INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding 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 –

ICSID Case No. ARB/19/6

AWARD

Members of the Tribunal
Prof. Dr. Klaus Sachs, President
Prof. Hugo Perezcano Díaz, Arbitrator
Dr. Charles Poncet, Arbitrator

Assistant to the Tribunal
Mr. Marcus Weiler

Secretary of the Tribunal
Ms. Sara Marzal Yetano

Date of dispatch to the Parties: 27 June 2024

REPRESENTATION OF THE PARTIES

Representing
Mr. Angel Samuel Seda
JTE International Investments, LLC
Mr. Jonathan Michael Foley
Mr. Stephen John Bobeck
Mr. Brian Hass
Mr. Monte Glenn Adcock
Mr. Justin Timothy Enbody
Mr. Justin Tate Caruso
The Boston Enterprises Trust:

Mr. Rahim Moloo
Ms. Anne Champion
Ms. Marryum Kahloon
Ms. Nika Madyoon
Mr. Ben Harris
Gibson, Dunn & Crutcher, LLP
200 Park Avenue
New York, NY 10166-0193
United States of America

and

Ms. Ankita Ritwik
Mr. Pedro Soto
Gibson, Dunn & Crutcher, LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
United States of America

Representing the Republic of Colombia:

Mr. Jhon Camargo
Mr. Giovanny Vega Barbosa
Ms. Mariana Reyes
Agencia Nacional de Defensa
Jurídica del Estado
Carrera 7 No. 75-66 – 2do y 3er piso
Bogotá
Colombia

and

Mr. Álvaro Rodríguez Rodríguez
Dirección de Inversión Extranjera y Servicios
Ministerio de Comercio, Industria y Turismo
Calle 28 #13 A-15
Bogotá
Colombia

and

Ms. Yas Banifatemi
Ms. Ximena Herrera-Bernal
Ms. Yael Ribco-Borman
Ms. Pilar Álvarez
Ms. Carolina Barros
Mr. Youssef Daoud
Gaillard Banifatemi Shelbaya Disputes
22 rue de Londres
75009 Paris
France

TABLE OF CONTENTS

TABLE OF SELECTED ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
C-[#]	Claimants' Exhibit
CL-[#]	Claimants' Legal Authority
Claimants' Memorial	Claimants' Memorial on the Merits and Damages dated 15 June 2020
Claimants' Post-Hearing Brief	Claimants' Post-Hearing Brief dated 21 July 2022
Claimants' Preliminary Response to Colombia's New Essential Security Defense	Claimants' Preliminary Response to Colombia's New Essential Security Defense dated 18 April 2022
Claimants' Rebuttal on Essential Security	Claimants' Rebuttal on Essential Security dated 13 September 2022
Claimants' Reply	Claimants' Reply on Jurisdiction and Merits dated 19 September 2021
Claimants' Reply on Costs	Claimants' Reply on Costs dated 9 August 2023
Claimants' Submission on Costs	Claimants' Submission on Costs dated 26 July 2023
Claimants' Submission on U.S. Treaties and [redacted]	Claimants' Submission on U.S. Treaties and [redacted] dated 21 December 2022
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
ICJ	International Court of Justice
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
MFN	Most Favored Nation
R-[#]	Respondent's Exhibit

Respondent's Counter-Memorial	Respondent's Counter-Memorial on Jurisdiction and Merits dated 16 November 2020
Respondent's Post-Hearing Brief	Respondent's Post-Hearing Brief dated 25 August 2022
Respondent's Rejoinder	Respondent's Rejoinder on Jurisdiction and Merits dated 17 February 2022
Respondent's Reply on Costs	Respondent's Reply on Costs dated 9 August 2023
Respondent's Submission on Costs	Respondent's Submission on Costs dated 26 July 2023
Respondent's Submission [redacted] and on the U.S. Treaty Practice on Essential Security Interests Exceptions	Respondent's Submission [redacted] and on the U.S. Treaty Practice on Essential Security Interests Exceptions dated 21 December 2022
RL-[#]	Respondent's Legal Authority
TPA or Treaty	United States-Colombia Trade Promotion Agreement, signed 22 November 2006, entry into force 15 May 2012
Tribunal	Arbitral tribunal constituted on 25 February 2020
VCLT	Vienna Convention on the Law of Treaties

A. THE PARTIES

I. Claimants

1. Angel Samuel Seda

1. Angel Samuel Seda is a citizen of the United States of America ("United States" or "U.S.").[1]

2. JTE International Investments, LLC

2. JTE International Investments, LLC ("**JTE International Investments**") is a company incorporated in the United States, established under the laws of Delaware on 23 May 2013 and wholly owned by Justin T. Enbody.[2]

3. Jonathan Michael Foley

3. Jonathan M. Foley is a citizen of the United States.[3]

4. Stephen John Bobeck

4. Stephen J. Bobeck is a citizen of the United States.[4]

5. Brian Hass

5. Brian Hass is a citizen of the United States.[5]

6. Monte Glenn Adcock

6. Monte G. Adcock is a citizen of the United States.[6]

7. Justin Timothy Enbody

7. Justin T. Enbody is a citizen of the United States.[7]

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1 Exhibit C-119, United States Passport of Angel Samuel Seda, 15 October 2013.

2 Exhibit C-107, JTE International Investments, LLC Certificate of Formation, 23 May 2013.

3 Exhibit C-200, United States Passport of Jonathan M. Foley, 7 October 2015.

4 Exhibit C-085, United States Passport of Stephen J. Bobeck, 16 March 2007.

5 Exhibit C-136, United States Passport of Brian Hass, 3 October 2014.

6 Exhibit C-076, United States Passport of Monte G. Adcock, 1 September 2000.

7 Exhibit C-082, United States Passport of Justin T. Enbody, 20 May 2005.

8. Justin Tate Caruso

8. Justin T. Caruso is a citizen of the United States.[8]

9. The Boston Enterprises Trust

9. The Boston Enterprises Trust is an entity established under the laws of Arizona, United States, on 9 August 2018.[9]

10. Angel Samuel Seda, JTE International Investments, Jonathan M. Foley, and The Boston Enterprises Trust are hereinafter referred to as "**Meritage Claimants**." Angel Samuel Seda, JTE International Investments, Jonathan M. Foley, The Boston Enterprises Trust, Stephen J. Bobeck, Brian Hass, Monte G. Adcock, Justin T. Enbody, and Justin T. Caruso are hereinafter referred to as "**Claimants**."[10] Claimants are represented in this arbitration by Mr. Rahim Moloo, Ms. Anne Champion, Ms. Marryum Kahloon, Mr. Ben Harris, Ms. Nika Madyoon, Gibson, Dunn & Crutcher, LLP, 200 Park Avenue, New York, NY 10166-0193, United States of America, and by Ms. Ankita Ritwik, Mr. Pedro Soto, Gibson, Dunn & Crutcher, LLP, 1050 Connecticut Avenue, N.W., Washington, DC 20036-5306, United States of America.

II. Respondent

11. The Republic of Colombia, hereinafter referred to as "**Respondent**" or "**Colombia**", is represented in this arbitration by Mr. Jhon Camargo, Mr. Giovanny Andrés Vega Barbosa, Ms. Mariana Reyes, Agencia Nacional de Defensa Jurídica del Estado, Carrera 7 No. 75-66, 2do y 3er piso, Bogotá, Colombia, and by Ms. María Paula Arenas Quijano, Dirección de Inversión Extranjera y Servicios, Ministerio de Comercio, Industria y Turismo, Calle 28 #13 A-15, Bogotá, Colombia. Respondent is also represented by its duly authorized attorneys Ms. Dr. Yas Banifatemi, Ms. Ximena Herrera-Bernal, Ms. Yael Ribco-Borman, Ms. Pilar Álvarez, Ms. Carolina Barros, Mr. Youssef Daoud, Gaillard Banifatemi Shelbaya Disputes, 46 Rue Copernic, 75116 Paris, France.

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8 Exhibit C-184, United States Passport of Justin T. Caruso, 8 February 2017.

9 Exhibit C-215, The Boston Enterprises Trust Formation Instrument, 9 August 2018.

10 Mr. Seda successfully established a hotel in Medellín, Colombia, Hotel The Charlee. Mr. Seda had several other projects in Colombia that were at different stages of development (some only in the pre-development stage) as discussed further below. Mr. Seda, The Boston Enterprise Trust, and Messrs. Enbody and Foley held an ownership interest in both the Meritage Project or the Luxé Project, the remaining Claimants held an ownership interest in either the Meritage Project or the Luxé Project, except Brian Hass, who was alleged to have held shares in Luxé by The Charlee, SAS indirectly, as further indicated below.

12. Claimants and Respondent are hereinafter each referred to as a "**Party**" and jointly as the "**Parties**."

B. THE ARBITRAL TRIBUNAL

13. The Arbitral Tribunal has been constituted as follows:

I. Prof. Dr. Klaus Sachs, President of the Tribunal

Prof. Dr. Sachs,
CMS Hasche Sigle,
Nymphenburger Str. 12,
Munich D-80335, Germany,
Tel.: + 49 89 23807 109
E-mail: klaus.sachs@cms-hs.com

II. Prof. Hugo Perezcano Díaz, Arbitrator

Prof. Hugo Perezcano Díaz
180 Northfield Drive West, Unit 4
Waterloo ON N2L 0C7
Canada
E-mail: hugo.perezcano@iiuris.com

III. Dr. Charles Poncet, Arbitrator

Dr. Charles Poncet,
Poncet SARL,
2 rue Bovy-Lysberg,
CP 5721,
CH-1211 Geneva 11, Switzerland,
Tel.: +41 22 311 00 10
E-mail: charles@poncet.law

C. SUMMARY OF THE PROCEDURAL HISTORY

I. Institution of the Proceedings

14. On 25 January 2019, the International Centre for Settlement of Investment Disputes ("**ICSID**" or "**Centre**") received a request for arbitration from Claimants of the same date ("**Request**") on the basis of the United States-Colombia Trade Promotion Agreement, signed 22 November 2006, entry into force 15 May 2012 (the "**TPA**" or the "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**"). The Request was submitted by the firm representing Claimants at that time, Arent Fox LLP.

15. The Centre requested clarifications from Claimants by letter of 19 February 2019. Claimants provided clarifications on 20 March 2019.

16. On 25 March 2019, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the notice of registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

17. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator, to be appointed by agreement of the Parties.

18. On 3 May 2019, following appointment by Claimants, Ms. Lucinda Low, a national of the United States, accepted her appointment as arbitrator.

19. On 12 June 2019, Claimants informed the Centre that they were no longer represented by the firm Arent Fox LLP and that they had engaged the firm Gibson Dunn LLP as new counsel.

20. On 15 June 2019, Claimants informed the Centre that, pursuant to Rule 7 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), they wished to replace Ms. Lucinda Low and appoint Dr. Charles Poncet, a national of Switzerland, as arbitrator. The Centre proceeded to inform Ms. Lucinda Low of the replacement and to seek Dr. Poncet's acceptance of his appointment.

21. On 24 June 2019, Dr. Charles Poncet accepted his appointment as arbitrator.

22. On 27 June 2019, following appointment by Respondent, Prof. Hugo Perezcano Díaz, a national of the United Mexican States, accepted his appointment as arbitrator.

23. On 28 July 2019, the Parties informed the Centre that they had not been able to reach an agreement on the selection of the presiding arbitrator but had reached an agreement on the method for his/her selection, according to which the Parties requested the Centre to assist them in selecting a mutually agreeable presiding arbitrator.

24. In accordance with the agreed procedure, on 7 October 2019, the Centre circulated a list of five candidates in ballot form. Each Party submitted its completed ballot on 17 October 2019.

25. By letter of 18 October 2019, the Centre informed the Parties that the ballot process had not resulted in the selection of a mutually agreeable candidate and that, pursuant to the Parties' agreement, the Centre would prepare and circulate a second list of candidates in ballot form.

26. On 1 November 2019, the Parties informed the Centre that they had agreed to modify the procedure for the second round of the selection process, according to which the Centre would prepare, instead of a new ballot, a list of seven candidates for the Parties to strike and rank.

27. In accordance with the agreed procedure, on 12 December 2019, the Centre circulated the list of seven candidates and on 17 December 2019, each Party informed the Centre of the name of the candidate they each chose to strike from the list.

28. On 18 December 2019, the Centre informed the Parties of the names of the five remaining candidates for presiding arbitrator and invited them to send their ranked lists.

29. On 26 December 2019, Respondent objected to two candidates on the list and on 6 January 2020, the Centre informed the Parties that the objected candidates had decided to withdraw.

30. On 7 February 2020, the Centre circulated a new list of five candidates for the Parties to rank. Each Party submitted its ranked lists on 15 February 2020.

31. On 17 February 2022, the Centre announced that the list procedure had resulted in the appointment of Prof. Dr. Klaus Sachs, a national of Germany, as the presiding arbitrator in this case.

32. On 25 February 2020, the Secretary-General, in accordance with Arbitration Rule 6(1), notified the Parties that all three arbitrators had accepted their appointments and that the

Tribunal was therefore deemed to have been constituted on that date. Ms. Sara Marzal Yetano, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

II. Arbitral Proceedings

33. In accordance with Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 2 April 2020 by video conference. With the consent of the Parties, the Tribunal appointed Mr. Marcus Weiler as Assistant to the Tribunal. His *curriculum vitae* and a declaration of impartiality and independence were circulated to the Parties.

34. Following the first session, on 7 April 2020, the Tribunal issued Procedural Order No. 1 ("**PO1**") recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. PO1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington D.C., United States. PO1 also included an agreed schedule for the jurisdictional and merits phase of the proceedings ("**Procedural Calendar**").

35. On 25 May 2020, Claimants requested an extension for the submission of their Memorial on the Merits and Damages. Respondent submitted its agreement on 26 May 2020. On 26 May 2020, the Tribunal issued a revised Procedural Calendar which reflected the amendments resulting from the Parties' communications of 25 and 26 May 2020.

36. On 16 June 2020, Claimants submitted their Memorial on the Merits and Damages ("**Memorial**"), together with Appendices A to H; Exhibits C-001 to C-302; Legal Authorities CL-001 to CL-128; Witness Statements from Mr. Angel Samuel Seda and Mr. Felipe López Montoya; and Expert Reports from Dr. Wilson A. Martínez Sánchez, Dr. Carlos E. Medellín Becerra, Ms. Daniela M. Bambaci and Mr. Santiago Dellepiane A. of Berkeley Research Group.

37. By communication of 15 July 2020, Respondent informed that it would not make use of its right to request the bifurcation of the jurisdiction and merits phases and that it would address its objections to the Tribunal's jurisdiction together with the merits. The Tribunal issued a revised Procedural Calendar on 20 July 2020.

38. On 18 October 2020, Respondent requested an extension for the submission of its Counter-Memorial. Claimants confirmed their agreement by communication of 19 October 2020. The Tribunal issued a revised Procedural Calendar which reflected the amendments resulting from the Parties' communications on 19 October 2020.

39. On 2 November 2020, the Tribunal issued, with the Parties' agreement, a revised Procedural Calendar which included deadlines for the submission by the United States of written submissions on matters of interpretation of the TPA pursuant to Article 10.20.2

of the TPA, and for the submission of comments to any such written submissions by the Parties.

40. On 17 November 2020, Respondent submitted its Counter-Memorial on Jurisdiction and Merits ("**Counter-Memorial**"), together with Appendix A, Exhibits R-001 to R-063; Legal Authorities RL-001 to RL-151, Witness Statements from Dr. José Iván Caro Gómez and Dr. Daniel Ricardo Hernández Martínez; Expert Reports from Dr. Nilson Elías Pinilla, Dr. Yesid Reyes, and Dr. Richard Hern.

41. By letter of the same date, Respondent requested that Claimants disclose the existence and identity of any third-party funder ("**Respondent's First TPF Disclosure Application**").

42. On 25 November 2020, Claimants objected to Respondent's disclosure request, stating that there is no rule, either in the Arbitration Rules or the TPA, that requires the disclosure of the requested information. Claimants added that in any event "*to avoid any tactical applications that might be brought to distract from the merits of their case, Claimants confirm that any award of adverse costs in this arbitration is insured up to an amount of $5.5 million.*"

43. On 2 December 2020, Respondent reiterated its request that Claimants disclose the existence and identity of any third-party funder, and further requested that Claimants disclose the terms of the insurance for adverse costs in this arbitration.

44. On 7 December 2020, the Tribunal informed the Parties that it intended to deal with any request for documents related to the existence of any third-party funder in the upcoming document production phase.

45. On 14 December 2020, the Tribunal issued a revised Procedural Calendar which reflected certain amendments concerning the document production schedule.

46. On 15 January 2021, following exchanges between the Parties, each Party filed a request for the Tribunal to decide on production of documents.

47. On 18 February 2021, the Tribunal issued Procedural Order No. 2 ("**PO2**") deciding on the Parties' requests for production of documents. Among others, the Tribunal ordered Claimants to disclose the existence and identity of a third-party funder but denied Respondent's further request for production of "[a]*ll Documents reflecting, containing, evidencing or relating to the conditions under which the Claimants' claims are being funded, including the funding agreement and any other relevant correspondence with the funder*."

48. On 26 February 2021, the United States filed its written submission pursuant to Article 10.20.2 of the TPA.

49. On 16 March 2021, the Tribunal issued a revised Procedural Calendar which reflected the amendments resulting from the Parties' communications of 12 and 15 March 2021. Additional changes were made to the Procedural Calendar by agreement of the Parties on 16 April 2021.

50. On 26 May 2021, the Tribunal issued Procedural Order No. 3 ("**PO3**") concerning additional amendments to the Procedural Calendar including the hearing dates.

51. On 28 June 2021, Claimants requested the Tribunal to order Respondent to fully comply with its obligations pursuant to PO2. At the Tribunal's invitation, Respondent submitted comments on Claimant's request on 6 July 2021. On 2 August 2021, Respondent submitted further comments.

52. On 13 August 2021, the Tribunal issued Procedural Order No. 4 ("**PO4**"), deciding on Claimants' request of 28 June 2021. Prof. Perezcano Díaz issued a dissenting opinion.

53. On 3 September 2021, Respondent filed a request for reconsideration of PO4. On 9 September 2021, at the Tribunal's invitation, Claimants submitted their observations on Respondent's request for reconsideration.

54. On 14 September 2021, the Tribunal issued Procedural Order No. 5 incorporating the terms of a confidentiality agreement reached by the Parties ("**PO5**").

55. On the same day, the Tribunal issued Procedural Order No. 6 ("**PO6**") rejecting, by majority, Respondent's request for reconsideration of 3 September 2021.

56. On 17 September 2021, Claimants requested an extension to submit their Reply on Jurisdiction and Merits by 19 September 2021. After receiving Respondent's comments on Claimants' request, the Tribunal granted the extension on 18 September 2021.

57. On 19 September 2021, Claimants submitted their Reply on Jurisdiction and Merits ("**Reply**") together with Appendices I through J, Exhibits C-303 to C-408, Legal Authorities CL-134 to CL-205, Second Witness Statements from Mr. Angel Seda, Second Expert Reports from Dr. Wilson A. Martínez Sánchez, Dr. Carlos E. Medellín Becerra, Ms. Daniela M. Bambaci, and Mr. Santiago Dellepiane A. of Berkeley Research Group, and Jones Lang LaSalle.

58. On 15 October 2021, Mr. Víctor Mosquera Marín submitted a written submission as a Non-Disputing Party pursuant to Article 10.20.3 of the TPA. On 16 October 2021, the Tribunal invited the Parties to submit their comments thereto.

59. On 1 November 2021, the Parties submitted their respective comments concerning Mr. Mosquera Marín's written submission. On 3 November 2021, Respondent submitted further observations on Claimants' comments. The Tribunal invited Claimants to submit a response by 8 November 2021. Claimants proceeded accordingly.

60. On 1 December 2021, the Tribunal issued Procedural Order No. 7 ("**PO7**") in which it decided not to admit Mr. Mosquera Marín's submission into the record. On the same date, the Secretariat notified PO7 to Mr. Mosquera Marín.

61. On 9 January 2022, Respondent requested an extension to file its Rejoinder on Jurisdiction and Merits. On the same day, Claimants submitted their comments on Respondent's request. On 11 January 2022, the Tribunal granted the requested extension. On 14 February 2022, Respondent further requested a brief extension to which Claimants confirmed their agreement. The Tribunal approved the extension on 15 February 2022.

62. On 17 February 2022, Respondent filed its Rejoinder on Jurisdiction and Merits ("**Rejoinder**"), together with Appendix A, Exhibits R-064 to R-256, Legal Authorities RL-152 to RL-233, Second Witness Statements from Dr. José Iván Caro and Dr. Daniel Ricardo Hernández, First Witness Statements from Dr. Alejandra Ardila Polo, Second Expert Report from Dr. Yesid Reyes and Dr. Richard Hern and First Expert Report from Chris Maugeri and David García of CBRE.

63. By communication of 28 February 2022, Respondent requested the Tribunal to issue an order adopting enhanced confidentiality measures regarding the production of several documents and to order that any violation of the confidentiality order shall give rise to injunctive relief. The Tribunal invited Claimants to submit any comments by 7 March 2022. Claimants submitted their comments accordingly.

64. By letter of the same day, 7 March 2022, Claimants submitted that Respondent had presented in its Rejoinder, for the first time in this arbitration, a new defense based on the protection of its essential security interests ("**New Defense**") and requested the Tribunal to: (i) declare that Respondent's New Defense violates Respondent's duty of good faith, the Arbitration Rules, and PO1; and (ii) strike the New Defense from the record ("**Claimants' Application of 7 March 2022**"). On 8 March 2022, the Tribunal invited Respondent to submit its comments by 18 March 2022.

65. On 11 March 2022, Respondent reiterated its request for enhanced confidentiality measures, enclosing a draft Enhanced Confidentiality Order, and its request for injunctive relief.

66. On 18 March 2022, Claimants agreed to the terms of the draft Enhanced Confidentiality Order and provided further comments on the allegedly delayed production of documents by Respondent and Respondent's request for injunctive relief.

67. On the same day, Respondent replied to Claimants' Application of 7 March 2022.

68. On 23 March 2022, the Tribunal issued Procedural Order No. 8 confirming the Parties' agreement regarding the enhanced confidentiality measures and adopting the terms of the Enhanced Confidentiality Order agreed by the Parties ("**PO8**" or "**Enhanced Confidentiality Order**").

69. On 28 March 2022, the Tribunal issued Procedural Order No. 9 concerning Respondent's request for injunctive relief of 28 February 2022, as well as Claimant's Application of 7 March 2022 ("**PO9**"). The Tribunal decided as follows: (i) denied Respondent's request for a declaration that any violation of the Enhanced Confidentiality Order shall give rise to injunctive relief; (ii) denied Claimants' request to declare that the New Defense violates Respondent's duty of good faith, the Arbitration Rules, and PO1, and (iii) denied the request to strike it from the Rejoinder. Additionally, the Tribunal granted leave for Claimants to address the New Defense in an additional submission to be filed, at their choice, either prior to the hearing by 15 April 2022, or at a date after the hearing to be determined by the Tribunal in consultation with the Parties.

70. On April 4, 2022, Claimants requested (i) leave to file a letter by 15 April 2022 responding, on a high level, to the substantive arguments presented in Respondent's letter of 18 March 2022; and (ii) the ability to file a more fulsome response to the New Defense after the hearing.

71. After considering the Parties' positions in that regard as set out in their letters of 7 and 8 April 2022 and emails of 5 and 9 April 2022, on 11 April 2022, the Tribunal decided to grant Claimants' request to file a preliminary response to the New Defense by 15 April 2022 ("**Preliminary Response**") and to provide a more complete response after the hearing, if necessary.

72. On 12 April 2022, the Tribunal held a pre-hearing organizational meeting with the Parties by video conference.

73. On 15 April 2022, Claimants requested an extension to submit their Preliminary Response. On the same day, Respondent submitted its comments, and the Tribunal granted Claimants' request to extend the deadline until 18 April 2022.

74. On 18 April 2022, Claimants filed their Preliminary Response, together with Exhibit C-409 and Legal Authorities CL-206 to CL-236.

75. On 20 April 2022, after receiving the consolidated list of participants for the hearing, Respondent requested the Tribunal to order Claimants to disclose (i) the precise stake and financial interest of Mr. Amariglio and/or Tenor Capital and/or Downie North LLC in this arbitration; and (ii) provide the financial arrangement between Tenor Capital and/or Downie North LLC and Claimants ("**Respondent's Second TPF Disclosure Application**").

76. On the same date, Claimants commented on Respondent's Second TPF Disclosure Application.

77. On 21 April 2022, the Tribunal invited Respondent to state whether it upheld its Second TPF Disclosure Application in light of Claimants' comments.

78. On 25 April 2022, Respondent reiterated its request for disclosure relating to Mr. Amariglio and/or Tenor Capital and sought the Tribunal's permission to add four factual exhibits relating to Mr. Amariglio and the funding arrangements between Tenor Capital and Eco Oro Minerals Corp. to the record.

79. On the same date, the Parties informed the Tribunal of their agreement to introduce new documents into the record. In accordance with this agreement, Claimants submitted a Third Witness Statement of Mr. Angel Seda, Exhibits C-410 to C-437 and Quantum Exhibits. Respondent submitted Exhibits R-257 to R-275.

80. On 26 April 2022, the Tribunal issued Procedural Order No. 10 ("**PO10**") concerning the organization of the hearing.

81. By communication of 29 April 2022, Respondent requested to add rebuttal documents into the record concerning: (i) the new allegations and evidence introduced by Claimants with the Third Witness Statement of Mr. Seda dated 25 April 2022; (ii) Claimants' Preliminary Response; and (iii) new documents that are responsive to Claimants' document production requests and that are "*relevant and material to the outcome of this dispute*" ("**Respondent's Initial Application for Admission of New Documents**").

82. On the same day, Claimants requested the Tribunal's leave to respond to Respondent's Initial Application for Admission of New Documents and to address Respondent's Second TPF Disclosure Application, if necessary, on the first day of the hearing. Also on the same day, the Tribunal informed the Parties that it would decide on these issues during the hearing.

83. A hearing on Jurisdiction and the Merits was held in Washington, D.C. and by video conference from 2 May 2022 to 7 May 2022 ("**First Hearing**"). The following persons participated in the First Hearing:

Tribunal:	
Prof. Dr. Klaus Sachs	President
Prof. Hugo Perezcano Díaz	Arbitrator
Dr. Charles Poncet	Arbitrator
Assistant to the Tribunal:	
Mr. Marcus Weiler	Assistant to the Tribunal
ICSID Secretariat:	
Ms. Sara Marzal Yetano	Secretary of the Tribunal
For Claimants:	
Counsel:	
Mr. Rahim Moloo	Gibson, Dunn & Crutcher LLP
Ms. Anne Champion	Gibson, Dunn & Crutcher LLP
Mr. Pedro Soto	Gibson, Dunn & Crutcher LLP
Ms. Ankita Ritwik	Gibson, Dunn & Crutcher LLP
Ms. Marryum Kahloon	Gibson, Dunn & Crutcher LLP
Mr. Ben Harris	Gibson, Dunn & Crutcher LLP
Ms. Nika Madyoon	Gibson, Dunn & Crutcher LLP
Ms. Nilly Gezgin	Gibson, Dunn & Crutcher LLP
Mr. Alejandro Mejía	Cáez Muñoz Mejía Abogados
Mr. Juan Pablo Pantoja Ruiz	Cáez Muñoz Mejía Abogados
Mr. Frans Schimper	Immersion Legal
Party Representatives:	
Mr. Angel Seda	Claimant
Mr. Justin Enbody	Claimant
Mr. Stephen Bobeck	Claimant
Mr. Justin Caruso	Claimant
Mr. Monte Adcock	Claimant
Mr. Pierre Amariglio	Tenor Capital Management Company
Experts:	
Mr. Wilson Alejandro Martínez Sánchez	Sintura Martínez
Mr. Clay Dickinson	Jones Lang LaSalle
Mr. Francisco Ruiz	Jones Lang LaSalle
Mr. Santiago Dellepiane	Berkeley Research Group
Ms. Daniella Bambaci	Berkeley Research Group
Mr. Ian Friser Frederiksen	Berkeley Research Group
Mr. Leandro Nallar	Berkeley Research Group
Ms. Carolina López Capo	Berkeley Research Group
Ms. Agustina Gallo	Berkeley Research Group
For Respondent:	
Ms. Yas Banifatemi	Gaillard Banifatemi Shelbaya Disputes
Ms. Ximena Herrera	Gaillard Banifatemi Shelbaya Disputes
Ms. Yael Ribco Borman	Gaillard Banifatemi Shelbaya Disputes
Ms. Pilar Álvarez	Gaillard Banifatemi Shelbaya Disputes
Ms. Carolina Barros	Gaillard Banifatemi Shelbaya Disputes

Mr. Mattéo Dabaghian	Gaillard Banifatemi Shelbaya Disputes
Mr. Joaquín Berriolo	Gaillard Banifatemi Shelbaya Disputes
Mr. Youssef Daoud	Gaillard Banifatemi Shelbaya Disputes
Mr. Camilo Gómez Alzate	Agencia Nacional de Defensa Jurídica del Estado
Ms. Ana María Ordóñez Puentes	Agencia Nacional de Defensa Jurídica del Estado
Mr. Giovanny Vega-Barbosa	Agencia Nacional de Defensa Jurídica del Estado
Mr. César Rodríguez	Agencia Nacional de Defensa Jurídica del Estado
Ms. Elizabeth Prado López	Agencia Nacional de Defensa Jurídica del Estado
Ms. Yadira Castillo Meneses	Agencia Nacional de Defensa Jurídica del Estado
Mr. Andrés Felipe Reina Arango	Agencia Nacional de Defensa Jurídica del Estado
Ms. Marcela María Silva Zambrano	Agencia Nacional de Defensa Jurídica del Estado
Party Representatives:	
Ms. Laura María Marín Moreno	Fiscalía General de la Nación
Mr. Carlos Saboyá	Fiscalía General de la Nación
Ms. Sandra Martínez	Fiscalía General de la Nación
Ms. Sandra Montezuma	Fiscalía General de la Nación
Ms. Tatiana García	Fiscalía General de la Nación
Ms. Lilia Rosa Mendoza	Fiscalía General de la Nación
Mr. Andrés Felipe Tinoco	Fiscalía General de la Nación
Witnesses:	
Dr. Alejandra Ardila Polo	Fiscalía General de la Nación
Dr. José Iván Caro Gómez	Fiscalía General de la Nación
Dr. Daniel Ricardo Hernández Martínez	Fiscalía General de la Nación
Experts:	
Dr. Nilson Elías Pinilla	Exmagistrado de la Corte Suprema de Justicia; Exmagistrado de la Corte Constitucional
Dr. Yesid Reyes	Profesor, Universidad de los Andes
Dr. Richard Hern	NERA UK Ltd.
Ms. Zuzana Janeckova	NERA UK Ltd.
Mr. Ricardo Rodrigues	NERA UK Ltd.
Mr. David Andrés García Joya	CBRE Valuation & Advisory Services
Mr. Chris G. Maugeri	CBRE Valuation & Advisory Services
Mr. Juan Sebastian Álvarez Yepes	CBRE Valuation & Advisory Services
Mr. Fernando García-Chacón	CBRE Valuation & Advisory Services

Non-Disputing Party:

Ms. Nicole Thornton	U.S. Department of State
Mr. Alvaro Peralta	U.S. Department of State
Ms. Lisa Grosh	U.S. Department of State
Mr. John Daley	U.S. Department of State
Ms. Julia Brower	U.S. Department of State

Mr. Matthew Hackell	U.S. Department of State
Ms. Catherine (Kate) Gibson	U.S. Trade Representative
Court Reporters:	
Mr. David Kasdan	B&B Reporters
Mr. Rodolfo Rinaldi	DR-Esteno
Mr. Leandro Iezzi	DR-Esteno
Interpreters:	
Ms. Silvia Colla	ENG-SPA interpreter
Mr. Charles Roberts	ENG-SPA interpreter
Mr. Daniel Giglio	ENG-SPA interpreter

84. On 2 May 2022, on the first day of the First Hearing and per the Tribunal's instructions, the Parties provided their comments on Respondent's Initial Application for Admission of New Documents. Following the Parties' arguments, the Tribunal resolved to: (i) accept the submission of Respondent's legal authorities rebutting Claimants' Preliminary Response, as well as of the *travaux préparatoires* of the TPA; [redacted] and (iii) invite the Parties to reach an agreement on the submission of the remaining categories of documents requested by Respondent.

85. On 3 May 2022, following the Tribunal's authorization, Respondent submitted new documents in rebuttal of Claimants' Preliminary Response (Exhibits R-283 to R-285 and Legal Authorities RL-234 to RL-254).

86. On 2 June 2022, Respondent informed that the Parties had been unable to reach an agreement with respect to the remaining categories of documents that were pending and requested the Tribunal to: (i) allow the submission of certain new factual exhibits and legal authorities listed in an annex to Respondent's letter into the record; (ii) reject any attempt by Claimants to belatedly and inappropriately include factual information in breach of Respondent's fundamental due process rights; and (iii) declare the closure of the record as of 2 June 2022, except in connection with any legal authority strictly relating to the documents in the *travaux préparatoires* to which Claimants had not had access prior to 2 June 2022, which may be filed into the record by no later than 9 June 2022 ("**Respondent's Application for Admission of New Documents**").

87. On 3 June 2022, Claimants requested the Tribunal to deny Respondent's request of 2 June 2022 and, instead, grant Claimants leave to add new documents to the record ("**Claimants' Application for Admission of New Documents**"). Assuming Claimants' application were granted, Claimants would agree to Respondent's new documents also being admitted.

88. On 10 June 2022, Respondent commented on Claimants' Application for Admission of New Documents, and on 15 June 2022, Claimants replied to Respondent's comments.

89. On 13 June 2022, the Parties informed the Tribunal of their agreement on the timetable for post-hearing briefs.

90. On 16 July 2022, the Tribunal issued Procedural Order No. 11 ("**PO11**"), rejecting Respondent's Second TPF Disclosure Application and granting both Parties' Applications for Admission of New Documents of 2 and 3 June 2022. The Tribunal also confirmed the Parties' proposed timetable for post-hearing briefs, as well as the dates for a second hearing on new evidence and oral closing submissions ("**Second Hearing**").

91. Following the Tribunal's decision, on 19 July 2022, Respondent submitted Exhibits R-286 to R-300 and Legal Authorities RL-255 to RL-256.

92. On 22 July 2022, Claimants submitted their Post-Hearing Brief and Submission on New Evidence, together with Exhibits C-439 to C-450 and Legal Authorities CL-237 to CL-245 ("**Claimants' PHB**").

93. On 26 August 2022, Respondent submitted its Post-Hearing Brief and Reply on New Evidence, together with Exhibits R-301 to R-318 and Legal Authorities RL-257 to RL-267 ("**Respondent's PHB**").

94. [redacted]

95. [redacted]

96. On 12 September 2022, the President of the Tribunal held a pre-hearing organizational meeting with the Parties by video conference, following which the Tribunal issued Procedural Order No. 12 ("**PO12**") establishing the rules that would govern the conduct of the Second Hearing.

97. On 14 September 2022, Claimants submitted a Rebuttal on Essential Security ("**Claimants' Rebuttal on Essential Security**"), [redacted]

98. On 15 September 2022, Claimants replied to Respondent's comments of 7 September 2022, and on 16 September 2022, Respondent submitted further comments in response.

99. On 20 September 2022, at the Tribunal's invitation, Respondent submitted its comments to Claimants' request of 14 September 2022.

100. [redacted]

[redacted]"

101. On the same date, Respondent objected to the Tribunal's decision and requested that the Second Hearing be suspended to a later date, [redacted]

102. On 23 September 2022, Claimants objected to Respondent's request for the Tribunal to overturn its decision and postpone the Second Hearing and offered to elaborate on their objection. On the same day, Respondent reserved its right to respond to Claimants' further observations should they be allowed by the Tribunal.

103. On 26 September 2022, the Tribunal decided to maintain its decision of 22 September 2022 and rejected Respondent's request to postpone the Second Hearing.

104. On the same day, Respondent objected to the Tribunal's decision and noted that it proceeded to the Second Hearing under protest and with reservation of rights.

105. The Second Hearing was held in Paris, France and by video conference on 3 and 4 October 2022. The following persons participated in the Second Hearing:

Tribunal:	
Prof. Dr. Klaus Sachs	President
Prof. Hugo Perezcano Díaz	Arbitrator
Dr. Charles Poncet	Arbitrator
Assistant to the Tribunal:	
Mr. Marcus Weiler	Assistant to the Tribunal
ICSID Secretariat:	
Ms. Sara Marzal Yetano	Secretary of the Tribunal
For Claimants:	
Counsel:	
Mr. Rahim Moloo	Gibson, Dunn & Crutcher LLP
Ms. Anne Champion	Gibson, Dunn & Crutcher LLP
Mr. Pedro Soto	Gibson, Dunn & Crutcher LLP
Ms. Ankita Ritwik	Gibson, Dunn & Crutcher LLP
Ms. Marryum Kahloon	Gibson, Dunn & Crutcher LLP
Mr. Ben Harris	Gibson, Dunn & Crutcher LLP
Ms. Nika Madyoon	Gibson, Dunn & Crutcher LLP
Mr. Alejandro Mejía	Cáez Muñoz Mejía Abogados
Mr. Juan Pablo Pantoja Ruiz	Cáez Muñoz Mejía Abogados
Party Representatives:	
Mr. Angel Seda	Claimant
Mr. Justin Enbody	Claimant
Mr. Stephen Bobeck	Claimant
Mr. Justin Caruso	Claimant
Mr. Monte Adcock	Claimant
Mr. Pierre Amariglio	Tenor Capital Management Company
For Respondent:	
Ms. Yas Banifatemi	Gaillard Banifatemi Shelbaya Disputes
Ms. Ximena Herrera	Gaillard Banifatemi Shelbaya Disputes
Ms. Yael Ribco Borman	Gaillard Banifatemi Shelbaya Disputes
Ms. Pilar Álvarez	Gaillard Banifatemi Shelbaya Disputes
Ms. Carolina Barros	Gaillard Banifatemi Shelbaya Disputes
Mr. César Rodríguez	Gaillard Banifatemi Shelbaya Disputes
Mr. Jad Markbaoui	Gaillard Banifatemi Shelbaya Disputes
Ms. Martha Lucía Zamora	Agencia Nacional de Defensa Jurídica del Estado
Ms. Ana María Ordóñez	Agencia Nacional de Defensa Jurídica del Estado
Mr. Giovanny Vega-Barbosa	Agencia Nacional de Defensa Jurídica del Estado

Ms. Elizabeth Prado López	Agencia Nacional de Defensa Jurídica del Estado
Ms. Yadira Castillo Meneses	Agencia Nacional de Defensa Jurídica del Estado
Mr. Andrés Felipe Reina Arango	Agencia Nacional de Defensa Jurídica del Estado
Ms. Marcela María Silva Zambrano	Agencia Nacional de Defensa Jurídica del Estado
Party Representatives:	
Mr. Carlos Saboyá	Fiscalía General de la Nación
Ms. Sandra Martínez	Fiscalía General de la Nación
Ms. Sandra Montezuma	Fiscalía General de la Nación
Ms. Tatiana García	Fiscalía General de la Nación
Mr. Andrés Felipe Tinoco	Fiscalía General de la Nación
Mr. Alberto Acevedo Quintero	Fiscalía General de la Nación
Non-Disputing Party:	
Ms. Nicole Thornton	U.S. Department of State
Mr. Alvaro Peralta	U.S. Department of State
Ms. Lisa Grosh	U.S. Department of State
Mr. John Daley	U.S. Department of State
Ms. Michelle Ker	U.S. Department of State
Mr. Matthew Hackell	U.S. Department of State
Ms. Catherine (Kate) Gibson	U.S. Trade Representative
Mr. Emmett Weiss	U.S. Department of Treasury
Court Reporters:	
Mr. David Kasdan	B&B Reporters
Mr. Leandro Iezzi	DR-Esteno
Interpreters:	
Ms. Anna Sophia Chapman	ENG-SPA interpreter
Ms. Amalia Thaler - de Klemm	ENG-SPA interpreter
Ms. Roxana Dazin	ENG-SPA interpreter

106. During the second day of the Second Hearing, on 4 October 2022, the Tribunal invited the U.S. to submit U.S. treaties with essential security interests exceptions worded similarly to Article 22.2(b) to the US-Colombia TPA. The Tribunal also invited the Parties to prepare (i) written submissions of 20 pages on the U.S. treaty practice on essential security interests exceptions, and [redacted] Finally, the Tribunal also indicated that it reserved the right to call for a third hearing (via videoconference).

107. In response to the Tribunal's invitation, on 20 October 2022, the U.S. submitted a table with linked treaties containing similarly worded essential security exceptions.

108. On 2 November 2022, Claimants informed the Tribunal of the Parties' agreement to submit their written submissions on U.S. treaty practice and on Exhibits [redacted]

[redacted] ("**Post-Closing Submissions**") on 21 December 2022, following the Tribunal's instructions at the Second Hearing. Additionally, referring to the Tribunal's indication at the Second Hearing that it may wish to convene a virtual hearing following receipt of the Parties' Post-Closing Submissions, Claimants requested that the Tribunal reserve a date to hold the virtual hearing.

109. On the same day, Respondent noted that it was premature to establish a date for a potential virtual hearing as the Tribunal had made no determination as to the need to hear the Parties on Post-Closing Submissions.

110. On 15 November 2022, the Tribunal informed the Parties that it had decided to reserve a date for a one-day virtual hearing in early 2023 and invited the Parties to provide their available dates.

111. On 22 November 2022, Respondent expressed concern that a further hearing would unnecessarily prolong the arbitration and cause Respondent to incur further costs.

112. On the same date, Claimants submitted comments to Respondent's communication, to which Respondent replied the following day on 23 November 2022.

113. On 12 December 2022, the Tribunal informed the Parties that after reviewing their Post-Closing Submissions, it would revert to the Parties should it decide to hold another virtual hearing.

114. On 22 December 2022, the Parties filed their Post-Closing Submissions. Respondent attached to its Post-Closing Submission a cover letter ("**Cover Letter**") [redacted]

115. On 27 December 2022, Claimants requested that the Tribunal exclude from the record (i) Respondent's Cover Letter [redacted] Furthermore, Claimants reiterated their proposal to schedule a virtual hearing to address the Post-Closing Submissions.

116. On 28 December 2022, the Tribunal invited Respondent to submit comments on Claimants' communication of 27 December 2022.

117. Further to the Tribunal's invitation, on 4 January 2023, Respondent submitted its comments and requested that the Tribunal (i) reject Claimants' request to exclude Respondent's Cover Letter [redacted]; (ii) grant leave to

Respondent to file evidence rebutting Claimants' remarks on allegedly false accusations regarding Respondent's witness, Mr. Hernández, including the decision of the Criminal Chamber of the Superior Tribunal of Bogotá of 16 December 2022; (iii) order Claimants to remove from its Post-Closing Submission the allegedly false information on Mr. Hernández and resubmit their submission as corrected; and (iv) order that no additional hearing is required at this late time in the arbitration and to close the record of the arbitration following the submission of Respondent's rebuttal evidence on Mr. Hernández.

118. On 7 January 2023, Claimants commented on Respondent's letter of 4 January 2023 and reiterated their request to exclude Respondent's Cover Letter [redacted] from the record as procedurally noncompliant.

119. On 9 January 2023, Respondent rejected the statements made by Claimants in their communication of 7 January 2023 and requested the Tribunal to close the discussion on this issue.

120. On 19 January 2023, the Tribunal issued Procedural Order No. 13 ("**PO13**") (i) excluding Respondent's Cover Letter [redacted] from the record; (ii) granting the Parties an opportunity to address the Post-Closing Submissions in a one-day virtual hearing at a date to be determined; and (iii) denying all other requests.

121. On 26 January 2023, Respondent requested the Tribunal to reconsider its decision issued in PO13. On 1 February 2023, Claimants submitted comments to Respondent's reconsideration request.

122. After considering the Parties' positions, on 14 February 2023, the Tribunal decided to uphold its decision in PO13 and to reject Respondent's request for reconsideration. Additionally, the Tribunal informed the Parties that it decided to schedule a one-day virtual hearing to address both Parties' concerns about being able to fully argue their respective cases.

123. On 18 February 2023, Respondent requested the Tribunal's leave to file as new exhibits three press articles published between 14 and 16 February 2023 into the record.

124. On 24 February 2023, Claimants submitted their comments on Respondent's application of 18 February 2023 stating they did not oppose Respondent's request, provided that Claimants were also allowed to admit four additional newly released press articles published between 13 and 19 February 2023 into the record.

125. On 3 March 2023, Respondent submitted its comments on Claimants' communication of 24 February 2023 stating that it did not oppose Claimants' request, provided that the

Tribunal also admits the three new documents referred to in Respondent's communication of 18 February 2023.

126. On 13 March 2023, the Tribunal decided to admit the three new documents referred to in Respondent's communication of 18 February 2023 and the four new documents referred to in Claimants' letter of 24 February 2023.

127. Following the Tribunal's decision, on 13 March 2023, Respondent submitted new fact Exhibits R-320 to R-322 and on 22 March 2023, Claimants submitted new fact Exhibits C-451 to C-454.

128. On 22 March 2023, Respondent requested leave to file one new document into the record, a letter by Mr. Mario Andrés Burgos Patiño.

129. On 27 March 2023, Claimants submitted their comments on Respondent's request of 22 March 2023, stating they did not object to Respondent's request provided that (i) Respondent disclosed the request from Mr. Hernández, ANDJE, or any other person requesting the letter from Mr. Burgos Patiño, and (ii) Claimants were allowed to add three rebuttal documents (an email exchange between Mr. Seda, Claimants' counsel, and Colombian officials, the recording of the hearing regarding the indictment of Ms. Mónica Valencia, and the investigation report into Ms. Catalina Noguera and other members of the Attorney General's Office) into the record.

130. On 31 March 2023, Respondent submitted its comments on Claimants' communication of 27 March 2023, agreeing (i) to disclose Mr. Hernández *derecho de petición* to Prosecutor Burgos Patiño upon the Tribunal's request, and (ii) to allow Claimants to submit Mr. Seda's email 11 August 2020 and Ms. Champion's email of 22 September 2020. However, Respondent requested that the Tribunal reject Claimants' request to include the recording of the hearing regarding the indictment of Ms. Mónica Valencia and the investigation report into Ms. Catalina Noguera and other members of the Attorney General's Office.

