She offers no explanation for this delay in her testimony in this Arbitration, but has confirmed that the Resolution had been signed off on by Ms. Malagón before it was signed on 22 July 2016 and thus could ostensibly have been implemented immediately.[199]

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192 **Exhibit C-151**, Letter from Victor Mosquera Marin to Angel Samuel Seda, 7 April 2016; Seda 1 WS, ¶ 75.

193 **Exhibit C-151**, Letter from Victor Mosquera Marin to Angel Samuel Seda, 7 April 2016.

194 **Exhibit C-163**, WhatsApp chain between Angel Seda and Gabriel Valderrama, 10 June 2016.

195 **Exhibit C-165**, Certificate of Seizure of the Meritage Property, 3 August 2016.

196 **Day 3 Tr.** 867:1-4 (Ardila Cross) ("*Q. Just to reiterate that last question, the decision to impose the Precautionary Measures was entirely up to you; correct? A. And that is correct.*"). *See also* **Day 3 Tr.** 866:3-6 (Ardila Cross) ("*Q. Just to wrap up the Precautionary Measures, the decision to impose those was entirely yours; is that correct?*").

197 **Day 3 Tr.** 892:14-19 (Ardila Cross) ("*Q. Did Ms. Malagón know about the Precautionary Measures Resolution in July of 2016? A. Clearly, because within that Office on Asset Forfeiture, before the Prosecutor shows his or her decisions, there is a technical-legal committee that reviews the decisions*.").

198 **Exhibit C-177**, Email chain between Angel Seda and Víctor Mosquera Marín, 10 November 2016.

199 **Day 3 Tr.** 892:14-893:8 (Ardila Cross) ("*Q. Did Ms. Malagón know about the Precautionary Measures Resolution in July of 2016? A. Clearly, because within that Office on Asset Forfeiture, before the Prosecutor shows his or her*

104. It is also notable that a copy of the Resolution, dated 22 July 2016, was not actually received by anyone until 25 August 2016.[200] Ms. Ardila refused to hand over a copy of the Resolution to Newport's representative on site when she halted the Meritage Project on 3 August, which she confirmed during her testimony,[201] and withheld the copy from Corficolombiana's representative despite multiple requests.[202] She even acknowledged that Mr. Sintura had to go to "*an official that was not a member of the Asset Forfeiture Unit for this individual to provide* [Mr. Sintura] *with a copy of the Precautionary Measures Resolution*" but distanced herself from the events, because she was allegedly "*not at the office at that time because* [she] *was studying*."[203] In fact, Mr. Sintura attempted to gain access to the Resolution multiple times and each time was unsuccessful.[204] In the end, the official who did disclose the Resolution to Mr. Sintura was referred for disciplinary measures by Ms. Malagón.[205]

105. Second, attempts to extort Mr. Seda specifically invoked references to the Attorney General's Office. Mr. Mosquera repeatedly bragged to Mr. Seda about his connections with and influence over the Asset Forfeiture Proceedings and his connections with Ms. Malagón and Ms. Ardila specifically.[206] And Mr. Seda was approached several times by individuals claiming to represent the Attorney General's Office, asking him to pay to make the case go away.[207] [redacted]

decisions, there is a technical-legal committee that reviews the decisions. Q. Do you know when that occurred in this case? A. I don't remember exactly, but in general, when the draft of the Decision is prepared, then it is passed on to the person who reviews it, and it undergoes two reviews. The initial reviewer and then the Director. Q. So, is it fair to say it would have been before you signed the Resolution on July 22nd, before you actually physically signed it? A. Yes. Yes, yes. Generally, it's a few days before.").

200 *See* **Exhibit C-321**, Letter from Alejandra Ardila Polo to Ivonn Giset Acero Cortes, 14 June 2017 (Ms. Ardila's complaint against the official that provided Mr. Sintura with the Precautionary Measures Resolution).

201 *See* **Day 3 Tr.** 860:3-861:2 (Ardila Cross).

202 *See* **Exhibit C-021bis**, Letter from Francisco José Sintura Varela to Alejandra Ardila Polo, 18 August 2016.

203 **Day 3 Tr.** 861:15-19.

204 **Day 3 Tr.** 864:16-865:8 (Ardila Cross) ("*If you look at the next page, you'll see the paragraph numbered 11, that he says he's been going to the Unit daily to get a copy of the resolution and the formal notification of the seizure, unsuccessfully. Do you see that? A. Yes, I do see that. Q. And he says: I also told you that in my letter of August 18. Do you see that? A. What was the second question again? Do I see what? Q. I think he is referencing his prior letter 4 to you here; no? A. Yes. I'm seeing that he went to the Unit, and I wasn't at the office. Perhaps I was elsewhere. I don't remember that date*.").

205 **Exhibit C-311**, Letter from Miguel Angel Pardo Nocobe to Yolima Cruz Pacheco, 28 November 2016; **Exhibit C-312**, Letter from Yolima Cruz Pacheoco to Nohora Patricia Ferreira Garcia, 11 July 2017; **Exhibit C-321**, Letter from Alejandra Ardila Polo to Ivonn Giset Acero Cortes, 14 June 2017.

206 *See* **Exhibit C-162**, Email chain between Victor Mosquera Marin and Angel Seda, 6 June 2016; **Exhibit C-163**, WhatsApp chain between Angel Seda and Gabriel Valderrama, 8 June – 25 July 2016; **Exhibit** C-**022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016; **Exhibit C-165**, Certificate of Seizure of the Meritage Property, 3 August 2016; **Exhibit C-177**, Email chain between Angel Seda and Victor Mosquera Marin, 10 November 2016.

207 *See* Seda 1 WS, ¶¶ 87, 89-91, 94, 103, 118.

[redacted]

106. Third, [redacted] It is therefore clear that the extortion Mr.

208 [redacted]

209 [redacted]

210 [redacted]

211 [redacted]

212 [redacted]

Seda suffered is not a farfetched conspiracy theory, but rather known conduct within the Attorney General's Office.

107. Fourth, the Colombian officials in charge of the Asset Forfeiture Proceedings have been linked to and investigated for corruption. [redacted] For example, on 26 April 2022 (mere days before the Hearing), Colombia closed another disciplinary investigation into Ms. Ardila that was filed in September 2021 in relation to an unrelated asset forfeiture case.[216] Colombia can turn a blind eye to the corruption within the ranks of the Asset Forfeiture Unit but this does not will away the corruption itself.

108. Fifth, Ms. Ardila has demonstrated a propensity to lie to the Tribunal in relation to her conduct of the Asset Forfeiture Proceedings. In her testimony alone, Ms. Ardila demonstrably perjured herself on at least two occasions:

(a) [redacted]

(b) [redacted]

[redacted]

213 [redacted].

214 [redacted]; **Exhibit R-292**, Closure Order of Criminal Investigations No. 144 dated 31 March 2022.

215 [redacted]

216 **Exhibit R-294**, Letter from Luz Ángela Hermina to Carlos Alberto Saboya González dated 26 April 2022 regarding Disciplinary Investigations No. 48473.

217 [redacted]

[redacted]

109. Finally, Colombia has notably failed to produce Ms. Malagón as a witness in this proceeding, who had presided over the Asset Forfeiture Proceedings and whom Mr. Mosquera had specifically named as his source at the Attorney General's Office.[220]

110. In light of these (non-exhaustive) red flags, each acting as discrete indicia of corrupt conduct on the part of Colombian officials, the Tribunal can "*connect the dots*" to "*infer from these indicia (using experience and reason) that* [corruption] *has occurred*."[221] And as Mr. Hernández confirmed in his testimony at the Hearing, corruption is very difficult to prove and, the absence of a confession, must be proved through inferences.[222] If a prosecutor, with the power of the State apparatus behind him, encounters such difficulty in proving corruption, the hurdle is even greater for private persons. Given Claimants have established *prima facie* corruption, the burden of proof shifts to Colombia.[223]

111. Yet, as discussed above, Colombia has been unable to explain, or even challenge, the red flags identified by Claimants. And its attempts to exculpate Ms. Malagón and Ms. Ardila utterly fail.

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218 **Day 3 Tr.** 780:3-10 (Ardila Cross) ("*Q. Iván López was--did Iván López ask you to be recognized as an affected party in those proceedings? A. Yes, via his lawyer, Dr. Victor Mosquera. A request was put to the Fiscalía that he be recognized as an affected party. There was a resolution that was issued by me, and it was decided not to recognize that he was an affected party because he was not the holder of that piece of property.*"). *See also* **Day 3 Tr.** 780:11-16 (Ardila Cross) ("*Q. The question was whether Iván López asked you to be recognized as an affected party in the Meritage Case. A. Yes. That request was made but my office issued a Decision whereby the affected party status of Mr. Iván López was not recognized.*").

219 [redacted]

220 *See* Seda 1 WS, ¶ 91.

221 **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019, ¶¶ 669-70; **Exhibit CL-090**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶¶ 4.876, 4.879.

222 **Day 3 Tr.** 694:16-695:6 (Hernández Cross) ("*Corruption is an act that is difficult to investigate. Moreover, in many discussions and conversations, I have expressed that the same expression of denomination used for sex crimes is applicable, to the extent that it is a crime that happens 'behind closed doors', oftentimes only known to the victim and victimizer, in this case, the person who offers the bribe and the official who receives it. That is why it is complicated to investigate. One must obtain and bring about a situation whereby the person who has carried out the corrupt activity feels the trust so as be able to turn over that information to the Colombian State.*").

223 *See* **Exhibit CL-040**, *Methanex Corporation v. United States*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part II ¶ 55 (finding that once a party had "*demonstrated prima facie*" that "*unlawful*[]*, if not criminal*[]" conduct had taken place, the burden of proof shifted).

112. First, Colombia bizarrely claims that Claimants have "*made charges of systemic corruption without even waiting for the facts alleged to be investigated in Colombia*."[224] Colombia further alleges that "*the arbitral record is replete with decisions in which independent judges and prosecutors have agreed that there is not the slightest bit of evidence of corruption in the Meritage case.*"[225] In reality, Claimants waited for several years for Colombia to investigate Mr. Seda's criminal complaint and it came to naught. Instead, Colombia has closed the investigations on the eve of the Hearing before the complaint could even be decided by an independent judge.[226] [redacted] A remarkable convenience. For the avoidance of doubt, no independent judge has assessed whether the Asset Forfeiture Proceedings have been tainted by corruption.

113. [redacted] But Ms. Ardila's actions in relation to López Vanegas, shortly after Mr. Seda had filed a complaint against her alleging corruption, and shortly before she was removed from the Asset Forfeiture Proceedings file, can hardly constitute exculpatory evidence on her behalf. [redacted]

[redacted]

114. Indeed, it is notable that Ms. Ardila and Ms. Malagón decided not to take any action against the Sister Property, particularly in light of the fact that in February 2017, López Vanegas

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224 **Day 1 Tr.** 173:17-174:2 (Colombia's Opening).

225 **Day 1 Tr.** 173:17-174:2 (Colombia's Opening).

226 *See supra* ¶ 108. *See also* Reply, ¶ 145.

227 [redacted]).

228 [redacted]

229 [redacted]

submitted an "expanded" complaint along with a 2014 title study of the Sister Property voluntarily to the Attorney General's Office, clearly indicating López Vanegas's intent to protect that property (now with his family members) from any forfeiture proceedings.[230] It appears Ms. Malagón and Ms. Ardila respected his wishes.

115. Third, Colombia complains that there is no motive because "[w]*hy would the drug dealer be interested* [. . .] *to have an asset forfeiture on his property, that will end up, at least for him, there's no chance to recover it*."[231] However, [redacted] This is precisely what Mr. Seda also said in response to Colombian counsel's question: "*they would start this because this would be a tremendous lever of pressure against a developer like me.*"[232] [redacted]

116. Accordingly, the only remaining conclusion is that the Asset Forfeiture Proceedings were initiated on the basis of a known lie, in pursuit of a corrupt scheme.

III.C.2. Colombia Did Not Consider Newport's Good Faith Status Before Seizing The Meritage Property

117. Newport (the Meritage Claimants' investment vehicle) had no opportunity to be heard prior to the seizure of the Meritage Property and initiation of the Asset Forfeiture Proceedings because no one at the Attorney General's Office considered or attempted to collect any evidence of whether Newport was a good faith third party without fault. This was a critical omission by Colombia which—separate from the improper commencement of the Asset Forfeiture Proceedings generally (as discussed above)—cost Claimants their entire investment, even though they ought to have been protected by their good faith status.

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230 **Exhibit C-023bis**, Determination of Claim, 25 January 2017, p. 40 ("*In order to obtain the information I'm providing here I hired attorneys and they even performed a title analysis, which I deliver now, which included the analysis of the information on real estate registration 001-930484* [the Sister Property] *in 07 sheets, and 001-930485, in 08 sheets.*").

231 **Day 1 Tr.** 240:10-13 (Colombia's Opening). *See also* **Day 1 Tr.** 315:3-15 (Colombia's Opening).

232 **Day 2 Tr.** 556:22-557:1 (Seda Cross).

233 [redacted].

234 [redacted]

118. It is undisputed that the Asset Forfeiture Law does not create a strict liability regime.[235] In other words, if a party has rights in a tainted property, it does not automatically lose those rights when the defect is discovered. Rather, the Law mandates that if a party acted in good faith in acquiring rights in the property, those rights should nevertheless be respected. Specifically:

(a) Article 3 of the Asset Forfeiture Law, on the right to ownership, provides: "*Asset forfeiture shall have as its limit the right to ownership legally obtained in good faith without fault. . .*"[236]

(b) Article 87 of the Asset Forfeiture Law, on precautionary measures, notes the overriding importance of protecting the interests of good faith third parties: "*In any case, the rights of third parties acting in good faith without fault must be safeguarded*."[237]

(c) Article 7 of the Asset Forfeiture Law establishes a presumption of good faith: "*Good faith is presumed in all legal action or transaction related to the acquisition or use of the assets, so long as the titleholder proceeds in a diligent and prudent manner, without any fault.*"[238] This provision operates such that "*any reasonable doubt as to the good faith of a third party must be interpreted in his/her favour, throughout the proceedings,*" and that "*when a procedural rule has different possible interpretations, the official must apply that which most closely aligns to the presumption of good faith.*"[239]

(d) Article 124 authorizes the Attorney General's Office "*to issue a resolution to dismiss the action … at any time where …* [i]*t is shown that the assets in question are in the name of third parties acting in good faith without fault*".[240]

(e) Article 152 of the Asset Forfeiture Law, on burden of proof, further provides "*the Office of the Attorney General of Colombia has the burden to identify, locate, gather, and file the elements of proof which show the existence of some of the grounds set forth in the law for the declaration of forfeiture and that the affected person is not a bona fide owner of rights without fault.*"[241] The Law thus creates "*an inescapable obligation for the Attorney General's Office to undertake this good faith analysis, because the encumbrance and harm a person or property would suffer if precautionary measures were to be imposed would be incalculable.*"[242] Accordingly, and quite obviously, this analysis must be carried out at the very outset, prior to precautionary measures being imposed.

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[235] *See* Martínez 1 Report, ¶ 36; Martínez 2 Report, ¶ 34 ("*If there is a good faith buyer without fault, that person's interest cannot be encumbered.*"); Medellín 1 Report, ¶ 29 (referring to the "*right to property lawfully obtained in good faith without fault*"); Medellín 2 Report, ¶ 11 ("*when precautionary measures are imposed, under all circumstances, the rights of those who are good faith third parties without fault must be safeguarded.*").

[236] **Exhibit C-003bis**, Law No. 1708, art. 3.

[237] **Exhibit** C-**003bis**, Law No. 1708, art. 87.

[238] **Exhibit C-003bis**, Law No. 1708, art. 7.

[239] Martínez 1 Report, ¶ 28(a).

[240] **Exhibit C-003bis**, Law No. 1708, art. 124.

[241] **Exhibit C-003bis**, Law No. 1708, art. 152 (emphasis added).

[242] Martínez 1 Report, ¶ 40.

119. Professor Medellín (who is considered to be the father of the Asset Forfeiture Law, including by Colombia's legal expert,[243] but whom Colombia declined to examine) makes clear that the protection of good faith third parties is "*the most important limit on asset forfeiture*"[244] under Law No. 1708, with the concept of good faith constituting "*an insurmountable limit for undertaking a forfeiture action. The negative consequences of an asset forfeiture judgment cannot impact those persons who not only have acted in good faith, but also those whose conduct has been guided by diligence*."[245]

120. In their pleadings, Claimants pointed out that Colombian authorities had failed even to acknowledge Newport as an affected party, and accordingly did not even bother to assess whether it was a good faith third party.[246] In response, Colombia defended its actions by arguing that Claimants were not, in fact, affected parties,[247] so it did not need to bother with assessing their good faith status.[248] The crux of Colombia's (incorrect) argument was that because title to the Meritage Property transferred to a trust managed by the fiduciary Corficolombiana, rather than to Newport directly, Newport could not be considered to have an interest worthy of protection by the Asset Forfeiture Law. Colombia's reasoning, however, ignored the fact that Newport had entered into a Sales Purchase Agreement with La Palma Argentina that envisioned the transfer of the Meritage Property to a trust, of which Newport was the beneficiary. Indeed, the title to the portion of the plot associated with two of the phases had already passed to the trust in February 2015.[249] Moreover, Royal Realty, Mr. Seda's investment vehicle, was entitled to management fees from the Project.[250] Accordingly, Newport had a direct interest in the Meritage Property and was obviously "*affected*" by its forfeiture.

121. Colombia's position proved wrong. The Superior Court of the Judicial District of Bogota, almost six years (or "*69 months*")[251] after the Meritage Claimants lost the entirety of their investment, "*concluded that the company Newport S.A.S., is entitled to participate in this case,*

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243 *See* **Day 4 Tr.** 1169:8-15, 1169:22-1170:2 (Reyes Presentation).

244 Medellín 1 Report, ¶ 76.

245 Martínez 1 Report, ¶ 34.

246 Memorial, ¶¶ 226-83; Reply, ¶¶ 37-47.

247 *See* Counter Memorial ¶¶ 124, n. 233, 217-41; Rejoinder, ¶¶ 159-88.

248 Rejoinder, ¶ 283 ("*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.*").

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

250 See Memorial, Appendix D.

251 *See* **Day 3 Tr.** 902:11.

given that it has a pecuniary right with respect to the affected properties".[252] As a result, by the time of the Hearing, Colombia all but abandoned its original argument.[253]

122. Confronted with this decision, Colombia now claimed that the Prosecutors in charge of the Asset Forfeiture Proceedings, Ms. Ardila and Mr. Caro, had considered Newport an affected party all along,[254] and that it was up to the court to make a final decision on this point. Whether these prosecutors had considered Newport an affected party or not (and their position on that has been inconsistent),[255] it is undisputed that, in Colombia's own words, "*the determination has not been made*" "*whether Newport is or not a bona fide third-party*."[256] In other words, Colombia does not dispute that now over six years after losing its investment, no Colombian authority has considered whether or not Newport is a good faith third party. As Arbitrator Poncet remarked:[257]

> "[W]*hen we have a seizure in August 2016, and the Court Decision in April 2022, that is 69 months later, if I compute rightly granting that a measure like this can be extremely useful, can be necessary, has all sorts of justifications, if there is polluted money or funding in the acquisition or in the trade involved, can you explain why, in your view it could have taken 69 months for a court to say that it was an interested person because it would seem that such a long waiting period is hardly compatible with due process or with what we call fair and equitable treatment in international terms. I'm very perplexed.*"

123. So are Claimants. The truth is that the Asset Forfeiture Law grants an "*affected party*" certain due process guarantees that cannot simply be foisted onto the courts. In particular, Article 152 requires that the Attorney General's Office "*identify, locate, gather, and file the elements of proof*" that make it possible to determine whether an affected party acted in good faith when acquiring its rights.[258] Newport has been indisputably denied the benefit of that required

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252 **Exhibit C-436**, Decision of the Superior Court of the Judicial District of Bogotá, 22 April 2022, p. 32.

253 At the Hearing Colombia appeared to abandon their argument regarding Newport's alleged interest in the Property, and indeed appear to have accepted in full Claimants' rendering of the Project structure, going so far as to adopt it in their Opening presentation at the Hearing. *See* Colombia's Opening, slide 40.

254 **Day 3 Tr.** 779:15-22 (Ardila Direct); **Day 4 Tr.** 912:19-913:4 (Caro Direct).

255 *Compare* Caro 1 WS, ¶¶ 36-37 ("*Newport and the plaintiffs, called area beneficiaries, acquired an expectation of right and not a real consolidated right over the affected property, and thus are neither affected parties nor third parties acting in good faith*.") with **Day 3 Tr.** 913:1-4 (Caro Direct) ("*Upon my analysis, and upon verifying who are claiming rights over the Lot, I recognized a company called 'Newport' as the affected party in the proceeding*.") and Ardila WS, ¶ 48 ("*Subsequently, through an order of 17 August of the 2017, the same Second Specialized Judge of Asset Forfeiture of Antioquia, who was in charge of the trial, decided not to recognize Newport S.A.S. as an affected party**, based on the reasons contained in the file***.") with **Day 3 Tr.** 779:15-22 (Ardila Direct) ("*Q. Ms. Ardila,* [. . .] *did you include Newport as an affected party? A. Of course.*").

256 Rejoinder, ¶ 15.

257 **Day 3 Tr.** 902:10-22.

258 **Exhibit C-003bis**, Law No. 1708, art. 152.

assessment, which was fundamental to its due process rights and the protection of its investment.

124. Had the Attorney General's Office given any thought to Newport's rights, it could have seized proceeds which were, in fact, illicit, instead of the Meritage Project. But instead, Ms. Ardila seized the Meritage Project without even knowing or understanding basic facts about the property before seizing it. She had not even seen the Certificate of No Criminal Activity,[259] and did not even know how the Meritage Project had been developed or how many people it employed.[260] She made no effort to obtain any of this information and rather based her decision entirely on López's *tutela* and the investigation file provided to her four months prior.[261] While Ms. Ardila zeroed in on the Meritage Property and decided precautionary measures were necessary within a matter of months of being assigned the case, she clearly did not make any attempts to determine whether seizure was appropriate if the developers of the Meritage Project acted in good faith or whether the actual proceeds of illicit activity should be seized instead, most obviously any proceeds received by López Vanegas.

125. After the imposition of the precautionary measures, Newport attempted several times to introduce evidence and arguments, solicit information and otherwise participate in the proceedings.[262] The Attorney General's Office conspicuously ignored Newport's pleas.[263] It was only after Newport successfully filed a *tutela*[264] that the Attorney General's Office even bothered to respond to Newport (and even then, after the court-imposed deadline).[265] Yet the Attorney General's eight-page response does not "*identify, locate, gather, and file the elements of proof*" of Newport's good faith (or lack thereof). The first six pages simply recite the alleged basis for the precautionary measures and determination of claim. Then "[r]*egarding the*

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259 *See* **Day 3 Tr.** 854:1-9; López Montoya WS, ¶ 31.

260 *See* **Day 3 Tr.** 855:22-856:17.

261 *See* **Day 3 Tr.** 778:6-779:1.

262 *See* Memorial, ¶¶ 218-25; Reply, ¶¶ 27 (nn)-(qq); **Exhibit C-048bis**, Newport's First Petition to Attorney General's Office Asset Forfeiture Unit, 7 December 2016; **Exhibit C-032bis**, Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Fiduciaria Corficolombiana, 9 September 2013; **Exhibit C-030bis**, Otero & Palacio Title Study and Supplement, 7 March 2013 and 23 July 2013; **Exhibit C-049bis** Newport's Supplement to Petition to Attorney General's Office Asset Forfeiture Unit, 14 December 2016; **Exhibit C-181**, A. Seda Complaint to *Fiscalía General*, 19 December 2016; **Exhibit C-050bis** Newport's Third Petition to Attorney General's Office Asset Forfeiture Unit, 23 January 2017.

263 *See* Memorial, ¶¶ 219, 223, 225; Reply, ¶¶ 27 (nn)-(qq); **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, p. 58; **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, p. 85 (noting Mr. Seda's reported complaint was "*inactive*").

264 **Exhibit C-054bis**, Asset Forfeiture Unit's Response to Newport's Petitions, 17 February 2017.

265 **Exhibit C-045bis**, Corficolombiana Appeal to First Instance Decision Corficolombiana's Control of Legality Petition, 26 October 2016.

eligibility of good faith" Mr. Ardila determines that any good faith assessment could not result in the lifting of the precautionary measures and therefore does not conduct it.[266]

126. Even the Determination of Claim and the Requerimiento, which formally instituted the Asset Forfeiture Proceedings, fail to conduct any assessment of Newport's good faith status.[267] Mr. Caro acknowledged this, admitting that he had conflated Corficolombiana's good-faith assessment with Newport's: [268]

> "*Q. But you cannot point me to anywhere in this Decision--right?--that specifically discusses independently Newport's good-faith status. It's just through Corficolombiana, in your position; correct?*
> *A. That's right, because Newport was tied to Corficolombiana.*"[269]

127. But, of course, Newport and Corficolombiana are not the same entity, nor are there any reasons to treat them as the same when assessing good faith status. As Mr. Caro himself acknowledged, Corficolombiana, as a financial institution, was subject to a higher standard of diligence:

> "*Q. Right. But it's not the same standard for everybody. You put yourself in the position of the person who's actually conducting the diligence; correct?*
> *A. Of course. The thing is, the standards are different. This same standard does not apply to a regular individual, a regular Tom, Dick or Harry than for a financial institution. A financial institution is obligated to abide by the SARLAFT, which is a system to fight terrorism and money-laundering. In that case, the standard is higher in the case of that entity.*"[270]

128. While Mr. Caro went on to (wrongly)[271] state that Newport was also subject to SARLAFT requirements, the undisputed fact is that Mr. Caro did not even attempt to conduct any

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266 **Exhibit C-054bis**, Asset Forfeiture Unit's Response to Newport's Petitions, 17 February 2017, pp. 7-8 ("*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*.").

267 *See generally* **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017; **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017.

268 **Day 4 Tr.** 974:7-14 (Caro Cross) ("*Q. And nowhere in here do you say what Newport--that Newport was at fault, did you? You just say Corficolombiana was at fault; right? Nowhere in here do you say Newport was at fault. A. Of course, I don't mention it because Newport speaks through Corficolombiana because it is the natural spokesperson of the property that was affected.*").

269 **Day 4 Tr.** 939:10-15 (Caro Cross). *See also* **Day 4 Tr.** 974:7-14 (Caro Cross).

270 **Day 4 Tr.** 963:17-964:6 (Caro Cross).

271 Martínez 1 Report, ¶¶ 50, 76 (distinguishing between "*obligated subjects*" such as Corficolombiana and "*non-obligated subjects*" such as Newport who are only required to perform "*simplified*" due diligence); **Exhibit CD-3**, slide 11; **Day 4 Tr.** 1123:22-1123:13-14 ("*THE WITNESS: Not all of the corporations in Colombia are compelled to have a money-laundering prevention mechanism. Only some that meet two requirements, the first one that they need to have the oversight of the Superintendency of Corporations, and the second requirement is that by 2013--*

independent review of Newport's good faith status at all (irrespective of the standard). There is no statement even in any of these decisions that Newport was subject to the same diligence requirements as Corficolombiana, nor any discussion of Newport's due diligence activities. Thus Colombia failed even to make a threshold assessment in respect of Newport's good faith status.

129. Accordingly, even if Colombia's position that Newport was designated "*affected party*" status is credited, Colombia failed to accord Newport with the rights to which it was entitled as an "*affected party*" including, critically, the right to have its good faith status assessed reasonably and diligently by the Attorney General's Office. The Attorney General's Office's failure in this regard resulted in the loss of Claimants' investments.

III.C.3. [redacted]

130. [redacted]

131. [redacted]

that is to say the previous year--they had revenue equal or higher than 160,000 minimum salaries that, as I estimated, would be about $41 million at current value. ***In my opinion, based on my information, Newport did not have that level of revenue, and they did not have the oversight of the Superintendency of Corporations. Therefore, this Circular did not apply to Newport.***") (Martínez Cross). *See also* Martínez 2 Report, ¶ 60(b).

272 **Exhibit RL-103**, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, ¶ 461; Memorial, ¶¶ 422-23; Counter Memorial, ¶ 403.

273 [redacted]

[redacted]

132. [redacted]

133. [redacted]

134. [redacted]

[redacted]

274 [redacted]

275 [redacted].

276 [redacted]

277 [redacted].

278 [redacted]).

279 [redacted]).

280 [redacted]

281 [redacted]

[redacted]

135. [redacted]

136. [redacted]

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282 [redacted]

283 [redacted]

284 [redacted]

285 [redacted]

286 [redacted].

287 [redacted]

288 [redacted].

289 [redacted]).

290 [redacted]

137. [redacted]

III.C.4. By Depriving Claimants Of Fundamental Due Process Rights, Colombia Has Violated Its TPA Obligations

138. The TPA requires Colombia to accord Claimants and their investments with due process. Specifically:

(a) Article 10.7 requires Colombia to conduct expropriations "*in accordance with due process of law*"[291] and

(b) Article 10.5.2(a) requires Colombia to accord FET "*in accordance with the principle of due process embodied in the principal legal systems of the world*".[292]

139. Due process in the expropriation context requires "*an actual and substantive legal procedure*" with "*basic legal mechanisms such as reasonable advance notice, a fair hearing and an unbiased adjudicator*" and "*a reasonable chance within a reasonable time to claim its legitimate rights and have its claim heard.*"[293] Due process also requires Colombia to follow its own law.[294]

140. The due process obligations in the FET context are parallel to those required for lawful expropriation under the TPA. Like with expropriation, due process in the FET context also requires the State to actually consider and assess the opposing party's position instead of merely paying it lip service.[295] Tribunals have found that the failure to collect, record and assess

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[291] **Exhibit CL-001bis**, TPA, art. 10.71.

[292] **Exhibit CL-001bis**, TPA, art. 10.5.2(a).

[293] **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hunary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 145.

[294] **Exhibit CL-066**, *Waguih Elie GeorgeSiag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICISD Case No. ARB/05/15, Award, 1 June 2009 ¶ 441; **Exhibit CL-103**, *Quiborax S.A., Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶ 245.

