ICSID CASE NO. ARB/19/6

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

Claimants,

v.

THE REPUBLIC OF COLOMBIA

Respondent.

RESPONDENT'S SUBMISSION ON THE [redacted] AND ON THE U.S. TREATY PRACTICE ON ESSENTIAL SECURITY INTERESTS EXCEPTIONS

21 December 2022

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AGENCIA NACIONAL DE DEFENSA JURÍDICA DEL ESTADO

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I. INTRODUCTION

1. We refer to the Tribunal's instructions of 4 October 2022 inviting the United States, as Non-Disputing Party in this dispute, to "*submit similarly worded Essential Security Interests Exceptions in U.S. treaties*" and allowing the Parties to "*comment on these treaties and the wording concerning the Essential Security Interests exception in such treaties in their final submissions*".[1] We also refer to the Tribunal's decision of 4 October 2022, to admit the [redacted] onto the record and to invite the Parties to make further submissions on these documents.[2]

2. [redacted] constitute key evidence, which directly supports Respondent's invocation of the Essential Security Exception contained in Article 22.2(b) of the US-Colombia TPA. To recall, the Respondent invoked Article 22.2(b) of the TPA as an objection on the merits (as an alternative to its objection on justiciability and jurisdiction). The Respondent's submission in this regard is that the requirements provided by the TPA for a measure to fall within the scope of Article 22.2(b) are threefold: *(i)* the adoption of measures; (*ii*) that the State considers necessary; and (*iii*) that such measures are plausibly expected to protect the State's essential security interests. All requirements are met in this case. Notably, as regards the third requirement, the [redacted] leave no doubt that the measures adopted by the Respondent are designed (and effectively protective of) Colombia's essential security interests in this case, [redacted] In light of the above, it is unquestionable that Colombia's measures squarely fall within the scope of Article 22.2(b), and that the Respondent could not have, and has not, breached its obligations under the US-Colombia TPA. [redacted]

4. Below, and in accordance with the Tribunal's instructions, the Respondent first shows that the U.S. longstanding treaty practice relating to the essential security interests exception confirms the

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1 Closing Hr. Tr., Day 2, pp. 540-541:14-11 (Tribunal's Procedural Discussion).

2 Closing Hr. Tr., Day 2, pp. 539-540:17-9 (Tribunal's Procedural Discussion).

Respondent's interpretation of Article 22.2(b) of the US-Colombia TPA, *i.e.* that once the essential security exception has been invoked by a Contracting Party to the TPA, the Tribunal is deprived of the power and jurisdiction to make any legal determination over such invocation. Accordingly, the Tribunal lacks jurisdiction over the present dispute (**II**).

5. Further, the Respondent provides its comments on the [redacted] in connection to which the Claimants are now seeking compensation before this Tribunal (**III**).

II. THE U.S. LONG-STANDING TREATY PRACTICE CONFIRMS THAT THE INVOCATION OF ARTICLE 22.2(B) OF THE US-COLOMBIA TPA IN THE PRESENT DISPUTE IS NON-JUSTICIABLE

6. As the Tribunal will recall, the Respondent's main position is that the Tribunal lacks the power and jurisdiction to adjudicate the present dispute by virtue of the invocation of the Essential Security Exception, enshrined in Article 22.2(b) of the TPA. In the alternative, should the Tribunal conclude that this dispute is justiciable and that it has jurisdiction over this matter, Colombia submits that the measures adopted by the Colombian State, which are challenged by the Claimants in this case, fall squarely within the scope of Article 22.2(b) of the TPA, such that there can be no breach of the Respondent's international obligations under the US-Colombia TPA.[3]

7. In the course of this proceeding, it became clear that the Respondent's interpretation of Article 22.2(b) of the TPA – *i.e.*, that its invocation by a Contracting Party to the TPA deprives the Tribunal of the power and jurisdiction to exercise any legal assessment over said invocation – not only fully coincides with that of the United States, the other Contracting Party to the TPA and the Claimants' home State, but that, given the authentic interpretation of the TPA by both Contracting Parties, such interpretation is binding on the Tribunal.[4] At the Closing Hearing, it also became clear that the Claimants' interpretation of Article 22.2(b) is meritless, as shown below (**A**). Moreover, an analysis of the U.S. Treaty Practice with regards to Essential Security Exceptions, as reflected in the United States' communication of 20 October 2022, confirms that, as repeatedly argued by the Respondent, Article 22.2(b) must be read as self-judging, meaning that its invocation is not subject to the Tribunal's legal assessment (**B**).

A. AT THE CLOSING HEARING, IT BECAME CLEAR THAT THE CLAIMANTS' OBJECTIONS AGAINST THE RESPONDENT'S INVOCATION OF ARTICLE 22.2(B) OF THE TPA ARE MERITLESS

8. As the Tribunal will recall, at the Hearing of May 2022, it became clear that the United States' interpretation of Article 22.2(b) of the TPA fully – and not surprisingly – coincides with the

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[3] *See* Respondent's Post-Hearing Brief, Section II; *see also*, Respondent's Rejoinder, Section II.

[4] *See* Respondent's Post-Hearing Brief, ¶¶ 49-54 and accompanying footnotes; *see also*, Colombia's Oral Pleadings, Hr. Tr. Day 2, p. 409:1-9; United States' Oral Submission, Hr. Tr. Day 2, p. 387:1-8. For completeness, the Respondent's position is that the Contracting Parties' interpretation of Article 22.2(b), as argued by both Colombia and the United States before the Tribunal in this proceeding, is the exact same as their reading of Article 22.2(b) during the negotiation rounds of the US-Colombia TPA. *See* Colombia's Closing Statement dated 3 October 2022, p. 17.