131. On 11 April 2023, further to Respondent's communications of 22 and 31 March 2023 and further to Claimants' communication of 27 March 2023, the Tribunal (i) granted Respondent's request to submit the letter from Mr. Burgos Patiño; (ii) ordered Respondent to produce and file Mr. Hernández's *derecho de petición* to Mr. Burgos Patiño; (iii) granted Claimants' request to introduce into the record the email exchange between Mr. Seda, Claimants' counsel and Colombian officials;[11] (iv) rejected Claimants' request to introduce into record a recording of the hearing regarding the

[11] Claimants submitted the new evidence as Exhibit C-455.

indictment of Ms. Valencia; and (v) invited Claimants to provide further details about the investigation report into Ms. Catalina Noguera and other members of the Attorney General's Office.

132. On 12 April 2023, the Tribunal issued Procedural Order No. 14 ("**PO14**") establishing the rules that would govern the conduct of the third hearing ("**Third Hearing**").

133. On 12 April 2023, further to the Tribunal's invitation of 11 April 2023, Claimants provided further details about the investigation report into Ms. Catalina Noguera and other members of the Attorney General's Office. On 13 April 2023, the Tribunal invited Respondent to comment on Claimants' communication of 12 April 2023.

134. On 14 April 2023, Respondent submitted new fact Exhibits R-323 and R-324, further to the Tribunal's decision of 11 April 2023.

135. On the same date, and further to the Tribunal's invitation of 13 April 2023, Respondent submitted its comments to Claimants' communication of 12 April 2023, reiterating its request of 31 March 2023, that the Tribunal reject Claimants' request to introduce into the record the investigation report into Ms. Catalina Noguera and other members of the Attorney General's Office.

136. On 19 April 2023, Claimants requested the Tribunal to revise the agenda for the Third Hearing so that Respondent delivers its opening statement first. On the same date, the Tribunal invited Respondent to respond to Claimants' request.

137. On the same date, the Tribunal decided to reject Claimants' request of 27 March 2023 to introduce into record the investigation report into Ms. Catalina Noguera and other members of the Attorney General's Office.

138. On 20 April 2023, Respondent submitted its objection to Claimants' request of 19 April 2023 to revise the agenda for the Third Hearing.

139. On 24 April 2023, having considered both Parties' communications, the Tribunal decided not to revise the agenda for the Third Hearing.

140. The Third Hearing on the issues addressed in the Post-Closing Submissions was held by video conference on 26 April 2023. The following persons participated in the Third Hearing:

Tribunal:

Prof. Dr. Klaus Sachs	President
Prof. Hugo Perezcano Díaz	Arbitrator
Dr. Charles Poncet	Arbitrator

Assistant to the Tribunal:	
Mr. Marcus Weiler	Assistant to the Tribunal
ICSID Secretariat:	
Ms. Sara Marzal Yetano	Secretary of the Tribunal
For Claimants:	
Counsel:	
Mr. Rahim Moloo	Gibson, Dunn & Crutcher LLP
Ms. Anne Champion	Gibson, Dunn & Crutcher LLP
Mr. Pedro Soto	Gibson, Dunn & Crutcher LLP
Ms. Ankita Ritwik	Gibson, Dunn & Crutcher LLP
Ms. Marryum Kahloon	Gibson, Dunn & Crutcher LLP
Mr. Ben Harris	Gibson, Dunn & Crutcher LLP
Ms. Nika Madyoon	Gibson, Dunn & Crutcher LLP
Party Representatives:	
Mr. Angel Seda	Claimant
Mr. Stephen Bobeck	Claimant
Mr. Justin Caruso	Claimant
Mr. Monte Adcock	Claimant
Mr. Pierre Amariglio	Tenor Capital Management Company
For Respondent:	
Ms. Yas Banifatemi	Gaillard Banifatemi Shelbaya Disputes
Ms. Ximena Herrera	Gaillard Banifatemi Shelbaya Disputes
Ms. Yael Ribco Borman	Gaillard Banifatemi Shelbaya Disputes
Ms. Pilar Álvarez	Gaillard Banifatemi Shelbaya Disputes
Ms. Carolina Barros	Gaillard Banifatemi Shelbaya Disputes
Mr. César Rodríguez	Gaillard Banifatemi Shelbaya Disputes
Ms. Ana María Ordóñez Puentes	Agencia Nacional de Defensa Jurídica del Estado
Mr. Giovanny Vega-Barbosa	Agencia Nacional de Defensa Jurídica del Estado
Party Representatives:	
Ms. Martha Lucía Zamora	Agencia Nacional de Defensa Jurídica del Estado
Ms. Sandra Montezuma	Fiscalía General de la Nación
Ms. Tatiana García	Fiscalía General de la Nación
Non-Disputing Party:	
Mr. Alvaro Peralta	U.S. Department of State
Ms. Lisa Grosh	U.S. Department of State
Mr. John Daley	U.S. Department of State
Ms. Julia Brower	U.S. Department of State
Mr. David Bigge	U.S. Department of State
Court Reporters:	
Mr. David Kasdan	B&B Reporters
Mr. Dante Rinaldi	DR-Esteno

Interpreters:

Mr. Jesus Getan Bornn	ENG-SPA interpreter
Ms. Amalia Thaler de Klemm	ENG-SPA interpreter
Ms. Monique Fernandez B.	ENG-SPA interpreter

141. Pursuant to the Tribunal's instructions at the Third Hearing of 26 April 2023, on 5 May 2023, the Parties jointly submitted their communication regarding developments in the asset forfeiture proceedings against the Meritage lot (the "**Asset Forfeiture Proceedings**").

142. On 7 May 2023, Claimants requested the Tribunal's leave to submit a video and transcription of a ruling of the First Civil Circuit Court of Envigado in Colombia, rendered on 3 May 2023.

143. On 8 May 2023, Respondent requested the Tribunal's leave to submit comments on Claimants' request of 7 May 2023, and to order Claimants to submit a copy of the ruling to Respondent. On 9 May 2023, Claimants stated that they had no objection to providing the ruling to Respondent. On the same date, the Tribunal invited Respondent to submit comments on Claimants' request.

144. On 12 May 2023, Respondent requested the Tribunal not to admit the ruling of the First Civil Circuit Court of Envigado referred to in Claimants' request of 7 May 2023.

145. On 15 May 2023, Claimants requested the Tribunal's leave to respond to Respondent's communication of 12 May 2023. On the same date, Respondent rejected Claimants' request to provide a response. On 16 May 2023, the Tribunal invited Claimants to submit comments to Respondent's communication of 12 May 2023, to be followed by Respondent's observations on Claimants' comments.

146. On 16 May 2023, Respondent requested that the Tribunal order Claimants to produce the full file before the Civil Court only to Respondent.

147. On 17 May 2023, Claimants submitted their comments to Respondent's communication of 12 May 2023 and reiterated their request that the Tribunal admit the ruling of the First Civil Circuit Court of Envigado in Colombia, arguing exceptional circumstances justify its inclusion into the record. On 19 May 2023, Respondent submitted its observations on Claimants' comments of 17 May 2023, and objected to the inclusion of the ruling into the record.

148. On 25 May 2023, the Tribunal decided not to admit the ruling of the First Civil Court of Envigado to the record.

149. Further to the Tribunal's instructions at the Third Hearing, on 4 July 2023, the Parties submitted their agreement on the sequence and length of their submissions on costs. The Tribunal confirmed the Parties' agreement on 5 July 2023.

150. In accordance with the Parties' agreed schedule, on 26 July 2023, the Parties submitted their respective submissions on costs ("**Submissions on Costs**") (Claimants with Legal Authorities CL-247 to CL-249, Respondent with Legal Authorities RL-268 to RL-271) and on 9 August 2023, the Parties' submitted their respective replies to the other Party's Submission on Costs ("**Replies on Costs**") (Respondent with Legal Authority RL-272).

151. On 25 October 2023, Claimants sought the Tribunal's leave to submit an additional document (Decision No. T-369 of 2023 of the Constitutional Court of Colombia) into the record. The Tribunal invited Respondent to submit any comments by 1 November 2023. Respondent submitted its comments accordingly and requested to submit rebuttal evidence. On 8 November 2023, Claimants submitted further comments and Respondent submitted a response on 10 November 2023.

152. On 28 November 2023, the Tribunal issued Procedural Order No. 15 ("**PO15**"), granting both Parties' requests to submit new evidence. The Tribunal further instructed Claimants to submit comments regarding the new evidence by 11 December 2023 and Respondent by 22 December 2023. Following the Tribunal's decision, on 30 November 2023, Claimants submitted Exhibit C-456 and Respondent submitted Exhibits R-325 to R-328.

153. On 11 December 2023, pursuant to PO15, Claimants submitted their comments on the newly admitted evidence and Respondent submitted its comments on 22 December 2023.

154. On 10 January 2024, considering the latest requests and submissions, the Tribunal invited the Parties to submit updated statements of costs by 19 January 2024.

155. On 19 January 2024, Respondent submitted an update on new developments in the Asset Forfeiture Proceedings. The Tribunal invited Claimants to submit any comments by 26 January 2024.

156. On 19 January 2024, Claimants submitted an updated statement on costs.

157. On 26 January 2024, pursuant to the Tribunal's authorization, Claimants submitted their response to Respondent's letter of 19 January 2024.

158. On 31 January 2024, Respondent submitted comments on Claimants' communication of 26 January 2024 and requested leave to submit further comments as well as to introduce new evidence. The Tribunal invited Claimants to submit any comments by 7 February 2024. Claimants submitted their comments accordingly. Respondent submitted further comments on 8 February 2024.

159. On 12 February 2024, the Tribunal informed the Parties that it would decide on Respondent's requests of 31 January 2024 if, during its deliberations, it deemed necessary to invite further submissions or to allow the admission of additional documents. On the same day, Respondent filed its objection. The Tribunal reiterated its decision on 16 February 2024.

160. On 29 February 2024, the Tribunal informed the Parties of its intention to close the proceedings by 8 March 2024.

161. On 7 March 2024, Respondent submitted a new update on the status of the Asset Forfeiture Proceedings. On the same date, Claimants requested leave to respond.

162. On 8 March 2024, the Tribunal decided not admit Respondent's 7 March 2024 communication into the record as the Tribunal considered that it was belated and submitted without prior leave from the Tribunal.

163. On the same date, the Tribunal declared the proceedings closed.

164. On 15 March 2024, Respondent requested the Tribunal to reconsider its decision of 8 March 2024 not to admit Respondent's letter of 7 March 2024.

165. On March 17, 2024, Claimants objected to Respondent's reconsideration request.

166. On 18 March 2024, the Tribunal confirmed its decision not to admit Respondent's letter of 7 March 2024 into the record. The Parties were reminded that the proceedings have been closed and were requested to refrain from further unsolicited submissions.

167. On 19 March 2024, Claimants requested the Tribunal to reopen the proceedings pursuant to Arbitration Rule 38(2) to admit new evidence.

168. On the same date, Respondent objected to Claimants' request and sought leave to respond to Claimants' application and provide relevant evidence.

169. On 20 March 2024, the Tribunal invited Respondent to comment on Claimants' application of 19 March 2024, but did not allow the introduction of new evidence as part of Respondent's comments.

170. On 26 March 2024, Respondent submitted its comments opposing Claimants' application of 19 March 2024.

171. On 30 March 2024, the Tribunal denied Claimants' request to reopen the proceedings.

172. On 4 June 2024, Claimants requested the Tribunal to reopen the proceedings pursuant to Arbitration Rule 38(2) to admit new evidence. The Respondent objected to Claimants' request on 5 June 2024.

173. On 7 June 2024, the Tribunal denied Claimants' request to reopen the proceedings.

D. FACTUAL BACKGROUND

174. The following is a summary of the background facts that are not disputed between the Parties, or which have otherwise been established by the evidence submitted in these proceedings to the satisfaction of the Tribunal. The following summary is intended to give general overview of the present dispute and should not be taken to be exhaustive of all facts that may be relevant. Such facts may be discussed in the Tribunal's analysis below.

I. Claimants

175. Claimants are a group of natural or juridical persons who directly or indirectly acquired shares in Luxé by the Charlee S.A.S. ("**Luxé**") and / or Newport S.A.S. ("**Newport**"). These companies were established by Mr. Seda to allow the development of different hospitality and property projects in Colombia.[12] Mr. Seda incorporated both companies and initially held shares in Luxé and Newport; but later transferred his shares in both of these companies to his wholly owned company Royal Realty S.A.S. ("**Royal Realty**"), incorporated under the laws of Colombia.[13]

176. Luxé was established by Mr. Seda under the laws of Colombia on 5 April 2009 to manage the development of the Luxé by The Charlee, a luxury resort and a residential complex.[14]

177. Mr. Seda incorporated Newport under the laws of Colombia on 23 September 2009 as the developer of and the investment vehicle for the Meritage project, a community project

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12 First Witness Statement of Mr. Angel Samuel Seda, 15 June 2020 ("**First Seda Witness Statement**"), ¶ 1, ¶¶ 7-9.

13 First Seda Witness Statement, ¶ 13; Exhibit C-012, Royal Realty S.A.S. Certificate of Existence and Good Standing, 20 December 2017, p. SP-0002.

14 Exhibit C-249, Luxé by The Charlee S.A.S. Certificate of Existence and Good Standing, 28 April 2020, p. SP-0002; First Seda Witness Statement, ¶ 21.

consisting of a luxury hotel with long-term stay hotel suites, residential apartments, single-family homes, and commercial storefronts (the "**Meritage Project**").[15]

178. Regarding their respective investments, Claimants can be subdivided into two groups.

179. The first group contains all Claimants who acquired shares in Luxé or in Newport directly or through another company, *i.e.*, all Claimants (Angel Samuel Seda, JTE International Investments, Jonathan M. Foley, The Boston Enterprises Trust, Stephen J. Bobeck, Brian Hass, Monte G. Adcock, Justin T. Enbody, and Justin T. Caruso).

180. The second group only comprises Claimants who bought shares in Newport, and thereby had an interest in the Meritage Project. Members of this group are Angel Samuel Seda, JTE International Investments, Jonathan M. Foley, Justin T. Enbody, and The Boston Enterprises Trust.

II. Mr. Seda's Decision to Invest in Colombia

181. Mr. Seda made his decision to develop hospitality and property projects in South America, and specifically Colombia, in the end of 2006 when he sold Royal Realty U.S.'s real estate portfolio.[16]

1. Colombia's and Medellín's Development

182. Mr. Seda's real estate projects in Colombia were located in Medellín.

183. During the 1980s and 1990s, large amounts of properties and land in the region were owned and controlled by drug cartels.[17]

184. From 2000 onwards, Medellín has experienced revival due to the growth of its economy in sectors such as tourism. In 2000, Colombia amended its General Regime for Foreign Investments, creating an open market for foreign investments, including by guaranteeing equal treatment and stability for foreign investments.[18] Additionally, it liberated foreign investments, *inter alia*, in the real estate and hospitality sectors from the obligation of

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15 Exhibit C-014, Newport S.A.S. Certificate of Existence and Good Standing, 6 October 2017; First Seda Witness Statement, ¶ 38.

16 First Seda Witness Statement, ¶ 7.

17 Claimants' Memorial on the Merits and Damages, 15 June 2020 ("**Claimants' Memorial**"), ¶ 25; Respondent's Counter-Memorial on Jurisdiction and Merits, 16 November 2020 ("**Respondent's Counter-Memorial**"), ¶ 43.

18 Claimants' Memorial, ¶ 26; Exhibit C-131, Decree No. 2080 of 2000 and Amendments, 14 July 2014, Art. 2.

prior government authorization.[19] Colombia implemented several legal reforms and policies to encourage "*foreign investors to invest or expand existing investments in the country.*"[20] As a consequence, Colombia entered into several investment treaties with other States providing for extensive protections for foreign investments, including the United States-Colombia Trade Promotion Agreement of 2012 ("**TPA**" or the "**Treaty**").[21]

185. Despite these positive developments, money laundering continues to be an issue in Medellín, and Colombia in general, due to the prevalence of narcotrafficking in the past.[22] Studies indicate that the amounts of money laundering between 1985 and 2013 correspond to 4.7% of Colombia's GDP or, including the funds from drug trafficking, to USD 8.7 billion per year.[23]

2. Mr. Seda's Investment in The Charlee Hotel

186. Mr. Seda's first hospitality and property project was the development of The Charlee Hotel, a luxury hotel.

187. In 2008, Mr. Seda found an appropriate lot of land close to Lleras Park in Medellín.[24] As a next step, Mr. Seda hired the law firm Enfoque Jurídico to conduct a title study.[25] After

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19 Claimants' Memorial, ¶ 26; Exhibit C-131, Decree No. 2080 of 2000 and Amendments, 14 July 2014, Arts. 1, 7; Exhibit CL-082, Hernando Otero and Enrique Gómez-Pinzón, Colombia, in Latin American Investment Protections (2012), p. 157.

20 Claimants' Memorial, ¶ 27; Exhibit CL-082, Hernando Otero and Enrique Gómez-Pinzón, Colombia, in Latin American Investment Protections (2012), p. 157, referring to Law 963 of 2005 and Decree 2950 of 2005.

21 Claimants' Memorial, ¶ 27; Exhibit CL-082, Hernando Otero and Enrique Gómez-Pinzón, Colombia, in Latin American Investment Protections (2012), pp. 165-168; Exhibit CL-001, United States-Colombia Trade Promotion Agreement, signed 22 November 2006, entry into force 15 May 2012 ("TPA").

22 Respondent's Counter-Memorial, ¶ 47.

23 Respondent's Counter-Memorial, ¶ 49; Exhibit R-023, Thomas Pietschmann et al., Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes, Research Report, United Nations Office on Drugs and Crime (UNODC), October 2011; Exhibit R-034, Edgar Villa et al., Illicit Activity and Money Laundering from an Economic Growth Perspective, A Model and an Application to Colombia, World Bank Group, Development Research Group, Macroeconomics and Growth Team, February 2016.

24 First Seda Witness Statement, ¶ 15; Respondent's Counter-Memorial, ¶ 22.

25 Exhibit C-086, Letter from Eulalia Warren Londoño to Angel Seda, María Clara Quintero and Clara Inés Bustamante, 6 June 2008.

the trademark "Charlee" was registered in Medellín on 19 January 2009, construction of The Charlee Hotel started in 2009.[26] The Charlee Hotel was financed through the pre-sale of individual suites in the hotel to third-party purchasers.[27] On 19 February 2009, Mr. Seda engaged the fiduciary Acción Sociedad Fiduciaria S.A. ("**Acción Fiduciaria**") on behalf of the Panamanian corporation Charlee M LTDA.[28] The trust agreement provided that the owner of the relevant land as trustor was to transfer the land to Acción Fiduciaria as the trustee holding the title of the land.[29] The automatic transfer of title to the Panamanian corporation Charlee M LTDA as final beneficiary should happen as soon as the payments for the lots were made to the owner of the land as trustor and prior beneficiary of the trust.[30]

188. As soon as construction of The Charlee Hotel had come to an end, it was opened to the public in January 2011.[31]

3. Mr. Seda's and Several Claimants' Investment in the Luxé

189. In 2009, Mr. Seda started a new project, namely the development of the Luxé project, a luxury resort and residential complex in Guatapé (the "**Luxé Project**").[32] After finding the suitable property, title studies of the property were conducted by Royal Realty in-house and Acción Fiduciaria externally.[33]

190. The financing of the Luxé Project was secured via pre-sales to third-party purchasers. Thus, Mr. Seda, as representative of the Luxé, entered into a trust agreement with two companies owning the relevant land and Acción Fiduciaria on 14 December 2009.[34]

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26 Exhibit C-026, "The Charlee" Trademark Registration, 19 January 2009; Claimants' Memorial, ¶ 37.

27 Claimants' Memorial, ¶ 38.

28 Exhibit C-087, Fiduciary Contract between Charlee M LTD Inc. and Acción Fiduciaria, 31 March 2009.

29 Exhibit C-087, Fiduciary Contract between Charlee M LTD Inc. and Acción Fiduciaria, 31 March 2009.

30 Exhibit C-087, Fiduciary Contract between Charlee M LTD Inc. and Acción Fiduciaria, 31 March 2009.

31 First Seda Witness Statement, ¶ 26.

32 Claimants' Memorial, ¶ 43.

33 Claimants' Memorial, ¶ 48; Exhibit C-088, Letter from María Isabel Villegas to Juliana Montoya, attaching Study of Ownership Titles, 18 November 2009.

34 Exhibit C-089, Contract with Acción Fiduciaria for Development of Luxé by The Charlee, 14 December 2009.

191. Luxé and Royal Realty entered into a management and operation contract on 21 March 2013, pursuant to which Luxé would develop the project under the Charlee brand and Royal Realty would manage operations for the hotel.[35]

192. Construction of the project began in 2010 and was scheduled to finish in 2016, so that operations could be planned to commence in 2017.[36] But by January 2017, phases 1, 2 and 5 of the Luxé had been terminated, while construction of the 116 hotel rooms was still ongoing.[37]

4. Further Projects

193. In parallel to the two Charlee brand projects, Mr. Seda was involved in three further relevant hospitality and property projects.

194. *First*, Mr. Seda was involved in the Tierra Bomba project. In 2013, Mr. Seda identified Tierra Bomba, an island in Cartagena, as suitable for investment, and established RDP Cartagena S.A.S. under the laws of Colombia as a development vehicle for the Tierra Bomba project.[38] The project involved the construction of a resort consisting of an 80-room hotel, a residential complex with 80 apartments, 110 cabana units, as well as several special amenities.[39] Despite the construction being scheduled to commence in April 2018 or in 2020 and the operations in January 2020 or in August 2022,[40] the Tierra Bomba project was delayed by seven months. The project was not realized.

195. *Second*, on 22 December 2015, Royal Realty and other investors entered into a sale-purchase agreement with the owner of two lots of land with the declared value of COP 35 million in Santa Fé de Antioquia.[41] Before purchasing the land, Mr. Seda commissioned a title study of the land conducted by Rodríguez Azuero at Contexto Legal, that found the property to be unencumbered.[42] The Santa Fé de Antioquia project was planned as a mixed-development project comprising a 250-room apart-hotel and 180 residential lots

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35 Exhibit C-101, Management Contract between Luxé by The Charlee S.A.S. and Royal Realty S.A.S., 21 March 2013.

36 Claimants' Memorial, ¶ 51.

37 First BRG Expert Report, 15 June 2020, ¶ 61.

38 Exhibits C-112 to C-117, RDP Cartagena S.A.S. Investment Agreement with several investors, 1 September 2013.

39 Claimants' Memorial, ¶ 107; First Seda Witness Statement, ¶ 31.

40 Claimants' Memorial, ¶ 108; First Seda Witness Statement, ¶ 31.

41 Exhibit C-146, Land Transfer Deed between Royal Realty S.A.S., Monica Betancur Cano, Nicolás Fernando Serna Navarro and Paola Andrea Serna Díez, 22 December 2015.

42 Exhibit C-144, Santa Fe title Study by Rodríguez Azuero Contexto Legal, 30 November 2015.

with waterfront views over the Cauca River.[43] Pre-sales for the project were expected in June 2017, so that construction could begin in 2018 and operations in mid-2019.[44] The project was not realized.

196. *Third*, Mr. Seda planned another mixed commercial, residential, and hotel development project, the 450 Heights project, comprising 100 hotel rooms, 83 condominium units, 300 luxury suites, 140 commercial units, 61 residential properties and other amenities.[45] For the realization of the project, Mr. Seda incorporated Interpalmas S.A.S. as an investment vehicle on 13 March 2013.[46] Construction of the 450 Heights project was planned to take 12 to 18 months after the end of 2017.[47] Nonetheless, pre-sales had a delay of 34 months and the project was never realized.[48]

III. Meritage Claimants' Decision to Invest in the Meritage Project

1. Meritage Project

197. The Meritage Project was planned as a large mixed-use project consisting of a luxury hotel with long-term stay hotel suites, residential apartments, single-family homes, and commercial storefronts.[49]

198. Conception of the Meritage Project started in 2012 with the identification of the Meritage property.[50]

2. Identification of the Meritage Property

199. Mr. Seda identified a 56-hectare lot of land in El Perico, municipality of Envigado registered under the number 001-930485 along the Las Palmas Highway connecting Medellín and the international airport ("**Meritage Property**"), which he considered a suitable location for this project due to its proximity to the airport and the relocation of a

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

44 First Seda Witness Statement, ¶ 35.

45 Exhibit C-068, 450 Heights Investment Brochure, p. SP-0004.

46 Exhibit C-138, Shareholder Ledger for Interpalmas S.A.S., 18 December 2014.

47 Claimants' Memorial, ¶ 115.

48 Exhibit BRG-001, Bambaci-Dellapiane Financial Model, "450H – Ph. 1 (m)."

49 First Seda Witness Statement, ¶ 38; Claimants' Memorial, ¶ 56.

50 Exhibit C-019, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012; Claimants' Memorial, ¶ 57.

tollbooth further from the city so that potential residents of the Meritage Property would not have to pay the toll.[51]

200. At that time, the Meritage Property belonged to La Palma Argentina S.A.S. ("**La Palma**"). On 1 November 2012, Mr. Seda, on behalf of his company, Royal Realty, entered into a Promise of Purchase Agreement pursuant to which La Palma was obliged to sell the Meritage Property to Royal Realty and Royal Realty acquired the option to purchase the Meritage Property for an overall minimum of COP 32 billion.[52]

3. Meritage Claimants' Due Diligence Procedures

201. In 2012, Mr. Seda learned from La Palma that the Meritage Property was unencumbered.[53] La Palma's representatives told Mr. Seda that, at the time of the purchase of the Meritage Property, La Palma had asked the Anti-Money Laundering and Asset Forfeiture Unit at the Attorney General's Office to confirm that the Meritage Property and its owners at the time were not part of any criminal or forfeiture proceeding or investigation. The result of this request was that the property and its sellers were not involved in any criminal investigation or action and / or forfeiture proceeding.[54]

202. Following the Promise of Purchase Agreement, Royal Realty as party to the contract had to appoint a fiduciary for the Meritage Project. Royal Realty chose Fiduciaria Corficolombiana S.A. ("**Corficolombiana**"), a subsidiary of GRUPO AVAL. On 5 July 2013, Royal Realty accepted Corficolombiana's proposal to provide its services as administrator of a real estate trust for the development of the Meritage Project.[55]

203. Corficolombiana directed Mr. Seda to conduct a title study of the Meritage Property and recommended Otero & Palacio as a law firm with significant experience in title studies.[56]

204. Thus, Otero & Palacio conducted a title study of the Meritage Property going back ten years in the property's ownership, as provided for in the Law 791 of 2002.[57] On

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51 Claimants' Memorial, ¶¶ 57-59.

52 Exhibit C-019, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012.

53 Claimants' Memorial, ¶ 60; Exhibit C-027, Letter from Elsa María Moyano Galvis to María Cecilia Uribe Quintero, 30 October 2007.

54 Exhibit C-027, Letter from Elsa María Moyano Galvis to María Cecilia Uribe Quintero, 30 October 2007.

55 Exhibit C-108, Letter from María Clara Quintero Ochoa to Laura Marcela Gómez Álvarez, 5 July 2013.

56 Claimants' Memorial, ¶ 65; First Seda Witness Statement, ¶ 49.

57 Exhibit C-030, Otero & Palacio Title Study and Supplement, 7 March and 23 July 2013; Exhibit C-078, Law No. 791 of 2002.

7 March 2013, Otero & Palacio issued its report, concluding the chain of title for the Meritage Property to be "*free of encumbrances, conditions subsequent and ownership restrictions.*"[58]

205. Additionally, Corficolombiana's external counsel, Francisco Sintura Varela, submitted a formal request seeking information from the Anti-Money Laundering and Asset Forfeiture Unit at the Attorney General's Office regarding inquiries, investigations, or criminal procedures concerning individuals who hold the positions of managers, assistant managers, legal representatives, members of the board of directors and shareholders of legal entities, as former or current owners of the Meritage Property.[59] On 9 September 2013, the Attorney General's Office responded to Corficolombiana's request acknowledging that it had no record of criminal cases or investigations against the property or the people or entities appeared in the chain of title of the Meritage Property.[60]

4. Establishment of Newport as an Investment Vehicle

206. On 23 September 2009, Mr. Seda established Newport as an investment vehicle for the development of the Meritage Project. As it was Royal Realty that had legally acted in terms of the Meritage Project, Mr. Seda assigned Royal Realty's rights under the Promise of Purchase Agreement with La Palma to Newport on 9 May 2013.[61] Newport would be the owner and developer of the Project, Royal Realty would assist in the development and run operations once construction would be finished.[62] Consequently, on 3 December 2013, Newport and Royal Realty entered into a management contract.[63]

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58 Exhibit C-030, Otero & Palacio Title Study and Supplement, 7 March and 23 July 2013, p. SP-0003.

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

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

61 Exhibit C-103, Agreement between Royal Realty S.A.S. and La Palma Argentina Y CIA. LTDA, 9 May 2013.

62 Claimants' Memorial, ¶ 75.

63 Exhibit C-120, Management Contract between Newport S.A.S. and Royal Realty S.A.S., 3 December 2013.

207. On 10 May 2013, Meritage Claimants and Royal Realty entered into shareholding agreements.[64] On 30 March 2016, Meritage Claimants acquired shares in Newport directly.[65]

5. Beginning of the Development and Structure of the Meritage Project

208. After having identified the Meritage Property as a suitable land plot and having entered into shareholding agreements with the Meritage Claimants, it was necessary to establish a trust, as required by the terms of the Promise to Purchase Agreement.[66]

209. Based on Royal Realty's acceptance of Corficolombiana's proposal in terms of the establishment of the required trust dated 5 July 2013, on 17 October 2013, Newport and Corficolombiana entered into a trust agreement setting up a trust structure to manage the development of the Meritage Project ("**Meritage Trust**").[67] The Meritage Trust consisted of two Agreements: (i) the Presales Trust Agreement[68] and (ii) the Administration and Payment Trust Agreement.[69]

210. The purpose of the Meritage Trust was to manage the funds received from third-party buyers of commercial and residential units ("**Unit Buyers**") and the disbursement of those to Newport for the development of the Meritage Project.[70] Following its purpose, funds received from Unit Buyers into the Presales Trust would be transferred on the basis of separate trust agreements between the latter and Corficolombiana, as a trustee.[71] As soon as Newport met certain milestones, such funds would be managed by the Administration and Payment Trust Agreement and disbursed to Newport, as the beneficiary.[72] The

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

65 Exhibit C-227, Newport S.A.S. Share Ledger, 15 January 2019, pp. SP-0004, SP-0005, SP-0008.

66 Exhibit C-019, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, p. SP-0006.

67 Exhibit C-028, Administration and Payment Trust Agreement and Amendments, 17 October 2013.

68 Exhibit C-034, Presales Trust Agreement, 17 October 2013.

69 Exhibit C-028, Administration and Payment Trust Agreement and Amendments, 17 October 2013.

70 Exhibit C-028, Administration and Payment Trust Agreement and Amendments, 17 October 2013; Exhibit C-034, Presales Trust Agreement, 17 October 2013.

71 Exhibit C-034, Presales Trust Agreement, 17 October 2013.

72 Exhibit C-028, Administration and Payment Trust Agreement and Amendments, 17 October 2013.

Administration and Payment Trust Agreement was amended four times during the development of the Meritage Project.[73]

211. Additionally, on 25 November 2014, Newport, Corficolombiana and La Palma signed (iii) the third trust agreement to govern title to the Meritage Property ("**Parqueo Agreement**" or "**Meritage La Palma Trust Agreement**").[74] According to the Parqueo Agreement, La Palma, as the owner of the Meritage Property, would transfer title to the latter in trust to Corficolombiana, as trustee, that should in the end parcel and transfer title to the Meritage Property to the beneficiary, Newport, developing the Meritage Project.[75] The Meritage La Palma Trust should, upon fulfilment of certain conditions, transfer through Newport parcels of the title to the Meritage Property to the Meritage Trust.[76] According to the Presales Trust Agreement, this parceled transfer of the title was a condition precedent for Corficolombiana to disburse the funds to Newport.[77] The Parqueo Agreement was amended on 6 February 2015 by replacing Newport as the beneficiary of the trust through La Palma.[78]

212. On 12 February 2015, Deed No. 361 was established.[79] In accordance with Deed No. 361, La Palma transferred to Corficolombiana, in its capacity as the trustee of the Parqueo Trust, the right of ownership over the Meritage Property.[80] Additionally, Corficolombiana, in its capacity as the trustee of the Parqueo Trust, transferred to the Meritage Trust the parcel of the Meritage Property necessary to develop phases 1 to 6 of the Meritage Property.[81]

213. In early 2015, Newport began construction of phases 1 to 6 of the Meritage Project.[82]

6. Iván López Vanegas' Relationship with Mr. Seda and the Meritage Project

214. According to Mr. Seda, Mr. Iván López Vanegas contacted Mr. Seda in early 2014 and continued contacting him during 2015 alleging he was the rightful owner of the Meritage

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73 Claimants' Memorial, ¶ 82.

74 Exhibit C-029, Parqueo Trust Agreement and Amendment, 25 November 2014.

75 Exhibit C-029, Parqueo Trust Agreement and Amendment, 25 November 2014.

76 Exhibit C-029, Parqueo Trust Agreement and Amendment, 25 November 2014, cl. 3.3.

77 Exhibit C-029, Parqueo Trust Agreement and Amendment, 25 November 2014, cl. 3.3.

78 Exhibit C-029, Parqueo Trust Agreement and Amendment, 25 November 2014, p. SP-0024.

79 Exhibit C-140, Deed No. 361, 12 February 2015.

80 Exhibit C-140, Deed No. 361, 12 February 2015, cl. 1, pp. SP-0001-SP-0009.

81 Exhibit C-140, Deed No. 361, 12 February 2015, Transaction 3, pp. SP-0038-SP-0051.

82 Claimants' Memorial, ¶ 92.

Property.[83] He purportedly urged Mr. Seda to "go away" and not to interfere with the Meritage Property.[84]

215. A letter from Mr. Víctor Mosquera, Mr. Iván López' lawyer, to Mr. Seda, dated 7 April 2016 claimed that Mr. López remains the legitimate owner of the land on which the Meritage Property is located and that title studies conducted by Mr. Mosquera's office confirm this result as well as several deeds proving the transfer of title to the property.[85] Mr. Mosquera further invited Mr. Seda to a meeting to negotiate the matter at stake; nonetheless, Mr. Seda did not send any reply to the letter at first.[86]

216. Mr. Mosquera reiterated his invitation by email on 27 April 2016 and proposed a meeting with Mr. Seda and his lawyers in Washington, D.C. referring to the first letter dated 7 April 2016.[87] On 3 May 2016, Mr. Seda agreed to meet Mr. Mosquera, but in Medellín or Bogotá – and not in Washington, D.C.[88] Nevertheless, the meeting could not take place as Mr. Mosquera informed Mr. Seda on the same day that Mr. Mosquera's client wanted him to proceed with his defense and that an amicable solution could no longer be reached.[89]

217. In parallel, on 8 April 2016, a property forfeiture investigation into the Meritage Property, which was part of a case involving properties linked to Héctor Javier Restrepo Santamaría, a member of the criminal organization *Oficina de Envigado*, which was first assigned to Prosecutor No. 37 was re-assigned to Prosecutor No. 44, Ms. Alejandra Ardila Polo.[90]

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83 Claimants' Memorial, ¶ 85; Respondent's Counter-Memorial, ¶ 94.

84 Claimants' Memorial, ¶ 85; Respondent's Counter-Memorial, ¶ 94.

85 Exhibit C-151, Letter from Víctor Mosquera Marín to Angel Samuel Seda, 7 April 2016.

86 Exhibit C-151, Letter from Víctor Mosquera Marín to Angel Samuel Seda, 7 April 2016; Respondent's Counter-Memorial, ¶ 96; Claimants' Memorial, ¶ 119.

87 Exhibit C-156, Email from Víctor Mosquera Marín to Angel Seda and J. Evans, attaching Letter from Víctor Mosquera Marín to James Evans and Letter from Víctor Mosquera Marín to Angel Samuel Seda, 27 April 2016.

88 Exhibit C-157, Email chain between Víctor Mosquera Marín and Angel Seda, 3 May 2016.

89 Exhibit C-157, Email chain between Víctor Mosquera Marín and Angel Seda, 3 May 2016.

90 Claimants' Memorial, ¶¶ 102, 120, 121; Respondent's Counter-Memorial, ¶ 107; Exhibit R-206, Asset Forfeiture Proceedings File No. 13641, Annex Folder No. 3; Exhibit R-207, Asset Forfeiture Proceedings File No. 13641, Annex Folder No. 4.

IV. Attorney General's Asset Forfeiture Proceedings

218. The Asset Forfeiture Proceedings involving the Meritage Property commenced as a result of an investigation into properties linked to Héctor Javier Restrepo Santamaría conducted by Prosecutor 37. Shortly after, in an unrelated action, Mr. Iván López Vanegas filed a criminal complaint before the Attorney General's Office that would eventually lead to a separate investigation specifically into the Meritage Property.

1. Asset Forfeiture Law

219. During the 1980s and early 1990s, the Colombian National Constituent Assembly enshrined in the Colombian Constitution the courts' right to authorize forfeiture of assets acquired through illicit enrichment. This constitutional provision was later elaborated upon through a series of legislative measures culminating in Law 1708 of 2014 ("**Asset Forfeiture Law**"), which sets out a comprehensive regulation of the asset forfeiture process in Colombia, including definitions, applicable procedures, the grounds on which asset forfeiture may proceed and fundamental guarantees for parties.[91]

220. Article 16 of the Asset Forfeiture Law states 11 grounds for the declaration of forfeiture stemming either from unlawful origin of the asset or its unlawful disposition.[92] Asset forfeitures under the Asset Forfeiture Law proceed in two phases: (i) the "Initial Phase" consists of the investigation and initiation of the proceedings by the Attorney General's Office; and (ii) the "Trial Phase" in front of a court.[93] Article 7 of the Asset Forfeiture Law provides for a presumption of good faith "*in all legal action or transaction related to the acquisition or use of the assets, as long as the titleholder proceeds in a diligent and prudent manner, without any fault.*"[94]

2. Iván López Vanegas' Complaint to the Attorney General's Office

221. On 16 June 2014, at the request of the Anti-Narcotics Department of Colombia's National Police, the Attorney General's Office opened an investigation into properties linked to

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91 Claimants' Memorial, ¶ 140; *see* Exhibit C-003, Law No. 1708, 20 January 2014 ("Asset Forfeiture Law"); Appendix E to Claimants' Memorial.

92 Exhibit C-003, Asset Forfeiture Law, Art. 16.

93 *See* Exhibit C-003, Asset Forfeiture Law; Appendix E to Claimants' Memorial.

94 Exhibit C-003, Asset Forfeiture Law, Art. 7.

Héctor Javier Restrepo Santamaría.[95] The file was assigned to Prosecutor 37 on Asset Forfeiture.

222. On 3 July 2014, Mr. Iván López Vanegas filed a formal criminal complaint with Prosecutor No. 24 of the Organized Crime Unit of the Attorney General's Office in Bogotá claiming that he was the rightful owner of the Meritage Property.[96] He claimed that he had formerly participated in drug trafficking and that his son, Sebastián López Betancur, had been kidnapped by members of a drug cartel, *Oficina de Envigado*, who forced him to sign over ownership of the Meritage Property. At that time, the Meritage Property was allegedly held by himself, Mr. Iván López Vanegas.[97] Mr. López Vanegas named Mr. Restrepo Santamaría as the one who had "negotiated" successive sales of the Meritage Property following López Betancur's alleged kidnapping.[98]

223. Prosecutor No. 37 instructed the National Police to gather information on any proceedings involving Mr. Restrepo Santamaría. Pursuant to this order, in August 2014, the Judicial Police met with Prosecutor 24 who informed it of López Vanegas's criminal complaint. Prosecutor 24 then provided Prosecutor 37 a complete copy of the record of her investigation.[99]

224. On 6 May 2016, Mr. Iván López filed a constitutional protection action (*Acción de Tutela*) before the Bogotá Superior Court, alleging that in nearly two years since he filed his criminal complaint, the Attorney General's Office Organized Crime Unit had taken no action.[100] As defendants in this action, Mr. Iván López Vanegas named Prosecutor No. 24 of the Attorney General's Office Organized Crime Unit, La Palma, Corficolombiana, and Royal Realty,[101] later followed by Newport and Prosecutor 37 of the Attorney General's Office Asset Forfeiture Unit.[102]

225. On 23 May 2016, the Bogotá Superior Court issued its ruling regarding Mr. Iván López' constitutional protection action finding that the action was inadmissible against La Palma,

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95 Exhibit R-206, Asset Forfeiture Proceedings File No. 13641, Annex Folder No. 3, pp. 106, 189; Exhibit R-207, Asset Forfeiture Proceedings File No. 13641, Annex Folder No. 4, p. 109.

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

97 Exhibit C-130, Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014, p. SP-0002.

98 Exhibit C-130, Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014, p. SP-0004.

99 Exhibit R-207, Asset Forfeiture Proceedings File No. 13641, Annex Folder No. 4, p. 109, Exhibit C-133, Judicial Police Report to Prosecutor 37, 4 September 2014.

100 Exhibit C-037, López Vanegas Tutela Action, 6 May 2016.

101 Exhibit C-037, López Vanegas Tutela Action, 6 May 2016, p. SP-0001.

102 Exhibit C-039, Decision on López Vanegas Tutela Action, 23 May 2016, p. SP-0001.

Corficolombiana, and Royal Realty.[103] Moreover, the court found that the alleged kidnapping and further criminal conduct were to be treated separately from the asset forfeiture part of his complaint.[104] As far as the asset forfeiture part is concerned, the decision states that the Attorney General's Office Asset Forfeiture Unit did not violate Mr. López' fundamental rights under the Colombian Constitution, as the asset forfeiture proceedings were in an initial phase and investigations were still ongoing, and that in this stage proceedings were closed to the public by law.[105] Regarding the criminal aspects of the complaint, the court ruled that it was insufficient for the Organized Crime Unit to only send copies of the complaint to the Asset Forfeiture Unit.[106] As a result, the court ordered the Organized Crime Unit to determine within 15 calendar days whether to open an investigation into the alleged criminal conduct described in Mr. López' complaint.[107]

3. Initial Phase of the Asset Forfeiture Proceedings

226. The initial phase of the Asset Forfeiture Proceedings formally commenced on 8 April 2016 when the Asset Forfeiture Unit of the Attorney General's Office assigned the matter to Prosecutor No. 44, Ms. Alejandra Ardila Polo, and requested her to conduct further research regarding the assets claimed by Mr. Iván López.[108]

227. Accordingly, on 18 April 2016, the Asset Forfeiture Unit of the Attorney General's Office decreed the opening of the initial phase of the Asset Forfeiture Proceedings under Articles 17 and 18 of the Asset Forfeiture Law and launched the investigation.[109]

228. The investigation conducted during the initial phase of the Asset Forfeiture Proceedings comprised the retrieval of information from several private and public entities, including the Superintendence of Notary and Registry and the Chamber of Commerce of Aburrá Sur of Medellín, regarding the ownership history of the Meritage Property.[110] One element was an analysis of the Meritage Property deeds in order to spot potential

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103 Exhibit C-039, Decision on López Vanegas Tutela Action, 23 May 2016, p. SP-0013.

104 Exhibit C-039, Decision on López Vanegas Tutela Action, 23 May 2016, p. SP-0009.

105 Exhibit C-039, Decision on López Vanegas Tutela Action, 23 May 2016, pp. SP-0010-SP-0011.

106 Exhibit C-039, Decision on López Vanegas Tutela Action, 23 May 2016, p. SP-0010.

107 Exhibit C-039, Decision on López Vanegas Tutela Action, 23 May 2016, pp. SP-0010, SP-0013.

108 Exhibit C-153, Attorney General's Office Resolution No. 125, 18 April 2016.

109 Exhibit C-022, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016.

110 Respondent's Counter-Memorial, ¶ 155; Exhibit C-022, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016.

irregularities of the property transfer.[111] This analysis revealed a number of irregularities in terms of signatures, formalities, and legal representation.[112] Another element was conducting research into the companies involved in the transfer of the Meritage Property in the past and into the *Oficina de Envigado*.[113]

229. As a result of the irregularities uncovered during the investigations, on 22 July 2016, the Asset Forfeiture Unit of the Attorney General's Office suspended, as a precautionary measure, the right to transfer the Meritage Property's title and attached and seized the property, placing it under the custody and management of the Sociedad de Activos Especiales, a State entity, thereby freezing all of the Meritage's business and investment activities.[114]

4. Precautionary Measures on the Meritage Project

230. The above-mentioned precautionary measures authorized on 22 July 2016 formally took effect on 3 August 2016 when Ms. Ardila from the Asset Forfeiture Unit of the Attorney General's Office arrived at the Meritage Property and posted a seizure notice on the property.[115]

231. The basis for the imposition of such precautionary measures stated by the Attorney General's Office was a reasonable inference of the "illicit origins" of the property based on the evidence gathered during the investigation that the Meritage Property had been subject to a series of irregular property transfers; and the stated purpose was to prevent further property transfers and unrelated parties (Unit Buyers) from continuing to purchase lots.[116]

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111 Exhibit C-022, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016.

112 Exhibit C-022, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016.

113 Exhibit C-023, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017.

114 Exhibit C-022, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016.

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

116 Exhibit C-022, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, pp. SP-0069 and SP-0071.

5. Challenges to the Precautionary Measures

232. On 26 September 2016, Corficolombiana challenged the imposed precautionary measures by filing a request for legality control pursuant to Article 111 of the Asset Forfeiture Law before the First Criminal Court of the Specialized Circuit for Asset Forfeiture of Antioquia ("**First Criminal Court**").[117] Corficolombiana substantiated its request by its alleged status of a good faith buyer of the Meritage Property, by arguing the measures to be unnecessary, unreasonable, disproportional, and not adequately tied to a compelling State interest.[118]

233. On 20 October 2016, the First Criminal Court rendered a decision on the challenge filed by Corficolombiana upholding the legality of the precautionary measures.[119] The First Criminal Court decided that the Attorney General's Office, more specifically Prosecutor 44, had duly motivated the imposition of the precautionary measures.[120]

234. On 26 October 2016, Corficolombiana appealed the First Criminal Court's decision before the Bogotá Superior Court, Asset Forfeiture Chamber.[121] Ultimately, on 21 February 2017, Corficolombiana's appeal was rejected as the Bogotá Superior Court held that the Attorney General's Office duly complied with Article 250 of the Colombian Constitution and Articles 29, 34, 87, 88, 112, 158 and 159 of the Asset Forfeiture Law in imposing the precautionary measures.[122]

235. On 7 December 2016, Newport directly requested the Asset Forfeiture Unit to recognize its status as a good faith third party without fault.[123] As the request remained unanswered, Newport further supplemented it on 14 December 2016.[124]

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117 Exhibit C-043, Corficolombiana's Control of Legality Petition, 26 September 2016.

