

**INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES**

ICSID Case No. ARB/19/6

BETWEEN

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

Claimants

and

THE REPUBLIC OF COLOMBIA

Respondent

**CLAIMANTS' PRELIMINARY RESPONSE TO COLOMBIA'S NEW ESSENTIAL
SECURITY DEFENSE**

18 April 2022

**GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
United States of America**

TABLE OF CONTENTS

I.	The Essential Security Provision Cannot Divest This Tribunal Of Jurisdiction Or Limit Colombia’s Liability	2
I.A.	Ordinary Meaning.....	3
I.B.	Context, Object and Purpose.....	5
I.C.	On The Other Hand, Colombia’s Position Is Not Supported By The TPA’s Text.....	11
II.	As a Merits Defense, Colombia’s New Essential Security Defense Is Time Barred. .	14
II.A.	No “ <i>New Facts</i> ” or “ <i>Special Circumstances</i> ” Have Arisen	15
II.B.	Any Newly Discovered Facts Could Not Have Given Rise To An Essential Security Interest At The Time Of The Measures.....	20
III.	Colombia’s Eleventh-Hour Invocation Of The Essential Security Defense Was Not Made In Good Faith	22
III.A.	Colombia Has Not Articulated Its Essential Security Interest In Good Faith	23
III.B.	Colombia’s Alleged Essential Security Interest Is Unconnected To The Measures In Dispute	26
IV.	In The Alternative, The TPA’s MFN Protection Precludes Colombia From Extinguishing Its Liability With The New Essential Security Defense.....	34
V.	Request For Relief.....	36

1. Further to Procedural Order No. 9, dated 28 March 2022, Claimants hereby submit their response to Colombia's New Essential Security Defense as invoked for the first time in Colombia's Rejoinder, dated 16 February 2022, and supplemented in Colombia's letter to the Tribunal, dated 18 March 2022 ("**Colombia's Letter**").¹
2. Colombia's New Essential Security Defense relies on the incorrect assumption that this Arbitration creates "*latent risk for Colombia to be deprived of a quintessential sovereign tool to investigate and punish major criminal organizations that have been jeopardizing the essential security of the Colombian State for decades.*"² This fundamentally misconstrues Claimants' request for relief in this Arbitration. Claimants are not asking the Tribunal to "*deprive*" Colombia of its ability to use its Asset Forfeiture Law or to order Colombia to revoke the Asset Forfeiture Proceedings. Rather, Claimants are asking for compensation because Colombia has unlawfully exercised its sovereign powers in an arbitrary, unreasonable, and discriminatory manner, and as a consequence (among other breaches) unlawfully expropriated Claimants' investments. Contrary to Colombia's hollow assertions, nothing in Article 22.2(b) of the TPA ("**Essential Security Provision**") allows Colombia to absolve itself of liability for breaching the TPA or shield it from paying Claimants compensation as a remedy. All Article 22.2(b) does is ensure Colombia can maintain its measures, however misguided and unlawful. Since Claimants are not asking for restitution, Article 22.2(b) has no impact on these proceedings. The provision does not deprive this Tribunal of jurisdiction and equally does not absolve Colombia of its liability.
3. But even if Colombia could use Article 22.2(b) to vitiate its obligations under the TPA (and it cannot), Colombia's attempt to belatedly extinguish its liability is time barred and has been brought in bad faith. Colombia has invoked the Essential Security Provision opportunistically at the eleventh hour to attempt to convert a police powers defense (which Colombia concedes is reviewable) to an New Essential Security Defense (which Colombia alleges is not reviewable). Indeed, despite two attempts, Colombia fails to identify any new circumstances that could justify its belated invocation of the New Defense. And if Colombia has in fact uncovered new evidence

¹ Short-forms not otherwise defined herein are defined in Claimants' Memorial on the Merits and Damages, 15 June 2022 (hereinafter "**Claimants' Memorial**"), and Claimants' Reply Memorial, 19 September 2021 (hereinafter "**Claimants' Reply**").

² Rejoinder, ¶ 44.

just before its Rejoinder, it could not have relied on this newly uncovered evidence as the basis for initiating the Asset Forfeiture Proceedings more than six years ago. The fact is Colombia did not implement the Asset Forfeiture Proceedings out of consideration for its essential security interests; had it done so, Colombia would have raised this defense before. In fact, there is no plausible way in which Colombia's measures could have furthered its stated security interest when it is undisputed that the Claimants had no role in any criminal activity.

4. Below Claimants set out their submission in five parts:
 - (a) **Section I** explains that the TPA's Essential Security Provision does not impact this Tribunal's jurisdiction or findings of liability, but only precludes the Tribunal from ordering Colombia to withdraw its measures;
 - (b) **Section II** explains that as a merits defense, Colombia's belated invocation of the Essential Security Provision is time barred;
 - (c) **Section III** establishes that Colombia has failed to invoke the Essential Security Provision in good faith because the measures that are the subject of Claimants' claims have nothing to do with the essential security interest invoked by Colombia;
 - (d) **Section IV** argues that, in the alternative, Claimants are entitled to a higher standard of protection available in other Colombian investment treaties that do not allow Colombia to escape liability on the basis of essential security; and
 - (e) **Section V** sets out Claimants' request for relief.

I. THE ESSENTIAL SECURITY PROVISION CANNOT DIVEST THIS TRIBUNAL OF JURISDICTION OR LIMIT COLOMBIA'S LIABILITY

5. Invoking the Essential Security Provision of the TPA, on its plain terms, does not impact this Tribunal's jurisdiction, nor does it preclude Colombia from paying compensation for breaching its obligations under the TPA. Article 22.2(b) of the TPA provides:

"Nothing in this Agreement shall be construed [. . .] to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of

international peace or security, or the protection of its own essential security interests.”³

6. A footnote clarifies: *“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.”⁴*
7. Colombia agrees that the starting point for interpreting this provision is Article 31(1) of the Vienna Convention on the Law on Treaties (“VCLT”),⁵ which requires that the TPA *“be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁶*

I.A. Ordinary Meaning

8. The ordinary meaning of Article 22.2(b) of the TPA is that Colombia cannot be precluded from taking measures it considers are necessary to protect its own essential security interests. The footnote clarifies that should Colombia invoke this provision (*i.e.*, should Colombia decide to take measures that it considers are necessary to protect its essential security interests), then the tribunal or panel hearing the matter shall not preclude Colombia from taking those measures.
9. Claimants here have not asked the Tribunal to “preclude” Colombia from taking any measures; Claimants’ request for relief is limited to a request for compensation due to damages caused by Colombia’s wrongdoing.⁷ Accordingly, Colombia’s invocation of the Essential Security Provision has no practical effect on this Tribunal’s role. Had Claimants asked for restitution, or injunctive relief, the Tribunal may have been barred from granting such relief if Colombia properly invoked this provision. But finding Colombia liable for its actions under the TPA and ordering it to pay compensation does

³ **Exhibit CL-230**, US-Colombia Trade Promotion Agreement (all chapters), Chapter 21, art. 22.2(b) (hereinafter “TPA”).

⁴ **Exhibit CL-230**, TPA, Chapter 21, fn. 2.

⁵ See Rejoinder, ¶ 26.

⁶ **Exhibit CL-187**, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (open for signature 23 May 1969; entry into force 27 January 1980), art. 31(1).

⁷ See Memorial, ¶ 524 (requesting a declaration that Colombia breached its TPA obligations and an award of damages).

not “preclude” (defined as “prevent from happening” or to “make impossible”⁸) Colombia from taking any measures. Put another way, paying Claimants compensation does not make it “impossible” for or “prevent” Colombia from taking the measures it wants.

10. Neither Article 22.2(b) nor its footnote even mention, much less restrict, jurisdiction or liability and therefore the provision impacts neither. All the provision stipulates is that Colombia can protect its essential security interests by “applying measures” that it chooses and the panel or tribunal cannot ask Colombia to withdraw those measures. Article 22.2(b) does not provide blanket absolution to Colombia if it violates the rights of protected investors under the TPA and international law through the application of such measures. Rather, Colombia has taken a valuable investment from Claimants and it would profit from its wrongdoing if it were both permitted to maintain its measure and it were exempt from having to provide Claimants compensation for the value of what has been taken. This is not what the TPA calls for.
11. This was precisely the conclusion reached by the *Eco Oro* tribunal interpreting a similar clause in the Colombia’s Free Trade Agreement with Canada. That treaty provided that “nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary [. . .] to protect human, animal or plant life or health.”⁹ After conducting a detailed textual analysis under Article 31 of the VCLT, the *Eco Oro* tribunal concluded that while “the State cannot be prohibited from adopting or enforcing” a measure pursuant to the exception, this did not mean that “in such circumstances payment of compensation is not required.”¹⁰ Such an interpretation would “not comport with the ordinary meaning of the Article when construed in the context of the FTA as a whole”.¹¹

⁸ **Exhibit CL-212**, Oxford English Dictionary (3rd ed. 2007), Definition of “preclude.” See also **Exhibit CL-232**, Cambridge English Dictionary, Definition of “preclude,” available at <https://dictionary.cambridge.org/us/dictionary/english/preclude>, last accessed 15 April 2022 (“to prevent something or make it impossible”).

⁹ **Exhibit CL-217**, Canada-Colombia Free Trade Agreement (signed 21 November 2008, entry into force 15 August 2011), art. 2201(3).