Respondent's interpretation that by virtue of that provision, "*the present dispute is not justiciable on the grounds of art. 22.2 of the US-Colombia TPA*" given that "*the invocation of Article 22.2(b) falls outside of the scope of the Tribunal's jurisdiction*", and "*the Tribunal must automatically refrain from adjudicating the dispute once the exception is invoked by a State party*".[5] Colombia's interpretation matches perfectly the position taken by the U.S. Government during its Oral Submissions of 3 May 2022, where the United States explained that (*i*) the language of the Article 22.2(b) is clear, (*ii*) the exception is self-judging, and therefore (*iii*) once a State Party to the TPA has raised the exception, its invocation is non-justiciable:[6]

> "Second, I would like to address the essential security interest exception in Article 22.2(b). **The language of the Article 22.2(b) is clear, that the exception is self-judging**. Article 22.2(b) states, and I quote, '*nothing in this Agreement shall be construed to preclude a party from applying measures that it considers necessary for the protection of its own essential security interests*.' The ordinary meaning of the word 'considers' is to come to judge or classify. Under Article 22.2(b), what must be considered or judged or classified is whether the relevant measure is necessary to protect the State's essential security interests. **That this determination is made solely by the State Party itself is plain by the use of the word '*it*' preceding '*considers*.' Thus, the ordinary meaning of the phrase '*it considers*' is that the exception is for the Party itself to determine—or in other words, that the exception is self-judging**. **That Article 22.2(b) is self-judging accords with the long-standing U.S. position that similarly worded essential security interests exceptions in U.S. agreements are to be read as self-judging**. Indeed, Footnote 2 clarifies that, and I quote, '*If a party invokes Article 22.2 in an arbitral proceeding initiated under Chapter 10 or Chapter 21, the Tribunal or panel hearing the matter shall find that the exception applies*.' **In other words, once a State Party to the TPA raises the exception, its invocation is non-justiciable, and a Chapter 10 Tribunal must find that the exception applies to the dispute before it**."

9. Conversely, the Claimants' position is that Colombia's invocation of Article 22.2(b) "*does not impact the Tribunal's jurisdiction or Colombia's liability and concomitant obligation to compensate Claimants*".[7] For the Claimants, although Colombia is not precluded "*from taking measures that it considers necessary to protect its essential security interests*", compensation is still required.[8] This reasoning is flawed on several grounds, which explains why it generated a plethora of questions from the Tribunal during the Closing Hearing. The Respondent addresses each of the legal issues raised by the Tribunal in turn below.

10. ***First,*** the Claimants simply could not explain the legal basis for their reading of Article 22.2(b). Not only that, but the Claimants in fact invite the Tribunal to simply forget the interpretation of the Exception provided, in similar terms, by <u>both</u> Contracting Parties. For instance, on 4 October 2022, counsel for the Claimants declared not to "*care as much*" about the State Parties' self-judging characterization of Article 22.2(b):[9]

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5 Respondent's Rejoinder, ¶¶ 23 and 11.

6 The U.S. Department of State stressed that in the case of the TPA, the "*<u>self-judging nature and non-justiciability of the essential security interests exception is inherent in the language of the exception itself</u>*". *See* Hr. Tr., Day 2, pp. 387-389:9-18(United States' Oral Submission). (Emphasis added).

7 Claimants' Post-Hearing Brief, ¶ 298 (a).

8 Claimants' Rebuttal on Essential Security, ¶ 15.

9 Closing Hr. Tr. Day 2, pp. 396-397:6-6. (Emphasis added).

> "MR. MOLOO: […] And then, we have the Essential Security Provision that they're relying upon: '*Nothing in this Agreement shall be construed to preclude a party from applying measures that it considers necessary for protection of its own Essential Security interests*.' **And then they say, but you have to look at the footnote. And the footnote says the Tribunal or panel hearing the matter shall find the exception applies, if it's invoked. But there's two questions here. <u>The first is: does the Essential Security Exception apply? And they're saying that's a self-judging question. I actually don't care as much about that question. The second question is—[…] [i]f it applies, what does that mean? […] And the footnote doesn't tell you what it—what happens if it applies, but what it does not say—it does not say if the exception applies, a tribunal shall not have jurisdiction or you don't get access to dispute resolution</u>**."

11. With respect, the Claimants' own home State does care, and has forcefully made the point that the self-judging character of the Exception is key to its interpretation. The Claimants' position is therefore not only contradicted directly by the <u>textual interpretation</u> provided by the U.S. Government and U.S. Treaty Practice (which will be further detailed below),[10] but also by the TPA Contracting Parties' <u>intention</u> with respect to Article 22.2(b) of the US-Colombia TPA. Indeed, it was the Contracting Parties' intention that once a Contracting Party to the TPA has invoked the Essential Security Exception, the arbitral tribunal hearing the matter shall carry out its mandate by finding that the Exception applies to the dispute before it.[11] In other words, and as stated by the United States in *Russia – Traffic in Transit*, where a WTO Panel was called upon to interpret the Security Exception contained in the GATT, "*the dispute is non-justiciable in the sense that the* [Tribunal] *cannot make findings on* [Colombia's] *invocation, other than to conclude that Article* [22.2(b)] *has been invoked*".[12]