118 Exhibit C-043, Corficolombiana's Control of Legality Petition, 26 September 2016.

119 Exhibit C-044, Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016.

120 Exhibit C-044, Decision by Asset Forfeiture Court on Corficolombiana's Control of Legality Petition, 20 October 2016.

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

122 Exhibit C-047, Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017.

123 Exhibit C-048, Newport's First Petition to Attorney General's Office Asset Forfeiture Unit, 7 December 2017. Colombian Asset Forfeiture Law distinguishes between simple good faith and good faith without fault or qualified good faith, which imposes a higher standard.

124 Exhibit C-049, Newport's Supplement to Petition to Attorney General's Office Asset Forfeiture Unit, 14 December 2016.

236. On 23 January 2017, Newport filed another request to the Attorney General's Office, this time asking the latter to set aside the precautionary measures on the grounds that more than six months had elapsed since their imposition, contrary to the six-months-limitation for the determination of the claim provided for in Article 89 of the Asset Forfeiture Law.[125]

237. Separately, Mr. Seda met with officials of the Anticorruption Unit of the Attorney General's Office early in December 2016 and, following their advice, he filed a formal criminal complaint to the Attorney General's Office on 19 December 2016 against Iván López Vanegas for alleged extorsion and implicating Prosecutor 44, Ms. Ardila Polo, because of the precautionary measures imposed.[126]

6. Provisional Determination of Claim

238. Pursuant to Article 126 of the Asset Forfeiture Law, on 25 January 2017 the Attorney General's Office issued a Provisional Determination of Claim.[127]

239. A Provisional Determination of Claim requires the proof of (i) the existence of at least one of the grounds provided for in Article 16 of the Asset Forfeiture Law; (ii) the existence of assets to which these grounds apply; and (iii) an unjustifiable increase in wealth.[128]

240. For the case at hand, the Attorney General's Office named the following applicable grounds pursuant to Article 16 of the Asset Forfeiture Law: (i) the assets were a direct or indirect product of an illicit activity; (ii) the provenance of the assets is the legal or physical transformation or the partial or total conversion, of material products, instruments or objects of illicit activities; and (iii) those assets form part of an unjustifiable increase in wealth.[129] These grounds were substantiated by the Attorney

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125 Exhibit C-050, Newport's Third Petition to Attorney General's Office Asset Forfeiture Unit, 23 January 2017.

126 Exhibit C-181, A. Seda Complaint to Fiscalía General, 19 December 2016.

127 Exhibit C-023, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017.

128 Exhibit C-023, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017.

129 Exhibit C-023, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017.

General's findings made during the course of the Asset Forfeiture Investigation up until that time.[130]

241. On 9 March 2017, Newport challenged the Provisional Determination of Claim by sending a letter to the Attorney General's Office. In this letter, Newport stated that it had legitimately acquired the property in good faith and that the Provisional Determination of Claim failed to adequately evaluate Newport's evidence in this respect.[131]

7. Newport's *Tutela* Action

242. On 17 February 2017, Newport filed a *Tutela* Action before the Supreme Court of Justice, Criminal Chamber to order the Asset Forfeiture Unit to respond to Newport's petitions of 7 December 2016, 14 December 2016, and 23 January 2017 regarding its status as good faith third party and the request to lift the precautionary measures.[132]

243. On 28 February 2017, the Supreme Court of Justice ruled on Newport's *Tutela* Action finding that the Attorney General's Office Asset Forfeiture Unit had violated Newport's fundamental rights guaranteed under the Colombian Constitution, specifically the right of access to justice and due process, by failing to answer Newport's petitions.[133] As a consequence, the court ordered the Attorney General's Office to provide a response to Newport's petitions.[134]

244. On 4 March 2017, the Attorney General's Office denied Newport's petitions concluding that it was not the appropriate stage of the proceedings to make that determination. The Attorney General's Office stated that the evidence gathered during the initial phase of the investigation allowed it to reasonably infer that Newport could not be considered a good faith third-party buyer, having concluded that Newport had failed to exercise the required due diligence in the acquisition of the Meritage Property, as reasoned in the Provisional Determination of Claim.[135] The Attorney General's Office quoted relevant passages from

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130 Exhibit C-023, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, pp. SP-0116 – SP-0130.

131 Exhibit C-055, Newport's Opposition to Determination of the Claim, 9 March 2017.

132 Exhibit C-052, Newport Tutela Action, 17 February 2017, pp. SP-0014 – SP-0015.

133 Exhibit C-053, Decision on Newport's Tutela Action, 28 February 2017, pp. SP-0018 – SP-0020.

134 Exhibit C-053, Decision on Newport's Tutela Action, 28 February 2017, pp. SP-0019 – SP-0020.

135 Exhibit C-054, Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017, pp. SP-0002 – SP-0003.

the Provisional Determination of Claim regarding Mr. López Vanegas' criminal history, Mr. Restrepo Santamaría's involvement and the series of irregular property transfers.[136]

8. Attorney General's Formal Request for Asset Forfeiture

245. On 5 April 2017, pursuant to Articles 131 and 132 of the Asset Forfeiture Law, the Attorney General's Office filed a formal request for asset forfeiture with the Circuit Criminal Court Specializing in Asset Forfeiture.[137] In this request, the court was formally asked to commence the trial phase of the Asset Forfeiture Proceedings.[138] At that time the case had been reassigned to Prosecutor 53, José Iván Caro Gómez, who filed the formal request.

246. In its request, the Attorney General's Office explained that Corficolombiana lacked status as good faith buyer of the property on which the Meritage Project was built. *First*, the Attorney General's Office explained the illicit background of the relevant property.[139] *Second*, the Attorney General's Office stated that Corficolombiana only conducted a title study going back ten years in the title history whereas it would have had to go back to 1994.[140] If Corficolombiana had done so, it would have recognized the property's illicit background and its connection to Mr. Iván López Vanegas.[141] *Third*, Corficolombiana could not rely on the Attorney General's Office letters regarding the non-existence of criminal or asset forfeiture proceedings at one point in time.[142] Furthermore, those letters could not prevent the Attorney General's Office from conducting investigations as a result of new findings in terms of the illicit background of the property concerned.[143]

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136 Exhibit C-054, Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017, pp. SP-0002 – SP-0003.

137 Exhibit C-024, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017.

138 Exhibit C-024, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, p. SP-0010.

139 Exhibit C-024, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017.

140 Exhibit C-024, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017.

141 Exhibit C-024, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017.

142 Exhibit C-024, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017.

143 Exhibit C-024, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017.

247. On 18 April 2018, the Second Criminal Court Specialized in Asset Forfeiture found that the Attorney General's request was defective, because it had neither properly identified nor provided the exact location of the Meritage Property, and dismissed the request. The Court gave the Attorney General's Office five days to correct the petition.[144] On 7 May 2018, the Court rejected the request for asset forfeiture because the Attorney General's Office had not remedied the deficiencies in time, but it preserved its right to correct and renew the request as there is no statute of limitations on asset forfeiture actions.[145]

248. On 25 May 2018, the Attorney General's Office renewed its request for asset forfeiture.[146]

249. On 5 October 2018, Newport submitted a petition to the Second Criminal Court Specialized in Asset Forfeiture by which it presented evidence and asked the court to admit testimonial evidence.

9. The Second Criminal Court's *Avocamiento* Order

250. On 17 August 2017, the Second Criminal Court Specialized in Asset Forfeiture rendered an *Avocamiento* Order.[147]

251. Pursuant to Article 137 of the Asset Forfeiture Law, an *Avocamiento* Order must be issued by the court after it has received the formal request for asset forfeiture in order to confirm its jurisdiction over the asset forfeiture in question by the means of an order to proceed.[148]

252. In its *Avocamiento* Order, the court analyzed who has standing in the Asset Forfeiture Proceedings as an affected party under the Asset Forfeiture Law.[149] Referring to Article 30 of the Asset Forfeiture Law, the court found that Newport was not an affected party. The court concluded that Newport did not hold any right over the Meritage Property since it withdrew as a party from the Parqueo Trust on 6 February 2015 and relinquished its position as the beneficiary of the trust agreement via a private document before the deed transferring the title to the Meritage Property was established.[150] The court acknowledged that Newport had personal rights *vis-à-vis* La Palma, but determined that these were

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144 Exhibit C-058, Asset Forfeiture Court Decision on First Requerimiento, 7 May 2018.

145 Exhibit C-058, Asset Forfeiture Court Decision on First Requerimiento, 7 May 2018.

146 Exhibit C-059, Attorney General's Office, Amended Requerimiento, 25 May 2018.

147 Exhibit C-057, Asset Forfeiture Court *Avocamiento* Order, 17 August 2017.

148 Exhibit C-003, Asset Forfeiture Law, Art. 137.

149 Exhibit C-057, Asset Forfeiture Court *Avocamiento* Order, 17 August 2017.

150 Exhibit C-057, Asset Forfeiture Court *Avocamiento* Order, 17 August 2017, pp. SP-0059-SP-0060.

insufficient to confer to Newport the quality of an affected party in the Asset Forfeiture Proceedings.[151]

253. On 24 August 2017, Newport filed an appeal against the *Avocamiento* Order stating that it had rights as beneficiary of the Meritage Trust and that the relevant lots had already been transferred to Meritage Trust by the time of the court's decision.[152] On 11 September 2017, Newport supplemented its appeal with further details.[153] Newport's appeal became moot when the Second Criminal Court Specialized in Asset Forfeiture dismissed the Attorney General's request for asset forfeiture on 17 May 2018.

10. Commencement of the Asset Forfeiture Trial

254. On 12 December 2018, the amended request for asset forfeiture was rejected by the Second Criminal Court Specialized in Asset Forfeiture, due to, again, the lack of precise description and identification of the relevant property.[154]

255. On 19 December 2018, the Attorney General's Office filed a second amended request for asset forfeiture.[155]

256. Finally, on 14 June 2019, the Second Criminal Court Specialized in Asset Forfeiture accepted the second amended request for asset forfeiture and, thus, declared the formal beginning of the Asset Forfeiture Proceedings.[156] In that same decision, the Court again denied Newport standing in the trial proceedings.[157] As a result, Newport filed an appeal against this decision.[158]

257. On 22 April 2022, the Special Chamber for Asset Forfeiture of the Superior Tribunal issued an order by which, *inter alia*, it upheld Newport's appeal, allowing full participation in the Asset Forfeiture Proceedings.[159]

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151 Exhibit C-057, Asset Forfeiture Court *Avocamiento* Order, 17 August 2017.

152 Exhibit C-195, Newport's Appeal Against the *Avocamiento* Order, 24 August 2017.

153 Exhibit C-196, Newport's Memorial complementing Its Appeal, 11 September 2017.

154 Exhibit C-060, Asset Forfeiture Court Decision on Amended Requerimiento, 12 December 2018.

155 Exhibit C-056, Second Amended Requerimiento, 19 December 2018.

156 Exhibit C-236, Specialized Asset Forfeiture Court's Decision on Amended Requerimiento, 14 June 2019.

157 Exhibit C-236, Specialized Asset Forfeiture Court's Decision on Amended Requerimiento, 14 June 2019, p. SP-0328.

158 Exhibit C-237, Newport's Appeal Against Decision to Accept Corrected Requerimiento, 20 June 2019.

159 Parties' Email to the Tribunal of 5 May 2023.

258. On 19 May 2022, Prosecutor Caro requested leave to file supervening evidence. The Court granted this request by its Order of 27 May 2022.[160]

259. On 3 June 2022, Newport filed a writ of reconsideration and, in the alternative, an appeal of the Court's Order of 27 May 2022. Newport also requested the annulment of the Asset Forfeiture Proceedings, as of the provisional determination of claim issued by Prosecutor Ardila on 25 January 2017, on the basis that Newport should have had the opportunity to defend itself from the beginning of the proceedings as an affected party. Newport requested that the Court suspend the Proceedings pending the appeal, since "*the burden that moving forward with the proceedings would cause should be avoided, given that it is possible that the proceedings be declared null and other judicial steps of particular importance may be thus invalidated, such as the collection of evidence.*" Newport's request to suspend the Asset Forfeiture Proceedings pending its appeal was rejected.[161]

260. By Order of 7 July 2022, the Court upheld its Order of 27 May 2022 admitting Prosecutor Caro's evidence. Accordingly, on 15 July 2022, Newport's appeal was remanded to the Superior Tribunal of Bogotá for further action (without staying the proceedings), pursuant to Articles 65(3) and 66 of the Asset Forfeiture Law.[162]

261. As of May 2023, Newport's appeal proceedings are ongoing before the Superior Tribunal of Bogotá, while the evidentiary phase in the Asset Forfeiture Proceedings before the Second Specialized Court continues in parallel.[163] Between February and March 2024, an evidentiary hearing was held by the Second Specialized Court in the Asset Forfeiture Proceedings.[164]

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160 Parties' Email to the Tribunal of 5 May 2023.

161 Parties' Email to the Tribunal of 5 May 2023.

162 Parties' Email to the Tribunal of 5 May 2023.

163 Parties' Email to the Tribunal of 5 May 2023.

164 Respondent's Letter of 19 January 2024.

E. PARTIES' POSITIONS

262. In the following, the positions of the Parties as argued in their written submissions and during the Hearings will be summarized.

I. Summary of Claimants' Position and Relief Sought

263. Claimants submit that the essential security exception is not applicable in the present case (**1.**), that the Tribunal has jurisdiction over the present dispute (**2.**) and that Respondent committed several breaches of the TPA entitling Claimants to compensation and moral damages (**3.**).

1. Essential Security Exception

a) Invocation of Article 22.2(b) of the TPA by Respondent

264. Claimants submit that Respondent's belated invocation of the essential security interest exception under Article 22.2(b) of the TPA ("**Essential Security Exception**", "**ESI Provision**", or, as Claimants refer to it, "**New Defense**") violated Sections 14.2 and 14.3 of the PO1 and Arbitration Rule 26(3) and should therefore be dismissed on procedural grounds.[165] Claimants submit that Respondent was precluded from raising the New Defense with the Rejoinder since no "*new facts have arisen after the first exchange of submissions which justify new allegations of fact and/or legal arguments*" or "*special circumstances*" apply.[166] Moreover, the belated introduction of the New Defense compromises the principles of fairness and equality of arms between the Parties.[167]

265. Claimants submit that PO9 only permitted the Essential Security Exception as a jurisdictional objection – and its belated introduction by Respondent merits a dismissal.[168]

266. In any case, Claimants argue that the Essential Security Exception must be raised to protect an essential security interest at the time the measure is enacted, and the "*new*" facts cannot support invoking the exception since they did not exist (or the relevant

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165 Claimants' Application of 7 March 2022, ¶¶ 3, 13-16.

166 Claimants' Application of 7 March 2022, ¶¶ 17-22; Claimants' Preliminary Response to Colombia's New Essential Security Defense, 18 April 2022 ("**Claimants' Preliminary Response to Colombia's New Essential Security Defense**"), ¶¶ 37-44.

167 Claimants' Application of 7 March 2022, ¶¶ 23-26.

168 Claimants' Post-Hearing Brief, 21 July 2022 ("**Claimants' Post-Hearing Brief**"), ¶ 319.

Colombian authorities were not aware of them) at the time Respondent initiated the Asset Forfeiture Proceedings.[169]

267. According to Claimants, Respondent has not identified an essential security interest at the time of the application of the measures in question – but rather initiated the Asset Forfeiture Proceedings on different grounds – and now should not be allowed to retrospectively invoke Article 22.2(b) of the TPA.[170] In support of that, Claimants rely on the language of this article, which provides that a State cannot be precluded from imposing measures "*that it considers necessary*" (emphasis added) for the protection of the essential security interest.[171] Claimants submit that the U.S. treaty practice supports this conclusion.[172]

b) Effect of Article 22.2(b) of the TPA

268. Claimants cite the ordinary meaning of Article 22.2(b) of the TPA to argue that nothing in this provision prohibits the Tribunal to exercise jurisdiction over the dispute or limits Respondent's liability.[173]

269. Claimants note that Article 31(1) of the Vienna Convention on the Law of Treaties ("**VCLT**") should be applied to Article 22.2(b) of the TPA, which requires the Tribunal to interpret the TPA "*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*."[174]

270. Claimants argue that the ordinary meaning of the Article 22.2(b) of the TPA provides that the Tribunal merely cannot "*preclude*" Respondent from taking any measures it deems necessary to protect its essential security interests.[175] Referencing definitions from several English language dictionaries, Claimants submit that the plain meaning of

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169 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 45-72.

170 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 46-48.

171 Claimants' Rebuttal on Essential Security, 13 September 2022 ("**Claimants' Rebuttal on Essential Security**"), ¶ 9.

172 Claimants' Submission on U.S. Treaties and [redacted], 21 December 2022 ("**Claimants' Submission on U.S. Treaties and [redacted]**"), ¶¶ 11-23.

173 Claimants' Application of 7 March 2022, ¶¶ 27-30; Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 5.

174 Claimants' Post-Hearing Brief, ¶ 301; Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 7.

175 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 8-11; Claimants' Rebuttal on Essential Security, ¶¶ 14-16.

"*preclude*" is defined as "*prevent from happening*" or to "*make impossible.*"[176] This language entails no effect on the Tribunal's jurisdiction or Respondent's liability and merely excludes restitution or withdrawal of the measures from the scope of the available remedies.[177] Claimants submit that the footnote to Article 22 of the TPA does not change the scope of the provision.[178]

271. In support of this interpretation, Claimants reference the decision in *Eco Oro v. Colombia*, in which the tribunal held that where a State cannot be prohibited from enacting a measure, it does not mean "*payment of compensation is not required*."[179] Claimants further reject the case law cited by Respondent as inapposite.[180]

272. Claimants argue that the ordinary meaning of Article 22.2(b) of the TPA is supported by its context as well as the TPA's object and purpose:[181]

— Where the TPA intends to exclude or limit admissibility, jurisdiction, or liability, it does so explicitly, which is not the case in Article 22.2(b).[182] Citing Annex 5 to the India-Singapore Comprehensive Economic Cooperation Agreement, Claimants submit that "[t]*reaties that have excised the justiciability of disputes from arbitral tribunals' authority on the basis of essential security do so in an express manner.*"[183]

— In the present case, in contrast, the provision is only "*designed to ensure that the State is allowed to continue applying the measures in question.*"[184] Claimants rely on the fact that Article 22(b) of the TPA applies to the disputes under Chapters 10

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176 Claimants' Post-Hearing Brief, ¶ 301(a).

177 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 10, 16-17; Claimants' Submission on U.S. Treaties and [redacted], ¶¶ 25-34.

178 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 27-28.

179 Claimants' Post-Hearing Brief, ¶ 301(a); Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 11; 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.

180 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 30-32.

181 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 12-26; Claimants' Submission on U.S. Treaties and [redacted], ¶¶ 35-43.

182 Claimants' Rebuttal on Essential Security, ¶ 21.

183 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 21.

184 Claimants' Post-Hearing Brief, ¶ 301(b).

and 21, the latter covering primarily inter-State disputes, in which withdrawal of the breaching measure is the primary remedy.[185]

— Claimants submit that this interpretation, namely, giving the Tribunal jurisdiction to examine Respondent's invocation of Article 22.2(b) of the TPA, is consistent with the purpose of the TPA to "*promote economic development through free trade and increased foreign investment.*" According to Claimants, this necessitates a predictable legal and commercial framework for business and investment.[186] It is Claimants' submission that Mr. Seda's investments served as a "*rejuvenation*" of Medellín's economy and were an "*alternative to* [the] *drug-crop production*" – something Respondent sought to attract through the TPA.[187]

— Claimants reject Respondent's argument that the security exception restricts the Tribunal's jurisdiction because it is contained under the "*General Exceptions*" Chapter of the TPA. Claimants submit that Article 22.2(b) of the TPA serves as an exception to the general remedy of restitution, and that nothing in the "*General Exceptions*" Chapter or its title suggests a restriction on jurisdiction or liability.[188]

— Claimants further reject Respondent's submission that Article 10.2 of the TPA is applicable to the dispute in question. Article 10.2 provides 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.*" Claimants argue that there is no inconsistency between Article 22.2(b) and Chapter 10 of the TPA.[189]

273. Claimants accept Respondent's claim that Article 22.2(b) of the TPA is a self-judging provision. However, Claimants argue that the self-judging nature of Article 22.2(b) of the TPA only extends to Respondent's right to decide which measures it deems necessary to protect its essential security interests.[190] It does not automatically exempt Respondent from the liability to compensate Claimants if the measures taken nevertheless violated the protections given to investors under Chapter 10 of the TPA.[191]

274. Claimants object to Respondent's reliance on the *travaux préparatoires*, which purportedly showed an intention of the U.S. and Colombia to restrict a tribunal's

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185 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 13-15.

186 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 24-25.

187 Claimants Post-Hearing Brief, ¶ 301(c); Claimants' Rebuttal on Essential Security, ¶¶ 18-20.

188 Claimants Post-Hearing Brief, ¶ 301(b)(ii).

189 Claimants Post-Hearing Brief, ¶ 301(b)(iii); Claimants' Rebuttal on Essential Security, ¶ 22.

190 Claimants' Rebuttal on Essential Security, ¶ 17.

191 Claimants Post-Hearing Brief, ¶ 303.

jurisdiction after Article 22.2(b) of the TPA has been invoked. Claimants submit that reference to the *travaux* and the drafters' intentions is a supplementary means of interpretation under the VCLT and can only be applied where the ordinary meaning of the provision is either ambiguous or leads to unreasonable results.[192] As neither is the case for Article 22.2(b) of the TPA, Claimants argue that the *travaux* cannot be invoked, especially not to alter the ordinary meaning of the provision.[193] In any event, Claimants maintain that the *travaux* do not show any clear intention by the State parties to the TPA to absolve themselves of liability or preclude a tribunal's jurisdiction once Article 22.2(b) of the TPA is raised.[194]

275. Claimants further reject Respondent's submission that there has been a subsequent agreement by virtue of Article 31(3) of the VCLT between the State parties to the TPA on the interpretation of Article 22.2(b).[195] Claimants view such an agreement between Respondent, a Party to the present dispute, and the U.S., a non-party to the present dispute, as a violation of Claimants' due process rights. The *Infinito Gold v. Costa Rica* tribunal held that concurrent positions of parties and non-parties to the dispute are legal arguments and do not constitute a subsequent agreement in the sense of Article 31(3) of the VCLT.[196]

276. Claimants further argue that the TPA provides for a proper mechanism to render binding interpretations on its provisions through the Free Trade Commission. Thus far, the Free Trade Commission has not provided interpretations on Chapters 10 or 22, and any oral or written submissions by a non-disputing treaty party would not be binding on this Tribunal.[197]

277. Even if the Tribunal were to accept the interpretation as a subsequent agreement, Claimants submit that such agreement cannot be used to modify or amend the meaning of Article 22.2(b) of the TPA. Referencing the *Magyar v. Hungary*, *Eskosol v. Italy*, and *Muszynianka v. Slovakia* tribunals, Claimants argue that a subsequent agreement offers

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192 Claimants' Rebuttal on Essential Security, ¶¶ 24-26.

193 Claimants Post-Hearing Brief, ¶¶ 305-307.

194 Claimants' Post-Hearing Brief, ¶ 308; Claimants' Rebuttal on Essential Security, ¶¶ 27-29; Claimants' Submission on U.S. Treaties and [redacted] ¶¶ 44-45.

195 Claimants' Rebuttal on Essential Security, ¶¶ 30-31; Claimants' Submission on U.S. Treaties and [redacted], ¶¶ 46-49.

196 Claimants' Post-Hearing Brief, ¶ 310; Exhibit RL-207, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICISD Case No. ARB/14/5, Award, 3 June 2021.

197 Claimants' Post-Hearing Brief, ¶ 312.

but one interpretation which should be considered alongside the ordinary meaning of the provision, its context, as well as its object and purpose – rather than as a "*trump card.*"[198]

c) Scope of the Tribunal's Review

278. Claimants submit that, in any case, the Tribunal shall be empowered to review Respondent's invocation of the Essential Security Exception and the merits of it, *i.e.* conduct a good faith review.[199] To this end, Claimants argue that Respondent must exercise its discretionary powers "*reasonably and in good faith*" and in a manner that is "*timely and not* […] *arbitrary*", pursuant to the jurisprudence of the International Court of Justice ("**ICJ**").[200] Moreover, Article 26 of the VCLT requires that States perform their obligations under treaties in good faith.[201] Claimants submit that Respondent has itself admitted that the good faith review was appropriate before reserving its stance.[202]

279. Claimants provide that Respondent has not acted in good faith under a two-fold test.[203]

280. *First*, Claimants submit that Respondent failed to articulate its essential security interest in good faith, since it originally labelled the interest in fighting organized crime as a legitimate public welfare objective before re-labelling it to an essential security interest.[204]

281. *Second*, Claimants further argue that the Tribunal is allowed to review if there is a plausible or *prima facie* connection between the Asset Forfeiture Proceedings and Respondent's stated essential security interest, with Respondent bearing the burden of

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198 Claimants' Post-Hearing Brief, ¶¶ 313-315; Exhibit CL-168, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019; Exhibit RL-203, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020; Exhibit CL-245, *Muszynianka Spólka z Ograniczoną Odpowiedzialnością v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020.

199 Claimants' Post-Hearing Brief, ¶¶ 319-326; Claimants' Application of 7 March 2022, ¶ 31.

200 Claimants' Rebuttal on Essential Security, ¶ 32.

201 Claimants' Rebuttal on Essential Security, ¶ 32.

202 Claimants' Rebuttal on Essential Security, ¶ 32.

203 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 49-50; Claimants' Submission on U.S. Treaties and [redacted], ¶¶ 50-60.

204 Claimants' Post-Hearing Brief, ¶ 335; Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 51-56; Claimants' Rebuttal on Essential Security, ¶ 34.

proof in this respect.[205] [redacted]

[redacted]

282. Consequently, Claimants submit that Respondent "*cannot demonstrate any rational nexus between seizing the Meritage Property and its stated goal of* 'investigating' *or* 'sanctioning' *alleged* Oficina de Envigado *members.*"[212]

d) MFN Clause

283. Lastly, Claimants propose that the Tribunal shall be permitted to review the invocation of Article 22.2(b) of the TPA in connection with the Most Favored Nation ("**MFN**") clause contained in Article 10.4 of the TPA to ensure Claimants would be treated no less favorably than investors from a third State. Claimants submit that Swiss investors are

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205 Claimants' Post-Hearing Brief, ¶ 337; Claimants' Rebuttal on Essential Security, ¶ 34.

206 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 57-58.

207 Claimants' Post-Hearing Brief, ¶ 338; Claimants' Rebuttal on Essential Security, ¶¶ 38-43.

208 Claimants' Rebuttal on Essential Security, ¶ 35.

209 [redacted]

210 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 67; Claimants' Rebuttal on Essential Security, ¶ 44.

211 Claimants' Post-Hearing Brief, ¶ 346.

212 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 64.

owed similar protections under the Colombia-Swiss bilateral investment treaty ("**BIT**") as American investors under the TPA. However, Claimants provide that under the Colombia-Swiss BIT, Respondent "*does not have discretion to evade such protections on the basis of essential security interests.*"[213]

284. Claimants submit that application of Article 10.4 of the TPA does not concern dispute resolution and is instead a general exception to substantive obligations under the TPA.[214]

2. Jurisdiction

285. Claimants submit that the Tribunal has jurisdiction over the present dispute as the requirements of the TPA and Article 25 of the ICSID Convention are met.

a) Requirements of the TPA

286. The TPA requires Claimants to qualify as "*investor*[s]" and to have made a protected "*investment*" in Colombia.

287. *First*, Claimants contend that Angel Samuel Seda, Jonathan M. Foley, Justin T. Caruso, Stephen J. Bobeck, Brian Hass, Monte G. Adcock, and Justin T. Enbody qualify as investors pursuant to Article 10.28 of the TPA as they are all citizens of the United States who have made an "*investment*", which comprised a "*bundle of rights*" including: (i) shares in Newport, Luxé, and Royal Realty; (ii) management contracts between Royal Realty and Newport, and Royal Realty and Luxé; 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.[215]

288. Specifically, Claimants submit that:

- Mr. Seda is sole owner of Royal Realty[216] and holds 53,348,700 shares in Luxé through the latter as of 9 March 2018.[217] Royal Realty holds 914,282 shares in Newport as of 6 November 2018.[218]

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213 Claimants' Post-Hearing Brief, ¶ 350; Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 74-76.

214 Claimants' Rebuttal on Essential Security, ¶ 52.

215 Claimants' Memorial, ¶ 339; Claimants' Reply, ¶¶ 162, 164; Claimants' Post-Hearing Brief, ¶ 286.

216 Exhibit C-012, Royal Realty S.A.S. Certificate of Existence and Good Standing, 20 December 2017, p. SP-0002.

217 Exhibit C-226, Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019, p. SP-0021.

218 Exhibit C-227, Newport S.A.S Share Ledger, 15 January 2019, pp. SP-0003, SP-0013.

- Jonathan M. Foley holds 10,260 shares in Newport as of 6 November 2018.[219]
- Justin T. Caruso holds 1,000,000 shares in Luxé as of 18 December 2018.[220]
- Stephen J. Bobeck holds 2,532,981 shares in Luxé as of 6 November 2018.[221]
- According to Claimants, Brian Hass has an ownership interest in Luxé through Haystack Holdings LLC, a company established in Nevis, and a series of trusts or corporations established in the Bahamas. Haystack Holdings holds 2,000,000 shares in Luxé as of 27 December 2018.[222]
- Monte G. Adcock holds 1,845,659 shares in Luxé as of 6 November 2018.[223]
- Justin T. Enbody holds 1,032,457 shares in Luxé as of 6 November 2018.[224]
- The Boston Enterprises Trust as well as JTE International Investments LLC comply with the requirements for an "*enterprise*" or an "*enterprise of a Party*" set forth by Article 1.3 and more specifically by Article 10.28 of the TPA, and thus are investors under the TPA that have made an investment.[225]
- The Boston Enterprises Trust holds 2,483,076 shares in the Luxé as of 8 November 2018.[226] Additionally, it holds 86,722 shares in Newport as of 9 August 2018.[227] Claimants submit that it also qualifies as an "*national of another Contracting State*" under the ICSID Convention.[228]

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219 Exhibit C-227, Newport S.A.S. Share Ledger, 15 January 2019, p. SP-0008.

220 Exhibit C-226, Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019, p. SP-0012.

221 Exhibit C-226, Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019, p. SP-0002.

222 Exhibit C-226, Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019, p. SP-0022. Claimants' Memorial, ¶ 52; Claimants' Reply, ¶ 184; Exhibit C-360, Haystack Holdings LLC Certificate of Good Standing, 11 January 2021; Exhibit C-361, Membership Certificate of Haystack Holdings LLC, 2 March 2005; Exhibit C-362, Trust Agreement of the Hass Family Investment Trust, 15 November 1999.

223 Exhibit C-226, Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019, p. SP-0005.

224 Exhibit C-226, Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019, p. SP-0007.

225 Claimants' Memorial, ¶ 341; Claimants' Reply, ¶¶ 162, 187-191; Claimants' Post-Hearing Brief, ¶ 284; Exhibit C-215, The Boston Enterprises Trust Formation Instrument, 9 August 2018.

226 Exhibit C-226, Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019, p. SP-0025.

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

228 Claimants' Post-Hearing Brief, ¶¶ 285, 295-296.

— JTE International Investments, holds 114,000 shares in Newport as of 6 November 2018.[229]

289. *Second*, Claimants submit that they own both direct and indirect investments pursuant to Article 10.28 of the TPA as they hold shares in Newport, Luxé, or both,[230] which are the owners and developers of the Meritage and the Luxé Projects respectively.

290. According to Claimants, Respondent has provided its consent to arbitration in Article 10.17(1) of the TPA.[231] Claimants state that they have provided their written consent to arbitration in their Notice of Intent, dated 17 August 2018, which they reaffirmed in their Request for Arbitration, dated 25 January 2019.[232]

b) Requirements of Article 25 of the ICSID Convention

291. Claimants submit that the requirements of Article 25 of the ICSID Convention are met as of the time of the Request for Arbitration: (a) the United States and Colombia were Contracting States of the ICSID Convention, (b) Claimants were citizens and enterprises of the United States, and thus qualifying as "*national*[s] *of another Contracting State*", and (c) both Colombia and Claimants had provided their written consent to arbitrate this dispute.[233]

292. Claimants argue that the satisfaction of the requirement of a protected investment under the TPA is sufficient to comply with the requirement of a protected investment under the ICSID Convention.[234] Claimants contend that the ICSID Convention does not impose separate requirements that must be met in order to qualify as having made a covered investment.[235]

293. In any case, Claimants argue that their investment in Colombia exhibits a commitment of capital or other resources and required an assumption of risk, thereby satisfying the *Salini* criteria.[236]

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229 Exhibit C-227, Newport S.A.S. Share Ledger, 15 January 2019, p. SP-0004.

230 Claimants' Memorial, ¶ 343.

231 Claimants' Memorial, ¶ 345.

232 Claimants' Memorial, ¶ 345; Exhibit C-008, Notice of Intent to Submit the Claim to Arbitration, 17 August 2018, ¶ 98; Request for Arbitration, 25 January 2019, ¶ 22.

233 Claimants' Memorial, ¶ 352.

234 Claimants' Memorial, ¶ 353; Claimants' Reply, ¶¶ 166-169.

235 Claimants' Reply, ¶¶ 165, 170-173; Claimants' Post-Hearing Brief, ¶ 289.

236 Claimants' Reply, ¶¶ 165, 175-178; Claimants' Post-Hearing Brief, ¶ 290.

294. Moreover, Claimants state that the present dispute is a "*legal dispute arising directly out of an investment*", as the claims arise directly out of Respondent's measures against Claimants' property.[237]

3. Respondent's Breach of Its Obligations under the TPA

295. According to Claimants, Colombia has breached several of its fundamental obligations under the TPA.

a) Unlawful Expropriation of Claimants' Investment

296. Claimants allege that Colombia breached Article 10.7 of the TPA by expropriating Claimants' investment.

aa) Legal Standard

297. The legal expropriation standard Claimants apply is Article 10.7 of the TPA prohibiting any expropriation or nationalization of a covered investment unless certain conditions are met.[238] In addition, Claimants refer to Annex 10-B of the TPA recognizing both direct and indirect expropriation having an equivalent effect to direct expropriation as relevant expropriation standards under the TPA.[239] Therefore, a State is deemed to have expropriated an investment when the effect of the measure taken by the State has been to deprive the owner of title, possession, or access to the benefit and economic use of his property.[240]

298. To substantiate this conclusion, Claimants cite two decisions, namely *Starret Housing Corp. v. Iran*[241] and *Middle East Cement v. Egypt.*[242] In the *Starret Housing*, the tribunal accepted the deprivation of effective use, control, and benefits of property rights to be an indirect expropriation. In the *Middle East Cement*, the banning of importing cement – even if the respective license had not been revoked – met the standard.[243]

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237 Claimants' Reply, ¶¶ 179-182; Claimants' Post-Hearing Brief, ¶¶ 292-294.

238 Claimants' Memorial, ¶ 359.

239 Claimants' Memorial, ¶ 360.

240 Claimants' Memorial, ¶ 363.

241 Claimants' Memorial, ¶ 364; Exhibit CL-011, *Starrett Housing Corporation, et. al. and The Government of the Islamic Republic of Iran, et al*., Case No. 24, Interlocutory Award, Iran-U.S. C.T.R., 20 December 1983, 23(5) I.L.M. 1090.

242 Claimants' Memorial, ¶ 366; Exhibit CL-029, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002.

243 Claimants' Memorial, ¶¶ 365-366.

299. Claimants contend that tangible or intangible property rights or property rights in an investment can be subject to expropriation under the TPA as well as under customary international law.[244]

bb) Respondent's Conduct as Expropriation

300. Claimants contend that Respondent's conduct amounts to an expropriation.

301. Claimants explain that Royal Realty and Newport had done all the necessary groundwork for the Meritage Project to succeed, including entering into agreements with La Palma as the landowner, Corficolombiana as the fiduciary, and the unit buyers to allow financing the Meritage Project.[245]

302. According to Claimants, the groundwork and the early success of the Meritage Project had suddenly been destroyed when, on 3 August 2016, based on a story of Mr. López, Colombian authorities imposed precautionary measures on the Meritage Project. These measures hindered any further development of the Project.[246]

303. Then, on 25 January 2017, the Attorney General's Office issued the Determination of Claim formally instituting the Asset Forfeiture Proceedings against the Meritage Project even though Claimants highlighted the falsity of Mr. López' story.[247]

304. Finally, on 5 April 2017, the Attorney General's Office formally requested the court to commence the Asset Forfeiture Trial, and Newport was denied an important opportunity to defend itself.[248]

305. On these grounds, Claimants conclude that Respondent indirectly and blatantly expropriated the Meritage Claimants' investment pursuant to Article 3 of Annex 10-B.[249] In this regard, Claimants contend that the imposition of Asset Forfeiture Proceedings has had "*an effect equivalent to direct expropriation*" as "*the suspension of the power of disposition, attachment and seizure*" has (i) deprived Claimants' investment of all economic value, (ii) interfered with Claimants' distinct, reasonable investment-backed expectations, and (iii) had the character of the government action.[250]

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244 Claimants' Memorial, ¶ 368; Claimants' Reply, ¶ 223.

245 Claimants' Memorial, ¶ 370.

246 Claimants' Memorial, ¶ 372.

247 Claimants' Memorial, ¶ 373.

248 Claimants' Memorial, ¶ 373; Claimants' Reply, ¶¶ 217-218.

249 Claimants' Memorial, ¶ 374.

250 Claimants' Memorial, ¶ 374.

306. Claimants reject Respondent's argument that Claimants' investments cannot be expropriated because Claimants did not have property rights. They argue that at the time of the measure taken by Respondent, they had a "*bundle of rights*" associated with their ownership of Newport and Royal Realty, namely "*(i) Newport had rights under the Sales Purchase and trusts agreements to develop the Meritage Project; and (ii) Royal Realty had rights to operate the aparta-hotel* [sic] *on the Project*."[251] Claimants submit that it is well-settled that contractual rights can be subject to expropriation.[252] Moreover, a real estate development project, such as Claimants', is inextricably bound to the land, therefore the seizure of the land also necessarily results in the seizure of the associated investments.[253]

307. Claimants' investment is deprived of all economic value as Newport's only source of expected revenue – the Meritage Project – was seized, which made any further development impossible.[254] To substantiate this, Claimants cite the decision *ADC v. Hungary* in which the tribunal held that an act of State can mean the end for an investment and thus a case of expropriation, particularly when there is no compensation.[255] Moreover, Claimants argue that the Asset Forfeiture Proceedings have made it impossible for Mr. Seda to seek financing for his projects due to "*a permanent scar on his reputation*" left by the proceedings and the surrounding press.[256]

308. Claimants also reject Respondent's proposition that the measures only had limited and temporary adverse impact, since the Asset Forfeiture Proceedings continue to this day and continue to inhibit the development of the Meritage Property.[257]

309. Claimants submit that Respondent interfered with their distinct reasonable investment-backed expectations. Claimants reasonably expected the Meritage Project to be completed and become profitable, unfettered by wrongful measures of the Colombian government.[258] Claimants allege that the Colombian Attorney General's Office itself had

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251 Claimants' Reply, ¶¶ 221-222.

252 Claimants' Reply, ¶ 222.

253 Claimants' Reply, ¶ 222.

254 Claimants' Memorial, ¶ 375; Claimants' Reply, ¶ 226; Claimants' Post-Hearing Brief, ¶ 22.

255 Claimants' Memorial, ¶ 375; Exhibit CL-044, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006.

256 Claimants' Post-Hearing Brief, ¶ 24.

257 Claimants' Reply, ¶ 227; Claimants' Post-Hearing Brief, ¶ 23.

258 Claimants' Memorial, ¶ 377; Claimants' Reply, ¶ 228; Claimants' Post-Hearing Brief, ¶ 26.

twice certified in writing that the prior title holders of the Meritage Property were not involved in any criminal activity.[259]

310. Moreover, only renowned fiduciaries as Corficolombiana as well as law firms like Otero & Palacio were hired to conduct title studies regarding the Meritage Property. All of this made Claimants' expectation reasonable.[260] Therefore, by conducting due diligence to ensure that the Property was not encumbered by prior criminality, Claimants formed "*distinct, reasonable investment-backed*" expectations that the Property would not be seized on the basis of an alleged criminal history.[261]

311. The Asset Forfeiture Proceedings initiated against the Meritage Project are a government action in the sense of the TPA, as it was the Attorney General's Office that initiated them and the Colombian courts processing them now.[262] Claimants also submit that such government action was not a legitimate exercise of regulatory powers.[263]

cc) Unlawful Character of this Expropriation

312. According to Article 10.7 of the TPA, in order to be lawful, an expropriation must be conducted (i) with payment of prompt, adequate, and effective compensation, (ii) under due process of law, (iii) in a non-discriminatory manner and (iv) for a public purpose. According to Claimants, Respondent did not comply with these conditions, which made the expropriation of Claimants' investment unlawful.[264]

313. Claimants state that Respondent failed to pay any compensation for the expropriation of the Meritage Claimants' investment, which alone renders the expropriation unlawful under the TPA.[265]

314. According to Claimants, Respondent ignored due process of law, including substantive and procedural protections, when expropriating Claimants' investment.[266] This is true both under the international law legal standard and under Colombian procedural guarantees.[267]

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259 Claimants' Memorial, ¶ 377.

260 Claimants' Memorial, ¶ 377.

261 Claimants' Reply, ¶ 232.

262 Claimants' Memorial, ¶ 379; Claimants' Reply, ¶ 233; Claimants' Post-Hearing Brief, ¶ 27.

263 Claimants' Reply, ¶¶ 234-239; Claimants' Post-Hearing Brief, ¶ 33.

264 Claimants' Memorial, ¶ 381.

265 Claimants' Memorial, ¶ 382; Claimants' Reply, ¶ 273; Claimants' Post-Hearing Brief, ¶ 31.

266 Claimants' Memorial, ¶ 383.

267 Claimants' Memorial, ¶ 384.

315. *First*, Claimants argue that Respondent arbitrarily initiated Asset Forfeiture Proceedings and disregarded its own Asset Forfeiture Law by failing to "*safeguard*" good faith third parties.[268] The Attorney General's Office based the institution of Asset Forfeiture Proceedings against the Meritage Project on "*the gossip of a drug trafficker*" without questioning his credibility despite the fact that doubts in this regard were raised.[269] Further, Claimants submit that the Attorney General's Office ignored the rights of good faith third parties when the Asset Forfeiture Proceedings formally commenced, since Respondent did not conduct any investigation or assessment in this regard.[270]

316. As a result, Respondent ignored the Meritage Claimants – and particularly Newport – as good faith third parties and, thus, failed to consider and safeguard their rights throughout the proceedings, including those in the First Criminal Court of the Specialized Circuit for Asset Forfeiture of Antioquia.[271] Claimants perceive this to be inadequate because they purportedly complied with the relevant standard of due diligence through commissioning *inter alia* Corficolombiana with the production of title studies.[272]

317. *Second*, Claimants state that there are "*glaring red flags*" to indicate that Respondent seized the Meritage Project on the grounds of a corruption scheme in which Colombian government officials collaborated with a known drug dealer to extort Mr. Seda.[273] According to Claimants, on the one hand, the timing of the Asset Forfeiture Proceedings suspiciously coincides with Mr. López' extortion attempts against Mr. Seda and, on the other hand, the Colombian government officials pursuing the Asset Forfeiture Proceedings against the Meritage Project are subject of anti-corruption investigations themselves.[274]

318. In that regard, Claimants explain that Ms. Malagón's handing over of the case to Ms. Ardila took place two days after Mr. López and his attorney reinitiated their extortion attempts against Mr. Seda.[275] Soon after Mr. Seda had ultimately declined to comply with Mr. López' extortion demands, Ms. Ardila allegedly seized the Meritage Property.[276]

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268 Claimants' Memorial, ¶¶ 385-386.

269 Claimants' Memorial, ¶ 385; Claimants' Reply, ¶ 279.

270 Claimants' Memorial, ¶ 386; Claimants' Reply, ¶ 280.

271 Claimants' Memorial, ¶ 387; Claimants' Reply, ¶¶ 281-283.

272 Claimants' Memorial, ¶ 387.

273 Claimants' Memorial, ¶ 389; Claimants' Reply, ¶ 285; Claimants' Post-Hearing Brief, ¶ 99.

274 Claimants' Memorial, ¶ 390; Claimants' Reply, ¶¶ 285, 289-294; Claimants' Post-Hearing Brief, ¶¶ 100-104.

275 Claimants' Memorial, ¶ 390.

276 Claimants' Memorial, ¶ 390; Claimants' Reply, ¶¶ 295-297.

Further, Claimants contend that Mr. López' attorney declared the window for negotiations closed on the day the precautionary measures resolution was signed.[277] On top of that, Ms. Malagón and Ms. Ardila, were accused of abusing their authority, extortion, and corruption schemes, according to Claimants.[278]

319. Relying on *Glencore International A.G. v. Colombia*, Claimants agree that they bear a *prima facie* burden to prove corruption for the Tribunal to be able to "*connect the dots*" in the indicia of corruption.[279] Claimants argue that the above establishes *prima facie* corruption so that the burden of proof shall shift to Respondent, who is in possession of the relevant documents proving the corruption scheme.[280] Claimants submit that Respondent has failed to produce rebuttal evidence or testimonies to debunk the red flags of corruption.[281] Moreover, neither the review conducted by Mr. Caro of the Attorney General's Office Asset Forfeiture Unit for the Determination of the Claim nor the Colombian courts' approval of Colombia's actions cure the lack of due process in the initiation of the proceedings.[282]

320. *Third*, according to Claimants, Colombia is obliged to protect third parties acting in good faith without fault against Asset Forfeiture Proceedings but failed in this case to even consider Newport's position as such.[283] As a consequence, Newport filed a *Tutela* Action against the Attorney General's Office in order to require the latter to acknowledge Newport's submissions. Claimants argue that this was the only thing the Attorney General's Office did in the end – without addressing any substantive argument.[284] Consequently, the competent court did not recognize Newport as an "affected party" in the Asset Forfeiture Proceedings, ignoring its evidence regarding the status of a good faith third party.[285]

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277 Claimants' Memorial, ¶ 390; Claimants' Reply, ¶ 285.

