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' REBUTTAL ON ESSENTIAL SECURITY

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13 September 2022

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1. Claimants submit this Rebuttal on Essential Security ("**Essential Security Rebuttal**") in response to the arguments raised by Colombia in its Post-Hearing Brief and Reply on New Evidence ("**Colombia's PHB**"), pursuant to Procedural Order No. 11, dated 15 July 2022.[1]

I. INTRODUCTION

2. Colombia has repeatedly confirmed that it did not initiate the Asset Forfeiture Proceedings for the "*essential security interest*" it now identifies as the basis for its invocation of Article 22.2(b). After some meandering,[2] [redacted]. However, [redacted] Indeed, this would have been impossible, because [redacted] At that point in time, in preparation for this Arbitration, [redacted] Accordingly, Colombia did not "*apply*[] *measures*" for any identified essential security interest, and Article

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1 For ease of reference, the Claimants adopt the same definitions contained in their Memorial dated 15 June 2020 (the "**Memorial**"), Reply dated 19 September 2021 (the "**Reply**"), and Post-Hearing Brief dated 21 July 2022 ("**Claimants' PHB**"), including the Table of Select Abbreviations and Defined Terms submitted therewith.

2 *See infra* ¶¶ 34-36.

3 [redacted]

22.2(b) of the TPA simply does not apply here. Colombia's PHB does not even attempt to address this issue, which is fatal to its attempt to shield itself from liability under Article 22.2(b).

3. Further, even if Colombia **had** undertaken the measures at issue for an identified essential security interest at the time, this still would not divest the Tribunal of jurisdiction or absolve Colombia of liability and its obligation to compensate Claimants. Despite having had multiple opportunities to brief this issue, Colombia studiously avoids dealing with the text of the provision, and instead wastes ink arguing about whether the provision is "*self judging*" (even though the question of whether Colombia can define its own essential security interests is not the relevant issue here).

4. Moreover, Colombia has patently invoked the defense in bad faith, and thus cannot use it as a shield. In order to invoke the Article 22.2(b) in good faith, there must be, at a minimum, a rational connection between the measures and Colombia's essential security interest. However, as Claimants have demonstrated, no such connection can exist where the essential security interest Colombia has now identified was not even known to it at the time it undertook the measures. The measures also have no rational connection to Colombia's goal of combating narcotrafficking where Colombia has not seized any of the proceeds of crimes captured by the alleged criminals and instead pursued the investments of Claimants, who, notwithstanding Colombia's salacious innuendo, have never been implicated in any criminal activity.

5. [redacted]

[redacted]

6. This Rebuttal proceeds in five parts. **First**, Claimants establish that, on Colombia's own position, it did not undertake the breaching measures for what it considers to be an essential security interest; thus, the defense does not apply. **Second**, Claimants address Colombia's arguments regarding the impact of Colombia's invocation of Article 22.2(b) (if it did apply here, which it does not). **Third**, Claimants demonstrate that Colombia has invoked the defense in bad faith. **Fourth**, Claimants point out that Colombia no longer argues that its invocation of Article 22.2(b) divests this Tribunal of jurisdiction, and thus the invocation of its defense is time-barred. Finally, **fifth**, Claimants establish that, in any event, they are entitled to most favoured nation ("**MFN**") protection with respect to Article 22.2(b).

II. ARTICLE 22.2(B) IS INAPPLICABLE, AS COLOMBIA HAS CONFIRMED THAT IT DID NOT ADOPT THE BREACHING MEASURES FOR AN ESSENTIAL SECURITY INTEREST

7. Colombia has expressly acknowledged, on multiple occasions, that it did not initiate the Asset Forfeiture Proceedings on the basis of an essential security interest. Indeed, according to Colombia, it was only able to identify its alleged essential security interest based on information it received on the same date it submitted its Rejoinder, 14 February 2022.[7] [redacted]

[redacted]

6 [redacted]

7 *See* Rejoinder, ¶¶ 45-46.

8 *See* Colombia's Opening, slide 123.