12. ***Second***, counsel for the Claimants also argued that the consequence of the Respondent's invocation of the Essential Security Exception does not deprive the Tribunal of jurisdiction or extinguish Colombia's liability. For the Claimants, even if the Essential Security Exception applies, Colombia's obligation to compensate the Claimants remains:[13]

> "MR. MOLOO: But the question is: Once you invoke it, then what? And that's where Eco Oro said, well, the 'then what' is you get to adopt your measures, but it does not mean you're exempt from the compensation obligation. […] **And the Tribunal at Eco Oro was saying, okay, let's say it applies. Let's say this exception applies, but then what?** If it applies, then what? And what they're saying in that case, very similar type of language for an exception provision, and it doesn't matter what the exception is, whether it's Essential Security or environment, but what happens then? They're saying it does not escape the-- **it just means that you can keep your measure whether it's to protect the environment or the Essential Security or the health of the population. Whatever it is, you can keep that Measure in place. But if you've breached the Treaty, you still have to compensate**. So, you don't get restitution, you don't get your property back, but you still have to compensate."

13. The Claimants' argument is plainly wrong. To begin with, it is a basic tenant of public international law that, if an exception to an obligation arising of an international agreement applies, there can be no

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10 *See below*, Section II.B.

11 Hr. Tr., Day 2, p. 388:6-18 (United States' Oral Submission). *See also*, United States-Colombia Trade Promotion Agreement, Article 22.2(b), footnote no. 2.

12 Executive Summary of the Arguments of the United States in *Russia – Traffic in Transit,* Addendum to the WTO Panel Report, 5 April 2019 (**RL-264**), ¶ 8.

13 Closing Hr. Tr. Day 2, pp. 398-399:18-17.

breach of the State's obligation and no liability and, thus, there can be no compensation either. Under these circumstances, it would be contrary to the Law of Responsibility of States to order a State to pay compensation when it has not committed any internationally wrongful act.[14]

14. Further, the Claimants' attempts to transpose the *Eco Oro*'s tribunal interpretation of an Environment Exception of the Canada-Colombia Free-Trade Agreement to the case at hand is farfetched, to say the least. The *Eco Oro*'s tribunal finding 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*'" is inapposite for several reasons, which were already argued both in this submission and in the Respondent's Post-Hearing Brief,[15] but most and foremost in light of the significant differences of the wording of the Canada-Colombia FTA and the US-Colombia TPA. The issue was raised at the Closing Hearing by President Sachs:[16]

> "PRESIDENT SACHS: **May I ask, when [the Claimants] compare the Canada-Colombia FTA, in the introductory sentence, there's a '*subject to*' half sentence, which is not in Article 22 of our Treaty**. They may be subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustified discrimination between investments or between investors. **So, what does it mean for the interpretation of Article 22 that there is not such a 'subject to' language**?"

15. For obvious reasons, the Claimants were incapable of providing the Tribunal with a reasonable answer, arguing that the disparity of the language between the Canada-Colombia and US-Colombia FTAs "*in* [the Claimants'] *reading of the Eco Oro Decision, does not factor into the Tribunal's decision*."[17] With respect, it is precisely the significant difference in language that is key to the interpretation of each of these treaties and the different consequences that the *Eco Oro* Tribunal has drawn from such different wording. Once again, when the Claimants do not have an answer to an obvious question, they simply brush the question off.

16. ***Third***, equally nonsensical were the Claimants' arguments that, notwithstanding the application of the Exception of Essential Security, Colombia must still compensate the Claimants. This was confirmed by the Claimants' answers to Dr. Poncet's questions that were beside the point. If an Essential Security Exception has to have any *effet utile*, it must add something to the standard regime of liability under international law resulting from a State's breach of its international obligations. In other words, under the normal rules of State liability, and international wrongful act, if established, results in restitution or compensation; if, however, the same regime were to apply to situations where an Essential Security Exception has been raised – namely for the State to be held liable, regardless of its invocation of its Essential Security interests, and sanctioned to pay compensation – then the Exception would be pointless altogether:[18]

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14 United Nations General Assembly Resolution A/RES/56/83, 28 January 2002 (**RL-267**), Article 31. *See also*, Respondent's Reply to Claimants' Application of 7 March 2022, 18 March 2022, p. 20 and accompanying footnotes.

15 *See* Respondent's Post-Hearing Brief, ¶¶ 47-48.

16 Closing Hearing, Hr. Tr. Day 2, pp. 408-409:14-2 (Questions from President Sachs to the Claimants).

17 Closing Hearing, Hr. Tr. Day 2, p. 409:3-5.

18 Closing Hr. Tr., Day 2, pp. 401-405:3:14 (Questions from Arbitrator Poncet to the Claimants).

> "ARBITRATOR PONCET: **But if the invocation of the exception, which is not subject to judicial review even by itself, if that invocation results in the Measure being excluded, carved out of the remedies of the Treaty, normally afforded by the Treaty, how is it that the Treaty sort of comes back by the back door through—**
> MR. MOLOO: Yeah, let me clarify. It's a good question.
> ARBITRATOR PONCET: Please do, because—
> MR. MOLOO: Yeah, it's not all of the remedies. It's one very specific remedy. If we go to Article 22.2, which is on Slide 11, it specifically says this--*nothing in this Agreement shall be construed to preclude a party from applying the Measures*. That's it, **so it doesn't exclude the compensation remedy. It just says you can apply the Measure** […].
> ARBITRATOR PONCET: **So, the Measure, you can apply them anyway, then if you apply them even without 22.2, the point is if you apply measures that are inconsistent with the Treaty, you end up being sanctioned under the Treaty, and you have to pay compensation.**
> MR. MOLOO: **You have to pay compensation but you don't have to withdraw the Measure. So, what's important—**
> ARBITRATOR PONCET: **But you don't anyway, do you? I mean, if a State expropriates unlawfully, it doesn't have to give the property back. It should, but if it doesn't, it's going to pay up**."