278 Claimants' Memorial, ¶¶ 391-392; Claimants' Reply, ¶¶ 298-300; Claimants' Post-Hearing Brief, ¶¶ 105-109.

279 Claimants' Reply, ¶ 286; Exhibit CL-125, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019.

280 Claimants' Memorial, ¶ 393.

281 Claimants' Reply, ¶ 287; Claimants' Post-Hearing Brief, ¶¶ 111-116.

282 Claimants' Reply, ¶¶ 301-302.

283 Claimants' Memorial, ¶ 394.

284 Claimants' Memorial, ¶ 394.

285 Claimants' Memorial, ¶ 395.

321. Claimants state that Respondent's conduct throughout the Asset Forfeiture Proceedings was discriminatory, since it was selective.[286] Specifically, the Attorney General's Office is stated to have found 47 properties associated with Mr. López – but only one was seized, namely the Meritage Property.[287] This appears to be most suspicious to Claimants as Respondent even refrained from seizing a parcel of land having been carved from the same parent property as the Meritage Property, thus sharing the same history in terms of ownership by narcotraffickers.[288]

322. Furthermore, Claimants note that Respondent failed to treat Mr. Seda's criminal complaints concerning Mr. López' extortion attempts adequately, while it immediately acted on Mr. López' criminal complaint accusing Mr. Seda of defamation.[289]

323. Claimants believe that Respondent did not expropriate Claimants for a public purpose as they submit that there is no reasonable nexus between the public purpose declared in Colombia's Asset Forfeiture Law and Colombia's actual application of the asset forfeiture measures against the Meritage Project.[290]

324. Claimants reject Respondent's position that the measures pursued a "*legitimate public welfare objective*", since the objectives of the Asset Forfeiture Law are to fight organized crime – and, at the same time, protect good faith third parties.[291] Instead, Claimants argue, "*Asset Forfeiture Proceedings were a gross misuse of the powers of the State that targeted the property of good faith third party buyers and left untouched the proceeds of illegal activity identified by Colombia itself*", which is contradictory to the goals of the Law.[292]

325. According to Claimants, Respondent based its Asset Forfeiture Proceedings on an unsubstantiated complaint regarding the criminal history of the Meritage Property filed by a former drug trafficker Mr. López.[293] Claimants are further convinced that Respondent's authorities understood that his story was false. They therefore shifted the basis of the proceedings to the fact that other individuals associated with criminal activity

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286 Claimants' Memorial, ¶¶ 397-398; Claimants' Post-Hearing Brief, ¶¶ 37-40.

287 Claimants' Memorial, ¶ 398; Claimants' Reply, ¶¶ 274-275; Claimants' Post-Hearing Brief, ¶¶ 41, 59-72.

288 Claimants' Memorial, ¶ 398; Claimants' Post-Hearing Brief, ¶¶ 42-58.

289 Claimants' Memorial, ¶ 400.

290 Claimants' Memorial, ¶ 403.

291 Claimants' Reply, ¶¶ 240-247; Claimants' Post-Hearing Brief, ¶ 34.

292 Claimants' Reply, ¶ 248.

293 Claimants' Memorial, ¶ 404.

were part of the ownership history of the Meritage Property, while totally ignoring Respondent's own letters to Claimants stating the opposite.[294]

326. Relying on the report of the Former Deputy Attorney General Martínez, Claimants argue that the public purpose of the measures is discredited by the fact that Respondent never pursued the proceeds of crime in the possession of the suspected criminals or taken any action to seize or disgorge profits made from transfers of the Meritage Property, which would have been a proper course of action.[295]

327. Moreover, Claimants contend that even if there was a deficiency in the ownership history, Colombian Asset Forfeiture Laws provide for protection of third parties who acquired an interest in or the affected assets themselves.[296] In this case, this is what Respondent refused to do, instead ignoring Newport's potential status as good faith third party.[297] Claimants rely on the due diligence steps they have undertaken *vis-à-vis* the Meritage Property.[298]

328. Taking into account the alleged corruption, Claimants conclude that the Asset Forfeiture Proceedings initiated by corrupt prosecutors, in any case, cannot be for a public purpose.[299]

b) Breach of the Fair and Equitable Treatment Standard

329. Claimants refer to Article 10.5(1) of the TPA stating that "[e]*ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*"[300]

330. The fair and equitable treatment standard ("**FET standard**") is interpreted by Claimants as an investor's protection, *inter alia*, from conduct that is (i) unreasonable, discriminatory, and arbitrary, (ii) not transparent and lacking in due process, and (iii) in frustration of an investor's legitimate expectations.[301] Claimants claim that Respondent did not respect these aspects of fair and equitable treatment in relation to Claimants.

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294 Claimants' Memorial, ¶ 404.

295 Claimants' Reply, ¶¶ 255-259.

296 Claimants' Memorial, ¶ 407.

297 Claimants' Memorial, ¶ 405.

298 Claimants' Reply, ¶¶ 260-269.

299 Claimants' Memorial, ¶ 408; Claimants' Reply, ¶¶ 249-252.

300 Claimants' Memorial, ¶ 411.

301 Claimants' Memorial, ¶ 414.

aa) Legal Standard

331. Claimants reject Respondent's position that there is a distinction between the minimum standard of treatment investors are entitled to under customary international law and the FET standard.[302] Instead, claimants submit that "*the treatment under customary international law is a progressive standard that has converged with the autonomous FET standard to provide the same level of protection.*"[303] Claimants equally dismiss the proposition that Article 10.5(1) of the TPA only protects Claimants' investments in the State, and does not provide protection to Claimants themselves. A similar position was argued in a non-disputing party submission filed by the U.S. in *Bridgestone v. Panama*, which Claimants submit is irrelevant and non-binding.[304]

332. Claimants cite several measures as examples for unreasonable, discriminatory and arbitrary treatment amounting to a violation of the FET standard and substantiate their reasoning with different cases, including *Saluka v. Czech Republic*. In *Saluka,* the tribunal found that "*any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies.*"[305]

333. Claimants explain that a breach of the FET standard due to unreasonable, discriminatory, and arbitrary treatment must be affirmed when a State acts contrary to its own legal principles, so that its measures defy basic reasoning and logic, "*inconsistent and chaotic*" approaches are taken by State agencies, or decisions are "*not founded on reason or fact.*"[306]

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302 Claimants' Reply, ¶ 309.

303 Claimants' Reply, ¶ 309.

304 Claimants' Reply, ¶¶ 311-314; Exhibit RL-112, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, United States of America Oral Submissions, 29 July 2019; Exhibit RL-108, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, United States of American Written Submission, 7 December 2018.

305 Claimants' Memorial, ¶¶ 414-416; Exhibit CL-042, *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ("***Saluka v. Czech Republic***").

306 Claimants' Memorial, ¶ 418; Claimants' Reply, ¶ 320, citing Exhibit CL-175, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 565; Exhibit RL-8, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 232; Exhibit CL-125, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 356.

334. Finally, Claimants submit that review of breaching conduct by domestic courts does not cure that breach.[307]

335. Claimants stress that, on the one hand, host States are subject to the obligation of acting transparently, and that investors are entitled to be treated with substantive and procedural due process, within both administrative and judicial proceedings through the entirety of such proceedings.[308] This shall specifically include the right to be heard and to be given a meaningful opportunity to defend oneself.[309]

336. Claimants submit that transparency has been recognized as a crystallized component of the minimum standard of treatment by numerous tribunals, separate from denial of justice.[310]

337. Claimants also object to Respondent's argument that there is a requirement for a claimant to exhaust local remedies in the host State before initiating a claim for an alleged administrative wrongdoing.[311]

338. Claimants submit that the protection of an investor's legitimate expectations is "*firmly rooted in arbitral practice.*"[312] According to Claimants, "*objectively reasonable*" legitimate expectations may be formed through explicit or implicit representations by the host State, including communications from the host State.[313] Furthermore, legitimate expectations can also arise through a host State's legal and regulatory frameworks, according to the decision *Murphy v. Ecuador*.[314]

bb) Respondent's Actions Breaching the FET Standard

339. According to Claimants, Respondent breached the FET standard under the TPA by violating Claimants' due process rights as well as their legitimate expectations.[315]

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307 Claimants' Reply, ¶ 321.

308 Claimants' Memorial, ¶¶ 420-422; Claimants' Reply, ¶ 326.

309 Claimants' Memorial, ¶ 424.

310 Claimants' Reply, ¶¶ 323-324.

311 Claimants' Reply, ¶ 327.

312 Claimants' Memorial, ¶ 425.

313 Claimants' Reply, ¶¶ 330-331.

314 Claimants' Memorial, ¶¶ 429-430; 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.

315 Claimants' Memorial, ¶ 431.

Due Process Rights

340. Claimants state that Respondent launched the Asset Forfeiture Proceedings against the Meritage Project based on a fictitious story of Mr. López Vanegas, who purportedly had to transfer the Meritage Property under duress as a result of the kidnapping of his son.[316]

341. Claimants describe the seizure of the Meritage Project as an abrupt act without direct link to the alleged kidnapping as it had only taken place two years after the first report of the story to the Attorney General's Office.[317] Claimants submit that it was a disproportionate measure unconnected from any rational policy purpose.[318] Furthermore, Claimants question Mr. López Vanegas story's reliability as he allegedly is a famous drug trafficker.[319]

342. In addition, Claimants argue that the prosecutors who initiated the procedures had had corrupt motives when doing so.[320] In Claimants' view, this was the only reason for Respondent to persist with precautionary measures even after Mr. Seda's formal complaint regarding Mr. López Vanegas' alleged extortion attempts.[321]

343. As a result, Claimants submit that Respondent initiated the Asset Forfeiture Proceedings against the Meritage Project without any evidence, making Claimants a victim of an extortion scheme.[322] Claimants further argue that Colombian courts did not have the authority to decide and did not decide on the false nature of Mr. López Vanegas' claim or the collusive nature of the Attorney General's Office's conduct – which makes them incapable of remedying Respondent's violations.[323] Therefore, Claimants conclude that Respondent breached all the core protections of the FET standard.[324]

344. On top of that, Claimants argue that Respondent's behavior during the initiation of the Asset Forfeiture Proceedings lacked transparency, as the relevant prosecutors did not hand out a copy of the precautionary measures.[325]

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316 Claimants' Memorial, ¶ 433; Claimants' Reply, ¶¶ 332-333; Claimants' Post-Hearing Brief, ¶¶ 96-99.

317 Claimants' Memorial, ¶ 433.

318 Claimants' Reply, ¶ 335.

319 Claimants' Memorial, ¶ 433.

320 Claimants' Memorial, ¶ 435; Claimants' Reply, ¶ 334.

321 Claimants' Memorial, ¶ 435.

322 Claimants' Memorial, ¶ 436.

323 Claimants' Reply, ¶ 336.

324 Claimants' Memorial, ¶ 436.

325 Claimants' Memorial, ¶ 437; Claimants' Reply, ¶ 337.

345. Claimants further contend that the Attorney General's office would have had to initiate Asset Forfeiture Proceedings against any property associated with Mr. López Vanegas if they had relied on his story. However, Respondent initiated such proceedings only against the Meritage Project.[326]

346. According to Claimants, Respondent lacked transparency when it suddenly shifted the basis for the Asset Forfeiture Proceedings from the transfer of property as a result of duress to Mr. López Vanegas' background as a drug trafficker.[327]

347. Claimants' due process rights were further violated by Respondent as follows.

348. *First*, Claimants were unlawfully precluded from effective defense during the Asset Forfeiture Trial, as Newport's petitions were ignored.[328] In this spirit, Claimants contend it to be unlawful that Colombian courts found that Newport had not been affected by the Asset Forfeiture Proceedings so that it does not have the ability to plead its good faith argument.[329] This decision purportedly conflicts with the common definition of an "affected" party.[330]

349. Therefore, according to Claimants, Newport was denied its basic process right to be heard.[331] Relying on the experts Dr. Medellín and Dr. Martinez, as well as the *Glencore* decision, Claimants submit that Newport should have had the opportunity to plead its good faith status as an affected party.[332]

350. *Second*, Claimants purport that Respondent failed to respect and protect the rights of Newport as a good faith third party in relation to the Asset Forfeiture Proceedings.[333] Newport had no opportunity to be heard prior to the seizure of the Meritage Property and initiation of the Asset Forfeiture Proceedings.[334]

351. Claimants argue that Colombia's Asset Forfeiture Law expressly guarantees the protection of rights of third parties acting in good faith.[335] Moreover, due process rights

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326 Claimants' Memorial, ¶ 438; Claimants' Reply, ¶ 338.

327 Claimants' Memorial, ¶ 440; Claimants' Reply, ¶¶ 339-342.

328 Claimants' Memorial, ¶ 442.

329 Claimants' Memorial, ¶ 442.

330 Claimants' Memorial, ¶ 442.

331 Claimants' Reply, ¶ 348.

332 Claimants' Memorial, ¶ 443.

333 Claimants' Memorial, ¶ 445; Claimants' Reply, ¶¶ 343-345.

334 Claimants' Post-Hearing Brief, ¶ 117.

335 Claimants' Memorial, ¶ 446; Claimants' Post-Hearing Brief, ¶ 118.

pursuant to international law are independent of any rights Claimants may or may not have under domestic law.[336]

352. In this spirit, Claimants contend that the Attorney General's Office has an obligation to "*search for and collect proof*" to ensure that no good faith third parties are affected by the Asset Forfeiture Proceedings and, if such evidence is found, it is obliged to cease the proceedings.[337]

353. According to Claimants, in this case, the Attorney General's Office breached the above principles as it did not initiate any investigation regarding the good faith status of the affected parties, including Newport.[338]

354. During the proceedings, the Attorney General's Office ignored multiple pleas brought by Newport concerning its good faith status.[339] According to Claimants, even Newport's *Tutela* Action could not force the Attorney General's Office to engage with the substantive arguments presented by Newport.[340]

355. Claimants submit that Newport would have had to be awarded the status of a good faith third party if it had been regarded as an affected party in the Asset Forfeiture Proceedings.[341] Claimants explain Newport's good faith with the commissioning of Corficolombiana as a fiduciary and of an experienced law firm for carrying out a title study and, finally, with the obtention of a letter confirming no criminal record.[342]

356. The only good faith third party the Attorney General's Office considered was Corficolombiana, and the Attorney General's Office unlawfully held the conducted due diligence to be insufficient.[343] According to Claimants, the relevant SARLAFT due diligence required investigations only against the clients of the auditing financial entity pursuant to Article 102 of Decree 633 of 1993, and not against all prior title holders as the Attorney General's Office purports.[344] Claimants summarize this subsequent claim of

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336 Claimants' Reply, ¶ 345.

337 Claimants' Memorial, ¶ 446.

338 Claimants' Memorial, ¶ 447; Claimants' Post-Hearing Brief, ¶¶ 120-123.

339 Claimants' Memorial, ¶ 447; Claimants' Post-Hearing Brief, ¶ 125.

340 Claimants' Memorial, ¶ 447.

341 Claimants' Memorial, ¶ 448; Claimants' Post-Hearing Brief, ¶ 129.

342 Claimants' Memorial, ¶ 448.

343 Claimants' Memorial, ¶ 448.

344 Claimants' Memorial, ¶ 448.

insufficiency as a "*post hoc imposition of a legally unsupported standard*", referring to the decisions in *Karkey v. Pakistan* and *Crystallex v. Venezuela*.[345]

357. Claimants submit that even if they had conducted due diligence against all prior title holders, they would not have been able to find Mr. López Vanegas.[346] In this regard, Claimants allege that his name did not appear on the property's chain of title as Mr. López Vanegas had never been its direct owner.[347] At most, he had been during several periods its indirect owner through several companies, *e.g.*, Inversiones Nueve represented by his son Mr. López Betancur.[348] Mr. López Vanegas' name only came up as a result of his criminal complaint and not before.[349]

358. Furthermore, Claimants substantiate the adequacy of Corficolombiana's due diligence with the negative results of other large national banks that also conducted title studies regarding the criminal record of the property and did not find any.[350]

359. [redacted]

360. According to Claimants, the Asset Forfeiture Proceedings did not only cease the development of the Meritage Project but also of all other projects associated with Mr. Seda.[353] Those other projects include the Luxé, where construction had to be stalled as the financing bank stopped disbursing funds for the project.[354] Therefore, Claimants

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345 Claimants' Memorial, ¶¶ 452-454; Exhibit CL-114, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017; Exhibit CL-105, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016.

346 Claimants' Memorial, ¶ 449.

347 Claimants' Memorial, ¶ 449.

348 Claimants' Memorial, ¶ 449.

349 Claimants' Memorial, ¶ 449.

350 Claimants' Memorial, ¶ 450.

351 [redacted]

352 [redacted]

353 Claimants' Memorial, ¶ 456; Claimants' Reply, ¶¶ 363-366; Claimants' Post-Hearing Brief, ¶¶ 214-220.

354 Claimants' Memorial, ¶ 456; Claimants' Reply, ¶ 365.

claim that they have lost the value of their investments in this project. Other affected projects were Tierra Bomba, 450 Heights, and Santa Fé.[355]

361. To support the relevance of the measures' effect on other projects, Claimants cite the decision in *Rompetrol v. Romania* in which the tribunal held that it if a state does not take any steps to avoid, minimize, or mitigate a possibility of harm regarding a locally incorporated subsidiary, it could result in a breach of the FET standard.[356]

362. In that sense, Claimants submit that Respondent must have been aware of the possibility of the other projects being affected by the initiation of the proceedings, so that Respondent had to take steps against the possibility of harm but refrained from doing so.[357] As a result, "*by wantonly dragging* [Mr. Seda's] *name through the mud by instituting the Asset Forfeiture Proceedings, Colombia knowingly and foreseeably destroyed the value of* [other Claimants'] *investments as well.*"[358]

Legitimate Expectations

363. Claimants argue that Respondent violated a legitimate expectation held by Claimants that the Meritage Property's chain of title was unencumbered by illegality, and any subsequent purchasers would be considered good faith third parties.[359] Claimants cite specific representations made by the Asset Forfeiture Unit of the Attorney General's Office to this effect.[360] In reasonable reliance upon this specific representation, Claimants invested in the Meritage Project.[361]

364. Later, Claimants' legitimate expectations were frustrated when the Asset Forfeiture Proceedings were initiated against the Meritage Property due to an alleged illegality in the chain of title, and Claimants were not recognized as affected good faith third parties.[362] Additionally, Respondent frustrated Claimants' legitimate expectation by

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355 Claimants' Memorial, ¶ 456.

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

357 Claimants' Memorial, ¶¶ 458-459.

358 Claimants' Reply, ¶ 366.

359 Claimants' Reply, ¶ 350.

360 Claimants' Reply, ¶ 350; Claimants' Post-Hearing Brief, ¶¶ 203-204.

361 Claimants' Reply, ¶¶ 354-357; Claimants' Post-Hearing Brief, ¶¶ 205-208.

362 Claimants' Reply, ¶ 351.

refusing to recognize Newport as an affected good faith third party in the Asset Forfeiture Proceedings.[363]

c) Breach of the National Treatment Standard

365. Applying the National Treatment Standard of the TPA, Claimants draw the conclusion that Respondent breached the latter by "*singl*[ing] *out the Meritage Project for Asset Forfeiture Proceedings while leaving intact other properties involving Mr. López Vanegas in the chain of title*."[364]

aa) Legal Standard

366. Claimants cite Article 10.3 of the TPA establishing that each party shall accord to investors as well as to covered investments treatment no less favorable than that it accords, in like circumstances, to its own investors and investments of its own investors.[365]

367. To establish this standard, Claimants contend that it is sufficient to present a *prima facie* case of a different and less favorable treatment.[366]

368. Claimants explain that the question of investors being in like circumstances can regularly be affirmed if they are competing entities in the same business or economic sector.[367]

369. Relevant criteria to assess the character of the protected investor are, according to Claimants, (i) whether the measure on its face appears to favor the host state's nationals over non-nationals or, (ii) whether the practical effect of the measure creates a disproportionate benefit for nationals over non-nationals.[368]

370. Regarding the burden of proof, Claimants contend that it shifts to the host State as soon as an investor presents *prima facie* evidence of discriminatory treatment. The host State then must justify its treatment by showing a reasonable nexus to rational government policies.[369]

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363 Claimants' Post-Hearing Brief, ¶¶ 209-213.

364 Claimants' Reply, ¶ 193.

365 Claimants' Memorial, ¶ 460.

366 Claimants' Memorial, ¶ 461.

367 Claimants' Memorial, ¶ 462.

368 Claimants' Memorial, ¶ 463.

369 Claimants' Memorial, ¶ 464.

bb) Respondent's Less Favorable Treatment of the Meritage Claimants and Their Investment

371. Claimants allege that the Meritage Project was singled out for seizure under Asset Forfeiture Proceedings while other properties involving Mr. López Vanegas in their chain of title were not.[370] More specifically, Respondent did not take any action against the other parcel of land which has formerly been part of the same parent property as the Meritage Property and now belongs to Mr. López Vanegas' half-brother (to which Claimants refer to as the "**Sister Property**") or any other López Vanegas Property.[371]

372. *First*, according to Claimants, these facts constitute "*like circumstances*" under Article 10.3 of the TPA between the Meritage Claimants and Mr. López Vanegas' half-brother, as Mr. López Vanegas appears in both property's chain of title.[372] Claimants submit that ownership by Mr. López Vanegas is "*the most salient circumstance in this case for the purpose of comparison*", since the Asset Forfeiture Proceedings against the Meritage Project were initiated on the basis of its association with Mr. López Vanegas.[373] Additionally, these properties were subject to the same legal and regulatory regime and are in the same economic sector.[374]

373. *Second*, Claimants argue that Respondent's differential treatment of the Meritage Project compared to other López Vanegas Properties has no rational justification.[375]

374. Claimants submit that "[t]*he only difference between the Meritage Property and the other López Vanegas Properties is that the former was to house a multi-million dollar project backed largely by U.S. investors whereas the latter is owned by a Colombian national*."[376]

375. *Finally*, while denying that it is a separate requirement, Claimants submit that Respondent's measures negatively impacted Claimants' investments, since Claimants lost their investment in the Meritage Project and the associated stigma resulted in the loss of Claimants' investment in its other development projects.[377]

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370 Claimants' Memorial, ¶ 465.

371 Claimants' Memorial, ¶ 465; Claimants' Reply, ¶ 193; Claimants' Post-Hearing Brief, ¶¶ 42-47. With respect to the other properties, *see* Claimants' Post-Hearing Brief, ¶¶ 59 *et seq*.

372 Claimants' Memorial, ¶ 465; Claimants' Reply, ¶ 198.

373 Claimants' Reply, ¶ 199.

374 Claimants' Reply, ¶¶ 202-203.

375 Claimants' Reply, ¶¶ 204-210; Claimants' Post-Hearing Brief, ¶¶ 48-58.

376 Claimants' Reply, ¶ 193.

377 Claimants' Reply, ¶¶ 211-214.

d) Breach of the Full Protection and Security Standard

aa) Legal Standard

376. Claimants summarize that Article 10.5(1) of the TPA requires Respondent to provide full protection and security ("**FPS**") to Claimants' investments, including a level of police protection required under customary international law pursuant to Article 10.5(2)(b) of the TPA.[378] Claimants reject Respondent's argument that a distinction exists between protection granted to investments and protection granted to investors under the TPA.[379] Instead, Claimants submit that investor who makes the investment is implicitly incorporated in the meaning of "*investment.*"[380]

377. Furthermore, Claimants purport that the "*FPS extends beyond the obligation to ensure the physical security of an investment, and includes the guarantee of commercial and legal security.*"[381] Claimants explain that to satisfy this standard the host State is required to exercise vigilance and due diligence towards investors and their investments.[382] This allegedly includes taking all measures necessary to ensure the full enjoyment and protection and security of the investment and to take reasonable, precautionary and preventive action against harm to the protected investment.[383] The inquiry is fact-specific.[384]

378. Claimants also submit that there is a distinction between "*general insecurity*" and "*specific instances of harassment*", with the latter requiring a heightened degree of diligence.[385]

379. Claimants cite Prof. Christoph Schreuer emphasizing the relevance of a secure factual and legal framework, and the taking of measures against adverse actions of private persons and State organs as well as the creation of legal remedies against such actions.[386]

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378 Claimants' Memorial, ¶ 466.

379 Claimants' Reply, ¶ 370.

380 Claimants' Reply, ¶ 370.

381 Claimants' Memorial, ¶ 467; Claimants' Reply, ¶ 371.

382 Claimants' Memorial, ¶ 467.

383 Claimants' Memorial, ¶ 467.

384 Claimants' Reply, ¶ 374.

385 Claimants' Reply, ¶ 373.

386 Claimants' Memorial, ¶ 468.

bb) Respondent's Actions Breaching the FPS Standard

380. In Claimants' opinion, Respondent failed to comply with the FPS standard as the Meritage Claimants' investment had been subject to a corrupt extortion scheme by officials from the Attorney General's Office and Mr. López Vanegas for two years, which Respondent failed to properly investigate and prosecute.[387] Consequently, Claimants allege that Mr. López Vanegas and his representatives harassed Mr. Seda with the launch of Asset Forfeiture Proceedings against the Meritage Project if he did not pay them.[388]

381. Claimants contend that Respondent was obliged to lift the precautionary measures against the Meritage Project as it acknowledged Mr. López Vanegas' story to be a hoax.[389] Furthermore, Respondent failed to identify and protect good faith third parties such as Newport even if it was obliged to do so under international and domestic law.[390]

382. Furthermore, Respondent purportedly failed to protect Claimants' investments from unlawful actions of third parties despite express requests for assistance.[391] For example, Mr. Seda's official complaint against Mr. López Vanegas with the Attorney General's Office was left without consideration.[392] This request was dismissed without a detailed assessment just a month later.[393] Other examples of threats of violence against Mr. Seda include a police report filed by Mr. Seda as a result of an assassination attempt against himself and threats to his daughter, which forced Mr. Seda to leave Colombia.[394]

383. [redacted]

387 Claimants' Memorial, ¶ 469; Claimants' Reply, ¶¶ 376-377.

388 Claimants' Memorial, ¶ 469.

389 Claimants' Memorial, ¶ 470.

390 Claimants' Memorial, ¶ 470.

391 Claimants' Post-Hearing Brief, ¶ 223.

392 Claimants' Memorial, ¶ 471.

393 Claimants' Memorial, ¶ 471.

394 Claimants' Memorial, ¶ 473; Claimants' Reply, ¶ 378.

395 Claimants' Reply, ¶ 380.

396 Claimants' Post-Hearing Brief, ¶¶ 224-227.

384. Citing *Pezold v. Zimbabwe*, Claimants submit that circumstances like these oblige a host State to take active measures to protect the investment from adverse effects that stem from private parties or from the host State and its organs.[397]

4. Claimants' Entitlement to Full Reparation

a) Legal Standard

385. To establish their claim for damages, Claimants rely on Article 10.26(1) of TPA, which gives the Tribunal the power to "*make a final award against*" Respondent, in which it may award "*monetary damages and any applicable interest*", including "*in lieu of restitution*." Claimants argue that they are entitled to reparation in accordance with the applicable principles of international law for the breaches of the TPA committed by Respondent, as described above.[398]

386. Claimants submit that the TPA does not establish the applicable measure of damages for the State's unlawful expropriation or breaches of the National Treatment and FET standards, therefore applicable principles of international law govern.[399] Citing *Case Concerning the Factory at Chorzów* and Article 31(1) of the International Law Commission's Articles on State Responsibility ("**ILC Articles**"), Claimants refer to the principle of "*full reparation*", which requires that Claimants be placed in the same economic position they would have been in had Respondent not committed the breaches, *i.e.*, the "but-for" scenario.[400]

387. According to Claimants, "*the starting point for assessing damages for unlawful conduct is often the fair market value ('**FMV**') of an investment immediately before the breach.*"[401] Claimants argue that such fair market value must be unaffected by the State's measures and constitute "*the floor of compensation*" due to Claimants.[402]

388. Claimants submit that, in contrast, Respondent's expert does not calculate the FMV of Claimants' investment.[403] Instead, Respondent's expert attempts to calculate the sum of the historical costs incurred by Claimants for the development of the Projects, *i.e.*, sunk-

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397 Claimants' Memorial, ¶ 472; Exhibit CL-102, *Bernhard Friedrich Arnd Rüdiger von Pezold, et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015.

398 Claimants' Memorial, ¶ 476.

399 Claimants' Memorial, ¶¶ 477-478.

400 Claimants' Memorial, ¶¶ 478-481.

401 Claimants' Memorial, ¶¶ 482-483.

402 Claimants' Memorial, ¶ 483; Claimants' Reply, ¶ 405.

403 Claimants' Reply, ¶ 406.

cost approach which makes his calculation irrelevant for the assessment of damages.[404] Claimants submit that Respondent eventually accepted the income-based approach during the Hearing.[405]

b) Causation between Measures and Damages

389. With regard to the causal link between a State's actions and damages, Claimants submit that the TPA does not require the breach to be the direct or sole cause of the loss.[406] Rather, Claimants argue, all losses stemming from or because of the breach are covered, and the causal link must be "*sufficient*" and not "*too remote.*"[407] Citing investment arbitration cases, Claimants elaborate on the legal standard of causation.[408]

390. Claimants reject Respondent's argument that any losses attributed to Claimants' project other than Meritage Project lack connection to Respondent's measures.[409] Instead, Claimants submit that it was not only the Meritage Project that lost value as a result of Respondent's actions, but other assets owned by Claimants in Colombia.[410] Claimants submit as a result of precautionary measures, "*construction came to a halt, sales were stopped, Banco de Bogotá accelerated the loan it had just granted to the Project, Unit Buyers refused to make further payments on the units they had purchased, and later even brought an arbitration claim against Newport and Corficolombiana.*"[411] Further, as Claimants submit, Colpatria halted loans disbursement to the Luxé Project, expressly citing the Asset Forfeiture Proceedings, and other investors stepped down from the Luxé Project.[412]

391. Claimants additionally argue that a public seizure of the Meritage Project [redacted] jeopardized Mr. Seda's reputation.[413]

392. Claimants also reject Respondent's contention that other factors, such as delays in construction and actions of Claimants' counteragents, contributed to the failures in

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404 Claimants' Reply, ¶¶ 406; 441-446; Claimants' Post-Hearing Brief, ¶¶ 248-255.

405 Claimants' Post-Hearing Brief, ¶ 244.

406 Claimants' Reply, ¶ 385.

407 Claimants' Reply, ¶ 385; Claimants' Post-Hearing Brief, ¶ 231.

408 Claimants' Reply, ¶¶ 385-386.

409 Claimants' Reply, ¶¶ 388-389.

410 Claimants' Reply, ¶¶ 388-389; Claimants' Post-Hearing Brief, ¶ 232.

411 Claimants' Reply, ¶ 388.

412 Claimants' Reply, ¶¶ 390-391.

413 Claimants' Reply, ¶¶ 398-401; Claimants' Post-Hearing Brief, ¶¶ 233-235.

Claimants' portfolio, arguing that Respondent has cherry-picked evidence and ignored established causation.[414]

c) Appropriate Valuation Date

393. Claimants submit that the appropriate valuation date for Claimants' damages in the present case is 25 January 2017, the date when the Colombian Attorney General's Office issued a Determination of the Claim, formally instituting Asset Forfeiture Proceedings against the Meritage Project and triggering an indefinite seizure of the latter.[415] This is when the date, on which "*Colombia's treaty breaches led to an irreversible and substantial deprivation of the value of Claimants' investments.*"[416]

394. For the breaches other than unlawful expropriation, Claimants argue that the appropriate valuation date is the date of irreversible deprivation of value or crystallization of loss.[417] Claimants argue that the measures had a negative impact on other development projects as well.[418]

395. Claimants argue that in cases of unlawful expropriation, claimants are entitled to choose between a valuation as of the date of the State's unlawful expropriation and a valuation as of the date of the tribunal's award.[419]

d) Application of Income- and Market-Based Valuation Methodology

396. Claimants contend that the Tribunal has discretion in applying one of the following methodologies to assess the FMV of an investment: income-, market-, or asset-based, with the last one being disfavored by the tribunals on account of its poor reflection of future potential of the investment.[420] According to Claimants, income-based approach, calculating the present value of a business based on its anticipated cash flows using a discounted cash flow ("**DCF**") analysis, is "*theoretically the strongest*" and by far the most commonly used method to determine the FMV.[421] The DCF analysis is "*reasonable and reliable*" and any uncertainties of this method can be accounted for by applying

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414 Claimants' Post-Hearing Brief, ¶¶ 236-241.

415 Claimants' Memorial, ¶¶ 484-489.

416 Claimants' Memorial, ¶ 484.

417 Claimants' Memorial, ¶ 486.

418 Claimants' Reply, ¶¶ 393-395.

419 Claimants' Memorial, ¶ 485.

420 Claimants' Memorial, ¶ 491.

421 Claimants' Reply, ¶¶ 410, 412-420.

through various controls, including by appropriately discounting the cash flows, as well as performing cross-checks.[422]

397. Claimants submit that BRG's assumptions underlying the income-based approach are "*based on contemporaneous business models from the Claimants and validated by JLL's market research*" and therefore "*provide a reasonable and* 'middle of the road' *basis to value Claimants' investments.*"[423]

398. Claimants describe Mr. Seda's successful track record and reputation, citing the average daily occupancy rates of Charlee Hotel, sale of all the units in Luxé within three months of the sales launch, as well as sale of nearly all phase 1 units of Meritage Project as of August 2016.[424] This allowed Mr. Seda "*to build a robust pipeline of additional projects*", including Cartagena resort Tierra Bomba, other planned mixed-use developments in Medellín's suburbs, 450 Heights and Santa Fé de Antioquia; and a planned condominium project with three hotels in the outskirts of Bogotá, Prado Tolima.[425] According to Claimants, this demonstrates that FMV of Claimants' investments must include the future potential value of Claimants' projects.[426]

e) Damages Calculation

399. In order to calculate damages under the income- and market-based approach, Claimants' experts, BRG, used the DCF methodology.[427] BRG also used market data sourced from Jones Lang LaSalle ("**JLL**"), a real estate and hospitality consultancy, to complement and validate the data used in Claimants' contemporaneous business plans and internal documents.[428]

400. The damages were calculated as the difference between the value, as of the date of valuation, of each of Claimants' projects in the "actual" and "but-for" scenarios.[429] The cash flows for the "but-for" scenario comprised "*expected revenue for each of Claimants' Projects from (i) unit sales, based on the number of units, timing of sales, equilibrium point and projected prices; and (ii) fees from hotel operations, based on the number of rooms, forecasted average daily occupancy rates, food and beverage revenues,*

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422 Claimants' Reply, ¶¶ 410, 422-440.

423 Claimants' Post-Hearing Brief, ¶¶ 245-247, 256-278.

424 Claimants' Memorial, ¶ 492.

425 Claimants' Memorial, ¶ 493.

426 Claimants' Memorial, ¶ 494.

427 Claimants' Memorial, ¶ 495.

428 Claimants' Memorial, ¶ 495.

429 Claimants' Memorial, ¶ 496.

management and incentive fees, etc."[430] The cost components of the cash flows, in turn, included "*pre-development expenses, land purchase costs, construction costs, sales and marketing costs, fees for developer, contractor, architect and fiduciary, among others, and taxes.*"[431]

401. The forecasted cash flows were then converted into USD and discounted using the weighted average cost of capital ("**WACC**") to calculate the present value as of the date of valuation for each of the projects.[432] Lastly, the value of any long-term financial debt held by the Project as of the date of valuation was deducted.[433]

402. Claimants submit that in the "actual" scenario, Respondent's measures suspended all of Claimants' projects, therefore actual value of Claimants' projects is "*only the residual value of the land held by Claimants as of the date of valuation.*"[434] The latter was therefore subtracted from the "but-for" value of Claimants' projects and the equity damages were then divided among Mr. Seda and the rest of Claimants according to their respective interests.[435]

403. BRG then compared the income-approach derived values with independent valuations under a market-based approach, using data from JLL.[436] Claimants submit that the market generated values were consistent with the values generated under the income-based DCF approach using Claimants' internal business planning documents.[437]

404. Moreover, BRG estimated the "*value of Claimants' brand by estimating the future value of Claimants' business beyond the value of the projects under construction and in development*" by developing an estimate of the value of additional projects later in time based on cash flows from Claimants' existing projects, accounting for risk.[438]

405. Finally, BRG accounted for the probability of failure of the projects in development by applying a haircut of 23%, derived from data published by the U.S. Bureau of Labor

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430 Claimants' Memorial, ¶ 497.

431 Claimants' Memorial, ¶ 497.

432 Claimants' Memorial, ¶ 498.

433 Claimants' Memorial, ¶ 498.

434 Claimants' Memorial, ¶ 499.

435 Claimants' Memorial, ¶ 500.

436 Claimants' Memorial, ¶ 501.

437 Claimants' Memorial, ¶ 501.

438 Claimants' Memorial, ¶ 502.

Statistics, to the intrinsic value of Tierra Bomba, 450 Heights, and Santa Fé, as well as to the value of Claimants' brand.[439]

406. Accordingly, for the Memorial, Claimants' experts calculated that the damages due to Mr. Seda are USD 290.6 million and damages due to other Claimants are USD 18.6 million.[440] In the Post-Hearing Brief, Claimants submitted that they were seeking USD 203.6 million in damages.[441]

407. In addition to economic damages, Claimants submit that Respondent must pay moral damages to Mr. Seda for "*the personal and reputational harm*" he suffered as a result of Respondent's actions.[442] Claimants rely on Article 31(2) of the ILC Articles that defines "*injury*" as "*any damage, whether material or moral, caused by the internationally wrongful act of a State*" as well as investment arbitration tribunals that concluded that "*an injury to an investor's credit, reputation and prestige is compensable in the form of moral damages.*"[443]

408. Claimants reject Respondent's contention that awarding moral damages would lead to double-dipping and argue that the personal harm to Mr. Seda extends beyond the economic harm to his real estate projects.[444]

409. Claimants submit that Respondent has tarnished Mr. Seda's reputation by refusal to assess or grant Newport a status of a good faith party, thereby implying that Mr. Seda was associated with criminal activity – an implication "*fatal to one's reputation.*"[445] Describing the incidents of what they describe as "[t]*he extortion campaign, threat of and actual physical violence against Mr. Seda, threats against Mr. Seda's family, and continued harassment by Colombian authorities*", Claimants also submit that Respondent's actions have impacted Mr. Seda's physical and mental well-being.[446]

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439 Claimants' Memorial, ¶ 503.

440 Claimants' Memorial, ¶¶ 504-505.

441 Claimants' Post-Hearing Brief, ¶ 282.

442 Claimants' Memorial, ¶ 510; Claimants' Post-Hearing Brief, ¶¶ 280-281.

443 Claimants' Memorial, ¶¶ 510-511.

444 Claimants' Reply, ¶ 454.

445 Claimants' Memorial, ¶ 512; Claimants' Reply, ¶ 452.

446 Claimants' Memorial, ¶¶ 515-520; Claimants' Reply, ¶ 456.

410. Mr. Seda therefore requests 10% of the total damages in moral damages as "*an adequate, proportionate and reasonable measure of compensation for the personal, business, reputational, physical and mental anguish.*"[447]

f) Interest on the Awarded Damages

411. Relying on Articles 10.26(1)(a) and 10.7(3) of the TPA, Claimants submit that they are entitled to both pre- and post-Award interest.[448] Claimants further rely on Article 38 of the ILC Articles to argue that payment of interest is an inherent part of "*full reparation.*"[449]

412. Claimants reject Respondent's position that the interest should be limited to post-award interest of only the U.S. risk-free rate, relying on the language of the TPA and the prevailing investment tribunals' jurisprudence.[450]

413. BRG calculates the "*commercially reasonable rate*" as 5.23% for the real estate and 4.83% for the hospitality businesses, based on the 5-year trailing average of JP Morgan's Emerging Bond Index and corporate bond yields for real estate development and hotel operations.[451] Consequently, as of 15 June 2020 (using the filing date as a proxy for the date of the Award), Claimants submit that the pre- and post-award interest owed to Mr. Seda comprises USD 44.5 million and that owed to the remaining Claimants USD 2.8 million.[452] In contrast, Claimants argue, the U.S. risk free rate suggested by Colombia is not "*commercially reasonable*" and ignores the commercial enterprise in which Claimants were invested.[453]

414. Claimants also submit that corporate taxes that Claimants would have paid in Colombia had their Projects been allowed to develop were accounted for by BRG, and therefore, the Award should not be subjected to any further taxes by Respondent.[454]

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447 Claimants' Memorial, ¶ 521; Claimants' Reply, ¶¶ 457-458.

448 Claimants' Memorial, ¶ 506.

449 Claimants' Memorial, ¶ 507.

450 Claimants' Reply, ¶¶ 447-448; Claimants' Post-Hearing Brief, ¶ 279.

451 Claimants' Memorial, ¶ 508.

452 Claimants' Memorial, ¶ 508.

453 Claimants' Reply, ¶ 449.

454 Claimants' Memorial, ¶ 509; Claimants' Reply, ¶ 451.

g) Claim for Costs

415. Relying on Article 10.26(1) of the TPA, Article 61(2) of the ICSID Convention, and Rule 28 of the ICSID Arbitration Rules, which grant the Tribunal power to award costs, Claimants submit that Respondent must pay the entire costs and expenses of the Arbitration, including Claimants' legal fees, the fees and expenses of any experts, the fees and expenses of the Tribunal, and ICSID's other costs, if the Tribunal finds that Respondent breached its obligations under the TPA.[455]

5. Relief Sought by Claimants

416. In the Post-Hearing Brief, Claimants sought the following relief from the Tribunal:

> "*(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.*"[456]

II. Summary of Respondent's Position and Relief Sought

417. It is Respondent's position that Article 22.2 of the TPA applies, and the case should be dismissed (**1.**). Alternatively, Respondent submits that the Tribunal lacks jurisdiction (**2.**). Should the Tribunal acknowledge jurisdiction, Respondent submits to have fully complied with the provisions of the TPA, so that the Tribunal should dismiss the entirety of the claims on the merits (**3.**) and that, in the alternative, Claimants are not entitled to any damages (**4.**). Respondent also claims all the costs incurred in connection with this arbitration (**4.f)**).

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455 Claimants' Memorial, ¶¶ 522-523; Claimants' Reply, ¶ 459.

456 Claimants' Post-Hearing Brief, Section VII.

1. Essential Security Interest

a) Essential Security Exception

418. Respondent submits that it invoked the Essential Security Exception not belatedly, as Claimants argues, but "*in good faith, only after new developments coupled with new information came to light, making it patent that what is at stake in these proceedings is Colombia's ability to exercise its sovereign criminal power to fight the activities of a criminal organization whose members, including those of the highest rank, have successively held the Meritage Lot and have engaged in money laundering operations that permeate its transfers up to the present.*"[457]

419. Respondent argues that the applicable rule is Arbitration Rule 41(2), which reflects the duty of the Tribunal to satisfy itself that all jurisdictional requirements are fulfilled before it proceeds to the examination of the merits of the case.[458] According to Respondent, this applies *a fortiori* given that Article 22.2 (b) of the TPA excludes from the scope of arbitration the invocation of essential security exceptions.[459] Respondent submits that there is no time limit that would circumscribe this power and duty of the Tribunal.[460]

420. Alternatively, Respondent argues that the Essential Security Exception – if it would be considered a merits defense – was invoked in compliance with the ICSID Arbitration Rules and the PO1, and that the principles of procedural fairness and equality of arms are not impacted.[461]

b) Effect of Article 22.2(b) of the TPA

421. Respondent first raised the Essential Security Exception in February 2022 with its Rejoinder and made two submissions in this regard.

422. *First*, the Tribunal lacks jurisdiction over the dispute on the basis of the ordinary language of Article 22.2(b) of the TPA:

> "[T]*he Tribunal lacks jurisdiction to adjudicate the legality of measures that the State considers necessary for the protection of its own essential*

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457 Respondent's Reply to Claimants' Application of 7 March 2022, 18 March 2022 ("**Respondent's Reply to Claimants' Application of 7 March 2022**"), p. 5.

458 Respondent's Reply to Claimants' Application of 7 March 2022, p. 7.

459 Respondent's Reply to Claimants' Application of 7 March 2022, p. 7.

460 Respondent's Reply to Claimants' Application of 7 March 2022, p. 7.

461 Respondent's Reply to Claimants' Application of 7 March 2022, pp. 8-14.

> *security interests. On this ground, the Tribunal must decline jurisdiction over the present dispute.*"[462]

423. Respondent submits that "*Article 22.2 (b) of the Treaty, read together with its interpretative footnote, establish that arbitral tribunals are bound to apply Article 22.2 (b) whenever it is invoked in an arbitration initiated under Chapter 10 of the Treaty*", since the State parties to the TPA carved out the Tribunal's power to assess whether the conditions of Article 22.2(b) are met.[463]

424. *Second*, Respondent provides that, in the alternative, should the Tribunal find it has jurisdiction over the dispute, the security exception must be found to apply and must result in a finding that Respondent has not breached any TPA obligations. Respondent submits that it:

> "*enjoys full discretion to define what constitutes its essential security interests, to the extent that such definition is done in good faith. Here, the Respondent identifies its 'essential security interests' as being those related to the 'quintessential functions of the* [Colombian State]*, namely, the protection of its territory and its population* […]*, and the maintenance of law and public order internally.' The position of the Republic of Colombia in this arbitration is that it seeks, through Asset Forfeiture Proceedings, to fight against organized crime, money laundering, and drug trafficking, thus ultimately protecting its population from the threats of paramilitary and marginalized groups that have been ravaging the country for years.*"[464]

425. Respondent submits that the characterization of Article 22.2(b) of the TPA as providing a ground for preclusion from wrongfulness is incorrect, and *LG&E v. Argentina* should be distinguished.[465] In contrast to the circumstances precluding wrongfulness of a State's conduct listed in Chapter V of the ILC Articles, treaty exceptions "*operate as a derogation from the obligations undertaken by the parties to the treaty.*"[466] Respondent submits that these are "*non-precluded measures*" to which the State can resort.[467]

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462 Respondent's Rejoinder on Jurisdiction and Merits, 17 February 2022 ("**Respondent's Rejoinder**"), ¶ 29.