[redacted]

8. [redacted] This is why, according to Colombia, it did not raise the Essential Security Defense until its Rejoinder. As Colombia "*emphasises*" in its PHB, "*it was not in a position to invoke Article 22.2(b) prior to its Rejoinder.*"[14] In other words, as Colombia has repeatedly confirmed, the contemporaneous evidence available at the time the Asset Forfeiture Proceedings were initiated was itself insufficient to establish an essential security interest;[15] [redacted]

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9 [redacted]

10 [redacted]

11 Respondent's Comments on Claimants' Application, 7 September 2022, p. 8.

12 [redacted]

13 *See* Rejoinder, ¶ 46; Colombia's Reply on Essential Security, 18 March 2022, p. 4 [redacted] **Day 1 Tr.** 284:19-285:1 ("*You have to give effect to what Colombia says is Essential Security interest because at the time when it was raised, it was raised in circumstances where there were new elements, new circumstances. . .*").

14 Colombia's PHB, ¶ 98.

15 [redacted]

[redacted] There is no question then that Colombia's seizure of Claimants' investment was completely untethered from what Colombia now identifies as an essential security interest. Rather, in the words of Respondent's counsel: "*the facts* [have] *evolve*[d]".[17] And Respondent's justification for its measures has likewise continued to evolve.

9. This is fatal to Colombia's invocation of Article 22.2(b), which provides that Colombia cannot be "*preclude*[d] [. . .] ***from applying measures that it considers necessary*** *for* [. . .] *the protection of its own essential security interests*." The provision is drafted in the present tense—Colombia must consider the measures necessary for its essential security **when** it applies them.[18] Thus, for Article 22.2(b) to apply, the State must have identified the essential security interest at issue at the time it adopted the measure in question, because it must have considered the measure "*necessary*" to meet that interest. Otherwise, it cannot possibly be taking measures it "*considers*" necessary for the protection of its essential security.[19] This point is underscored by the fact that in all cases where an essential security exception has been found to apply, the State's identification of its essential security interest has preceded whatever measures were taken in protection of that interest.[20]

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16 [redacted]

17 [redacted]

18 **Exhibit CL-230**, US-Colombia Trade Promotion Agreement (all chapters) (signed 22 November 2006, entry into force 15 May 2012) ("**TPA**"), art. 2.2 (emphasis added) ("*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.*")

19 *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*" to be 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)). *See also* Claimants' Essential Security Submission, ¶¶ 46-47.

20 *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, which constituted the essential security interest); **Exhibit RL-201**, *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel,

10. Here, however, it is undisputed that Colombia undertook the measures in question between **2016 and 2017**. And on its own case, Colombia only identified the essential security interest it relies on to justify its measures in **2022**. Colombia could not therefore have adopted the measures for the essential security interest it now seeks to rely on, and as a result, Article 22.2(b) is inapplicable.

11. Colombia does not even attempt to mount a response to this fatal flaw in its PHB. Instead, Colombia argues that "*the provision* [Article 22.2(b)] *does not establish a time limit for the invocation of the Essential Security Exception.*"[21] This misses the point by a mile. While Claimants have previously argued (and maintain) that Colombia's Essential Security Defense is time-barred under the applicable procedural rules governing this Arbitration,[22] Claimants' argument here is different (and it appears unrefuted): that Colombia did not initiate (and could not have initiated) the Asset Forfeiture Proceedings for an alleged essential security reason because, on its own case, it only identified that reason a few months ago.

12. As Article 22.2(b) is inapplicable to the measures at issue in these proceedings, the Tribunal's analysis of the Essential Security Defense can stop here. Nevertheless, for completeness, Claimants address in the remaining sections Colombia's arguments about the legal effect of invoking Article 22.2(b) in circumstances where it does apply (which is not the case here).

III. COLOMBIA'S INVOCATION OF ARTICLE 22.2(B) DOES NOT IMPACT THIS TRIBUNAL'S JURISDICTION OR EXTINGUISH COLOMBIA'S LIABILITY

13. There is no dispute between the Parties that the TPA, including Article 22.2(b), must be interpreted pursuant to VCLT Article 31(1).[23] Yet Colombia's essential security submissions have studiously avoided addressing the plain text of Article 22.2(b) to elicit its ordinary meaning. Instead, Colombia attempts to rely, in vain, on *travaux* that do not, in fact, assist the State's position. Further, Colombia has affirmed that whether the United States' submissions

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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, which constituted the essential security interest). Colombia attempts to distinguish these cases on the basis that in those cases GATT Article XXII(b)(iii) requires the measures to be taken in the time of war or other specified circumstances. But there is no dispute here about when the measures were taken (from 2016-2017) but rather whether those measures were taken for an essential security interest that arose at that time. In all cases where the exception has applied, the measure was taken in response to an identified essential security interest at the time, not a interest manufactured post hoc, which is what Colombia has done here.