17. ***Fourth***, and relatedly, nor can the Claimants seriously differentiate between restitution and compensation, arguing that the Respondent somehow "*can keep that Measure in place*[,] [**b**]***ut if you've breached the Treaty****, you still have to compensate. So,* ***you don't get restitution, you don't get your property back, but you still have to compensate***"[19] Again, the argument is fundamentally flawed. The application of Article 22.2(b) operates as a derogation from all of the obligations under the TPA, including Article 10.26 of the TPA which provides for the remedies available to arbitral tribunals established under the Treaty.[20] Simply put, absent a breach of Colombia's international obligations, reparation (be it restitution or compensation) cannot be awarded.

18. By the same token, as pointed out by Arbitrator Perezcano, the Claimants' argument that the consequence of the application of Article 22.2(b) simply means that "*the State*[] *gets to keep the Measures*" has no legal basis in public international law:[21]

> "ARBITRATOR PEREZCANO: Now, Article 22 is--sorry. I had it here, and I just--so, Article--actually, the whole of Chapter 22 are exceptions, and **[the Claimants are] saying that what the exceptions mean is that if they applied, then the country, the State, gets to keep the Measures no more. So, what are the 'exceptions to,' then? Why are they exceptions? Exceptions to what?** […] **if it is an exception to the Treaty, you're saying that in the trade context, the--it's just--you know, the remedy is you get to keep the Measure. I would disagree with that characterization. <u>If it falls under the exception, then there is no wrongfulness in terms of the ILC Articles. If there is no--if the exception applies, although there might be a prima facie violation, it is covered by the exception, so there is no international unlawfulness. And if there is no international unlawfulness, why--what would be compensated?</u> That's what I don't understand.** […]. **So, again, if it**

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19 Closing Hr. Tr., Day 2. p. 399:13-17 (Claimants' Closing Statement).

20 United States-Colombia Trade Promotion Agreement, Article 10.26 (1). (Emphasis added) ("*Article 10.26: Awards - 1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution. A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.*"). (Emphasis added).

21 Closing Hr. Tr., Day 2, pp. 410-415:7-1 (Questions from Arbitrator Perezcano to the Claimants).

> **falls under the exception--if it doesn't exclude compensation, then what's the purpose of the exception to begin with?**"

19. Once again, the Claimants were not able to provide a satisfactory – or even logical – response to this question. For the reasons already explained by the Respondent, if the Tribunal were to proceed to the merits of the dispute (which it should not, as the it has neither the power nor the jurisdiction to subject the invocation of Article 22.2(b) to judicial review), the application of Article 22.2(b) would still exclude any assessment of liability under the TPA as, when this exception to the international obligations contained in the Treaty is invoked, there can be no breach of said international obligations. Pursuant to the most basic principles of public international law, absent a breach of an international obligation, reparation (whether it takes the form of compensation or restitution) simply cannot follow.[22] This surely explains why Arbitrator Perezcano found "*odd*" the Claimants' interpretation of Article 22.2(b):[23]

> "ARBITRATOR PEREZCANO: Now, Article 22 is—sorry. I had it here, and I just—so, Article—actually, the whole of Chapter 22 are exceptions, and **[the Claimants are] saying that what the exceptions mean is that if they applied, then the country, the State, gets to keep the Measures no more. So, what are the 'exceptions to,' then? Why are they exceptions? Exceptions to what?** […]
> MR. MOLOO: So, I understand your question, and **I think it's really important to look at the treaty language because the treaty language does not preclude a wrongful action**. **It does not say that if this exception applies, there is no breach of the Treaty**. […] All this Treaty says is that if the exception applies, it means that it doesn't preclude the Party from adopting the Measure. So, I would say in the trade context—
> ARBITRATOR PEREZCANO: But, again, what's it an exception to?
> […]
> MR. MOLOO: The exception does not apply to the breach. It applies to the remedy of applying the Measure. […] It doesn't say '*breach*.' It says to preclude a party from applying the Measure. So, this is precisely the language—
> ARBITRATOR PEREZCANO: **Well, I don't think—I mean, I haven't looked recently at the whole of Chapter 22, but I don't think that any of those Articles say '*in case of breach, then the exception applies*.' That would be an odd formulation for exceptions. I don't think we'll find—I haven't seen any treaty where that language would come up. I think exceptions are drafted generally as they are here in Chapter 22**."