463 Respondent's Reply to Claimants' Application of 7 March 2022, pp. 15-16.

464 Respondent's Rejoinder, ¶ 55.

465 Respondent's Reply to Claimants' Application of 7 March 2022, p. 19; Exhibit CL-045, *LG&E and others v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.

466 Respondent's Reply to Claimants' Application of 7 March 2022, p. 20.

467 Respondent's Reply to Claimants' Application of 7 March 2022, p. 20.

426. Respondent argues that the Asset Forfeiture Proceedings are the measure enacted for the purpose of the stated security exception.[468]

427. In its Post-Hearing Submissions, Respondent submitted another distinct level of argument in interpreting Article 22.2(b) of the TPA. According to Respondent's new primary case, under Article 22.2(b) of the TPA, the Tribunal lacks justiciability over the dispute, that is the "*ability to subject such invocation to any legal assessment*."[469] According to Respondent, the Tribunal is bound to the conclusion that the exception in Article 22.2(b) of the TPA applies without making "*any legal assessment at all.*"[470] This is because, Respondent argues, the language of the provision and the nature of essential security form part of Respondent's sovereignty. Respondent maintains that, for these reasons, the dispute is non-justiciable.[471] Respondent submits that the long-standing U.S. treaty practice confirms this conclusion.[472]

428. Should the Tribunal reject Respondent's primary submission on non-justiciability, Respondent, in the alternative, argues a lack of jurisdiction.

429. According to Respondent, the language of Article 22.2(b) of the TPA confirms that the State parties to the TPA intended to exclude matters of essential security from the jurisdiction of any tribunal. Respondent argues that this is confirmed by the submissions of the U.S. during the Hearing and the *travaux*.[473] Respondent advances five arguments in support of this position.

430. *First*, Respondent interprets Article 22.2(b) of the TPA in line with the rules of treaty interpretation under the VCLT.

431. Respondent submits that, following the ordinary meaning of Article 22.2(b) of the TPA under Article 31(1) of the VCLT, it is evident that the Tribunal has no jurisdiction once the Essential Security Exception is invoked because the provision is self-judging. The State parties to the TPA have purposefully excluded any "*objective*" or "*non-self-judging*

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468 Respondent's Rejoinder, ¶¶ 51-52, 56.

469 Respondent's Post-Hearing Submission, 25 August 2022 ("**Respondent's Post-Hearing Submission**"), ¶ 20.

470 Respondent's Post-Hearing Submission, ¶ 22.

471 Respondent's Post-Hearing Submission, ¶ 23.

472 Respondent's Submission on [redacted] and on the U.S. Treaty Practice on Essential Security Interests Exceptions, 21 December 2022 ("**Respondent's Submission on [redacted] and on the U.S. Treaty Practice on Essential Security Interests Exceptions**"), ¶¶ 22-31.

473 Respondent's Post-Hearing Submission, ¶ 25.

elements" from Article 22.2(b) of the TPA to restrict the scope of a tribunal's jurisdiction over Chapter 10, according to Respondent.[474]

432. Respondent provides several references to the drafting history of the TPA to show an intention to remove the Essential Security Exception from the remit of an external review.[475] Respondent further submits that Article 10.2 of the TPA provides that the Essential Security Exception should prevail in case of inconsistencies between Chapter 10 (on dispute resolution) and Article 22.2(b) of the TPA, evidencing that when the exception is raised, the dispute resolution mechanism is disabled.[476] Respondent argues that such interpretation is consistent with the object and purpose of the TPA which is to combat narco-trafficking.[477]

433. *Second*, Respondent maintains that the wording of Article 22.2(b) of the TPA is purposeful when compared to the other investment agreements concluded by Respondent and the self-judging nature of the Essential Security Exception is to be recognized through the *effect utile* principle.[478]

434. *Third*, Respondent relies on case law dealing with essential security exceptions. Respondent submits that decisions by the ICJ, the World Trade Organization ("**WTO**"), and investment tribunals show that where phrases such as "*it considers*" are used in a provision and no "*limitative qualifying clauses*" are included, that provision is self-judging.[479]

435. Respondent rejects Claimants' interpretation of the decision of the *Eco Oro* tribunal to the effect that Article 22.2(b) of the TPA does not limit the Tribunal's jurisdiction. Respondent argues that the present dispute is substantially different from the facts of the *Eco Oro* case and no analogy can be drawn. According to Claimants, the relevant provision in the *Eco Oro* case, Article 2201(3) of the Canada-Colombia free trade agreement ("**FTA**"), did not include the same self-judging elements as Article 22.2(b) of the TPA. Respondent maintains that while Article 22.2(b) of the TPA applies to the entire Treaty, Article 2201(3) of the Canada-Colombia FTA is limited to the investment chapter only. Furthermore, Respondent claims that the U.S. have rejected Claimants' analogy to

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474 Respondent's Post-Hearing Submission, ¶ 30.

475 Respondent's Post-Hearing Submission, ¶ 31.

476 Respondent's Reply to Claimants' Application of 7 March 2022, p. 16; Respondent's Post-Hearing Submission, ¶ 41.

477 Respondent's Post-Hearing Submission, ¶ 42.

478 Respondent's Post-Hearing Submission, ¶ 44.

479 Respondent's Post-Hearing Submission, ¶ 46.

the *Eco Oro* case, proving that it is not possible to use the findings of that tribunal in the present case.[480]

436. *Fourth*, Respondent's interpretation purportedly reflects the authentic interpretation of Article 22.2(b) of the TPA. Respondent argues that because both State parties to the TPA have provided identical interpretations of Article 22.2(b) of the TPA during the Hearing, this interpretation should be binding on the Tribunal under Article 31(3) of the VCLT. This is, Respondent claims, because the common interpretation between Respondent and the U.S. represents "*objective evidence of the understanding of the parties as to the meaning of the Treaty.*"[481]

437. *Finally*, Respondent relies on the *travaux préparatoires* to confirm its position. Respondent submits that the drafting history of the TPA clearly evidences that Article 22.2(b) of the TPA was intended by the Contracting Parties to be self-judging and that a tribunal is not empowered to exercise jurisdiction after the Essential Security Exception has been invoked. Respondent disagrees with Claimants' argument that the *travaux* are irrelevant because the ordinary meaning of Article 22.2(b) of the TPA is unambiguous. Respondent maintains that arbitral tribunals have turned to the drafting history to ascertain the intention of the contracting parties even where a provision was not unclear.[482]

c) Scope of the Tribunal's Review

438. In case the Tribunal decides it has jurisdiction over the dispute, which Respondent submits it does not, Respondent maintains that Claimants' case should be dismissed on the merits because Asset Forfeiture Proceedings fall within the remit of the Essential Security Exception.

439. Initially, in the Rejoinder, Respondent argued that the standard of review should be that of good faith:

> "*It is the Respondent's submission that the Tribunal's scope for review of Colombia's invocation of the exception is strictly circumscribed to an examination of whether the exception of essential security of Article 22.2.b has been invoked in good faith by Colombia.*"[483]

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480 Respondent's Post-Hearing Submission, ¶ 48.

481 Respondent's Post-Hearing Submission, ¶ 50.

482 Respondent's Post-Hearing Submission, ¶ 56.

483 Respondent's Rejoinder, ¶ 43.

440. Later, Respondent argues that the Tribunal is merely permitted to carry out a *prima facie* review which includes the following four elements:

> "*that the host State (i) adopts measures (ii) that it considers necessary, and (iii) that such measures be adopted for the protection of the (iv) essential security interests of the State invoking the exception.*"[484]

441. Respondent submits that it is undisputed between Claimants and Respondent that elements (ii) and (iv) fall outside the Tribunal's scope of review. Respondent further maintains that the Asset Forfeiture Proceedings constitute a "measure" in the sense of element (i). Respondent claims that the Tribunal therefore should only review if "*the measures adopted by Colombia could plausibly be expected to protect its Essential Security interests.*"[485]

442. Respondent submits that the correct test to determine the link between the measure and the essential security interest is "*plausibility*", and maintains that it is not implausible that the Asset Forfeiture Law, the Asset Forfeiture Proceedings, and the parallel criminal proceedings are connected to Respondent's interest to combat narco-trafficking.[486] Respondent disputes that the Tribunal is permitted to carry out any further review, including whether Article 22.2(b) of the TPA has been invoked in good faith or arbitrarily.[487]

443. Respondent submits that once the Essential Security Exception is raised, Claimants are not entitled to any form of compensation, as Article 22.2(b) of the TPA absolves Respondent from liability.[488] Respondent argues that an invocation of Article 22.2(b) of the TPA precludes an internationally wrongful act – and absent such, no compensation is owed to Claimants.[489]

444. Respondent disputes Claimants' argument that Article 22.2(b) of the TPA prohibits the Tribunal from ordering reversal of measures taken in protection of essential security interests – but still allows for compensation in monetary damages. Respondent denies that there is a hierarchy within public international law regarding the forms of reparations and argues that the TPA cannot be read in a way that prohibits one form – restitution – but

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484 Respondent's Post-Hearing Submission, ¶ 66.

485 Respondent's Post-Hearing Submission, ¶ 69.

486 Respondent's Reply to Claimants' Application of 7 March 2022, p. 22; Respondent's Post-Hearing Submission, ¶ 70.

487 Respondent's Post-Hearing Submission, ¶ 71.

488 Respondent's Reply to Claimants' Application of 7 March 2022, pp. 23-24.

489 Respondent's Post-Hearing Submission, ¶ 80.

allows another – compensation.[490] Respondent further objects to Claimants being awarded compensation as the Asset Forfeiture Proceedings are ongoing and the Meritage Lot has not yet been forfeited.[491]

445. Respondent rejects Claimants' submission that Respondent can only invoke Article 22.2(b) of the TPA over an essential security interest identified at the time the measures where first enacted because the relevant provision is drafted in the present tense. Respondent argues that there is no time limit set out in the TPA within which the Essential Security Exception is to be raised. The language of Article 22.2(b) of the TPA, Respondent maintains, merely dictates that the Tribunal put itself "*at the time of the invocation of the exception*" to decide if Respondent considered the adopted measures necessary for the protection of an essential security interest.[492]

d) MFN Clause

446. Respondent opposes Claimants' argument that they are entitled to the same protection as Swiss investors under the Colombia-Swiss BIT via the MFN standard. *First*, Respondent submits that Article 10.4 of the TPA "*expressly bars the importation of investor-State dispute settlement mechanisms through its MFN clause.*"[493] *Second*, Respondent argues that Claimants' request to be granted more favorable treatment under the Colombia-Swiss BIT does not meet the requirements of the MFN clause. *Third*, Respondent maintains that Article 10.4 of the TPA cannot be used to "*import third treaty provisions to bypass the express exclusions provided in the treaty.*"[494]

2. Jurisdictional Objections

447. Respondent submits that Claimants failed to prove that they have made an "investment" under the TPA and the ICSID Convention (**a**), that the vast majority of Claimants' claims does not concern the Meritage Project (**b**), and that Claimants have failed to show that

490 Respondent's Post-Hearing Submission, ¶ 83.

491 Respondent's Post-Hearing Submission, ¶ 84.

492 Respondent's Post-Hearing Submission, ¶ 91.

493 Respondent's Post-Hearing Submission, ¶ 95.

494 Respondent's Post-Hearing Submission, ¶ 95.

The Boston Enterprises Trust and Mr. Brian Hass are entitled to bring investment claims before the Tribunal (**c**) and (**d**).

a) No Investment under the TPA and the ICSID Convention

448. Respondent argues that Claimants' investment does not have the "*characteristics of an investment*" and, therefore, does not qualify for protection under the TPA and the ICSID Convention.[495] Respondent submits that Claimants have failed to prove that they made an economic contribution or commitment of capital or resources qualifying for treaty protection, and that there was an assumption of risk.[496]

449. Respondent submits that Claimants ought to have examined jurisdiction following a dual test considering not only Chapter 10 of the TPA but also the ICSID Convention standard set forth in its Article 25(1), which imposes an autonomous definition of "*investment.*"[497] More specifically, Respondent highlights that Claimants failed to prove the commitment of capital, a certain duration, as well as the assumption of an investment risk, which are prerequisites for jurisdiction according to Article 25(1) of the ICSID Convention.[498]

450. According to Respondent, even if the ICSID Convention does not impose any additional requirements to define investment, the purported investment must still have "*the characteristics of an investment*" under the TPA, including the commitment of capital, the expectation of gain or profit, and the assumption of risk.[499] Relying on *Seo v. Korea*, where the tribunal adopted a "*global assessment*" test to determine whether claimants made an investment, Respondent submits that the tribunal assessed the additional characteristics contained in the base treaty and left the opportunity open for further characteristics, such as duration.[500]

451. Respondent submits that Claimants' investment fails the "*global assessment*" test.[501]

452. As regards commitment of capital, Respondent submits that Claimants have failed to provide evidence of significant contribution of capital or other own resources into the

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495 Respondent's Rejoinder, ¶ 512; Respondent's Post-Hearing Brief, ¶ 113.

496 Respondent's Counter-Memorial, ¶ 247; Respondent's Rejoinder, ¶ 509.

497 Respondent's Counter-Memorial, ¶ 249; Respondent's Rejoinder, ¶ 513.

498 Respondent's Counter-Memorial, ¶¶ 254, 259; Respondent's Rejoinder, ¶ 513.

499 Respondent's Rejoinder, ¶ 515.

500 Respondent's Rejoinder, ¶ 518; Exhibit CL-134, *Seo v. The Government of the Republic of Korea*, HKIAC Case No. 18117, Final Award, 27 September 2019.

501 Respondent's Rejoinder, ¶ 521; Respondent's Post-Hearing Brief, ¶ 114.

Meritage Project.[502]Respondent bases its argument on Newport's audited financial statements between 2013 and 2017, which record less than USD 2 million contributed by the shareholders between 2013 and 2017, but do not specify which shareholders.[503] Respondent argues that even assuming that all of Claimants provided the contributions, it would still be insignificant, with contribution of other resources beyond capital injection being negligible.[504]

453. In addition, according to Respondent, Claimants failed to show a commitment of capital as they did not prove their rights *in rem* over the Meritage Property.[505]

454. As regards investment risk, Respondent argues that general risks do not suffice, and an investment risk must be "*qualified and strictly related to the investment*", which Claimants did not undertake.[506] Furthermore, due to their close connection, an investment risk cannot exist in the absence of a contribution of capital.[507]

455. As regards expectation of gain, Respondent argues that in the absence of any commitment of capital or other resources and assumption of risk, a mere expectation of gain or profit cannot be sufficient to establish an investment.[508]

456. Finally, Respondent contends that Claimants have failed to demonstrate that they have unencumbered rights over the shares in Royal Realty, Newport, and Luxé.[509] As of the filing of the Request for Arbitration, most of Claimants' shares in Newport and Luxé had been pledged as a collateral in favor of Downie North LLC, as were Mr. Seda's shares in Royal Realty.[510] Respondent argues that absent any evidence as to the rights of Downie North LLC over Claimants' investment, the extent of Claimants' control over their shares in Royal Realty, Newport, and Luxé remains unclear.[511]

b) Connection between the Meritage Project and Claimants' Claims

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502 Respondent's Rejoinder, ¶ 522.

503 Respondent's Counter-Memorial, ¶ 256; Respondent's Rejoinder, ¶ 522.

504 Respondent's Rejoinder, ¶¶ 523-524.

505 Respondent's Counter-Memorial, ¶ 257.

506 Respondent's Rejoinder, ¶ 525.

507 Respondent's Counter-Memorial, ¶ 262.

508 Respondent's Rejoinder, ¶ 528.

509 Respondent's Rejoinder, ¶ 529; Respondent's Post-Hearing Brief, ¶ 115.

510 Respondent's Rejoinder, ¶ 530.

511 Respondent's Rejoinder, ¶ 531.

457. Respondent contends that only 25% of Claimants' damages claims concern damages in connection with the Meritage Project and the remainder fall outside the Tribunal's jurisdiction.[512] Particularly, Brian Hass, Stephen J. Bobeck, Monte G. Adcock, Justin T. Enbody, and Justin T. Caruso only hold shares in Luxé.[513] Moreover, Respondent states that some of the claims brought by The Boston Enterprises Trust and many of the damages claimed by Mr. Seda concern alleged losses in Luxé and other projects, such as Cartagena Tierra Bomba, 450 Heights, and Santa Fé de Antioquia.

458. Relying on Article 25 of the ICSID Convention and Article 10.1.1 of the TPA, Respondent argues that for the Tribunal to have jurisdiction, the claims must "*directly*" arise out of or be "*related to*" the investments, which requires a legally significant connection between them.[514] Claimants have failed to show such legally significant connection between the measures against the Meritage Project and claims related to other projects.[515]

c) Lack of Standing of The Boston Enterprises Trust

459. Respondent submits that The Boston Enterprises Trust is barred from seeking investment protection before the Tribunal since it does not qualify as a "*national of another Contracting State*" under Article 25 of the ICSID Convention and, additionally, the circumstances of its establishment and acquisition of shares in Newport and Luxé prevent it from invoking the said protection.[516]

460. In its Counter-Memorial, Respondent argued that The Boston Enterprises Trust lacks legal personality as it is an unincorporated consortium being nothing more than a contractual relationship between different entities without legal personality so that it cannot qualify as a "*juridical person*" for the purposes of the ICSID Convention.[517]

461. Following disclosure of the identity of the settlor, trustee, and beneficiary of The Boston Enterprises Trust, [redacted], Respondent maintained its objection to The Boston Enterprises Trust's standing in the present dispute. In the Rejoinder, Respondent contested the reasons which Claimants cited for [redacted] transferring his shares in

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512 Respondent's Counter-Memorial, ¶ 263; Respondent's Rejoinder, ¶ 533.

513 Respondent's Counter-Memorial, ¶ 264.

514 Respondent's Rejoinder, ¶¶ 536-537; Respondent's Post-Hearing Brief, ¶ 116.

515 Respondent's Rejoinder, ¶ 540; Respondent's Post-Hearing Brief, ¶ 117.

516 Respondent's Counter-Memorial, ¶ 267.

517 Respondent's Counter-Memorial, ¶ 268; Respondent's Rejoinder, ¶¶ 558-563; Respondent's Post-Hearing Brief, ¶¶ 121-122.

Newport and Luxé to The Boston Enterprises Trust a few weeks before filing the Request for Arbitration, *i.e.*, fear of retaliation.[518]

462. Further, Respondent relies on Article 10.16 of the TPA, which requires that in order to submit an investment claim to arbitration, a claimant must own or control the investment at the time of the purported breach, a requirement lacking for The Boston Enterprises Trust.[519]

d) Lack of Standing of Mr. Brian Hass

463. Respondent submits that Mr. Brian Hass has no standing in this dispute as he is not listed in the Share Ledger of Luxé, which is Claimants' only evidence for Brian Hass' investment in Luxé.[520] In the Counter-Memorial, Respondent points to the fact that only Haystacks Holding LLC is listed in the Share Ledger of Luxé and that no evidence exists concerning its sole owner, the Hass Family Investment Trust, specifically regarding its establishment and structure.[521]

464. In the Rejoinder, Respondent argues that the documents submitted by Claimants show that the Hass Family Investment Trust had been constituted as a discretionary trust, meaning that the rights of Mr. Hass as a discretionary beneficiary are subject to the decisions of a third party, the trustee, and Mr. Hass himself does not have any direct right or interest over the trust assets, but a mere expectation.[522] Relying on *Agarwal v. Uruguay*, Respondent submits that this disqualifies Mr. Hass from having made a protected investment.[523]

3. Respondent's Compliance with the TPA

465. Assuming the Tribunal has jurisdiction to hear the dispute, Respondent claims full compliance with its obligations under the TPA *vis-à-vis* Claimants.[524]

a) No Expropriation of Claimants' Investment

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518 Respondent's Rejoinder, ¶ 555; Respondent's Post-Hearing Brief, ¶ 124.

519 Respondent's Rejoinder, ¶¶ 556-557.

520 Respondent's Counter-Memorial, ¶ 275.

521 Respondent's Counter-Memorial, ¶ 276.

522 Respondent's Rejoinder, ¶¶ 546-547.

523 Respondent's Rejoinder, ¶¶ 549-551; Respondent's Post-Hearing Brief, ¶¶ 118-119; Exhibit RL-202, *Prenay Agarwal, Vinita Agarwal and Ritika Mehta v. Oriental Republic of Uruguay*, PCA Case No. 2018-04, Award, 6 August 2020.

524 Respondent's Counter-Memorial, ¶ 278; Respondent's Rejoinder, ¶ 564.

466. Respondent submits that it did not expropriate Claimants' investment either directly or indirectly pursuant to Article 10.7 of the TPA, since the measures in question were a legitimate exercise of its regulatory powers, and, in any case, the acts of Respondent are not expropriatory in nature.[525]

aa) Legal Standard

467. Respondent rejects both claims of direct and indirect expropriation, with only the latter being a disputed legal standard.[526]

468. *First*, according to Respondent, it is a well-established principle in international law explicitly enshrined in Annex 10-B para. 3(b) of the TPA that non-discriminatory actions being designed and applied to protect legitimate public welfare objectives do not constitute expropriation.[527] Respondent cites decisions in *Saluka*, *Suez v. Argentina*, and *LG&E* to substantiate a State's right to adopt measures having an expropriatory effect in order to regulate in the public interest.[528]

469. *Second*, Respondent states that the measures in dispute cannot constitute an expropriation, as they did not interfere with a tangible or intangible property right or property interest in an investment, which is a condition for an expropriation pursuant to Annex 10-B para. 1 of the TPA.[529] Citing Prof. Douglas, Respondent notes that a business activity or the activity of making profit cannot be characterized as property interests and thus be the object of an expropriation.[530]

470. *Third*, Respondent states that three non-exhaustive factors should be considered when assessing whether a government action constitutes an indirect expropriation: (i) economic impact of the government action, referring to – at least – a strong decrease of the economic value of an investment, (ii) interference with reasonable investment-backed expectations,

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525 Respondent's Counter-Memorial, ¶ 300; Respondent's Rejoinder, ¶ 567.

526 Respondent's Counter-Memorial, ¶ 284.

527 Respondent's Counter-Memorial, ¶¶ 287-288.

528 Respondent's Counter-Memorial, ¶¶ 289-291; Exhibit CL-042, *Saluka v. Czech Republic*, Partial Award; Exhibit RL-044, *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010; Exhibit CL-045, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.

529 Respondent's Counter-Memorial, ¶ 292; Respondent's Post-Hearing Brief, ¶ 127.

530 Respondent's Counter-Memorial, ¶ 293.

requiring an objective inquiry as to the regulatory climate existing at the time the property was acquired, (iii) and the character of the government action.[531]

471. *Finally*, citing decisions in *Busta v. Czech Republic*, *A.M.F. v. Czech Republic*, and *Plama v. Bulgaria*, Respondent states that it is well-established that only total and permanent deprivation of property rights constitutes an expropriation and triggers a compensation requirement.[532] Therefore, Respondent concludes, temporary measures in compliance with legitimate police powers are not, in their nature, expropriatory.[533]

bb) Asset Forfeiture Proceedings Are Not Expropriatory in Nature

472. Respondent recalls that Asset Forfeiture Proceedings are related to the concept of private property, enshrined in the 1991 Colombian Constitution, and aim at the pursuit of assets acquired through illicit enrichment.[534] Consequently, they could not be expropriatory by nature.[535] Respondent also submits that "*asset forfeiture is widely recognized and adopted in 'several leading States'*", and that Colombian Asset Forfeiture Law was drafted in adherence to international standards.[536]

473. *First*, citing the decision in *Vestey v. Venezuela*, Respondent claims that Claimants did not have any property right or right *in rem* in the Meritage Property.[537] Respondent admits that Newport had entered into a sale-purchase-agreement regarding the Meritage Property, but objects to Newport having any right *in rem*.[538] According to Respondent, even to the extent that Claimants may have had any rights in connection with the Meritage Project, none of these have been affected by the Asset Forfeiture Proceedings.[539]

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531 Respondent's Counter-Memorial, ¶¶ 293-294; Respondent's Rejoinder, ¶ 572.

532 Respondent's Counter-Memorial, ¶¶ 295-297; Exhibit RL-092, *Ivan Peter Busta and James Peter Busta v. Czech Republic*, SCC Case No. V 2015/014, Award, 10 March 2017; Exhibit RL-119, *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Award, 11 May 2020; Exhibit RL-030, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.

533 Respondent's Counter-Memorial, ¶ 297.

534 Respondent's Counter-Memorial, ¶ 301.

535 Respondent's Counter-Memorial, ¶ 301; Respondent's Rejoinder, ¶ 569.

536 Respondent's Rejoinder, ¶ 569.

537 Respondent's Counter-Memorial, ¶¶ 349-350; Respondent's Rejoinder, ¶ 574; Exhibit CL-106, *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016.

538 Respondent's Counter-Memorial, ¶ 351.

539 Respondent's Rejoinder, ¶ 576.

474. *Second*, none of the measures, and in particular the precautionary measures and the ongoing Asset Forfeiture Proceedings, resulted in the total and permanent deprivation of Claimants' property rights.[540] Respondent submits that the Meritage Lot has not been sold, is not being treated by Claimants as "dead", and the Project may continue if the seizure is lifted.[541]

475. *Third*, Claimants have not met any of the non-exhaustive requirements listed in Annex 10-B of the TPA to determine whether indirect expropriation exists.[542]

476. With respect to the first factor, Respondent claims that Claimants have failed to demonstrate that the Asset Forfeiture Proceedings destroyed the economic value of their alleged investment and that this was caused by the adopted measures.[543]

477. Concerning the second factor, Respondent states that Claimants could not have had reasonable investment-backed expectations that the Colombian authorities would not initiate Asset Forfeiture Proceedings against the Meritage Property, as they are not subject to any limitations.[544] Rather, Respondent explains that the Attorney General's Office is obliged to pursue such proceedings as soon as it finds that an asset has an illicit origin.[545] Respondent submits that none of the certificates brought by Claimants contain specific commitments by the Colombian government that it would refrain from adopting asset forfeiture measures.[546] Furthermore, Respondent submits that Claimants' reliance on due diligence conducted before acquiring the lot is misplaced due to this due diligence's shortcomings.[547] Respondent states that Claimants, particularly Mr. Seda, must have been aware of Mr. López' claims and his links to the Meritage Property since 2014.[548]

478. Regarding the third factor, Respondent emphasizes that the Asset Forfeiture Proceedings were a governmental action adopted in application of general legislation that was known,

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540 Respondent's Rejoinder, ¶ 577.

541 Respondent's Rejoinder, ¶¶ 578-581.

542 Respondent's Counter-Memorial, ¶ 352.

543 Respondent's Counter-Memorial, ¶ 353; Respondent's Rejoinder, ¶¶ 583-585; Respondent's Post-Hearing Brief, ¶ 129.

544 Respondent's Counter-Memorial, ¶ 355; Respondent's Post-Hearing Brief, ¶ 131.

545 Respondent's Counter-Memorial, ¶ 355; Respondent's Rejoinder, ¶ 586.

546 Respondent's Counter-Memorial, ¶ 356.

547 Respondent's Rejoinder, ¶ 586.

548 Respondent's Counter-Memorial, ¶ 357.

or should have been known, to Claimants.[549] Moreover, Respondent submits that the Asset Forfeiture Proceedings are still pending before the Colombian courts and are not final yet.[550]

479. Instead, Respondent contends that the Asset Forfeiture Proceedings against the Meritage Project were a legitimate exercise of Colombia's regulatory powers as they were designed and applied to protect legitimate public welfare objectives, *i.e.*, to fight organized crime and protect good faith third parties without fault. The proceedings were non-discriminatory and in compliance with due process of law.[551]

(i) Protection of Legitimate Public Welfare Objectives

480. According to Respondent, Asset Forfeiture Law was enacted to protect a legitimate public welfare objective, namely, "*to 'fight organized crime through the rejection of wealth originating in illicit activities, such as drug trafficking' with the purpose of ultimately 'obtain[ing]* social and economic stability in the country.'"[552]

481. Although the maintenance of social and economic stability in the host State is not part of the non-exhaustive list of Annex 10-B of the TPA, Respondent deems it to be in line with this provision. Citing the decision in *Vestey*, Respondent contends that tribunals should accept the policies determined by the State to be useful or necessary for the public good, except in situations of blatant misuse of powers.[553] The maintenance of public security and social and economic stability is legitimate welfare objectives since the State Parties to the TPA included safety or security therein.[554]

482. Recalling the relevant procedural steps, Respondent submits that Asset Forfeiture Proceedings were initiated and conducted "*with strict adherence to the Asset Forfeiture Law and in accordance with its legitimate public welfare objectives.*"[555] They were also

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549 Respondent's Counter-Memorial, ¶ 358; Respondent's Rejoinder, ¶ 588; Respondent's Post-Hearing Brief, ¶ 134.

550 Respondent's Counter-Memorial, ¶ 360; Respondent's Rejoinder, ¶ 589.

551 Respondent's Counter-Memorial, ¶ 302; Respondent's Rejoinder, ¶ 568.

552 Respondent's Counter-Memorial, ¶ 304; Respondent's Rejoinder, ¶ 597; Respondent's Post-Hearing Brief, ¶ 141.

553 Respondent's Counter-Memorial, ¶ 305.

554 Respondent's Counter-Memorial, ¶ 307.

555 Respondent's Rejoinder, ¶¶ 598-602, 604-619.

proportionate to the pursued public welfare objective, which was confirmed by the Asset Forfeiture Court.[556]

(ii) Absence of Discrimination against Claimants

483. Respondent states that one cannot assume discrimination where there is different treatment towards different parties.[557] According to *Saluka*, discriminatory treatment requires (i) similar cases (ii) treated differently and (iii) without reasonable justification.[558]

484. Citing the decisions in *Cargill v. Mexico*, *Total v. Argentina*, and *Renée Rose v. Peru*, Respondent submits that the first element of "*like circumstances*" is a fact-specific inquiry.[559]

485. The Meritage Lot is not in like circumstances with the other lots allegedly belonging (or having belonged) to Mr. López Vanegas, including what Claimants refer to as "Sister Property" – as several "red flags" were unique to the Meritage Lot.[560] The Attorney General's Office initiated Asset Forfeiture Proceedings only against the Meritage Property, as the formal complaint filed by Mr. López Vanegas exclusively concerned the latter.[561] Moreover, the irregularities found in the chain of domain of the Meritage Lot gave the Colombian authorities strong indications that the lot was closely related to the *Oficina de Envigado*.[562] Finally, given that money was being collected through the pre-sales of units, Respondent deemed it necessary to protect prospective buyers and the general public.[563]

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556 Respondent's Rejoinder, ¶ 603.

557 Respondent's Counter-Memorial, ¶ 308.

558 Respondent's Counter-Memorial, ¶ 309; Respondent's Rejoinder, ¶ 631; Respondent's Post-Hearing Brief, ¶ 231; Exhibit CL-042, *Saluka v. Czech Republic*, Partial Award, ¶ 313.

559 Respondent's Counter-Memorial, ¶¶ 310-312; Exhibit CL-068, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009; Exhibit CL-079, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010; Exhibit RL-066, *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014.

560 Respondent's Rejoinder, ¶ 634; Respondent's Post-Hearing Brief, ¶¶ 234-242.

561 Respondent's Counter-Memorial, ¶ 314.

562 Respondent's Rejoinder, ¶ 634.

563 Respondent's Rejoinder, ¶ 634.

486. Regarding the second element of different treatment, Respondent submits that it treated Meritage Property as it treated other assets in "*like circumstances*", *i.e.*, those tainted by wrongful conduct.[564]

487. Regarding the third element, according to Respondent, an investor must demonstrate that it had been subject to unequal treatment in circumstances where there appears to be no reasonable basis for such differentiation.[565] Respondent submits that the measures taken against Claimants had a reasonable basis as they were adopted out of urgency to protect third parties.[566]

(iii) Compliance with Due Process of Law

488. Citing the decision in *ADC*, Respondent submits that due process of law "*demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it*."[567] Respondent purports that it did not breach this standard regarding the Asset Forfeiture Proceedings.[568]

489. Respondent submits that the due process was followed in these main aspects:[569]

— Commencement of the Asset Forfeiture Proceedings was based on the existence of "*serious and reasonable*" evidence to infer the probable existence of one of the grounds regarding the illegal origin of the Meritage Lot.[570]

— The imposition of the precautionary measures was in accordance with the law and the applicable standard of proof – the measures were based on the illegal origin of the asset and the evidence of money laundering operations including the *Oficina de Envigado*, and *Fiscalía* was not under an obligation to confirm the existence of good faith third parties at that stage. Furthermore, the imposition was twice reviewed and confirmed by the competent Colombian courts as regards formal and material legality.[571]

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564 Respondent's Rejoinder, ¶¶ 635-637; Respondent's Post-Hearing Brief, ¶¶ 247-254.

565 Respondent's Counter-Memorial, ¶ 317.

566 Respondent's Counter-Memorial, ¶ 318; Respondent's Rejoinder, ¶ 638.

567 Respondent's Counter-Memorial, ¶ 321.

568 Respondent's Counter-Memorial, ¶¶ 322-323; Respondent's Post-Hearing Brief, ¶¶ 147-148.

569 Respondent's Post-Hearing Brief, ¶¶ 144-146.

570 Respondent's Post-Hearing Brief, ¶¶ 157-166.

571 Respondent's Counter-Memorial, ¶ 324; Respondent's Post-Hearing Brief, ¶¶ 167-181.

— To the extent that there are "*serious grounds for considering their imposition indispensable and necessary*", the Attorney General's Office may adopt precautionary measures before the issuance of a provisional determination of the claim, which in the present case was done due to the matter's urgency to prevent transfer of the assets.[572]

— The Attorney General's Office treated Newport as an *afectado* and the Superior Tribunal of Bogotá included Newport as a participant in the Trial Phase of the Proceedings, meaning that Newport's status of good faith third party would be assessed by the competent court.[573]

— The final court decision requires fulfillment of one of the grounds established by Article 16 of the Asset Forfeiture Law and will entail a finding on the good faith parties.[574] Therefore, "*firm evidence of the merits of the forfeiture action is only required for the rendering of the final decision on the merits.*"[575]

— The duration of the Asset Forfeiture Proceedings is not unreasonable, considering the average duration of such proceedings, the complexity of the case, and the COVID-19 pandemic.[576]

— Claimants' allegations as to the existence of an "*extortion scheme*" to explain the initiation of the Asset Forfeiture Proceedings, Claimants' arguments relating to Respondent's alleged failure to disgorge profits, and [redacted] are baseless.[577]

490. According to Respondent, Newport's position and the relevant evidence were analyzed by the Second Criminal Court; the same is true for Newport's appeal of the *Avocamiento* order.[578] As explained by Respondent's expert, Dr. Reyes, Newport's due process rights cannot be deemed to have been breached.[579]

491. Therefore, Respondent states that the Asset Forfeiture Proceedings were a reasonable measure in compliance with Colombian law and due process of law so that the Tribunal

572 Respondent's Post-Hearing Brief, ¶ 151.

573 Respondent's Post-Hearing Brief, ¶¶ 201-212.

574 Respondent's Post-Hearing Brief, ¶ 153.

575 Respondent's Post-Hearing Brief, ¶ 154.

576 Respondent's Post-Hearing Brief, ¶¶ 213-219.

577 Respondent's Post-Hearing Brief, ¶¶ 220-231.

578 Respondent's Counter-Memorial, ¶ 326.

579 Respondent's Rejoinder, ¶¶ 622-626.

to this arbitration should not be treated as a court of appeal.[580] According to Respondent, Claimants "*had more than* 'a reasonable chance' *to be heard by independent judges, in accordance with the procedural opportunities offered in the Asset Forfeiture Law and the Colombian Constitution and have used such chances extensively.*"[581]

492. In addition to Newport's direct exercise of its procedural rights, Corficolombiana, in its capacity of fiduciary of the Meritage Lot, also initiated the legality control proceedings under Article 111 of the Asset Forfeiture Law with respect to the precautionary measures, which was confirmed.[582]

(iv) No Misuse of Power

493. Respondent rejects Claimants' claim that the Asset Forfeiture Proceedings were a gross misuse of the powers of the State.[583] Instead, these proceedings were a *bona fide* application of the law and the "red flags" identified by Claimants carry no relevance.[584]

494. Respondent submits that Claimants have brought no evidence to substantiate their accusations of a corruption theory, even though Claimants bear the burden of proof under international law.[585] In particular, Respondent cites the decisions in *Glencore* and *ECE v. Czech Republic* to show that "red flags" based on a chronological sequence are unreliable, that the fact of not reporting extortion attempts to official authorities can lead to the rejection of a corruption claim, and that "*everyone knows' arguments*" cannot suffice as proof of corruption.[586] Respondent further submits that, "*in light of the seriousness of the Claimants' corruption allegations, and considering what is at stake in this arbitration*", the relevant standard of proof is "clear and convincing" evidence of corruption.[587]

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580 Respondent's Counter-Memorial, ¶¶ 327-328.

581 Respondent's Rejoinder, ¶ 630.

582 Respondent's Rejoinder, ¶¶ 628-629.

583 Respondent's Rejoinder, ¶ 639.

584 Respondent's Post-Hearing Brief, ¶¶ 256-275.

585 Respondent's Counter-Memorial, ¶¶ 329-333; Respondent's Rejoinder, ¶¶ 641-642.

586 Respondent's Counter-Memorial, ¶¶ 336-339; Exhibit CL-125, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019; 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.

587 Respondent's Rejoinder, ¶¶ 664-666.

495. Respondent explains that the imposition of precautionary measures by Mses. Malagón and Ardila was based on objective evidence from their preliminary analysis, which cannot be rebutted by the mere indicia brought by Claimants.[588]

496. With regard to the purported coincidences in timing, Respondent submits that there is no link whatsoever between the launch of the Asset Forfeiture Proceedings and the extorsions of which Mr. Seda claims to be a victim.[589] Claimants have failed to prove that there was any connection between Ms. Ardila, Ms. Malagón, and Mr. López Vanegas or provide evidence of corruption.[590] In support of this, Respondent produced the entire case files of relevant criminal and administrative investigations.[591]

b) Respondent's Compliance with the Fair and Equal Treatment Standard

497. Respondent states that it complied with the FET standard pursuant to Article 10.5 of the TPA.

aa) Legal Standard

498. *First*, citing *Micula v. Romania*, Respondent states that a fact-specific assessment is required to assess the compliance with the FET standard by the host State.[592]

499. Investment tribunals have also assessed an investor's diligence both at the time of entering into the investment, as well as in the course of managing the investment.[593] In particular, an investor's due diligence before an investment must contain an assessment of the applicable law, especially when investing in a "*risky business environment.*"[594]

500. *Second*, Respondent claims that the protection in Article 10.5 of the TPA is limited to "*the customary international minimum standard of treatment of aliens.*"[595] Claimants bear the burden of proof concerning existence and applicability of a relevant obligation under customary international law; and arbitral decisions interpreting legal standards in other treaties do not constitute evidence of the content of the customary international law

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588 Respondent's Counter-Memorial, ¶ 341; Respondent's Rejoinder, ¶ 621.

589 Respondent's Rejoinder, ¶¶ 644-645.

590 Respondent's Rejoinder, ¶¶ 646-650.

591 Respondent's Rejoinder, ¶¶ 651-653.

592 Respondent's Counter-Memorial, ¶ 365; Exhibit CL-093, *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013.

593 Respondent's Counter-Memorial, ¶ 367.

594 Respondent's Counter-Memorial, ¶ 367.

595 Respondent's Counter-Memorial, ¶ 368; Respondent's Rejoinder, ¶¶ 723-732.

standard under the TPA.[596] Moreover, Respondent alleges that the minimum standard of treatment under Article 10.5 of the TPA extends only to cover investments and not to cover investors.[597]

501. *Third*, the threshold for finding a breach of the FET standard is high, especially where the impugned conduct concerns actions of the state to protect legitimate public welfare objectives.[598] Respondent concludes that the conduct of a host state must be "*gross, manifest, complete or such as to offend judicial propriety.*"[599]

502. *Fourth*, Respondent points out that the assessment of whether certain conduct constitutes a breach of the FET standard must be made in the light of the right of domestic authorities to regulate matters within their own borders, especially when it is in connection with the protection of the state's legitimate public welfare objectives.[600] A violation of the standard is found only if the state's conduct is manifestly unfair or unreasonable.[601]

503. *Fifth*, citing the decisions in *MTD v. Chile* and *Unglaube v. Costa Rica*, Respondent emphasizes that tribunals have repeatedly held that investment treaties are not insurance policies against business risk or poor business decisions.[602]

504. *Sixth*, Respondent notes that a causal link between the state's conduct and the harm allegedly suffered by the investor must be established.[603]

505. *Finally*, Respondent alleges that the conduct must be unreasonable, discriminatory, and arbitrary, not transparent, lacking in due process and in frustration of the investor's legitimate expectations in order to constitute a violation of the FET standard.[604]

(i) Unreasonable, Discriminatory and Arbitrary Treatment

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596 Respondent's Counter-Memorial, ¶ 368.

597 Respondent's Counter-Memorial, ¶ 370.

598 Respondent's Counter-Memorial, ¶¶ 371-372; Respondent's Rejoinder, ¶ 744.

599 Respondent's Counter-Memorial, ¶ 374.

600 Respondent's Counter-Memorial, ¶ 376.

601 Respondent's Counter-Memorial, ¶ 377.

602 Respondent's Counter-Memorial, ¶¶ 378-380; 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; Exhibit RL-054, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012.

603 Respondent's Counter-Memorial, ¶ 382.

604 Respondent's Counter-Memorial, ¶ 383.

506. *First*, Respondent refers to the definition of arbitrariness under international law developed in the *ELSI* case, where the ICJ defined the term as "*not so much something opposed to a rule of law, as something opposed to the rule of law, or a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*.[605]

507. *Second*, Respondent purports that the threshold to find that a conduct is unreasonable is similarly high.[606] Therefore, a State's conduct is held to be unreasonable if the conduct is not linked to a rational government policy, or unreasonable in view of the pursuit of a rational government policy; it is reasonable only when there is an appropriate correlation between the State's public policy objective and the measure adopted to achieve it.[607]

508. *Third*, Respondent states that the threshold for finding a breach of the prohibition against discrimination is also high, as tribunals have already held that discrimination requires a "*capricious, irrational or absurd differentiation.*"[608] Specifically, Respondent describes the assessment whether a certain measure is discriminatory as a three-pronged analysis consisting of whether (i) the investment was in like circumstances with the identified comparator, (ii) the investment/investor was treated differently to the identified comparator and (iii) there is a reasonable justification for the measure.[609]

509. *Fourth*, according to Respondent, tribunals have often held that a State is not liable in the absence of manifest impropriety.[610] On the other hand, Respondent explains that measures adopted in pursuit of rational policy objectives, have been deemed not to be unreasonable or discriminatory as *e.g.* in *Electrabel v. Hungary*.[611]

(ii) Transparency and Due Process

510. *First*, according to Respondent, the concept of transparency is not included within the minimum standard of treatment, as it has already been confirmed by the U.S.[612] Nonetheless, Respondent states that there is a high threshold to establish a violation of the transparency obligation in a sense that it requires that all legal requirements

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605 Respondent's Counter-Memorial, ¶¶ 385-386; Respondent's Rejoinder, ¶ 749.

606 Respondent's Counter-Memorial, ¶ 388; Respondent's Rejoinder, ¶ 749.

607 Respondent's Counter-Memorial, ¶ 389.

608 Respondent's Counter-Memorial, ¶ 390.

609 Respondent's Counter-Memorial, ¶ 391.

610 Respondent's Counter-Memorial, ¶ 392.

611 Respondent's Counter-Memorial, ¶ 395; Exhibit RL-081, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015.

612 Respondent's Counter-Memorial, ¶ 398; Respondent's Rejoinder, ¶ 764.

concerning investments should be capable of being readily known to all affected investors.[613]

511. *Second*, citing *Aven v. Costa Rica*, Respondent claims that a breach of due process of law under the TPA only amounts to a breach of the FET standard when it results in a denial of justice.[614] For the latter, Respondent claims, a very high threshold is required, so that investment tribunals have held that the denial of justice involves a "*systemic failure of the State's justice system.*"[615] Respondent relies on the language of the TPA to argue that only denial of justice is included in the FET standard.[616] Regarding the violation of due process, Respondent notes that only a severe violation thereof – and not just any procedural irregularity – can constitute a breach of the FET standard.[617]

512. *Third*, Respondent states that there cannot be a violation of the FET standard as long as an investor is given the opportunity to challenge the impugned measures before the local courts of the host State.[618] Moreover, the standards of transparency and due process do not require the host State's administrative and judicial authorities to decide in favor of the investment.[619]

(iii) Legitimate Expectations

513. *First*, Respondent alleges that legitimate expectations are not a part of the FET standard.[620] Further, a frustration of the investor's legitimate expectations cannot, alone, amount to a breach of the FET standard.[621]

514. *Second*, even assuming legitimate expectations were part of the FET standard, they could only give rise to a protection obligation if the expectations were objectively reasonable.[622]

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613 Respondent's Counter-Memorial, ¶ 400; Respondent's Rejoinder, ¶ 765.

614 Respondent's Counter-Memorial, ¶ 401; Respondent's Rejoinder, ¶ 771; Exhibit RL-105, *David Aven et al. v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018.