21 Colombia's PHB, ¶ 90.

22 *See* Claimants Application to Strike, 7 March 2022, ¶¶ 3, 12-26.

23 Rejoinder, ¶¶ 26, 506; Colombia's Reply on Essential Security, 18 March 2022, pp. 16, 18; Claimants' Essential Security Submission, ¶ 7; Colombia's PHB, ¶ 27.

constitute "*subsequent practice*" under VCLT Article 31(3) is irrelevant here, and in any event cannot modify the provision's ordinary meaning. Below, Claimants briefly summarize the proper reading of Article 22.2(b) under Article 31 of the VCLT, followed by a discussion of Colombia's arguments on the *travaux*.

III.A. The Ordinary Meaning of Article 22.2(b)

14. There is also no dispute between the Parties that the starting point for the interpretation of a provision under VCLT Article 31(1) is the "*ordinary meaning*" of the provision.[24]

15. As Claimants have repeatedly established, the ordinary meaning of Article 22.2(b) is that the Tribunal cannot "*preclude*" Colombia from taking measures it considers necessary to protect its essential security interests.[25] Claimants, however, are not asking the Tribunal for restitutive relief. Thus, Colombia's invocation does not apply.[26] As Claimants have set out in detail, multiple authoritative English language dictionaries define "*preclude*" as " [t]*o prevent* [something] *from taking place*"[27] or to "*make it impossible*."[28] As the *Eco Oro* tribunal confirmed (while interpreting a similar term, "*prevent*")[29] this means that while "*the State cannot be prohibited from adopting or enforcing*" a measure pursuant to the exception, this did not mean that "*in such circumstances payment of compensation is not required.*"[30]

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[24] *See* Colombia's PHB, ¶ 28.

[25] Article 22.2(b) provides that "[n]*othing in this Agreement shall be construed* [. . .] *to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to* [. . .] *the protection of its own essential security interests*." A footnote clarifies that "[f]*or greater certainty, if a Party invokes Article 22.2* [. . .] *the tribunal or panel hearing the matter shall find that the exception applies*."

[26] *See* Claimants' Essential Security Submission, ¶¶ 2, 9, 15, 17; **Day 1 Tr.** 133:5-138:5; Claimants' PHB, ¶¶ 300-303 ("*Claimants do not dispute that under Article 22.2 Colombia may take the measures it considers necessary, and the Tribunal cannot* 'preclude' *it from doing so. Rather, it is Claimants' position that Colombia's invocation of this Article, on its plain reading, does not automatically exempt it from liability.*").

[27] **Exhibit CL-212**, Oxford English Dictionary (3rd ed. 2007), Definition of "*preclude*," 2007, p. 2.

[28] **Exhibit CL-232**, Cambridge English Dictionary, Definition of "*preclude*," *available at* https://dictionary.cambridge.org/us/dictionary/english/preclude, last accessed 15 April 2022, p. 1 ("*to prevent something or make it impossible*").

[29] In *Eco Oro*, the Tribunal was interpreting art. 2201(3) of the Canada-Colombia Free Trade Agreement, which provided "*nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary* [. . .] *to protect human, animal or plant life or health*." **Exhibit CL-217**, Canada-Colombia Free Trade Agreement, Chapter 22 (signed 21 November 2008, entry into force 15 August 2011), art. 2201(3).