20. ***Fifth*,** and finally, the proper interpretation of Article 22.2(b) of the TPA leads to the conclusion that the Contracting Parties' intention, as clearly expressed in the language of the provision, was to leave to the Contracting Parties, when they are faced with situations of Essential Security, the option of invoking Article 22.2(b) without such invocation being susceptible of being submitted to the assessment of a tribunal. This is nothing more and nothing less than (*i*) the ordinary meaning of the terms of Article 22.2(b), read in their context and in the light of the Treaty's object and purpose; fully in line with (*ii*) the *travaux préparatoires* of the US-Colombia TPA, (*iii*) the Contracting Parties' authentic interpretation of Article 22.2(b) of the TPA, which is binding upon the Tribunal, (*iv*) the U.S. Treaty Practice, (*v*) the principle of *effet utile*, as Colombia purposefully decided to have a self-judging Essential Security Exception in its free-trade agreement with the United States, and (*vi*) the

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[22] Respondent's Post-Hearing Brief, ¶ 80 and accompanying footnotes.

[23] Closing Hr. Tr., Day 2, pp. 410-415:7-1 (Questions from Arbitrator Perezcano to the Claimants).

international case law interpreting essential security exceptions. The Respondent will refrain from repeating its arguments in this regard.[24] Suffice is for the Respondent, however, to draw the Tribunal's attention to the summary provided by U.S. in its Oral Submissions at the Hearing of May 2022, whereby it explained, in no ambiguous terms, that the consequence of an invocation of Article 22.2(b) is that the Tribunal lacks power and jurisdiction over the dispute:[25]

> "OPENING STATEMENT BY COUNSEL FOR THE UNITED STATES OF AMERICA: […] Finally on this point, **I would like to address an argument we heard from Claimants yesterday that Article 22.2(b) merely allows a State to apply, or continue to apply, measures that it considers necessary for the protection of its own essential security interests, but that Article 22.2(b) does not address the question of liability or compensation. The United States disagrees. Once the essential security interest exception is invoked, a tribunal may not, thereafter, find the relevant measure in breach of the Chapter 10 obligation and may not, consequently, order the payment of any compensation in connection with that measure**."

21. As the Tribunal can only conclude, the Claimants are merely asking it to disregard both the clear language of the TPA and the Contracting Parties' common interpretation of Article 22.2(b), according to which the Tribunal lacks the power, or the jurisdiction, to adjudicate the present matter. The Contracting Parties' intention – as clearly expressed in the TPA itself and, again, in their submissions to this Tribunal – must be given effect, rather than, as the Claimants invite the Tribunal to do, be made completely nugatory.

B. ACCORDING TO THE U.S. LONG-STANDING TREATY PRACTICE, ESSENTIAL SECURITY EXCEPTIONS IN INTERNATIONAL AGREEMENTS CONCLUDED BY THE UNITED STATES ARE SELF-JUDGING AND THEIR INVOCATION RENDERS THE DISPUTE NON-JUSTICIABLE

22. As explained above,[26] at the Hearing of May 2022, the representative of the U.S. Department of State explained that it is clear from the wording of Article 22.2(b) of the US-Colombia TPA that the Essential Security Exception provided by Article 22.2 (b) is self-judging and non-justiciable. In particular, the representative of the U.S. Department of State explained that the ordinary meaning of the language of the treaty makes it clear that the determination as to whether a measure is necessary for the protection of a State's essential security interests is made solely by the State itself. As a result, once a Contracting Party to the Treaty has invoked Article 22.2(b), the Tribunal is bound, by the language of the TPA, to find that the exception applies to the dispute. This interpretation, according to the U.S. Department of State, is consistent with the United States' long-standing position on similarly worded Essential Security Exceptions.[27]

23. At the Closing Hearing held in October 2022, the Tribunal invited the United States to "*submit similarly worded Essential Security Interests Exceptions in U.S. treaties*", and allowed the Parties to "*comment on these treaties and the wording concerning the Essential Security Interests exception in such treaties in*

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[24] *See*, Respondent's Post-Hearing Brief, Section II; Respondent's Rejoinder, Section II; Respondent's Letter of 18 March 2022, Section 3(A); Respondent's Opening Statement, pp. 108-119; Respondent's Closing Statement, pp. 9-17.

[25] United States' Oral Submission, Hr. Tr., Day 2, p. 390:9-21. (Emphasis added).

[26] *See above*, ¶ 8.

[27] United States' Oral Submission, Hr. Tr., Day 2, pp. 387-388:9-18. (Emphasis added).

their final submissions".[28] On 20 October 2022, the United States provided the Tribunal with the wording of 17 U.S. bilateral investment treaties ("**BITs**") and free trade agreements ("**FTAs**") with investment chapters in force, as well as the U.S. Model BITs, all of which contain similarly worded essential security exceptions as that enshrined in Article 22.2(b) of the US-Colombia TPA.[29] As demonstrated below, the U.S. treaty practice confirms the Respondent's interpretation of Article 22.2(b) of the TPA, *i.e.*, that once invoked, the Tribunal should refrain from exercising jurisdiction over the dispute.