615 Respondent's Counter-Memorial, ¶ 402; Respondent's Rejoinder, ¶ 772.

616 Respondent's Rejoinder, ¶ 773.

617 Respondent's Counter-Memorial, ¶ 403; Respondent's Rejoinder, ¶ 774.

618 Respondent's Counter-Memorial, ¶ 409.

619 Respondent's Counter-Memorial, ¶ 411.

620 Respondent's Counter-Memorial, ¶ 413; Respondent's Rejoinder, ¶ 785; Respondent's Post-Hearing Brief, ¶ 290.

621 Respondent's Rejoinder, ¶ 786.

622 Respondent's Counter-Memorial, ¶ 414; Respondent's Rejoinder, ¶ 788.

According to *Invesmart v. Czech Republic* and *Saluka*, an investor's subjective motivations and considerations are not protected.[623]

515. *Third*, Respondent claims that legitimate expectations can only be protected and, in a second step, breached if a state has made a specific promise or commitment to the investor.[624]

516. *Fourth*, Respondent asserts that legitimate expectations must be assessed in light of "*an objective understanding of the legal framework within which the investor has made its investment.*"[625]

517. *Fifth*, Respondent argues that an assessment of the reasonableness and legitimacy of an investor's expectations must take into account the overall conditions in the host State at the time of the investment, such as a state's level of development and the economic, social and political situation.[626] Citing several decisions, Respondent emphasizes that an investor carries the responsibility to evaluate the risk of an investment in a specific environment and finally bears the risk of the investment decision.[627]

518. *Finally*, according to Respondent, the question of a breach of the FET standard should be assessed by weighing the legitimate and reasonable expectations of an investor against the legitimate regulatory interests of a host State.[628]

bb) Respondent's Compliance with the FET Standard Regarding the Meritage Project

(i) Initiation of the Asset Forfeiture Proceedings

519. *First*, according to Respondent, the Asset Forfeiture Proceedings were initiated and carried out in accordance with Colombian law.[629] Consequently, Respondent claims that the Asset Forfeiture Proceedings were commenced based on the reasonable grounds for the imposition of precautionary measures.[630] These were the result of exhaustive investigations concerning the alleged irregularities affecting the Meritage Property and

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623 Respondent's Counter-Memorial, ¶¶ 414-415; Exhibit RL-035, *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009; Exhibit CL-042, *Saluka v. Czech Republic*, Partial Award.

624 Respondent's Counter-Memorial, ¶ 416; Respondent's Rejoinder, ¶ 788.

625 Respondent's Counter-Memorial, ¶ 420.

626 Respondent's Counter-Memorial, ¶ 421.

627 Respondent's Counter-Memorial, ¶ 422.

628 Respondent's Counter-Memorial, ¶ 425.

629 Respondent's Counter-Memorial, ¶ 433; Respondent's Rejoinder, ¶ 751.

630 Respondent's Counter-Memorial, ¶ 433.

the precautionary measures were, thus, not based on the kidnapping story.[631] Therefore, the measures were the consequence of a reasonable and proportional application of the legal framework known to Claimants.[632]

520. *Second*, the imposition of precautionary measures was subject to a legality control in accordance with Colombian law by the First Criminal Court of Asset Forfeiture on 20 October 2016 and the Bogotá Superior Court on 21 February 2017.[633]

521. *Third*, Respondent emphasizes that there is no evidence of the purported extortion scheme or other corrupt motives even if investigations against Mses. Malagón and Ardila are ongoing.[634] According to Respondent, mere suggestions of illegitimate conduct, general allegations of corruption ,and shortcomings of a judicial system do not constitute evidence of a treaty breach.[635] Respondent states that even the investigations against Mses. Malagón and Ardila are no proof of corruption in the underlying case, as it was the prosecutor Mr. Caro who independently and on the basis of the evidence gathered during the investigations decided to further pursue the Asset Forfeiture Proceedings.[636]

522. Respondent further argues that its measures were fully transparent, and the precautionary measures could not be imposed with a prior notice due to their confidential and urgent nature.[637] Furthermore, Respondent claims that it has given Claimants every opportunity to challenge the measures in accordance with Colombian law, and that Mr. Seda even had the opportunity to discuss the irregularities with representatives of the Anti-Corruption Unit of the Attorney General's Office.[638]

(ii) Non-Discriminatory Nature of the Asset Forfeiture Proceedings

523. Respondent argues that the minimum standard of treatment in Article 10.5 of the TPA does not incorporate a general prohibition against discrimination, and even assuming it does – the threshold for finding a breach of the prohibition against discrimination is high and requires, for example, a "*capricious, irrational or absurd differentiation.*"[639]

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631 Respondent's Counter-Memorial, ¶ 433; Respondent's Rejoinder, ¶ 752.

632 Respondent's Counter-Memorial, ¶ 434.

633 Respondent's Counter-Memorial, ¶ 435; Respondent's Rejoinder, ¶ 754.

634 Respondent's Counter-Memorial, ¶ 436; Respondent's Rejoinder, ¶ 753.

635 Respondent's Counter-Memorial, ¶ 436.

636 Respondent's Counter-Memorial, ¶ 438.

637 Respondent's Counter-Memorial, ¶ 439.

638 Respondent's Counter-Memorial, ¶¶ 440-441.

639 Respondent's Rejoinder, ¶¶ 758-759.

524. Respondent submits that even if the three-pronged analysis was the relevant legal standard, the Asset Forfeiture Proceedings against the Meritage Property were not discriminatory in comparison to Respondent's treatment of the neighboring lot.[640] Conducting a fact-specific analysis of the three elements of the test, Respondent concludes that (i) the circumstances of the Meritage Lot and the neighboring lot were significantly different, (ii) Claimants did not suffer any negative impact as a result of having been treated differently and (iii) the Asset Forfeiture Proceedings were fully justified under and conducted in accordance with Colombian law.[641]

(iii) Transparency

525. Respondent states that it did not intransparently shift the bases for the Asset Forfeiture Proceedings – but rather based them on the Judicial Police's and Attorney General's Office findings regarding the illicit origin of the Meritage Property.[642]

526. Furthermore, Respondent reiterates that it has always granted Claimants, and especially Mr. Seda, the opportunity to challenge the measures and created the "*climate of cooperation.*"[643]

527. Respondent further claims that the non-recognition of Newport as an affected party in the Asset Forfeiture Proceedings could be and, in fact, was challenged repeatedly so that this can also not show Respondent's lack of transparency.[644]

(iv) Claimants' Due Process Rights

528. Respondent submits that Claimants cannot prevail with their allegation of denial of justice as they are far from reaching the very high threshold required.[645] Respondent even holds this allegation to be *prima facie* unjustified as the case does not involve a systematic failure of the State's justice system and as the Colombian Supreme Court has not rendered any decision in connection with the case.[646]

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640 Respondent's Counter-Memorial, ¶¶ 442-444.

641 Respondent's Counter-Memorial, ¶ 444; Respondent's Rejoinder, ¶ 760.

642 Respondent's Counter-Memorial, ¶ 447; Respondent's Rejoinder, ¶ 767.

643 Respondent's Counter-Memorial, ¶ 448; Respondent's Rejoinder, ¶ 768.

644 Respondent's Counter-Memorial, ¶ 449.

645 Respondent's Counter-Memorial, ¶ 452.

646 Respondent's Counter-Memorial, ¶ 452.

529. Respondent submits that the Asset Forfeiture Proceedings have been conducted in accordance with the Asset Forfeiture Law, Colombian law, and the due process of law.[647] In that sense, Newport received multiple "*fair opportunities to present its case and to marshal appropriate evidence*", as well duly reasoned decisions that were subject to appeal.[648]

530. Respondent submits that its actions met even a higher standard set by Claimants, *i.e.*, "*to facilitate 'an actual and substantive legal procedure' 'within a reasonable time' that allows an injured foreign investor to 'raise its claims against the depriving actions'*" and granted Claimants "*the right to be heard, the right to present evidence, the right to equality of arms, and the right to receive a reasoned decision.*"[649]

(v) Claimants' Legitimate Expectations

531. According to Respondent, the Asset Forfeiture Proceedings could not have frustrated Claimants' legitimate expectations as the Colombian authorities never gave the required specific promise or commitment to Claimants.[650]

532. Specifically, the Certification of No Criminal Activity and Corficolombiana's petition letter to the Attorney General's Office cannot have given rise to legitimate expectations.[651] In this sense, the letters provided by the Anti-Money Laundering and Asset Forfeiture Unit are only a response pursuant to the right to petition provided in Article 23 of the Colombian Constitution. As such, they could not be understood as specific commitment and were limited to the information existing in the database.[652] Furthermore, Respondent claims that Corficolombiana's letter was produced by a third party independent from the Colombian State and that the request was very specific and limited in scope so that no legitimate expectations could arise from it.[653] On the basis of this request, Claimants could not expect any specific commitment that the Colombian Government would not initiate any asset forfeiture proceedings.[654]

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647 Respondent's Rejoinder, ¶ 779.

648 Respondent's Counter-Memorial, ¶¶ 453-455; Respondent's Rejoinder, ¶ 769.

649 Respondent's Rejoinder, ¶ 782.

650 Respondent's Counter-Memorial, ¶ 465; Respondent's Rejoinder, ¶ 790.

651 Respondent's Counter-Memorial, ¶ 466; Respondent's Rejoinder, ¶¶ 790-792.

652 Respondent's Counter-Memorial, ¶ 466; Respondent's Post-Hearing Brief, ¶¶ 323-330.

653 Respondent's Counter-Memorial, ¶ 466.

654 Respondent's Counter-Memorial, ¶ 466.

533. Moreover, Respondent states that any subjective expectation Claimants may have derived from these documents is not protected under international law.[655] Referring to the decision in *Generation Ukraine v. Ukraine*, Respondent notes that an investor's expectation should be assessed against the background of potential prospects and pitfalls of the investment.[656] Thus, according to Respondent, (i) Claimants should have been aware of Antioquia's turbulent past related to drug dealing activities, (ii) Claimants negotiated with Mr. López Vanegas despite being aware of his claims over the Meritage Property, and, (iii) Claimants created a high-risk company structure by the installation of trusts so that, finally, Claimants cannot claim legitimate expectations that no asset forfeiture procedure would take place.[657] In particular, Respondent places an emphasis on the "patently insufficient" due diligence that Claimants have conducted.[658]

534. Respondent emphasizes that Claimants could only expect that the Colombian authorities would apply the legislative and regulatory framework in force at the time of the investment.[659] Respondent stresses that Article 16 of the Asset Forfeiture Law is part of that framework and that it allows the initiation of Asset Forfeiture Proceedings, if assets are a "*direct or indirect product of illicit activity.*"[660] Claimants could, according to Respondent, not have expected that they would be exempted from the application of this law.[661]

(vi) Newport as a Good Faith Third Party

535. Respondent states that the non-recognition of Newport as a good-faith third party does not constitute a breach of the FET standard because it was neither arbitrary, unreasonable, nor in breach of Claimants' legitimate expectations, and Claimants' due process rights were respected.[662]

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655 Respondent's Counter-Memorial, ¶ 468.

656 Respondent's Counter-Memorial, ¶ 468; Exhibit RL-013, *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003.

657 Respondent's Counter-Memorial, ¶ 468; Respondent's Rejoinder, ¶¶ 794, 796; Respondent's Post-Hearing Brief, ¶¶ 314-322.

658 Respondent's Post-Hearing Brief, ¶¶ 292-313.

659 Respondent's Counter-Memorial, ¶ 469; Respondent's Rejoinder, ¶ 795.

660 Respondent's Counter-Memorial, ¶ 469; Respondent's Rejoinder, ¶ 795.

661 Respondent's Counter-Memorial, ¶ 469; Respondent's Rejoinder, ¶ 795; Respondent's Post-Hearing Brief, ¶ 291.

662 Respondent's Counter-Memorial, ¶ 457.

536. *First*, Respondent claims that Colombian authorities have acted in accordance with Colombian Asset Forfeiture Law. The Attorney General's Office in its *Requerimiento* addressed Newport`s allegations and provided sound reasons why Newport would not qualify as a good faith third party.[663] On top of that, the Second Criminal Court conducted an in-depth analysis of the alleged rights of Newport *vis-à-vis* the Meritage Property, explaining why under the Asset Forfeiture Law, Newport would not be considered an affected party as it does not hold *in rem* rights over the property.[664]

537. Regardless of this, Respondent states that there cannot be any breach of the FET standard because Article 10.5 of the TPA does not apply to Claimants, as it is only applicable to "*covered investments.*"[665]

(vii) Impact of the Asset Forfeiture Proceedings on Claimants' Other Projects

538. *First*, Respondent argues that Colombian authorities did not launch a "*systemic assault*" targeting Mr. Seda or his investments in Colombia. Rather, Respondent states that the Asset Forfeiture Proceedings represent the mere and correct application of law and only target assets having an illicit origin – not their owners.[666] Respondent states that it has not adopted any other measure targeting Mr. Seda or any of his other projects.[667]

539. *Second*, Respondent claims that even assuming any impact of the adopted measures on any other project, this could not be deemed to be a breach of the FET standard as Claimants have failed to produce sufficient evidence of a causal link between the other projects and the Asset Forfeiture Proceedings.[668]

540. *Third*, according to Respondent, Respondent did not have to and could not take any steps to minimize or mitigate the possibility of harm. Respondent claims that it only applied its laws and that it rather was Mr. Seda who attracted the attention of the media by discussing details of Mr. López Vanegas' extortion and threats.[669]

c) Respondent's Compliance with the National Treatment Standard

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663 Respondent's Counter-Memorial, ¶ 459.

664 Respondent's Counter-Memorial, ¶ 460.

665 Respondent's Counter-Memorial, ¶ 464.

666 Respondent's Counter-Memorial, ¶ 471; Respondent's Rejoinder, ¶ 802; Respondent's Post-Hearing Brief, ¶ 335.

667 Respondent's Counter-Memorial, ¶ 471; Respondent's Rejoinder, ¶ 802.

668 Respondent's Counter-Memorial, ¶ 473; Respondent's Rejoinder, ¶¶ 803-804; Respondent's Post-Hearing Brief, ¶ 336.

669 Respondent's Counter-Memorial, ¶ 476; Respondent's Post-Hearing Brief, ¶ 334.

541. Respondent submits that it complied with Article 10.3 of the TPA by according Claimants' alleged investments treatment in accordance with the national treatment standard.[670]

aa) Legal Standard

542. *First*, according to Respondent, the national treatment standard should be applied pursuant to its purpose to ensure a level playing field between domestic and international investors.[671]

543. *Second*, Respondent submits that Claimants must show that (i) a foreign investor, (ii) has received treatment less favorable (iii) than other investors in "*like circumstances*", and (iv) the different treatment is not justified.[672] The assessment of "*like circumstances*" is fact-specific, requires the determination of whether the "*competing entities*" are in the same business or economic sector, and an "*examination of the surrounding situation in its entirety.*"[673]

bb) Respondent's Compliance with the National Treatment Standard

544. *First*, Respondent states that the Meritage Property and the other lots belonging to Mr. López Vanegas' half-brother cannot be deemed to be in "*like circumstances*", as Claimants did not show that those two lots are "*competing entities*" in the same sector thriving for a similar development goal, and as the "*surrounding situation*" does not prove that the Asset Forfeiture Proceedings have been initiated due to Claimants' nationality.[674] Respondent submits that "*several irregularities found during the investigations conducted by the Attorney General's Office were unique to the Meritage Lot.*"[675] Moreover, Newport and Corficolombiana were selling units in the Meritage Project to third parties and collecting money through the pre-sales of units, which made Meritage Property different and called for protection of the prospective buyers.[676]

545. *Second*, Respondent submits that it treated the Meritage Lot as it treated other lots which may be considered in "*like circumstances*", *i.e.*, assets linked to organized crime in the

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670 Respondent's Counter-Memorial, ¶ 479.

671 Respondent's Counter-Memorial, ¶¶ 482-483; Respondent's Rejoinder, ¶ 672.

672 Respondent's Counter-Memorial, ¶ 484; Respondent's Rejoinder, ¶ 673.

673 Respondent's Counter-Memorial, ¶¶ 485-486.

674 Respondent's Counter-Memorial, ¶¶ 490-491; Respondent's Rejoinder, ¶ 690.

675 Respondent's Rejoinder, ¶¶ 679-688; Respondent's Post-Hearing Brief, ¶¶ 279-281.

676 Respondent's Rejoinder, ¶ 689.

municipality of Envigado.[677] In this regard, Respondent submits that the Attorney General's Office confirmed that between 1997 and 2015, at least 16 Asset Forfeiture Proceedings were initiated against lots in the Envigado region, and, as of 2015, at least 20 Asset Forfeiture Proceedings have been initiated against hundreds of lots and other assets that were related to the *Oficina de Envigado*.[678]

546. *Third*, assuming any different treatment which Respondent denies, Respondent submits that such treatment is justified by the different circumstances.[679]

547. *Fourth*, Respondent claims that Claimants did not suffer any significant practical negative impact because of the alleged different treatment.[680] The Meritage Property was subject to Asset Forfeiture Proceedings as a result of its illicit origin so that, regardless of the initiation of similar proceedings against other properties, the Meritage Property would still be subject to Asset Forfeiture Proceedings.[681]

d) Respondent's Compliance with the Full Protection and Security Standard

548. Respondent states that it has at all times accorded Claimants' alleged investments treatment in accordance with the FPS standard pursuant to Article 10.5 of the TPA.[682]

aa) Legal Standard

549. *First*, Respondent notes that following the plain language of Article 10.5 of the TPA, the application of the FPS standard is limited to covered investments and not applicable to investors.[683]

550. *Second*, Respondent purports that Article 10.5 of the TPA requires the host Sate to protect against physical damage or interference only – not against any other kind of impairment

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677 Respondent's Rejoinder, ¶¶ 694-702.

678 Respondent's Rejoinder, ¶ 695.

679 Respondent's Counter-Memorial, ¶ 494; Respondent's Rejoinder, ¶¶ 703-708; Respondent's Post-Hearing Brief, ¶ 282.

680 Respondent's Rejoinder, ¶¶ 709-716.

681 Respondent's Counter-Memorial, ¶ 495.

682 Respondent's Counter-Memorial, ¶ 497.

683 Respondent's Counter-Memorial, ¶ 501; Respondent's Rejoinder, ¶¶ 812-813; Respondent's Post-Hearing Brief, ¶ 337.

of an investor's investment.[684] As the TPA confines the FPS standard to physical protection, it cannot be extended to legal security.[685]

551. *Third*, Respondent claims that the FPS standard is one of due diligence reasonable under the circumstances.[686]

552. *Fourth*, Respondent stresses that the threshold for finding a breach of the FPS standard is extremely high, which was confirmed by Claimants' authorities.[687] According to Respondent, the FPS standard may only be breached when the host State fails to accord "*the level of police protection required under customary international law.*"[688]

553. *Finally*, Respondent submits that Claimants may only be awarded damages in connection with an alleged breach of the FPS standard if they show that they suffered damage as a result of such breach.[689]

bb) Respondent's Guarantee of FPS to Claimants

In response to Claimants' allegations, Respondent states that none of them comes close to furnishing the basis for an FPS claim under Article 10.5 of the TPA.[690]

(i) State's Alleged Inaction in the Face of Mr. López Vanegas' Extortion

554. *First*, Respondent submits that despite the purported threats by Mr. López Vanegas received in 2014, Mr. Seda had only reported them in December 2016, four months after the seizure of the Meritage Property, and allegedly had been meeting with Mr. López Vanegas and his legal representatives until then.[691] Thus, Respondent concludes that Mr. Seda did not consider that any (immediate) action was required from the Colombian Government to address the alleged threats during this three-year period.[692] Furthermore, there is no evidence that the alleged threats continued after Mr. Seda put an end to the negotiations with Mr. López Vanegas in November 2016.[693]

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684 Respondent's Counter-Memorial, ¶ 503; Respondent's Rejoinder, ¶¶ 814-817.

685 Respondent's Counter-Memorial, ¶ 505.

686 Respondent's Rejoinder, ¶¶ 818-819; Respondent's Counter-Memorial, ¶¶ 508-510.

687 Respondent's Counter-Memorial, ¶ 511; Respondent's Rejoinder, ¶ 820.

688 Respondent's Rejoinder, ¶¶ 816-817.

689 Respondent's Rejoinder, ¶ 821.

690 Respondent's Counter-Memorial, ¶ 513.

691 Respondent's Counter-Memorial, ¶ 517.

692 Respondent's Counter-Memorial, ¶ 522.

693 Respondent's Counter-Memorial, ¶ 526.

555. *Second*, Respondent explains that there is no evidence that the authorities "*have dismissed the complaint just a month later and took no steps to protect Mr. Seda's and the Claimants' investments.*"[694] Respondent does not deem the purported declarations of Mr. Seda as well as two documents issued by the Attorney General's Office in January and April 2017 marking a report by Mr. Seda "*inactive*" to suffice.[695]

556. *Third*, the Attorney General's Office did act upon Mr. Seda's report and launched investigations into the purported extortion scheme involving Mses. Ardila and Malagón.[696]

(ii) State's Alleged Inaction in the Face of Unlawful Conduct by State Officials

557. *First*, Respondent notes that there is no factual evidence of "*collusion*" or a "*corrupt extortion racket*" by state officials, as none of Mr. Seda's allegations concerning the alleged extortion scheme were even reported to the Colombian authorities in his official complaint.[697] Further, the mere allegation of "*coincidences in timing*" as well as the production of press articles could not suffice as evidence.[698]

558. Respondent stresses that straight after Mr. Seda's complaint in December 2016, exhaustive investigations were commenced into the purported extortion scheme involving Mses. Ardila and Malagón, and that until now, allegedly no evidence of criminal conduct has been found.[699] According to Respondent, this and the fact that Mr. Seda and the Attorney General's Office had been in touch regarding the allegations show that Respondent did not fail to act.[700]

559. *Second*, Respondent explains that it is neither under the obligation to lift the precautionary measures nor to identify and protect Newport as a good faith third party.[701] The decision to impose precautionary measures was made on the basis of objective evidence, so the Colombian authorities were obligated by law to continue the Asset Forfeiture

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694 Respondent's Counter-Memorial, ¶ 523.

695 Respondent's Counter-Memorial, ¶ 524.

696 Respondent's Counter-Memorial, ¶ 525.

697 Respondent's Counter-Memorial, ¶ 531; Respondent's Rejoinder, ¶ 826.

698 Respondent's Counter-Memorial, ¶ 531.

699 Respondent's Counter-Memorial, ¶ 532; Respondent's Rejoinder, ¶¶ 827-830; Respondent's Post-Hearing Brief, ¶ 338.

700 Respondent's Counter-Memorial, ¶ 534.

701 Respondent's Counter-Memorial, ¶ 535.

Proceedings.[702] Similarly, Respondent does not have to identify and protect Newport as a good faith third party as Colombian courts are currently reviewing this question.[703]

560. *Third*, Respondent reiterates that the FPS standard is only meant to protect the physical integrity of an investor's investment.[704]

(iii) State's Alleged Inaction in the Face of Threats against Mr. Seda and His Family

561. *First*, Respondent recalls that on 26 September 2017, Mr. Seda filed a police complaint concerning a purported shooting attack by two motorcyclists. Despite the police not being able to identify the origin of the damage to the car, it had launched investigations to find the alleged attackers, which could not be identified.[705] Nevertheless, Respondent alleges that it had not been inactive.[706]

562. After Mr. Seda and his daughter had allegedly been attacked again and Mr. Seda had requested that measures be adopted to protect his family and himself, the Attorney General's Office issued an order to adopt the necessary measures to protect Mr. Seda and his family.[707]

563. Respondent notes that despite the fact that Mr. Seda's request to armor his car with level three armor was rejected by the Security Superintendence, it offered Mr. Seda to appeal the decision. There is no evidence of such appeal filed by Claimants.[708]

564. *Second*, Respondent rejects Mr. Seda's statements that due to Respondent's alleged breach of the FPS standard, he was unable to conduct business in Colombia. Respondent submits that this is contradicted by the evidence in the record, including Mr. Seda's own statements to members of the Attorney General's Office.[709]

565. *Third*, citing relevant evidence, Respondent rejects Claimants' accusations that Respondent manufactured evidence for the purposes of this arbitration, including by [redacted]

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702 Respondent's Counter-Memorial, ¶ 535.

703 Respondent's Counter-Memorial, ¶ 536.

704 Respondent's Counter-Memorial, ¶ 537; Respondent's Rejoinder, ¶¶ 824-826.

705 Respondent's Counter-Memorial, ¶ 541.

706 Respondent's Counter-Memorial, ¶ 543; Respondent's Rejoinder, ¶¶ 832-834.

707 Respondent's Counter-Memorial, ¶ 542; Respondent's Post-Hearing Brief, ¶ 339.

708 Respondent's Counter-Memorial, ¶ 544.

709 Respondent's Rejoinder, ¶¶ 837-842.

710 Respondent's Post-Hearing Brief, ¶¶ 342-344.

566. *Finally*, Respondent states that, in any case, Respondent's behavior could not constitute a breach of the FPS standard because the allegations do not involve any attack or threat against the alleged investments, but rather against the purported investors.[711]

4. Claimants' Damages Claims Are Unfounded

567. Relying on an expert opinion of Richard Seymour Hern of NERA UK Ltd, Respondent submits that – even if the Tribunal finds that it has jurisdiction to hear Claimants' claims and finds that Respondent had violated its obligations under the TPA – Claimants are not entitled to receive the amount of compensation that they claim.

a) Legal Standard

568. Respondent argues that there is a generally agreed principle that the party alleging to have suffered loss bears the burden to prove both the fact of such loss and its amount, as reflected in Article 36(2) of the ILC Articles and applied by investment arbitration tribunals.[712]

569. Moreover, Claimants must establish a direct causal link between their alleged loss and a purported violation by Respondent, a "*well-established rule of customary international law*" incorporated in Article 31 of the ILC Articles and in Article 10.16.1 of the TPA.[713] Respondent cites, *inter alia*, decisions in *Biwater v. Tanzania* and *S.D. Myers v. Canada* for the requirement of the direct causal link between the breach and the loss.[714] According to the decision in *El Jaouni v. Lebanon*, claimant bears the burden of proof of establishing factual and legal causation between the breach and the incurred losses.[715]

570. According to Respondent, the analysis is that of a "*proximate causation*", and foreseeability is only one of the elements to assess whether a loss is compensable.[716]

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711 Respondent's Counter-Memorial, ¶ 545; Respondent's Rejoinder, ¶ 831.

712 Respondent's Counter-Memorial, ¶¶ 550-555; Respondent's Rejoinder, ¶ 851.

713 Respondent's Counter-Memorial, ¶ 556; Respondent's Rejoinder, ¶¶ 854-855; Respondent's Post-Hearing Brief, ¶¶ 351-352.

714 Respondent's Counter-Memorial, ¶¶ 559-560; Respondent's Rejoinder, ¶ 856; Exhibit RL-029, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008; Exhibit RL-010, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, NAFTA, Second Partial Award, 21 October 2002.

715 Respondent's Rejoinder, ¶ 851; Exhibit RL-205, *Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic*, ICSID Case No. ARB/15/3, Award, 14 January 2021.

716 Respondent's Rejoinder, ¶¶ 855-857.

b) Claimants' Lack of Proof of Their Losses

aa) Other Projects

571. With regard to the damages claimed by Claimants in connection with the projects other than the Meritage Project, Respondent argues that these are not compensable, as only the losses resulting directly from the wrongful act of the host State are compensable.[717] Respondent argues that Claimants have failed to discharge their burden of proof in this respect and demonstrate the "*proximate causation*" between the Asset Forfeiture Proceedings against the Meritage Lot and damages to Claimants' other projects.[718]

572. *First*, as acknowledged by Claimants, Respondent did not directly interfere with the projects or accuse Mr. Seda of wrongdoing. Respondent further submits that Claimants have failed to show that the press that allegedly caused harm to Mr. Seda's reputation was in any way attributable to Respondent.[719] To the contrary, Respondent submits that it was Mr. Seda who provided the relevant information to the media more than once, as in August 2014, August 2016, April and July 2020.[720] [redacted]

573. Therefore, Respondent submits that Claimants have failed to demonstrate a causal link between the Asset Forfeiture Proceedings, which concerned exclusively the Meritage Lot, and the damages claimed with respect to other projects.[722] As an example, Respondent demonstrates how, in its view, there is no causal link between Asset Forfeiture Proceedings and Claimants' decision to discontinue the Luxé project due to the decision of Banco Colpatria to stop financing the latter.[723] Similarly, no evidence exists regarding any hypothetical future projects.[724]

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717 Respondent's Counter-Memorial, ¶ 564.

718 Respondent's Counter-Memorial, ¶ 564; Respondent's Rejoinder, ¶¶ 853, 858.

719 Respondent's Counter-Memorial, ¶ 565.

720 Respondent's Counter-Memorial, ¶ 565.

721 Respondent's Counter-Memorial, ¶ 566.

722 Respondent's Counter-Memorial, ¶ 567.

723 Respondent's Counter-Memorial, ¶¶ 568-571; Respondent's Rejoinder, ¶¶ 859-866; Respondent's Post-Hearing Brief, ¶¶ 353-357. Regarding other projects, *see* Respondent's Rejoinder, ¶¶ 867-872; Respondent's Post-Hearing Brief, ¶¶ 358-360.

724 Respondent's Post-Hearing Brief, ¶¶ 361-362.

574. Moreover, Respondent submits that damages to Claimants' other projects "*could objectively not have been foreseen to ensue from the*" Asset Forfeiture Proceedings.[725]

bb) Violations of Obligations *Vis-à-Vis* Covered Investments

575. Relying on the U.S. position and citing the language of the TPA, Respondent submits that an arbitral tribunal cannot award damages to a claimant with respect to violations of obligations that only extend to covered investments (and not the investors), such as obligations to accord national treatment, to treat an investment fairly and equitably, and to accord an investment full protection and security.[726]

cc) Amount of Losses

576. Respondent submits that Claimants have not discharged their burden of proving the amount of their alleged losses, which are based on speculative and unreliable methodologies and are vastly overstated.[727]

577. *First*, Respondent argues that Claimants applied the wrong standard of compensation.[728] Respondent agrees with Claimants that the Tribunal must determine any compensation due to Claimants based on the Treaty standard set forth in Article 10.7.2(b), which is "*the fair market value of the expropriated investment immediately before the expropriation took place*."[729] Respondent draws a distinction between this standard and the "*full compensation standard*" proposed by Claimants, and argues that only the FMV standard is applicable as *lex specialis*.[730] According to Respondent, "*is true irrespective of whether the alleged expropriation was 'lawful' or 'unlawful.* "'[731]

578. *Second*, Respondent submits that the same standard applies to the non-expropriation claims, based on the fact that the TPA does not set forth a standard for compensation of non-expropriation claims.[732] Respondent concludes that the maximum compensation for any non-expropriatory claim should be the same as that for an expropriation claim, *i.e.*, FMV compensation.[733]

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725 Respondent's Rejoinder, ¶¶ 873-876.

726 Respondent's Rejoinder, ¶¶ 878-884.

727 Respondent's Counter-Memorial, ¶ 574.

728 Respondent's Counter-Memorial, ¶ 576.

729 Respondent's Counter-Memorial, ¶ 577.

730 Respondent's Counter-Memorial, ¶¶ 578-579.

731 Respondent's Counter-Memorial, ¶ 580.

732 Respondent's Counter-Memorial, ¶ 583.

733 Respondent's Counter-Memorial, ¶ 583.

dd) Valuation Methodology

579. Respondent contends that Claimants' valuation is based upon a flawed methodology, which should be disregarded by the Tribunal.[734]

580. *First*, Respondent submits that the DCF method, while generally accepted, cannot be used to assess the value of Claimants' projects, since it is inappropriate for early-stage start-up projects.[735] Respondent cites *Metalclad v. Mexico* to demonstrate that investment tribunals have rejected DCF as a basis for calculating damages where a company does not have an established record of profitability.[736] Exceptionally, the DCF method may be applied to investments that are not going concerns, if certain factors are present that allow for a reliable estimation of the investment's future profits (*e.g.* track record of successful commercial operations, certainty around future revenues or cash-flows, no uncertainty about specific timing or availability of financing), which are not present with Claimants' projects.[737]

581. Moreover, Respondent argues that and there is no reliable and objective data on Claimants' projects, meaning that there are no reliable estimates of key DCF inputs (*e.g.*, failure rate, cash flows, time of completion of the different projects).[738]

582. *Second*, Respondent argues that Claimants' valuation is "*grossly exaggerated because BRG has overstated the cash flow forecasts, assumed unrealistic low discount rates and ignored the risk of failure for each of the Claimants' projects*" in relation to both hotel and real-estate related activities.[739] Moreover, Respondent argues that BRG's DCF model was based on unverified assumptions provided by Claimants.[740] Respondent submits that aligning the assumptions of Claimants' experts with the available evidence would reduce damages related to (i) Claimants' hotel operations to USD -12 to -2 million, and (ii) Claimants' real-estate operations to USD -3 to 3 million.[741]

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734 Respondent's Counter-Memorial, ¶ 585.

735 Respondent's Counter-Memorial, ¶¶ 596-599; Respondent's Rejoinder, ¶¶ 891-892; 896; Respondent's Post-Hearing Brief, ¶ 366.

736 Respondent's Counter-Memorial, ¶ 597; Exhibit CL-021, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.

737 Respondent's Rejoinder, ¶¶ 893-894; Respondent's Post-Hearing Brief, ¶¶ 366-380.

738 Respondent's Counter-Memorial, ¶¶ 600-605.

739 Respondent's Counter-Memorial, ¶¶ 606-615; Respondent's Rejoinder, ¶¶ 899-900, 907-908, 911; Respondent's Post-Hearing Brief, ¶¶ 393-421.

740 Respondent's Rejoinder, ¶¶ 901-906.

741 Respondent's Rejoinder, ¶¶ 909, 912.

583. Respondent further submits that Claimants' inclusion of lost fees for hotel and real estate services that Royal Realty would have provided to the projects are similarly exaggerated by the incorrect assumptions of the BRG's DCF model.[742]

584. *Third*, Respondent argues against the losses associated with hypothetical real estate projects which Mr. Seda would have allegedly developed in the future as in theory these are not recoverable as a matter of law and fact.[743]

585. *Fourth*, Respondent contends that BRG's market cross-checks of the DCF valuation are wholly unsuitable, since (i) the comparators used are not comparable to Claimants' hotels, and (ii) for Claimants' real-estate business, the sale prices and costs do not reflect the key elements of a DCF valuation.[744]

586. According to Respondent, the most appropriate market cross-check is one based on the same assets being appraised by the DCF method, which, in the present case, would be the acquisition by investors of the shares in Claimants' projects.[745] A market cross-check performed by Respondent's experts confirms, according to Respondent, that BRG's DCF valuation is exaggerated and must be rejected.[746]

587. *Finally*, according to Respondent, the most appropriate method of valuating Claimant's projects based on objective data is cost-based approach relied on by investment tribunals.[747] The valuation performed by Respondent's experts demonstrates that the total value of Claimants' projects under the cost approach as of 25 January 2017 was USD 2,680,892.[748] In the Rejoinder, Respondent submitted that applying the cost-based approach results in maximum damages of USD 7,609,776.[749] Respondent submits that a DCF valuation on the basis of the reliable data produces results which are consistent with those resulting from a cost approach.[750]

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742 Respondent's Rejoinder, ¶¶ 914-916; Respondent's Post-Hearing Brief, ¶¶ 422-425.

743 Respondent's Rejoinder, ¶¶ 917-921; Respondent's Post-Hearing Brief, ¶¶ 426-429.

744 Respondent's Counter-Memorial, ¶¶ 616-620; Respondent's Rejoinder, ¶¶ 923-929.

745 Respondent's Counter-Memorial, ¶¶ 621-626; Respondent's Post-Hearing Brief, ¶¶ 431-448.

746 Respondent's Counter-Memorial, ¶ 626.

747 Respondent's Counter-Memorial, ¶¶ 627-629; Respondent's Rejoinder, ¶¶ 931-942; Respondent's Post-Hearing Brief, ¶¶ 381-385.

748 Respondent's Counter-Memorial, ¶ 630.

749 Respondent's Rejoinder, ¶ 937.

750 Respondent's Post-Hearing Brief, ¶¶ 386-392.

c) Award on Moral Damages Is Not Justified

588. *First*, Respondent submits that for the reasons described in connection with other damages, Claimants have failed to establish any connection between any harm done to Mr. Seda's reputation and Respondent's actions. The claim for moral damages must therefore also be dismissed for the lack of evidence.[751]

589. *Second*, according to Respondent, "*the request for moral damages is, in any event, nothing but an impermissible attempt at double-dipping*" since the damages in connection with Mr. Seda's alleged loss of reputation are claimed by Claimants separately.[752]

590. *Third*, Respondent argues that Claimants have failed to show exceptional circumstances where the State's conduct and the harm are grave and substantial, which would warrant an award on moral damages, as in other investment cases.[753] In the present case, there are no allegations of physical duress by State officials, and Mr. Seda has only filed an official complaint regarding an alleged instance of extortion racket two years after it had happened – and in the meantime continued working and developing projects in Colombia.[754] In Respondent's view, that discredits any claim for moral damages.[755]

591. In any case, Respondent submits that the amount of claimed moral damages is exaggerated.[756]

d) Claim for Interest Is Not Justified

592. *First*, Respondent submits that Claimants are not entitled to pre-award interest and that interest, if any, should not accrue before the lapse of a grace period of 60 days from Respondent's receipt of this Award or declaration of the Tribunal of any breach of Respondent's obligations.[757]

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751 Respondent's Counter-Memorial, ¶ 632; Respondent's Rejoinder, ¶¶ 959-962.

752 Respondent's Counter-Memorial, ¶ 635; Respondent's Rejoinder, ¶ 965.

753 Respondent's Counter-Memorial, ¶¶ 636-639; Respondent's Rejoinder, ¶¶ 963-964; Respondent's Post-Hearing Brief, ¶ 450.

754 Respondent's Counter-Memorial, ¶ 640.

755 Respondent's Counter-Memorial, ¶ 640.

756 Respondent's Counter-Memorial, ¶ 641; Respondent's Rejoinder, ¶¶ 966-969; Respondent's Post-Hearing Brief, ¶ 451.

757 Respondent's Counter-Memorial, ¶¶ 644-648; Respondent's Rejoinder, ¶ 947.

593. *Second*, in any case, the interest rate should not be the rate based on Claimants' cost of debt but the rolling yield on a 1-year US treasury bill.[758] According to Respondent, the US risk-free rate is the "*commercially reasonable rate*" in this case.[759]

e) The Award as Object of Taxation

594. Respondent argues that Claimants' request that any amounts awarded to Claimants not be subjected to taxes in Colombia is speculative and premature.[760] To the extent that this Award is subject to taxes in the same amount as the corporate taxes, and that these corporate taxes would have been accounted for in the damages calculation, Respondent agrees that Claimants' request could be acceptable.[761] However, Respondent's experts submit that BRG has not accounted for the applicable corporate tax in several instances.[762]

f) Costs Claims

595. Respondent submits that Claimants are not entitled to any costs or expenses and, instead, should be ordered to bear the entirety of Respondent's costs and the costs of the arbitration.[763]

5. Relief Sought by Respondent

596. In its Post-Hearing Brief,[764] Respondent requests the Tribunal to:

> "*a) Declare that, pursuant to Article 22.2(b) of the US-Colombia TPA, it manifestly lacks jurisdiction over the present dispute;*
> *b) In the alternative, declare that the exception of essential security set forth in Article 22.2(b) of the US-Colombia TPA applies and the Republic of Colombia has not breached its Treaty obligations;*
> *c) In the alternative, declare that it lacks jurisdiction over the Claimants' claims for the reasons set forth in Section IV of this Rejoinder;*

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758 Respondent's Counter-Memorial, ¶ 649.

759 Respondent's Counter-Memorial, ¶ 649; Respondent's Rejoinder, ¶¶ 948-950; Respondent's Post-Hearing Brief, ¶¶ 453-454.

760 Respondent's Counter-Memorial, ¶¶ 651-652.

761 Respondent's Counter-Memorial, ¶ 653; Respondent's Rejoinder, ¶¶ 951-954.

762 Respondent's Counter-Memorial, ¶ 654.

763 Respondent's Counter-Memorial, ¶ 656; Respondent's Rejoinder, ¶¶ 970-973.

764 Respondent's Post-Hearing Brief, ¶ 455.

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."

III. United States' Position as a Non-Disputing Party

597. To the extent the Parties have discussed the U.S. position as a Non-Disputing Party, it is reflected above.

1. Essential Security Exception

a) Effect of Article 22.2(b) of the TPA on the Tribunal's Jurisdiction

598. In her oral submission during the Third Hearing, the U.S. Representative raised two points regarding the essential security interest exception's effect on the Tribunal's jurisdiction.

599. *First*, the U.S. maintains that the language of Article 22.2(b) of the TPA, which is also contained in exception clauses in other U.S. treaties, is clearly self-judging and therefore the "*tribunal must find that the Exception applies.*"[765]

600. This conclusion is based on the ordinary meaning of Article 22.2(b) of the TPA ("*it considers*") and Footnote 2 ("*the Tribunal or panel hearing the matter shall find that the Exception applies*"). The U.S. submits that the invocation of Article 22.2(b) of the TPA is, accordingly, non-justiciable.

601. *Second*, the U.S. rejects Claimants' submission that "*U.S. treaty practice on Essential Security Interest Exceptions supports the conclusion 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 Interest, but that Article 22.2(b) does not address the question of liability or compensation.*"[766] The U.S. submits that Article 22.2(b) of the

765 Third Hearing, p. 12:15.

766 Third Hearing, p. 13:8-15.

TPA intends to exclude any and all measures invoked under this provision from the scope of the obligations under the TPA.

602. In connection with this argument, the U.S. provides that without an injury caused by an internationally wrongful act, a State is under no obligation to make reparation or restitution. Claimants are therefore not entitled to compensation for any loss or damage resulting from measures covered by Article 22.2(b) of the TPA, as these acts cannot be viewed as a breach of an international obligation.

603. The U.S. further rejects Claimants' argument that the U.S. and Colombia should have used clearer language, such as the one contained in the Singapore-India Comprehensive Economic Cooperation Agreement, if the State Parties to the TPA wished to prevent a tribunal from making findings of liability. According to the U.S., that Singapore-India Agreement has "*no bearing whatsoever on the U.S. treaty practice*" as the U.S. is not a party to it.[767]

b) Scope of the Tribunal's Review

604. The third submission of the U.S. during the Third Hearing concerned the extent to which the invocation of Article 22.2(b) of the TPA is subject to a good faith review.

605. While the U.S. claims it expects all its treaty partners to implement the treaty obligations in good faith, the U.S. argues that this is not the same as authorizing a tribunal to assess whether a treaty party has done so. The U.S. submits that the deliberate wording of "*it considers*" in Article 22.2(b) of the TPA in connection with Footnote 2 bars a tribunal from carrying out a good faith review, and that it is for the State parties to the TPA alone to "*ensure that the provision is invoked in good faith.*"[768]

606. The U.S. Representative, when asked about what options an investor would have if an essential security clause invocation is arbitrary and a tribunal would not be competent to carry out a good faith review, submitted that it does not "*have a specific process or avenue in mind*" – but that the investor could turn to their home State for a State to State resolution or the home State may raise the bad faith invocation "sua sponte *directly with its treaty partner.*"[769] The U.S. maintains that the decision whether a State invoked the essential security exception in bad faith lies with the concerned State Parties and "*the Investor has limited avenues in terms of how it could pursue its interests.*"[770]

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767 Third Hearing, p. 15:17-18.

768 Third Hearing, p. 16:13.

769 Third Hearing, p. 19:6-15.

770 Third Hearing, p. 21:2-3.

607. According to the U.S., this position remains the same regarding the good faith obligation under the VCLT and a tribunal is not competent to review the invocation of an essential security exception in connection with Article 26 of the VCLT.

608. The U.S. further provides that a State Party cannot waive the essential security exception, either implicitly or explicitly, as there is no provision in the TPA to that effect.

F. THE TRIBUNAL'S REASONING

609. By way of introduction, the Tribunal wishes to emphasize that it has carefully reviewed all the arguments and evidence presented by the Parties in the course of these proceedings. Although the Tribunal may not address all such arguments and evidence in full detail in its reasoning below, the Tribunal has nevertheless taken them into account in arriving at its decision.

610. The Tribunal will first deal with the essential security interest exception under Article 22.2(b) of the TPA raised by Respondent and supported by the United States as a Non-Disputing Party (**I**). Should the Tribunal find that the essential security interest exception is not applicable in the present case, the Tribunal will proceed to address the matters of its jurisdiction and merits of Claimants' claims (**II**).

I. Essential Security Interest Exception under Article 22.2(b) of the TPA

611. For the first time with its Rejoinder, Respondent invoked the essential security interest exception enshrined in Article 22.2(b) of the TPA (the "**ESI Provision**"), which reads as follows:

> "*Article 22.2: Essential Security*
> *Nothing in this Agreement shall be construed:*
> *(a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or*
> *(b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.* [Footnote 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.*]."[771]

612. Before the Tribunal proceeds to the analysis of the ESI Provision, it must address Claimants' procedural objection: namely, that Article 22.2(b) of the TPA was invoked by Respondent belatedly and must, therefore, be dismissed.

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[771] According to Article 23.1 of the TPA, "*The Annexes, Appendices and footnotes to this Agreement constitute an integral part of this Agreement.*" (emphasis added), Exhibit CL-230.

1. Timing of the Invocation of Article 22.2(b) of the TPA by Respondent

613. As elaborated above, shortly after Respondent invoked the ESI Provision in its Rejoinder, Claimants objected to what they described as a "*New Defence*" and requested that it be struck from the record.[772] Claimants argued that the invocation was belated, and Respondent should have identified its essential security concern at the time when the contested measures were implemented, since "*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.*"[773] According to Claimants, such belated invocation prejudiced Claimants and violated their due process rights.[774]

614. Respondent does not dispute that it had identified the essential security concern that it considered sufficient to trigger the ESI Provision only before the submission of its Rejoinder – but maintains that the TPA imposed no time limitation for invoking Article 22.2(b).[775]

615. The Tribunal cannot conclude that Respondent's invocation of Article 22.2(b) of the TPA was untimely for three reasons.

616. *First*, the Tribunal finds that Article 22.2(b) of the TPA, indeed, does not contain any reference to a point in time at which it must be invoked. Most telling in this relation is Footnote 2, in which the present tense of the verb "*invokes*" is combined with the only temporal qualifier of "*in an arbitral proceeding.*" The plain reading of Article 22.2(b) of the TPA does not align with Claimants' suggestion that Respondent ought to have identified its essential security interest *as such* in connection with implementing the measures against Claimants.