¹⁰ **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 836.

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, ¶ 836.

I.B. Context, Object and Purpose

12. The Essential Security Provision's ordinary meaning is supported by its context and the TPA's object and purpose.
13. **First**, Article 22.2(b) is plainly concerned with ensuring that States can adopt and maintain measures they consider necessary for their essential security interests; it says nothing about jurisdiction or liability. The provision's preoccupation with reserving this right of States is logical given the fact that the primary remedy for trade disputes is withdrawal of a breaching measure.
14. Article 22.2(b) expressly states that it applies to disputes under Chapter 10 (the investment chapter) and Chapter 21 (the dispute settlement chapter, largely concerned with resolving inter-State trade disputes between the State Parties to the TPA). Chapter 21 of the TPA clarifies that "*the resolution [to any trade dispute], whenever possible, shall be to eliminate the non-conformity or the nullification or impairment*" of the breaching measure.¹² Article 21.16.9 further provides that "[c]ompensation, the payment of monetary assessments, and the suspension of benefits are intended as temporary measures pending the elimination of any non-conformity or nullification or impairment that the panel has found."¹³ Accordingly, if a panel under Chapter 21 of the TPA finds that a State's measures violates one of the applicable trade protections, the State must withdraw the breaching measure. In this circumstance, invoking an exception such as Article 22.2(b) would ensure that the State is able to continue to implement the breaching measure.
15. By contrast, Chapter 10 of the TPA makes clear that a tribunal "*may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.*"¹⁴ In other words, not only can a tribunal grant compensation, it must grant the possibility of

¹² **Exhibit CL-230**, TPA, Chapter 21, art. 21.15(2). This is consistent with the WTO's Dispute Settlement Understanding, which provides that "*the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if those are found to be inconsistent with the provisions of any of the covered agreements.*" **Exhibit CL-209**, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Agreement establishing the World Trade Organization (signed 15 April 1994, entry into force 1 January 1995), art. 7.

¹³ **Exhibit CL-230**, TPA, Chapter 21, art. 21.16.9.

¹⁴ **Exhibit CL-001**, TPA, Chapter 10, art. 10.26.1

compensation where restitution is not possible. Here, while invocation of the Essential Security Provision may make restitution impossible, it would have no impact on the State's ability (and indeed obligation) to provide compensation.

16. In short, the exception is not intended to absolve the breaching State of liability. Rather, it is intended to ensure that the State can take measures it considers necessary to protect its essential security interest. If these measures are arbitrary, discriminatory or otherwise breach its obligations, the TPA does not condone those measures just because they were adopted in the name of essential security. It is worth recalling that under international law, "*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 specific circumstances apply, such as the act was the "*only way for the State to safeguard an essential interest.*"¹⁵ Thus by merely labelling an act as necessary for protecting its essential security, a State cannot escape liability for its actions. In this sense, the Essential Security Provision acts in a similar manner to the expropriation provision, which provides that even if an expropriation has been carried out for a public purpose, that does not remove a state's obligation to provide "*prompt, adequate, and effective compensation*" for the expropriation.¹⁶
17. Put another way, Article 22.2(b) serves as an "[e]xception" to the TPA's allowance of restitution or withdrawal of measures as a remedy.¹⁷ With this exception, the State Parties to the TPA derogate from their general obligation to cease or nullify the breaching measures in the trade context, or offer restitution in the investment context. The provision does not, however, serve as an exemption from liability or limit jurisdiction. Notably, "*exception*" is defined as "*someone or something that is not*

¹⁵ **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 25. See also **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 27 ("*The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: [. . .] the question of compensation for any material loss caused by the act in question.*"); **Exhibit CL-236**, *Mr. Patrick Mitchell v. The Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, ¶ 57 ("*Furthermore, the ad hoc Committee notes that even if the Arbitral Tribunal had examined Article X(1) of the Treaty, if it had checked the need for the measures – regardless of the degree of such a check – and if it had concluded that they were not wrongful, this would not necessarily have had any impact on evaluating the act of dispossessing Mr. Mitchell, and on the need for compensation; possibly, it could have had an influence on the calculation of the amount of such compensation.*").

¹⁶ **Exhibit CL-001**, TPA, Chapter 10, art. 10.7.

¹⁷ **Exhibit CL-230**, TPA, Chapter 22, title.

*included in a rule, group or list*¹⁸ or “*a person or thing that is not included in a general statement.*”¹⁹ In the context of Article 22.2(b), essential security measures are classified as exceptions to the general remedy of cessation of the measure or restitution. Had the provision meant to “*exempt*” (“*to excuse someone or something from a duty or payment*”)²⁰ such measures from liability or a tribunal’s jurisdiction, it would have said so.

18. **Second**, where the tribunal’s jurisdiction or the admissibility of claims is circumscribed, the TPA is express. For example:

- (a) Article 10.18.1 provides that “[n]o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach”;
- (b) Annex 10-E provides that the “claimant may not submit” certain claims “to arbitration until one year after the events that gave rise to the claim”; and
- (c) Article 10.18.2 provides that “[n]o claim may be submitted to arbitration under this Section unless” the claimant “consents in writing” and submits a written waiver “of any right to initiate or continue before any administrative tribunal or court.”

19. Likewise, where the TPA restricts the scope of its protections, and thus State liability, it does so in express terms. For example:

- (a) Footnote 2 to Article 10.4 provides that the MFN protection “*does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreement*”;

¹⁸ **Exhibit CL-227**, Cambridge English Dictionary, Definition of “*exception*,” available at <https://dictionary.cambridge.org/us/dictionary/english/exception>.

¹⁹ **Exhibit CL-229**, Oxford Learner’s Dictionary, Definition of “*exception*,” available at <https://www.oxfordlearnersdictionaries.com/us/definition/english/exception>.

²⁰ **Exhibit CL-228**, Cambridge English Dictionary, Definition of “*exempt*,” available at <https://dictionary.cambridge.org/us/dictionary/english/exempt>.

- (b) Article 10.7.5 notes that the expropriation “*Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights*”; and
 - (c) Annex 10-B provides that “*non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.*”
20. Article 22.2(b), by contrast, does not contain any language providing that the Tribunal may not review the State’s measures for liability. The provision likewise does not say that none of the protections of the TPA, in Chapter 10 or elsewhere, apply if a State Party invokes this exception. Rather, the TPA has an independent clause, at Article 10.12, that allows a State Party to deny the benefits of the TPA’s investment chapter under certain conditions.²¹ Those conditions do not include invocation of Article 22.2(b).
21. Treaties that have excised the justiciability of disputes from arbitral tribunals’ authority on the basis of essential security do so in an express manner. For example, Annex 5 to the India-Singapore Comprehensive Economic Cooperation Agreement states:

“[W]here the disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a security exception as set out in Article 6.12 of the Agreement, any discussion of the disputing Party taken on such security 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

²¹ The provision provides in full:

“1. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

- (a) *does not maintain diplomatic relations with the non-Party; or*
- (b) *adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.*

2. A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.”

assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.”²²

22. Likewise, the Protocol for Cooperation and Facilitation for Investments Intra-MERCOSUR provides:

“1. Nothing in this Protocol shall be interpreted to preclude a Member State from adopting or maintaining measures aimed at preserving public order, the fulfillment of obligations concerning the maintenance or restoration of international peace or security, the protection of its own essential security interests, or the application of its criminal laws.

2. The dispute settlement mechanism set forth by this Protocol shall not be applicable to measures a Member State adopts pursuant to paragraph 1 of this Article, or to decisions made pursuant to its national security or public order laws, which at any time prohibit or limit the making of an investment in its territory by an investor of another State Party.”²³

23. Such choices were open to the United States and Colombia when drafting the TPA, but they did not opt to include such a broad exception. As noted by the *Eco Oro* tribunal, “given that the Contracting Parties drafted other provisions [. . .] to include an express stipulation as to the circumstances in which a measure is not to constitute a treaty breach, it is simply not credible that the Contracting Parties left such an important provision of nonliability to be implied.”²⁴ The provision here is narrow and preserves only the ability of a State Party to undertake the said measure, not escape liability for it.
24. **Third**, the stated object and purpose of the TPA is to promote economic development through free trade and increased foreign investment, which requires, *inter alia*, the creation of a “predictable legal and commercial framework for business and

²² **Exhibit CL-210**, India-Singapore Comprehensive Economic Cooperation Agreement (signed 29 June 2005, entry into force 1 August 2005), Annex 5 (emphasis added).

²³ **Exhibit CL-223**, Protocol for Cooperation and Facilitation for Investments Intra-MERCOSUR (signed 29 June 2005, entry into force 30 July 2019), art. 12 (emphasis added). See also **Exhibit CL-220**, Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and ____, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download>, 2015, art. 13 (identical provision) and **Exhibit CL-222**, Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates (signed 15 March 2019), art. 25 (“The following may not be subject to arbitration: Article 13 – Security Exceptions”).

²⁴ **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, ¶ 829.

investment.”²⁵ Colombia’s construction of Article 22.2(b) is at odds with this purpose. If a State could at any time self-certify itself free of liability by simply stating it had adopted a measure for essential security reasons, and the tribunal was required to find that such an invocation extinguished its jurisdiction and/or absolved the State of liability, the investment protections granted in Chapter 10 would be utterly deprived of all meaning. This is, in fact, what Colombia has done here, as discussed in further detail below.²⁶ Needless to say, such a construction cannot possibly promote a stable legal framework to promote business, investment, and ultimately economic development.