[295] *See e.g.* **Exhibit CL-060**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008. *See e.g.*, ¶¶ 617-19 (finding that the State's decision was made without transparency and due process where it was "*made without the Claimants having a real possibility to present their position. They were only verbally invited to a meeting just two days before the meeting of the Working Group.*").

evidence, such as by interviewing key personnel during investigations, particularly evidence that would contradict the Government's position, violates due process.[296]

141. A breach of due process does not have to amount to a denial of justice in order to amount to a breach of the TPA. Contrary to Colombia's submissions,[297] a number of tribunals interpreting a similarly worded treaty provision have confirmed that due process is a discrete component of the minimum standard of treatment, separate from a denial of justice.[298] Claimants have not alleged a denial of justice in this Arbitration, and the language of the TPA does not support a finding that a denial of justice is a precondition to a breach of due process.

142. As detailed below, Colombia has breached its due process obligation in three respects.

143. First, Colombia initiated the Asset Forfeiture Proceedings on the basis of a known lie in pursuit of a corrupt extortion scheme. Ms. Ardila and Ms. Malagón conspired with López Vanegas to attempt to extort Mr. Seda, utilizing the threat of commencement of asset forfeiture proceedings and seizure of the Meritage Property as leverage. When Mr. Seda did not succumb to the extortion and bribery requests, Ms. Ardila went ahead and seized the Meritage Property and the Asset Forfeiture Proceedings commenced – ultimately resulting in the expropriation of the Meritage Claimants' investment. An expropriation stemming from corrupt motives by its nature contravenes fundamental due process.[299]

144. Second, Claimants were denied the opportunity to properly participate in the proceedings that led to the seizure of the Meritage Project. Even after Colombia imposed the precautionary

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296 *See e.g.* **Exhibit CL-087**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012 ¶¶ 485-89 (finding that the State breached its obligation to accord due process because its investigation failed to interview key people).

297 Counter Memorial, ¶¶ 401-403; Reply, ¶¶ 770-83; **Day 1 Tr.** 322:15-323:7 (Colombia's Opening); Colombia's Opening, slide 217.

298 *See* **Exhibit CL-095**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶ 587 ("*Article 10.5 CAFTA-DR also obliges the State to observe due process in administrative proceedings. A lack of reasons may be relevant to assess whether a given decision was arbitrary and whether there was lack of due process in administrative proceedings*."); **Exhibit CL-084**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 219.

299 *See* **Exhibit CL-090**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.871, ("*International tribunals cannot turn a blind eye to corruption and cannot decline to investigate the matter simply because of the difficulties of proof*."); **Exhibit CL-024**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, Award, ¶ 111 ("[I]*nternational tribunals have often held that corruption of the type alleged* [. . .] *are contrary to international* [bonas] mores"); **Exhibit CL-046**, *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, ¶ 157 ("*In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy*.").

measures, it continued to ignore Newport's requests to admit evidence, submissions and participate in the proceedings, despite now alleging that it had always accorded Newport affected-party status. Critically, the Attorney General's Office did not bother to "*identify, locate, gather, and file the elements of proof*" regarding Newport's good faith status, despite being required to do so under the Asset Forfeiture Law.[300] As a result, Claimants' investment in the Meritage Project has languished for over six years, resulting in the complete deprivation of its value.

145. [redacted].

146. Accordingly, through its conduct of the Asset Forfeiture Proceedings, Colombia has acted in contravention of its due process obligation both procedurally and substantively. Colombia's behaviour is thus in breach of the FET protection that Claimants are entitled to, and it further renders the expropriation unlawful for a lack of due process.

III.D. Colombia's Initiation Of The Asset Forfeiture Proceedings Is Unconnected To Any Rational Policy Purpose

147. Colombia's actions are also arbitrary and unreasonable because they are unconnected to any rational policy purpose. Accordingly, they breach Colombia's expropriation and FET obligations.

148. Measures that *(i)* "*inflict*[] *damage on the investor without serving any apparent legitimate purpose*"; *(ii)* are "*not based on legal standards but on discretion, prejudice or personal preference*"; and/or *(iii)* are "*measure*[s] *taken for reasons that are different from those put forward by the decision maker*" characterize unreasonable and arbitrary behaviour that falls afoul of a State's FET obligations.[301] Moreover, Colombia accepts that measures must be adopted "*in pursuit of rational policy objective*[s]" to be deemed reasonable.[302]

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300 **Exhibit C-003bis**, Law No. 1708, art. 152.

301 **Exhibit CL-070**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303; **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 578.

302 Counter Memorial, ¶ 395.

149. In order to establish a valid public purpose, Colombia must: *(i)* identify a public purpose; and *(ii)* demonstrate that a reasonable nexus exists between the disputed measure and the nominated public purpose.[303] Failure to establish such a nexus will both render an expropriation unlawful for failing to meet the requirement that the State only expropriate for a "*public purpose*,"[304] and it will also amount to a breach of the FET protection.[305]

150. Colombia has stated that its purported public purpose for initiating and conducting the Asset Forfeiture Proceedings was "*in order to protect Colombia's legitimate welfare objectives, namely, to fight organized crime and secure social and economic stability.*"[306] However, Colombia has failed to establish any nexus—let alone a reasonable nexus—between this public purpose and the Asset Forfeiture Proceedings. This is because:

(a) The Asset Forfeiture Proceedings did not target any illicit proceeds of crime, thus Colombia's measures have done nothing to "*fight organized crime*";

(b) The due diligence conducted and good faith third party status acquired by Newport was ignored, thus Colombia's measures weakened "*social and economic stability*" rather than promoted it.

III.D.1. Colombia Failed To Target Illicit Proceeds

151. It is undisputed that Colombia's initiation and conduct of the Asset Forfeiture Proceedings has not had any impact on the assets of any individual involved in organized crime in Colombia. The Asset Forfeiture Law provides that in instances in which an asset is tainted by prior illegality but there is a subsequent, good faith purchaser, the proper recourse for the State is to leave the asset undisturbed to the good faith purchasers, and instead trace (and seize, if appropriate) the proceeds of the original transaction from the relevant upstream parties.[307] The

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303 *See* Memorial, ¶¶ 402-408; Reply, ¶¶ 276-77; **Exhibit CD-1**, slides 119, 128-34, 138.

304 *See* **Exhibit CL-106**, *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 296 (finding expropriatory conduct will be unlawful where there is no reasonable nexus).

305 *See* **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 307 (finding a measure will be unreasonable and arbitrary in breach of FET where there is no reasonable relationship to a rational policy).

306 Counter Memorial, ¶ 428. *See also* Rejoinder, ¶ 608 ("*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.*"). Colombia's Opening, slide 189. **Day 1 Tr.** 307:13-308:21 (Colombia's Opening).

307 Martínez 1 Report, ¶ 40; Martínez 2 Report, ¶ 34 ("*Asset forfeiture seeks to prevent anyone from knowingly profiting from illegality. If there is a good faith buyer without fault, that person's interest cannot be encumbered; rather, the proper thing to do is to follow the chain of title history backwards to find the illegality and determine who was not a good faith buyer. Once it has been determined who that person lacking in good faith is, the state can take action against the assets of that person to recover the value of the asset the illegality of which has been established.*"); Medellín 2 Report, ¶ 60. *See* **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 16.

Constitutional Court of Colombia has confirmed that tracing assets is how the Asset Forfeiture Law should be used to achieve its purpose of fighting organized crime:

> "[T]*his Court has understood that, to the degree that the aforementioned tool* [asset forfeiture] *was developed by the constituent* [assembly] *as a primary tool to combat criminality and illegality through the elimination of the underlying financial incentives to those phenomena, it must be understood to be directed at eliminating the financial benefits inherent to those activities. In this manner, the action goes not so much as suppressing the domain over the assets that are linked to the illegality, but avoiding that this* [illegality] *becomes an instrument of profit and personal enrichment*."[308]

152. [redacted] As described above, this includes Quartier, the site of a housing development, where López Vanegas actually appears in the chain of title (as distinct from the Meritage Property, where he was never an owner in his personal capacity).[310] Accordingly, there has been no disgorgement of illicit profits and the persons who allegedly perpetrated illegal conduct in connection with the Meritage Property remain unaffected by the Asset Forfeiture Proceedings. The Asset Forfeiture Proceedings accordingly did not (and given the manner in which they were conducted, could not have) "*eliminated the financial benefits*" accrued by the alleged front men and criminal suspects. It simply "*eliminated the financial benefits*" for Claimants, who have no connection to any criminal activity.

153. [redacted]

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308 **Exhibit C-329**, Constitutional Court of Colombia, Judgment C-327/20, 19 August 2020, p. 37.

309 [redacted]

310 *See supra* ¶ 68.

[redacted]

154. Accordingly, it is difficult to see how the Asset Forfeiture Proceedings against Meritage have assisted in any way Colombia's stated goal to "*fight against organized crime*".

III.D.2. Colombia Ignored Newport's Good Faith Status

155. Instead of targeting illicit proceeds, the Asset Forfeiture Proceedings have instead rendered Newport valueless, which is a good faith third party buyer that is not accused of any wrongdoing or organized crime. Another stated goal of Colombia is to "*secure social and economic stability*" which requires Colombia to uphold the rule of law by , among other things, ensuring that investments made in good faith are protected as required by the Asset Forfeiture Law.

III.D.2.a. Good Faith Standard Under Colombian Law

156. In order to be entitled to good faith third-party status, a property buyer must take reasonable, objective steps designed to acquire information regarding the property it seeks to acquire.[312] The Colombian Constitutional Court—the highest court in Colombia—has recently identified the relevant standard as follows:

> "[T]*he good faith and diligence that may be required of third-party acquirers refer exclusively to assets that are the object of a legal operation, but not to those persons who transfer domain over them. In fact, when someone intends to acquire an asset, it is up to that person to ascertain the legal status of such asset in order to establish the history and the chain of title and tradition, but not to inquire into the history or personal details of the party that transfers the respective assets to him, especially when in many cases the transfer occurs when the State itself has not been able to prove or penalize the perpetration of illegal activities.*"[313]

157. In other words, while thorough diligence of your counterparties and clients is required, the Asset Forfeiture Law does not require going back over the entire chain of title and ascertaining the personal details and criminal history of every owner until the beginning of time. Indeed,

311 [redacted]

312 Medellín 1 Report, ¶ 82; Martínez 1 Report, ¶¶ 37, 47.

313 **Exhibit C-329**, Constitutional Court of Colombia, Judgment C-327/20, 19 August 2020, p. 42. *See also* **Day 4 Tr.** 1061:1-1063:5 (Martínez Direct); *see also* Medellín 2 Report, ¶¶ 70-73.

that standard is an impossible one to attain.[314] Even though the Constitutional Court (and common sense) is clear, Colombia insists that this case does not apply to the diligence requirements for assets of illicit origin; only licit origin. But that distinction makes no sense. While the Court in this case was hearing a case regarding assets of licit origin, the due diligence standard it pronounced must apply with respect to assets of both licit and illicit origin. There is no justifiable reason for the diligence standard to be different for licit and illicit properties as the party conducting diligence cannot know whether the property has licit or illicit origin prior to conducting its diligence. In other words, at that *ex ante* stage before the status is known, the diligence standard must necessarily be the same. Neither Colombia nor its experts have been able to explain this logical quandary. When confronted with this during cross-examination, Colombia's expert, Dr. Reyes, could not provide a direct response.[315]

158. As the Colombian Constitutional Court has held repeatedly,[316] and as Drs. Medellín[317] and Martínez[318] have explained in their respective expert reports, the standard of diligence to acquire good faith third party protection is not perfection. Diligence must be based on materials or information that is both available (*i.e.*, information that exists) and accessible (*i.e.*, available to the public) at the time of the diligence.[319] Diligence does not require "*meticulous investigations into the legal past of the sellers, into any legal disputes they may be involved in different jurisdictions*" because this would "*impose*[] *unreasonable and unsustainable burdens on individuals, which go far beyond the duties that the legislator can constitutionally impose*

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314 *See* **Day 4 Tr.** 1201:16-1202:3 (Reyes Cross) ("*I'm just asking very simply that--whether you would agree and I believe your answer was yes--that in 2013, I had no way of going back to 2004 and figuring out how much money someone had in their bank account in 2004 who's not my counter-party. That person is not there for me to ask. We agree on that; right? A. We agree on that, specifying that that is not--does not suffice, as I see it, to characterize the conduct of a person as good faith and no fault.*").

315 *See* **Day 4 Tr.** 1223:12-1224:10 (Reyes Cross) ("*You have said that you believe there is a different standard of diligence for assets of legal origin versus illegal origin, and I guess I just have one question:* ***If, before buying the asset and I'm trying to decide what diligence I need to do, I knew that the asset was illicit, I couldn't buy it at all, could I, Dr. Reyes? There is no amount of diligence in the world I could do that would allow me to knowingly buy an illicit asset, and yet your analysis seems to suggest that, before I buy it, I need to know that it's legal or illegal to then decide what 1 standard of diligence to do?*** *A. If you are referring to the Judgment of the Constitutional Court, it has to be with examples, that first, where the proceeding is pursuing equivalent assets; that is to say, proceedings that start after an asset forfeiture judge has said that that asset is not pursuable because there is a good-faith third party. And second, they need to be equivalent assets of absolutely licit origin.*"). *See generally* **Day 4 Tr.** 1221-1224.

316 *See, e.g.*, **Exhibit C-077**, Constitutional Court of Colombia, Ruling C-1007, November 18, 2002, at p. 76.

317 Medellín 1 Report, ¶ 98.

318 Martínez 1 Report, ¶ 33.

319 Martínez 1 Report, ¶¶ 37, 47. *See also* **Day 4 Tr.** 1201:3-8 (Reyes Cross) ("*Q. So, to be sure, Dr. Reyes, you would, of course, agree with me that, in 2013, when Newport is conducting diligence on the property, it can't possibly go to a bank and ask how much money did the fruit seller have in 2004? Can't be done; right? A. Right.*").

on them."[320] Here, Colombian prosecutors discovered the alleged illicit origin of the Meritage Property after an allegedly extensive investigation which required the exercise of Colombia's sovereign powers. Newport cannot reasonably be expected to conduct the same investigation, and the Constitutional Court's language on what burdens can be constitutionally imposed on individuals supports this conclusion.

159. Another important aspect of due diligence requirements for financial institutions and other regulated entities[321] is the implementation of internal diligence and know-your-client policies as part of a risk management, anti-money laundering, and anti-terrorism financing compliance system commonly known as "SARLAFT" (*Sistema de Administración del Riesgo de Lavado de Activos y de la Financiación del Terrorismo*, in Spanish). Specifically, Article 102 of Decree 663 of 1993 (the Organic Statute of the Financial System in Colombia) requires financial entities to "*adequately know the economic activity carried out by their clients, its magnitude* [and] *the basic characteristics of the transactions in which they engage*."[322]

160. While Colombia has attempted to obfuscate the scope of SARLAFT, Colombian law expressly requires that the SARLAFT process be conducted with respect to *clients* and counterparties.[323] It would, of course, be impossible to conduct the process with respect to non-clients, or indeed everyone on a chain of title going back forever, as Dr. Reyes acknowledged on cross-examination.[324] To state the obvious, some of those persons may be deceased, or even if alive, have no obligation to provide sensitive financial or other personal information to a complete stranger in a transaction in which they are not involved.

161. Moreover, as there appears to have been some confusion over this, it is important to clarify that neither Newport nor Royal Realty are regulated entities that are required to implement

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

321 *See* **Tr. Day 3** 937:16-938:2 (Caro Cross) ("*And then on the next page, second last paragraph, it says: "Thus, Fiduciaria, given this actual non-compliance with the SARLAFT system, cannot be considered a third party acting in good faith and free from fault." Do you see that?* ***But there is no finding with respect to Newport, is there? A. That is correct***…").

322 **Exhibit C-072**, Decree 663 of 1993, art. 102.

323 *See* **Tr. Day 4** 968:5-10 (Caro Cross) ("*Q.* ***Now, all of these requirements*** **[of SARLAFT]** ***are with respect to their own clients; correct? A. The clients and the users of the financial system. Well, they must know their clients and their users****, and they must abide by all of the provisions of the--this financial statute.*"). *See also* **Day 4 Tr.** 970:22-975:14.

324 *See* **Day 4 Tr.** 1201:17-1202:3 (Reyes Cross) ("*I'm just asking very simply that--whether you would agree and I believe your answer was yes--that* ***in 2013, I had no way of going back to 2004 and figuring out how much money someone had in their bank account in 2004 who's not my counter-party. That person is not there for me to ask. We agree on that; right? A. We agree on that****, specifying that that is not--does not suffice, as I see it, to characterize the conduct of a person as good faith and no fault*.").

SARLAFT.[325] The requirement to implement SARLAFT was not required of all companies engaged in those activities, only of those with income in 2013 above 160,000 times the minimum legal monthly wage of the time.[326] Newport did not have such income at the time and thus, did not qualify. Nonetheless, Newport hired fiduciaries like Corficolombiana to implement rigorous SARLAFT processes in advance of commencing major Projects.[327] And, in any event, Newport has never been accused of failing to implement SARLAFT by Colombia, nor did the Attorney General's Office cite this as a basis to deny Newport's good faith status in the Asset Forfeiture Proceedings (as the Attorney General's Office did not even assess Newport's good faith status).

162. A final point is that Colombian law *specifically* recognizes the "*common error*" doctrine, pursuant to which a person's good faith may not be assailed for not discovering a particular fact, if, as the Constitutional Court explained, "*the error or mistake is of such a nature that any prudent and diligent person would have also made it.*"[328] The "*common error*" doctrine is a longstanding, well-established principle under Colombian law, described by the Constitutional Court as "*developed in our country by doctrine for more than* [now-sixty] *years*."[329] The law will not punish the buyer for not having discovered an alleged defect in title that another reasonable person might also have overlooked. At its highest, Colombia's case alleges that Newport committed a common error.

III.D.2.b. Newport Met The Standard For A Good Faith Third Party Under Colombian Law

163. Newport not only met but exceeded the due diligence standard required for good faith third-party status. Newport's due diligence included:[330]

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325 See Martínez 2 Report, pp. 16-17; Day 4 Tr. 1121:13-1122:7.

326 See Martínez 2 Report, ¶ 60(b).

327 *See* **Day 2 Tr.** 463:2-4 (Seda Cross).

328 **Exhibit C-077**, Constitutional Court of Colombia, Ruling C-1007, November 18, 2002, at p. 76.

329 **Exhibit C-077**, Constitutional Court of Colombia, Ruling C-1007, November 18, 2002, at p. 76 (writing 20 years ago, in 2002, the Court wrote: "*developed in our country by doctrine for more than forty years*." (emphasis added)).

330 **Day 2 Tr.** 500:10-501:12 (Seda Cross) ("*What I'm referring to--what we relied on, to apply and be protected by the law as qualified good-faith buyers was the diligence, the realm and world of diligence that we did at the time of the acquisition of the property. Those items are: (1) the study by Otero & Palacio that we contracted; (2), the petition, certificate, whatever we will call it, that was positive--received a positive response from the Attorney General's Office, money-laundering and Asset Forfeiture Unit. No. 3, the hiring of a nationally recognized fiduciary that had strict guidelines under the banking and finance superintendency and which we knew, even though we hadn't necessarily seen their manuals because they're proprietary in their in-house documents, we know that they have to do this because it's regulated by law, but they have to scrub not just the property, but the counter-party for--who we're dealing with. That's not just the asset itself but La Palma, the counter-party who we're buying it from. And so, considering that they're extremely well-to-do professionals, all of those elements that I just*

(a) Engaging Corficolombiana, one of Colombia's leading fiduciaries, to act as the fiduciary for the Meritage Project and to implement SARLAFT on the Property.

(b) Commissioning and reviewing a title and corporate study from Otero & Palacio, a prominent local law firm with experience in conducting title studies, which worked regularly with Corficolombiana and which Corficolombiana recommended to Newport.[331]

(c) Obtaining the Certification of No Criminal Activity from the Attorney General's Office.[332]

(d) Obtaining and reviewing a Certification of No Criminal Activity from La Palma Argentina.[333]

164. The Constitutional court has held that due diligence only needs to be conducted on the property itself and not prior owners.[334] Here, Newport therefore exceeded this standard by performing diligence on both the Property itself and the prior owners.[335]

III.D.2.c. Corficolombiana Also Met The Good Faith Standard Under Colombian Law

165. Colombia, however, never assessed Newport's good faith status. Instead, it conflated Newport's obligations with Corficolombiana's. But even Colombia's complaints with Corficolombiana's due diligence are not credible.

166. First, Colombia argues that Corficolombiana should have run Google searches on each and every legal representative of every company on the chain of title going back in time forever. This standard of diligence has however been debunked by Colombia's Constitutional Court, which only requires diligence to be conducted on the property and not all of its prior owners (as noted above). Colombia attempts to distinguish the Constitutional Court's decision on the basis that it is only relevant to asset forfeiture where property has a "*licit origin*."[336] However, as discussed, such a distinction would be unworkable given that the purpose of diligence is to

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described to you, that are those three elements, gave us a high level of certainty and comfort that we were doing what was right, what was required by the law.").

331 **Exhibit C-030bis**, Otero & Palacio Title Study and Supplement, 7 March 2013 and 23 July 2013; **Exhibit C-219**, Testimony of Margarita María Betancourt Guzmán in Pinturas Prime Arbitration, 18 September 2018 ("*The fiduciary has a list of firms or of attorneys who can conduct title studies for us, and we recommend them to clients; and they hire out those title studies to those firms*.").

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

333 *See* **Exhibit C-027bis**, Letter from Elsa Maria Moyano Galvis to María Cecilia Uribe Quintero, 30 October 2007.

334 **Exhibit C-329**, Constitutional Court of Colombia, Decision C-327/20, 19 August 2020, pp. 42-43; Martínez 2 Report, ¶ 9; Medellín 2 Report, ¶¶ 9 *et seq*.

335 Reply, ¶ 156; Martínez 1 Report, ¶ 65; Medellín 1 Report, ¶ 15.

336 Rejoinder, ¶¶ 236-44.

determine whether or not an asset has a licit or illicit origin, and if a determination were made that the asset had an illicit origin it could not be purchased in the first place.[337]

167. Second, Colombia contends that Newport should have commissioned a title study that verified the transfers of title to the Property for a period of 20 years as opposed to the 10 years covered in the Otero & Palacio title study. However, Colombia cannot point to any law, rule, or regulation that requires a title study spanning longer than 10 years, the industry norm for title studies,[338] and it is commercially impractical for due diligence to be *ad infinitum*—to the beginning of a property's history.[339]

168. Third, Colombia contends that Corficolombiana should have been able to know in 2013 the historic financial circumstances of prior owners including the alleged "*frontmen*" Mr. Arboleda, Ms. Gil, and Ms. Gil Rendon. However, as Dr. Reyes accepted at the Hearing: *(i)* due diligence obligations are limited to "*information* [that] *exists, and* [is] *accessible*";[340] and *(ii)* "*that a person's banking information, including how much money they have is Confidential Information*."[341] Accordingly, verification of the financial position of past owners is incompatible with Colombia's own articulation of the due diligence standard.

169. In this respect, Colombia alleges that Corficolombiana's SARLAFT process was deficient because it was not able to verify the financial details of the mango seller or López Vanegas. This charge is absurd. Neither the mango seller nor López Vanegas were Corficolombiana's client or counterparty—it was not responsible for, and indeed could not, conduct SARLAFT on them. In fact, Corficolombiana had a robust SARLAFT department with a compliance officer,

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337 *See* **Day 4 Tr.** 1221:1-1224:10 (Reyes Cross).

338 *See, e.g.*, Martínez 1 Report, ¶ 45; **Exhibit C-219**, Testimony of Margarita María Betancourt Guzmán in Pinturas Prime Arbitration, 18 September 2018, p. 13 ("*QUESTION: If you know or have evidence thereof, who determined that the title study would go back 10 years? ANSWER: The title study goes back 10 years because the title study is conducted for the civil side of things* [. . .] *Since the statute of limitations on civil actions runs out after 10 years, that's why we go back 10 years. QUESTION: But you didn't answer my question: Who instructed or determined that the title study would go back 10 years? ANSWER: In the FIDUCIARY we go back 10 years.* [. . .] *COUNSEL FOR THE RESPONDENT RESUMES HIS EXAMINATION. QUESTION:* ***In other words, that title study was satisfactory for the FIDUCIARY? ANSWER: Yes, it was complete*** [. . .]."); **Exhibit C-216**, Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018, p. 3 ("*the title study is done going back 10 years, considering the statute of limitations provided for in Colombian law for titles of purchase*.").

339 Martínez 2 Report, ¶ 60 ("*First, the standard that Reyes suggests for Newport is that a title study by definition must be* ad infinitum*; with no time limit whatsoever. That is not reasonable or feasible and does not reflect the commercial practice carried out in Colombia. Secondly, I must point out that there is no law, rule or provision establishing what period of time a buyer must cover in researching the title to a property. Attempting to impose a standard now—or, even worse, suggesting there is no limit whatsoever—is arbitrary and seems to me to constitute a post hoc rationalization*.").

340 **Day 4 Tr.** 1197:14-15 (Reyes Cross).

341 **Day 4 Tr.** 1200:18-21 (Reyes Cross).

who was in charge of studying and verifying information from potential clients and counterparties, which it thoroughly applied in this case.[342] What, in fact, appears to have happened is that Dr. Caro—who has admitted that he has no knowledge of SARLAFT requirements: "*I can't tell you what would have been a proper SARLAFT*"[343]—did not actually assess whether Corficolombiana had instituted a proper SARLAFT process:

> "*Q. Right. You hadn't asked Corficolombiana what they did; correct? This is just your assumption.*
>
> *A. I didn't really have to ask anything of Corficolombiana as to whether it met the SARLAFT requirement or not. They know the rules that they have to abide by. If they don't abide by those regulations, then they may be subject to a SARLAFT breach.*
>
> *It was not my obligation. The rules didn't require that of me. I didn't have to ask Corficolombiana whether it met the requirements of SARLAFT or not. That was the subject matter to be discussed during the asset forfeiture trial that we're going to put to the Court.*"[344]

170. Accordingly, under the Colombian law standard, Corficolombiana's diligence was sufficient and its good faith, had it been properly reviewed by a prosecutor who actually understood diligence requirements, ought to have been credited. But even if Corficolombiana's diligence was found to be lacking, it is clear that Newport acted in good faith. As it is not a financial institution or fiduciary or title study firm, Newport's diligence was manifested by hiring experts in the field. Newport did that and much more. [redacted]

[redacted]

[redacted]

[redacted]

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342 **Exhibit C-219**, Testimony of Margarita María Betancourt Guzmán in Pinturas Prime Arbitration, 18 September 2018, pp. 4-5, 13.

343 **Day 4 Tr.** 974:1-2 (Caro Cross).

344 **Day 4 Tr.** 966:14-967:5 (Caro Cross).

345 [redacted]

171. [redacted].

172. [redacted]

[redacted]

346 [redacted]

347 [redacted]

[redacted] Neither bodes well for his credibility.

173. [redacted]

174. Faced with these compelling admissions, Colombia has invented a new reason to call into question Newport's good faith status. Colombia now claims that Newport cannot be considered a good faith third party because it supposedly "*ignored*" López Vanegas's first attempt to extort Mr. Seda in 2014. This argument, however, fails because:

(a) Colombia did not deny Newport (or Corficolombiana) good faith status due to its alleged failure to report López Vanegas's extortion threats; and

(b) Newport and Corficolombiana did, in fact, redo their diligence after López Vanegas's first threat, even though there was no duty to do so, and still found nothing.

III.D.2.d. Colombia Did Not Deny Good Faith Status Based On Corficolombiana's Response to López Vanegas's First Extortion Attempt

175. As discussed above, Colombia did not even attempt to assess Newport's good faith status before it seized the Meritage Property and initiated the Asset Forfeiture Proceedings.[350] Rather it lumped together Corficolombiana's diligence with Newport's even though Corficolombiana has a much higher standard of diligence because of its reporting obligations as a financial entity and Newport does not have access to the same diligence databases and mechanisms as

348 Hernández 2 WS, ¶ 43-44; [redacted]

349 [redacted]

350 *See supra* section III.C.2.

Corficolombiana. Moreover, Dr. Caro's determination that Corficolombiana's diligence was insufficient was not reasonable.[351]

176. But even in assessing Corficolombiana's due diligence, nowhere in the Precautionary Measures Resolution, the Determination of the Claim or the *Requerimiento* does Colombia make the finding that Corficolombiana's (or Newport's) alleged lack of reassessment of its diligence following López Vanegas's extortion attempt deprived it of good faith status.[352] This is a tactical *post hoc* theory that Colombia has invented specifically for this Arbitration. These were not grounds considered by Colombia in its decision to undertake the Asset Forfeiture Proceedings. Accordingly, how Corficolombiana and Newport addressed López Vanegas's extortion claims is not in any way relevant to Colombia's initiation of the Asset Forfeiture Proceedings, and thus cannot serve as grounds to justify Colombia's arbitrary and unreasonable initiation of the Proceedings that lacked any rational public policy nexus.

III.D.2.e. Newport and Corficolombiana Redid Their Due Diligence After López Vanegas's First Extortion Attempt

177. In any event, contrary to Colombia's insinuations, Mr. Seda responded diligently once made aware of López Vanegas's threats. So did Corficolombiana. They did this even though there was no obligation to redo diligence at that point because binding agreements in relation to the property had already been signed.

178. As Mr. Seda has consistently testified, in 2014, López Vanegas called his office claiming to be the true owner of the Meritage plot.[353] Mr. Seda and his team reviewed the title study on hand and did not find his name, they reviewed the full record of title holders of the Meritage Property that dated back to 1955, which had been prepared by Corficolombiana, and did not find his name.[354] They then searched for his name on the Internet and it appeared that he was a convicted drug criminal.[355] But even though López Vanegas appeared to be a discredited source who was making unsupported allegations, Mr. Seda did not ignore or dismiss him.

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351 *See supra* ¶¶ 169-170.

352 *See generally* **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017; **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Court, 5 April 2017.

353 *See* Seda 1 WS, ¶ 62; Seda 2 WS, ¶¶ 5-13; **Day 1 Tr.** 35:15-36:1 (Claimants' Opening).

354 *See* Seda 1 WS, ¶ 64; Seda 2 WS, ¶ 6; **Day 2 Tr.** 518:8-20 (Seda Cross).

355 *See* Seda 2 WS, ¶ 7; **Day 2 Tr.** 518:8-20 (Seda Cross).

(a) He asked La Palma Argentina if they knew the man.[356] They did not.