617. In that sense, Claimants' reference to the prospective invocation of the denial of benefits clauses by respondent States is inapposite.[776] The denial of benefits clauses are, by

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772 *See supra* at Section E.I.1.a).

773 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 45-46 (emphasis omitted); Claimants' Post-Hearing Brief, ¶¶ 327-333.

774 *See supra* at Section E.I.1.a).

775 Third Hearing, p. 239:11-21.

776 Claimants' Post-Hearing Brief, ¶ 329, fn. 769; Exhibit CL-118, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018; Exhibit CL-094, *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. The Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013; 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; Exhibit CL-188, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227,

definition, forward-looking, in that they allow a State to prevent abuses of substantive treaty protections and forum-shopping. An essential security exception is, on the other hand, necessarily invoked in a specific case and only *after* an essential security concern is implicated.

618. *Second*, as the Tribunal noted in its PO9, "*both under ICSID Arbitration Rule 41(2) and ICSID Arbitration Rule 26(3), it enjoys discretion in considering new submissions made by a Party independent of their timing*."[777] Moreover, the Tribunal is entitled to consider its jurisdiction – which is what Respondent challenges in its first alternative case – at any time during the proceedings.[778]

619. *Third*, the Tribunal considers that with several rounds of submissions and a separate Third Hearing held in April 2023, both Parties' right to be heard was preserved.

620. Therefore, the Tribunal concludes that Respondent's invocation of Article 22.2(b) of the TPA was not belated and will proceed with its interpretation and application.

2. Article 22.2(b) of the TPA

621. As acknowledged by Respondent, Respondent's case on the ESI Provision has evolved since its invocation in the Rejoinder. As it stands following the Third Hearing, Respondent offers three alternative cases regarding Article 22.2(b) of the TPA with three distinct legal outcomes.[779]

Final Award, 18 July 2014; Exhibit CL-038, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005. The Tribunal notes that all the cases cited by Claimants arose under the Energy Charter Treaty and, consequently, discuss one specific provision in one specific treaty.

777 Procedural Order No. 9, 28 March 2022, ¶ 10.

778 Rule 41(2) of the ICSID Arbitration Rules.

779 Third Hearing, pp. 240:22-241:19: "[MS. BANIFATEMI]: *Now, one point that Mr. Moloo made is that is somehow a merits defense. This is not a merits defense. This is a defense that goes to the power of the Tribunal. 'Non-justiciable' means that there is no legal review by anyone, a tribunal for that matter, of the circumstances in which the Exception is invoked. So, that is not a merits defense; that is a power defense. You do not have the power. That's the first layer. In the alternative, you don't have the jurisdiction. In the third layer, it's even before merits. In the third alternative, it's--if you would like to determine the good faith, you have ample evidence to show that this is, indeed, has been raised in good faith, and the timeline and everything else that we said today shows that, and then you go to the merits, and on the merits this doesn't apply.* […]" (emphases added).

622. Respondent's primary case is that the ESI Provision is non-justiciable, *i.e.*, as soon as it is invoked, the Tribunal cannot conduct any further inquiry into its invocation or the effects thereof and must dismiss the case.[780] This approach would require the Tribunal to stop short of assessing its jurisdiction to hear the case, let alone the merits of Claimants' claims and associated damages. The Tribunal notes that this is a line of argumentation that Respondent did not pursue initially.[781]

623. In the alternative, Respondent's argument rests on the proposition that the ESI Provision deprives the Tribunal of its jurisdiction to hear the claims stemming out of the measures covered by ESI Provision.[782]

624. Respondent's third alternative case is that the Tribunal may review the invocation of the ESI Provision by Respondent, but that review must be limited in scope, given that the elements of the exception are self-judging. The Parties have presented different arguments on what the standard of review should be in this case, and the Tribunal will address those in detail below.[783]

625. In contrast, Claimants' primary case has been that Article 22.2(b) of the TPA has no effect on either Tribunal's power or jurisdiction, or Respondent's liability. According to Claimants, the ESI Provision's effect is limited to excluding the remedies of restitution or withdrawal of measures (for the trade disputes) from the Tribunal's toolkit. The basis for this line of argument is that the ESI Provision only allows the States to *maintain* the measure introduced for the protection of their essential security interests. By extension, Claimants argue, the Tribunal may proceed with the case on the merits and award compensation to Claimants for Respondent's breaches of the TPA, if any.[784]

626. The starting point for the Tribunal's own analysis is the interpretation of Article 22.2(b) of the TPA. [redacted]

780 *See supra* at Section E.II.1.

781 *See* Rejoinder, ¶¶ 11-12, Section II.A.

782 *See supra* at Section E.II.1.b).

783 *See supra* at Section E.II.1.c).

784 *See supra* at Section E.I.1.b) and c).

785 Respondent's Post-Hearing Brief, ¶ 93.

786 Claimants' Submission on U.S. Treaties and [redacted], ¶ 63.

627. On that note, the Tribunal disagrees with Respondent that "*no room for interpretation if* [sic] *left for the Tribunal.*"[787] Even if the ESI Provision is non-justiciable, the Tribunal can only determine that through interpreting Article 22.2(b) of the TPA.[788]

628. The rules of international treaty interpretation under the VCLT as such are not disputed between the Parties. Instructive in this regard are the rules of international treaty interpretation which render the TPA operable.[789] The Tribunal will base its analysis primarily on Articles 31 and 32 of the VCLT.

629. Article 31(1) of the VCLT entitled "*General rule of interpretation*" (emphasis added) provides that:

> "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"[790]

630. Article 32 of the VCLT further provides that:

> "*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.*"[791] (Emphasis added)

631. This Tribunal's mandate is not to alter or supplement the terms of the TPA – but merely to interpret their meaning using the general rule of interpretation of Article 31 of the

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787 Respondent's Rejoinder, ¶¶ 27-28.

788 Respondent itself seems to recognize as much, stating: "*It is trite that it falls on arbitral tribunals to make sure, under the appropriate test, whether any preliminary objections to their jurisdiction are well-founded before they can determine whether or not they have jurisdiction to adjudicate a dispute. In other words, for this Tribunal to refrain from adjudicating disputes under Article 22.2 (b), it must first satisfy itself that the invocation of the Article as a jurisdictional objection has been made in good faith*." *See* Respondent's Reply to Claimants' Application of 7 March 2022, p. 18.

789 *See* Respondent's Rejoinder, ¶ 26; Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 7.

790 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) ("**VCLT**"), Art. 31(1).

791 Exhibit CL-187, VCLT, Art. 32.

VCLT and the supplementary means of interpretation of Article 32 of the VCLT to the extent necessary. It is an approach that is generally accepted and uncontroversial.

632. Therefore, in order to assess all four alternative cases raised by the Parties, the Tribunal will first interpret the ordinary meaning of Article 22.2(b) of the TPA under the VCLT (**3.**), examine the provision's history and other supplementary means of interpretation to the extent necessary (**4.**), and then apply it to the circumstances of the present case (**5.**).

3. Interpretation of Article 22.2(b) of the TPA

3.1. Interpretation according to Article 31 of the VCLT

a) Ordinary meaning of Article 22.2(b) of the TPA

633. The Tribunal will proceed to analyze the ordinary meaning of the following individual components of Article 22.2(b) of the TPA:

- "*Nothing in* [the TPA] *shall be construed* […] *to preclude a Party from applying measures that it considers necessary for*"
- "*the protection of its own essential security interests*", and
- Footnote 2.

(i) "*Nothing in* [the TPA] *shall be construed* […] *to preclude a Party from applying measures that it considers necessary*"

634. The linguistic element has instigated much discussion in the present case and in the interpretation of the (dis)similarly worded essential security clauses in other international treaties. In short, the questions are whether and to what extent the exception is self-judging.

635. As will be discussed in detail below at Section F.I.3.2., the formulation of the essential security clause in Article 22.2(b) of the TPA seems to trace back to the ICJ judgements in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* and *Oil Platforms (Islamic Republic of Iran v. United States of America)*. These cases prompted the U.S. Government to include language limiting external review of State measures taken under the umbrella of an essential security clause in the investment protection treaties concluded since then.

636. In interpreting essential security clauses, investment tribunals generally have called for clear indications of the self-judging character of the provisions in question – a proposition which is undisputed between the Parties.[792]

637. For example, the tribunal in the *Deutsche Telekom v. India* interpreted Article 12 of the Germany-India BIT, which reads as follows: "*Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests.*" The tribunal succinctly held that:

> "*India does not argue that Article 12 is a self-judging clause, and rightly so. Clear indications in the text of the treaty would be required in order to infer that a provision is self-judging. Such indications are absent from Article 12.*"[793]

638. The Tribunal concurs with this line of thinking. The power of a State to *unilaterally* determine the scope of a carveout to the otherwise binding obligations under international law, given its scope and potential for abuse, must be reserved in explicit terms. And in the present case, it is: Article 22.2(b) of the TPA explicitly states that "*it*", *i.e.*, the Contracting State applying the measures, "*considers*" necessary, leaving no doubt that this provision is self-judging.

639. In an excerpt partially cited by Respondent, the *Deutsche Telekom* tribunal went on to discuss the level of deference the *non-self-judging* essential security exception affords to a State's determination of the necessity of the measures:

> "*In that review, the Tribunal will undoubtedly recognize a margin of deference to the host state's determination of necessity, given the state's*

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792 *See* Respondent's Rejoinder, ¶ 37 and fns. 28-29, quoting Exhibit RL-163, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 ("***CMS v. Argentina***"), ¶ 370: "*The Tribunal is convinced that when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly*."; Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 30.

793 Exhibit RL-188, *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶¶ 225, 231. A similar interpretation was given by investment tribunals to Article XI of the U.S.-Argentina BIT. *See e.g.*, Exhibit CL-062, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 188; Exhibit CL-049, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 ("***Enron v. Argentina***"), ¶ 335.

> *proximity to the situation, expertise and competence. Thus, the Tribunal would not review* de novo *the state's determination nor adopt a standard of necessity requiring the state to prove that the measure was the 'only way' to achieve the stated purpose. On the other hand, the deference owed to the state cannot be unlimited, as otherwise unreasonable invocations of Article 12 would render the substantive protections contained in the Treaty wholly nugatory.*"[794]

640. In this Tribunal's view, a margin of deference should be afforded *a fortiori* to a State invoking a *self-judging* essential security exception, such as Article 22.2(b) of the TPA.

(ii) "[T]*he protection of its own essential security interests*"

641. The main body of the ESI Provision contains a reference to the two alternative end goals pursued by a Contracting State implementing the measures: (i) the fulfilment of that State's obligations with respect to the maintenance or restoration of international peace or security, and (ii) the protection of that State's own essential security interests. Given that the peace and security obligations were not invoked by Respondent in the present case, the Tribunal will focus on the essential security interests.

642. The Tribunal observes that the TPA itself does not define the Contracting State's "*own essential security interests*". The Tribunal will, therefore, start by examining the ordinary meaning of these terms, which suggest that the essential security interest must carry at least two defining qualities: it must be of higher importance than just *any* interest – vital and going to the core of the State's main functions, and it must be related to the matters of security, *i.e.*, protection from threats.

643. This interpretation is in line with the understanding of the essential security interests by other international law bodies.[795] The examples of what can be considered an essential security interest include "*political or economic survival, the maintenance of conditions*

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794 Exhibit RL-188, *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶ 238. *See* Respondent's Rejoinder, ¶ 52.

795 *See* Exhibit R-251, OECD, Essential Security Interests under International Investment Law in International Investment Perspectives: Freedom of Investment in a Changing World, 2007 Edition, p 100. The report by Professor Crawford notes that no *a priori* definition of an essential interest can be offered, and it must depend on the specific facts of each case. *See* J. Crawford, Second Report on State Responsibility, UN General Assembly, International Law Commission, 51st Session, Geneva, 17 March, 1 and 30 April, 19 July 1999, A/CN.4/498 and Add.2 cited in Exhibit R-251, OECD, Essential Security Interests under International Investment Law in International Investment Perspectives: Freedom of Investment in a Changing World, 2007 Edition, p 100.

in which its essential services can function, the keeping of its internal peace, the survival of part of its population […]"[796], protection of the environment[797], and economic security and stability[798]. What is clear is that a State's essential security interests are no longer understood to be limited to the sphere of military threats and territorial integrity. In any case, it is the State itself which can best identify the scope of its own essential security interests.

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796 Documents of the Thirty-Second Session, Yearbook of the International Law Commission, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1) cited in Exhibit R-251, OECD, Essential Security Interests under International Investment Law in International Investment Perspectives: Freedom of Investment in a Changing World, 2007 Edition, p 100. In the Commentaries to the 2001 Draft Articles on State Responsibility, the examples cited by the Commission include "*safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population*." *See* Exhibit CL-025, International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001, p. 83, ¶ 14.

797 *See e.g. Gabčíkovo-Nagymaros Project* (*Hungary v. Slovakia*), International Court of Justice, Judgment, 25 September 1997 cited in Exhibit R-251, OECD, Essential Security Interests under International Investment Law in International Investment Perspectives: Freedom of Investment in a Changing World, 2007 Edition, p 100.

798 *See e.g.*, Exhibit CL-062, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 175: "*As to 'essential security interests,' it is necessary to recall that international law is not blind to the requirement that States should be able to exercise their sovereignty in the interest of their population free from internal as well as external threats to their security and the maintenance of a peaceful domestic order. It is well known that the concept of international security of States in the Post World War II international order was intended to cover not only political and military security but also the economic security of States and of their population*."; Exhibit RL-163, *CMS v. Argentina*, ¶ 360; Exhibit CL-045, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 238: "*The Tribunal rejects the notion that Article XI is only applicable in circumstances amounting to military action and war. Certainly, the conditions in Argentina in December 2001 called for immediate, decisive action to restore civil order and stop the economic decline. To conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead. When a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion*."

644. Almost by definition, the essential security interests of a State are an expression of its sovereignty, so the Tribunal is especially conscious of the associated limitations to its mandate and scope of inquiry.[799]

645. Moreover, in contrast with the TPA, some international treaties take a more restrictive approach in defining essential security interest. For example, the list of essential security interests under Article XXI of the 1994 General Agreement on Tariffs and Trade (the "**GATT**") is exhaustive and encompasses only "*essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations*."[800]

646. While the absence of limitative qualifying clauses does not necessarily mean that the term can encompass everything, the Tribunal considers that such open-ended approach taken by the State parties to the TPA – once again – underscores a broad margin of appreciation a Contracting State enjoys in identifying its essential security interest.

647. Finally, given the clear self-judging nature of the other element of the ESI Provision, namely the necessity of the measures applied by the Contracting State, the Tribunal must establish whether the determination of what constitutes an essential security interest is also reserved solely to the invoking State, as argued by Respondent[801].

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799 *See e.g.*, Exhibit CL-196, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, ¶ 245: "*An arbitral tribunal may not sit in judgment on national security matters as on any other factual dispute arising between an investor and a State. National security issues relate to the existential core of a State. An investor who wishes to challenge a State decision in that respect faces a heavy burden of proof, such as bad faith, absence of authority or application to measures that do not relate to essential security interests*." *See also* Exhibit RL-216, Stephan Schill and Robyn Briese, "*'If the state Considers': Self-Judging Clauses in International Dispute Settlement*,"13 Max Planck Yearbook of United Nations Law, 2009, pp. 77-78.

800 Exhibit RL-222, General Agreement on Tariffs and Trade, 1994 ("**GATT**"), Art. XXI(b). These have been described in the *Russia – Measures concerning traffic in transit* case as "*limitative qualifying clauses; in other words, they qualify and limit the exercise of the discretion accorded to Members under the chapeau to these circumstances.*" *See* Exhibit RL-192, *Russia — Measures Concerning Traffic in Transit*, WT/DS512, Report of the Panel, 5 April 2019, ¶ 7.65.

801 *See* Respondent's Rejoinder, ¶ 12: "*The language of Article 22.2.b establishes that the Tribunal must grant a large margin of appreciation for the State in both the determination of its essential security interests and the choice of measures the State considers necessary for the protection of such interests*."

648. Citing a WTO Panel *Russia – Measures concerning traffic in transit* case, Respondent submits that: "*it is generally accepted that it is entirely for a State to define what it deems to constitute its 'essential security interests.' The Respondent thus enjoys full discretion to define what constitutes its essential security interests, to the extent that such definition is done in good faith.*"[802]

649. The WTO Panel does not go as far and elaborates as follows:

> "*The specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances. For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests.*
> *However, this does not mean that a Member is free to elevate any concern to that of an 'essential security interest'. Rather, the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith. The Panel recalls that the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as codified in Article 31(1) ('[a] treaty shall be interpreted in good faith ...') and Article 26 ('[e]very treaty ... must be performed* [by the parties] *in good faith') of the Vienna Convention.*"[803]

650. Therefore, the ordinary meaning of the ESI Provision suggests that it is for the State to determine the scope of its "*own essential security interests*" – but, as the above quoted WTO Panel has held in similar circumstances, such determination may be restrained by the good faith obligations.

(iii) Nexus between the measures and the ESI

651. The other key element of the ESI Provision is "*for*", *i.e.*, the nexus between the measures the State considers necessary and the goal it pursues. The ordinary meaning of the wording merely suggests that the measures must be connected *in some form* to the underlying essential security interest.

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802 Respondent's Rejoinder, ¶ 55 (footnotes omitted).

803 Exhibit RL-192, *Russia — Measures Concerning Traffic in Transit*, WT/DS512, Report of the Panel, 5 April 2019, ¶¶ 7.131-132 (emphases added, footnote omitted).

652. The Parties have both referred to the plausibility test for establishing nexus under Article 22.2(b) of the TPA.

653. In *Russia – Measures concerning traffic in transit* case, the WTO Panel opined that the good faith obligation extends to the nexus element of the Article XXI of the GATT (which bears close textual resemblance to Article 22.2(b) of the TPA, as will be discussed below at Section F.I.4c)):

> "*The obligation of good faith, referred to* […] *above, applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue. Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests.*
> *The Panel must therefore review whether the measures are so remote from, or unrelated to, the 2014 emergency that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of the emergency*."[804]

654. Additionally, citing investment tribunals' application of taxation carve-outs under the Energy Charter Treaty and BITs, Claimants argue that "*a* bona fide *connection*" or a "*rational connection*" between the measures and the relevant sovereign interest must be established.[805] At the Third Hearing, Respondent also accepted the *prima facie* standard for establishing the nexus.[806]

655. The Tribunal finds the plausibility standard an appropriate benchmark against which to evaluate the nexus between the measures adopted by the State and the essential security interest sought to be protected under Article 22.2(b) of the TPA. In the Tribunal's view, it carries an implication of a 'light-touch' good faith review – not too restrictive as to

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804 Exhibit RL-192, *Russia — Measures Concerning Traffic in Transit*, WT/DS512, Report of the Panel, 5 April 2019, ¶¶ 7.138-7.139 (emphases added). *See also* Exhibit RL-201, *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, 16 June 2020, ¶ 7.293. *See* Respondent's Rejoinder, ¶¶ 56-57; Claimants' Post-Hearing Brief, ¶¶ 336-337.

805 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 58, fns. 93-95; Claimants' Rebuttal on Essential Security, ¶ 4.

806 Third Hearing, p. 249:8-9.

infringe on the explicit self-judging language of the ESI Provision. The Tribunal also considers that the other tests invoked by the Parties (*i.e. bona fide* connection, rational connection, *prima fac*ie standard) would lead to a very similar, if not identical, scope of review.

(iv) Footnote 2

656. The Parties have attributed much weight to Footnote 2 to Article 22.2(b) of the TPA, which reads as follows:

> "*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.*"[807]

657. The introductory phrase "[f]*or greater certainty*" implies that the footnote does not add additional elements to the ESI Provision, but merely explains the meaning the Contracting States attributed to it.

658. The two main 'actors' of the Footnote are (i) a State "*invok*[ing]" the ESI Provision in an arbitral proceeding under Chapters Ten or Twenty-One, and (ii) a tribunal that "*shall find that the exception applies.*"

659. On one hand, the formulation of these elements suggests certain actions both on the side of the State invoking the ESI Provision and of the tribunal that makes its finding. This construction implies a certain role by a party *other than the Contracting State applying the measures* in making a finding on the invoked essential security interest.

660. On the other hand, the term "*shall find*" suggests that a tribunal only has limited discretion as to its course of action. In other words, the ordinary meaning of Footnote 2 would suggest that, upon the invocation of Article 22.2(b) of the TPA, the tribunal is empowered to make a finding – but that finding has a defined outcome.

661. Footnote 2 leaves an important matter open: what is the standard of review a tribunal should apply in its findings, a matter which the Tribunal will address below at Section F.I.3.3.d).

[807] Exhibit CL-230, US-Colombia Trade Promotion Agreement, Art. 22.2.

Preliminary Conclusion

662. On the basis of the interpretation of the ordinary meaning of Article 22.2(b) of the TPA, it can be concluded that the ESI Provision is a self-judging exception to the TPA, which allows a Contracting State to invoke an interest that it judges to be critical for its security as a justification for the measures – which may otherwise be in violation of the substantive provisions of the TPA – that it considers necessary to further that interest, with some connection between the former and the latter. Once the ESI Provision is invoked, the tribunal is directed towards a finding that it applies.

663. However, the interpretation of the ordinary meaning does leave certain questions open, such as the standard of review that a tribunal is to apply in reviewing the invocation of the ESI Provision, so the Tribunal will next turn to the object and purpose, as well as the context of Article 22.2(b) of the TPA.

b) Object and purpose of the TPA

664. Article 31 of the VCLT invites the Tribunal to take account of the object and purpose of the Treaty to shed light on the ordinary meaning of the ESI Provision.

665. In that context, the Tribunal appreciates the emphasis that Respondent placed on the fight against narco-trafficking as one of the objects of the TPA. It is, indeed, true that the second recital in the Preamble to the TPA refers to the promotion of "*broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production.*" Of note is also one further recital – preservation of the Contracting States' "*ability to safeguard the public welfare.*"

666. However, further down in the Preamble, another declared goal of the Contracting States is stipulated, namely, to ensure "*a predictable legal and commercial framework for business and investment.*" Given the significant heft of the investor protection provisions in the overall structure of the TPA, the Tribunal also considers it as one of the purposes of the Treaty.

667. In that sense, the object and purpose of the TPA do not shed further light on the interpretation of the ordinary meaning of Article 22.2(b) of the TPA, but rather serve as a reflection of the balanced approach between the sovereign interests of the Contracting States and the protection of investors' rights that the TPA – and, consequently, this Tribunal – seeks to strike.

c) Context of Article 22.2(b) within the TPA

668. The Parties have submitted several arguments on the context of the Treaty in which Article 22.2(b) is placed.

669. *First*, divergent interpretations of the Chapter Twenty-Two's heading "Exceptions" have been proposed, with Respondent arguing that it reflects the intended exception of measures taken under Article 22.2(b) from the scope of the TPA, and Claimants suggesting that "*Article 22.2(b) serves as an '[e]*xception' *to the TPA's allowance of restitution or withdrawal of measures as a remedy.*"[808]

670. The Tribunal finds no support for Claimant's limited interpretation of the word "Exceptions" in the context of the TPA. Given that the other exceptions contained in this Chapter constitute exceptions to the matters covered by the Treaty, it would be counter-intuitive to assume that the essential security "[e]*xception*" is aimed at a different – implicit and narrow – outcome.

671. *Second*, of note in the context of the present case is Article 10.2(1) of the TPA which provides for subordination of Chapter 10 "Investment" to other chapters of the TPA, including Chapter 22 "Exceptions."[809] That is, the ESI Provision must take precedence over the substantive and procedural rights of the investors contained in the TPA.

672. Therefore, the Tribunal considers that the ESI Provision, placed in the context of the TPA, should be understood as an exception to the coverage of the Treaty which is placed hierarchically above the provisions regulating investors' substantive rights and dispute resolution provisions of Chapter 10 of the TPA.

d) Relevant Rules of International Law

673. Aside from particularities of the TPA drafting history, the Tribunal considers it important to place Article 22.2(b) of the TPA in the larger context of public international law – whether that context provides guidance or contrast. *First*, Article 31(3) of the VCLT directs the Tribunal to take into account, "*together with the context:* […] *c.* [a]*ny relevant rules of international law applicable in the relations between the parties*."[810] *Second*, Article 42(1) of the ICSID Convention provides that "[t]*he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State*

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808 Respondent's Submission on [redacted] and on the U.S. Treaty Practice on Essential Security Interests Exceptions, ¶ 19; Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 17.

809 *See* Exhibit CL-001, TPA, Art. 10.2: "*1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency*."

810 Exhibit CL-187, VCLT, Art. 31(3).

party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable" (emphasis added)[811].

(i) Plea of Necessity

674. Traditionally, the 'first port of call' for the notion of essential security interests was the plea of necessity under customary international law, often understood to be reflected in Article 25 of the ILC Articles as follows:

> "*Article 25 Necessity*
> *1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*
> *(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*
> *(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
> *2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*
> *(a) the international obligation in question excludes the possibility of invoking necessity; or*
> *(b) the State has contributed to the situation of necessity.*"[812]

675. Claimants, in fact, invoke Article 25 of the ILC Articles to illustrate a point about the limited effects of Article 22.2(b) of the TPA.[813]

676. In the string of investment arbitration cases of the early 2000s against Argentina, investment tribunals were faced with an essential security clause in the Argentina-U.S. BIT drafted as a non-self-judging essential security exception.[814] These tribunals incorporated the stringent requirements of the plea of necessity under customary

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811 ICSID Convention, Art. 42(1).

812 Exhibit CL-025, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001, Art. 25.

813 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 16.

814 Article XI of the 1991 Argentina - United States of America BIT: "*This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, 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*."

international law into the BIT's essential security exception – in effect conflating two distinct legal norms despite the *lex specialis* nature of the treaty-based provision.[815]

677. *CMS v. Argentina*, *Enron v. Argentina*, and *Sempra v. Argentina* were subsequently annulled by the ICSID *ad hoc* committees on the basis of, *inter alia*, the convergence of the legal standards.[816] These *ad hoc* committees' decisions are illustrative as to the nature of the essential security exceptions in the BITs – whether self-judging or not.

678. In *CMS v. Argentina*, the *ad hoc* committee consisting of Mr. Nabil Elaraby, Judge James Crawford[817], and Judge Gilbert Guillaume as chair, elaborated on the difference between the pleas of necessity under customary international law and a treaty-based essential security exception:

> "[…] *Article XI specifies the conditions under which the Treaty may be applied, whereas Article 25* [of the ILC's Articles on State Responsibility] *is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met. Moreover, Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.*

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815 *See e.g.*, Exhibit CL-049, *Enron v. Argentina*, ¶ 333 (emphasis added): "*The Tribunal notes that the Treaty does not define what is to be understood by essential security interest* […]. *The specific meaning of these concepts and the conditions for their application must be searched for elsewhere.* […] *The situation is more complex in respect of security interests because there is no specific guidance to this effect under the Treaty. This is what makes necessary to rely on the requirements of state of necessity under customary international law, as outlined above in connection with their expression in Article 25 of the Articles on State Responsibility, so as to evaluate whether such requirements have been met in this case*." *See also* Exhibit RL-163, *CMS v. Argentina*, ¶ 373; Exhibit CL-054, *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶ 375.

816 Exhibit RL-168, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *Ad hoc* Committee on Argentina's Application for Annulment, 25 September 2007; Exhibit RL-237, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010.

817 Judge Crawford was a Special Rapporteur for the draft Articles on State Responsibility.

> […] *In other terms the requirements under Article XI are not the same as those under customary international law as codified by Article 25* […]."[818]

679. This analysis is further supported by the *ad hoc* committee in *Sempra*, which also placed its focus on the different operation of the essential security interest *exception* and the *defense* of necessity:

> "*More importantly, Article 25 is concerned with the invocation by a State Party of necessity 'as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State'. Article 25 presupposes that an act has been committed that is incompatible with the State's international obligations and is therefore 'wrongful'. Article XI, on the other hand, provides that 'This Treaty shall not preclude' certain measures so that, where Article XI applies, the taking of such measures is not incompatible with the State's international obligations and is not therefore 'wrongful'*."[819]

680. In line with these findings, the tribunal in *Continental v. Argentina* – citing Prof. Vandevelde, who had advised on U.S. BIT negotiations in the 1980s and submitted an expert opinion in that case – noted that Article XI of the Argentina-U.S. BIT "*has been defined as a safeguard clause; it has been said that it recognizes 'reserved rights,' or that it contemplates 'non-precluded' measures to which a contracting state party can resort*."[820]

681. Even though the language of Article XI of the Argentina-U.S. BIT and Article 22.2(b) of the TPA are not identical, some parallels can be drawn to the present case. The Tribunal concurs with the *ad hoc* committees' views in *CMS v. Argentina* and *Sempra v. Argentina*, which interpreted a BIT-based essential security exception to operate as a derogation from the BIT-based obligations of a State, essentially an exception to the scope of the treaty.

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818 Exhibit RL-168, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *Ad hoc* Committee on Argentina's Application for Annulment, 25 September 2007, ¶¶ 129-130 (emphases added).

819 Exhibit RL-237, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, ¶ 200 (emphasis added).

820 Exhibit CL-062, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 164.

682. Based on the above, the Tribunal rejects Claimants' contention that the ESI Provision constitutes an "*affirmative defense against liability.*"[821] Unlike Article 25 of the ILC Articles, it does not "*presuppose*[] *that an act has been committed that is incompatible with the State's international obligations and is therefore 'wrongful'*."[822] Instead, it precludes the measures from being incompatible with the Treaty in the first place.

(ii) Article XXI of the GATT

683. The other similarly worded clause that the Parties drew on to interpret the meaning and operation of the ESI Provision is Article XXI of the GATT, a WTO agreement, which reads as follows:

> "*Article XXI Security Exceptions*
> *Nothing in this Agreement shall be construed*
> *(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or*
> *(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests*
> *(i) relating to fissionable materials or the materials from which they are derived;*
> *(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;*
> *(iii) taken in time of war or other emergency in international relations; or*
> *(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*"[823]

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821 Claimants' Application of 7 March 2022, ¶ 28; Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 16.

822 Exhibit RL-237, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, ¶ 200.

823 Exhibit RL-222, GATT, Art. XXI. Similarly drafted is Article 24 of the Energy Charter Treaty, which reads in relevant part:
"*The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:*

684. It is apparent why Article XXI of the GATT is frequently used as a comparator for the essential security exception provisions in the investor-State context, including by the Parties. The wording "*taking any action which it considers necessary for the protection of its essential security interests*" is, indeed, semantically almost identical to the relevant part of Article 22.2(b) of the TPA.

685. Moreover, unlike Article 25 of the ILC Articles, Article XXI of the GATT operates in the same manner, *i.e.*, without establishing the 'wrongful' nature of the underlying State measure but rather treating such measures as *not incompatible* with the State's international obligations in the first place.

686. Finally, it is of note that the Preamble of the TPA specifically refers to the Contracting States' "*respective rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization and agreements to which they are both parties*", and Article 1.2 of the TPA affirms these rights and obligations, drawing the GATT 'into the orbit' of the TPA. However, unlike Article XX of the GATT and its interpretative notes (*see* Article 22.1.1), Article XXI of the GATT was not explicitly incorporated into the Treaty.

687. At the same time, the Tribunal recognizes that the specific context of the international trade law is not directly applicable to the context of international investment law. Moreover, and most importantly, the qualifiers (i) to (iii) of Article XXI(b) of the GATT distinguish it from the present case, as will be addressed in detail below.

688. However, given the linguistic proximity of the provisions, the Tribunal considers it prudent to take the provision itself as well as the considerable body of case law interpreting and applying Article XXI of the GATT as a helpful, albeit inconclusive, supplementary means of interpretation, on which both Parties have extensively relied, as will be discussed in relevant sections below.

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a. for the protection of its essential security interests including those

i. relating to the supply of Energy Materials and Products to a military establishment; or

ii. taken in time of war, armed conflict or other emergency in international relations;

b. relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or

c. for the maintenance of public order."

e) Subsequent Agreement and Subsequent Practice

689. Respondent and the U.S. invited the Tribunal to consider, in the interpretation of Article 22.2(b) of the TPA, the "*authentic interpretation*" of the Treaty by its Contracting States through the instruments envisaged in Article 31(3) of the VCLT[824]:

> "*There shall be taken into account, together with the context:*
> *a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
> *b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
> *c. any relevant rules of international law applicable in the relations between the parties.*"[825]

690. Specifically, Respondent and the U.S. argue that the congruence of their positions in this arbitration *vis-à-vis* the nature and the effects of the ESI Provision should be decisive for this Tribunal's interpretation.

691. The Tribunal is mindful of the current positions taken by the Contracting Parties regarding Article 22.2(b) of the TPA in this arbitration.

692. Specifically, as discussed in Section E.II.1 above, Respondent's initial position did not entail the primary case that Article 22.2(b) of the TPA is non-justiciable. However, by the time of the Third Hearing, it was Respondent's primary case, coherent with the U.S. position on the matter. Respondent nevertheless maintained a more detailed position, arguing that, in the alternative, the Tribunal does not have jurisdiction to hear the claims and that Respondent invoked the ESI Provision in good faith.[826]

693. The Tribunal is not convinced, however, that the congruence of the Contracting Parties' positions in this arbitration, taken individually or together, can override the ordinary meaning of the ESI Provision. This is for three reasons.

694. *First*, Article 31(3) of the VCLT merely instructs the Tribunal to take any subsequent agreement or subsequent practice "*into account*" together with the context of the provision. What the VCLT does not do is designate a subsequent agreement of the

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824 Third Hearing, pp. 11:8-12:5; Respondent's Post-Hearing Brief, ¶ 50.

825 Exhibit CL-187, VCLT, Art. 31(3).

826 *See* Section E.II.1 above.

contracting parties to a treaty as a conclusive tool of that treaty's interpretation.[827] It is not disputed between the Parties that any subsequent agreement or practice cannot amend the language of the TPA.[828]

695. *Second*, while undoubtedly "*subsequent*" to the conclusion of the TPA, whether the positions of Respondent and the U.S. can be characterized as an "*agreement*" is doubtful. In principle, a subsequent agreement must not be as formal as the underlying treaty and may take different forms. However, by definition, there must be an *agreement*, *i.e.*, a joint manifestation of consent, between the contracting parties. In the present arbitration, Respondent's position on the ESI Provision and its interpretation evolved, as Respondent itself admitted, and gradually aligned with the U.S. position. Even now, these positions are congruent, but not identical, which makes designating them as "*agreement*" a rather tall order.

696. The same is true for the "*practice.*" Again, the Tribunal accepts that a subsequent practice may take various forms, as long as it reflects contracting parties' conduct "*in the application of the treaty.*"[829] Leaving aside the question of whether one instance of congruent interpretation in the context of one dispute may establish "*practice*", the Tribunal is faced with the problem of deducing which "*agreement of the parties regarding* [the provision's] *interpretation*" such practice would establish.

697. *Third*, the Tribunal is mindful of the concerns raised by the *Infinito Gold* tribunal, namely that accepting that the Contracting States' submissions as an interpretative agreement post-dating the commencement of the arbitration may put Claimants' due process rights

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827 *See* Exhibit CL-243, International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, 2018, A/73/10, pp. 24-25: "*The characterization of subsequent agreements and subsequent practice of the parties under article 31, paragraph 3 (a) and (b), as 'authentic means of interpretation' does not, however, imply that these means necessarily possess a conclusive effect*. […] [S]*ubsequent agreements and subsequent practice that establish the agreement of the parties regarding the interpretation of a treaty are not necessarily legally binding. This is confirmed in draft conclusion 10, paragraph 1. Thus, when the Commission characterized a 'subsequent agreement' as representing 'an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation', it did not go quite as far as saying that such an interpretation is necessarily conclusive in the sense that it overrides all other means of interpretation*." (Footnotes omitted).

828 Respondent's Post-Hearing Brief, ¶ 54; Claimants' Post-Hearing Brief, ¶ 313.

829 *See* Exhibit CL-243, International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, 2018, A/73/10, p. 32.

in jeopardy.[830] In that sense, the Tribunal cannot accept Respondent's claim that "*the meaning that Colombia and the United States attributed to Article 22.2(b) of the TPA, as is clear from the* travaux préparatoires*, has remained unchanged as of the date they launched the TPA's negotiations*"[831], as Respondent's own case on the ESI Provision has changed in the course of this arbitration.

698. For these reasons, while evaluating both Respondent's and the U.S.' submissions with all diligence, the Tribunal cannot treat them as a subsequent agreement or subsequent practice of the Contracting Parties under Article 31(3) of the VCLT.

3.2. Interpretation according to Article 32 of the VCLT

699. Having interpreted the ordinary meaning of Article 22.2(b) of the TPA, the Tribunal considers that it would be helpful to turn to the supplementary means of treaty interpretation as per Article 32 of the VCLT, such as history of the ESI Provision and *travaux préparatoires* of the TPA, to confirm the meaning resulting from the application of Article 31 of the VCLT.

700. As alluded above and as not disputed between the Parties, the wording of the ESI Provision in the TPA builds upon the U.S. treaty practice which has evolved following the ICJ judgements in *Nicaragua* and *Oil Platforms* cases. The previous generation of international trade and investment treaties concluded by the U.S. contained essential security exception clauses that differed from Article 22.2(b) of the TPA in one critical aspect: they allowed a Contracting State to apply measures "*necessary*" for the protection of its essential security interests – as opposed to the measures that "*it considers necessary.*"

701. A provision drafted in that fashion, namely, Article XXI of the 1956 Treaty of Friendship, Commerce and Navigation between the U.S. and Nicaragua, was the one that the ICJ interpreted in the *Nicaragua* case. There, the ICJ drew on the lack of a defined subject in the sentence to establish that it had jurisdiction to determine whether the measures applied by the U.S. were "*necessary*" within the meaning of the treaty.[832] In other words, the ICJ rejected the U.S.' claim that the essential security exception was a self-judging provision.

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830 Exhibit RL-207, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, ¶ 339.

831 Respondent's Post-Hearing Brief, ¶ 52.

832 Exhibit RL-152, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), International Court of Justice, Judgment - Merits, 27 June 1986, ¶ 222: "*That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also*

702. The ICJ upheld this interpretation in relation to a similarly worded treaty in the later *Oil Platforms* case.[833] Investment tribunals and scholars have since followed suit.

703. Following this ICJ jurisprudence, the U.S. adopted a new formulation for the next generation of its international treaties and Model BITs to include the "*it considers necessary*" clause – with a view to eliminate any doubt as to the role of the Contracting State in determining the necessity of the measures adopted under the auspices of an essential security exception provision. As evidenced by the U.S. submission of the relevant excerpts of investment treaties that contained essentials security interest exceptions, Article 22.2(b) of the TPA – a treaty negotiated between 2004 and 2006 – is a rather typical provision within U.S. treaty practice subsequent to the *Nicaragua* / *Oil Platforms* paradigm shift.[834]

704. That is, Article 22.2(b) of the TPA stands in contrast with the language of essential security exception interpreted by the ICJ in *Nicaragua* and should be interpreted *a contrario* as a self-judging provision.

705. The intention of the U.S. is also clear from the *travaux préparatoires* to the TPA that were submitted into the record. The minutes of the Round IV of the TPA negotiations reflect the statement of the U.S. representative to the effect that "[t]*his is a strong exception in cases of matters that have to do with national security. The invocation of that exception is not subject to court review.*"[835]

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clear a contrario from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, 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."

833 Exhibit RL-156, *Oil Platforms* (*Islamic Republic of Iran v. United States of America*), International Court of Justice, Judgment - Preliminary Objection, 12 December 1996, ¶ 20.

834 Letter from the United States Department of State to the Tribunal dated 20 October 2022. *See also* Third Hearing, p. 12:11-15.

835 Exhibit RL-254, Minutes of negotiation rounds of the US-Colombia Trade Promotion Agreement, pp. 9-10 of the PDF.

706. Respondent claims that its position has also been clearly expressed during the negotiations and was "*identical*" to that of the U.S.[836] In support of this proposition, Respondent cites its representative discussing *the GATT* in the following terms:

> "*COL: it is very useful to know what are the elements included in the definition of essential security, that is the problem, that essential security is not defined in the chapter of general exceptions of the GATT, but, as it is used it is a self-judging exception, no panel is going to say anything, nobody is going to let that happen, but we must be cautious, I will see how we can list it, essential security is what it is, I think that no one in GATT wants to define it.*"[837]

707. The Tribunal is hard-pressed to read this statement as conclusively expressing Respondent's intent *vis-à-vis* the present Article 22.2(b) of the TPA. At best, it reflects Respondent's reading of a similarly worded provision in the GATT, discussed in detail below. The use of the word "*panel*" (likely, a WTO panel) speaks to that conclusion. The rest of the statements cited by Respondent do not provide conclusive evidence as to Respondent's understanding of the ESI Provision at the time of the conclusion of the TPA.[838]

708. Therefore, the Tribunal considers the *travaux préparatoires* of the TPA together with the U.S. treaty practice conclusive as to the position of one of the two Contracting States at best.

709. This analysis supports the interpretation of the ESI Provision under Article 31 of the VCLT, as elaborated above at Section F.I.3.1.

3.3. Practical Effect of the Interpretation of Article 22.2(b) of the TPA

710. On the basis of the interpretation of Article 22.2(b) of the TPA according to Articles 31 and 32 of the VCLT above, the Tribunal will, *first*, address whether the ESI Provision is non-justiciable (**a**). *Second*, the Tribunal will consider whether the invocation of the ESI Provision deprives it of jurisdiction to review the merits of the dispute (**b**). *Third*, the Tribunal will consider whether the ESI Provision merely limits the remedies available to

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836 Respondent's Post-Hearing Brief, ¶ 32 (emphasis omitted).

837 Exhibit RL-254, Minutes of negotiation rounds of the US-Colombia Trade Promotion Agreement, p. 14 of the PDF.

838 Respondent's Post-Hearing Brief, ¶¶ 59-60.

investors to compensation (**c**). *Finally*, the Tribunal will assess the standard of review of the invocation of the ESI Provision (if any) (**d**).

a) Non-justiciable provision

711. Under Respondent's primary case, the effect of the ESI Provision is such that a Contracting State may choose not to uphold its otherwise binding obligations under the TPA based on a determination entirely immune to scrutiny.

712. The Tribunal does not agree that the ESI Provision is non-justiciable, *i.e.*, "[its] *invocation by a Contracting State deprives the tribunal seized of the matter of the ability to subject such invocation to any legal assessment.*"[839]

713. *First*, Article 22.2(b) of the TPA or Footnote 2 thereto simply do not contain 'non-justiciable' language.

714. As Claimants have pointed out, there are examples of treaty language that explicitly convey the non-justiciable nature of an essential security exception. For instance, the Singapore-India Comprehensive Economic Cooperation Agreement provides in its Article 6.12(4):

> "*This Article shall be interpreted in accordance with the understanding of the Parties on <u>non-justiciability</u> of security exceptions as set out in their exchange of letters, which shall form an integral part of this Agreement.*"[840]

715. Annex 5 to the Exchange of Letters contemplated by this article provides, in turn:

> "[I]*n respect of disputes submitted to arbitration pursuant to paragraph 3(b) and/or paragraph 3(c) of Article 6.21 of the Agreement, where the disputing Party asserts as a defence 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 decision of the disputing Party taken on such security considerations shall be non-justiciable in that <u>it shall not be open to any arbitral tribunal to review the merits of any such decision</u>, even where the arbitral proceedings concern an assessment*

839 Respondent's Post-Hearing Brief, ¶ 20.

840 Exhibit CL-210, Singapore-India Comprehensive Economic Cooperation Agreement, signed 29 June 2005, entry into force 1 August 2005, Art. 6.12(4) (emphasis added).

> *of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.*"[841]

716. Moreover, in 2009, Respondent itself signed a Joint Interpretative Declaration with the Republic of India regarding the Agreement for Promotion and Protection of Investments Between India and Colombia, where it explicitly agreed to Note 9 along the same lines:

> "*Where the Contracting Party asserts as a defence that the measure alleged to be a breach of its obligations under this Agreement is for the protection of its 'essential security interests'* […] *as set out in Article 13, any decision of such Contracting Party taken on such security considerations 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.*"[842]

717. Notably, the India-Colombia BIT is among 13 international investment agreements Respondent itself submitted to substantiate its argument that the "*language of Article 22.2.b is unique and purposeful.*"[843] While the U.S. Representative submitted during the Third Hearing that the language of the Singapore-India Agreement has no bearing on the U.S. treaty practice,[844] Colombia's *own* treaty practice points to diverging formulations regarding the (non-)justiciable nature of essential security exceptions.

718. This is all the more so in light of the history of the ESI Provision and similar provisions in U.S. treaty practice. The change of wording in U.S. treaty practice was induced by the ICJ's *Nicaragua* decision and must be taken into account by the Tribunal.

719. *Second*, based on the ordinary meaning of the terms of Article 22.2(b) of the TPA and Footnote 2 analyzed in detail above, the Tribunal considers that the process of invocation of the ESI Provision entails a *finding* of applicability *by a tribunal*, meaning that the provision does not apply automatically.

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841 Annex 5 to the Exchange of Letters under Article 6.12(4) of the Singapore-India Comprehensive Economic Cooperation Agreement (emphasis added).

842 Note 9 to the Joint Interpretative Declaration with the Republic of India regarding the Agreement for Promotion and Protection of Investments Between India and Colombia (emphasis added).

843 Respondent's Rejoinder, ¶ 33. *See* Exhibit RL-149, Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and the Republic of India, 10 November 2009.

844 Third Hearing, p. 15:10-18.

720. *Third*, it does not take much to recognize that an ESI Provision interpreted as a non-justiciable exception would be an omnipotent tool at a State's disposal, which could potentially undermine legal certainty and predictability for the investors, who are not a Contracting Party to the TPA but are sought to be protected thereunder.