25. On the contrary, by giving effect to the ordinary meaning of Article 22.2(b), Colombia will not be forced to withdraw measures it considers necessary for its essential security, while at the same time, investors’ protections will not be dependent on the whims of the State. As in *Eco Oro* and *Bear Creek*, Colombia has failed to provide any “justification as to why it is necessary for the protection of [its essential security] not to offer compensation to an investor for any loss suffered as a result of measures taken by Colombia to protect” its essential security.²⁷ Nor has Colombia “explained how such a construction would support the protection of investment in addition to the protection of” its essential security interest.²⁸
26. As Colombia accepts, the *effet utile* principle requires the interpreter to give provisions “their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.”²⁹ This also reflects the general treaty interpretation principle that, as far as possible, provisions in a treaty must be read in a consistent manner, and

²⁵ **Exhibit CL-001**, TPA, pmb1.

²⁶ See *infra* ¶¶ section III.

²⁷ **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 832. See also **Exhibit RL-187**, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, ¶¶ 477-478 (“[S]ince the exception in Article 2201 does not offer any waiver from the obligation in Article 812 to compensate for the expropriation, Respondent has also failed to explain why it was necessary for the protection of human life not to offer compensation to Claimant for the derogation of Supreme Decree 083.”).

²⁸ **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, ¶ 832.

²⁹ **Exhibit RL-179**, *Murphy Exploration & Production Company International v. Republic of Ecuador*, PCA Case No. 2012-16 (formerly AA 434), UNCITRAL, Partial Award on Jurisdiction, 13 November 2013, ¶ 171 (cited by Colombia in its Rejoinder, ¶ 33 and n. 11).

not in conflict with each other.³⁰ Here, Colombia's proposed interpretation forces into conflict Chapters 10 and 22, and deprives Chapter 10 of all meaning at the cost of Article 22.2(b).³¹ Any conflict, however, is obviated if Article 22.2 is given its ordinary meaning, which does not automatically give the State unilateral power to divest Chapter 10 of all effect, thus further weighing in favor of adopting the plain meaning of Article 22.2.

I.C. On The Other Hand, Colombia's Position Is Not Supported By The TPA's Text

27. Colombia's position that Article 22.2 makes Colombia's actions "*immune from scrutiny by arbitral tribunals*" does not even attempt to find support in the plain language of the provision.³² Rather, Colombia merely asserts this with little textual, or indeed other, analysis.
28. Colombia's sole text-based argument appears to be that Article 22.2(b) has a clarifying footnote that requires the tribunal or panel adjudicating the matter to "*find that the exception applies*" when invoked.³³ Yet all this footnote does is add "*greater certainty*" to the meaning of Article 22.2(b). It does not expand or amplify the scope of Article 22.2(b). In other words, the footnote merely clarifies what the provision says—that a tribunal may not preclude a State Party from adopting measures that the State considers are necessary for its essential security. The footnote does not convert this exception into one through which the State can spare itself from a tribunal's review of whether the State's conduct is otherwise compliant with its obligations under the TPA. Neither the ordinary meaning of the footnote, its context, nor the TPA's object and purpose support Colombia's sweeping self-exculpatory reading of the provision.

³⁰ See, e.g., **Exhibit CL-183**, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07, 19 December 2012, ¶ 52 ("*Any treaty rule is to be interpreted in respect of its purpose as a rule with an effective meaning rather than as a rule having no meaning and effect*"); **Exhibit CL-219**, *The Renco Group, Inc. v. Peru*, Case No. UNCT/13/1, UNCITRAL, Decision As To The Scope Of The Respondent's Preliminary Objections Under Article 10.20.4, 18 December 2014, ¶ 177 ("*the principle of effectiveness [. . .] is broadly accepted as a fundamental principle of treaty interpretation*" and requires treaty provisions be "*read together and that 'every provision in a treaty be interpreted in a way that renders it meaningful.'*").

³¹ Colombia acknowledges this as it seeks to invoke the treaty's conflict provisions. Rejoinder, ¶ 21; Colombia's Letter, p. 16.

³² Rejoinder, ¶ 24.

³³ Rejoinder, ¶¶ 27, 38; Colombia's Letter, pp. 16-17.

29. Rather than interpreting the text, Colombia spends much ink discussing other cases, most of which bear little relevance to the one at hand.
30. **First**, Colombia refers to a handful of investor-State arbitration decisions to support the proposition that where 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 must do so expressly*” and offer “*clear textual or contextual indications*” confirming their intent.³⁴ Claimants agree—indeed, where the United States and Colombia have carved out exemptions for liability under the TPA, they have done so expressly.³⁵ And where State Parties intended to make disputes non-justiciable, they have also made this express.³⁶ Article 22.2(b) does not, however, contain any express (or implied) exemptions from liability or payment of compensation for a breach. It only ensures that the State is able to carry on with its impugned measures (whether or not it violates the TPA).
31. The investor-State arbitration decisions Colombia refers to are primarily concerned with determining the proper scope of review of the State’s essential security defense, followed by a review of that defense. **None** of them have found that the exception affects the jurisdiction or admissibility of the claim. And while some have excused the State’s liability, those tribunals have considered treaty language fundamentally different from the TPA,³⁷ or merely made assertions with scarce textual analysis or assessment.³⁸ This approach has largely been driven by the manner in which the

³⁴ Rejoinder, ¶ 37 and nn. 28-29, quoting **Exhibit RL-163**, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 370.

³⁵ See *supra* ¶¶ 18-20.

³⁶ See *supra* ¶¶ 21-22.

³⁷ See e.g. **Exhibit CL-196**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited., and Telkom Devas Mauritius Limited. v. The Republic of India*, UNCITRAL, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, ¶ 293 (where the relevant article provided that “[t]he provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests”). This provision has broader implications than Article 22.2(b) of the TPA, as it prohibits “any way” in which the State’s right to take the impugned action may be “limit[ed]”, which could entail the payment of compensation. By contrast, payment of compensation cannot “preclude” States from adopting the measures they wish, as explained above. Indeed, States regularly pay compensation for acts such as expropriations.

³⁸ See e.g. **Exhibit RL-188**, *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶ 227 (quoting *dicta* from the annulment decision in *CMS Gas Transmission Company v. Republic of Argentina* without any textual analysis of the treaty provision); **Exhibit CL-062**, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 164 (also referring to *dicta* from the *CMS Gas Transmission Company v. Republic of Argentina* annulment committee’s decision, without further textual analysis). In fact, the committee in **Exhibit RL-168**,

essential security provisions were addressed in those cases, as the disputing parties, and thus the tribunals, focused on whether the measures qualified as essential security measures, and, if so, whether they were indeed necessary for the State's essential security rather than whether the exceptions clause negated liability.³⁹ Thus, a textual analysis of the provision in light of the VCLT was barely considered, and if so, only summarily.

32. **Second**, Colombia refers to a number of World Trade Organization (“WTO”) cases to advance its argument that Article 22.2(b) should be read as a bar on jurisdiction or, in the alternative, a complete defense on the merits.⁴⁰ However, the WTO case law is inapposite because, as explained above,⁴¹ the remedies available to investor-State tribunals constituted under Chapter 10 are very different from those available to panels formed to adjudicate trade disputes under Chapter 21 (which are derived from and largely identical to remedies available to dispute settlement bodies under the WTO/GATT framework).⁴² Whereas the primary remedy available in the trade context is the cessation or revocation of the measure, investment tribunals constituted under

CMS Gas Transmission Company v. Republic of Argentina, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶ 136, upheld the underlying tribunal's application of the essential security provision where the tribunal found that the provision had no impact on its jurisdiction or Argentina's liability.

³⁹ See e.g. **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, ¶ 205 (“First, the Tribunal must decide whether the conditions that existed in Argentina during the relevant period were such that the State was entitled to invoke the protections included in Article XI of the Treaty. Second, the Tribunal must determine whether the measures implemented by Argentina were necessary to maintain public order or to protect its essential security interests, albeit in violation of the Treaty.”).

⁴⁰ Rejoinder, ¶¶ 39-40, 52-57.

⁴¹ See *supra* ¶¶ 13-15.

⁴² Compare **Exhibit CL-230**, TPA, Chapter 21, arts. 21.15.2 (“If, in its final report, the panel determines that a disputing Party has not conformed with its obligations under this Agreement or that a disputing Party's measure is causing nullification or impairment in the sense of Article 21.2, the resolution, whenever possible, shall be to eliminate the non-conformity or the nullification or impairment.”) and 21.16.9 (“Compensation, the payment of monetary assessments, and the suspension of benefits are intended as temporary measures pending the elimination of any non-conformity or nullification or impairment that the panel has found”) with **Exhibit CL-209**, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Agreement Establishing the World Trade Organization (signed 15 April 1994; entry into force 1 January 1995), arts. 19(1) (“Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.”) and 3(7) (“The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent.”).

Chapter 10 may (and sometimes must) order compensation.⁴³ Accordingly, the impact of invoking the exception in an investment context is very different as the exception does not preclude a Tribunal adjudicating an investment dispute from awarding any remedy—*i.e.*, it can still award compensation.