[30] **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. Colombia attempts, unsuccessfully, to distinguish *Eco Oro* from this case. Colombia's PHB, ¶¶ 47-48, 52, n. 60. Colombia again misses the mark completely. Claimants have cited to *Eco Oro* because it (correctly) addresses the meaning and significance of the word "*prevent*", a synonym of "*preclude*", in an exceptions clause. That there are other differences between the exceptions clauses, and that there might be differences in the factual

16. Despite having briefed its arguments no fewer than three times, and despite now acknowledging that "*the terms of Article 22.2(b) are unambiguous*",[31] Colombia has failed to provide any interpretation of the ordinary meaning of the text at issue. Neither has Colombia attempted to meaningfully challenge Claimants' explanation of the provision's ordinary meaning. Instead, Colombia has simply asserted, without analysis, that the meaning of the provision is "*obvious*"[32] or "*evident*"[33] and then sought to rely on supplementary means of interpretation, such as the TPA's *travaux préparatoires*.[34]

17. Colombia has fastidiously avoided addressing the ordinary meaning of Article 22.2(b) because it simply cannot interpret the "*unambiguous*" provision in a manner contrary to Claimants' submissions. Instead, Colombia harps on an issue that is not relevant here: whether the provision is "*self judging*."[35] But, as Claimants made clear in their PHB,[36] the issue here is not whether Colombia is allowed to determine for itself (or "*self judge*") what essential security measures it considers necessary (pursuant to an obligation to invoke the provision in good faith, as discussed further below).[37] Rather, the question is this: once Colombia undertakes a measure for an essential security interest, what is the consequence of that invocation? The text provides a clear answer. The consequence is that the Tribunal cannot "*preclude*" Colombia from taking the measures, and nothing more. Nothing in the text deprives the Tribunal of jurisdiction (quite

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circumstances of the cases, bears no relevance to the textual interpretation of the similar provisions being compared. *Cf.* **Exhibit CL-217**, Canada-Colombia Free Trade Agreement (signed 21 November 2008, entry into force 15 August 2011), art. 2201(3) ("*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*") *with* **Exhibit CL-230**, TPA, Chapter 21, art. 22.2(b) ("*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.*").

31 Colombia's PHB, ¶ 56.

32 **Day 1 Tr.** 244:20 (Colombia's Opening).

33 Colombia's PHB, ¶ 28 (where Colombia simply asserts, without explanation, that "*it is evident that the provision expressly carves out from the Tribunal's jurisdiction all measures that a Contracting Party considers necessary for the protection of its own essential security interests.*")

34 *See e.g.*, Colombia's PHB, ¶¶ 27-37.

35 *See* Colombia's PHB, ¶¶ 29-30.

36 *See* Claimants' PHB, ¶ 303. Colombia appears to agree that this issue is not in dispute. *See* Colombia's PHB, ¶ 67 ("*The Parties agree that … the determination of the necessity of the measures to be adopted and the definition of a State's Essential Security interests, are not subject to the Tribunal's review.*")

37 *See infra* Section IV. *See also* Claimants' Essential Security Submission, Section III; **Exhibit CD-1**, Claimant's Opening Statement, slides 202-204; Claimants' PHB, Section VI.D.

the opposite, as Arbitrator Perezcano pointed out in the Hearing)[38] or extinguishes Colombia's liability (and its corresponding obligation to compensate Claimants if found liable).[39]

III.B. The Object And Purpose of the TPA

18. The Parties agree that one of the overriding objectives of the TPA, as expressed in the preamble, was to "*promote broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives*."[40] As Claimants set out in their PHB, the Claimants' investment was precisely the type of "*alternative to drug-crop production*" that the TPA was designed to promote and protect, as Claimants' investments in the hospitality and real estate industries rejuvenated Medellín's economy by stimulating local and foreign tourism as well as generating opportunities in related industries such as construction.[41] Indeed, approximately 700 people were working on construction of the Meritage Project alone at the time the Meritage Project was seized. Hundreds of others—in fact, likely over a thousand—would have been employed at the Meritage, the Luxé by Charlee and the other projects in which Mr. Seda and the Claimants had invested. Each of these projects would also have housed hundreds of homes and local businesses.[42] Colombia does not dispute these facts, and does not respond to them in its PHB.