721. As the tribunal in *Continental Casualty Company v. Argentina* (an Argentina award spared by an *ad hoc* committee) noted:

> "*Although a provision such as Art. XI, as earlier indicated, involves naturally a margin of appreciation by a party invoking it, caution must be exercised in allowing a party unilaterally to escape from its treaty obligations in the absence of clear textual or contextual indications. This is especially so if the party invoking the allegedly self-judging nature of the exemption can thereby remove the issue, and hence the claim of a treaty breach by the investor against the host state, from arbitral review. This would conflict in principle with the agreement of the parties to have disputes under the BIT settled compulsorily by arbitration, both between an investor and the host State or between the Contracting Parties, as the case may be.*"[845]

722. This Tribunal is not venturing to – and could not – deny the Contracting States their sovereign power to define the scope of an exception to an international law obligation in the treaty they conclude, unless such obligation is a *jus cogens* norm. However, the Tribunal is convinced that the Contracting States must do so explicitly and unambiguously. Otherwise, an essential security exception may turn into what the OECD Investment Committee described as an "*escape clause.*"[846]

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845 Exhibit CL-062, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 187.

846 *See* Public Order and Essential Security Interests under the OECD National Treatment Instrument, Investment committee's clarification reproduced in national treatment of foreign-controlled enterprises, OECD, 2005: "*The Declaration excludes from the scope of the National Treatment instrument those measures necessary to maintain public order and essential security interests. Interpretation of these concepts depends on the specific context in which they are applied and may evolve over time as circumstances warrant. However, these provisions should be applied with caution, bearing in mind the objectives of the instrument, and should not be a general escape clause from adhering governments' commitments. Public order and security can, in certain circumstances, be interpreted to include public health. In addition, measures taken for economic, cultural or other reasons should be identified as such and should not be shielded by an excessively broad interpretation of public order and essential security interests*." (emphasis added).

723. In the absence of clear and unequivocal language to that effect, the Tribunal is unable to place the otherwise binding international law obligations of the Contracting States in a Schrödinger's box of uncertainty.

724. Therefore, the Tribunal considers that Article 22.2(b) of the TPA as well as Footnote 2 thereto fall short of the express language exempting the measures taken under the ESI Provision from any review by a tribunal upon invocation. Given the far-reaching consequences of allowing a State to avoid its international law obligations, the Tribunal is cautious not to read more State discretion into the ESI Provision than the Parties expressly agreed upon at the time of the TPA conclusion.

725. For these reasons, the Tribunal finds that Article 22.2(b) is not a non-justiciable provision.

b) Lack of jurisdiction

726. While at times intertwined with Respondent's primary case on non-justiciability, in the alternative, Respondent argued that the ESI Provision deprived the Tribunal of its jurisdiction relying on the ordinary meaning of Article 22.2(b) of the TPA – as a self-judging provision – and the TPA's *travaux préparatoires*.[847]

727. Largely for the same reasons as discussed above, the Tribunal is not convinced that Article 22.2(b) operates to exclude a tribunal's jurisdiction.

728. *First*, the ordinary meaning of Article 22.2(b) of the TPA and, specifically, of Footnote 2 suggests that there is place for certain findings to be made by a tribunal. As discussed above, the Tribunal recognizes the self-judging nature of some of the elements of the ESI Provision – but is not convinced that that translates into depriving the Tribunal of its *Kompetenz-Kompetenz* entirely. The Tribunal may defer to the State for establishing whether the measures enacted are "*necessary*" to further the declared security interest, but that is not the end of the inquiry.

729. *Second*, as elaborated above at Section F.I.3.2., the *travaux préparatoires* cited by Respondent remain inconclusive as regards the intended effect of Article 22.2(b) of the TPA.

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847 Respondent's Post-Hearing Brief, ¶ 29: "*All the terms of the provision expressly reflect the self-judging nature of the exception, leaving no doubt that the State invoking the exception is the sole judge of whether the conditions for the Essential Security Exception to apply are met*"; Respondent's Post-Hearing Brief, ¶¶ 31-32.

730. *Finally*, depriving this Tribunal of jurisdiction would achieve the same effect as declaring the ESI Provision non-justiciable in terms of the risks to legal certainty and predictability for the investors under the TPA.

c) Limitation of available remedies

731. Since Respondent's invocation of Article 22.2(b) of the TPA, Claimants maintained that Respondent's "*invocation of the Essential Security Provision has no practical effect on this Tribunal's role*" given that "[n]*either Article 22.2(b) nor its footnote even mention, much less restrict, jurisdiction or liability and therefore the provision impacts neither.*"[848]

732. Instead, Claimants argue, the function of the ESI Provision is to merely exclude restitution from the scope of the remedies available to the Tribunal, *i.e.* it is "*an 'exception' to the general rule that allows investment tribunals to award restitution.*"[849] In other words, even if Respondent can invoke the ESI Provision, it does not absolve it of an obligation to provide compensation to Claimants for a violation of the investment chapter of the TPA.[850]

733. The Tribunal is not convinced by the arguments presented by Claimants for four reasons.

734. *First*, this reading of Article 22.2(b) of the TPA does not reflect what is generally understood to be the operation of an essential security exception.[851] The wording "*Nothing in this Agreement shall be construed* […] *to preclude*" – as opposed to, for example, "*A tribunal constituted under Chapter 10 cannot preclude*" – points to an exception to the overall scope of the TPA, not just Article 10.26 of the TPA, which provides the remedies capable of being awarded by a tribunal. In this Tribunal's view, it would require clear contractual language to limit this provision to a targeted exclusion of one specific remedy. Also, there is nothing in Chapter 22 of the TPA that would suggest

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848 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 9-10.

849 Claimants' Submission on U.S. Treaties and [redacted], ¶ 37.

850 Claimants' Post-Hearing Brief, ¶ 303.

851 *See e.g.*, Exhibit RL-216, Stephan Schill and Robyn Briese, "*'If the state Considers': Self-Judging Clauses in International Dispute Settlement*" 13 Max Planck Yearbook of United Nations Law 2009, p. 67: "*At the most general level, self-judging clauses have the function of allowing a state to enter into international cooperation on the basis of binding international obligations, while at the same time retaining the power to escape from such obligations in certain circumstances, most frequently if the state determines that it would harm its sovereignty, security, public policy, or more generally, its essential interests. It constitutes a safety valve for reconciling international cooperation and for state's occasional preference for unilateralism within cooperative regimes*."

the very narrow interpretation of the Chapter heading "*Exceptions*" that Claimants put forward.

735. *Second*, this does not square with the history of the ESI Provision – and similarly worded provisions in U.S. treaty practice, as discussed above at Section F.I.3.2. It seems highly implausible that the intention of the Contracting States to craft such a specific exception to the remedies' regime would have left no trace in any of the discussions surrounding the TPA.

736. *Third*, in the Tribunal's view and as elaborated above, the operation of the ESI Provision is such that it precludes the wrongfulness of the underlying measures. In that sense, it is not a "*get-out-of-jail-free card*"[852], as Claimants describe it – in case of an effective invocation, the Tribunal is not mandated to make the underlying finding of wrongfulness, from which Respondent would then be "freed".

737. The compensation Claimants are requesting must follow a finding of wrongfulness, as reflected in Article 31(1) of the ILC Articles:

> "*The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act*."[853]

738. Similarly, Article 10.26(1) of the TPA conditions an award of monetary damages and any applicable interest and/or restitution of property on finding "*against a respondent.*"

739. In that regard, the Tribunal finds the comparison with the compensation stemming out of an expropriation inapposite, as compensation is one of the explicit conditions of a lawful expropriation.[854]

740. *Finally*, the Tribunal finds that the *effet utile* of Article 22.2(b) would be close to non-existent if a State could continue to apply the measures in violation of the TPA but would still be required to pay compensation for applying them. Specifically in case of an unlawful expropriation, the claim Claimants have pursued in this arbitration, the Tribunal would not order the expropriated property to be returned to Claimants – it would order compensation. Taking Claimants' interpretation of Article 22.2(b) at its highest, the effect of invoking and not invoking the ESI Provision would be identical.

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852 Claimants' Post-Hearing Brief, ¶ 297.

853 Exhibit CL-025, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 2001, Art. 31

854 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 16.

741. Therefore, the Tribunal finds that Article 22.2(b) of the TPA is not merely an exception to the remedies regime under the TPA. If invoked properly, it excepts the measures taken by Respondent from the scope of the TPA, and the Tribunal's inquiry stops short of establishing wrongfulness of Respondent's actions (if any) – let alone awarding any compensation.

d) Limited Review

742. Notably, unlike the three 'primary' interpretation theories proposed by the Parties and analyzed by the Tribunal above, both Parties seem to agree on the 'fallback' interpretation of Article 22.2(b) of the TPA: namely, that it allows a limited form of review by an investment tribunal.[855] Both Parties have extensively discussed the standard and the implications of such review.

743. Notwithstanding its finding that Article 22.2(b) of the TPA is not "*immune from scrutiny by arbitral tribunals*", as Respondent suggests[856], the Tribunal is mindful of its limited mandate in light of the self-judging nature of the ESI Provision. It will, therefore, first consider the appropriate standard of review of Respondent's invocation of Article 22.2(b) of the TPA.

744. The Tribunal recognizes that the standard of review for essential security exceptions is an issue that is far from settled in international investment law.

745. In its Rejoinder, Respondent's alternative case – with reference to *CMS v. Argentina* award – was that the Tribunal should limit itself to a good faith review:

> "*The Respondent requests the Tribunal to take proper note of the clear intention of the State parties to the US-Colombia TPA in this regard, and refrain from adjudicating this dispute by virtue of Article 22.2.b of the US-Colombia TPA. It is the Respondent's submission that the Tribunal's scope for review of Colombia's invocation of the exception is strictly circumscribed to an examination of whether the exception of essential security of Article 22.2.b has been invoked in good faith by Colombia.*"[857]

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855 *See e.g.*, Respondent's Rejoinder, ¶¶ 43, 57; Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶ 49.

856 Respondent's Rejoinder, ¶ 24.

857 Respondent's Rejoinder, ¶ 43 (emphasis added, footnote omitted). *See also* Claimants' Letter of 7 March 2022, ¶ 29.

746. Respondent has later employed different ways to describe the standard of review that the Tribunal should follow, namely that "*the Asset Forfeiture Proceedings fall squarely within the scope of Article 22.2(b) of the TPA, such that the initiation of Asset Forfeiture Proceedings in the present case does not constitute a breach of the Respondent's international obligations under the TPA*" or "*a* prima facie *test.*"[858] At the same time, Respondent still maintained that the ESI Provision had been invoked in good faith.[859]

747. Claimants have generally accepted a good faith review as the relevant legal standard.[860]

748. In any case, the Tribunal notes that the depth and the breadth of inquiry suggested by both Parties seem to be on a limited spectrum, implying some form of a cursory review. For the ease of reference and without aiming to provide a conclusive definition thereof, the Tribunal considers a good faith review – a standard supported by jurisprudence and legal scholars – sufficiently balanced to ensure proper application of Article 22.2(b) of the TPA without infringing on its self-judging nature.

749. The good faith review has been most notably developed by the ICJ in a line of jurisprudence dealing with States exercising their treaty-based discretionary powers, which includes the *Nicaragua* and *Oil Platforms* judgements discussed above. In *Equatorial Guinea v. France*, as a part of an unrelated legal test under the Vienna Convention on Diplomatic Relations, the ICJ accentuated this principle:

> "*The Court has repeatedly stated that, where a State possesses a discretionary power under a treaty, such a power must be exercised reasonably and in good faith (see* Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, I.C.J. Reports 1952, p. 212;* Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 229, para. 145).*"[861]

750. Similarly, in *Djibouti v. France*, the ICJ subjected to a good faith review France's discretionary power to refuse to provide mutual assistance in criminal matters under the corresponding convention, if it considers that execution of the request is likely to prejudice its essential interests:

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858 Respondent's Post-Hearing Brief, ¶¶ 12, 63.

859 Respondent's Post-Hearing Brief, ¶¶ 19, 98.

860 Claimants' Submission on U.S. Treaties and [redacted], Section I.D.

861 Exhibit CL-225, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment, 11 December 2020, ¶ 73 (emphasis added).

> "*The Court begins its examination of Article 2 of the* [Convention on Mutual Assistance in Criminal Matters between France and Djibouti of 27 September 1986] *by observing that, while it is correct, as France claims, that the terms of Article 2 provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties (see* Certain German Interests in Polish Upper Silesia*, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, p. 30, and* Free Zones of Upper Savoy and the District of Gex*, Judgment, 1932, P.C.I.J., Series A/B, No. 46, p. 167 ; for the competence of the Court in the face of provisions giving wide discretion, see* Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 116, para. 222, and* Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 183, para. 43).*"[862]

751. In doing so, the ICJ places reliance on a norm *external* to the treaties under its review, namely Article 26 of the VCLT, which serves as a basic "sanity check" on the States' performance of their international law obligations:

> "*Article 26* 'Pacta sunt servanda'
> *Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*"[863]

752. Investment arbitration tribunals are also familiar with good faith review of State's discretionary powers.

753. With its finding that the U.S.-Argentina BIT provision in question was not self-judging, the tribunal in *LG&E v. Argentina* remarked, in *obiter*, that:

> "*Were the Tribunal to conclude that the provision is self-judging, Argentina's determination would be subject to a good faith review anyway* […]."[864]

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862 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 4 June 2008, ¶ 145 (emphasis added).

863 Exhibit CL-187, VCLT, Art. 26.

864 Exhibit CL-045, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 214.

754. Similarly, the tribunal in *Continental v. Argentina*, referred to a good faith review in a hypothetical:

> "*If Art. XI granted unfettered discretion to a party to invoke it, in good faith, in order to exempt a particular measure which the investor claims has breached its treaty rights from any scrutiny by a tribunal, then that tribunal would be prevented from entering further into the merits, after having recognized that an economic crisis such as the one experienced by Argentina in 2001-2002 qualified under Art. XI.*"[865]

755. Although the ESI Provision is self-judging, the Tribunal does not agree with the proposition that it is solely for the State parties to the TPA to ensure that the provision is invoked in good faith and, ultimately, that the other State Party is the judge of the proper invocation of the ESI Provision, as argued by the U.S.[866] This interpretation finds no support in the language of Article 22.2(b) of the TPA and, taken at its highest, leads to the same risks to the legal certainty at foreign investors' expense, as described above.

756. Therefore, the Tribunal will conduct a limited review as to whether Respondent invoked the ESI Provision in good faith.

4. Application of Article 22.2(b) of the TPA

757. Having considered the ordinary meaning of the terms of Article 22.2(b) of the TPA in light of the object and purpose of the Treaty, supplemented by external interpretative tools when appropriate, the Tribunal will proceed to apply its understanding of the ESI Provision to the circumstances of the present case.

758. Claimants raise two main arguments to demonstrate that Article 22.2(b) was not, in fact, raised by Respondent in good faith: (i) Respondent's articulation of its essential security interest did not meet the standard, as Respondent had previously invoked "*precisely the same interest as one to protect public welfare, not essential security*"; and (ii) Respondent's stated essential security interest "*has no plausible connection to the Asset Forfeiture Proceedings*", as the latter have not targeted the proceeds of the alleged crime or criminals – and have instead only targeted Claimants' investment.[867]

759. Below, the Tribunal will analyze the prongs of the ESI Provision.

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865 Exhibit CL-062, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 182.

866 Third Hearing, pp. 16:8-13, 19:16-20:3.

867 Claimants' Post-Hearing Brief, ¶ 298.

a) Measures

760. It is undisputed between the Parties that the measures adopted by Respondent, *i.e.*, the Asset Forfeiture Proceedings commenced in 2016, constitute a "*measure*" within the meaning of Article 22.2(b) of the TPA.

761. Further, as demonstrated above, the interpretation of Article 22.2(b) of the TPA leads to the conclusion that the State has a wide discretion in enacting measures "*it considers*" necessary.

762. In the present case, the measures enacted against Claimants were implemented by the law enforcement authorities under the Asset Forfeiture Law. These measures are now subject to review of the Columbian courts.

763. Respondent stated plainly that it "*considers the Asset Forfeiture Proceedings to be a necessary measure.* […] *The necessity of Asset Forfeiture Proceedings in the fight against criminal organizations, drug-trafficking and money laundering in Colombia can hardly be denied, particularly when the Colombian State launches Asset Forfeiture Proceedings to bar a transnational criminal organization such as the* Oficina de Envigado *from continuing to operate in the country*."[868] In its Rejoinder, Respondent describes the Asset Forfeiture Proceedings as "*one of the most important measures available under Colombian law to fight against organized crime, drug-trafficking and money laundering in Colombia*" and a "*quintessential tool in the investigation and further sanction of one of the major criminal organizations that has been a risk for the essential security interests of the Colombian State for decades*."[869]

b) Essential Security Interest

(i) Definition of the Essential Security Interest

764. As demonstrated above at Section F.I.3.1.a)(ii), an essential security interest can refer to sovereign interests outside the realm of territorial integrity or military security, like environmental safety and economic stability.

765. In the present case, the Tribunal is convinced that the interests invoked by Respondent "*to fight against organized crime, money laundering, and drug trafficking, thus ultimately protecting its population from the threats of paramilitary and marginalized groups that*

868 Respondent's Rejoinder, ¶¶ 52-53 (emphasis added).

869 Respondent's Rejoinder, ¶ 10.

have been ravaging the country for years"[870]– directly relate to public safety, national security, and socio-economic stability of Columbia and therefore constitute essential security interests.

766. This Tribunal appreciates how seriously the policies aimed at combating organized crime and drug-trafficking are and should be taken by Respondent. The Tribunal consequently does not consider that there is any doubt that those can – in principle – be invoked in good faith as essential security interests of Respondent. In and of itself, this is not disputed by Claimants – it is only the relevance of these objectives to this specific case that is disputed.

767. One of Claimants' two main arguments against Respondent's invocation of the ESI Provision is that Respondent "*failed to articulate the essential security interest in good faith.*"[871] According to Claimants, Respondent merely "*relabelled*" the interest in fighting organized crime as essential security interest after initially characterizing it as a "*legitimate public welfare objective.*"[872]

768. Respondent does not dispute that it had initiated the Asset Forfeiture Proceedings due to the "*existing suspicions regarding the owners of the Meritage Lot, and the manner in which the lot was transferred over the years*" – and only designated them as taken for protection of an essential security interest after [redacted].[873] However, Respondent maintains that the relevant point in time to assess the essential security interest is the invocation of the ESI Provision.[874]

769. Having dealt with the timing of the invocation of Article 22.2(b) of the TPA above at Section F.I.1., the Tribunal will now consider whether Respondent's designation of its

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870 Respondent's Rejoinder, ¶ 55. *See also* Respondent's Reply to Claimants' Application of 7 March 2022, p. 5: "[Respondent] *raised the Exception, in good faith, only after new developments coupled with new information came to light, making it patent that what is at stake in these proceedings is Colombia's ability to exercise its sovereign criminal power to fight the activities of a criminal organization whose members, including those of the highest rank, have successively held the Meritage Lot and have engaged in money laundering operations that permeate its transfers up to the present*."

871 Claimants' Post-Hearing Brief, ¶ 335.

872 Claimants' Post-Hearing Brief, ¶¶ 298, 335.

873 [redacted]

874 Respondent's Post-Hearing Brief, ¶ 91.

efforts to fight organized crime and drug-trafficking as its essential security interest within the meaning of Article 22.2(b) of the TPA for the purposes of this arbitration withstands a good faith review. The Tribunal finds that it does.

770. To recall, Respondent referred to its legislative framework and law enforcement efforts to combat organized crime since the beginning of this arbitration.[875] In fact, the Asset Forfeiture Law, which is at the core of the contested measures, has a purpose of targeting the proceeds of drug-trafficking activities and preventing the transfer of assets acquired with these proceeds to third parties.[876] That is, Respondent's interest to fight organized crime – by targeting its proceeds – is ingrained in the Asset Forfeiture Law and has been present since the introduction of the asset forfeiture measures against Claimants.

771. Whether Respondent has waived its right to *designate* this interest as essential security interest in the meaning of the TPA by not doing so *earlier* is a different question. Respondent argues that it invoked the ESI Provision in good faith after having accumulated enough evidence that the chain of title of the Meritage Project was allegedly connected to the members of *Oficina de Envigado*.[877] Claimants dismiss these rationale as "*nothing more than a tactical revision*" or merely a pretext.[878]

772. The Tribunal cannot speak to the tactical considerations of Respondent in this arbitration. However, the Tribunal considers it necessary to consider the course of the proceedings and the context in which Respondent invoked the ESI Provision. Based on the record submitted by the Parties – and without going into the merits of the case, – the Tribunal notes that there is a clear line between the commencement of the Asset Forfeiture Proceedings regarding the Meritage Project and the invocation of the ESI Provision on the basis of further criminal investigations into the same project and individuals involved.

773. The Tribunal accepts Respondent's argument that complex criminal investigations are "*evolutionary by definition*", with certain facts and circumstances coming to light at later stages than the initial measures are taken.[879] That these new facts may trigger new heightened concerns *vis-à-vis* essential security interests is not unlikely. In the present case, [redacted] were subsequent to – but not unconnected with – the initial measures taken against Claimants.

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875 *See e.g.*, Respondent's Counter Memorial, Section IV.A.2(i)(a).

876 Exhibit C-003, Asset Forfeiture Law, Art. 15. *See e.g.*, Respondent's Post-Hearing Brief, ¶ 17.

877 *See* Respondent's Counter Memorial, ¶¶ 153-155, 159-160, 164-165, 167, 193, 632; Respondent's Rejoinder, ¶¶ 57, 88, 101-104, 113, 118, 123 *et seq.*, 370-371, 408, 594.

878 Claimants' Post-Hearing Brief, ¶ 335; Claimants' Submission on U.S. Treaties and [redacted] ¶ 55.

879 [redacted]

Moreover, both the [redacted] and the related court proceedings challenging the measures are still ongoing.

(ii) Scope of the Essential Security Interest

774. As to the scope of the essential security interest, the Parties have discussed whether the good faith carve-out under the Asset Forfeiture Law may factor into the definition of the essential security interest in the present case. In other words, whether the Asset Forfeiture Law provides for an exception to the exception under the TPA.

775. Claimants submitted that Respondent has concretized its essential security interest in the field of fighting narco-trafficking by the means of the Asset Forfeiture Law, and, in doing so, provided for a *bona fide* acquisition exception. As explained by Claimants:

> "[I]*n defining their Essential Security Interests, it must be the case that, in dealing with narco-trafficking, you must also acknowledge the Exception that is contained within domestic law. Otherwise, it would not be a good-faith definition of the Essential Security Interest, and that is one of the prongs of the good-faith analysis.* […]. [I]*n doing a good-faith analysis* […] *the Tribunal, should accept that, in articulating that Essential Security Interest, protection of narco-trafficking, the law itself acknowledges the Exception of good-faith third parties, so the Tribunal can and should assess whether or not Mr. Seda and the Investors were good-faith third parties* […]."[880]

776. On the other hand, Respondent submits that the Tribunal should not assess the exception within the exception for two reasons.

777. *First*, Respondent clarifies that it is not invoking the Asset Forfeiture Law *itself* as an essential security exception, since the law has a much broader scope and does not apply exclusively to the matters of narco-trafficking. According to Respondent, "*the Essential Security is not the law itself.* […] *It's* in concreto *invocation of that specific proceeding affecting the money-laundering to the benefit of narco-trafficking*."[881]

778. *Second*, Respondent submits that the Asset Forfeiture Law and the ESI Provision operate on two different planes: the domestic and the international one respectively. Respondent argues that it is the Colombian courts – to which Claimants have turned – that have the power to determine whether the rights of *bona fide* third parties should be preserved under

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880 Third Hearing, pp. 216:11-217:7; 229:20-230:21.

881 Third Hearing, pp. 244:22-247:11.

the Asset Forfeiture Law. In contrast, this Tribunal's mandate – for the good faith review – is to determine "*whether the Asset Forfeiture Proceedings, as they are ongoing and invocation by Colombia is indeed for the protection of Essential Security Interests in the form of fight against money-laundering and narco-traffic* […]."[882]

779. The Tribunal is mindful of the fact that even if the Asset Forfeiture Law has a broader scope, to the extent it concerns narco-trafficking and organized crime, there is an overlap between the substance of the law and the substance of the essential security interest that Respondent is invoking. However, the Tribunal follows Respondent's argument and agrees that the ESI Provision is an instrument of public international law that is not necessarily defined or limited by Respondent's national Asset Forfeiture Law.

780. The good faith that is the focus of this Tribunal's inquiry is that of Respondent in invoking the ESI Provision under the TPA. Theoretically, if it were undisputed that Claimants acquired the Meritage Lot in good faith under the Asset Forfeiture Law, this could raise the question of whether Respondent could invoke the ESI Provision in good faith, considering that its national legislation in the field of fighting narco-trafficking exempts forfeiture of real property acquired in good faith. At a minimum, in such a case Respondent could be required to specify why that exception would not apply to the ESI Provision.

781. However, the question as to whether Claimants acquired the property in good faith under the Asset Forfeiture Law is part of the merits and is disputed in the present proceedings. Importantly, this precise question is currently pending before the Colombian courts in order to determine Claimants' compliance with the provisions of Colombian national law.

782. Under these circumstances, the Tribunal finds no basis to conclude that Respondent identified its essential security interest for the purposes of the present proceedings in bad faith.

c) Nexus

783. Finally, as discussed above, the Tribunal considers a plausibility analysis appropriate to determine the connection between the contested measures and the essential security interest invoked by Respondent. This reflects a balance between the self-judging nature of the ESI Provision, which calls for a high level of discretion in State's determination of necessity and the associated essential security interest, and the good faith standard of review the Tribunal has adopted.

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882 Third Hearing, pp. 246:11-249:18.

784. In the Rejoinder, Respondent briefly argued that it had satisfied the plausibility connection in good faith.[883] Later, Respondent elaborated on the connection between the measures undertaken against Claimants and the essential security interest sought protected:

> "*To recall, the Asset Forfeiture Proceedings over the Meritage Lot were commenced,* inter alia*, on the grounds of the illicit origin as the property was initially owned by Ivan López Vanegas, a drug trafficker, the spurious transfers of the property through front men, the multiple irregularities in the sale-purchase deeds and physical and legal transformations of the lot that exhibited the hallmarks of money laundering. In addition, there were allegations of involvement in the successive transfers of the property of members of the* Oficina de Envigado*.*
> *In the course of these proceedings, the manner in which the illegal transfers took place, the mechanism used by the drug traffickers and front men involved in the transfers to attempt to shield the product of illicit activities from the action of the State and the identity of the very owners of the Meritage Lot with whom Mr. Seda entered into a sale-purchase agreement, and who are the trustors of the Meritage, have been fully revealed.*"[884]

785. Claimants disagree and argue that it is precisely the lack of "*rational nexus*" or "*plausible connection*" between the Asset Forfeiture Proceedings and the essential security interest identified that are fatal to Respondent's invocation of Article 22.2(b) of the TPA.[885] According to Claimants, the lack of criminal allegation against Claimants, which would lend credence to the Asset Forfeiture Proceedings, juxtaposed against the lack of action against the proceeds of alleged criminal wrongdoings of the alleged members of the *Oficina de Envigado* discredits the connection between the measures taken against them and the stated objective of protecting the population from organized crime.[886]

786. The Tribunal considers that the nexus between the measures enacted against Claimants and the essential security interest invoked by Respondent in the present case satisfies the plausibility threshold for three reasons.

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883 Respondent's Rejoinder, ¶¶ 56-57.

884 Respondent's Reply to Claimants' Application of 7 March 2022, p. 21 (footnote omitted).

885 *See* Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 64, 57 *et seq*; Claimants' Post-Hearing Brief, ¶¶ 298, 336.

886 Claimants' Post-Hearing Brief, ¶ 336; Claimants' Rebuttal on Essential Security, ¶¶ 4, 34.

787. *First*, the Tribunal emphasizes that the standard of review accepted in different formulations by both Parties is low. Plausible – or, for that matter, *prima facie* or rational – connection does not require the Tribunal to establish that the measures enacted by Respondent were the main avenue to combatting organized crime, let alone a sole instrument. It suffices that the measures *could* serve such purpose on their face, *i.e.*, are not "*so remote from, or unrelated to*" the stated objective as to render the connection implausible. The fact that a different measure taken or not taken by a State could be more plausibly connected with the declared essential security interest is not a relevant consideration.

788. In that, the Tribunal cannot follow Claimants' argument on the applicable legal standards.[887] Although interconnected in the present case, the legal standards for (i) applying forfeiture measures under the Asset Forfeiture Law, (ii) initiating a criminal investigation under Colombian law, and (iii) establishing a plausible nexus between the asset forfeiture measures and the essential security interest identified by Respondent for the purposes of Article 22.2(b) of the TPA are distinct.[888]

789. [redacted]

790. To reiterate, this Tribunal is not a criminal court – and in case it finds that the ESI Provision applies, it will not even venture to review the case on the merits. The only finding it is currently making is whether or not Respondent invoked Article 22.2(b) of the TPA in good faith.

791. *Second*, the purpose of a self-judging ESI Provision is precisely to afford a State a measure of discretion in identifying essential security concerns and addressing them,

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887 *See* Claimants' Post-Hearing Brief, ¶ 336: "*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.*"

888 Asset forfeiture proceedings are autonomous and independent from criminal or other proceedings or from any declaration of liability. *See* Exhibit C-003, Asset Forfeiture Law, Art. 18.

889 [redacted]

890 [redacted]

including by the means of law enforcement. As elaborated above, the Tribunal appreciates that the nature of a large-scale criminal investigation is an evolving one. The Tribunal's mandate is not to instruct Respondent how to conduct criminal investigations, as Claimants invite it to do[891], – that should be achieved by the system of checks and balances in Colombian national law.

792. *Finally*, the Tribunal finds it plausible that Asset Forfeiture Proceedings under the Asset Forfeiture Law involving Claimants' assets – related to other asset forfeiture and criminal proceedings – are connected to the interest of combating drug-trafficking. In other words, to establish a plausible nexus between the Asset Forfeiture Proceedings and the essential security interest of fighting organized crime, this Tribunal need not conclusively establish that "[redacted] *were owners of La Palma Argentina.*" Instead, it needs to satisfy itself that it is plausible that Asset Forfeiture Proceedings *could* be connected to the criminal investigations against them, as submitted by Respondent. Had the contested measures been entirely disconnected from the law enforcement actions in fighting organized crime – geographically, temporarily, and in scope of people involved – the Tribunal would be hard-pressed to see the nexus. However, having been briefed extensively on the status of the criminal investigations, the Tribunal finds it plausible that the measures Respondent took are connected to its stated essential security interest.[892]

793. It is undisputed between the Parties that the Meritage Lot had traces of criminal origin in its chain of title. Up until September 2004, the Meritage Lot was owned by Iván López Vanegas, who is a convicted drug trafficker, through his company Inversiones Nueve (previously, Sierralta López y Cía.).[893] Between 2004 and 2007, the Meritage Lot was the subject of at least ten real estate transactions involving eight different owners who held property title of the Meritage Lot in varying proportions.[894] An additional transaction

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891 Claimants' Post-Hearing Brief, ¶ 345.

892 [redacted]

893 *See* Exhibit C-022, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016; Exhibit C-031, Petition for Information from Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013; Exhibit C-036, *United States v. Lopez-Vanegas*, 493 F.3d 1305 (11th Cir. 2007), 26 July 2007; Exhibit C-130, Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014; Exhibit C-173, Legal Opinion by Wilson Alejandro Martínez Sánchez, 13 September 2016; Exhibit R-003, Deed No. 2589, 5 December 1989; Exhibit R-008, Deed No. 1554, 12 August 1994.

894 *See* Exhibit C-022, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016; Exhibit C-023, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017; Exhibit C-030, Otero & Palacio Title Study and Supplement, 7 March 2013, 23 July 2013; Exhibit C-031, Petition for Information from Corficolombiana to Attorney General Office of Asset

between Inversiones Aler and La Palma took place in 2012.[895] In 2014, the Meritage Lot was included in a property forfeiture investigation into properties linked to Mr. Restrepo Santamaría, a member of the criminal organization *Oficina de Envigado*.[896]

794. [redacted]. Nevertheless, the Tribunal observes that the submitted evidence, together with the undisputed facts as to the chain of title of the Meritage Lot, constitutes a sufficiently plausible nexus between the measures taken by Respondent against Meritage Property and the stated essential security interest of fighting drug trafficking.[897]

795. Therefore, on the evidence presented by the Parties, the Tribunal considers that there are no indications in the case record that the ESI Provision was not invoked by Respondent in good faith. In light of the nature of the ESI Provision, this means that the measures taken by Respondent are excluded from the scope of the TPA coverage and Tribunal's inquiry must stop here.

Forfeiture and Anti-Asset Laundering, 22 August 2013; Exhibit C-037, López Vanegas Tutela Action, 6 May 2016; Exhibit C-067, Letter from Michael J. Burdick to Aimer Fredy Alonso Triana, 21 November 2016; Exhibit C-080, Deed No. 1762, 16 September 2004; Exhibit C-081, Deed No. 738, 29 April 2005; Exhibit C-130, Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014; Exhibit R-018, Deed No. 2834, 7 September 2006; Exhibit R-019, Deed No. 3338, 4 October 2006; Exhibit R-020, Deed No. 1992, 4 September 2007.

895 *See* Exhibit C-023, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017; Exhibit C-030, Otero & Palacio Title Study and Supplement, 7 March 2013, 23 July 2013; Exhibit C-031, Petition for Information from Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013; C-130, Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014.

896 *See* Exhibit R-047, Decision C-235/19 of the Colombian Constitutional Court, 29 May 2019; Exhibit R-206, Asset Forfeiture Proceedings File No. 13641, Annex Folder No. 3; Exhibit R-207, Asset Forfeiture Proceedings File No. 13641, Annex Folder No. 4.

897 [redacted]

5. MFN Clause

796. In the alternative, Claimants have argued that the TPA's MFN clause, contained in Article 10.4, can serve to import a more favorable treatment of the investors under the Colombia-Swiss BIT, which does not contain an essential security exception similar to that of the TPA.[898]

797. It is undisputed that the MFN protections of Article 10.4 do not extend to dispute resolution by virtue of its footnote 2.[899] Claimants argue that the suggested model of MFN import does not impact dispute resolution, since Article 22.2(b) of the TPA "*creates a general exception to the substantive obligations owed under the TPA, and is unconnected to any specific dispute resolution mechanism.*"[900]

798. This is, however, an artificial argument since the purpose of Claimants' attempted import (or, rather, export in this case) is precisely to safeguard the dispute resolution provisions of Chapter 10 of the TPA: power and jurisdiction of the Tribunal and available remedies.

799. In these circumstances, the Tribunal finds that Article 10.4 of the TPA cannot operate to exclude the effects of Article 22.2(b) of the TPA.

6. Conclusion

800. As a general rule, protection of investors' rights in an international forum is a creature of state sovereignty and is limited by it. More specifically, this Tribunal's mandate deriving from the TPA is likewise limited by the Treaty itself.

801. For the reasons stated above, the Tribunal concludes that Respondent invoked the ESI Provision in line with the requirements of the TPA, and therefore the measures enacted by Respondent against Claimants are placed outside of the scope of the Treaty. That effectively means that the Tribunal has no mandate to review further objections to its jurisdiction and the merits of the case.

802. The Tribunal notes that it was briefed by the Parties on the status of the national court proceedings in Columbia, where Claimants appeal the measures that are at the core of this

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898 Claimants' Preliminary Response to Colombia's New Essential Security Defense, ¶¶ 74-76.

899 Exhibit CL-001, TPA. Footnote 2 to Article 10.4 of the TPA reads as follows: "*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*."

900 Claimants' Post-Hearing Brief, ¶ 351.

arbitration. In light of the above, the Tribunal notes that its findings – which are not based on the Tribunal's review of the case on the merits – are without prejudice to Claimants' rights in that appropriate forum, including a right to compensation, if any. Specifically, the Tribunal reiterates that it does not purport to make any finding on the legality of Claimants' actions or their alleged involvement with organized crime.

II. Jurisdiction and Merits

803. In light of the findings above, the Tribunal need not consider further objections to its jurisdiction raised by Respondent or the merits of Claimants' claims.

G. DECISION ON COSTS

I. Claimants' Costs Submission

804. In their Submission on Costs, Claimants argue that Respondent should bear the total arbitration costs incurred by Claimants, including legal fees and expenses, totaling USD 21,258,661.74, broken down as follows:

Category	**Amount**
ArentFox Schiff LLP Fees	USD 4,649,896.79
Gibson, Dunn & Crutcher LLP Fees	USD 13,125,980.10[901]
Disbursements[902]	USD 2,432,784.85
Advance Payments made to ICSID	USD 1,050,000
Total	**USD 21,258,661.74**

805. Claimants note that investment tribunals have confirmed that in the event a claimant succeeds on the merits of its claim, the *Chorzów* principle requires that a claimant be awarded reasonable costs incurred as a result of brining the dispute to arbitration.[903] On this basis, Claimants argue that if the Tribunal finds that Claimants prevail in part or in all of their claims on the merits, they should be reimbursed for the costs they have incurred for the entirety of this arbitration to be made whole.[904]

806. Claimants further argue that, even if the Tribunal were to credit Respondent's Essential Security Defense (*quod non*), the Tribunal should award Claimants their costs, given that

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901 Claimants note that, out of this amount of fees, approximately USD 1,087,226.10 were incurred to respond to Respondent's Essential Security Defense. Claimants' Submission on Costs, 26 July 2023 ("**Claimants' Submission on Costs**"), ¶ 18, fn. 44; Claimants' Updated Statement of Costs, 19 January 2024.

902 This category includes accommodation and means, communications, consultants and local counsel, copying, courier, E-Discovery hosting, legal research, testifying experts' fees and expenses, translations and travel. Claimants' Submission on Costs, ¶ 18.

903 Claimants' Submission on Costs, ¶ 7.

904 Claimants' Submission on Costs, ¶ 9. *See also* Claimants' Reply on Costs, 9 August 2023 ("**Claimants' Reply on Costs**"), ¶¶ 2-6.

such defense was raised belatedly, in its final written submission, just two and a half months before the First Hearing, for no justifiable reason "*other than to manufacture grounds to evade liability after its own officials admitted to Claimants behind closed doors that Colombia had unlawfully initiated Asset Forfeiture Proceedings against Claimants, who were good faith third parties.*"[905]

807. Claimants submit that Respondent's belated Essential Security Defense put Claimants at a "*severe disadvantage because the document disclosure phase of the Arbitration was already over*,"[906] and forced them to make additional submissions and numerous applications to assert their procedural rights, prolonging this Arbitration by over a year.[907]

808. Claimants also argue that, beyond belatedly raising the Essential Security Defense, Respondent's conduct throughout this arbitration was "*riddled with procedural gamesmanship and misconduct*" and such behavior must be taken into account by the Tribunal in the allocation of costs.[908] As examples, Claimants submit that Respondent refused to comply with the Tribunal's document production orders in PO2; that Respondent "*repeatedly made vague and unfounded allegations throughout the Arbitration that Mr. Seda and counsel have leaked confidential information*;" and "*repeatedly sought to re-litigate issues already decided by the Tribunal*."[909]

809. Finally, Claimants contend that, by contrast, Respondent's accusations of abusive procedural conduct against Claimants "*cannot be taken seriously given that, as usual, its allegations are without citations or references to actual facts.*"[910]

II. Respondent's Costs Submission

810. In its Submission on Costs, Respondent submits that Claimants should bear all the costs and expenses of these proceedings, including Respondent's legal fees and expenses, totaling USD 5,099,605.96, broken down as follows:

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905 Claimants' Submission on Costs, ¶ 10.

906 Claimants' Submission on Costs, ¶ 12.

907 Claimants' Submission on Costs, ¶ 12.

908 Claimants' Submission on Costs, ¶¶ 16-17.

909 Claimants' Submission on Costs, ¶ 16.

910 Claimants' Reply on Costs, ¶ 7. Claimants rebut Respondent's allegations in ¶¶ 8-11 of Claimants' Reply on Costs.

Category	**Amount**
Gaillard Banifatemi Shelbaya Disputes (and previously, Sherman & Sterling LLP) Fees	USD 3,045,450.50
Experts' Fees and Expenses	USD 670,648.16
Other Costs and Expenses[911]	USD 333,507.30
Advance Payments made to ICSID	USD 1,050,000
Total	**USD 5,099,605.96**

811. Respondent argues that if Respondent is successful in the present arbitration and prevails on the preliminary issues, the merits or on the damages claim, the Tribunal should order Claimants to reimburse Respondent for its costs.[912]

812. Respondent further maintains that, in allocating the costs of the arbitration, the Tribunal should consider that Claimants, through their "*highly abusive procedural conduct*, *imposed an exceptional burden on the Respondent and forced it to invest exorbitant human and material resources to defend its interests*."[913] In this regard, Respondent submits, *inter alia*, that Claimants "*prematurely initiated the arbitral proceedings,*" [914] "*sought to leverage the different proceedings by sharing confidential information across the different fora*;"[915] made "*unsubstantiated allegations against the Respondent, unduly prolonging the proceedings – including by filing irrelevant evidence late in the*

911 This category includes costs and expenses of ANDJE lawyers, expenses in connection with witnesses' attendance to the hearings and external consultants. Respondent's Submission on Costs, 26 July 2023 ("**Respondent's Submission on Costs**"), ¶ 5.

912 Respondent's Submission on Costs, ¶ 11.

913 Respondent's Submission on Costs, ¶ 23. *See also* Respondent's Submission on Costs, ¶ 13.

914 Respondent's Submission on Costs, ¶ 15.

915 Respondent's Submission on Costs, ¶ 15.

proceedings –;"[916] made "*inconclusive or irrelevant document requests*,"[917] and failed to "*engage with the evidence in the record of the Arbitration*."[918]

813. In response to Claimants' Submission on Costs, Respondent notes, *inter alia*, that, as acknowledged by Claimants themselves, only reasonable costs may be reimbursed.[919] For Respondent, Claimants' costs are "*by any measure unreasonable and excessive,*" pointing out to the disproportion between Claimants' costs when compared with (i) Respondent's costs,[920] (ii) Claimants' alleged investment in the Meritage Project and the damages they claim;[921] and (iii) the mean costs for investors in investment arbitration proceedings.[922]

814. Additionally, Respondent contends that, contrary to Claimants' allegations, Respondent's invocation of the Essential Security Defense "*cannot justify an award of costs against the State.*"[923] In this regard, Respondent notes that such a defense is "*an entitlement under the TPA for any of the Contracting States, and the exercise of that entitlement cannot possibly give rise to cost liability*,"[924] and that the TPA does not provide for any time limit for the State to raise the defense.[925]

815. Respondent further argues that, in any event, the Essential Security Defense was not raised belatedly.[926] Moreover, Respondent states that, as acknowledged by Claimants, only around USD 1 million of Claimants' legal fees were incurred responding to the Essential Security Defense, *i.e.*, "*only 6% of the total legal fees claimed.*" Therefore, Claimants' request for an award of costs "*on account of the alleged 'belated invocation' of the Essential Security Exception is wholly unwarranted*."[927]

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916 Respondent's Submission on Costs, ¶ 16.

917 Respondent's Submission on Costs, ¶ 16. Respondent provides examples of this alleged conduct in ¶¶ 17-22 of Respondent's Submission on Costs.

918 Respondent's Submission on Costs, ¶ 16.

919 Respondent's Reply on Costs, 9 August 2023 ("**Respondent's Reply on Costs**"), ¶ 3.

920 Respondent's Reply on Costs, ¶ 5.

921 Respondent's Reply on Costs, ¶ 6.

922 Respondent's Reply on Costs, ¶ 7.

923 Respondent's Reply on Costs, ¶ 9.

924 Respondent's Reply on Costs, ¶ 9.

925 Respondent's Reply on Costs, ¶ 9.

926 Respondent's Reply on Costs, ¶ 10.

927 Respondent's Reply on Costs, ¶ 11.

816. Finally, Respondent submits that Claimants' remaining allegations regarding the alleged conduct of Respondent that would warrant an award of costs are also baseless.[928]

III. The Tribunal's Decision on Costs

817. Article 61(2) of the ICSID Convention provides:

> "*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*"

818. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

819. In its decision on costs, the Tribunal primarily takes into account two circumstances. On one hand, Respondent was successful in invoking Article 22.2(b) of the TPA, as established by the Tribunal above. On the other hand, the Tribunal is mindful of the fact Respondent invoked the ESI Provision in its Rejoinder, when the Parties had already made extensive submissions on jurisdiction and merits of the case. While the Tribunal ultimately did not consider such invocation untimely (*see* above at Section F.I.1.), it appreciates that the associated costs could have potentially been avoided, at least in part.

820. Therefore, the Tribunal considers that the costs of the arbitration should be borne by each Party in equal shares. Furthermore, each Party should bear its own legal costs.

821. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Klaus Sachs	719,596.81
Charles Poncet	150,901.34
Hugo Perezcano Díaz	448,979.90
Marcus Weiler's expenses	11,399.52

928 Respondent's Reply on Costs, ¶¶ 12-13.

ICSID's administrative fees	262,000.00
Direct expenses	341,561.07
Total	**1,934,438.64**[929]

822. The above costs have been paid out of the advances made by the Parties in equal parts.[930] As a result, each Party's share of the costs of arbitration amounts to USD 967,219.32.

[929] This amount does not reflect any costs derived from the finalization of the Spanish translation of the Award and/or arising out of the redaction process of the Award, which will be borne by both Parties in equal parts.

[930] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

H. THE TRIBUNAL'S DECISION

823. For the reasons referred to above, the Tribunal:

I. FINDS that Respondent invoked the essential security interest exception under Article 22.2(b) of the United States-Colombia Trade Promotion Agreement in accordance with this Treaty and, therefore, said exception applies;

II. DISMISSES Claimants' claims (a) through (d);

III. ORDERS the Parties to bear the costs of the arbitration in equal shares;

IV. ORDERS each Party to bear its own legal expenses and other costs incurred in this arbitration;

V. DISMISSES all other claims and requests raised by the Parties.

[signed]

Prof. Hugo Perezcano Díaz
Arbitrator

Date: 27 June 2024

Dr. Charles Poncet
Arbitrator

Date:

Prof. Dr. Klaus Sachs
President of the Tribunal

Date:

[signed]

Prof. Hugo Perezcano Díaz
Arbitrator

Date:

Dr. Charles Poncet
Arbitrator

Date: 27 June 2024

Prof. Dr. Klaus Sachs
President of the Tribunal

Date:

Prof. Hugo Perezcano Díaz
Arbitrator

Date:

Dr. Charles Poncet
Arbitrator

Date:

[signed]

Prof. Dr. Klaus Sachs
President of the Tribunal

Date: 27 June 2024