24. It stems from the U.S. Department of State Letter to the Tribunal of 20 October 2022[30] that, until the early 2000s, the United States used to include security exceptions in their trade and investment-related agreements stating that the treaty's provisions shall not preclude the application of "*measures necessary to protect the State's essential security interests*" (as opposed to the measures "*the State considers necessary*" as provided by Article 22.2(b) of the TPA). That was, for instance, the case of the US-Iran Treaty of Amity, Economic Relations and Consular Rights of 1955,[31] of the US-Nicaragua Treaty of Friendship, Commerce and Navigation ("**FCN**") of 1956[32] and the US-Argentina BIT of 1991.[33] This U.S. treaty practice changed drastically after the judgments rendered by the International Court of Justice ("**ICJ**") in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)*, of 1986, and in the *Oil Platforms Case (Iran v. USA)*, of 1996, where the ICJ held that the security exception contained in the agreements at stake was not self-judging. In both cases, the United States invoked the security exception of the treaties concluded with Nicaragua and Iran respectively, arguing that the ICJ had no jurisdiction over the disputes before it. The ICJ, however, affirmed its jurisdiction over both matters, *inter alia* because the security exception invoked by the United States lacked explicit self-judging language. The ICJ held that, had the US-Nicaragua and the US-Iran treaties allowed for the application of "*measures that the State **considers** necessary to protect*

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28 Closing Hr. Tr., Day 2, pp. 540-541:14-11 (Tribunal's Procedural Discussion).

29 Letter from the United States Department of State to the Tribunal dated 20 October 2022.

30 Letter from the United States Department of State to the Tribunal dated 20 October 2022, pp. 3-5.

31 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, 12 December 1996, I.C.J. Reports 803, (**RL-156**), ¶ 20, quoting the Security Exception of the US-Iran Treaty of 1955, Art. XX(1)(d), which provides that "*1. The present Treaty shall not preclude the application of measures* […] *(d) necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests*."

32 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14 (**RL-152**), ¶ 221, citing the Security Exception of the US-Nicaragua FCN of 1956, Art. XXI, which reads "*the present Treaty shall not preclude the application of measures:* […] *(d) necessary to fulfil the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests*."

33 *CMS Gas Transmission Company v. Argentina Republic*, ICSID Case No. ARB/01/08, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentina Republic, 25 September 2007 (**RL-168**), ¶ 108 quoting the Security Exception of the US-Argentina BIT of 1991, Art. XI, which states "*This treaty shall not preclude the application by either Party of measures necessary for* […] *the protection of its own essential security interests*."

its essential security interests", the United States' argument that the Court lacked jurisdiction by virtue of the invocation of such security exceptions would have prevailed:[34]

> "221. […] Having thus established its jurisdiction to entertain the dispute between the Parties in respect of the interpretation and application of the Treaty in question, the Court must determine the meaning of the various provisions which are relevant for its judgment. In this connection, the Court has in particular to ascertain the scope of Article XXI, paragraphs 1 (c) and 1 (d) of the Treaty. According to that clause '*the present Treaty shall not preclude the application of measures:* […] *(d) necessary to fulfil the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests*'. […]
> 222. This article cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. […] **That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which […] stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it '*considers necessary for the protection of its essential security interests*', in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of '*necessary*' measures, not of those considered by a party to be such**."

25. After the ICJ's double rejection of the U.S. interpretation of its security exceptions, the United States (*i*) terminated its declaration of acceptance of the ICJ's jurisdiction[35] and (*ii*) changed the language of its trade and investment-related treaties, to explicitly state that security exceptions shall be read as self-judging, and to exclude the possibility of having an international tribunal make any assessment in that regard. As a result, the Security Exceptions in U.S. agreements concluded after the ICJ's judgments in the case *Oil Platforms* (1996 and 2003) have contained explicit self-judging language (*i.e.*, allowing for the Essential Security Measures "*the State **considers** necessary*"), which will appear either in the treaty's main text or in its submittal letter. This includes the treaties communicated by the U.S. Department of State in its letter of 20 October 2022.[36]

26. As regards the treaties communicated by the U.S. Department of State and which contain Security Exceptions similarly worded to Article 22.2(b) of the TPA, the Respondent makes the following additional remarks:

- ***As to the U.S. free-trade agreements***, the U.S. Department of State's letter makes clear that the wording of Security Exceptions contained in free-trade agreements concluded by the United

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[34] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14 (**RL-152**), ¶¶ 221-222 (Emphasis added); *see also*, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, 12 December 1996, I.C.J. Reports 803, (**RL-156**), ¶ 20.

[35] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14 (**RL-152**), ¶ 36 ("*By its Judgment of 26 November 1984, the Court found that it had jurisdiction to entertain the present case, first on the basis of the United States declaration of acceptance of jurisdiction, […] and secondly on the basis of Article XXIV of a Treaty of Friendship, Commerce and Navigation between the Parties, signed at Managua on 21 January 1956. The Court notes that since the institution of the present proceedings, both bases of jurisdiction have been terminated. On 1 May 1985 the United States gave written notice to the Government of Nicaragua to terminate the Treaty, […]. On 7 October 1985 the United States deposited with the Secretary-General of the United Nations a notice terminating the declaration under the optional clause, in accordance with the terms of that declaration, and that notice expired on 7 April 1986*.")

[36] Letter from the United States Department of State to the Tribunal dated 20 October 2022.