19. Colombia emphasizes that one of the TPA's major objectives was to combat drug trafficking. But again, despite having had multiple opportunities to brief this issue, Colombia has failed to provide any plausible link between the seizure of Claimants' investment and Colombia's fight against drugs.[43] Quite the opposite: as Mr. Seda's testified, Claimants' investments sought to

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38 *See* **Day 1 Tr.** 278:8-16 ("*Let me stop you there and put it point blank. The footnote* [to Article 22.2(b)] *says 'the Tribunal or panel hearing the matter shall find.' That to me suggests that we have a say in what the Tribunal shall find. It doesn't say the Tribunal shall accept whatever the Party says. It says the Tribunal shall make a finding, so that's point blank. It seems to be that we have a say, under the footnote.*"). Colombia argues in its PHB that because the footnote contemplates that the Tribunal "*shall find that the exception applies,*" this leaves the Tribunal "*with no power to adjudicate the dispute.*" Colombia's PHB, ¶ 36. But again Colombia is adding meaning to the provision that does not exist in its text. The footnote expressly contemplates that the Tribunal "*shall*" make a finding that "*the exception applies.*" Thus, as a matter of plain logic, the Tribunal must have jurisdiction to make that finding. The question then becomes what the *content* of that finding, i.e. that "*the exception applies*", will be—which, as Claimants have established, is that the Tribunal cannot "*preclude*" Colombia from undertaking an essential security measure.

39 *See* Claimants' Essential Security Submission, Section I; **Exhibit CD-1**, Claimant's Opening Statement, slides 193-195; Claimants' PHB, Section VI.A.

40 Claimants' PHB, ¶ 301(c); Colombia's PHB, ¶ 42, n. 36; **Day 1 Tr.**: 247:5-8.

41 *See* Claimants' PHB, ¶¶ 34(b), 301(c); **Day 1 Tr.** 445:8-9 (Seda Cross).

42 *See* Seda 1 WS, ¶¶ 25, 31-32, 35-36; Seda 2 WS, ¶ 67.

43 *See infra* ¶¶ 39, 47. [redacted]

be "*part of … rebuilding of a country*" that had entered into instruments such as the TPA to encourage economic growth through foreign investments in the aftermath of its violent history.[44] This express purpose could not possibly be achieved by converting Article 22.2(b) into a get-out-of-jail-free card to be used at Colombia's whim to avoid liability.

20. [redacted] But this is a *non sequitur*. Colombia's investigative and sanctioning powers have in no way been compromised by this Arbitration, [redacted] Recognizing that Colombia has violated its obligations under the TPA and ordering compensation will in no way preclude Colombia from targeting and sanctioning any criminals, and indeed Colombia does not even appear to allege as much.

III.C. The Context Of Article 22.2(b) Of The TPA

21. The ordinary meaning of Article 22.2(b) is supported by its "*context*".[47] The provision itself says nothing about jurisdiction or liability, and rather, is designed to ensure that the State is allowed to continue applying the measures in question.[48] Where the TPA restricts jurisdiction, admissibility, or liability, it does so in express terms.[49] Likewise, treaties that exempt States

[redacted]

44 **Day 1 Tr.** 445:8-9 (Seda Cross).

45 [redacted]

46 [redacted]

47 *See* Claimants' Essential Security Submission, ¶¶ 12-26; Claimants' PHB, ¶¶ 300-303.

48 *See* Claimants' Essential Security Submission, ¶¶ 13-17.

49 *See* Claimants' Essential Security Submission, ¶¶ 18-20 (referring to Article 10.18.1 ("[n]*o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach*"); Annex 10-E (the "*claimant may not submit*" certain claims "*to arbitration until one year after the events that gave rise to the claim*"); Article 10.18.2 ("[n]*o claim may be submitted to arbitration under this Section unless*" the claimant "*consents in writing*" and submits a written waiver "*of any right to initiate or continue before any administrative tribunal or court*"); Footnote 2 to Article 10.4 (providing that the MFN protection in the TPA "*does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreement*"); Article 10.7.5 (noting that the expropriation "*Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights*"); Annex 10-B ("*non-*

from liability for invoking essential security measures do so expressly.[50] Colombia did not respond to any of these arguments during the Hearing, nor did it attempt to do so in its PHB.

22. Colombia points out that Article 22.2(b) "*applies to all the TPA provisions*", including the arbitration agreement, and that Article 10.2 of the TPA provides that Article 22.2(b) prevails over the Dispute Settlement Chapter.[51] But neither argument is relevant here because there is no conflict between Article 22.2(b) and either the arbitration agreement or the Dispute Settlement Chapter. Indeed, it is Colombia's extra-textual position, rather than the plain text of Article 22.2(b), that would, in Colombia's view, create a conflict, thus creating an additional reason to avoid Colombia's reading.[52]

23. Accordingly, the context of Article 22.2(b) weighs in favour of Claimants' position, which Colombia does not refute, and Colombia's arguments regarding context do not apply here.