33. In the end, Colombia acknowledges that it is “*wrong[to] conflate exceptions to a treaty obligation with defenses regarding wrongfulness*”⁴⁴ yet goes on to do exactly that. It conflates an exception allowing it to apply to measures for a particular purpose with a defense as to the wrongfulness of that measure. The TPA may permit Colombia to maintain a particular measure in certain circumstances (which in any event do not apply here), but it does not give Colombia a blanket defense as to the wrongfulness of that measure (and therefore the need to provide compensation for it). And Article 22.2(b) on its face does not comment on whether a particular measure constitutes a breach, nor does it prevent a tribunal from reaching that issue. If it applies at all, it merely prevents the tribunal from ordering a remedy (withdrawal of the measures) that Claimants have not even sought here.

* * *

34. In sum, by invoking Article 22.2(b), Colombia has simply prevented the Tribunal from ordering Colombia to withdraw or not to implement certain measures. The Tribunal can—and under Chapter 10 of the TPA, must—maintain jurisdiction over the dispute and decide whether Colombia’s actions have breached its obligations under the TPA, and, if so, award compensation to the Claimants.

II. AS A MERITS DEFENSE, COLOMBIA’S NEW ESSENTIAL SECURITY DEFENSE IS TIME BARRED

35. As explained above, Colombia’s invocation of the New Essential Security Defense can have no impact on the Tribunal’s jurisdiction. Accordingly, the Tribunal has jurisdiction over the dispute. Colombia, however, also argues that “*in the alternative*” the Tribunal should find that Colombia has not breached “*any of its treaty obligations*” because the “*Asset Forfeiture Proceeding fall[s] within the scope of the [essential*

⁴³ See *supra* ¶¶ 13-17.

⁴⁴ Colombia’s Letter, p. 19.

security] *exception*.”⁴⁵ As explained above, the Essential Security Provision also does not impact this Tribunal’s determination of breach or liability.⁴⁶ But the Tribunal need not even reach these issues because Colombia is barred from invoking the New Essential Security Defense for the first time with its Rejoinder.

36. In this respect, Claimants note that “[f]or the purposes of assessing [the Defense’s] admissibility” the Tribunal “accept[ed] Respondent’s characterization of the New Essential Security Defense as a jurisdictional objection.”⁴⁷ The Tribunal has not accordingly decided on the admissibility of Colombia’s belated invocation of Article 22.2(b) as a defense on the merits, which should be barred for the reasons below.

II.A. No “New Facts” or “Special Circumstances” Have Arisen

37. As explained in Claimants’ Application, the ICSID Arbitration Rules and Procedural Order No. 1 (“**PO 1**”) governing the conduct of this Arbitration bar the admission of affirmative defenses submitted after the counter-memorial stage. Specifically, Sections 14.2 and 14.3 of PO 1 state:

“In the first exchange of submissions (Memorial and Counter-Memorial), the parties shall set forth all the facts and legal arguments on which they rely including any expert opinion evidence the parties submit in support of their respective cases. Allegations of fact and legal arguments shall be presented in a detailed, specified and comprehensive manner, and shall respond to all allegations of fact and legal arguments made by the other party.

In their second exchange of submissions (Reply and Rejoinder), the parties shall limit themselves to responding to allegations of fact and legal arguments made by the other party in the first exchange of submissions, unless new facts have arisen after the first exchange of submissions which justify new allegations of fact and/or legal arguments.”

38. And ICSID Arbitration Rule 26(3) provides:

“Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after

⁴⁵ Rejoinder, ¶ 48.

⁴⁶ See *supra* section I.

⁴⁷ Procedural Order No. 9, ¶ 11.

giving the other party an opportunity of stating its views, decides otherwise.”

39. No “*special circumstances*” or “*new facts*” have arisen since Colombia submitted its Counter Memorial. In its Rejoinder, Colombia identified Sections III.A and III.C.1 of the Rejoinder as the basis for its New Essential Security Defense.⁴⁸ Section III.A, entitled [REDACTED] [REDACTED] has no new facts; indeed, Colombia considers the facts therein to be “*notorious*.” Section III.C.1 entitled “*The Attorney General’s Office had sufficient evidence on the illegal origin of the Meritage Lot to impose Precautionary Measures and initiate the Asset Forfeiture Proceedings*” is concerned with evidence the Attorney General’s Office had in 2016 that it purportedly relied upon to initiate the Asset Forfeiture Proceedings. Neither of these sections thus contain “*special circumstances*” or “*new facts*.”
40. Colombia also vaguely alluded in its Rejoinder to documents purportedly disclosed to the State’s defense team on 14 February 2022 concerning investigations into the two prosecutors who initiated the Asset Forfeiture Proceedings as a veiled justification for its delay.⁴⁹ But investigations into these prosecutors cannot be a basis for the measures having been adopted for essential security purposes in 2016. It is no surprise, therefore, that in its latest Letter, Colombia appears to have altogether dropped these documents as a basis to advance its New Essential Security Defense.
41. Instead, in its Letter—filed one month after its Rejoinder and six weeks prior to the final hearing—Colombia put forward entirely new documents that Colombia claims made it realize it had a purported essential security interest at stake. An ever changing target, Colombia now offers seven supposedly “*new facts and their supporting*” documents that it did not even bother to cite in its Rejoinder as forming the basis for its New Essential Security Defense.⁵⁰ None of these supposed facts, however, are new.

⁴⁸ See Rejoinder, n. 45 and ¶ 57.

⁴⁹ See Rejoinder, ¶ 653.

⁵⁰ [REDACTED]

As discussed below, they relate to allegations Mr. López Vanegas made in his complaints in 2014 and 2016. Specifically:

[REDACTED]

⁵¹ **Exhibit R-65**, Wradio, “Los nexos de Meritage y el narcotraficante alias ‘Maracuyá’”, 11 March 2021 (<https://www.wradio.com.co/noticias/judicial/los-nexos-de-meritage-y-el-narcotraficante-alias-maracuya/20210311/nota/4116240.aspx>) accessed on 31 January 2022.

⁵² Colombia’s Letter, p. 22.

⁵³ **Exhibit C-409**, EL TIEMPO, *The Shadow Of The Mafia Over A Million-Dollar US Lawsuit Against Colombia*, 13 February 2022, p. 4 (“However, the prosecutor on the case was dispatched to Barrancabermeja (Santander) and on December 1, 2021, the new prosecutor decided to revoke the summons issued to ‘Maracuyá. According to a ruling to which EL TIEMPO has had access, to date ‘there is insufficient compelling evidence to implicate Javier García, a.k.a. Maracuyá, in the facts under investigation, especially since he has not been fully identified.’”)

⁵⁴ **Exhibit R-65**, Wradio, “Los nexos de Meritage y el narcotraficante alias ‘Maracuyá’”, 11 March 2021 (<https://www.wradio.com.co/noticias/judicial/los-nexos-de-meritage-y-el-narcotraficante-alias-maracuya/20210311/nota/4116240.aspx>) accessed on 31 January 2022.

⁵⁵ [REDACTED] See also **Exhibit CL-233**, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008 (Turkey surveilled the claimants and their legal representatives and effected a “sustained campaign of interception of the e-mail communications of [Claimant’s] counsel in this arbitration,” one result of which was “[a]ll privileged documents and information which have been tendered or disclosed to the Tribunal in connection with the Claimant’s application [. . .] will be excluded from the evidence to be received in this arbitration.”).

⁵⁶ [REDACTED]

⁵⁷ **Exhibit C-023bis**, Attorney General’s Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, p. SP-0065.

[REDACTED]

[REDACTED]

[REDACTED]

58 [REDACTED]

59 [REDACTED]

60 [REDACTED]

61 **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0036 [REDACTED] **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January, 2017, p. SP-0036 [REDACTED]

[REDACTED]

62 Colombia's Letter, p. 9.

63 [REDACTED]

[REDACTED]

- 42. It is worth reiterating that each and every one of the documents listed above has not only been in the possession, custody and control of Colombia for years, but was created by Colombian authorities. In fact, no other entity but Colombia has access to the full scope of these documents, some of which it failed to produce in violation of the Tribunal’s document production orders.⁶⁵ Colombia’s belated disclosure of selected documents that it believes advance its case—disclosed just in time for Colombia’s Rejoinder—cannot be taken at face value.
- 43. In any event, for the present purposes, it is clear as day that neither the documents, nor the propositions for which they are being put forward by Colombia now, are new to this Arbitration. There is, accordingly, no basis on which Colombia can claim that these were “*new facts*” or “*special circumstances*” that would allow it to add a new merits defense.
- 44. Indeed, Colombia does not claim that these documents were new; rather it contends that its Counsel only found out about these documents just before submitting its Rejoinder

⁶⁴ [REDACTED]

⁶⁵ See Procedural Order No. 6, ¶ 7 (“the Tribunal has taken note of Respondent’s announcement that it will not produce any documents regarding the pending disciplinary investigations nos. 45482 and 48473 (items nos. 2 and 3 on its Exemption Log) as well as the actual files regarding criminal investigations nos. 2017-00019, 2018-00144, 2018-24867, 2020-55879, 2020-01770, 2020-0251, and 70278 (items nos. 8, 10, 11, 16, 17 on its Exemption Log).”).

because that is when Colombia's prosecutors decided to share them.⁶⁶ But it is undisputed that the prosecutors form part of the Colombian State.⁶⁷ That the State's Counsel apparently failed to seek out such documents or its own prosecutors apparently chose to withhold information from its Counsel, and then only share selected information with Counsel just before its Rejoinder was due, hardly constitutes "*special circumstances*" or "*new facts*" that would justify the belated introduction of a merits defense. Rather, as discussed in Section III below, it reveals the opportunistic and tactical manner in which Colombia has set about to manufacture a new defense as a desperate measure of last resort to avoid liability. Accordingly, Colombia's defense is late and should not be permitted.