(b) He made a public statement on nationally broadcast radio, denouncing the extortion attempt.[357]

(c) He notified the unit buyers, and "*he made all the information available*" to them.[358]

(d) He asked Corficolombiana to look into the extortionist.[359] And Corficolombiana reran their diligence but still did not find any red flags. As Corficolombiana's legal director testified under oath:

> "*We had already begun seeking information, we verified once again how the business deal had taken place, we verified the title studies, we verified the searches that Mr. Sintura had performed, and once again the tool we have is to search in the list for people whose name appear in the title transfer of the property and those who appear, especially for La Palma Argentina, that was generated. In other words, La Palma Argentina transfers it to me, there is clear title, and so they rechecked it again in 2014, and everything turned up clean.*
>
> [. . .]
>
> *And in fact, when this came up, we reviewed what had been done at the time, and we reviewed La Palma, and everything was clean.*
>
> [. . .]
>
> *In fact, when the situation arose, we crosschecked the list again for people affiliated with La Palma Argentina and those involved in the transfer of title of that Real Property, and they don't show up. There's no impediment to working with La Palma Argentina nor with those who appear on the transfer of title of the property.*"[360]

179. Based on Corficolombiana's thorough and refreshed diligence, it concluded that there were no grounds to believe López Vanegas's claims. This could be for several reasons. First, López Vanegas was not then (nor is now) on the SDN or OFAC lists that would normally trigger an alert. Second, López Vanegas was not a prior owner of any property in the chain of title; rather, he was at some points in time—though not at the time the lot was purchased for the Meritage Project—a legal representative of a company that owned the property, Sierralta. Third, Sierralta

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356 *See* Seda 1 WS, ¶ 63; Seda 2 WS, ¶ 9; **Day 2 Tr.** 523:4-14 (Seda Cross).

357 *See* Seda 2 WS, ¶ 6, 12.

358 *See* Seda 2 WS, ¶ 10; **Exhibit C-219**, Testimony of Margarita María Betancourt Guzmán in Pinturas Prime Arbitration, 18 September 2018. *Cf.* **Day 2 Tr.** 520:7-521:18 (Seda Cross) ("*Q. When you say 'we discussed,' with whom did you discuss that at Corficolombiana?* [. . .] *Q. Okay. We don't have testimony from Corficolombiana in this case, do we? We don't know, I mean, we have to take your word for it; right?* [. . .] *Q. Did you ask them to provide testimony?*").

359 Seda 1 WS, ¶ 64; Seda 2 WS, ¶ 10. *See also* **Day 2 Tr.** 520:7-521:2 (Seda Cross) (Mr. Seda testifying that he discussed with Jamie Toro, National Director for Real Estate at Corficolombiana).

360 **Exhibit C-219**, Testimony of Margarita María Betancourt Guzmán in Pinturas Prime Arbitration, 18 September 2018, p. 6.

changed its name and legal representative in 1997, and thus the most recent records of the company would not include López Vanegas's name as a legal representative (even if that was relevant). Whatever the reason, it is indisputable that Corficolombiana acted diligently and found no cause for halting the Project. Doing so would have breached their fiduciary and contractual obligations:

> "[After] *we confirmed was that there was no impediment to the transfer of title of the properties that would permit claims against the fiduciary that it must return the Lot or anything that would affect the real estate Project. Since no legal or contractual grounds were present, the Agreement carry--continued being carried out. Terminating it would have meant breach of agreement by the fiduciary because there was no just cause to terminate it. On the contrary, we would have been the target of claims, obviously from Newport, such as those pending today. Those would be against the fiduciary from all the area of beneficiaries.*"[361]

180. Indeed, the unit buyers' contract with Newport and Corficolombiana shows that Newport was obligated to develop the Meritage Project and there was no scope in the circumstances to "*reverse*[] *and terminate*[]"[362] the Project.[363] Mr. Caro did not bother to consider any of this, indeed there is no evidence he made the effort even to learn these facts.[364] Neither he nor Ms. Ardila interviewed Newport or Corficolombiana or made any attempt at all to gather evidence on the initial due diligence or the refreshed diligence that Corficolombiana conducted after López Vanegas's extortion attempt.

181. That Corficolombiana's refreshed diligence did not turn up any red flags is completely consistent with other diligence performed by other fiduciaries and banks on López Vanegas, including after the Asset Forfeiture Proceedings had publicized his name. For example, in 2016, when Mr. Seda applied for a loan with Scotiabank, the bank requested another law firm, Osorio & Moreno, to conduct a title study of the Meritage Property.[365] That firm went back 20 years and even found the company for which López Vanegas was a legal representative, Sierralta, but did not identify any issues with that entity based on publicly available

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361 **Exhibit C-219**, Testimony of Margarita María Betancourt Guzmán in Pinturas Prime Arbitration, 18 September 2018.

362 Rejoinder, ¶ 215.

363 *See* **Exhibit C-449**, Unit Buyer Contract, 13 November 2013.

364 *See* **Day 4 Tr.** 986:18-987:11 (Caro Cross) ("*Q.* [. . .] *Terminating* [the Project] *would have meant breach of agreement by the fiduciary because there was no just cause to terminate it.* [. . .] *So, had you interviewed Corficolombiana, you probably would have understood this position; correct? A. Let me reiterate that Corficolombiana will have to provide its explanations before the natural Judge, the asset forfeiture judge.* [. . .] *It was not my obligation to call Corficolombiana* [. . .].").

365 *See* Seda 1 WS, ¶ 83.

information.[366] Likewise, the title study that was conducted on the Quartier Project identified López Vanegas but did not report that as a project-halting red flag either.[367]

182. Indeed, a panoply of fiduciaries and financial institutions have reviewed and authorized transactions of properties of which López Vanegas was identified as a direct owner (rather than a legal representative). For example, on June 26, 2007, while sitting in prison in the United States for drug trafficking, Ivan López Vanegas[368] in his *personal capacity* (not, as in the case of the Meritage lot, in which he acted as legal representative of an entity that had transferred property many years earlier) transferred a property he owned to Fiduciaria Central, S.A.[369], which is majority owned by the Government of the State of Antioquia.[370]

183. Thus, the State Government—acting through Fiduciaria Central—acquired the lot *directly and personally* from Mr. López Vanegas and then split it up into a series of commercial lots, which it then sold off to private buyers.[371] Shocking as it may be that a financial institution owned by the Government of Antioquia conducted business directly with Mr. López Vanegas while he was in prison, it is equally noteworthy that nearly every major fiduciary or bank in Colombia then transacted in that very lot, which passed directly from Mr. López Venegas.

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366 *See* **Exhibit C-160**, Osorio & Moreno Abogados, Title Study, 17 May 2016 (commissioned by Scotiabank). *See also* **Exhibit C-161**, Daniel C Pardo, Study for Banco de Bogotá, 26 May 2016 (commissioned by Banco de Bogotá).

367 *See* **Exhibit C-341**, Title Study for Development On Property No. 001-719319, 1 June 2015. . *See also* **Exhibit C-336**, Certificate of Title of Lot 001-462801; **Exhibit C-337**, Certificate of Title of Lot 001-719319. *See also* **Day 2 Tr.** 503:17-21 (Seda Cross) ("*I could go through a list of, I don't know, maybe five, six, seven, eight, ten other financial institutions that have all run diligence on Mr. Iván López, and not a single one has ever had a negative finding with regards to this gentleman.*").

368 While in prison in the State of Florida, Mr. López Vanegas executed a power of attorney for his adult daughter, Mariana López Torres, to perform real estate transactions on his behalf relating to lots no. 50C-170714, 50C-41730 and 50C-170713 in Medellín, Colombia.

369 *See* **Exhibit C-439**, Notarial Instrument No. 2165, 26 June 2007.

370 *See* **Exhibit C-445**, Certificate of Existence and Legal Representation of Fiduciaria Central S.A., 26 April 2022, p. 6; **Exhibit C-440**, INSTITUTE FOR DEVELOPMENT OF ANTIOQUIA, Frequently Asked Questions, https://www.idea.gov.co/Paginas/PreguntasFrecuentes.aspx, Last accessed 2 May 2022.

371 *See* **Exhibit C-446**, Certificate of Title of Lot 50C-1707849, 25 April 2022, pp. 3-4.

184. Property records confirm that a who's-who of Colombian financial institutions, such as Scotiabank Colpatria,[372] Banco de Bogotá,[373] Bancolombia,[374] and Alianza Fiduciaria,[375] among many others, each participated in purchase, sale, and trust transactions taking title to the lot owned by Mr. López Vanegas *after* he had been convicted and was sitting in prison for drug trafficking. Several of them did so repeatedly. By way of example only (although there are several more instances not included here):

(a) On February 17, 2009, Scotiabank Colpatria acquired a portion of the lot from an individual who had, himself, acquired it directly from Fiduciaria Central.[376] On April 16, 2009, Scotiabank Colpatria recorded a mortgage on the property,[377] and as recently as November 3, 2021, Scotiabank Colpatria again transacted in the lot at issue, this time apparently lifting a lien on it.[378] Mr. López Vanegas is personally identified as the prior owner and transferor twice in the very first page of the property history.

(b) On October 10, 2012, Leasing Bancolombia acquired one of the sub-divisions of the López Vanegas lot, and on July 21, 2015 transferred such lot to Banco de Bogotá, a multi-billion dollar bank that is the oldest bank in Colombia. As recently as May 31, 2021, Banco de Bogotá transferred the lot to a different entity.[379] Mr. López Vanegas is personally identified as the prior owner and transferor twice in the very first page of the property history.

(c) On December 12, 2016, Acción Sociedad Fiduciaria received one of the sub-divisions of the López Vanegas lot, and through a public deed of August 8, 2019, sold such lot to Alianza Fiduciaria, acting on behalf of a government-related pension fund.[380] Mr. López Vanegas is personally identified as the prior owner and transferor twice in the very first page of the property history.

185. Accordingly, just because Corficolombiana's original or second round of diligence did not turn up a red flag despite López Vanegas's extortion requests did not mean that its diligence was insufficient. Many other prudent and reasonable financial institutions, which are some of the largest and most experienced in the country, likewise did not identify even López Vanegas's direct ownership of properties as a red flag. Accordingly, Corficolombiana acted as any other

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372 *See* **Exhibit C-441**, Certificate of Title of Lot 50C-1732259, 26 April 2022, p. 2.

373 *See* **Exhibit C-442**, Certificate of Title of Lot 50C-1732268, 26 April 2022, p. 3; **Exhibit C-444**, Certificate of Title of Lot 50C-1732275, p. 3.

374 *See* **Exhibit C-443**, Certificate of Title of Lot 50C-1732274, p. 3; **Exhibit C-444**, Certificate of Title of Lot 50C-1732275, p. 3.

375 *See* **Exhibit C-443**, Certificate of Title of Lot 50C-1732274, at p. 3.

376 *See* **Exhibit C-441**, Certificate of Title of Lot 50C-1732259, at p. 2.

377 *See* **Exhibit C-441**, Certificate of Title of Lot 50C-1732259, at p. 2.

378 *See* **Exhibit C-441**, Certificate of Title of Lot 50C-1732259, at p. 3.

379 *See* **Exhibit C-443**, Certificate of Title of Lot 50C-1732274, at p. 3.

380 *See* **Exhibit C-442**, Certificate of Title of Lot 50C-1732268, at p. 3.

diligent and prudent purchaser would have, and therefore should have been protected as a good faith third party.

III.D.2.f. Corficolombiana Was Not Required To Redo Its Diligence

186. For the avoidance of doubt, Corficolombiana redid diligence even though it was not required to do so. After Corficolombiana conducted thorough due diligence in 2013, it established the trust designed to collect funds from Unit Buyers and manage the development of the Meritage Project.[381] It was on the basis of these agreements that presales and construction began.[382] Accordingly, it must be that the due diligence required to support these activities should be assessed as of the time of the creation of the trust in October 2013.

187. This is precisely what Claimants' legal experts, Drs. Medellín (whom Colombia refused to question) and Martínez, provided in their expert reports.[383] When Arbitrator Perezcano asked Dr. Martínez about the date as of which diligence ought to be considered, Dr. Martínez noted that "*when the legal contractual relationship between both parties materialises … it is at that point in time when you need to assess the good faith of the acquiring party. In this case the Fiduciary. From that moment onwards, the following trust contracts to be signed are the implementation of a project that had already been structured.*"[384] In other words, as Dr Martínez indicates, it is the date of the formation of the trust that matters, not the subsequent agreements and events that implement it. As he did not have the benefit of the full suite of trust documents before him, Dr. Martínez appears to have mistakenly submitted that in this case, the trust was only initiated "*when La Palma transferred the property to the Trust.*"[385] Of course, that is not true, as Dr. Martínez explained directly in writing[386] that the Project's trust was

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381 *See* **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013; **Exhibit C-034bis**, Presales Trust Agreement, 17 October 2013.

382 *See* Seda 1 WS, ¶¶ 55-61.

383 Martínez 2, ¶ 60(d) ("*commercial trust agreement for administration and payments that gave rise to the MERITAGE Trust was signed on October 13, 2013. In other words, by the time of the meeting between Iván López and Ángel Seda (in 2016) the property had already been acquired and the project was underway.* [. . .] *The good faith of Newport and of Corficolombiana must be assessed based on the information that they could have known at the time of the due diligence in October 2013, not based on the information that Ángel Seda received in 2014, which at that time did not appear to be true or credible.*"); Medellín 2 Report, ¶ 80 ("*As such, demanding that the requests for information, whose value is being discredited, continue to be made subsequent to the signing of the commercial trust agreement entered into in the year 2013, is to demand that the person who already holds patrimonial rights to an asset indefinitely conduct due diligence over an asset over which it already has a legitimate interest. As I stated before, the analysis must be* ex ante.").

384 **Day 4 Tr.** 1154:18-22, 1155:1-3 (Reyes Tribunal Questions).

385 **Day 4 Tr.** 1162:14-17.

386 Martínez 2 Report, ¶ 60(d) ("commercial trust agreement for administration and payments that gave rise to the MERITAGE Trust was signed on October 13, 2013. In other words, by the time of the meeting between Iván López and Ángel Seda (in 2016) the property had already been acquired and the project was underway. [. . .] The good faith of Newport and of Corficolombiana must be assessed based on the information that they could have known

created in 2013, and the 2014 agreement with La Palma was merely a subsequent "*implementation of a project that had already been structured*."

188. Even Dr. Caro, the Prosecutor in charge of the Asset Forfeiture file, confirmed that the relevant date for assessing Corficolombiana's diligence was in 2013, prior to finalization of the contracts for the development of the Meritage Project.[387] This is consistent with the approach of the Attorney General's Office in the Asset Forfeiture Proceedings to only review Corficolombiana's diligence as of 2013, before it entered into the trust agreements, rather than in 2014. Indeed, the Attorney General's Office made no attempt to understand or consider what additional diligence Corficolombiana (or Newport) conducted in 2014 after López Vanegas attempted to extort Mr. Seda.[388]

189. While Colombia's expert, Dr. Reyes, insisted that Corficolombiana's diligence should be assessed as of 2014, it was not because he considered there to be any continuing obligation to conduct due diligence, even if you learn of new circumstances of potential illegalities in the origin of the plot, once a party qualifies as a good faith third party.[389] As he affirmed, diligence has to occur "[b]*efore any legal act*".[390] He further confirmed this by way of his response to President Sachs's hypothetical:

> "*PRESIDENT SACHS: I have a question that is not yet clear to me. Assume I buy a property in Colombia and there is no problem, nothing turns out, I do a due diligence that you would consider sufficient, and 10 years later I learned that a relative of Escobar was involved in the initial—at the origin of the property. Now, does this affect my property rights?*
>
> *THE WITNESS: Absolutely not.*
>
> *PRESIDENT SACHS: Okay. If I want to resell the property in the year thereafter, so the new circumstance has arisen, and I want to sell my property, and now it is known that there was at the origin an illicit circumstance: Would I be able to sell the property to somebody else? Would that somebody else be*

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at the time of the due diligence in October 2013, not based on the information that Ángel Seda received in 2014, which at that time did not appear to be true or credible.").

387 **Day 4 Tr.** 994:3-5 (Caro Cross) ("*Now, Newport and Corficolombiana would have conducted their due diligence in 2013; correct? A. Of course, they should have done it.*") (Caro Cross).

388 *See* **Day 4 Tr.** 982:6-985:13 ("*Q. Are you aware that Mr. Iván López approached Mr. Seda in 2014?* [. . .] *and you haven't interviewed anybody at Corficolombiana; right? A. That is right, but I have no reason to interview them because they are represented by a lawyer who is going to attend an Asset Forfeiture Trial, and they will have to speak there to say what they might say to defend their interests. Q. Right. They can tell the Court.* [. . .] *A.* [. . .] ***I'm just now finding out about this interview with the legal representative, no doubt, of Corficolombiana***.").

389 *See* **Day 4 Tr.** 1227:5-1234:2 (Tribunal Questions).

390 **Day 4 Tr.** 1221:1-4 (Reyes Cross) ("*Q. Dr. Reyes, diligence has to occur before a purchase; right? A. Before any legal act, not necessarily a purchase.*").

a good-faith purchaser? Because he would know, wouldn't he—probably he would know—of that illicit origin.

THE WITNESS: Yes, you can sell it."[391]

190. Under this hypothetical, Dr. Reyes confirmed that "*the only thing that the Fiscalía could eventually do is to go and prosecute an equivalent asset of the person that committed the illegal act.*"[392] This is precisely Claimants' position—the target of the Asset Forfeiture Proceedings against the Meritage Project should have been assets belonging to the people who Colombia alleges actually committed the illegal acts, which at a minimum include López Vanegas. However, Colombia has not even touched his assets. According to Dr. Reyes, however, the reason that Corficolombiana did not merit the same protection as President Sach's hypothetical was because he "*underst*[ood] *that the Project is still pending, it hasn't been finished. That is why there is this obligation of reviewing good faith on that project or a new one, of course, if the circumstances change.*"[393] Dr. Reyes's position, however, is untenable—one could never have any legal certainty over the viability of any large scale phased development in Colombia because at any time someone could call and make a (non-credible) threat and the entire Project would have to come to a screeching halt.[394] There is no legal, commercial or indeed rational basis to his position.[395] This is also not what occurs in practice in Colombia. For example, the

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391 **Day 4 Tr.** 1227:5-1228:1 (Reyes Tribunal Questions).

392 **Day 4 Tr.** 1229:10-14 (Reyes Tribunal Questions).

393 **Day 4 Tr.** 1229:15-19 (Reyes Tribunal Questions).

394 *See* Seda 2, ¶ 7 ("*As a developer in Colombia, it is a harsh reality that on every project, you will receive extortionate threats from opportunistic individuals, whether neighbors, city employees, state officials, etc., who claim to have the power to interfere with your project. If you stopped every project because of these threats, you would never get anything built.*"). *See also* **Day 2 Tr.** 516:8-12 (Seda Cross) ("*this wasn't the first extortion claim we had received. In every project we receive at least—I don't know 5 to 10 extortion claims, most very small, very silly things, run-of-the-mill things, and this just seemed like another one of those same old things.*"); **Exhibit R-30**, W Radio Interview by A. Seda, 5 August 2014, pp. 2-3 ("*What is happening at the moment, and has already happened, for example, this person you are referring to, is a person who is trying to extort money. This person contacted our office once and contacted the previous owners and talks about a transaction that happened twenty years ago. The person you are referring to does not show them as a person who owns the property; they are not in the chain of owners of the property, which they say and which they told us, they said, we want you to pay us money or that we are going to take this to the news. ...It is like, for example, if you buy a flat, and someone says that thirty years ago the owner was Pablo Escobar, then one says good, show me the proof and the person says no, pay me a fee because they took the property from me and if you do not pay me the fee, then I will go with the law, I will go with the news, I will try to do some reputational damage. That is what is happening at the moment and what is happening is a person believes that money extortionists are only bandits with guns. Money extortionists, like me, as project developers, come out in various ways, they can come out as a neighbour who says: pay me money or I will try to stop your project, they can come out as an official of a municipality, which one hopes will not happen but, an official of a municipality who says: pay me a sum of money or I will not approve the project. When I say good people, I mean people who are not necessarily gangsters or something like that, but normal, day-to-day people who simply tell you to do A or I do B, pay me money, or pay me money, or I will extort you and harm your project or something like that.*").

395 *See* **Day 4 Tr.** 1225:16-1226:11 (Reyes Cross) ("*Q. So Dr. Reyes, is there ever a point that I will have certainty that I can keep my investment? A. When there are no circumstances that change the conditions on which the first good faith assessment was drawn, in that case, yes. Q.* ***20 years down the line, a new circumstance arises as you***

development on the Quartier Project continued well after López Vanegas's criminal history and the Asset Forfeiture Proceedings against the Meritage Project came into the public domain, and it is undisputed that Colombia has taken no action against that (Colombian-owned) development.

191. Colombia's suggestion that "*no 'reasonable developer' in Colombia* [. . .] *will continue sales and commence construction until it has obtained a judicial decision on the legality of the origin of the property*"[396] is equally nonsensical; Colombia seized the Meritage Property more than 71 months ago and a judicial decision on the origin of the Property remains pending.[397] It would be commercially impossible for a real estate developer to operate in Colombia if it had to pause and seek a judicial determination every time an extortion request (unfortunately common)[398] is received. Even Dr. Reyes does not take such an extreme position.

192. In any event, as discussed above,[399] Corficolombiana satisfied even Dr. Reyes's elevated good faith requirement and "*conducted* [diligence] *again to verify that the* [Meritage Property did] *not have an illicit origin*"[400] following López Vanegas's threats. Corficolombiana (and Newport) found no evidence to corroborate his claims, which were not credible to begin with as they were being made by a drug trafficker, and accordingly could not repudiate the agreements it had already entered into for the development and presales of the Project.[401]

193. Ultimately, whatever due diligence requirements Corficolombiana was subject to in 2014, it is clear that Newport's rights with respect to the Meritage Property were perfected in 2013. This is precisely what the Superior Court of the Judicial District of Bogota found, confirming that Newport acquired its rights in the Project in 2013 when it became party to the Sales-Purchase Agreement with La Palma.[402] Dr. Reyes too confirmed that the Court anchored its finding that

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said that changes my understanding of the initial diligence, I still can't have legal certainty, then? A. If you are referring to an Asset Forfeiture Action, you're right. *The law indicates that the Asset Forfeiture Action cannot be time-barred. You mentioned that period of 20 years. So, within that period, the person should be conducting new actions, if new actions are going to be conducted (in relation to the property), and the person has information that the circumstances have changed, then an update is in order.*").

396 Rejoinder, ¶ 216.

397 *See* **Day 3 Tr.** 902:9-903:1.

398 *See* Seda 1 WS, ¶ 7; Seda 2 WS, ¶ 63.

399 *See supra* n. 394.

400 *See* **Day 4 Tr.** 1225:13-15 (Reyes Cross).

401 *See supra* section III.D.2.e.

402 **Exhibit C-436**, Decision of the Superior Court of the Judicial District of Bogotá, 22 April 2022, pp. 29 ("*Thus, the waiver did not in any way modify the private agreement whereby the company ROYAL REALTY S.A.S. assigned to NEWPORT S.A.S. the Sales-Purchase Agreement for the lot with registration No. 001-930485 dated November 1, 2012, which is contained at page 40 of defense file No. 1; in view of this expectation, it signed and formed together with La Palma Argentina S.A., the trust as trustor and beneficiary, a position from which it resigned in order to*

Newport was an affected party on the 2013 Sales-Purchase Agreement.[403] Accordingly, Newport's good faith status (which Colombia never assessed) would have perfected in 2013 [redacted]

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194. In sum, Colombia has completely ignored Newport's good faith status and held Corficolombiana to a standard that is not supported by its own law.

III.D.3. Colombia's Actions Breach Its TPA Obligations

195. In light of the above, there is no nexus between Colombia's nominated policy purpose and the Asset Forfeiture Proceedings because the only parties impacted have been good faith third parties without fault. Accordingly, Colombia has breached the FET protection due to Claimants' investments and unlawfully expropriated Claimants' investment without a public purpose.

III.D.3.a. FET

196. It is well accepted that unreasonable or arbitrary treatment amounts to a violation of the FET protection, including any of the following:

> *"a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;*
> *b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;*
> *c. a measure taken for reasons that are different from those put forward by the decision maker;*
> *d. a measure taken in willful disregard of due process and proper procedure."*[405]

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carry out the Meritage project."), 32 ("*Thus, based on the foregoing, the Court has concluded that the company Newport, S.A.S., is entitled to participate in the case, given that it has a pecuniary right with respect to the affected properties; therefore, in extension of Article 30 ibid., it must appear in the proceeding with the possibility of participating and intervening only with the authorities ascribed to it by law, without such implying the declaration or recognition of a right that corresponds to a different area of the law.*").

403 **Day 4 Tr.** 1189:2-7 (Reyes Cross) ("*Q. So, Dr. Reyes, what the Court here is saying, the basis on which it would recognize Newport's affected-party status was, in fact, anchored on the Sales-Purchase Agreement; isn't that correct, sir? A. That's right.*").

404 [redacted]

405 *See* **Exhibit CL-070**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303. *See also* **Exhibit CL-072**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on

197. In particular, when taking measures that will affect a covered investors' investments, the host State must show that differential conduct "*bears a reasonable relationship to rational policies*."[406] A State acting contrary to its own laws, regulations, and the advice of its agencies will be deemed to be acting unreasonably and arbitrarily.[407]

198. Here, Colombia has initiated the Asset Forfeiture Proceedings against the Meritage Property despite the fact that: *(i)* the Meritage Claimants have never been accused of any wrongdoing, and *(ii)* the Meritage Claimants have conducted diligence which exceeds the standard required under Colombian law to be considered a good faith third party.[408] The rational policy offered by Colombia in support of the measures is that it was combatting organized crime.[409] However, as shown above, no one who is actually accused of illicit conduct has been affected by the measures.[410] Accordingly, Colombia's conduct bears no relationship, let alone a reasonable one, to a rational policy purpose and is in breach of the FET protection in the TPA.

III.D.3.b. Expropriation

199. In order for an expropriation to be lawful, the TPA requires that it be carried out for a public purpose. Similar to the standard under the FET protection, to establish a public purpose the State must: *(i)* identify a public purpose; and *(ii)* demonstrate that a reasonable nexus exists between the expropriatory measure and the declared public purpose.[411]

Jurisdiction and Liability, 14 January 2010, ¶¶ 262-63 (quoting Professor Schreuer's description in EDF and explaining "[s]*umming up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law.*"); **Exhibit CL-064**, Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures*, *in* THE FUTURE OF INVESTMENT ARBITRATION (2009), pp. 184-88; **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 578 ("*In the Tribunal's eyes, a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker.*").

406 **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 307.

407 *See* **Exhibit CL-095**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶¶ 664-711 (finding a breach of FET where the State ignored the conclusions of an Expert Commission); **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019, ¶ 1475 (finding a breach of FET where the General Comptroller of Colombia calculated tariffs owed by the claimant following a contractual amendment in a manner that was "*contrary to basic principles of legal reasoning and financial logic*.").

408 *See supra* ¶ 164.

409 *See supra* ¶¶ 12, 15, 72, 151.

410 *See supra* ¶¶ 38, 70.

411 **Exhibit CL-106**, *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶¶ 294-96.

200. The State bears the burden of proving this nexus, and it is insufficient to just assert (as Colombia does here) that it was acting for a public purpose as "[i]*f a mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless*."[412] Colombia tries to skirt this requirement by relying upon the general purpose of the Asset Forfeiture Law,[413] without consideration of how that purpose was actually advanced by initiation of the Asset Forfeiture Proceedings against the Meritage Property.[414] This is because, for all the reasons above, it was not. Accordingly, Colombia has acted without public purpose and unlawfully expropriated the Meritage Claimants' investment.

III.E. Colombia Frustrated Its Specific Representation That The Property Was Unencumbered By Illegality

201. A host State's obligation to protect a foreign investor's legitimate expectations is a well-established component of the FET protection.[415] Colombia has made no attempt to distinguish the consistent line of authority supporting this finding in its written and oral submissions.[416] Moreover, Colombia does not dispute that protection of an investor's legitimate expectations forms the "*touchstone*" of whether an investor has been treated fairly and equitably under customary international law.[417] Colombia's main contention is that legitimate expectations are not a part of the FET standard under the TPA, which is false. Colombia's position is contradicted by the decisive weight of jurisprudence.[418]

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412 **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 432.

413 *See* Counter Memorial, ¶ 303; Rejoinder, ¶¶ 607-19.

414 *See* Reply, ¶ 277.

415 *See* **Exhibit RL-21**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, NAFTA, Award, 26 January 2006, ¶ 147; **Exhibit RL-14**, *Waste Management, Inc. v. United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶¶ 98-99; **Exhibit CL-195**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 141. *See also* **Exhibit RL-34**, *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 June 2009, ¶¶ 620-21.

416 *See* Counter Memorial, ¶¶ 425-30; Rejoinder, ¶¶ 784-89.

417 **Exhibit CL-196**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. The Republic of India*, UNCITRAL, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, ¶¶ 458, 463. *See also* Reply, ¶ 330, n. 814.

418 **Exhibit CL-196**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. The Republic of India*, UNCITRAL, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, ¶¶ 458, 463 ("*There is an overwhelming trend to consider the touchstone of fair and equitable treatment to be found in the legitimate and reasonable expectations of the parties, which derive from the obligation of good faith.* [. . .] [W]*hatever the scope of the FET standard, the legitimate expectations of the investors have generally been considered central to its definition.*"). *See also* **Exhibit CL-197**, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxémbourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Arbitral Award, 15 February 2018, ¶ 648 (referring to legitimate expectations as the "*primary element*" of

202. In this case, the Meritage Claimants can discharge each of the elements required for a finding that Colombia has breached the fair and equitable treatment protection by frustrating the Meritage Claimants' legitimate expectations.[419]

203. First, Colombia made an unequivocal representation to the Meritage Claimants that the Meritage Property was unencumbered by illegality at the time they made their investment. Specifically, on 22 August 2013, Corficolombiana (on behalf of the Meritage Project) asked the Attorney General's Office to "*identify whether there are actions underway against the real properties or their current or former owners*."[420] The Government was informed that the specific purpose of this inquiry was "*to take measures for prevention of Asset Laundering and Asset Forfeiture for the possible future transaction with the* [Meritage Property]."[421] The letter listed all "*current or former owners*" including Mr. Cardona (the "*Engineer*"), Ms. Gil (the "*model*"), Mr. Arbodela (the "*Fruit Seller*"), Sociedad Inversiones Nueve S.A., and Mr. López Betancur.[422]

204. On 9 September 2013, the Attorney General's Office responded with the Certification of No Criminal Activity and made a specific representation that: "*there is no evidence of any type of investigation related to this property or its owners in the database of that unit*."[423] This statement in the Certification creates a reasonable expectation that when the Certification was issued in August 2013, the Attorney General's Office was not aware that any of the individuals or entities named within had served as a "*frontman*" for an illicit transaction.[424] Indeed, Counsel

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FET); **Exhibit RL-61**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.75 ("*It is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations.*").