III.D. The *Travaux* Do Not Assist Colombia

24. Colombia agrees that Article 22.2(b) is "*unambiguous*"[53] yet its arguments on the meaning of the provision rest heavily on the *travaux*.[54] Colombia does not appear to dispute that the *travaux* are a "*supplementary*" means of interpretation, and that accordingly, if the text is indeed—as Colombia puts it—"*unambiguous*," there is no need to look at the *travaux*.[55]

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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.")).

50 *See* Claimants' Essential Security Submission, ¶¶ 21-22 (referring to Annex 5 to the India-Singapore Comprehensive Economic Cooperation Agreement ("[W]*here the disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a security exception as set out in Article 6.12 of the Agreement, any discussion of the disputing Party taken on such security consideration shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal*") and Article 12 of the Protocol for Cooperation and Facilitation for Investments Intra-MERCOSUR ("*1. Nothing in this Protocol shall be interpreted to preclude a Member State from adopting or maintaining measures aimed at preserving public order, the fulfillment of obligations concerning the maintenance or restoration of international peace or security, the protection of its own essential interests, or the application of its criminal laws. 2. The dispute settlement mechanisms set forth by this Protocol shall not be applicable to measures a Member State adopts pursuant to paragraph 1 of this Article, or to decisions made pursuant to its 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.*")).

51 Colombia's PHB, ¶¶ 39-41.

52 *See* Claimants' Essential Security Submission,¶ 26.

53 Colombia's PHB, ¶ 56.

54 *See* Colombia's PHB, ¶¶ 31-32, 40, 55-59.

55 *See* **Exhibit CL-187**, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (open for signature 23 May 1969, entry into force 27 January 1980) ("**VCLT**"), art. 32. *See also* **Exhibit CL-246**, R. Gardiner,

25. Colombia contends that tribunals regularly review the *travaux* to "*confirm*[] *the interpretation of a provision*" even if it is unambiguous.[56] But again, Colombia misses the point. While the *travaux* might supplement or confirm the reading of an ambiguous provision, it may not modify or amend the meaning of an "*unambiguous*" one. As the *Hulley* tribunal (cited by Colombia for this proposition[57]) found:[58]

> [T]*he Tribunal recalls that, according to the VCLT's principles of treaty interpretation, Article 32 provides supplementary means of interpretation. Under Article 32 of the VCLT, recourse may be had to the* travaux préparatoires*:*
>
> > in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.
>
> *The Tribunal does not consider that its interpretation of Article 45 resulting from the application of the general rule of interpretation leads to a result which is manifestly absurd or unreasonable. Nor has the Tribunal found that its interpretation of Article 45 according to Article 31 of the VCLT "leaves the meaning ambiguous or obscure"; quite the contrary. The Tribunal recognizes that, in practice, tribunals and other treaty interpreters may consider the* travaux préparatoires *whenever they are pleaded, whether or not the text is ambiguous or obscure or leads to a manifestly absurd or unreasonable result. But, in the present case, the Tribunal concludes that the plain and ordinary meaning to be given to these two treaty provisions, read together, demonstrates that there is no linkage between them. It is thus the terms of the Treaty as finally adopted that govern.*

26. Here, the ordinary meaning of the provision read in lights of its context, object and purpose does not lead to a "*manifestly absurd or unreasonable*" result (nor does Colombia argue as

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Treaty Interpretation, Part II Interpretation Applying the Vienna Convention on the Law of Treaties, The General Rule: (1) The Treaty, its Terms, and their Ordinary Meaning, OPIL, 1 June 2015, p. 18 ("*If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.*"); **Exhibit RL-242**, R. Jennings, A. Watts, *Oppenheim's International Law*, Vol. 1 Peace, Part 4 International Transactions, Chapter 14 Treaties, Interpretation of Treaties, OPIL, 19 June 2008, p. 5 ("*The application of the basic rule of interpretation laid down in Article 31 of the Vienna Convention will usually establish a clear and reasonable meaning: if such is the case, there is no occasion to have recourse to other means of interpretation.*")

[56] Colombia's PHB, ¶ 56.