II.B. Any Newly Discovered Facts Could Not Have Given Rise To An Essential Security Interest At The Time Of The Measures

45. Even if Colombia's Counsel came across "*new facts*" in these documents that their client only recently decided to disclose, it is clear that these facts cannot support the New Essential Security Defense for the simple reason that these facts did not exist (or the relevant Colombian authorities were not aware of them) at the time Colombia initiated the Asset Forfeiture Proceedings.
46. Colombia can only invoke the Essential Security Provision if it was acting out of an identified essential security concern at the time of the measures. Article 22.2(b) of the TPA is drafted in the present tense: it allows a State to undertake measures the State "*considers necessary for [. . .] the protection of its own essential security interests,*" when the invoking State is "*applying measures.*"⁶⁸ In other words, the State must be in possession and aware of the facts that give rise to its essential security interest when it undertakes the measures; otherwise it cannot be taking measures that it considers are

⁶⁶ Rejoinder, ¶¶ 45-47; Colombia's Letter, pp. 4-5.

⁶⁷ Colombia argues that the ILC Articles on State Responsibility are only relevant for liability, not procedural matters. But this is not at all what the article on attribution provides. *See* Colombia's Letter, p. 10. Article 4 states that "[t]he conduct of any State organ shall be considered an act of that State under international law." There is nothing in this provision that limits the conduct to matters of merits and not procedure; a distinction that Colombia attempts to draw without any basis in the text or jurisprudence. *See Exhibit CL-025*, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 4.

⁶⁸ Exhibit CL-230, TPA, art. 22.2 ("*Nothing in this Agreement shall be construed [. . .] to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.*")

necessary for the protection of its essential security. Indeed, in all cases where an essential security exception has been found to apply, the State's identification of its essential security interest has preceded measures taken in protection of that interest.⁶⁹ Put differently, it is impossible for a State to consider a course of action to be necessary to protect an essential security interest that it has not yet identified.⁷⁰

47. This is also supported by the object and purpose of the TPA, which includes the creation of a “*predictable legal and commercial framework for business and investment.*”⁷¹ Needless to say, the retroactive application of the Essential Security Provision as a *post-hoc* defense falls afoul of this goal. Accordingly, investment tribunals have roundly held when assessing the invocation of other affirmative defenses, such as the use of denial of benefits clauses, that States may only invoke them in a prospective manner.⁷² The timely invocation of Article 22.2 is important not just because that is what the provision requires, but also because, as discussed below,⁷³ it demonstrates that the exception is being invoked in good faith and not to belatedly extinguish liability (which, in any case, is not what the provision does).⁷⁴
48. Colombia has asserted but not yet identified any new relevant facts that led it to raise the New Essential Security Defense, all of a sudden, with its Rejoinder.⁷⁵ But even if

⁶⁹ See, e.g., **Exhibit RL-192**, *Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019, ¶¶ 7.142-44 (finding Russia implemented measures in late 2014 and 2016 in response to a situation that arose in early 2014); **Exhibit RL-201**, *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, WTO, WT/DS567/R, 16 June 2020, ¶ 2.16 (finding Saudi Arabia implemented measures after June 2017 in response to the severance of relations with Qatar that month)

⁷⁰ See **Exhibit RL-152**, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Judgment of 27 June 1986, p. 141, ¶ 281 (finding the “*chronological sequence of events*” critical because in order for activities “*to be covered by [an essential security provision] they must have been, at the time they were taken, measures necessary to protect its essential security interests.*” (emphasis added)).

⁷¹ **Exhibit CL-001**, TPA, pbml.

⁷² See, e.g., **Exhibit CL-118**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶ 239; **Exhibit CL-094**, *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra RafTrans Trading Ltd v. The Republic of Kazakhstan*, SCC Case No. V116/2010, Award, ¶ 745; **Exhibit CL-215**, *Limn Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, ¶ 225; **Exhibit CL-188**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 14 July 2014, ¶ 718; **Exhibit CL-038**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 162.

⁷³ See *infra* ¶ 49.

⁷⁴ See *supra* ¶¶ 35-44.

⁷⁵ See *supra* section II.A.

Colombia's assertions that it has uncovered new facts are taken at face value, under its own position, these so-called "*facts*" came to light after the initiation of the Asset Forfeiture Proceedings in July 2016.⁷⁶ In other words, Colombia was unaware of them when it instituted the Asset Forfeiture Proceedings. To the extent Colombia is correct and these documents reveal new information giving rise to an essential security interest now, Colombia could not have based its decision to initiate the Asset Forfeiture Proceedings on that information back in 2016. Colombia's belated defense accordingly fails for this reason too.

III. COLOMBIA'S ELEVENTH-HOUR INVOCATION OF THE ESSENTIAL SECURITY DEFENSE WAS NOT MADE IN GOOD FAITH

49. Even if the Tribunal accepts Colombia's New Defense as being admissible, the Parties agree that this Tribunal has the authority to review whether Colombia has invoked the New Essential Security Defense in good faith.⁷⁷ While Colombia acknowledges that this requirement exists, it makes no effort to establish its good faith. Colombia's eleventh hour invocation of an exception, six years after it initiated the Asset Forfeiture Proceedings and mere weeks before the Hearing, with the astonishing claim that by simply invoking the exception Colombia can extinguish this Tribunal's jurisdiction and Colombia's liability, is not indicative of good faith.
50. Applying the WTO caselaw that Colombia itself relies upon, the Tribunal's assessment of good faith must be two-fold.⁷⁸ **First**, the Tribunal must determine whether Colombia has articulated or defined its essential security interest in good faith. **Second**, the Tribunal must determine whether there is a connection between the measures at issue and the proffered essential security interests. As set out below, Colombia has failed to establish that it has acted in good faith with respect to both prongs.

⁷⁶ See *supra* ¶¶ 45-47.

⁷⁷ See Rejoinder, ¶¶ 43, 57 ("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"); Claimants' Application, ¶¶ 29, 31.

⁷⁸ See **Exhibit RL-192**, *Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019, ¶ 7.138 ("The obligation of good faith [...] 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.").

III.A. Colombia Has Not Articulated Its Essential Security Interest In Good Faith

51. In order to rely upon Article 22.2(b) of the TPA, Colombia must articulate its essential security interest in good faith. Colombia cannot use Article 22.2(b) of the TPA as a “means to circumvent [its] obligations” by simply “re-labelling [public welfare] interests that it had agreed to protect and promote within the system, as ‘essential security interests’, falling outside the reach of that system.”⁷⁹ The International Court of Justice (“ICJ”) has held that a State’s discretionary power of this kind “must be exercised reasonably and in good faith” and “must be timely and not be arbitrary.”⁸⁰
52. Colombia’s invocation of the Essential Security Provision is arbitrary and belated for no justifiable reason.⁸¹ Indeed, relying on Annex 10-B of the TPA, Colombia already argued in its Counter Memorial that the TPA affords Colombia “‘broad deference’ to design and implement measures to protect their public welfare objectives,”⁸² the same argument it now puts forward as the New Essential Security Defense. This re-labelling exercise is elucidated through a simple comparison of Colombia’s Counter-Memorial with its Rejoinder:

⁷⁹ **Exhibit RL-192**, *Russia—Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019, ¶ 7.133. See also **Exhibit CL-234**, Bin Cheng, *General Principles of Law As Applied by International Courts and Tribunals* (1987), p. 117 (“From the fact that it is the common intention of the parties or the spirit of the treaty that has to be respected it follows that it is not permissible, whilst observing the letter of the agreement, to evade treaty obligations by—what the Permanent Court has called—‘indirect means.’ If, for instance, it is the intention of the parties that freedom of navigation and commerce should be established in certain parts of their territory, it is not permissible for one party, while respecting the letter of the agreement, to evade its obligations in effect by an exaggerated exercise of its right to manage national shipping.”).

⁸⁰ **Exhibit CL-225**, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment, (2020) I.C.J. REPORTS 300, 11 December 2020, ¶ 73. See also **Exhibit CL-187**, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (open for signature 23 May 1969; entry into force 27 January 1980), art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”); **Exhibit CL-214**, Alexander Orakhelashvili, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* (2008), p. 548 (“In terms of substance, what we surely know is that the involvement of political factors cannot make these clauses non-justiciable or exempt them from the normal regime of treaty interpretation”); **Exhibit CL-206**, *Free Zones of Upper Savoy and the District of Gex*, Judgment, 7 June 1932, 1932 P.C.I.J. (Ser. A/B) No. 46, p. 167 (“A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon.”); **Exhibit CL-234**, Bin Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1987), p. 117 (“The unreasonable exercise of a right in such cases constitutes an abuse of right, which being an act that is inconsistent with the duty to carry out the treaty in good faith, is considered as unlawful.”).

⁸¹ See *supra* section II.

⁸² Counter Memorial, ¶ 305.