419 *See* Memorial, ¶¶ 425-30; Reply, ¶¶ 329-31; **Exhibit CD-1**, slides 178-84.

420 **Exhibit C-031bis**, Petition for Information from Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013, p. SP-0002. *See also* Seda 1 WS, ¶ 53; **Exhibit CD-1**, slide 30.

421 **Exhibit C-031bis**, Petition for Information from Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013, p. SP-0001.

422 **Exhibit C-031bis**, Petition for Information from Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013, pp. SP-0002, SP-0004.

423 **Exhibit C-032bis**, Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Corficolombiana, 9 September 2013, p. SP-0001. *See also* Seda 1 WS, ¶ 54.

424 **Day 4 Tr.** 1031:22-1032:16 (President Sachs) ("*When I look at them, Mr. Arboleda—that's the mango vendor--Mr. Cardona Rodríguez, Mrs. Muñoz, and Mrs. Rendón Gil. These individuals were named in the list that was part of the petition to the Attorney General's Office of August 2013. We can check it, if the operator would please, in parallel, if possible, show us C-031bis, and that would be Page 42. So, in other words, my first question was: In 2003--'13, sorry--when you received this petition and you responded to it, those individuals were commented as not listed in the information system. So, in other words, I conclude from this that, at the time, you were not aware that, for example, Mr. Arboleda who was, according to the Respondent's position, a frontman and a former mango vendor. Do I understand that correctly, that you were not in possession of such information in 2013?*").

for Colombia confirmed as much in response to a question from the Tribunal President. Dr. Caro also appeared to confirm this, noting that the Certification "*is an exact picture of the time when the information is requested*" and "*it is a snapshot of that moment*."

205. Second, the Meritage Claimants reasonably relied upon the representation that no current or prior owners were subject to investigation by the Asset Forfeiture Unit of the Attorney General's Office in making their investment in the Meritage Project.[425] Mr. Seda confirmed in his testimony that the Certification was a document "*that we relied on and felt very proud about when we received it*."[426] Accordingly, on 17 October 2013, Newport and Corficolombiana concretized the Meritage Project through a series of trust agreements,[427] shortly after which pre-sales began. Accordingly, "*Claimants' investment* [. . .] *originate*[d] *from some affirmative action of* [Colombia] *in the form of specific commitments made by* [Colombia] *to the investor, or by representations made by* [Colombia]*, which encouraged the investment*."[428]

206. The Meritage Claimants' reliance on the representation of the Attorney General's Office in the Certification at the time they made their investment was objectively reasonable.[429] Colombia does not dispute that the Meritage Claimants' "*objectively reasonable*" expectations are protected (assuming protection of legitimate expectations is a component of the applicable standard).[430] Dr. Reyes confirmed in his testimony that the Attorney General's Office is "*very*

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425 Memorial, ¶¶ 72, 453; Reply, ¶¶ 119, 228, 232, 350-51, 356; **Exhibit CD-1**, slide 30.

426 **Day 2 Tr.** 462:21-463:1 (Seda Cross) ("*writing the Attorney General's Office, getting a certificate that we relied on and felt very proud about when we received it*"). *See also* **Day 2 Tr.** 490:8-491:3 (Seda Cross) ("*We signed a Contract, which bound us to acquire this property barring that if after we had done our title research, if we didn't find any issues and we did this with good faith and with good conscience, and we did that in 2013. And I relied on--I hired the most premier companies, financial institutions, banks to do this research for us, and we went as far as writing the Attorney General's Office to ask them. So, I looked at the universe of all of these pieces of evidence, and I said, I feel great. I feel comfortable. It was not my intention to request to the--to Corficolombiana team and ask for this 65-year certificate or whatever we'd like to call it, but it definitely made me feel good at the end of the day when I got it. I was very proud of it. I didn't know any other projects that had this.*"), 500:10-19 ("*What I'm referring to--what we relied on, to apply and be protected by the law as qualified good-faith buyers was the diligence, the realm and world of diligence that we did at the time of the acquisition of the property. Those items are:* [. . .] *(2), the petition, certificate, whatever we will call it, that was positive--received a positive response from the Attorney General's Office, money-laundering and Asset Forfeiture Unit.*").

427 *See* Memorial, ¶ 453; Reply, ¶ 41; Seda 1 WS, ¶¶ 55-57; **Exhibit CD-1**, slide 33. *See also* **Exhibit C-034bis**, Presales Trust Agreement, 17 October 2013; **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013.

428 Rejoinder, n. 1164, citing **Exhibit RL-196**, *Watkins Holdings S.à.r.l and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award of 21 January 2020, ¶ 517.

429 Martínez 1 Report, ¶ 47 ("[T]*his certification was the official response by a Colombian authority to a citizen exercising its fundamental right to that information. For this reason, the citizen has the right to trust that the content of that certification is not only truthful, but also that it is the official information that is kept in the records or document management systems of the corresponding public authority.*").

430 *See* Counter Memorial, ¶¶ 414-15; Rejoinder, ¶ 788.

careful when it responds to rights of petition."[431] Dr. Reyes further confirmed that the only alleged "*limitation*" in the Certification relied upon by the Meritage Claimants was that it only reflected information available to the Attorney General's Office up until the date of issuance.[432] This is a logical truism—it would be impossible for the Attorney General's Office (or the Meritage Claimants) to know what events may occur in the future. But it is also sufficient for purposes of giving Newport a good faith basis to assume that the property it was purchasing was not tainted by illegality.[433]

207. The contents of the Meritage Claimants' Certification can further be contrasted with the revised letter that is regularly being issued by the Attorney General's Office as of at least September 2020.[434] The Attorney General's Office now refuses to provide any information and introduces a new caveat that cannot be found in the Certification of No Criminal Activity:

> "*The foregoing does not mean that a process is or is not being carried out within the Directorate. It simply states that it is NOT possible to agree to provide information of any kind on the cited legal grounds.*
>
> *Per the above terms, your request is deemed to be answered, and you are reminded that this document DOES NOT CONSTITUTE CERTIFICATION, nor is it an obstacle to an extinction process being brought forward in the future, in the event that any of the causes of the Extinction of Ownership Code coincide.*"[435]

208. Dr. Reyes explained in his testimony that the caveats above present "*a good example of the thoughtfulness of the Office of the Attorney General later on for issuing certification.*"[436] Through this language the Attorney General's Office represents that the document "*is not a certification. This is the response to a Right of Petition, and that it does not guarantee that in*

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[431] **Day 4 Tr.** 1207:13-17 (Reyes Cross) ("*Q. So, sir, the point is, after 1994, given this history, the Attorney General's Office is very careful when it responds to rights of petition. That's what you're saying; right? A. Yes.*"). *See also* Reyes 1 Report, ¶ 58; Martínez 2 Report, ¶¶ 60, 62(b).

[432] **Day 4 Tr.** 1209:4-8 (Reyes Cross) ("*Dr. Reyes, could you please show me where on this document it contains all the disclaimers that you've mentioned? A. Yes. It is highlighted and in upper case where it says, 'To date'.*").

[433] Martínez 2 Report, ¶ 60(a) ("[T]*he question before us is not whether the certification is perfect or complete in and of itself* [. . .] *even if certification has some limitations and its sources of information are imperfect* [. . .] *the certification was one more reason for Newport, Corficolombiana and Seda to believe that the information they had obtained from the title study was correct.*").

[434] **Exhibit C-331**, Letter from Public Prosecutor Office to Daniel Zea Giraldo, 30 September 2020. *See also* **Exhibit CD-1**, slide 183.

[435] **Exhibit C-331**, Letter from Public Prosecutor Office to Daniel Zea Giraldo, 30 September 2020, p. 2. *See also* **Day 4 Tr.** 1212:8-11 ("*Q. Dr. Reyes, that language, that specific disclaimer, that's not in the Meritage certification, is it, sir? A. No.*"), 1213:2-5 ("*Q. Dr. Reyes, that language was not in the Meritage one either, was it, sir? A. Correct.*") (Reyes Cross).

[436] **Day 4 Tr.** 1213:4-10 (Reyes Cross).

the future no Asset Forfeiture Proceedings may not be initiated."[437] The absence of this language from the Certification applicable to the Meritage Project further confirms that the Meritage Claimants' reliance on the Attorney General's Office's representation was reasonable.

209. Third, Colombia frustrated the Meritage Claimants' legitimate expectation by refusing to recognize Newport as an affected good faith third party in the Asset Forfeiture Proceedings. Colombia has misleadingly tried to transmogrify the scope of the Meritage Claimants' expectation into an alleged expectation that proceedings against the Meritage Property would not be initiated under the Asset Forfeiture Law.[438] As already noted in the Meritage Claimants' Reply (and ignored in Colombia's Rejoinder), this is incorrect and is not Claimants' contention.[439] Instead, the Meritage Claimants' reasonable expectation was that by making a specific representation to the Meritage Claimants that the Meritage Property was not tainted by illegality at the time the Meritage Claimants' investment was made, the Meritage Claimants should have been accorded good faith status by Colombia in any asset forfeiture proceedings against the Property.[440] [redacted] Ms. Ardila too was surprised to see the Certification in August 2016 when she seized the Meritage Property, and noted that it was "*a great document*."[442] However, despite its representations in the Certification of No Criminal Activity—and the acknowledgment by government officials that Newport should have been recognized as a good faith third party as a result—Colombia has arbitrarily and unreasonably refused to grant the Meritage Project the protections it warrants.[443]

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437 **Day 4 Tr.** 1213:4-10 (Reyes Cross).

438 Counter Memorial, ¶ 465; Rejoinder, ¶¶ 790-98.

439 Reply, ¶ 352; Rejoinder, ¶¶ 790-98.

440 Martínez 2 Report, ¶ 60(a); Medellín 2 Report, ¶ 86.

44 [redacted]

442 López Montoya WS, ¶ 31 ("*I even pulled up on my phone a copy of the letter received from the Fiscalía affirming that there were no issues with the Meritage lot and persons associated with its ownership history. When she heard this, she seemed very surprised and said* 'This is a great document. It will be very useful to you, but we're going to proceed with the seizure of the land. '"). *See also* **Day 3 Tr.** 851:20-852:7 (Ardila Cross) ("*Q. You're aware that Corficolombiana, through its outside counsel, Francisco Sintura, former Deputy Attorney General, submitted a complete list of the owners of the property going all the way back to its origins, legal representatives for the entities that owned it and other names, and obtained a certification that there were no investigations relating to any of those owners? You're aware of that; right? 'Yes' or 'no.' A. Correct.*").

443 *See supra* Section III.D.2. *See also* Rejoinder, ¶ 786, citing **Exhibit RL-208**, *Infracapital Fl S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and

210. The exclusion of López Vanegas's name from the list sent to the Attorney General's Office is of no practical import. First, López Vanegas has never been on the title of the Meritage Property, nor has he been identified as an owner; he was only the legal representative—for a period of time—of a company that owned the Meritage Property.[444] As Dr. Martínez explained, the Meritage Claimants were not required to identify and perform diligence on every legal representative of every legal entity in the chain of title.[445] This is because the legal representative of an entity listed on title does not necessarily beneficially own the property.[446] To put it plainly, any employee could be the legal representative of a company and their employment could be terminated for any reason thereafter; if that employee is later discovered to have engaged in criminal activity, it cannot possibly taint the assets of the company that employed him or her. But that is precisely what Colombia is alleging here.

211. In assessing whether the Meritage Claimants' legitimate expectations have been frustrated, the Tribunal only needs to consider representations the Meritage Claimants relied upon when

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Directions on Quantum of 13 September 2021, ¶ 568 (acknowledging that an investor's legitimate expectations will be frustrated if the host State acts with "*arbitrariness or unreasonableness*" in connection with a representation); Colombia's Opening Statement, slide 229 (same). *See also* **Exhibit CD-1**, slides 162-164.

444 **Day 3 Tr.** 948:4-15 (Caro Cross) ("*Q. Is Mr. Iván López' name, has it ever been on the title, not whether or not it was the legal representative, of one of the entities whose name was on title, but was Iván López' name ever on title, to your knowledge? A. As the legal representative of the holder of the right of ownership, yes, Iván López Vanegas appeared. Q. You're answering a different question. Was Mr. Iván López ever the direct owner of this property? A. Yes, he was the owner via his legal representation of the Company.*"). *See also* **Day 3 Tr.** 946:3-949:4.

445 **Day 4 Tr.** 1114:7-1116:15 (Martínez Cross) ("*In Colombia, we do not have a unified Registry of legal representatives, shareholders or final beneficiaries or controlling Parties for the companies, so when a company is carrying out due diligence in connection with Real Property, they only have the certificate issued by the Registry Office where they see the holders of the property right. If in the ownership transfer history of the property there is a legal person, a company, establishing who was the legal representative when that transaction took place is the issue. Because I can go to, first, that certificate doesn't tell me who the representative was. I have the name of the Company, so I need to go to the proper Chamber of Commerce. We have several in Colombia, and I need to request a certificate of existence and legal representation-of that company. So, they do have that certificate of existence and representation, but it is up to date, so I see who the legal representative is today. So, if I want to know who the legal representative was back then, I would have two ways. I would first have to request a Chamber of Commerce to provide the historical data on all of the Company legal representatives. And in the case of some Chambers of Commerce, that is an option, but it is more difficult in the case of others. If the Chamber of Commerce provides the information, I say okay, now I can--I know who the legal representative was back then. But if the Chamber of Commerce does not have that information, the only way I can do that is by looking at the act of incorporation and the changes to that Act of Incorporation to try to see--to try to go to the notary offices that recorded that and ask for a copy of the deeds to see who the legal representative would be. So, that's the reason why in my presentation I referred to the due diligence that we need to carry out in connection with the client and the other Party and also the due diligence in connection with the other individuals that are included in the chain of title, and so sometimes it is exaggerated if we have it that way.* [. . .] *And for that reason, I understand that for that reason as part of this Request for Information, information is being requested in connection with individuals that are currently included as registered, but to go beyond this would have been--and I apologize--an absurd standard because it would have entailed to use excessive resources that are not demanded by the law.*"). *See also* Martínez 2 Report, ¶ 9 ("[T]*he obligation to diligence extends to the property itself, but not to its prior owners.*").

446 *See* **Day 3 Tr.** 947:4-11 (Caro Cross) ("*Q. The legal representative is the individual who is authorized to bind the entity; correct? A. Claro* [of course in English]. *Q. It's not necessarily the owner; correct? There may be multiple owners of a particular entity; correct? A. Yes, but the representative of the company before the courts is a legal representative.*").

making their investment.[447] Accordingly, it is irrelevant that the representation in the Certification of No Criminal Activity is circumscribed to the date of issuance. Similarly, the Meritage Claimants did not have an obligation to seek renewed certifications after the investment was made.[448] Indeed, Colombia concedes that obtaining even one was not a required due diligence step.[449]

212. Moreover, even if López Vanegas's name had been included, the Attorney General's Office would not have identified any investigations into his property holdings. Indeed, as described above, in 2014, following López Vanegas's initial outreach, Corficolombiana reran diligence including López Vanegas and no alerts arose.[450] Rather, investigations into López Vanegas have only materialized as of April 2022 as a means for Colombia to mount a defense in this Arbitration.[451]

213. In sum, Colombia made a specific representation that there was no criminal activity associated with the plot of land purchased for the Meritage Project. This meant that as of the moment that Colombia made the certification, Claimants reasonably relied on that representation in order to begin the Project, which Colombia should have, at the very least, credited as good faith conduct

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447 *See* **Exhibit CL-192**, *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, ¶ 456 ("*the relevant moment with respect to which one has to assess what was foreseeable to the investor or not must be the moment of making the investment.*"); **Exhibit CL-193**, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, ¶ 482 ("*it is important to identify precisely when a given Investment was made by the Claimants and what the promises or assurances were that were then relied upon as a matter of fact*"). *See also* Reply, ¶ 362.

448 *Cf.* **Day 4 Tr.** 1210:2-18 (Reyes Cross) (Dr. Reyes suggested that every time someone made a claim that an asset was tainted by illegality, a property owner should file a new request with the Attorney General's Office for an updated certification.).

449 *See, e.g.*, Rejoinder, ¶ 234 ("*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*.").

450 **Exhibit C-219**, Testimony of Margarita María Betancourt Guzmán in Pinturas Prime Arbitration, 18 September 2018, p. 6 ("***QUESTION:*** *Did you know or did the FIDUCIARY know of any radio interview given by Mr. Ángel Seda in relation to this project?* ***ANSWER:*** *Yes, we knew, we didn't listen to the interview itself, but we did learn of the interview subsequently, because he sent a notice to the area beneficiaries informing them of that interview and about the situation that arose. We had already begun seeking information, we verified once again how the business deal had taken place, we verified the title studies, we verified the searches that Mr. Sintura had performed, and once again, the tool we have is to search in the lists for people whose names appear in the title transfer of the property, and those who appear, especially for La Palma Argentina, that were generated, in other words, La Palma Argentina transfers it to me, there is clear title why does this kind of interview appear [sic], and at that moment the documents that we had matched, and they clearly supported the transfer of title of the property without raising doubts for us, and when that interview with the gentleman came out, because of the dispute with Mr. Iván López, it wasn't in the transfer of title of the property, and we encountered no sign saying: "No, the project will be affected and it will be terminated," because the studies performed previously and that supported it showed that the deal had been structured properly.*"). *See also* **Day 4 Tr.** 982:6-985:4 (Caro Cross).

451 *See supra* ¶¶ 10, 69.

(particularly where there has been no evidence adduced at all that the Claimants' tactically or fraudulently obtained the Certification).

III.F. Colombia's Measures Put Claimants' Project Portfolio "[I]*n* [T]*he* [L]*ine* [O]*f* [F]*ire*"

214. Colombia's FET obligation under the TPA requires it to take measures to protect the "*the legitimate expectations of a protected investor* [. . .] *that, if its interests find themselves caught up in the criminal process either directly or indirectly, means will be sought by the authorities of the host State to avoid any unnecessarily adverse effect on those interests or at least to minimise or mitigate the adverse effects.*"[452]

215. Here, Colombia's arbitrary and discriminatory treatment is not confined to the Meritage Project but has also independently been fatal to the viability of Claimants' portfolio of projects, including Luxé and the Development Projects. Colombia's conduct has resulted in severe damage to these investments (and concomitantly the investors) without any legitimate purpose. This accordingly amounts to a discrete breach of Colombia's obligation to accord the Claimants and their investments FET protection.[453]

216. Colombia knew, or should have known, that all other projects being spearheaded by Mr. Seda and the Royal Property Group, including Luxé and the Development Projects, "*stood directly in the line of fire*"[454] if it improperly initiated and conducted the Asset Forfeiture Proceedings against the Meritage Property. An asset forfeiture proceeding severely taints the reputation of any parties publicly associated with the land because it indicates that the parties either: *(i)* are involved in illegal activity; or *(ii)* they did not conduct adequate diligence. The Attorney General's Office's own correspondence and public documentation recognizes that being linked to Asset Forfeiture Proceedings can affect linked persons "*fundamental rights of privacy and good name*."[455] This is precisely what occurred here, with the Asset Forfeiture Proceedings against the Meritage Project being reported on by Colombia's most widely read periodicals and thus becoming publicly notorious.[456]

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

453 *See* Memorial, ¶¶ 455-59; Reply, ¶¶ 363-66.

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

455 **Exhibit C-331**, Letter from Public Prosecutor Office to Daniel Zea Giraldo, 30 September 2020.

456 *See* **Exhibit C-042bis**, Colombian Press Articles on Imposition of Precautionary Measures, August 2016; **Exhibit C-409**, EL TIEMPO, *The Shadow Of The Mafia Over A Million-Dollar US Lawsuit Against Colombia*, 13 February 2022; **Exhibit R-148**, El Tiempo, "A former drug dealer, key to a big lawsuit against Colombia in the U.S.", 13 December 2020.

217. Similarly, the tribunal in *Rompetrol v. Romania* considered that criminal investigations initiated against company principals by Romanian authorities were tainted by "*procedural irregularities*," and "*from a certain point*" Romanian authorities must have known that the interests of the claimant's locally incorporated subsidiary "*stood directly or indirectly in the line of fire*."[457] Romania therefore breached its FET obligation to the claimant as no "*steps were taken either to assess or to avoid, minimise, or mitigate that possibility of harm*."[458] Other tribunals have similarly recognized that by launching proceedings that "*inflict*[] *damage on the investor without serving any apparent legitimate purpose*," the State has acted arbitrarily and in breach of its FET obligations.[459]

218. Colombia's initiation of the Asset Forfeiture Proceedings likewise resulted in unlawful treatment in relation to Luxé and the Development Projects because:

(a) Mr. Seda can no longer borrow money for the development of Luxé and the Development Projects. Following the seizure of the Meritage Property in August 2017, Colpatria withdrew its financing for Luxé despite having verbally agreed to increase the credit limit by an additional COP 5 billion (USD 2.5 million) in July 2016.[460] Mr. López Montoya testified that Colpatria informed him "*that they had decided to stop disbursement of funds for Luxé and advised that Colpatria would no longer formally approve any increases to the loan due to the ongoing asset forfeiture proceedings against the Meritage lot*."[461] Colombia declined to cross-examine Mr. López Montoya at the Hearing and this testimony remains unchallenged. Similarly, Mr. Seda cannot obtain any financing for the Development Projects.

(b) Mr. Seda could not attract additional equity investments for Luxé and the Development Projects. For example, prior to initiation of the Asset Forfeiture Proceedings, major Latin American real estate investor, Paladin Realty Partners, was also looking to invest in Luxé but halted discussions in August 2016 asking to "*wait until the Meritage issue is resolved*."[462]

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

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

459 **Exhibit CL-070**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303.

460 *See* López Montoya WS, ¶ 45.

461 López Montoya WS, ¶ 48. *See also* Seda 1 WS, ¶ 110; **Exhibit C-382**, Statement of Defense filed on behalf of Luxé SAS and Angel Seda in Lawsuit Against Colpatria, 25 January 2018 (confirming Colpatria "*did not comply with the total disbursements*").

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

(c) Existing business partners in the Development Projects withdrew their participation because it was "*difficult for the prospective seller to continue the commercial relation with the prospective buyer, given the difficulties and the scandal wield upon the MERITAGE project in Medellín, which was disclosed both in written and oral media outlets, a situation that may result in a lack of success in any other project that shall be undertaken in the future*,"[463] and because business partners "[did]*n't want the situation that's going on with the Meritage project to affect* [them] *in the near future*."[464]

(d) Buyers were no longer willing to risk purchasing property developed by the Royal Property Group.[465]

219. None of this should come as a surprise to Colombia. Indeed, [redacted]

220. Colombia's FET obligation required it to ensure that its unlawful conduct did not place Luxé and the Development Projects "*directly or indirectly in the line of fire*." However, as demonstrated above, Colombia did precisely this through the wrongful initiation of the Asset

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Mr. Hern confirmed at the Hearing he was not provided with this documentary evidence by Colombia in the preparation of his expert reports. *See* **Day 6 Tr.** 1731:1-13 ("*Q. And you're aware that there were investors like Paladin that said we can't move forward with our investment in the Meritage Project until the--sorry, in the Luxé Project until the Meritage issue is resolved. You're aware of that? A. Again, I'm aware that that's what the Claimants say, but I haven't—Q. You haven't seen the evidence--(Overlapping speakers.) A. I haven't--Q. You weren't shown the evidence? A. I haven't looked at the evidence behind those.*").

463 **Exhibit C-193**, Cancellation of Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sánchez Vargas, 3 August 2017. *See also* **Exhibit C-194**, Cancellation of Promise to Purchase contract between Angel Seda and Ramón Antonio Duque Marín, 15 August 2017; **Exhibit C-197**, WhatsApp chain between Tierra Bomba Hotel Owner and Angel Seda, 13 September 2017.

464 **Exhibit C-197**, WhatsApp chain between Tierra Bomba Hotel Owner and Angel Seda, 13 September 2017.

465 **Exhibit C-263**, Letter from Luis Alberto Jaramillo Estrada to Newport S.A.S., 30 August 2016 ("*we discussed the precautionary measures that the Attorney General's Office adopted in the course of a criminal investigation regarding the real estate on which the Meritage Project is currently being developed. I am an investor in that project* [. . .] *This severe occurrence, on your account, led to the suspension of the building activities. Therefore, as we agreed at the above-mentioned meeting, I will proceed to suspend the payments of future fees for as long as said interruption remains in place.*"); **Exhibit C-262**, Letter from John José Alexander Cadena Sánchez to Newport S.A.S., 4 August 2016 ("*I am writing in response to news that has come out in the media today, which has been widely disseminated with respect to the* ***asset forfeiture proceedings that the Attorney General's Office is pursuing over the premises of the Meritage Luxury Community project*** [. . .] *I therefore hereby respectfully request the immediate return of all moneys paid plus the respective financial yields, as well as cancelation of the respective unit buyer purchase contract and any ties of a contractual nature associating me with the project*.").

466 [redacted]. *See also infra* ¶ 225; Seda 1 WS, ¶¶ 115; Seda 2 WS, ¶¶ 90-91; López Montoya WS, ¶¶ 44, 48; **Exhibit C-382**, Statement of Defense filed on behalf of Luxé SAS and Angel Seda in Lawsuit Against Colpatria, 25 January 2018.

Forfeiture Proceedings as part of a corrupt and extortionate scheme.[467] Accordingly, Colombia has breached the FET obligation in the TPA by failing to treat Claimants who had invested in Luxé and the Development Projects fairly and equitably.

III.G. Colombia Has Engaged In A Sustained And Increasingly Hostile Campaign To Tarnish Mr. Seda's Reputation

221. In addition to ensuring the Claimants' investments are treated fairly and equitably, the TPA also requires Colombia to provide Claimants' investments with "*full protection and security*."[468] This is a dual obligation that requires Colombia to: *(i)* exercise vigilance to ensure the full enjoyment and protection of the investment; and *(ii)* to exercise due diligence to take reasonable, precautionary and preventive action against harm to the protected investment.[469]

222. Colombia's obligation to accord Claimants' investments FPS necessarily extends to, in particular, Mr. Seda, who is implicitly incorporated within the meaning of investment given his role as the CEO and public face of Royal Realty and its Projects including the Meritage Project, Luxé, and the Development Projects.[470] Similarly, the tribunal in *Mondev v. USA* underscored the importance of protecting persons spearheading and implementing a protected investment in a host State, finding that "[a]*n investor whose local staff had been assaulted by the police while at work could well claim that its investment was not accorded 'treatment in accordance with international law, including* [. . .] *full protection and security' if the government were immune from suit for the assaults*."[471]

223. Here, Colombia has failed to take reasonable measures to protect Claimants' investments from the unlawful conduct of third parties despite express requests for assistance:

(a) In December 2016, Mr. Seda filed a criminal complaint against López Vanegas, Ms. Malagón, and Ms. Ardila.[472] However, as outlined above, Colombia's failure to make reasonable efforts to investigate this criminal complaint had a significant impact on Claimants' ability to continue to develop the Meritage Project.[473]

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467 *See supra* ¶¶ 13, 96-117.

468 **CL-001bis**, TPA, Art. 10.5.

469 *See* Memorial, ¶¶ 466-68; Reply, ¶¶ 369-74; **Exhibit CD-1**, slides 185-90.

470 *See* Reply, ¶ 370.

471 **Exhibit CL-30**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 152.

472 **Exhibit C-181**, A. Seda Complaint to Attorney General's Office, 19 December 2016.

473 *See supra* ¶¶ 11, 223.

(b) On 26 September 2017, Mr. Seda suffered an assassination attempt that Colombian authorities have failed to investigate.[474]

(c) On 28 September 2017, an unknown individual threatened Mr. Seda's daughter.[475]

(d) On 7 November 2017, despite having knowledge of the incidents above, Colombian authorities denied Mr. Seda's request for a permit for an armored car.[476]

(e) On 14 February 2018, FBI agents attended Mr. Seda's home and conducted a search based on a newly published list by OFAC, with names of individuals against whom the U.S. Government had imposed sanctions.[477] [redacted]

224. [redacted]

[redacted]

[redacted]

474 *See* Seda 1 WS, ¶¶ 137-38; **Exhibit C-202**, Angel Seda Statement attached to Request for Police Protection, 11 October 2017; **Exhibit C-198**, Photos of A. Seda's Car After Assassination Attempt, 26 September 2017; **Exhibit C-285**, A. Seda Statement to US Embassy, 29 September 2017.

475 *See* Seda 1 WS, ¶ 139. *See also* Memorial, ¶¶ 320, 474, 517; Reply, ¶ 378.

476 Seda 1 WS, ¶ 141; **Exhibit C-202**, Angel Seda Statement attached to Request for Police Protection, 11 October 2017; **Exhibit C-203**, Denial of A. Seda's Application for Permit to Armor Vehicle, 14 November 2017.

477 Seda 1 WS, ¶ 143.

478 Seda 1 WS, ¶ 143.

479 [redacted]

480 [redacted]

481 [redacted]

482 [redacted]

483 [redacted]

484 [redacted]

485 [redacted].

486 [redacted]

487 [redacted]

488 [redacted]).

489 [redacted]

[redacted]

225. [redacted]

226. [redacted]

490 [redacted]

491 [redacted]

492 [redacted]

493 [redacted]

494 [redacted]

495 [redacted]

[redacted] But those who have actually visited and reported on the hotel, including reputable journalists from the *New York Times*[499] and *Conde Nast*,[500] have considerably different views. [redacted]

[redacted]

496 [redacted]).

497 [redacted]

498 [redacted]

499 *See* **Exhibit C-141**, Nell McShane Wulfhart, 36 hours in Medellín, Colombia, The New York Times, 13 May 2015, https://www nytimes.com/2015/05/17/travel/things-to-do-in-36-hours-in-medellin html.