States with 18 countries is similar to the wording of Article 22.2(b) of the TPA.[37] This is especially relevant since, as of this date, the United States has free-trade agreements in force with 20 countries. Thus, with the exception of two, all free-trade agreements concluded by the United States currently in force contain security exceptions that are similarly worded to the Article 22.2(b) of the US-Colombia TPA.[38]

- ***As to the US bilateral investment treaties***, the U.S. Department of State has provided the wording of Security Exceptions in the U.S.-Mozambique BIT (1998), the U.S.-Bahrain BIT (1999), the U.S.-Uruguay BIT (2005), and the U.S.-Rwanda BIT (2008), which are similarly worded to Article 22.2(b) of the U.S.-Colombia TPA. All four of the BITs provided by the U.S. Department of State were concluded and entered into force at the end of the 1990's and early 2000's, that is after the ICJ's decisions that prompted the United States to shift its treaty practice with regard to security exceptions.[39] For the sake of completeness, the Respondent notes that, after a thorough review of all security exceptions in US BITs currently in force (*i.e.*, 37 BITs),[40] all of the BITs concluded by the U.S. after the ICJ's *Oil Platforms* decisions (*i.e.*, 1996 and 2003) contain explicit self-judging language, either in the treaty's main text or in its submittal letter.[41]
- ***As to the U.S. Model BITs,*** the U.S. Department of State has provided the Tribunal with the wording of the U.S. BIT Models of 2004 – which reflects the United States' treaty practice post-*Oil Platforms* – and the current U.S. BIT Model, dated 2012, which Security Exception provides the following:[42]

> "Article 18: Essential Security
> Nothing in this Treaty shall be construed […]
> 2. to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

27. The explicit self-judging language contained in the Essential Security Exception of Article 22.2(b) of the U.S.-Colombia TPA thus fully reflects the U.S. Treaty Practice post-*Oil Platforms* to prevent an

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37 Letter from the United States Department of State to the Tribunal dated 20 October 2022, pp. 3-5.

38 These numbers are publicly available on the website of the Office of the United States Trade Representative, at https://ustr.gov/trade-agreements/free-trade-agreements.

39 Letter from the United States Department of State to the Tribunal dated 20 October 2022, p. 3.

40 These numbers are publicly available on the website of the Office of the United States Office of Trade Agreements Negotiation and Compliance, at https://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp. As previously stated in this submission (*see above*, ¶ 24), originally, the U.S. Security Exceptions, albeit considered self-judging by the United States, did not contain explicit self-judging language.

41 For the sake of completeness, the Respondent notes that the Tribunal invited the United States to "*submit similarly worded Essential Security Interests Exceptions in U.S. treaties*" (*see* Closing Hr. Tr., Day 2, pp. 540-541:14-11 (Tribunal's Procedural Discussion) (emphasis added). Therefore, and logically, the United States did not provide the wording of Essential Security Exceptions in U.S. treaties whose wording differs from Article 22.2(b) of the US-Colombia TPA, even though they are considered to be self-judging by the United States. For instance, several U.S. treaties concluded after *Oil Platforms/Nicaragua* decisions contain implicit self-judging language (and so, are not similarly worded to Art. 22.2(b) of the US-Colombia TPA), but must still be read as self-judging by virtue of their accompanying submittal letters, which clarify such essential security exceptions self-judging character. This is the case of the U.S. BITs concluded with Armenia, Croatia, Azerbaijan, Jordan and Lithuania between 1996 and 1998.

42 Letter from the United States Department of State to the Tribunal dated 20 October 2022, pp. 5-6. (Emphasis added).

international tribunal from ignoring the self-judging character of the provision, as the ICJ did. It is precisely in this context, *i.e.*, a few years following the ICJ's decisions in the *Nicaragua* and *Oil Platforms* cases, that in March 2004 Colombia and the United States started negotiating the free trade agreement.[43] The U.S.-Colombia TPA, which was finally signed on 22 November 2006, was also largely inspired by the U.S. BIT Model of 2004, the text of which was the basis for the negotiations between the United States and Colombia, as revealed by TPA's *travaux préparatoires*.[44] The only difference between the security exception in the U.S. Model BIT of 2004 and that in the U.S.-Colombia TPA is that the latter includes an interpretative footnote, in a belt and suspenders approach, to ensure that the common intention of the United States and Colombia will be given effect, *i.e.* that the invocation of Article 22.2(b) of the TPA, in situations deemed by either of the two Contracting Parties to raise to the level of Essential Security, will render non-justiciable the dispute in relation to which the Essential Security Exception was invoked.[45] In this regard, the U.S. Department of State explained at the Hearing held in May 2022 that Footnote 2 to Article 22.2(b) of the TPA is meant to leave no room for any doubts that the Essential Security Exception in both the U.S.-Colombia TPA and all its other agreements is non-justiciable:[46]

> "[O]nce a State Party to the TPA raises the exception, its invocation is non-justiciable, and a Chapter 10 Tribunal must find that the exception applies to the dispute before it. Further, **Footnote 2 to Article 22.2(b) is prefaced with the phrase '*for greater certainty*,' which in U.S. practice confirms that the self-judging nature and non-justiciability of the essential security interests exception is inherent in the language of the exception itself**. As a general practice, the United States uses the words '*for greater certainty*' in its International Trade and Investment Agreements to introduce confirmation regarding the meaning of the Agreement. In other words, the phrase 'for greater certainty' signals that the text it introduces reflects the understanding of the United States and the other Treaty Party or Parties of what the provisions of the Agreement would mean, even if the text following the phrase were absent. As a consequence, '*for greater certainty*' sentences also serve to spell out more explicitly the proper interpretation or similar provisions, mutatis mutandis, '*in other agreements*.' **By explaining that '*for greater certainty*' a tribunal shall find that the essential security interests exception applies where a party has invoked it, the United States signalled its understanding that this is what the essential security interest exception has always required, including in agreements where that '*for greater certainty*' language is absent.**"

28. The *travaux préparatoires* of the U.S.-Colombia TPA further demonstrate that, as early as the IV and VIII Negotiation Rounds of the TPA dated September 2004 and March 2005, Colombia adopted the

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43 Office of the US Trade Representative, "U.S. and Colombia to Begin FTA Negotiations on May 18", 23 March 2004 (**R-284**).