Colombia's Counter Memorial, ¶ 303	Colombia's Rejoinder, ¶ 55
<p><i>“The Claimants’ experts have acknowledged that the purpose of <u>asset forfeiture is “to fight organized crime through the rejection of wealth originating in illicit activities, such as drug trafficking” and, by attacking organized crime, to “obtain social and economic stability in the country”</u>. Thus, it cannot be contested that the Asset Forfeiture Law was enacted to protect a legitimate public welfare objective, namely, the maintenance of social and economic stability in the country.”</i></p>	<p><i>“Here, the Respondent identifies <u>its</u> “essential security interests” as being those related to the “quintessential functions of the [Colombian State], namely, <u>the protection of its territory and its population [...], and the maintenance of law and public order internally.</u>” The position of the Republic of Colombia in this arbitration is that it seeks, <u>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.</u>”</i></p>

53. Viewing these extracts side-by-side, it becomes clear that Colombia has arbitrarily relabeled its interest in fighting organized crime through the use of its Asset Forfeiture Law in this case from being a “*legitimate public welfare objective*” to being an “*essential security interest*” even though no new facts have come to light to justify this relabeling, and even if they had, Colombia was, by its own admission, unaware of them when it launched the Asset Forfeiture Proceedings and therefore could not have based its actions on these supposedly newly uncovered facts.⁸³ This is not just a belatedly introduced defense, but one that, according to Colombia, would have the far reaching consequences of automatically depriving the Tribunal of jurisdiction and extinguishing Colombia’s liability without the Tribunal’s review. Given that Colombia’s articulation of the nature and purpose of the Asset Forfeiture Law remains the same (*i.e.*, a mechanism to fight organized crime, drug trafficking, and money laundering), this is nothing more than a tactical revision.
54. Moreover, Colombia cannot point to any new factual circumstances that would justify such a revision. Each of the circumstances identified by Colombia in its Rejoinder that allegedly led to its new conclusion that fighting organized crime through the use of its Asset Forfeiture Law was an essential security interest,⁸⁴ was well-known and expressly acknowledged by Colombia in its Counter Memorial. This includes: (*i*) the

⁸³ See *supra* section II.B.

⁸⁴ Rejoinder, ¶ 55 (“*The position of the Republic of Colombia in this arbitration is that it seeks, through asset forfeiture proceedings, to fight against organized crime, money laundering, and drug trafficking, thus ultimately protecting its population from the threats of paramilitary and marginalized groups that have been ravaging the country for years.*”).

proliferation of organized crime and drug trafficking in Colombia;⁸⁵ (ii) the operation of the *Oficina de Envigado* in the Medellín region;⁸⁶ and (iii) the use of real estate transactions as a means to launder money in Colombia.⁸⁷ In similar circumstances, the ICJ held that the United States could not classify certain economic policies implemented by Nicaragua as a threat to the United States' essential security interests when these same "*policies had been consistent, and consistently criticized by the United States, for four years previously,*" and there was "*no evidence at all*" that these pre-existing policies became a threat to essential security interests (when previously the United States did not treat them as such).⁸⁸

55. When Claimants pointed this out in their Application, Colombia attempted to supplement the basis for invoking the essential security clause by referring to other supposedly new documents (which were created by and in Colombia's possession all along, but only supposedly recently provided to its Counsel).⁸⁹ However, as discussed above, none of the allegations on which Colombia seeks to rely are "*new,*" even for Colombia's Counsel, so as to serve as grounds for supplanting Colombia's public welfare defense with the New Essential Security Defense.⁹⁰
56. The fact is that Colombia did not invoke the Essential Security Provision before its Rejoinder because it knew it had no basis to do so. It is invoking the Provision with its Rejoinder now as a tactical attempt to escape liability in a case involving a blatant

⁸⁵ Counter Memorial, ¶¶ 43 ("*Whilst the killing of Pablo Escobar in 1993 was a milestone in the history of the war against drugs, his killing was far from the end of the illicit activities of the Medellín cartel and illegal groups in Antioquia.*"), 45 ("*It is a fact that criminals formerly under the cartel structure have continued the drug trafficking and money laundering activities*").

⁸⁶ Counter Memorial, ¶¶ 45 ("*It bears mentioning that the State's efforts against these groups, and in particular against the Oficina de Envigado members – which illegal activities have been continuous for over three decades – continues to date, with captures of some of its main members as recently as in 2019*"), 159 ("*the Asset Forfeiture Unit investigated and collected information about the Oficina de Envigado, and its scheme consisting of using figureheads to acquire real estate*").

⁸⁷ Counter Memorial, ¶¶ 43 ("*in 1988, an estimated 80% of the land in southwest Antioquia, that includes the municipality of Envigado, was controlled by the cartel*"); 47 ("*It is no coincidence that Medellín and its many economic sectors have been permeated by the criminal organizations in order to hide or launder the money obtained from their criminal activities.*"), 48 ("*use of real estate transactions and forgery before the public notaries as a means to launder illicit money is well-documented*"), 167 ("*This was in line with the modus operandi of the Oficina de Envigado, which had historically used duress to obtain properties*").

⁸⁸ **Exhibit RL-152**, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Judgment of 27 June 1986, p. 141, ¶ 282.

⁸⁹ Colombia's Letter, pp. 8-9.

⁹⁰ See *supra* ¶¶ 40-44.

expropriation without the payment of compensation (as required under international law) and in light of the compelling and irrefutable evidence submitted by Claimants with their Reply, including taped affirmations by Colombia’s witness in this Arbitration and the Head of the Asset Forfeiture Unit that the Claimants were good faith parties against whom the proceedings were unlawfully pursued by corrupt prosecutors.⁹¹ Colombia’s brazen attempt to circumvent the protections and obligations it owes the Claimants under the TPA by retroactively recasting its justification for the (unlawful) measures it took is not good faith conduct.

III.B. Colombia’s Alleged Essential Security Interest Is Unconnected To The Measures In Dispute

57. In order to invoke Article 22.2.(b) of the TPA in good faith, Colombia must also show that there is a connection between the measure at issue and the essential security interest advanced as being necessary to protect.
58. Colombia accepts that the Essential Security Provision “*demand[s] 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.*”⁹² Investment tribunals have likewise demanded that States seeking to avoid liability through the invocation of treaty exceptions demonstrate a *bona fide* connection between the impugned measure and the relevant sovereign interest relied upon.⁹³ For example, the *Yukos v. Russia* tribunal held that Russia could not

⁹¹ See Reply, ¶¶ 93-135; see also **Exhibit C-324**, Transcript of Audio File (Part 2), 4 June 2020, pp. 4 (Daniel Hernández tells Mr. Seda “*you are a good faith third party*”) 7 (Ana Catalina Noguera telling Mr. Seda “*If you look at the chain of title, it’s clean [. . .] they put it through the mango seller who was clean, then they put it under this model because she was allegedly clean, but we knew that we have all of these statements and that’s what taints this lot*”); **Exhibit C-325**, Transcript of Audio File (Part 5), 4 June 2020, p. 38 (Daniel Hernández tells Mr. Seda “*it’s not just the Attorney General’s Office that got it wrong [. . .] The judiciary also got it wrong.*”).

⁹² Rejoinder, ¶¶ 56-57, citing **Exhibit RL-192**, *Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019, ¶ 7.138 (emphasis added). See also **Exhibit RL-201**, *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, WTO, WT/DS567/R, 16 June 2020, ¶ 7.285.

⁹³ See, e.g., **Exhibit CL-224**, *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020, ¶ 357 (finding that Italy tried to label measures as taxes when they “*were not imposed for the purpose of raising general revenue for the state*”); **Exhibit CL-226**, *FREIF Eurowind Holdings Ltd v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award, 8 March 2021, ¶ 371 (“*If ‘Taxation Measures’ were taken by name only, this could enable a Contracting Party to create undue carve-outs by labelling laws as ‘taxes’ or ‘Taxation Measures.’*”); **Exhibit RL-208**, *Infracapital FI S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13

characterize its unlawful conduct as a purported taxation measure to take advantage of a treaty carve out when in fact the conduct at issue was implemented for an ulterior purpose.⁹⁴ The *Yukos* tribunal reasoned that:

“[A]ctions that are taken only ‘under the guise’ of taxation, but in reality aim to achieve an entirely unrelated purpose (such as the destruction of a company or the elimination of a political opponent), argue Claimants, cannot qualify for exemption from the protection standards of the ECT under the taxation carve-out in Article 21(1).

The Tribunal essentially accepts the latter interpretation of Article 21.

To find otherwise would mean that the mere labelling of a measure as ‘taxation’ would be sufficient to bring such measure within the ambit of Article 21(1) of the ECT, and produce a loophole in the protective scope of the ECT. Since the claw-back in Article 21(5) of the ECT relates only to expropriations under Article 13 of the ECT, a State could, simply by labelling a measure as ‘taxation’, effectively avoid the control of that measure under the ECT’s other protection standards. It would seem difficult to reconcile such an interpretation with the purpose of Part III of the ECT.”⁹⁵

59. In this case Colombia must discharge its burden of proof in demonstrating that there is a plausible connection between protection of its interest in “*fight[ing] organized crime, money laundering and drug-trafficking*”⁹⁶ and the necessity of taking the unlawful

September 2021, ¶ 370 (finding a State was entitled to elect “*how, how much, under what conditions, and when to tax nationals, residents, [etc.]*” so long as a number of requirements were met, including “*that it has been established in good faith -and not to achieve an entirely unrelated purpose- such as the destruction of a company.*”); **Exhibit CL-171**, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Arbitration V (079/2005), Final Award, 12 September 2010, ¶ 628 (it “*is generally accepted that the mere fact that measures by a host state are taken in the form of application and enforcement of its tax law, does not prevent a tribunal from examining whether this conduct of the host state must be considered, under the applicable BIT or other international treaties on investment protection, as an abuse of tax law to in fact enact an expropriation*” (emphasis added)); **Exhibit CL-218**, *Quasar de Valores SICAV S.A. et al. v. The Russian Federation*, SCC Arbitration, Award, 20 July 2012, ¶ 179 (it “*is no answer for a state to say that its courts have used the word ‘taxation’ [...] in describing judgments by which they effect the dispossession of foreign investors. If that were enough, investment protection through international law would likely become an illusion, as states would quickly learn to avoid responsibility by dressing up all adverse measures, perhaps expropriation first of all, as taxation. When agreeing to the jurisdiction of international tribunals, states perform accept that those jurisdictions will exercise their judgment, and not be stumped by the use of labels.*” (emphasis added)).