500 *See* **Exhibit C-016bis**, Hot List 2012: Best New Hotels Under $300, Conde Nast Travel, 16 April 2012, https://www.cntraveler.com/galleries/2012-04-16/best-affordable-new-luxury-hotels-deals-hot-list-2012; **Exhibit C-017bis**, A. Marsh, 3 days in Medellin, Colombia, Conde Nast Travel, 16 April 2018, https://www.cntraveler.com/story/3-days-in-medellin-colombia.

501 [redacted]

[redacted]

227. [redacted]

IV. CLAIMANTS ARE OWED COMPENSATION

228. As Colombia has breached its obligations under the TPA, it must compensate Claimants for their losses arising out of Colombia's breaches. The Parties differ on two main issues relating to compensation:

(a) Whether Claimants' are entitled to damages in connection with Claimants' Projects other than the Meritage Project ("Claimants' Project Portfolio").

(b) The calculation methodology of damages.

229. The Hearing confirmed Claimants' position in both respects, as detailed below.

IV.A. Claimants' Project Portfolio Was Destroyed Due To The Asset Forfeiture Proceedings

230. There is no dispute between the Parties that Claimants are entitled to damages arising from the loss of the Meritage Project should the Tribunal find that Colombia has breached its obligations under the TPA. Colombia maintains however that Claimants' damages should not include any losses incurred due to the destruction of the Claimants' Project Portfolio. This ignores the plain language of the TPA as well as the plethora of evidence on the record demonstrating that the

[redacted]

[redacted]

503 **Day 2 Tr.** 663:4-6 (Seda Redirect).

Asset Forfeiture Proceedings destroyed Claimants' investments in the remaining Project Portfolio.

IV.A.1. Claimants Have Shown That The Claimants' Project Portfolio Was Destroyed "*By Reason Of, Or Arising Out Of*" The Asset Forfeiture Proceedings

231. Colombia agrees that the applicable legal standard is Article 10.6 of the TPA, which provides that the Claimants must be compensated for "*loss or damage* [incurred] *by reason of, or arising out of*" Colombia's breaches.[504] Colombia further agrees that all this requires is "*a sufficient causal link between the breach* [. . .] *and the loss sustained by the investor*," that is not "*too remote*," "*too indirect* [. . .] *and uncertain to be appraised*."[505] As the *Lemire II* tribunal further explained, "[i]*f it can be proven that in the normal course of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other.*"[506] There is accordingly little disagreement between the Parties on the applicable standard of establishing causality.

232. It is unquestionable that the Claimants' Project Portfolio was destroyed "*by reason of, or arising out of*" the Asset Forfeiture Proceedings. As discussed above, Claimants have adduced witness testimony as well as corroborating contemporaneous documents establishing that "*by reason of, or arising out of*" the Asset Forfeiture Proceedings, banks and investors withdrew support from the remaining Claimants' Project Portfolio, leading to their collapse. In summary:

(a) Claimants have established that Colpatria pulled financing for Luxé "*due to the ongoing asset forfeiture proceedings against the Meritage Lot*"[507] and also caused prospective investors, such as Paladin Realty Partners, to refrain from investing "*until the Meritage issue is resolved.*"[508] Colpatria's withdrawal put the Luxé Project "*in an extremely detrimental position, since they were forced to suspend the development of the project, which also generated a series of additional defaults with the suppliers,*

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504 Colombia's Opening, slide 248.

505 Colombia's Opening, slide 249, *quoting* **Exhibit CL-160**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, ¶ 140 and **Exhibit CL-056**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶ 438.

506 **Exhibit RL-047**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, 28 March 2011, ¶ 169.

507 López Montoya WS, ¶ 48; *see also* Seda 1 WS, ¶ 110 ("*Shortly after the imposition of the precautionary measures, however, Colpatria informed us that they could no longer finance the construction of the rest of the Luxé.*"); Seda 2 WS, ¶ 68 ("*However, **following the imposition of precautionary measures, all construction on Luxé was halted. Even though we had secured the financing required for the remainder of the Project, Colpatria informed us it could no longer continue to finance the development and refused to grant us a credit extension it had already verbally agreed to provide. Colpatria was concerned that other properties with which I was affiliated might also be impacted and therefore refused to provide further financing**. Indeed, Colpatria's reaction was echoed by other investors. At the time, real estate investor Paladin was also looking to invest in Luxé but halted discussions in August 2016 asking to* 'wait until the Meritage issue is resolved.'").

508 **Exhibit C-379**, Email from Alejandro Krell to Angel Seda, 8 August 2016.

workers, and buyers of the project, a situation which [was] *very harmful to the project*" which "*produced such a high deficit*" that Claimants "*had to halt construction of the hotel.*"[509]

(b) Claimants have also established that the Development Projects "*also came to a halt*" as a result of the Asset Forfeiture Proceedings as investors and business partners backed out of planned projects and Claimants were unable to secure financing as no bank would work with anyone implicated in the Asset Forfeiture Proceedings.[510]

233. While Colombia has complained about the supposed unreliability of Mr. Seda's and Mr. López Montoya's allegedly "*self serving*" statements, it chose not to call Mr. López Montoya for testimony and did not question Mr. Seda about the impact of the Asset Forfeiture Proceedings on the Claimants' Project Portfolio. Accordingly, their testimony remains unchallenged. Indeed, their testimony makes sense. It is Colombia's very position in this Arbitration that even unsubstantiated rumors of anyone connected in any capacity to a project means that anyone conducting business with them automatically loses their status as good faith third parties for the purposes of Asset Forfeiture Proceedings.[511] Given the publicity of the seizure,[512] [redacted][3] banks, investors and potential business partners would obviously be wary of engaging with Claimants, and particularly Mr. Seda. [redacted]

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509 **Exhibit C-382**, Statement of Defense filed on behalf of Luxé SAS and Angel Seda in Lawsuit Against Colpatria, 25 January 2018, pp. 2-3.

510 *See* Seda 1 WS, ¶¶ 108, 111-14; **Exhibit C-193**, Cancellation of Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sánchez Vargas, 3 August 2017, p. 3 ("*It is also stated, that it is difficult for the prospective seller to continue the commercial relation with the prospective buyer, given the difficulties and the scandal wield upon the MERITAGE project in Medellín, which was disclosed both in written and oral media outlets, a situation that may result in a lack of success in any other project that shall be undertaken in the future.*"); **Exhibit C-194**, Cancellation of Promise to Purchase Contract between Angel Seda and Ramón Antonio Duque Marín, 15 August 2017, p. 4 ("*It is also stated that it is difficult for the prospective seller to continue the commercial relation with the prospective buyer, given the difficulties and the scandal held with the MERITAGE project in Medellín, which was disclosed both in written and oral media outlets, a situation that may result in a lack of success in any other project undertaken, as its goodwill has been negatively affected by such situation.*"); **Exhibit C-197**, WhatsApp chain between Manager of Tierra Bomba Hotel Owner and Angel Seda, 13 September 2017 ("*Good morning Angel. Yesterday, at a meeting with our attorneys at the office, we have determined that we must put an end to the negotiation process for the operation of our hotel, since we don't want the situation that is occurring with the Meritage project to affect us in the near future.*").

511 [redacted]

512 *See* López Montoya WS, ¶ 40 ("*The Meritage Project, Newport, and Royal Realty were inundated by an onslaught of negative publicity.*"); **Exhibit C-042bis**, Colombian Press Articles on Imposition of Precautionary Measures, August 2016; **Exhibit C-166**, Meritage Project Splattered by Drug Trafficking, (Proyecto Meritage, Salpicado por El Narcotráfico), El Espectador, 4 August 2016, https://www.elespectador.com/noticias/judicial/poryecto-meritage-salpicado-el-narcotrafico-articulo-647389/.

513 *See* [redacted]

[redacted] There can be no serious dispute over the calamitous effect that the Asset Forfeiture Proceedings had on Mr. Seda's ability to do business in Colombia, leading to the collapse of the Claimants' Project Portfolio.

234. Curiously, Dr. Hern, in his second report, stated that he "*had not seen any evidence*" that Claimants' "*ability to provide hotel and real estate operations*" in Colombia had been impacted[516] and that "*it should always be possible to sell such a project to another investor.*"[517] This was because, as became apparent in his testimony, Colombia had failed to show him much of the pertinent evidence on the record.[518] Dr. Hern ultimately acknowledged that if Mr. Seda's reputation were detrimentally impacted such that he could no longer engage in business dealings with financial institutions, then he would "*take a different view.*"

> "*Q. So, your assumption, though, is that someone would be able to buy from him, that someone would transact with Mr. Seda's company?*
> *A. Implicit in that is the assumption that, either yes, that someone--that he should have been able to sell them. Yes.*
> *Q. And if he was prevented from being able to sell them, if nobody would buy from or transact with the Royal Property Group, then you'd take a different view; correct?*

514 [redacted]

515 [redacted]

516 Hern 2 Report, ¶¶ 77, 225.

517 Hern 2 Report, ¶ 119.

518 *See* **Day 6 Tr.** 1731:1-13 ("*Q: And you're aware that there were investors like Paladin that said we can't move forward with our investment in the Meritage Project until the--sorry, in the Luxé Project until the Meritage issue is 4 resolved. You're aware of that? A: Again, I'm aware that that's what the 6 Claimants say, but I haven't— Q. You haven't seen the evidence-- (Overlapping speakers.) A. I haven't--* ***Q. You weren't shown the evidence? A. I haven't looked at the evidence behind those.***"), 1732:8-14 ("*Q. For example, C-186. We can put it up, and you can tell me if you've seen it or not. Do you recall seeing this Agreement? There are several others like it, but I won't take you to them all.* ***A. I can't recall, honestly, whether I have seen that particular agreement.***") 1732:15-1733:1 ("*Q. Have you seen statements from Government representatives acknowledging that Mr. Seda, his reputation, had been impacted and it would be difficult for him to borrow money, for example? A. Again, can you take me to the statements you're referring to? Q. Yeah. Let's go to C-322. Page 10.* ***A. I have not seen this document.***").

A. Yes, logically if he is impacted and he can't develop them and he can't also sell them, then I would take a different view that economically those projects must have been impacted, then."[519]

235. Claimants have put unrefuted witness and documentary evidence on the record showing precisely that Mr. Seda was unable to develop and sell the Claimants' Project Portfolio. Accordingly, Claimants must be compensated for the loss of the Claimants' Project Portfolio to be made whole.

IV.A.2. Colombia's Attempts To Find Other Explanations For The Dissolution Of The Claimants' Project Portfolio Fail

236. During the Hearing, Colombia contended that other factors, such as delays in construction, also contributed to the Project's being halted.[520] In making its case, Colombia completely ignored the Claimants' evidence establishing causation and instead cherry picked language from documents that, when examined in their proper context, do not aid Colombia's case.

237. First, Colombia points to a 2015 work progress report for the Luxé hotel to claim that the construction was behind schedule[521] and that it was construction and funding delays,[522] not the Asset Forfeiture Proceedings, that halted Luxé. As a preliminary matter, Colombia has not adduced any evidence, technical or factual, to indicate that mere construction delays in this case would have shuttered a project that was over 70% complete as of the date of the Measures.[523] While construction delays may impact a project's profitability, they generally do not end projects, particularly when they are close to completion.[524] Colombia did not question his testimony on this matter during the Hearing. Moreover, the record indicates that completion of construction and commencement of operations was near. A progress report from July 2016 showed that construction of the hotel was scheduled for completion by December 2016.[525] Mr. Seda had already "*in anticipation of operations starting in January 2017*" started hiring staff to operate the hotel.[526] However, "*following the imposition of the precautionary measures, all construction on Luxé was halted*" because "*Colpatria was concerned that other properties with*

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519 *See* **Day 6 Tr.** 1735:6-20 (Hern Cross).

520 *See* Colombia's Opening, slides 252-59.

521 *See* Colombia's Opening, slides 252-53.

522 *See* Colombia's Opening, slide 256.

523 *See* **Exhibit C-338**, Letter from Ochoa Arquitectos & Ingenieros S.A.S. to Luxé By The Charlee S.A.S., 21 August 2021, p. 2.

524 *See* **Day 5 Tr.** 1501:1-1502:10 (BRG Cross).

525 *See* **Exhibit C-394**, Luxé Project Accumulated Progress Control by Ochoa Arquitectos e Ingenieros S.A.S., 11 July 2016.

526 Seda 2 WS, ¶ 67.

which [Mr. Seda] *was affiliated might also be impacted and therefore refused to provide further financing.*"[527] Accordingly the delays did not lead to the demise of the Project, the Asset Forfeiture Proceedings did.

238. Second, Colombia alleges that because Colpatria had disbursed much of the original loan already, it would (for some unknown and certainly uneconomical reason) refuse to extend the additional credit it had promised to complete construction.[528] This assertion ignores Mr. López's and Mr. Seda's testimony that Colpatria had agreed to provide a credit extension before the Asset Forfeiture Proceedings.[529] Indeed, it was firmly in Colpatria's economic interest to finish financing the Luxé Project so that the Project could commence operations and Colpatria could collect on its loan.

239. Third, Colombia claims that the Tierra Bomba Project failed not because of the Asset Forfeiture Proceedings but because Colombia alleges that the prospective sellers did not have legal title to the lots.[530] This is not true. The titles were in the process of being perfected, but the sellers pulled out of the contracts due to the Asset Forfeiture Proceedings. Colombia's position, however, completely ignores the evidence on the record, including messages from prospective business partners for Tierra Bomba who pulled out of the Project because "*we don't want the situation that is occurring with the Meritage project to affect us in the near future.*"[531]

240. Fourth, Colombia alleges that the contracts with the sellers of the Tierra Bomba property were terminated not due to the Asset Forfeiture Proceedings but for other reasons.[532] Again, Colombia's assertion simply ignores Mr. Seda's (unchallenged) testimony that "*after the seizure, the sellers of the land for the project told us that they no longer wanted to work with Royal Realty*."[533] This is corroborated by the termination contracts which expressly state "*that it is difficult for the prospective seller to continue the commercial relation with the prospective buyer, given the difficulties and the scandal wield upon the MERITAGE project in Medellín, which was disclosed both in written and oral media outlets, a situation that may result in a lack*

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527 Seda 2 WS, ¶¶ 67-68.

528 *See* Colombia's Opening, slide 254.

529 *See* López Montoya WS, ¶ 45; Seda 2 WS, ¶ 68.

530 *See* Colombia's Opening, slide 257.

531 *See* **Exhibit C-197**, WhatsApp chain between Manager of Tierra Bomba Hotel Owner and Angel Seda, 13 September 2017, p. 1.

532 *See* Colombia's Opening, slide 259.

533 Seda 2 WS, ¶ 73.

of success in any other project that shall be undertaken in the future."[534] In light of these express reasons, Colombia's desperate efforts to find other reasons is futile. For example, Colombia notes that Mr. Seda paid only two of the four installments, but this is not stated as a reason for termination. Colombia further asserts that the contracts were terminated because the lots had not been regularized, but again, that is not stated as a reason for termination. The termination was, rather, by mutual consent because, as Mr. Seda has testified (without challenge) and as is apparent on the face of the agreements, the sellers were no longer willing to be associated with someone whose name was connected to the Asset Forfeiture Proceedings.[535]

241. Accordingly, Colombia's efforts to find other reasons for the dissolution of the Claimants' Project Portfolio fail. The evidence (and common sense) indicates that the Asset Forfeiture Proceedings drove financing, investors and potential business partners away from Claimants' Projects. That is why the Projects failed.

IV.A.3. Claimants' Claims Are For Losses Incurred By Their Investments In The Claimants' Project Portfolio

242. Colombia argues that even if Claimants establish causation, the Tribunal may not award damages in respect of the Claimants' Project Portfolio because "*the Tribunal has no authority to award damages that a claimant allegedly incurred in its capacity as an investor for violations of obligations that only extend to covered investments.*"[536] This argument is difficult to understand since Claimants are making claims for damages incurred by their investments in Meritage and Claimants' Project Portfolio,[537] which are "*covered investments*" under the TPA.[538] Again, Respondent's attempt to escape its compensation obligation on this basis can be summarily dismissed.

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243. In sum, the Hearing confirmed that damages to Claimants' Project Portfolio were "*by reason of, or ar*[ose] *out of*" the Asset Forfeiture Proceedings, which made it impossible for Claimants, and in particular Mr. Seda, to find financing, investors or business partners to continue the

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534 **Exhibit C-193**, Cancellation of Promise to Purchase Contract between Angel Seda and Jaime Alfredo Sánchez Vargas, 3 August 2017, p. 3. *See also* **Exhibit C-194**, Cancellation of Promise to Purchase Contract between Angel Seda and Ramón Antonio Duque Marín, 15 August 2017, p. 4; **Exhibit C-186**, Cancellation of Promise to Purchase Contract between Angel Seda and Jaime Francisco Martínez Pinilla and Edilia Rosa Sánchez Hoyos, 1 March 2017.

535 *See* Seda 1 WS, ¶ 106.

536 Colombia's Opening, slides 262-64.

537 *See* Claimants' Opening, slide 214. *See also* Reply, Sections V.A., V.C., V.D.

538 *See* Memorial, ¶¶ 343-44; Reply, Section IV.B.

remaining projects in the Claimants' Project Portfolio. Those Projects accordingly lost all their value as a direct and foreseeable result of the Asset Forfeiture Proceedings.

IV.B. BRG's Calculations, Supported By JLL's Market Data, Accurately Determine The Fair Market Value Of Claimants' Investments

244. The Parties disagree over the appropriate methodology to calculate damages. Claimants' damages experts, BRG, have used an income approach to calculate damages, and validated that with cross-checks under a market-based approach using data provided by Colombian real estate and hospitality experts at JLL. This methodology is widely accepted by valuation experts, and results in the most rigorous and reliable estimate of the fair market value of Claimants' investments. Colombia and its expert, Dr. Hern of NERA, initially advocated for the sunk-costs approach, but by the Hearing, Dr. Hern acknowledged that the valuation had to be forward-looking, and Colombia accepted that an income-based approach with the correct assumptions would provide an accurate reflection of the Claimants' damages.[539]

245. The remaining questions therefore relate to the assumptions underlying the income-based approach. Here, Claimants' experts provided a far more credible, objective and market-based assessment of Claimants' damages than Colombia's experts. BRG's assumptions, based on contemporaneous business models from the Claimants and validated by JLL's market research, provide a reasonable and "*middle of the road*" basis to value Claimants' investments.[540] BRG's experts had not only been to Colombia but had specifically visited the Charlee, Meritage, and Luxé sites,[541] and have broad expertise in the hospitality and real estate sector in Latin America. By contrast, Dr. Hern acknowledged he had little expertise in hospitality and real estate generally, having only previously valued an airport hotel and some agricultural land in Serbia.[542] He also had no knowledge of the Colombian market, having never even visited the country before,[543] much less any of Claimants' Projects. Dr. Hern's lack of familiarity with the

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[539] Rejoinder, n. 1377 ("*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.*").

[540] **Day 5 Tr.** 1492:2-22 (BRG Cross).

[541] *See* **Day 5 Tr.** 1607:22-1608:4.

[542] **Day 6 Tr.** 1656:2-4, 1657:11-21 (Hern Cross).

[543] **Day 6 Tr.** 1713:17-18 (Hern Cross).

hospitality and real estate sector became apparent by his crude analyses of industry metrics such as failure rates[544] and hotel room rates.[545]

246. Likewise, Claimants' real estate and hospitality experts, JLL, provided market data based on objective, quantifiable, transparent and replicable methodologies. By contrast, Colombia's industry experts, CBRE, relied almost exclusively on an unscientific and poorly documented survey, with unverifiable data that appeared to have been cherry-picked by the experts. As became apparent during the Hearing, CBRE's main source of information was a rudimentary survey, for which CBRE provided no methodology[546] and an inconsistent list of participants.[547] The survey itself was full of holes, with many missing pieces of information,[548] and with no way to identify which survey respondent had provided what information. CBRE moreover acknowledged that they took the survey respondents' responses at face value, without any probing.[549] And when these survey respondents provided responses that did not align with Colombia's position (such as high sales velocities reported in Medellín and Cartagena), CBRE simply ignored them on the basis that they were not the "*most relevant*" or "*representative*"[550] even though the survey itself provided no data on comparability or relevance of the survey respondents' projects to Claimants' Projects.[551] In sum, the CBRE report is of little value to this case, as reflected by the fact that even Dr. Hern cites to their report just six times.

247. Below Claimants set out in further detail the appropriate (1) methodology, and (2) assumptions to calculate damages in this case.

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544 **Day 5 Tr.** 1294:18-1295:7 (JLL Cross) ("*Yes, these were the numbers, and I'm sorry because I have to--flew through my presentation, but this is--**these are the numbers that we say we believe are nonsensical**. If you think that every project in 2021 in a have failed, that just **shows an utter lack of understanding about the real-estate** market. You cannot--this would be worse than 2008 here in the U.S. This would be--this is absolute collapse, every project failing. So, this is why we meant that you have to be very careful when you--how you treat the data.*").

545 **Day 5 Tr.** 1261:8-20 (JLL Presentation) ("***Hern's methodology for evidence of much higher room rates is questionable at best** because to try to pick a specific moment in time and just (drop in audio) you know, on June 19th the rate at the Four Seasons Papagayo was $2,300. With today's revenue management systems, **that's almost worthless information.** You could do it a week later or two days before and it could end up being $600. It's sort of the same concept as sitting next to someone on an airplane. You pay $200 for your ticket and the other person paid 2,000. There's a lot of algorithms, and these prices are dynamic, they're changing all of the time.*").

546 **Day 5 Tr.** 1368:12-18 (CBRE Cross) ("*Q. I haven't seen anywhere in your Report, though, you describing these aspects of the methodology. You don't list them in your Report anywhere, do you? A. (Mr. García) Not explicitly, but that does not invalidate the results or those who provided the answers.*").

547 **Day 5 Tr.** 1371:7-1373:12 (CBRE Cross).

548 **Day 5 Tr.** 1373:21:1374:21 (CBRE Cross).

549 **Day 5 Tr.** 1370:18-20 (CBRE Cross) (" *You did not ask for the underlying data. You took their word for it? A. (Mr. García) Yes.*").

550 *See, e.g.*, **Day 5 Tr.** 1379:14-1381:6 (CBRE Cross).

551 **Day 5 Tr.** 1364:8-1370:20 (CBRE Cross).

IV.B.1. The Income And Market Approach, Not The Cost Approach, Are Appropriate Here

248. The Parties agree that should Colombia be found liable for breaches of its obligations under the TPA, it must pay Claimants "*the fair market value*" ("FMV") of the Claimants' investments.[552] The Parties and their experts also agree that the FMV is "*the price that a willing buyer would pay to a willing seller* [. . .] *in a liquid market*" on an arm's length basis.[553]

249. The gold standard to calculate the FMV of an investment is the income approach, generally calculated using a DCF analysis.[554] Claimants' damages expert, BRG, accordingly conducted a DCF analysis using estimates from the Claimants' contemporaneous business models, with key inputs validated with market data provided by Claimants' real estate and hospitality experts JLL.[555]

250. By contrast, Colombia advances the sunk-costs approach even though it is widely recognized that, in the case of businesses with forward-looking value potential, the FMV of an asset cannot be measured using a sunk-costs approach. As a matter of economic logic, "*it would be wrong to mechanically assume that the historic cost of an investment is a good indicator of its 'market value'*".[556] This is because sunk-costs are fundamentally unable to value many important value-

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552 *See* Rejoinder, ¶ 889 ("*It is undisputed that, if any compensation is due to the Claimants* [. . .] *the 'fair market value' of the alleged investments 'captures the full reparation owed to Claimants*'."); Reply, ¶ 403 ("*Colombia accepts that, if successful, Claimants are due compensation that is worth, at least, the fair market value ('FMV') of Claimants' investments under Article 10.7 of the TPA*."); Counter Memorial, ¶¶ 576 ("*If the Tribunal finds that Colombia has expropriated the Claimants' investment in breach of Article 10.7 of the FTA, the compensation standard provided for in that article should be applied. If the Tribunal finds Colombia liable for other breaches of the FTA, it should still apply the compensation standard set forth in Article 10.7*."), 583 ("[T]*he maximum compensation for any non-expropriatory claim should be the same as that for an expropriation claim, i.e., compensation for the 'fair market value' only*.").

553 **Day 6 Tr.** 1662:19-22, 1663:1-7 (Hern Cross).

554 *See* Reply, ¶ 417. *See also* **Exhibit CL-157**, *Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara,* Final Award, 4 May 1999, ¶¶ 357-72 (tribunal used DCF analysis when damages arose after improper termination of electricity purchase agreement); **Exhibit CL-158**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, ¶¶ 553-61, 599, 604-39 (tribunal applied a DCF model to value contractual rights); **Exhibit CL-097**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 830; **Exhibit CL-048**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 355-57; **Exhibit CL-156**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Quantum, 13 October 2020, ¶ 541; **Exhibit CL-159**, *Tethyan Copper Company Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 1734, 1741; **Exhibit CL-160**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, ¶ 222; **Exhibit RL-047**, *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶¶ 59-62, 205, 254, 296-98.

555 *See* BRG presentation, particularly slides 11, 20, and 31.

556 **Exhibit CL-057**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 229.

generating activities of a business such as know-how,[557] brand value, and track record, among others, which are particularly important in real estate and hospitality development companies. Colombia relies on the award in *Deutsche Telekom* to advance the sunk-costs approach, though in that case the tribunal expressly stipulated that it was not granting the FMV of the investment as compensation.[558] Indeed, by the Hearing, even Colombia's expert, Dr. Hern, pedaled back from a sunk-costs approach,[559] and instead relabeled his favored approach as a "*replacement costs-type approach.*"[560]

251. According to Dr. Hern, his "*replacement costs*" approach takes "*account of what was paid for the Investments*" and "*roll*[s] *forward the historic costs of those investments with a nominal Risk-Free rate*".[561] But Dr. Hern's preference of this methodology relies on an erroneous assumption that the Colombian real estate and hospitality market is perfectly competitive.[562] That assumption is (obviously) incorrect.[563] Dr. Hern acknowledges that he is not a hospitality or real estate expert.[564] Indeed, the only valuation experience in the hospitality industry he

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[557] This includes market knowledge, consumer insights, vendor relationships, construction and project management expertise, regulatory knowledge, hotel management expertise, marketing expertise, etc.

[558] *See* Rejoinder, ¶ 934; **Exhibit RL-199**, *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Final Award, 27 May 2020, ¶¶ 287-289 ("*the Tribunal is not limited to the FMV … the Tribunal may either award the FMV or, if there is sufficient evidence in the record to reach a reasonably reliable assessment of FMV, resort to different indicators of the damage caused.*"). There is no such optionality provided by the TPA, as Colombia acknowledges.

[559] **Day 6 Tr.** 1663:8-22, 1664:14-16 (Q: "[T]*he best approach is sort of, like, a sunk-costs type approach; correct? A. Well, I didn't characterize it as "sunk costs*.") (Hern Cross).

[560] **Day 6 Tr.** 1664:11-16 ("*A. Essentially. You know, you could think of that as a replacement--an estimate of the replacement costs of those assets, yes. Q. So, you've taken a replacement-cost type approach? A. Yes.*") (Hern Cross).

[561] **Day 6 Tr.** 1663:20-1664:4 (Hern Cross).

[562] *See* **Day 6 Tr.** 1665:3-10 (Hern Cross) ("*as an economist,* [I] *also justify my* [replacement cost] *approach based on economic principles of prices in competitive markets, generally converging to the costs of the Investments in those markets, so there's a basic economic principle that the prices that we expect to observe in markets that are competitive, that the cash flows should converge to the cost of those investments*.").

[563] Indeed, Dr. Hern himself later acknowledged that no market is perfectly competitive. *See* **Day 6 Tr.** 1682:6-8 (Hern Cross) (Dr. Hern: "*No. When it's perfectly competitive, that's a hypothetical.* ***Nothing is perfectly competitive; right?***").

[564] *See* **Day 6 Tr.** 1656:22-1657:10, 1715:4-13 (Hern Cross). Perhaps the most obvious display of Dr. Hern's lack of expertise in hospitality was his attempt to compare room rates at Colombian hotels, for which exercise he picked a single week, somewhat randomly and without regard for the school or vacation schedule in Colombia, and used booking.com to elicit rates. *See* **Day 6 Tr.** 1710:1-4, 1711:1-19, 1712 (Hern Cross) (vacations can affect things). As JLL's hospitality expert noted, "*Hern's methodology for evidence of much higher room rates is questionable at best because to try to pick a specific moment in time and just (drop in audio) you know, on June 19th the rate at the Four Seasons Papagayo was $2,300. With today's revenue management systems, that's almost worthless information. You could do it a week later or two days before and it could end up being $600. It's sort of the same concept as sitting next to someone on an airplane. You pay $200 for your ticket and the other person paid 2,000. There's a lot of algorithms, and these prices are dynamic, they're changing all of the time*."). **Day 5 Tr.** (JLL Presentation) 1261:8-20.

could identify during his testimony are valuation of airport hotels in Serbia.[565] Dr. Hern has never even been to Colombia.[566] And he did not conduct any competition analysis of the real estate or hospitality industry in Colombia.[567] Accordingly, Dr. Hern's assertions about the competitive landscape of the Colombian real estate and hospitality market are simply not credible.

252. Dr. Hern's assertion that the Colombian real estate and hospitality market is perfectly competitive is also wrong. Dr. Hern's determination of the industry as "*perfectly competitive*" arose from his assumptions that it was "*easy to enter*", "[t]*here is no particular IP*", "[i]*t's easy to buy land, it's easy to develop land*."[568] None of these assumptions are true in the Colombian market. In fact, the only testifying hospitality expert in this Arbitration,[569] Mr. Dickinson of JLL, stated that the hospitality industry is "*capital-intensive*",[570] and "*illiquid*".[571] Mr. Dickinson explained that in Colombia "*there is a kind of lack of long-term debt and there's a lot of stratified ownership structures as a result, and that has actually retarded the development of an active transactions market in Colombia*".[572] Accordingly, the industry in Colombia is not "*easy to enter*" as Dr. Hern claims. Rather, there are significant barriers to entry, which in turn allow first movers in the market to garner a high premium. As Mr. Dickinson noted, the Charlee innovated and established the lifestyle concept in Medellín, and has since then "*consistently been the market leader ... not only in Medellín but also in Colombia*".[573] Thus not only is the Colombian market difficult to enter, Mr. Seda entered it with resounding success. It is therefore simply not reasonable to assume that Claimants' Projects would have achieved zero NPV over their lifetime.