44 [redacted]

45 *See* US-Colombia Trade Promotion Agreement, Article 22.2(b): "*Nothing in this Agreement shall be construed:* […] *(b)to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential securityinterests.*[2] *2 For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.*" (Emphasis added).

46 United States' Oral Submission, Hr. Tr., Day 2, pp. 388-390:15-8. (Emphasis added).

same interpretation of the TPA's Essential Security Exception as the U.S., namely that the security exception contained in their Agreement would not be [redacted]

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29. As the above explanations clearly show, ***first,*** it can hardly be denied that, as stated by the U.S. Department of State at the Hearing, the United States has a "*long-standing* […] *position that similarly worded essential security interests exceptions in U.S. agreements are to be read as self-judging*"[48]; and ***second***, the United States' and Colombia's intention has always been for this specific provision of the U.S.-Colombia TPA to operate in such way that arbitral tribunals established under the investment chapter of the Treaty will not have the power and jurisdiction to make any determination as to its invocation.[49]

30. The Claimants' arguments that Colombia's invocation of Article 22.2(b) *"does not impact the Tribunal's jurisdiction or Colombia's liability and concomitant obligation to compensate Claimants*"[50] is therefore utterly wrong and groundless and must, as such, be dismissed. On this basis, the Respondent respectfully requests that the Tribunal declare that, pursuant to Article 22.2(b) of the US-Colombia TPA, it lacks the power or jurisdiction to adjudicate the present dispute.

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47 [redacted] *See also*, Respondent's PHB, ¶¶ 31-32, 40, 55-61 and accompanying footnotes; Colombia's Closing Statement dated 3 October 2022, p. 17.

48 United States' Oral Submission, Hr. Tr., Day 2, p. 388:6-9.

49 As previously stated in the Respondent's Rejoinder (*see* Respondent's Rejoinder, ¶¶ 33-36), most of security exceptions contained in Colombia's investment treaties present a stricter language in comparison to Article 22.2(b). Therefore, the terms of the TPA's Essential Security Exception being unique to Colombia (on top of being equivalent to the United States' long-standing practice), make it clear that both Contracting Parties to the TPA intended not to grant arbitral tribunals the power to subject the Essential Security Exception to judicial adjudication. This answers Arbitrator's Poncet question in this regard. As the Tribunal may recall, in the Closing Hearing, Arbitrator Poncet requested counsel for the Respondent to confirm whether Article 22.2(b) was generally unique or rather particularly unique to Colombia: "*ARBITRATOR PONCET: Why does the U.S. refer to the fact in one of the documents we saw--why does the U.S. refer to the alleged existence of same provisions in treaties signed by the United States? So, you're saying it's unique to Colombia or are you saying it's unique, period?*" – to which the Respondent clarified that the wording of Article 22.2(b) is "*unique to the treaties entered into by Colombia*." *See* Closing Hr. Tr., Day 2, pp. 515-517:7-14, where the Respondent argued that "*this provision that* [the arbitrators] *have in front of you is exceptional, it's quite unique. And that's why you have to give it the meaning that the Parties said it should have, and that's why we said the authentic interpretation given by the U.S. and Colombia is so important to you.*"

50 Claimants' Post-Hearing Brief, ¶ 298 (a).

31. In the alternative, should the Tribunal determine that it has, first, the power to assess the invocation of Article 22.2(b) of the TPA by Colombia, and, second jurisdiction to determine the merits of this dispute, the Respondent respectfully requests that the Tribunal declare that the Essential Security Exception applies, and that the Republic of Colombia has not breached any of its treaty obligations. The Respondent's alternative position is that the measures at stake in this dispute meet the standards of Article 22.2(b), [redacted]

III. RESPONDENT'S COMMENTS ON THE [redacted]

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IV. THE RESPONDENT'S REQUEST FOR RELIEF

129. For the foregoing reasons, the Respondent respectfully requests that the Arbitral Tribunal issue an Award in the following terms:

a) Declare that, pursuant to Article 22.2(b) of the US-Colombia TPA, it lacks jurisdiction over the present dispute;

b) In the alternative, declare that the exception of essential security set forth in Article 22.2(b) of the US-Colombia TPA applies and the Republic of Colombia has not breached its treaty obligations;

c) In the alternative, declare that it lacks jurisdiction over the Claimants' claims;

d) In the alternative, dismiss the entirety of the Claimants claims on the merits;

e) In the alternative, declare that the Claimants are not entitled to the damages they seek or to any damages;

f) Order the Claimants to separately and together pay to the Republic of Colombia all costs incurred in connection with this arbitration, including without limitation the costs of the arbitrators and ICSID, as well as the legal and other expenses incurred by the Respondent including the fees of its legal counsel, experts and consultants on a full indemnity basis, plus interest thereon at a reasonable rate; and

g) Grant such relief against the Claimants as the Tribunal deems fit and proper.

21 December 2022

Respectfully submitted on behalf of the Respondent,

Dr. Yas Banifatemi
Ximena Herrera-Bernal
Yael Ribco Borman
GAILLARD BANIFATEMI SHELBAYA DISPUTES

AGENCIA NACIONAL DE DEFENSA JURÍDICA DEL ESTADO