⁹⁴ **Exhibit CL-188**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, ¶¶ 1430-36.

⁹⁵ **Exhibit CL-188**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, ¶¶ 1430-33.

⁹⁶ Rejoinder, ¶ 44.

measures in dispute in this Arbitration against Claimants and their investments. Colombia has not, and cannot, make such a showing because no such connection exists.

60. **First**, there is no objective connection between the Asset Forfeiture Proceedings and Colombia's essential security interests. Colombia has articulated its essential security interest generally—"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"—but it has failed to ever explain how initiation of the Asset Forfeiture Proceedings against the Meritage Property protected this interest.
61. In the Rejoinder, Colombia merely asserted, without specificity or explanation, that the Asset Forfeiture Proceedings were "*adopted for the protection of its essential security interests*"⁹⁷ because they "*were launched for the purposes of investigating and later sanctioning* [REDACTED] [REDACTED] [REDACTED]"⁹⁸ Colombia cannot rely on self-certified facts in this regard.⁹⁹ And indeed the Asset Forfeiture Proceedings did not, and could not have, achieved Colombia's stated purpose.
62. As a matter of fact, all the Asset Forfeiture Proceedings have led to is the seizure of the Meritage Property, leading to the utter destruction of Claimants' investment. Colombia's actions have incidentally also resulted in the complete loss of investments made by over 170 unit buyers of the Meritage Project who had pre-purchased units in the development, and most of whom are Colombian citizens. Thus Colombia's actions have harmed not just Claimants but also their own citizens, whom Colombia claims to want to protect through the Asset Forfeiture Proceedings.
63. Yet Colombia has not so much as touched the assets or disgorged the proceeds of crime of the alleged *Oficina de Envigado* members. Colombia cannot point to a single seizure of criminal proceeds from the alleged transfers of the Meritage Property between

⁹⁷ Rejoinder, ¶ 56.

⁹⁸ Rejoinder, ¶ 57.

⁹⁹ **Exhibit CL-207**, *Flegenheimer Case (United States v. Italy)*, 14 R.I.A.A. 327 (1958), pp. 337-38 ("*in an international dispute, official declarations, testimonials or certificates do not have the same effect as in municipal law. They are statements made by one of the Parties to the dispute which, when denied, must be proved like every other allegation.*").

Oficina de Envigado members. The only alleged criminal whom Colombia appears to have targeted with any seizure proceedings at all is ██████████ but Colombia accepts that these seizures (which took place in 2018) have no relationship whatsoever with his purported interest in the Meritage Property. The seizures were of “107 hectares located in a sector of a very high commercial value ... in Cartagena”, a city over 600 km from Medellín.¹⁰⁰ In fact, Colombia itself acknowledges that it found out about the purported association between ██████████ and the transfers of the Meritage Property just before it filed its Rejoinder.¹⁰¹ Thus whatever Colombia has seized from ██████████ bears no relation to the Asset Forfeiture Proceedings.

64. The truth is Colombia cannot demonstrate any rational nexus between seizing the Meritage Property and its stated goal of “investigating” or “sanctioning” alleged *Oficina de Envigado* members. Despite multiple opportunities, Colombia ties itself into knots trying to justify its actions as its explanations remain abstract. On the one hand, Colombia asserts that the Asset Forfeiture Proceedings *were launched for the purposes of investigating and later sanctioning* ██████████
██████████¹⁰² On the other hand, Colombia notes that asset forfeiture proceedings are “unlike criminal proceedings” because the former only target “assets that have been tainted by illegality,” whereas the latter “are conducted against individuals suspected of having committed a crime.”¹⁰³ There is accordingly no plausible reason to seize the assets of those who are not “suspected of having committed a crime” to achieve Colombia’s stated purpose of “investigating and later sanctioning” alleged criminals. Colombia has never bothered to explain the fundamental cognitive dissonance its irrational position creates.
65. As Claimants pointed out in their Application, Colombia’s stated goal to prosecute criminal persons and organizations could not be achieved by taking the property of

¹⁰⁰ Exhibit C-126, Attorney General’s Office, “Fiscalía ocupa con fines de extinción de dominio bienes valuados en un billón de pesos, que pertenecerían al denominado capo oculto del narcotráfico”, 14 February 2018 (<https://www.fiscalia.gov.co/colombia/seccionales/fiscalia-ocupa-con-fines-de-extincion-de-dominio-bienes-avaluados-en-un-billon-de-pesos-que-pertenecerian-al-denominado-capo-oculto-del-narcotrafico/>), accessed on 13 February 2022, 14 February 2018.

¹⁰¹ Colombia’s Letter, p. 8.

¹⁰² Rejoinder, ¶ 57.

¹⁰³ Colombia’s Letter, p. 23.

Claimants who have no connection to organized crime at all.¹⁰⁴ The only rational way to achieve Colombia's stated objectives—which is also incidentally what the Asset Forfeiture Law calls for—would have been to seize the assets and disgorge the proceeds of those actually implicated in the crime.¹⁰⁵ Colombia did not even attempt to do so. Neither the Essential Security Provision, nor the Asset Forfeiture Law, excuses Colombia for rendering Claimants collateral damage in their supposed efforts to fight organized crime while leaving those who are the apparent subject of investigation and possible sanction untouched.

66. Colombia, in its Letter:(i) rehashes its argument that Mr. Seda was not a good faith third party because he engaged in allegedly negligent dealings with [REDACTED];¹⁰⁶ and (ii) appears to argue that [REDACTED] [REDACTED] that somehow justifies the taking of Claimants' investment.¹⁰⁷ However, neither of these reasons to establish a plausible connection between the Asset Forfeiture Proceedings and Colombia's essential security interest (let alone as an excuse to liability under the Treaty).
67. With respect to Mr. Seda's diligence, Claimants have set out in great detail the numerous steps Mr. Seda, Newport, and their fiduciary, Corficolombiana, took to ensure that the title to the Meritage Property was free from criminal activity, and will not repeat them here.¹⁰⁸ What is notable is that Colombia invokes (as of yet unproven) connections between [REDACTED] [REDACTED] as a reason for casting doubt on Mr. Seda's and Newport's level of due diligence. At the same time, Colombia acknowledges that the relevant officials in the Asset Forfeiture Unit of the Attorney General's Office itself did not

¹⁰⁴ Claimants' Application, p. 12.

¹⁰⁵ Martínez2 Report, ¶¶ 34-35 (“*even in the event the asset forfeiture was determined to be appropriate [..] the correct course of action would have been to attach the payment rights*”; and “[o]nce it had been confirmed that Newport was a good faith buyer, all the Attorney General's Office had to do was to look for the next person in the chain of title.”)

¹⁰⁶ Colombia's Letter, p. 22.

¹⁰⁷ Colombia's Letter, p. 23.

¹⁰⁸ See, e.g., Memorial, ¶¶ 62-73; Reply, ¶¶ 13-18.

uncover this evidence until well after initiating the Asset Forfeiture Proceedings.¹⁰⁹ Accordingly, there is no plausible basis for taking Claimants' investment away because Mr. Seda and Newport did not discover an alleged criminal taint that Colombia itself, with the powers and investigative apparatus of the State, apparently did not discover until much later, and is still in the process of investigating.

68. With respect to the investigations against individuals appearing in the Meritage Property's chain of title, this is a non-sequitur and is not supportive of a connection. Neither investigation report to which Colombia points required the seizure of the Meritage Property.

█ [REDACTED]

█ [REDACTED]

69. To be sure, Claimants are not asking Colombia to stop investigating individuals and organizations it suspects of being involved in criminal activity. Claimants are simply pointing out that there is no reason for Colombia to have taken away Claimants' investment in order to do so. It has always been Claimants' position that Colombia

¹⁰⁹ See Rejoinder, Part III.C.2. [REDACTED]
[REDACTED] See also Caro 2 WS, ¶ 4.

110 [REDACTED]

111 [REDACTED]

should go after the alleged criminals and their proceeds of crime by properly invoking and directing the Asset Forfeiture Law at them, not Claimants, who Colombia has repeatedly recognized as having no criminal connections. And, in any event, Claimants are merely asking that Colombia compensate Claimants for wrongly taking their investment.