253. Colombia contends that DCF is unsuitable here because the Claimants' Projects were not sufficiently advanced. This is not true in particular for the Meritage and Luxé Projects. As of the date of valuation, January 2017:

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565 *See* **Day 6 Tr.** 1655:13-1656:4, 1657:7-21 (Hern Cross).

566 *See* **Day 6 Tr.** 1713:17-18 (Hern Cross).

567 *See* **Day 6 Tr.** 1681:16-1682:2 (Hern Cross).

568 **Day 6 Tr.** 1679:7-14 (Hern Cross).

569 Notably Respondents' experts from CBRE were instructed to (and did) opine only on the real estate, and not hospitality industry in Colombia. *See* CBRE Report, slide 4; **Day 5 Tr.** 1342:19-1343:22, 1364:8-11 (CBRE Presentation and Cross).

570 **Day 5 Tr.** 1250:1 (JLL Presentation).

571 **Day 5 Tr.** 1252:3 (JLL Presentation).

572 **Day 5 Tr.** 1250:4-8 (JLL Presentation).

573 **Day 5 Tr.** 1251:4-8 (JLL Presentation).

(a) The Meritage Project had reached the equilibrium point for Phases 1 and 6 in February 2015,[574] which had advanced considerably by August 2016, when the Attorney General's Office halted further construction. By July 2016, structural construction was nearly complete for five of the eight aparta-hotel towers in Phase 1 and construction was about to begin on Phase 2 and 3 towers.[575] By this time, all the 152 Phase 1 units and 21 units for Phases 4 to 6 had already been sold and presales for the remaining units were ongoing.[576] Colombia did not contest the evidence or challenge Mr. Seda's testimony on this during the Hearing.

(b) The Luxé Project was near completion at the time of the measures, with the cabanas already built, and the hotel over 72.5% complete.[577] The hotel was set to commence operations in January 2017, with hiring already underway.[578] Again, Colombia did not challenge the evidence or Mr. Seda's testimony on this during the Hearing.

254. Accordingly, the Meritage and Luxé Projects were in advanced stages of development. While the Development Projects were not advanced, they were additionally risked by BRG through the application of a success rate.[579]

255. In any event, Colombia acknowledges that the DCF methodology can be applied to value damages, as long as "*some of the assumptions made by BRG*" are "*correct*[ed]."[580] Moreover, Colombia's real estate industry expert, Mr. Magueri of CBRE, which values over USD 40 billion in assets per year,[581] confirmed that he has used the DCF approach for "*undeveloped project*[s]" that are "*not in development*."[582] For example, Mr. Magueri used DCF to value barren land where no construction had even begun, based solely on a planned development of a resort on that land.[583] That study uses a DCF methodology backed by market data to value an undeveloped piece of land,[584] which is consistent with standard practice in the real estate and hospitality industries. This is precisely the approach BRG has taken. Even Dr. Hern presents a DCF valuation with his second report (though with serious flaws).[585] Accordingly,

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574 *See* Memorial, ¶¶ 89, 371; Reply, ¶ 27(h); Seda 1 WS, ¶ 68; NERA Report, ¶ 49; BRG 2 Report, ¶ 30(b); **Exhibit C-139**, Letter from Newport to Corficolombiana, 9 February 2015.

575 *See* Seda 1 WS, ¶ 95; Seda 2 WS, ¶ 58.

576 *See* Seda 1 WS, ¶ 96; Seda 2 WS, ¶ 59(a).

577 *See* **Exhibit C-338**, Letter from Ochoa Arquitectos & Ingenieros S.A.S. to Luxé By The Charlee S.A.S., 21 August 2021. *See also* Seda 2 WS, ¶ 66.

578 *See* Seda 2 WS, ¶¶ 66-67.

579 *See* BRG Report, ¶¶ 120, Section V.2.3.

580 Rejoinder, n. 1377.

581 *See* **Day 5 Tr.** 1342:5-8.

582 **Day 5 Tr.** 1393:12-15.

583 *See* **Exhibit C-434**, CBRE Valuation Report, 20 March 2018.

584 *See* **Exhibit C-434**, CBRE Valuation Report, 20 March 2018.

585 *See* NERA Presentation, slide 10; NERA 2 Report, Tables 5.13 and 6.4.

the question is not whether DCF is the appropriate approach to calculate damages here, but what assumptions should be applied in the DCF model.

IV.B.2. BRG's DCF Assumptions Are Reliable And Backed By Market Data

256. In this case, BRG's valuation relied on contemporaneous business plans from Claimants, whose assumptions were cross-checked with market data and analysis by JLL's industry experts. To recap:

(a) BRG relied on revenue estimates from Claimants' contemporaneous business models, which were verified by market-based inputs provided by JLL and STR (the leading source of hospitality data).[586] BRG's hotel valuations were cross-checked by market transaction data and market operating data, and the real estate prices in the business models were cross checked with prices in the Colombian real estate database, Galeria Inmobiliaria.[587]

(b) BRG likewise relied on cost estimates from Claimants' contemporaneous business models, again verified by JLL's market analysis.[588] Notably, Colombia's industry expert, CBRE, confirmed these estimates were reasonable,[589] indicating that not only is JLL's market analysis of costs uncontroversial, but also that Claimants' contemporaneous business models included reasonable estimates.

(c) BRG accounted for risks by discounting the estimated cash flows and applying an additional discount on value based on an estimated failure rate to the Development Projects, which was also cross-checked with actual failure rates in the Colombian market, as provided by JLL.

257. Dr. Hern and Colombia do not appear to object in principle to the data sources used by BRG, but instead complain that the valuation must be inaccurate because, according to Colombia and Dr. Hern, it is too high.[590] Needless to say, Claimants would not have invested in a business venture that was not expected to make money. And it is expected that large-scale projects,[591] capable of housing hundreds of people and dozens of businesses, spanning over 50 hectares, will be highly valuable. In any event, Colombia's and Dr. Hern's criticisms are meritless, as demonstrated by a discussion of certain key assumptions discussed below.

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586 *See* BRG presentation, slides 17-18, 28-32.

587 *See* BRG 2 Report, ¶¶ 70-71.

588 *See* BRG presentation, slide 19.

589 *See* CBRE report, p. 25.

590 *See* Colombia's Opening, slide 269; Hern presentation, slides 13-14, 20, 25.

591 Meritage was planned to have 632 units in all, including apartsuites, apartments, houses, retail units and lots. Luxé was planned to have 219 units in all, including hotel rooms, cabañas, apartments and lots. Cartagena Tierra Bomba was planned to have 270 units in all, including 80 hotel rooms, 110 cabañas and 80 apartments. 450 Heights was planned to have 1704 units in all, including hotel rooms, condos, apartments, commercial units, houses and parking spaces. Santa Fe was planned to have 430 units in all, including apartsuites and lots.

258. First, Dr. Hern references supposed transactions of Newport and Luxé shares to claim that BRG's valuation is "*exaggerated*."[592] But there are two fundamental problems with using these alleged transactions as a basis for comparison. First, these so-called transactions occurred well before the date of valuation, and accordingly cannot reflect the value of the Projects as of the date of valuation, which had advanced considerably by that time.[593] Second, as Mr. Seda has explained, these were not arm's-length transactions and therefore cannot reflect the market value of the companies at that time.[594] Mr. Seda's testimony on this issue was not questioned or otherwise challenged during the Hearing.

259. Second, Dr. Hern claimed that the EBITDA margins in BRG's cash flows are much higher than those realized by other Colombian real estate developers and hotels. However, possibly owing to Dr. Hern's lack of familiarity with the Colombian market, the comparators he uses are inapplicable.

260. With respect to the real estate EBITDA comparators, Mr. Ruiz, a Colombian real estate expert at JLL, explained that the real estate companies Dr. Hern uses are not comparable because (a) they are construction companies, not developers, and (b) approximately 80% of their product is social housing, not luxury developments.[595] "*Because government subsidies are given directly to families to buy housing units with a price cap (160MMW), social housing projects tend to have razor thin margins making it a business of volume, not margin*."[596] Colombia did not question Mr. Ruiz's testimony on this issue during the Hearing.

261. Though CBRE attempted to offer developer profit margins in its report, as became clear during the Hearing, CBRE obtained its figures in a wholly unscientific and unreliable manner. CBRE's figures for developer's profits are based solely on what its (undisclosed) survey respondents reported to CBRE. CBRE did not check the underlying data to corroborate the reported profit margins.[597] Moreover, CBRE did not identify its survey respondents, making it

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592 NERA Presentation, pp. 13-14.

593 *See* Reply, ¶ 438.

594 *See* Seda 3 WS, ¶ 18.

595 *See* JLL Presentation, slide 40.

596 JLL Presentation, slide 40.

597 *See* **Day 5 Tr.** 1369:19-1370:20 (CBRE Cross) ("*Q. So, say that you asked a survey Respondent for their profit margins. Did you then ask for the underlying data, their accounting, their records, to verify that that was, in fact, their profit margin? A. (Mr. García) Sometimes we did. Sometimes it wasn't necessary because this is something that the market normally knows. This is direct information, so they simply answered on the basis of the question that was posed to them. So, it wasn't really necessary to look at their financial statements, because all of these individuals were leaders, and they knew about the market, and they had that information at hand and top of mind. They simply answered. And what we were trying to do here is to find the reasonableness for the profitability that an investor of those characteristics could have in this market. This is what we asked. And the responses we obtained.*

impossible to examine whether their businesses, and therefore margins, would be comparable to Claimants'.[598] And even if one could blindly rely on CBRE's judgment to select comparable developers (*quod non*), CBRE failed to report them in a reliable manner. As pointed out in the Hearing, CBRE failed to disclose or follow any systematic survey methodology—we do not know what questions were asked, how comparators were picked, how the information was recorded, etc.[599] Indeed, where a survey respondent failed to provide an answer "*it simply was not included*."[600] Accordingly, of the 32 anonymous survey respondents, less than half, only 15, provided responses.[601] CBRE's survey accordingly lacked even a basic amount of rigor and can hardly be considered a reliable source of information.

262. Dr. Hern also uses inappropriate comparators for the hotel EBITDA. Dr. Hern picked a dataset where only nine out of the 776 companies were from Latin America, and did not filter for companies that were plainly incomparable, such as those that operated as diversified holdings, including, for example, companies that "*manufactur*[ed] *and* [sold] *various plastic wear products.*"[602] The business profiles and, accordingly, EBITDA margins of these companies clearly cannot be comparable to those of high end luxury real estate and hospitality developments in Colombia.

263. Third, Dr. Hern claims that speed of sales in Claimants' business models was too "*exaggerated*", relying on CBRE's reported speed of sales.[603] CBRE reported speed of sales from a local database, Coordenada Urbana, but failed to account for the peculiarities of that database, thus artificially deflating the figures. As Mr. Ruiz of JLL explained:[604]

Q. Okay. So, I think you said "no," so the answer to my question is "no", is that right? ***You did not ask for the underlying data. You took their word for it? A. (Mr. García) Yes.***") (emphasis added).

598 *See* **Day 5 Tr.** 1376:3-1377:14. *See also* **Day 5 Tr.** 1359:4-12, [redacted], 1369:19-1370:20.

599 *See* **Day 5 Tr.** 1368:2-18 ("*Q. Okay. And so, apart from the participants, do you think it's also important to have a consistent methodology when you're performing a survey for, say, things like the exact question asked, the person who's asking those questions, how those questions are responded to either by writing or by phone, where those questions are written down, how they're collated. Are those kinds of aspects of a survey methodology also important, in your opinion? A. (Mr. García) They are descriptive.* ***Q. I haven't seen anywhere in your Report, though, you describing these aspects of the methodology. You don't list them in your Report anywhere, do you? A. (Mr. García) Not explicitly****, but that does not invalidate the results or those who provided the answers*.") (emphasis added).

600 **Day 5 Tr.** 1368:20-1369:4 ("*So, my understanding is that you recorded all of the responses that you got in this survey in one of the spreadsheets that you submitted with your Report, is that correct? A. (Mr. García) In those in which it was possible to actually get an answer, yes. Were that was not possible, it simply was not included*.").

601 *See* **Exhibit CBRE-09**, Developer Survey (Tabulation and Graphs).

602 **Day 6 Tr.** 1698:22-1699:12.

603 *See* NERA Presentation, slide 16.

604 JLL presentation, slide 44.

> "*The CU database is updated monthly. The status of projects tend to remain "active" on it for years after being built and mostly sold. This is because most projects have at least a few units that are unattractive (e.g. no view, first, second floor, etc.) and remain "available" throughout the construction phase and beyond. If a long run average is calculated without considering this feature of the database, results will be severely skewed downwards by diluting the actual sales pace of the projects. The sales pace across markets are usually far higher than those presented by CBRE, especially during a project's first months until it reaches its equilibrium point when developers make their strongest marketing efforts.*"

264. Colombia did not question Mr. Ruiz's testimony on this point. Moreover, CBRE agreed that "*certainly there will be greater level of sales*" initially, which then gradually taper off.[605] CBRE also recognized "*that the Meritage at Phase 1 had record sales; we were able to verify this*".[606] In fact, CBRE's survey respondents reported sales velocities in Medellín and Cartagena of 15 and 20 units per month respectively (which CBRE failed to include in its report for no discernible reason).[607] Accordingly, the sales velocity assumed by Claimants in their business plans, were reasonable forecasts, in line with market trends.

265. Fourth, Dr. Hern claims the failure rates applied by BRG for the Development Projects are not high enough. This is not correct. The failure rate BRG applied of 23% to 39%[608] is higher than the actual failure rate observed in the market as calculated by JLL, of 19%, even after JLL made adjustments proposed by Dr. Hern.[609]

266. By contrast, in Mr. Ruiz's words, Dr. Hern's calculation of failure rates using JLL's data resulted in "*numbers that* [JLL] *believe are nonsensical*" because "[i]*f you think that every project in 2021 in all cities of Colombia have failed, that just shows an utter lack of understanding about the real-estate market. … this would be worse than 2008 here in the U.S. This would be—this is absolute collapse, every project failing.*"[610] This is because, owing to Dr. Hern's lack of expertise in the Colombian real estate market, he removed all the ongoing projects from the denominator of the failure rate calculation, leading to exponential increases

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605 **Day 5 Tr.** 1355:17-1356:16.

606 **Day 5 Tr.** 1357:6-8.

607 *See* **Day 5 Tr.** 1382:4-11 ("*Q. Understood, Mr. García. So, you're saying this [reported high sales velocity] was not relevant. It just happened to have the highest figures, but it's also not relevant, is that what you're saying? A. (Mr. García) Well, no. I'm saying that this is not the most representative one. That's what I'm saying.* ***Regardless of the data, it is not the most representative one.*** *That's what I'm saying.*") (emphasis added).

608 *See* BRG presentation, slide 43.

609 *See* JLL Presentation, slide 41.

610 **Day 5 Tr.** 1294:18-1295:5. *See also* JLL Presentation, slide 42.

in the failure rate that are simply not realistic: "*that would be basically an Armageddon in the market*."[611]

267. Notably, failure rates are not frequently used to discount the value of even completely undeveloped projects—for example, Colombia's expert, Mr. Magueri, did not use a failure rate in his valuation of a plot of land to be used for an undeveloped resort that had not even begun construction.[612] Thus BRG's application of a failure rate is more conservative than the traditional approach employed by industry experts such as CBRE.[613]

268. Accordingly, the failure rates applied by BRG are conservative when compared to the market trends observed by JLL.

269. Dr. Hern and Colombia also contend that failure rates should be applied to the Meritage and Luxé Projects. As BRG explained, for Meritage and Luxé, the "*proof of concept*" had already taken place:[614] "[t]*hese* [projects] *are established. Luxé is in operation. Except for the hotel … and the Meritage is not in operation but sold its entire Phase 1 and part of the following phase.*"[615] Likewise, JLL confirmed that when a project has started construction, its failure is highly unlikely: "*it could* [fail]*, should something extraordinary happen, but usually construction does not start until a project reaches equilibrium point*."[616] Accordingly, the risks for Meritage and Luxé are adequately captured in the discount rate and cash flow assumptions; an additional failure rate is not required.[617]

270. Fifth, Dr. Hern complains that JLL's hotel transactions data is not comparable because it collects data from operational hotels outside Colombia. This complaint demonstrates a lack of familiarity with the hospitality industry. As Mr. Dickinson of JLL (the only testifying

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611 **Day 5 Tr.** 1276:13-14. *See also* JLL Presentation, slides 41-42.

612 *See* **Exhibit C-434**, CBRE Valuation Report, 20 March 2018.

613 *See* **Day 5 Tr.** 1493:9-20.

614 **Day 5 Tr.** 1424:13-15.

615 **Day 5 Tr.** 1490:3-7.

616 **Day 5 Tr.** 1293:16-19.

617 **Day 5 Tr.** 1494:8-10 (BRG Cross) ("*What I'm trying to say to you is that our valuation and our projections already encompass probabilities of failure*"), 1494:8-18 ("*W. But I'm talking about the project completely failing. Is it impossible? A. (Mr. Dellepiane) That is—Q. Is that taken into account by the Discount Rate? A. (Mr. Dellepiane) A hundred percent. That's exactly what it is—*"). *See generally* 1502-1509, where Colombia's counsel questioned BRG repeatedly on this issue.

hospitality expert in this case) testified, this is the industry standard method to assess the value of proposed projects:[618]

> *Honestly, I'm a little bit mystified by this because what else would one use if one were trying to come up with a value, you know, whether a hotel is existing or whether it's proposed, it's -- it routinely--these were valued on the basis of fully operational comparators.*

271. Likewise, looking outside the country of the project being valued, particularly when the country in question lacks transaction data from the relevant period, is common industry practice.[619]

272. Indeed, JLL's data set consisted of sample transactions from jurisdictions with both more and less developed tourism sectors.[620] Mr. Dickinson further explained that many of the transactions in the sample set consisted of developments that initially were in undeveloped tourist regions, which evolved to become popular tourism destinations.[621]

> "*I actually remember what the region looked like where the Four Seasons is now before it was built. It was very isolated, very--very much on its own. There was absolutely nothing there in Papagayo at the particular time, and it was sort of the first property to be built there. Over the course of 25 years, it has evolved to become quite the destination-- So, I almost think it's a great example of what happens if you pick a fundamentally good spot and invest in the infrastructure, that it can turn into a viable (drop in audio) location. I mean, actually, this same thing happened with Puerto Vallarta, the same thing happened with Cancun, and a lot of tourist destinations. They started out with nothing.*"

273. This, of course, was precisely Mr. Seda's business model, as Colombia's counsel have acknowledged,[622] whereby he identified promising but underdeveloped regions and developed innovative lifestyle retreats there, which turned out to be wildly popular, thus resulting in high rates of return. As Mr. Dickinson noted, "*the Luxé would have been quite … a unique project within the Guatape area*" because "*the base requirements in terms of proximity to a major airport, proximity to a major city, waterfront location with beach, incredible vistas and the*

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618 **Day 5 Tr.** 1259:9-14. *See also* **Day 5 Tr.** 1303:13-17 (Dickinson Cross) ("*Yeah, I mean, if you were trying to value a yet-to-be-built hotel, the assumption would be that it is built and operational and, therefore, it's comparable. So, yes, that's how you would do it.*"), 1305:4-7 ("*Well, the assumption, when you go to try to value a prospective—a proposed hotel is that it is fully built and operational. That's how you do the comparison.*"), 12-16 ("*But the fundamental assumption is that when you go to do the value of a proposed hotel, the fundamental assumption is that it is—it is basically as as-complete or as-developed valuation.*").

619 **Day 5 Tr.** 1261:1-5 ("*As I previously stated, we knew …* [this approach] *was going to produce more variability in the markets … and in the assets, but that's not a reason to not follow what's a very common practice.*").

620 **Day 5 Tr.** 1306:21-1307:19.

621 **Day 5 Tr.** 1310:7-22, 1311:1-2.

622 *See e.g.* **Day 2 Tr.** 443:20-444:1, 444-449:3 (Seda Cross).

facilities themselves … I think could have made for a very, very interesting destination type resort there in Antioquia."[623]

274. Sixth, Dr. Hern alleges that BRG should not have assumed that fees collected from hotel operations are pure profit.[624] However, the operating agreement expressly calls for the reimbursement of Royal Realty's costs, listing a comprehensive set of expenses and accounting for "*the possibility of additional fees*" to be "*paid to Royal Realty or its affiliate companies*" in the event they arise.[625] Therefore, there are no additional costs that Royal Realty would have had to incur, and indeed neither Dr. Hern nor Colombia nor CBRE have identified any.

275. Seventh, Dr. Hern's discount rate assumptions do not reflect market reality. Among other issues:

(a) Dr. Hern's cost of debt is based on the interest rates for construction loans, which usually have higher rates than typical mortgage loans and are intended to be refinanced at a lower rate once construction is advanced.[626] Construction loans are also generally short-term loans, and thus are not representative for a long-term valuation.[627]

(b) Dr. Hern overestimates the market risk premium by calculating an arithmetic rather than a geometric average, which is the industry preference.[628]

(c) Dr. Hern's beta parameter considers companies that operate in the gaming industry in its calculation,[629] which are businesses that have a higher risk profile than hospitality businesses.[630] Indeed, Dr. Hern himself criticized JLL for including hotels with casinos in their transactions sample, which JLL removed for better comparability in its second report.[631]

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623 **Day 5 Tr.** 1312:16-22, 1313:1-4.

624 *See* NERA Presentation, slide 16.

625 **Exhibit BRG-048**, Company Agreement of RR Meritage Associates S.A., 17 June 2013, sections 3.03, 3.08.

626 BRG Presentation, slide 45.

627 BRG Presentation, slide 45.

628 BRG Presentation, slide 46, *quoting* Professor Damodaran in **Exhibit BRG-82** ("*In reality, … there are strong arguments that can be made for the use of geometric averages.* [. . .] *Consequently, the arithmetic average return is likely to over state the premium.")*

629 **Day 6 Tr.** 1695:2-5 ("*So, in assessing risk, you've included risk in the gaming industry in your WACC calculations; correct? A. Implicitly, yes.*").

630 BRG Presentation, slide 47.

631 JLL 2, pp. 33.

(d) Dr. Hern includes the country risk by using Colombian peso denominated issuances, which are thinly traded instruments. By contrast, BRG's country risk premium relies on the Emerging Markets Bond Index (EMBI) calculated by J.P. Morgan, which is based on U.S. dollar-denominated issuances that are more widely traded; this therefore allows a more reliable representation of the country risk.[632]

276. A fundamental flaw in Dr. Hern's discount rate assumption is that he considers that the discount rates should be equivalent to the internal rates of return of the projects. This arises out of Dr. Hern's mistaken assumption that the Colombian real estate and hospitality industry is perfectly competitive. This is not true, as discussed above.[633] Indeed, "[i]*nvestors would not pursue any investment under an expected NPV of zero*."[634] "*Even in competitive industries there is always a spread above the cost of capital that justifies new investment*". Indeed, even Dr. Hern ultimately admitted that no market, including the Colombian one, is perfectly competitive.[635] Thus his assumption must be wrong.

277. Finally, Colombian counsel appeared to be exploring new damages arguments during BRG's cross-examination.[636] While it is up to Colombia's counsel to use their cross-examination time as they wish, the arguments they appeared to be exploring were not raised in the Counter-Memorial or Rejoinder and are accordingly time-barred.[637] Claimants expressly reserve their right to respond should Colombia attempt to belatedly raise any new defenses.

278. In sum, none of Dr. Hern's or Colombia's complaints with the DCF model have merit. Indeed, they largely arise from a lack of understanding of the Colombian real estate and hospitality sector. On the other hand, BRG's calculation relied on contemporaneous data and projections, which were validated with JLL's thorough and transparent analyses and data of the Colombian market.

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632 BRG Presentation, slide 45.

633 *See supra* ¶¶ 254-255.

634 BRG Presentation, slide 48.

635 *See* **Day 6 Tr.** 1664:6-8 (Dr. Hern: "*No. When it's perfectly competitive, that's a hypothetical. Nothing is perfectly competitive; right?*").

636 This includes, for example, cross-examination by Colombian counsel on the value of minority versus majority shareholding and whether non-expropriatory breaches should be valued on an ex ante or ex post basis. **Day 6 Tr.** 1458-1466 and 1560-1580.

637 *See* Procedural Order No. 1, Sections 14.2, 14.3; ICSID Rules, Rule 26(3).

IV.C. Claimants Are Owed Pre-Award Interest At A Commercially Reasonable Rate

279. As Claimants have explained, they are entitled to pre-Award interest to be made whole. BRG has used Claimants' cost of debt as the appropriate pre-Award interest. Dr. Hern claims that the U.S. risk-free rate should be awarded. This would, however, undercompensate Claimants, as the U.S. risk-free rate is substantially lower than Claimants' cost of debt as calculated by Dr. Hern, BRG and lower even than Colombia's cost of debt.[638] Accordingly, other tribunals in matters against Colombia, such as *Eco Oro*, have determined that the U.S. risk-free rate is not a "*commercially reasonable rate*" for pre-Award interest.[639] Instead, the average estimated cost of debt for the real estate and hospitality businesses should be applied to fully compensate Claimants.[640]

IV.D. Claimants Are Owed Moral Damages

280. As set out above, Colombia's measures did not just have a serious economic impact on Mr. Seda. Colombia's actions have inflicted substantial "*mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation*".[641] Under international law, in order to make full reparation, Colombia must account for "*any damage, whether material or moral.*"[642] Colombia's actions have gone beyond the tactics normally employed in legal defense, [redacted]

281. In a similar circumstance, where the investors were "*humiliated, threatened with death and assaulted*"[644] with the host State's endorsement, the tribunal in *von Pezold v. Zimbabwe* awarded moral damages in recognition of the fact that the events caused the investors "*considerable stress and anxiety*"[645] that could not otherwise be accounted for. As outlined

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638 *See* BRG Presentation, slide 50.

639 **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 913.

640 *See* **CD-5**, BRG Opening, slide 44.

641 **Exhibit CL-005**, *Lusitania Cases (United States v. Germany)*, Opinion, 7 R.I.A.A. 32, 1 November 1923, p. 40.

642 **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 31(2) (emphasis added).

643 [redacted]

644 **Exhibit CL-102**, *Bernhard von Pezold et al. v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 898.

645 **Exhibit CL-102**, *Bernhard von Pezold et al. v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 920.

above, Colombia's conduct here has similarly wreaked havoc on Mr. Seda's professional and personal life and cannot be condoned. Mr. Seda's professional and personal life has been completely derailed since Colombia's measures and he will never get the past six years back. The Tribunal retains discretion as to the amount of moral damages that it deems appropriate in the circumstances, but recent tribunals have awarded as much as USD 30 million where the investor suffered reputational harm from the wrongful cancellation of a tourism investment project.[646] It is reasonable to award moral damages in an amount commensurate to the size of the claim in question, and accordingly, Mr. Seda seeks moral damages as a percentage (*i.e.*, 10%) of the overall claim value.[647]

IV.E. Summary Of Damages To Claimants

282. On the basis of the above and the evidence of BRG and JLL, Claimants seek the following damages.[648]

Figures in USD Million	Loss in Equity	Loss in Fees	Total Damages
Projects in Construction	**62.2**	**46.2**	**108.3**
Meritage	35.8	28.2	64.0
Luxé	26.4	17.9	44.3
Projects in Development	**40.8**	**39.7**	**80.5**
Cartagena Tierra Bomba	12.9	13.2	26.0
450 Heights	4.8	8.7	13.5
Santa Fé de Antioquia	23.2	17.8	41.0
Expansion Projects	**14.8**	-	**14.8**
Total All Projects as of January 25, 2017	**117.8**	**85.8**	**203.6**
Pre- Award Interest up to September 17, 2021			52.2
Total All Projects as of September 17, 2021			**255.8**

646 **Exhibit CL-088**, *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. The Government of the State of Libya et al.*, Final Arbitral Award, 22 March 2013, p. 392.

647 In this respect, Colombia's references to cases from the Inter-American Court of Human Rights and other human rights bodies addressing vastly different types of violations are obviously inapposite.

648 *See* BRG Opening, slide 9.

V. THE TRIBUNAL HAS JURISDICTION OVER THE DISPUTE

283. Colombia's jurisdictional objections can be easily addressed. As Claimants have established in both their written and oral submissions,[649] the Tribunal has jurisdiction over this dispute in accordance with the provisions of the TPA and Article 25 of the ICSID Convention. As confirmed below, none of the jurisdictional objections raised by Colombia can be sustained.

V.A. Claimants Are Protected Investors Under The TPA And The ICSID Convention

284. The Parties agree that the individual Claimants and JTE International Investments, LLC are United States nationals that could qualify as protected investors under the TPA and the ICSID Convention.[650] The Parties further agree that the Boston Enterprises Trust, the only remaining Claimant, qualifies as a protected investor under the TPA, which specifically extends protection to "*entities constituted or organized under applicable law*" "*including any* [. . .] *trust*."[651] The only remaining issue in dispute between the Parties is whether Boston Enterprises Trust also qualifies as an "*national of another Contracting State*" under the ICSID Convention.[652]

285. The ICSID Convention extends protection to "*any juridical person*"[653] with United States nationality, and does not include a definition of "*juridical person*." The drafters of the ICSID Convention deliberately did not define the term in order to "*take into account the fact that countries might differ in the way their national laws treated partnerships.*"[654] For example, some States recognize associations as juridical entities whereas others do not.[655] "*For that*

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649 Memorial, Part IV; Reply, Part IV; **Exhibit CD-1**, slides 227-47; **Day 1 Tr.** 151:16-163:19.

650 *See* Memorial, ¶ 340; Reply, ¶ 162; **Exhibit CD-1**, slide 228; Rejoinder, ¶ 503. *See also* **Exhibit C-348**, U.S. Passport of Monte Adcock, 3 December 2020; **Exhibit C-349**, U.S. Passport of Stephen Bobeck, 18 April 2012; **Exhibit C-350**, U.S. Passport of Justin Enbody, 28 January 2015; [redacted]

651 **Exhibit CL-001bis**, TPA, arts. 1.3 (definition of "*enterprise*" including a "*trust*"), 10.28 (definition of "*investment*" including an "*enterprise*"); Rejoinder, ¶ 563 ("*while the Boston Enterprises Trust may be entitled to bring investment claims under other fora available under the TPA, it does not have standing to bring claims before this Tribunal constituted under the ICSID Convention.*").

652 ICSID Convention, art. 25(2).

653 ICSID Convention, art. 25(2)(b).

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

655 *See* **Exhibit CL-137**, History of ICSID Convention, Volume II-1, 2019, p. 284 (Chairman Broche notes that "*for the purposes of the Convention* ***a host State could elect at the time of consent to jurisdiction of the Center*** *to treat the association either as a national of the State in which they are associated or as a national of the State to which the individuals belonged.*") (emphasis added).

reason, it had been thought desirable to keep the definition as neutral as possible."[656] Tribunals have accordingly held that "[t]*he requirements and criteria to be fulfilled in order to qualify as a corporate investor shall be those set out in the applicable investment treaties*" and as a result "*there is no scope for importing additional conditions purporting to be based upon Article 25 of the ICSID Convention*."[657] Indeed, doing so risks annulment.[658] Here, the United States and Colombia expressly agreed that a "*trust*" could qualify as a form of entity that was entitled to protection as an investor under the TPA with the right to initiate ICSID arbitration. Colombia cannot retroactively seek to add conditions for corporate personality when the clear terms of the treaty include "*trust*" within the definition of an investor that can initiate ICSID arbitration. The Boston Enterprises Trust accordingly has standing to appear as a protected investor before this Tribunal.

V.B. Claimants Have Made Protected Investments

286. Each of the Claimants has made a qualifying "*investment*" that is entitled to protection pursuant to the TPA and the ICSID Convention. Claimants' investments are comprised of a "*bundle of rights*" including: *(i)* shares in Newport, Luxé SAS, and Royal Realty;[659] *(ii)* management contracts in place between Royal Realty and Newport, and Royal Realty and Luxé;[660] and *(iii)* the enterprises set up by Mr. Seda to serve as investment vehicles for the Development Projects including RDP Interpalmas S.A.S., RDP Cartagena S.A.S., and Revmarketing S.A.S.

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

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

658 **Exhibit CL-065**, *Malaysian Historical Salvors Sdn Bhd v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, ¶¶ 73-74 ("*It is* [. . .] *bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term 'investment' as found in Article 25(1) of the Convention, risks crippling the institution.*").

659 **Exhibit CD-1**, slide 235 (table setting out share ownership of Claimants). *See also* [redacted] **Exhibit C-180**, Royal Realty S.A.S. Share Ledger, 13 December 2016.

660 **Exhibit C-101**, Management Contract between Luxé By The Charlee S.A.S. and Royal Realty S.A.S., 21 March 2013; **Exhibit C-120**, Management Contract between Newport S.A.S. and Royal Realty S.A.S., 3 December 2013.

287. Claimants' investments, as outlined above, fall within the broad definition of "*investment*" under the TPA which extends to "*every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment.*"[661] Colombia erroneously contends that Claimants' investments do not meet the "*characteristics of an investment*" under the TPA and, in turn, the ICSID Convention.[662] This objection must be dismissed.

288. First, the TPA provides a non-exhaustive list of characteristics that are stated as an example and do not need to be fulfilled cumulatively. Instead, tribunals have confirmed that "*none of* [the characteristics] *is indispensable*"[663] and instead a "*the prudent course of action is a global assessment*."[664]

289. Second, the ICSID Convention does not establish an autonomous definition of "*investment*." The ICSID Convention deliberately makes "[n]*o attempt* [. . .] to define *the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre*."[665] A number of tribunals and annulment committees have likewise confirmed that the term "*investment*" in the ICSID Convention does not impose additional jurisdictional requirements beyond the scope of the instrument of consent, here the TPA.[666]

290. Third, in any event, Claimants' investments discharge each of the allegedly required characteristics advanced by Colombia:

(a) Claimants have made a commitment of capital or other resources.[667] Colombia has conceded in its submissions and at the Hearing that the Claimants have invested, at minimum, USD 2 million (even though the amount is much more).[668] It became clear

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661 **CL-001bis**, TPA, art. 10.28.

662 Counter Memorial, ¶¶ 251-62; Rejoinder, ¶¶ 512-28.

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

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

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

666 *See* Reply, ¶ 173 n. 455.

667 Reply, ¶¶ 175-76; **Exhibit CD-1**, slide 241.

668 *See* Counter Memorial, ¶ 256; **Day 1 Tr.** 290:9-13 ("*Pursuant to the Financial Statements of Newport between 2013 and 2017, you see there has been a payment of less than USD 2 million, so that is not significant at all.*") (Colombia's Opening Statement).

at the Hearing that Claimants have provided proof of capital contributions from each of the Claimants which Colombia has chosen to willfully ignore in prosecuting this baseless jurisdictional objection.[669] Setting aside that Colombia has severely underestimated the amount contributed by Claimants, there is no authority to support a finding that Claimants must meet an arbitrary minimum contribution threshold in order to qualify for protection under the TPA.[670] In addition, Colombia ignores the significant expertise, brand value and time Mr. Seda has dedicated to the development of Claimants' Projects in Colombia.[671] Colombia's highly misleading contention that "*the Meritage Project has no proven link to the Charlee Hotel*"[672] was also roundly discredited at the Hearing when it became patent that advertising for the Meritage Project was closely tied to the success of the Charlee Hotel and Royal Realty's brand.[673] The Tribunal will recall that in attempting to demonstrate the opposite was true, Respondent's counsel cited to excerpts of Unit Buyer presentations without citing several pages in the very same presentation that discussed the Charlee brand and its prior success.[674] Such a contribution of know-how and brand value has been recognized by a number of tribunals as a protected contribution of "*other resources.*"[675]

(b) Claimants have assumed risk.[676] As an initial matter, Colombia accepts that if Claimants have made a contribution of capital of other resources, they will necessarily have assumed investment risk.[677] Patently, the Claimants' assumed investment risk with the expectation of gain or profit.

291. Fifth, Claimants own their investments and do not need to evidence "*unencumbered rights.*"[678] Colombia's contention in its Rejoinder for the first time that Claimants must "*clarify the role and extent of rights of Downie North, LLC*" over their investments is entirely unconnected from

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669 *See* **Exhibit C-358**, Meritage Claimants' Capital Contributions to Newport S.A.S.; **Exhibit C-359**, Luxé SAS Claimants' Capital Contributions to Luxé S.A.S. *See also* [redacted]

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

671 *See* Seda 1 WS, ¶¶ 2-5.

672 Rejoinder, ¶ 524.

673 *See* **Day 5 Tr.** 1607:4-1610:14 (BRG Re-examination).

674 *See* **Day 5 Tr.** 1606:18-22 (BRG Re-examination) ("*MR. DAOUD: Sorry to intercept. You don't have in your bundle the full—*[. . .] *MR. DAOUD: We put like one-third or so.*"). *See also* **Day 5 Tr.** 1607:4-1610:14 (BRG Re-examination).

675 *See* Reply, nn. 463, 465.

676 Reply, ¶¶ 177-178; **Exhibit CD-1**, slide 242.

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

678 Rejoinder, ¶¶ 529-31.

any requirement in the TPA. All that is required under the TPA is that Claimants "*own*[] *or control*[]" a protected investment. As outlined above, Claimants clearly own their investments,[679] and such ownership is not diminished by alleged "*encumbrances*." In this respect, Claimants note that the Tribunal recently rejected Colombia's request that the Claimants disclose the details regarding Downie North's stake in this case.[680]

V.C. Claimants' Claims Directly Relate To Colombia's Unlawful Measures

292. Claimants are entitled to protection under the TPA for all measures "*relating to: (a) investors of another Party;* [and] *(b) covered investments*."[681] Tribunals considering similar language have held that the phrase "*relating to*" should not be interpreted as denoting a "*narrow threshold jurisdictional issue without any regard*" for the substantive treaty protections being invoked by an investor.[682] Instead, all that is necessary is a "*relationship of apparent proximity between the challenged measure and the claimant or its investment*."[683]

293. Claimants in this Arbitration are seeking relief for measures taken by Colombia that have resulted in the unlawful treatment of Claimants' investments in the Meritage Project and Luxé. As set out below, Colombia was aware of Claimants' investments in Luxé but nevertheless did not take steps to minimize or mitigate the harm caused to Luxé as a direct result of the Asset Forfeiture Proceedings.[684] As a result, Claimants have articulated a separate and independent breach committed by Colombia in connection with its treatment of Claimants' investments in Luxé.[685] And in any event, the unlawful conduct in relation to the Meritage Project had a proximate adverse impact on the Luxé (and the remaining projects in the Claimants' Project Portfolio) such that Claimants should also be entitled to claim for those losses.[686] Colombia's claim that the "*vast majority of Claimants' claims do not concern the Meritage Project*"[687] and

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679 *See supra* Section V.A.

680 Procedural Order No. 11.

681 **Exhibit CL-001bis**, TPA, art. 10.1.

682 **Exhibit CL-147**, *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 238 (citing **Exhibit RL-071**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, NAFTA, Award, 25 August 2014).

683 **Exhibit CL-147**, *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 242.

684 *See supra* Section III.F.

685 *See supra* ¶¶ 215, 218, 220.

686 *See supra* Section IV.A.

687 Counter Memorial, ¶¶ 263-66.

that any claims unconnected to the Meritage Project fall outside the Tribunal's jurisdiction should accordingly be dismissed.

294. Colombia's arguments in this respect relate not to the Tribunal's jurisdiction but to whether the TPA's substantive requirements of causation have been met. That question, however, is more appropriately reserved for the merits.

V.D. Brian Hass And The Boston Enterprises Trust Have Standing To Act As Claimants

295. Colombia alleges that Mr. Hass does not have standing in this arbitration because he structured his investment in Luxé through a family trust.[688] Specifically, Mr. Hass made his investment through Haystack Holdings LLC, which in turn is controlled by a family trust for which Mr. Hass and his wife are the settlors and sole beneficiaries.[689] As Mr. Hass is the ultimate beneficial owner of the shares, he has standing to claim relief before this Tribunal pursuant to the principle "*in international law* [that] *grants standing and relief to the owner of the beneficial interest.*"[690] Accordingly, Mr. Hass is a protected investor who made a protected investment, and he has standing to appear as a claimant in this Arbitration.

296. Colombia further alleges that the Boston Enterprises Trust does not have standing in this Arbitration because its investments were allegedly acquired after the present dispute arose.[691] However, as Claimants have explained the settlor, trustee, and beneficiary of the Boston Enterprises Trust is a United States national [redacted], he reorganized his investments through the Boston Enterprises Trust prior to initiation of this Arbitration because he wanted to maintain

688 Counter Memorial, ¶¶ 275-77; Rejoinder, ¶¶ 544-51.

689 **Exhibit C-222**, Letter from The Private Trust Corporation Limited, 4 October 2018.

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

691 Counter Memorial, ¶¶ 267-74; Rejoinder, ¶¶ 552-63.

692 [redacted]

693 [redacted].

694 [redacted].

his anonymity to avoid reprisals like those against Mr. Seda.[695] Given the identity of personality between the investor that suffered damage, and the beneficiary of Boston Enterprises Trust, and the fact that [redacted] has been entitled to the protection of the TPA at all times given his U.S. nationality, no question of abuse arises. Instead, the transfer of [redacted] investment to the Boston Enterprises Trust is more appropriately characterized as an internal corporate reorganization that was permitted under the TPA.[696] Accordingly, the Boston Enterprises Trust is a protected investor who made a protected investment, and it has standing to appear as a claimant in this Arbitration.

VI. COLOMBIA'S ELEVENTH-HOUR INVOCATION OF THE ESSENTIAL SECURITY DEFENSE FAILS

297. In a last-ditch attempt to avoid its international obligations, in its Rejoinder, for the very first time in this Arbitration, almost three years after Claimants initiated this Arbitration and more than six years after the Attorney General's Office initiated the Asset Forfeiture Proceedings, Colombia alleged that it had actually taken the measures in dispute to protect its essential security interests ("Essential Security Defense"). According to Colombia, by simply asserting this Defense, Colombia can deprive the Tribunal of jurisdiction or, in the alternative, excuse itself of liability. In other words, Colombia would like the Tribunal to believe that Article 22.2(b) is a "*get-out-of-jail-free card*," available to be played by Colombia whenever it wants. That is not what the provision does.

298. In their Essential Security Submission and during the Hearing, the Claimants explained that:

(a) When interpreted in accordance with Article 31(1) of the VCLT, Article 22.2(b) of the TPA ensures that Colombia can continue to implement measures in contravention of the TPA but this does not impact the Tribunal's jurisdiction or Colombia's liability and concomitant obligation to compensate Claimants;[697]

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695 *See supra* ¶ 224.

696 *See* **Exhibit CL-240**, *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, Decision on Jurisdiction, 5 March 2008, ¶¶ 97-108 ("*When a parent absorbs its subsidiary and thus becomes formally the investor in the latter's place, there is no real change in the 'investor' from the State's perspective. No previously unknown entity has entered into the contractual relationship. The only real change is a shortening of the corporate chain of ownership, which should not impact the State in any way. This is especially true here where the nationality of the parent and subsidiary is the same. . . .* [I]*n economic terms, the persona is essentially unchanged when the parent replaces (absorbs) a wholly-owned subsidiary*."); **Exhibit CL-242**, *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 24 November 2015, ¶¶ 195-208.

697 Claimants' Essential Security Submission, ¶¶ 5-34.

(b) It is implicit in Colombia's argument that the Essential Security Defense does not impact the Tribunal's jurisdiction;[698]

(c) Under Colombia's own case, it did not have an essential security interest at the time it undertook the measures, and thus the measures cannot have been "*necessary for the fulfilment of* [Colombia's] *obligations with respect to*" that alleged essential security interest.

(d) At a minimum, Colombia concedes that the Tribunal can review whether Colombia has invoked the Essential Security Defense in good faith, which Colombia did not do here as:

(i) Colombia has not articulated its essential security interest in good faith as it had previously invoked precisely the same interest as one to protect public welfare, not essential security;[699] and

(ii) Colombia's stated essential security interest to "*fight organized crime*" has no plausible connection to the Asset Forfeiture Proceedings as the Asset Forfeiture Proceedings did not and have not targeted the proceeds of the alleged crime or criminals and instead have targeted Claimants' investments, even though Claimants have not been implicated in any criminal activity.[700]

299. The Hearing further confirmed every prong of Claimants' position, as detailed below.

VI.A. Article 22.2(b) Does Not Erase Jurisdiction Or Liability

VI.A.1. The Ordinary Meaning Of Article 22.2(b) In Light Of Its Context And Purpose Merely Ensures Colombia Is Not "*Precluded*" From Applying Certain Measures

300. Article 22.2(b) provides that "[n]*othing in this Agreement shall be construed* [. . .] *to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to* [. . .] *the protection of its own essential security interests*." A footnote clarifies "[f]*or greater certainty, if a Party invokes Article 22.2* [. . .] *the tribunal or panel hearing the matter shall find that the exception applies*."

301. There is no dispute between the Parties that the VCLT applies to questions of interpretation of the TPA.[701] Under Article 31(1) of the VCLT, the TPA must "*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 light of its object and purpose.*" In their Essential Security Submission, Claimants established that:

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[698] Claimants' Essential Security Submission, ¶¶ 35-48.

[699] Claimants' Essential Security Submission, ¶¶ 52-56.

[700] Claimants' Essential Security Submission, ¶¶ 57-73.

[701] Claimants' Essential Security Submission, ¶ 7; Rejoinder, ¶¶ 26, 506; Colombia's Letter, pp. 16, 18.

(a) The ordinary meaning of Article 22.2(b) is that the Tribunal cannot "*preclude*" Colombia from taking measures it considers necessary to protect its essential security interests. Multiple authoritative English language dictionaries define to "*preclude*" as to "*prevent from happening*" or to "*make impossible*."[702] As the *Eco Oro* tribunal confirmed (while interpreting a similar term, "*prevent*")[703] this means that while "*the State cannot be prohibited from adopting or enforcing*" a measure pursuant to the exception, this did not mean that "*in such circumstances payment of compensation is not required.*"[704] Colombia has so far failed to provide any textual basis to explain its expansive (and unjustified) reading of the provision, other than asserting that it was "*obvious*."[705] Yet the only "*obvious*" reading of the provision is the plain meaning that Claimants have offered; Colombia's interpretation has no textual basis.

(b) The ordinary meaning of Article 22.2(b) is supported by the "*context*": the provision itself says nothing about jurisdiction or liability, and is rather designed to ensure that the State is allowed to continue applying the measures in question.[706] Where the TPA restricts jurisdiction, admissibility, or liability, it does so in express terms.[707] Likewise, treaties that exempt States from liability for invoking essential security measures do so expressly.[708] Colombia did not respond to any of these arguments during the Hearing.

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[702] **Exhibit CL-212**, Oxford English Dictionary (3rd ed. 2007), Definition of "*preclude*." *See also* **Exhibit CL-232**, Cambridge English Dictionary, Definition of "*preclude*," *available at* https://dictionary.cambridge.org/us/dictionary/english/preclude, last accessed 15 April 2022 ("*to prevent something or make it impossible*").

[703] In *Eco Oro*, the Tribunal was interpreting art. 2201(3) of the Canada-Colombia Free Trade Agreement, which provided "*nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary* [. . .] *to protect human, animal or plant life or health*." **Exhibit CL-217**, Canada-Colombia Free Trade Agreement (signed 21 November 2008, entry into force 15 August 2011), art. 2201(3).

[704] **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 836.

[705] **Day 1 Tr.** 244:20 (Colombia's Opening).

[706] *See* Claimants' Essential Security Submission, ¶¶ 13-17.

[707] *See* Claimants' Essential Security Submission, ¶¶ 18-20, referring to Article 10.18.1 ("[n]*o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach*"), Annex 10-E (the "*claimant may not submit*" certain claims "*to arbitration until one year after the events that gave rise to the claim*"), Article 10.18.2 ("[n]*o claim may be submitted to arbitration under this Section unless*" the claimant "*consents in writing*" and submits a written waiver "*of any right to initiate or continue before any administrative tribunal or court*"), Footnote 2 to Article 10.4 (providing that the MFN protection in the TPA "*does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreement*"), Article 10.7.5 (noting that the expropriation "*Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights*"), Annex 10-B ("*non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations*").

[708] *See* Claimants' Essential Security Submission, ¶¶ 21-22, referring to Annex 5 to the India-Singapore Comprehensive Economic Cooperation Agreement ("[W]*here the disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a security exception as set out in Article 6.12 of the Agreement, any discussion of the disputing Party taken on such security consideration shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal*") and Article 12 of the Protocol for Cooperation and Facilitation for Investments Intra-MERCOSUR ("*1. Nothing in this Protocol shall be interpreted to preclude a Member State from adopting or maintaining measures aimed at preserving public order, the fulfillment of obligations concerning the maintenance or restoration of international peace or security, the protection of its own essential interests, or the application of its criminal laws. 2. The dispute settlement mechanisms set forth by this Protocol shall not be applicable to measures a Member State adopts pursuant to paragraph 1 of this Article, or to decisions made pursuant to its*

It made only three arguments on "*context*", none of which change the meaning of the provision.

(i) First, Colombia points to the phrase that "*Nothing in this Agreement*" shall "*preclude*" Colombia,[709] but that phrase does not modify the ordinary meaning of the provision.

(ii) Second, Colombia notes that the provision is in the "*Exceptions*" chapter.[710] But as Claimants explained in their Essential Security Submission,[711] Article 22.2(b) serves as an "[e]*xception*" to the general remedy of restitution (in the investment context) or withdrawal of measures (in the trade context)[712]—which are the primary remedies available in the TPA[713] (and under international law generally applicable in the investment and trade contexts).[714] The provision does not, however, serve as an exemption from liability or limit jurisdiction, and indeed nothing in the title of the provision or elsewhere suggests as much.[715]

(iii) Third, Colombia points to Article 10.2[716] providing that "[i]*n the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency*." The plain meaning of Article 22.2(b) however results in no inconsistency between Chapters 10 and 22.[717]

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national security or public order laws, which at any time prohibit or limit the making of an investment in its territory by an investor of another State Party").

709 **Day 2 Tr.** 419:17-19 ("*you remember the context. That says nothing in this Agreement, so it captures the entirety of the Treaty*").

710 **Day 1 Tr.** 246:2-14.

711 Claimants' Essential Security Submission, ¶ 17.

712 **Exhibit CL-209**, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Agreement establishing the World Trade Organization (signed 15 April 1994; entry into force 1 January 1995), arts. 19(1) ("*Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations*.") and 3(7) ("*The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent*.").

713 *See* **Exhibit CL-001**, TPA, Chapter 10, art. 10.26.1.

714 *See* **Exhibit CL-025**, ILC INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 34.

715 Notably, "*exception*" is defined as "*someone or something that is not included in a rule, group or list*" or "*a person or thing that is not included in a general statement."* **Exhibit CL-227**, Cambridge English Dictionary, Definition of "*exception*," available at https://dictionary.cambridge.org/us/dictionary/english/exception. Had the provision meant to *"exempt" ("to excuse someone or something from a duty or payment")* such measures from liability or a tribunal's jurisdiction, it would have said so. **Exhibit CL-229**, Oxford Learner's Dictionary, Definition of "*exception*," *available at* https://www.oxfordlearnersdictionaries.com/us/definition/english/exception.

716 **Day 1 Tr.** 246:16-245:1 (Colombia's Opening) (". . . *you see that Article 10.2 very clearly says that if there is an inconsistency between Chapter 10 on investment and another chapter, the other chapter shall prevail. So that means essentially that when a party refers and relies on the Essential Security exception, this trumps everything else in the Treaty; again, that goes to the clear wording of the provision itself.*").

717 *See* Claimants' Essential Security Submission, ¶¶ 24-26.

> And indeed creating a conflict where none exists through a reading that is not supported by the text runs contrary to basic treaty interpretation principles.[718]

(c) The ordinary meaning of Article 22.2(b) is supported by the TPA's stated "*purpose*" to promote economic development through free trade and increased foreign investment, which requires the creation of a "*predictable legal and commercial framework for business and investment*."[719] During the Hearing, Colombia acknowledged that the "*object and purpose*" of the TPA was "*as you see in the Preamble,* [to] *'promote broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives*."[720] The Claimants' investment was precisely the type of "*alternative to drug-crop production*" that the TPA was designed to promote and protect. As Mr. Seda testified, he "*thought* [he] *was being part of something, of the rebuilding of a country*" when he decided to invest, and indeed his investments did contribute to the rejuvenation of Medellín's economy, starting with the Charlee Hotel, and followed by the Luxé, and then the Meritage Project where approximately 700 people were working on construction at the time of its seizure, and which would have housed hundreds of homes and local businesses.[721] Colombia does not dispute these facts.

302. Accordingly, the ordinary meaning of Article 22.2(b) read in light of its context and purpose to protect economic development must be to allow Colombia to take the measures it wishes but not to allow Colombia to absolve itself from liability.[722] Colombia does not even attempt to explain how its expansive interpretation is supported by the text of Article 22.2(b) even though "[t]*he general rule of interpretation laid down in Article 31 of the Vienna Convention adopts the textual approach*."[723] Indeed, the textual approach, unanimously accepted by the International Law Commission, "*is an accepted part of customary international law* [as] *suggested by many pronouncements of the International Court of Justice, which has also emphasized that interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain*."[724]

303. Instead of grounding its interpretation in the text, Colombia spent much of the Hearing discussing whether Article 22.2(b) was "*self judging*."[725] But whether the provision is "*self judging*" is of little assistance to Colombia's preferred interpretation. Claimants do not dispute

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[718] *See* Claimants' Essential Security Submission, ¶ 26.

[719] **Exhibit CL-001**, TPA, pmbl.

[720] **Day 1 Tr.**: 247:5-7.

[721] Seda 1 WS, ¶ 96; **Day 1 Tr.** 445:8-9 (Seda Cross).

[722] *See* Claimants Essential Security Submission, ¶¶ 8-26.

[723] **Exhibit RL-242**, R. Jennings, A. Watts, *Oppenheim's International Law*, Vol. 1 Peace, Part 4 International Transactions, Chapter 14 Treaties, Interpretation of Treaties, OPIL, 19 June 2008, p. 4.

[724] **Exhibit RL-242**, R. Jennings, A. Watts, *Oppenheim's International Law*, Vol. 1 Peace, Part 4 International Transactions, Chapter 14 Treaties, Interpretation of Treaties, OPIL, 19 June 2008, p. 4.

[725] **Day 1 Tr.** 245:18-250:8, 271:22-272:7, 273:21-274:4; **Day 2 Tr.** 387:9--16, 413:11-14, 415:16-416:4, 416:21-417:3; Rejoinder, ¶¶ 11, 36; Colombia's Letter, pp. 16-18.

that under Article 22.2 Colombia may take the measures it considers necessary, and the Tribunal cannot "*preclude*" it from doing so. Rather, it is Claimants' position that Colombia's invocation of this Article, on its plain reading, does not automatically exempt it from liability. Accordingly, whether Colombia can determine and apply whatever measures it considers necessary for the protection of its essential security interests is not at issue here. The only question here is whether Colombia must nonetheless compensate Claimants if such measures—which cannot be ordered undone if Article 22.2 is invoked—otherwise contravened the investment chapter of the TPA. In other words, Article 22.2 goes only to the available remedy.

VI.A.2. The *Travaux* Is Of No Help To Colombia

304. Without textual support, Colombia instead placed great weight on the *travaux* it sought to introduce mere days before the Hearing commenced, claiming it would make "*extremely clear* [. . .] *the State's intention as to what they meant when they drafted this provision.*"[726] Having now reviewed the *travaux* with care, Claimants have failed to find this alleged paragon of clarity.

305. As a preliminary matter, the *travaux*, as a "*supplementary*," not primary, "*means of interpretation*" cannot supplant the ordinary meaning of the text.[727] It is well settled that "*the Vienna Convention places priority of textual interpretation*" and "*makes spaces for the intentions of the parties in a somewhat subsidiary manner.*"[728] In other words, the *travaux* cannot be used to alter the ordinary meaning of Article 22.2(b) in light of its object and purpose.

306. Indeed, there is no need to review the *travaux* where the text is clear. As noted by the ICJ:

> "*If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.*"[729]

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[726] **Day 1 Tr.** 287:19-22.

[727] **Exhibit CL-187**, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (open for signature 23 May 1969; entry into force 27 January 1980), art. 32.

[728] **Exhibit CL-126**, *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 1053.

[729] **Exhibit RL-246bis**, R. Gardiner, Treatey Interpretation, Part II, Interpretation Applying the Vienna Convention on the Law of Treaties, The General Rule: (2) Agreements as Context, Subsequent Agreements and Subsequent Practice, OPIL, 1 June 2015, p. 18. *See also* **Exhibit RL-242**, R. Jennings, A. Watts, *Oppenheim's International Law*, Vol. 1 Peace, Part 4 International Transactions, Chapter 14 Treaties, Interpretation of Treaties, OPIL, 19 June 2008, p. 5 ("*The application of the basic rule of interpretation laid down in Article 31 of the Vienna Convention*

307. There is no ambiguity over the meaning of the words in Article 22.2(b), nor do they lead to an unreasonable result, and indeed Colombia does not even attempt to argue as much.[730] Accordingly, there is no reason to resort to supplementary means of interpretation.

308. In any event, the *travaux* do little to advance Colombia's position. Nowhere in the *travaux* do the Parties state that Article 22.2(b), as drafted in its final form, would allow the invoking State to deprive the Tribunal of jurisdiction and/or absolve itself of liability. Had the State Parties wished to incorporate such a provision, they would have drafted it as such. The *travaux*, unsurprisingly, does not contain any such declarations that counter the final text. What the *travaux* does make clear is the strong sense of investor protections that guided the U.S. delegation during the negotiations, including its insistence that investors must be compensated, even if the State has undertaken measures for public interest:

[redacted]

will usually establish a clear and reasonable meaning: if such is the case, there is no occasion to have recourse to other means of interpretation.").

730 *See* **Day 2 Tr.** 387:9–388:5; Colombia's Letter, pp. 15-18; Rejoinder, ¶¶ 23-47. *See also* Rejoinder, section II; Colombia's Letter.

731 **Exhibit RL-254**, Minutes of negotiation rounds of the US-Colombia Trade Promotion Agreement, pdf p. 4.

732 **Exhibit RL-254**, Minutes of negotiation rounds of the US-Colombia Trade Promotion Agreement, pdf p. 21.

733 **Exhibit RL-254**, Minutes of negotiation rounds of the US-Colombia Trade Promotion Agreement, pdf p. 21.

734 **Exhibit RL-254**, Minutes of negotiation rounds of the US-Colombia Trade Promotion Agreement, pdf p. 24.

VI.A.3. There Is No Subsequent Agreement On Article 22.2(b) Which Can Override Its Ordinary Meaning

309. During the Hearing, Colombia also attempted to *post-hoc* construct a subsequent agreement with the U.S. on the interpretation of Article 22.2(b),[735] claiming this was a subsequent party agreement under Article 31(3) of the VCLT.[736] This argument fails for a number of reasons.

310. First, Party and Non Disputing Party ("NDP") submissions during the pendency of arbitration proceedings cannot properly be considered an "*agreement*" on the interpretation of the TPA, as they are legal arguments being offered in the context of a dispute. Advancing a legal argument in one's defense in the guise of an "*agreement*" on interpretation jeopardizes Claimants' due process rights. Accordingly, tribunals have frequently found that the coincidence of Party and NDP submissions in an arbitration cannot be construed as "*subsequent agreement*" or "*practice*" under the VCLT.[737] As the *Infinito Gold* tribunal opined:

> "*In the Tribunal's view, Costa Rica's and Canada's concurrent positions in this arbitration do not amount to an agreement within the meaning of Article 31(3) of the VCLT.* [. . .] [T]*he Contracting Parties must have agreed to a particular interpretation. This requires a joint manifestation of consent from the Contracting Parties, or at least an offer and acceptance, evidencing their*

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[735] **Day 2 Tr.** 410:6-15.

[736] Article 31(3) provides:

"*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"

[737] *See* **Exhibit CL-026**, *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, ¶ 115; **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶¶ 380, 625, 698, 836; **Exhibit RL-200**, *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, ¶¶ 288-89 (finding that the non-disputing party submission at issue "*at best can be seen as offering a new shared* intention *with respect to the BIT's arbitration clause*," because the purpose of [VCLT] Article 31(3)(a) "*was to allow Contracting States to clarify later '[a] question of fact* [. . .] *as to whether an understanding reached during the negotiations [of a particular treaty] concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation*" and the parties involved could not possibly have originally shared the understanding advanced in the NDPS); **Exhibit CL-181**, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 251 ("*The position taken by Bolivia in this proceeding and the statements made by Ministries of the Government of the Netherlands* [. . .] *despite the fact that they both relate to the present dispute, are not a 'subsequent agreement between the parties.*'"). *See also* **Exhibit CL-192**, *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021, ¶ 223 ("[T]*his Declaration, as well as the two further Declarations, which were adopted by the remaining EU Member States, may have some interpretative value. Yet, being non-binding instruments and not reflecting a consensus of all EU Member States* [. . .] *these Declarations cannot change the clear terms of the ECT*"); **Exhibit RL-80**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, ¶ 381, n. 761 ("[A] *tribunal is not bound by the views expressed in such a non-disputing Party submission, but may give them persuasive weight where appropriate.*").