70. Initiation of the Asset Forfeiture Proceedings was therefore unconnected to opening criminal investigations against individuals that Colombia suspects are involved in drug trafficking and/or organized crime. It is likewise unconnected to “later sanctioning” those individuals. In similar circumstances, a WTO Panel held that Saudi Arabia breached an intellectual property treaty by failing to criminally prosecute an entity in its jurisdiction, *beoutQ*, that was broadcasting pirated content that belonged to a Qatari entity. Saudi Arabia claimed that it was in its essential security interest to protect against terrorism and thus it was entitled to “*end[] or prevent[] any form of interaction with Qatari nationals*” as a protection against terrorism.¹¹² The WTO Panel, however, held that it was “*unable to discern any basis for concluding that the application of criminal procedures or penalties to beoutQ [a Saudi entity] would require any entity in Saudi Arabia to engage in any form of interaction with [. . .] any other Qatari national.*”¹¹³ Accordingly, “*the Saudi authorities’ non-application of criminal procedures and penalties [. . .] is so remote from, or unrelated to, the ‘emergency in international relations’ [i.e., cessation of relations with Qatar] as to make it implausible that Saudi Arabia implemented these measures for the protection of its ‘essential security interests’ [i.e., protection against terrorism].*”¹¹⁴
71. **Second**, the concocted nature of the New Essential Security Defense is patent in the shifting rationales offered *post-hoc* by Colombia to fabricate a connection. In its Rejoinder, Colombia contended that the connection between the Asset Forfeiture Proceedings and its essential security could be found in “*sensitive case files*” obtained on 14 February 2022 which allowed Colombia’s counsel to allegedly appreciate for the

¹¹² **Exhibit RL-201**, *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, WTO, WT/DS567/R, 16 June 2020, ¶¶ 7.279-93.

¹¹³ **Exhibit RL-201**, *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, WTO, WT/DS567/R, 16 June 2020, ¶ 7.289.

¹¹⁴ **Exhibit RL-201**, *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, WTO, WT/DS567/R, 16 June 2020, ¶ 7.293.

first time “*the seriousness of the Colombian interests at stake in this dispute, both in terms of criminal organizations and criminal individuals involved.*”¹¹⁵ But as discussed above, [REDACTED]

[REDACTED] after the Asset Forfeiture Proceedings had already commenced.¹¹⁷ Those investigations cannot possibly have established the connection between the Asset Forfeiture Proceedings and the purported essential security interest for which the Proceedings were undertaken in the first place.

72. Left without a sound rationale, Colombia was forced to pivot to assert a wholly new set of “*facts*” that were allegedly unknown to Colombia’s Counsel prior to filing the Counter Memorial.¹¹⁸ However, as explained above, these allegations too are not, in fact, new and were known to both Colombia and Colombia’s Counsel long ago.¹¹⁹ And even if Colombia has indeed come across (as yet unidentified) “*new*” facts, it cannot use those facts *post-hoc* to justify the measures because, under its very own position, it did not know about these facts when it undertook the measures.¹²⁰ As stated above, any other reading would allow the State to arbitrarily invoke Article 22.2(b) on a *post-hoc* basis to release itself from liability at its own discretion. Such a retroactive application of the Provision is patently not in good faith—nor would it satisfy the requirement that the measure was undertaken for protection of an essential security interest at the time—but is precisely what Colombia is attempting here.
73. In this case, the rational measure to protect Colombia’s essential security interest would be to initiate criminal investigations against those individuals suspected of involvement in drug trafficking and/or organized crime and seize their assets and proceeds of crime under the Asset Forfeiture Law. To instead seize the Meritage Property mid-development, causing a significant loss to innocent investors (including Claimants)

¹¹⁵ Rejoinder, ¶ 46.

¹¹⁶ [REDACTED]

¹¹⁷ [REDACTED] See also Claimants’

Application, n. 28.

¹¹⁸ See Colombia’s Letter, pp. 8-9.

¹¹⁹ See *supra* ¶¶ 40-44.

¹²⁰ See *supra* ¶¶ 45-48.

and unit buyers, does nothing to protect Colombia's essential security interest and "is so remote from, or unrelated to [the purported essential security at issue, to] make it implausible that [Colombia] implemented these measures for the protection of its 'essential security interests'."¹²¹

IV. IN THE ALTERNATIVE, THE TPA'S MFN PROTECTION PRECLUDES COLOMBIA FROM EXTINGUISHING ITS LIABILITY WITH THE NEW ESSENTIAL SECURITY DEFENSE

74. Article 10.4 of the TPA guarantees that Claimants and their investments will be treated no less favorably than investors and investments from third States. Article 10.4 states:

"1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

75. MFN protection allows "every party to the treaty [to] demand from any other party to accord to it treatment equal to that extended to any third State, irrespective of whether that third State is a party to the treaty or not."¹²² Thus, by application of Article 10.4, Claimants are entitled to the same level of protection granted to foreign investors and investments under other Colombian investment treaties. Tribunals have held that MFN provisions such as Article 10.4 can be used to both import more favorable substantive treatment from third treaties.¹²³

¹²¹ See **Exhibit RL-201**, *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, WTO, WT/DS567/R, 16 June 2020, ¶ 7.293.

¹²² **Exhibit CL-208**, INTERNATIONAL LAW COMMISSION, *Draft Articles on most-favoured-nation clauses, with commentaries* (1978), pp. 19-20.

¹²³ See, e.g., **Exhibit CL-080**, *Sergei Paushok, CJSC Golden East Company, and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, ¶ 254 ("[T]he MFN clause of the Treaty allows for the integration into it of the broader provisions contained in the U.S. Mongolia BIT and the Denmark-Mongolia BIT."); **Exhibit CL-035**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 104 (noting the MFN provision may be used to import additional rights into FET provision "that can be construed to be part of the fair and equitable treatment of investors"); **Exhibit CL-067**, *Bayindir Insaat Turizm Ticaret Ve Sanayi*

76. In this case, there is a clear disparity between the treatment granted by Colombia to Swiss investors in its territory vis-à-vis American investors. Pursuant to *The Agreement Between The Republic of Colombia And The Swiss Confederation On The Promotion And Reciprocal Protection of Investments* (“**Colombia-Swiss BIT**”), Swiss investors and their investments are entitled to similar treaty protections as available here,¹²⁴ and Colombia does not have discretion to evade such protections on the basis of essential security interests.¹²⁵ In contrast, if the Tribunal concludes that Colombia is entitled to invoke Article 22.2 at any time, for any reason, without review, in order to eliminate justiciability or absolve itself of liability, then American investors are subject to less favorable treatment than Swiss investors.¹²⁶ In such circumstances, American investors can be left devoid of all treaty protections at Colombia’s discretion, whereas Swiss investors cannot be subject to the same vagaries. In order to harmonize the standard of treatment between Swiss and American investors, the TPA’s MFN protection then operates to preclude the application of Article 22.2 in this Arbitration (assuming Colombia’s interpretation of it, which is incorrect).

* * *

A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 155-57; **Exhibit CL-060**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 575; **Exhibit CL-098**, *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, ¶¶ 551-52, 554-55.

¹²⁴ See **Exhibit CL-069**, Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (signed 17 May 2006; entry into force 6 October 2009), arts. 4(2) (fair and equitable treatment protection), 6 (protection from expropriation).

¹²⁵ See generally **Exhibit CL-069**, Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (signed 17 May 2006; entry into force 6 October 2009). See also **Exhibit CL-231**, Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration*, in INVESTMENT TREATY LAW: CURRENT ISSUES III (2009), 270 (“In that sense, access to arbitration is part of the rights granted under the treaty and there is hardly any difference in nature between the right to arbitrate one’s dispute and the right to be treated fairly and without discrimination. In effect, the protection accorded in investment treaties would not be of great value without the right to arbitrate one’s dispute before a neutral judge.”).

¹²⁶ For the avoidance of doubt, nothing in the text of the footnote to Article 10.4 can be construed to limit application of the MFN provision to Article 22.2. The footnote states: “For greater certainty, treatment ‘with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments’ referred to in paragraphs 1 and 2 of Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements.” However, as discussed above, Article 22.2 creates a general exception to the substantive obligations owed under the TPA, and is unconnected to any specific dispute resolution mechanism. Accordingly, the footnote to Article 10.4 bears no relevance in this circumstance. See **Exhibit CL-221**, *Le Chèque Déjeuner and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, ¶ 159 (“[t]o be capable of overturning the fundamental, non-discriminatory object and purpose of an MFN clause, the language of any limitation must have clearly and unambiguously in contemplation a restriction on the operation of the MFN clause itself”).

77. For the foregoing reasons, Claimants urge the Tribunal to dismiss Colombia's improper, abusive, meritless, and last-ditch effort to deprive the Tribunal of jurisdiction and to escape liability for its wrongful actions. The Essential Security Provision by its clear terms cannot deprive this Tribunal of jurisdiction, and does not prevent the Tribunal from awarding Claimants compensation for Colombia's unlawful conduct. Even if the Essential Security Provision could serve as a defense against liability, it has been brought out of time and its invocation is not in good faith.

V. REQUEST FOR RELIEF

78. In light of the above, Claimants respectfully request this Tribunal to:

- (a) **REJECT** the new items for relief at paragraphs 974(a)-(b) added by Respondent in their unauthorized errata to the Rejoinder; and
- (b) **ORDER** Respondent to pay all of the costs incurred in preparing Claimants' submissions on the New Defense.

Dated: 18 April 2022

Respectfully submitted for and on behalf of
Claimants

Gibson Dunn & Crutcher LLP

Gibson, Dunn & Crutcher LLP