> *common intention that Article II(2)(a) of the BIT reflects the MST under customary international law.*
>
> *No such consent is found here. The submissions made by Costa Rica and Canada in this arbitration reflect legal arguments put forward in the context of this dispute to advance their respective interests. Although they happen to coincide, they do not reflect an agreement as just described over the interpretation of the BIT. Even if the Tribunal could infer an "agreement" from the Contracting States' submissions, quod non, this agreement would postdate the commencement of this arbitration and the Tribunal could not take it into consideration in favour of one litigant to the detriment of the other without incurring the risk of breaching the latter's due process rights*."[738]

311. Colombia seeks to do precisely what Professors Kauffman-Kohler (President), Hanotiau and Stern refused to do in *Infinito Gold*, and this Tribunal should not accept Colombia's subsequent agreement argument here for the same reasons adopted by that tribunal.

312. Second, it is precisely because such submissions are ripe for abuse that the TPA contains an express mechanism for Colombia and the U.S. to issue authoritative and binding interpretations, which contemplates a separate and distinct mechanism for the issuance of binding decisions on interpretations of the TPA. Such interpretations must be rendered by the Free Trade Commission "*comprising cabinet-level representatives of the parties*"[739] that "*shall be binding on a tribunal*."[740] To date, the TPA Free Trade Commission has not issued any decisions interpreting the provisions in Chapter 10 or 22.[741] While the TPA authorizes NDPs to make oral and written submissions regarding interpretation, the TPA specifically does not make these binding on the Tribunal.[742] In fact, the TPA says nothing at all about the level of deference that the Tribunal should accord to both Party and NDP submissions.

313. Third, even if the coincidence of Party and NDP submissions could be considered a "*subsequent agreement*," these submissions cannot modify or amend the provision, but only offer to interpret it. As the *Magyar* tribunal noted:

> "[J]*oint interpretative declarations or agreements are not an exclusive and dispositive method of treaty interpretation. Pursuant to Article 31(3) of the*

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738 **Exhibit RL-207**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICISD Case No. ARB/14/5, Award, 3 June 2021, ¶ 338.

739 **Exhibit CL-001**, TPA, art. 20.1(3)(c).

740 **Exhibit CL-001**, TPA, art. 10.22(3).

741 *See* **Exhibit C-347**, *Colombia TPA Free Trade Commission Outcomes*, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa/free-trade-commission-outcomes.

742 *See* **Exhibit CL-001**, TPA, art. 10.20.2 ("*A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement*.").

> *VCLT they are but one circumstance that "shall be taken into account, together with the context" of the relevant treaty terms. What is more, context is itself one of the means of interpretation under Article 31(1) of the VCLT, together with the ordinary meaning and object and purpose of the treaty. Thus, an interpretative declaration, as its name indicates, can only interpret the treaty terms; it cannot change their meaning:*
> *Unlike interpretation, the subsequent modification of a treaty can hardly be left to informal agreements as the amendment must be on the same legal level as the original treaty as foreseen in the treaty.*"[743]

314. Likewise, the *Eskosol* tribunal noted:

> "*Article 31(1), and not Article 31(3)(c), is the "correct starting point for the interpretation of Article 26 ECT," and also* [] *"[t]he need for coherence, and for a single unified interpretation of each treaty provision, is reflected in the priority given to the text of the treaty itself over other contextual elements under Article 31 VCLT." In these circumstances, '[i]t is not the proper role of Article 31(3)(c) VCLT to rewrite the treaty being interpreted, or to substitute a plain reading of a treaty provision with other rules of international law, external to the treaty being interpreted, which would contradict the ordinary meaning of its terms.* "[744]

315. And the *Muszynianka* tribunal confirmed:

> "*In the face of such clear text, interpretative declarations pursuant to Article 31(3)(a) of the VCLT cannot be employed as 'a trump card to allow States to offer new interpretations of old treaty language, simply to override unpopular treaty interpretations based on the plain meaning of the terms actually used.*
>
> *Under Article 31(3)(a) of the VCLT, subsequent agreements must be considered, together with the context, as interpretative tools only. They may thus clarify the meaning or scope of a treaty provision, but "cannot modify treaty obligations"—their value is limited to "interpreting [a] treaty in accordance with the general rule of interpretation of treaties.*'"[745]

316. Restricting retroactive amendments to change the ordinary meaning of the TPA in light of its context and purpose is especially important where the rights of third parties, such as the Claimants, are implicated. As noted by Professor Roberts in a legal authority added to the record by Colombia:

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[743] **Exhibit CL-168**, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, ¶ 218.

[744] **Exhibit RL-203**, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020, ¶ 126.

[745] **Exhibit CL-245,** *Muszynianka Spólka z Ograniczona Odpowiedzialnoscia v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020, ¶¶ 223-25.

> "[P]*ermitting unreasonable, retroactive interpretations would strike a clear blow to the credibility of investment treaty commitments and reduce the role of investment tribunals to mere agency, precisely in the circumstance in which tribunals have the strongest claim to trusteelike*[sic] *status in resolving specific investor-state disputes.*"[746]

317. The *Sempra* tribunal agreed, noting that "*even if* [a post hoc] *interpretation were shared today by both parties to the Treaty, it still would not result in a change of its terms. States are of course free to amend the TPA by consenting to another text, but this would not affect rights acquired under the TPA by investors or other beneficiaries*."[747] This is because "*the fact that the TPA is concluded between States cannot allow the derogation of rights that belong to private parties.*"[748]

318. The U.S. and Colombia's submissions in this case fail to find any textual support for their reading. As such, these submissions are effectively attempting to amend the TPA rather than offer clarifying interpretations of ambiguous language. Amendments to the TPA, however, must be made by following the formal requirements contemplated by the TPA, and in any case cannot be applied retroactively.[749] Accordingly, any alleged State Party "*agreement*" between the U.S. and Colombia made in their submissions during this Arbitration should not be interpreted to deprive Claimants who relied on the ordinary meaning of the provision to invest in Colombia. Indeed, the interpretation now put forward by Colombia would completely deprive the TPA of all practical effect as it would be able to invoke the Essential Security Defense at any time, for any reason, during international arbitration to escape liability for its actions. This is not what Article 22.2(b), on its face, provides.

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[746] **Exhibit RL-245**, Anthea Roberts, *Power and persuasion in investment treaty interpretation: The dual role of states*, 104 AM. J. INT'L L. 179, 213-14.

[747] **Exhibit CL-054**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 386. *See also* **Exhibit CL-038**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 162 (finding that any denial of advantages to the investor "*should not have retrospective effect*").

[748] **Exhibit CL-054**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 387.

[749] **Exhibit CL-001**, TPA, art. 20.1(3)(d) ("*The Commission may:* [. . .] *consider any amendments to this Agreement*").

VI.B. Colombia's Belated Essential Security Defense Has No Jurisdictional Impact; Thus It Must Be Dismissed

319. As Claimants pointed out in their Essential Security Submission[750] and at the Hearing,[751] if the Essential Security Defense has no jurisdictional impact, it is time-barred under Procedural Order No. 1[752] and ICSID Arbitration Rule 26.[753] This was confirmed by the Tribunal's Procedural Order No. 9, which only admitted the Essential Security Defense "*as a jurisdictional objection*" as the Tribunal considered it had a "*duty to ascertain its jurisdiction*."[754] Conversely, if the Essential Security Defense is not a jurisdictional defense, the Tribunal has a duty to dismiss it as belated under the rules governing this Arbitration.

320. First, as demonstrated above, the Essential Security Defense has no jurisdictional impact.[755] Rather, as discussed above, it merely addresses the nature of the available remedies. Specifically, if properly invoked, Article 22.2(b) precludes the Tribunal from ordering that the measure be withdrawn (given that the Article does not permit the Tribunal to "*preclude a Party from applying*" a measure adopted in conformity with the article).

321. Second, the text is clear that it does not affect the jurisdiction of this Tribunal as it contemplates the Tribunal making a "*finding*" if Article 22.2(b) is invoked. As Arbitrator Perezcano rightly noted:

> *Let me stop you there and put it point blank. The footnote* [to Article 22.2(b)] *says 'the Tribunal or panel hearing the matter shall find.' That to me suggests that we have a say in what the Tribunal shall find. It doesn't say the Tribunal shall accept whatever the Party says. It says the Tribunal shall make a finding, so that's point blank. It seems to be that we have a say, under the footnote.*[756]

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750 Claimants' Essential Security Submission, section II.

751 **Day 1 Tr.** 133:1-14, 138:6-139:1, 139:21-140:20; Claimants' Opening Presentation, pp. 191-199.

752 *See* Procedural Order No. 1, Sections 14.2, 14.3 ("*In the first exchange of submissions (Memorial and Counter-Memorial), the parties shall set forth all the facts and legal arguments on which they rely including any expert opinion evidence the parties submit in support of their respective cases. Allegations of fact and legal arguments shall be presented in a detailed, specified and comprehensive manner, and shall respond to all allegations of fact and legal arguments made by the other party* [. . .] *In their second exchange of submissions (Reply and Rejoinder), the parties shall limit themselves to responding to allegations of fact and legal arguments made by the other party in the first exchange of submissions, unless new facts have arisen after the first exchange of submissions which justify new allegations of fact and/or legal arguments.*").

753 *See* ICSID Rules, Rule 26(3) ("*Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.*").

754 Procedural Order No. 9, ¶ 11.

755 *See supra* Section VI; *see also* Claimants' Essential Security Submission, section I.

756 **Day 1 Tr.** 278:8-16.

322. Colombia had moreover confirmed in its Rejoinder that, at a minimum, its invocation of the Defense is subject to a good faith review by the Tribunal.[757] To undertake this good faith review, the Tribunal must have jurisdiction. Though Colombia attempted to walk back its acknowledgement in its Rejoinder, arguing that the argument was made "*in the alternative*,"[758] that is not how Colombia actually pled it in the Rejoinder. In its Rejoinder, Colombia argued under the heading "*Pursuant to the Terms of Art. 22 of the* [TPA]*, The Tribunal Manifestly Lacks Jurisdiction*"[759] 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*."[760] Colombia's argument "*in the alternative*" that "*The Exception of Essential Security Applies And The Republic of Colombia Has Not Breached Its Treaty Obligations*" is made in the next section.[761] Accordingly, it has always been Colombia's position that the Tribunal is entitled to, at a minimum, review the invocation of the Defense for good faith, which the Tribunal must have jurisdiction to do.

323. Third, Colombia expressly stated during the Hearing that Article 22.2(b) does not impact jurisdiction:[762]

> *Justiciability is above* [jurisdiction]. *Justiciability is as just like arbitrability but in an international law world. It means that you do not have the power. It's a question of power. It's not even a question of jurisdiction. You do not have the power because if the States say this is outside the scope of what you can do, this is non justiciable and therefore it cannot be adjudicated at all.*[763]

324. Thus, in Colombia's own words, its Essential Security Defense is not jurisdictional.

325. Rule 41(2) of the ICSID Convention only gives the Tribunal discretion to consider "*at any stage of the proceeding, whether the dispute or ancillary claim before it is within the jurisdiction of the Center and within its own competence*."[764] Even accepting, for the sake of argument, Colombia's characterization of its essential security defense as a question of "*justiciability*,"

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757 Rejoinder, ¶¶ 43, 46.

758 **Day 2 Tr.** 415:20. *See also* **Day 1 Tr.** 284-285.

759 Rejoinder, section II.A.

760 Rejoinder, ¶ 43.

761 Rejoinder, section II.B.

762 Notably, even the US in its submissions did not describe the Defense as one divesting the Tribunal of jurisdiction, but rather as one impacting "justiciability" of the case. **Day 2 Tr.** 389:19-389:218.

763 **Day 2 Tr.** 416:13-20.

764 ICSID Rules, Rule 41(2).

the ICSID Convention does not authorize the Tribunal to, at its own discretion, consider matters of "*justiciability*" at any stage of the arbitration. Only questions of jurisdiction and competence are covered by Article 41(2). There is good reason for this. A tribunal can make an independent assessment whether it has jurisdiction (*ratione voluntatis*, *ratione personae*, *ratione materiae*, and *ratione temporis*) to hear a dispute, no matter what arguments the Respondent puts forward. This is why Article 41(2) contemplates that the Tribunal may determine issues of jurisdiction and competence at any stage of the Hearing, as its jurisdiction and competence are independent of Party argument. By contrast, justiciability is an affirmative defense, employed by the State to declare that certain matters are not for the Tribunal to decide. For good reason, the State cannot make this declaration in the middle of litigation, as it would constitute an abuse of process. As a result, tribunals have consistently held that Parties cannot invoke justiciability defenses, such as those arising under denial of benefits provisions, in a retroactive manner.[765] Indeed, the belated, strategic introduction of such a justiciability defense in the middle of litigation strongly indicates that the exception is not being invoked in good faith, as discussed further below.

326. Accordingly, the Essential Security Defense should be dismissed as time-barred, as the text shows and Colombia acknowledges that the Defense is not jurisdictional.

VI.C. Colombia Acknowledges No Essential Security Interest Existed When Colombia Adopted The Breaching Measures

327. At the Hearing, Colombia acknowledged multiple times that the Asset Forfeiture Proceedings were not initiated on the basis of an essential security interest as, according to Colombia, it was only able to identify an essential security interest after it submitted its Counter Memorial, mere weeks before it submitted its Rejoinder. Article 22.2(b) protects measures from the Tribunal's revocation only if the State adopted the measures for essential security purposes. Put differently, a State cannot adopt measures to protect its essential security interests if it is not even aware of those interests when it adopts the measures. Accordingly, Colombia has improperly invoked the exception, which must be dismissed.

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[765] *See, e.g.*, **Exhibit CL-118**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶ 239; **Exhibit CL-094**, *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. The Republic of Kazakhstan*, SCC Case No. V116/2010, Award, ¶ 745; **Exhibit CL-215**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, ¶ 225; **Exhibit CL-188**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 14 July 2014, ¶ 718; **Exhibit CL-038**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 162.

328. Colombia can only invoke the Essential Security Provision if it was acting out of an identified essential security concern at the time of the measures. Article 22.2(b) of the TPA is drafted in the present tense: it allows a State to undertake measures the State "*considers necessary for* [. . .] *the protection of its own essential security interests*," when the invoking State is "*applying measures*."[766] In other words, the State must be in possession and aware of the facts that give rise to its essential security interest when it undertakes the measures; otherwise it cannot be taking measures that it considers are necessary for the protection of its essential security. Indeed, in all cases where an essential security exception has been found to apply, the State's identification of its essential security interest has preceded measures taken in protection of that interest.[767] Put differently, it is impossible for a State to consider a course of action to be necessary to protect an essential security interest that it has not yet identified.

329. This is also supported by the object and purpose of the TPA, which includes the creation of a "*predictable legal and commercial framework for business and investment*."[768] Needless to say, the retroactive application of the Essential Security Provision as a post-hoc defense falls afoul of this goal. Accordingly, investment tribunals have roundly held when assessing the invocation of other affirmative defenses, such as the use of denial of benefits clauses, that States may only invoke them in a prospective manner.[769] The timely invocation of Article 22.2 is important not just because that is what the provision requires, but also because, as discussed below, it demonstrates that the exception is being invoked in good faith and not in a belated attempt to extinguish liability.[770]

330. Ever since it invoked the Essential Security Defense in its Rejoinder, Colombia has had difficulty articulating precisely what facts or circumstances caused it to invoke the exception

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766 **Exhibit CL-230**, TPA, art. 22.2 ("*Nothing in this Agreement shall be construed* [. . .] *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*.")

767 *See*, *e.g.*, **Exhibit RL-192**, *Russia – Measures concerning traffic in transit, Report of the Panel,* WTO, WT/DS512/R, 5 April 2019, ¶¶ 7.142-44 (finding Russia implemented measures in late 2014 and 2016 in response to a situation that arose in early 2014); **Exhibit RL-201**, *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, WTO, WT/DS567/R, 16 June 2020, ¶ 2.16 (finding Saudi Arabia implemented measures after June 2017 in response to the severance of relations with Qatar that month).

768 **Exhibit CL-001**, TPA, pbml.

769 *See, e.g.*, **Exhibit CL-118**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶ 239; **Exhibit CL-094**, *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. The Republic of Kazakhstan*, SCC Case No. V116/2010, Award, ¶ 745; **Exhibit CL-215**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, ¶ 225; **Exhibit CL-188**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 14 July 2014, ¶ 718; **Exhibit CL-038**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 162.

770 *See infra* Section VI.D.

so late.[771] Ultimately, at the Hearing, Colombia conceded that "*there are 'new facts' and 'special circumstances'* [. . .] *that prompted the invocation of the essential security exception*."[772] According to Colombia, these "*new facts*" were not known at the time it filed its Counter Memorial (and hence they were not known at the time Colombia initiated the Asset Forfeiture Proceedings).

331. [redacted]

332. Colombia's main defense on the timing of the invocation of the essential security exception was that the timing of the invocation does not matter.[776] But that misses the point. While Claimants have taken issue with the belated nature of Colombia's assertion of the defense because it suggests bad faith,[777] Claimants' primary argument is that if Colombia did not know about its essential security interest in 2016, then it could not have initiated the Asset Forfeiture Proceedings for that reason. Colombian counsel have averred that because facts "*evolve*", "[f]*or the purposes of analysing whether the State considers a measure necessary within the meaning of Article 22.2(b), the Tribunal must place itself at the time of the invocation of the exception, not before.*"[778] There is no dispute that Colombia invoked the Essential Security Defense for the first time on 14 February 2022, and it claims to have invoked the Defense based on facts that it submits have "*evolved*," *i.e.* "*facts*" that did not exist or that Colombia was not aware of at the time it launched the Asset Forfeiture Proceedings.[779] Accordingly, Colombia

771 *See infra* ¶ 337.

772 [redacted].

773 [redacted]

774 [redacted]

775 [redacted]

776 [redacted].

777 *See infra* ¶ 337.

778 Respondents' Opening, slide 132. *See also* **Day 1 Tr.** 260:3-4 ("[y]*ou have to look at the Measures at the time of the invocation.*").

779 [redacted]

itself acknowledges that it did not seize Claimants' investments in order to protect its essential security interest, as that interest, under Colombia's own case, did not exist at the time it initiated the Asset Forfeiture Proceedings.

333. For these reasons, Colombia has improperly invoked Article 22.2 to attempt to defend the Asset Forfeiture Proceedings—in Colombia's own words, it did not seize Claimants' property for its currently stated essential security interest.

VI.D. Colombia Has Not Raised The Essential Security Defense In Good Faith

334. Separately, the International Court of Justice ("ICJ") has held that a State's discretionary power of this kind "*must be exercised reasonably and in good faith*" and "*must be timely and not be arbitrary*."[780] As Claimants have explained, Colombia had not invoked the Defense in good faith.[781]

335. First, Colombia has failed to articulate the essential security interest in good faith, as it has arbitrarily relabelled the interest in fighting organized crime from being a "*legitimate public welfare objective*" to being an "*essential security interest*."[782] This belated relabelling, according to Colombia, has far-reaching consequences of automatically depriving the Tribunal of jurisdiction and extinguishing liability without the Tribunal's review. This relabelling exercise is nothing more than a tactical revision. [redacted] It was only then that Colombia

[780] **Exhibit CL-225**, Immunities and Criminal Proceedings (Equatorial Guinea v. France), Judgment, (2020) I.C.J. REPORTS 300, 11 December 2020, ¶ 73. *See also* **Exhibit CL-187**, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (open for signature 23 May 1969; entry into force 27 January 1980), art. 26 ("*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*"); **Exhibit CL-214**, Alexander Orakhelashvili, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW (2008), p. 548 ("*In terms of substance, what we surely know is that the involvement of political factors cannot make these clauses non-justiciable or exempt them from the normal regime of treaty interpretation*"); **Exhibit CL-206**, Free Zones of Upper Savoy and the District of Gex, Judgment, 7 June 1932, 1932 P.C.I.J. (Ser. A/B) No. 46, p. 167 ("*A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon.*"); **Exhibit CL-234**, Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS(1987), p. 117 ("*The unreasonable exercise of a right in such cases constitutes an abuse of right, which being an act that is inconsistent with the duty to carry out the treaty in good faith, is considered as unlawful.*").

[781] Claimants' Essential Security Submission, ¶¶ 49-73.

[782] Claimants' Essential Security Submission, ¶¶ 51-56.

[783] See Reply, ¶¶ 93-135; *see also* [redacted]

invoked an exception it proclaims allows it to sweep the whole ordeal under the rug. Colombia's relabelling was thus not done in good faith. Colombia did not address this argument in any detail during the Hearing.

336. Colombia's alleged essential security interest has no plausible connection to the measures in this dispute because, notwithstanding Colombia's unseemly attacks on Mr. Seda's reputation at the Hearing, Colombia has consistently accepted that the Asset Forfeiture Proceedings did not arise out of any criminal allegations against Claimants [redacted] Accordingly there is no plausible connection between Colombia's seizure of Claimants' investment and its stated essential security interest to "*protect its population from threats of paramilitary and marginalized groups that have been ravaging the country for years*."[787] And, in any event, a discriminatory measure where the primary perpetrators are left scot free cannot be a good faith invocation of a measure to purportedly protect a State's essential security interest.[788]

337. During the Hearing, Colombia has failed to establish any plausible, or, as Colombia accepted, "*prima facie*,"[789] connection between the Asset Forfeiture Proceedings and its purported essential security interest. In fact, [redacted]

[redacted]

784 *See* Counter-Memorial, ¶¶ 11, 111, 153-155, 159-160, 164-165, 167, 193, 632 ("*Mr. Seda was not personally accused of any wrongdoing*"); Rejoinder ¶¶ 57, 88, 101-104, 113, 118, 123-124, 127, 129, 132, 138, 148-149, 370-371, 408, 594 n. 846 ("*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*"), 599-601, 680-682, 767; [redacted]

785 [redacted].

786 [redacted]

787 Rejoinder, ¶ 55.

788 *See supra* Sections III.B and III.D.

789 **Day 1 Tr.** 281:6-7 ("*Well, yes, can you say, you can say it's prima facie.*").

[redacted] But Colombia's reasoning fails for a number of reasons.

338. First, [redacted]

339. [redacted]

340. [redacted]

790 [redacted].

791 [redacted]

792 [redacted].

793 [redacted].

794 [redacted].

[redacted]

341. [redacted]

342. During the Hearing, [redacted]

795 [redacted]

796 [redacted].

797 [redacted]

798 [redacted]

799 [redacted].

800 [redacted]

[redacted]

343. As the President, Mr. Sachs noted, the Asset Forfeiture Law itself "*defines* [Colombia's] *national interests in this regard*" and the Law "*provides for* [the] *exception* [of] *the bona fide acquisition of a possibly tainted property*."[804] Thus, by seizing Claimants' investment for their alleged failure to act on information that would have been impossible for them to ever find out has no rational connection to Colombia's stated goal of fighting organized crime through the Asset Forfeiture Law, which specifically makes an exception for *bona fide* purchasers.

344. Second, as discussed above, Colombia's witnesses repeatedly confirmed that they had not taken any actions against the Sister Property, [redacted] and Other Alleged Criminals' Properties.[805] Colombia cannot point to a single seizure of criminal proceeds from the alleged transfers of the Meritage Property between the proceeds that those they allege to have been Oficina de Envigado members. [redacted]

801 [redacted]

802 [redacted]

803 [redacted]

804 **Day 2 Tr.** 283:12-19.

805 *See supra* Section III.B.

806 [redacted]

[redacted]

345. Colombia's stated goal to prosecute criminal persons and organizations could not be achieved by taking the property of Claimants who have no connection to organized crime at all. The only rational way to achieve Colombia's stated objectives—which is precisely what the Asset Forfeiture Law calls for—would have been to seize the assets and disgorge the proceeds of those actually implicated in the crime.[807] Colombia did not even attempt to do so.

346. Third, [redacted]

[807] Martínez 2 Report, ¶¶ 34-35 ("*even in the event the asset forfeiture was determined to be appropriate* [. . .] *the correct course of action would have been to attach the payment rights*"; and "[o]*nce it had been confirmed that Newport was a good faith buyer, all the Attorney General's Office had to do was to look for the next person in the chain of title.*").

[808] [redacted]

[809] *See* **Exhibit C-409**, EL TIEMPO, *The Shadow Of The Mafia Over A Million-Dollar US Lawsuit Against Colombia*, 13 February 2022.

[810] [redacted]

[811] [redacted]

347. Accordingly, the Hearing only further confirmed that Colombia's stated interest could not, and was not, furthered by the Asset Forfeiture Proceedings.

VI.E. MFN

348. Article 10.4 of the TPA guarantees that Claimants and their investments will be treated no less favorably than investors and investments from third States. Article 10.4 states:

> "*1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*
>
> *2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*"

349. MFN protection allows "*every party to the treaty* [to] *demand from any other party to accord to it treatment equal to that extended to any third State, irrespective of whether that third State is a party to the treaty or not*."[812] Thus, by application of Article 10.4, Claimants are entitled to import the same level of substantive protection granted to foreign investors and investments under other Colombian investment treaties.[813]

350. In this case, there is a clear disparity between the treatment granted by Colombia to Swiss investors and their investments in its territory vis-à-vis American investors and their investments. Pursuant to *The Agreement Between The Republic of Colombia And The Swiss Confederation On The Promotion And Reciprocal Protection of Investments* ("Colombia-Swiss BIT"), Swiss investors and their investments are entitled to similar treaty protections as

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[812] **Exhibit CL-208**, INTERNATIONAL LAW COMMISSION, *Draft Articles on most-favoured-nation clauses, with commentaries* (1978), pp. 19-20.

[813] *See, e.g.*, **Exhibit CL-080**, *Sergei Paushok, CJSC Golden East Company, and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, ¶ 254 ("[T]*he MFN clause of the Treaty allows for the integration into it of the broader provisions contained in the U.S. Mongolia BIT and the Denmark-Mongolia BIT.*"); **Exhibit CL-035**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 104 (noting the MFN provision may be used to import additional rights into FET provision "*that can be construed to be part of the fair and equitable treatment of investors*"); **Exhibit CL-067**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 155-57; **Exhibit CL-060**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 575; **Exhibit CL-098**, *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, ¶¶ 551-52, 554-55.

available here,[814] and Colombia does not have discretion to evade such protections on the basis of essential security interests.[815] In contrast, if the Tribunal concludes that Colombia is entitled to invoke Article 22.2 at any time, for any reason, without review, in order to eliminate justiciability or absolve itself of liability, then American investors are subject to less favorable treatment than Swiss investors. In such circumstances, American investors can be left devoid of all treaty protections at Colombia's discretion, whereas Swiss investors cannot be subject to the same vagaries. The inability to invoke a get-out-of-jail-free card under the Colombia-Swiss BIT is a clear example of better treatment that Colombia tried to avoid addressing at the Hearing.[816]

351. Moreover, contrary to Colombia's position at the Hearing, the application of the MFN protection to Article 22.2 does not concern dispute resolution.[817] Nothing in the text of the footnote to Article 10.4 can be construed to limit application of the MFN provision to Article 22.2.[818] The footnote states: "*For greater certainty, treatment 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments' referred to in paragraphs 1 and 2 of Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements*." However, as discussed above, Article 22.2 creates a general exception to the substantive obligations owed under the TPA, and is unconnected to any specific dispute resolution mechanism. Accordingly, the footnote to Article 10.4 bears no relevance in this circumstance.

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814 *See* **Exhibit CL-069**, Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (signed 17 May 2006; entry into force 6 October 2009), arts. 4(2) (fair and equitable treatment protection), 6 (protection from expropriation).

815 *See generally* **Exhibit CL-069**, Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (signed 17 May 2006; entry into force 6 October 2009). *See also* **Exhibit CL-231**, Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration*, in INVESTMENT TREATY LAW: CURRENT ISSUES III (2009), 270 ("*In that sense, access to arbitration is part of the rights granted under the treaty and there is hardly any difference in nature between the right to arbitrate one's dispute and the right to be treated fairly and without discrimination. In effect, the protection accorded in investment treaties would not be of great value without the right to arbitrate one's dispute before a neutral judge*.").

816 *See* **Day 1 Tr.** 271:7-22 (complaining Claimants allegedly do not "*set out the precise basis on which they seek the application of 10.4*") (Colombia's Opening).

817 *See* **Day 1 Tr.** 270:18-271:5 (Colombia's Opening).

818 *See* **Exhibit CL-221**, *Le Chèque Dèjeuner and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, ¶ 159 ("[t]*o be capable of overturning the fundamental, non-discriminatory object and purpose of an MFN clause, the language of any limitation must have clearly and unambiguously in contemplation a restriction on the operation of the MFN clause itself*.").

352. In order to harmonize the standard of treatment between Swiss and American investors, the TPA's MFN protection then operates to preclude the application of Article 22.2 in this Arbitration (assuming adoption of Colombia's interpretation of it, which is incorrect).

VII. REQUEST FOR RELIEF

353. In light of the above, Claimants respectfully request this Tribunal to:

(a) DECLARE that Colombia has breached its obligations to Claimants under the TPA;

(b) ORDER Colombia to pay Claimants in excess of USD 255.8 million to be updated as of the date of the Award;

(c) ORDER Colombia to pay Mr. Seda 10 percent of the total damages owed to him in moral damages;

(d) ORDER Colombia to pay the Award net of taxes;

(e) ORDER Colombia to pay all of the costs and expenses of the Arbitration, including Claimants' legal fees, the fees and expenses of any experts, the fees and expenses of the Tribunal, and ICSID's other costs;

(f) REJECT the new items for relief at paragraphs 974(a)-(b) added by Respondent to the Rejoinder; and

(g) AWARD such other relief as the Tribunal considers appropriate

Dated: 21 July 2022

Respectfully submitted for and on behalf of Claimants

Gibson Dunn & Crutcher LLP

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Gibson, Dunn & Crutcher LLP