[57] *See* Colombia's PHB, ¶ 56, fn. 72.

[58] **Exhibit CL-146**, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009, ¶¶ 267-268 (emphasis added).

much). Rather, allowing a State to invoke the exception at any stage as a get-out-of-jail-free card, even though nothing on the face of the exception provides as much, would be "*manifestly absurd*" and "*unreasonable.*" In any event, Colombia acknowledges that the text is "*unambiguous*". Accordingly, like the *Hulley* tribunal, the Tribunal here has no need to scour through more than 2,000 pages of *travaux* merely to "*confirm*" the meaning of Article 22.2(b).

27. Further, even if the *travaux* were relevant here, it would not assist Colombia. As Claimants pointed out in their PHB, nowhere in the *travaux* do TPA parties authoritatively declare that Article 22.2(b), as drafted in its final form, would allow the invoking State to absolve itself of liability and/or deprive the Tribunal of jurisdiction.[59] [redacted]

28. [redacted]

[59] *See* Claimants' PHB, ¶ 308.

[60] [redacted]

[61] [redacted]

[62] [redacted]

[redacted]

29. But even setting aside any qualms about the source and authoritativeness of the statements, they do nothing to advance the issue in dispute here. The references to which Colombia points,[64] in Colombia's words, "*confirm*[] *the self-judging nature of Article 22.2(b)*".[65] Yet as Claimants have explained repeatedly, whether the provision allows Colombia to "*self-judge*" which measures are necessary for the protection of its essential security interest is not at issue here.[66] What is at issue is whether (i) Colombia adopted the measures in question in order to protect an essential security interest **at the time the measures were adopted**; and (ii) Colombia's invocation of an essential security defense automatically divests this Tribunal of jurisdiction and rids Colombia of its liability. With respect to the former, Colombia admits it had not identified the essential security interest it now advances at the time of the measures. With respect to the latter, the provision's text makes clear that Article 22.2(b) does not divest this Tribunal of jurisdiction or exempt Colombia from liability, and Colombia cannot point to anywhere in the *travaux* indicating otherwise.

III.E. There Is No Subsequent Agreement On Article 22.2(b)

30. During the Hearing, Colombia appeared to argue that the U.S. submissions in the context of this Arbitration constituted a subsequent agreement under VLCT 31(3).[67] In their PHB,

[redacted]

63 *See* **Exhibit CL-244**, Ursula Kriebaum, Rudolf Dolzer and Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (Oxford University Press, 3d ed, 2022), pdf pp. 4-5 ("*The drafting history of the ICSID Convention is well-documented, readily available, and easily accessible through an analytical index. As a consequence, ICSID tribunals frequently resort to its* travaux préparatoires. *By contrast, the negotiation history of BITs is typically not or only poorly documented. . . 'the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation.'*") (quoting **Exhibit CL-040**, *Methanex Corporation v. United States*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, ¶ 22). *See also* **Exhibit CL-243**, INTERNATIONAL LAW COMMISSION, *Draft Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries* (2018), p. 67 ("*The 'presumed intention' is thus not a separately identifiable original will, and the* travaux préparatoires *are not the primary basis for determining the presumed intention of the parties, but they are only, as article 32 indicates, a supplementary means of interpretation.*").

64 *See* Colombia's PHB, ¶¶ 57-59.

65 Colombia's PHB, ¶ 60.

66 *See supra* ¶ 17; Claimants' PHB, ¶ 303.

67 *See* **Day 2 Tr.** 409:1-412:20.

Claimants explained that submissions made during the pendency of the proceedings could not be considered an "*agreement*," as they are legal arguments being offered in the context of a dispute.[68] Remarkably, in its PHB, Colombia appears to agree, noting that "[A]*rticle 31(3)(c) of the VCLT is irrelevant, as this provision has never been raised in these proceedings by the Respondent or by the United States in its capacity as a Non Disputing Party*."[69] Colombia further agrees that any interpretive declarations offered by either TPA party during the course of the Arbitration can only interpret, and not modify, the terms of the TPA.[70]

31. In light of these apparent admissions, the U.S. submissions are of little assistance to Colombia. To the extent the U.S. submissions subvert the ordinary meaning of Article 22.2(b), Colombia has acknowledged that they are not binding in any manner. Thus the U.S.'s submissions on whether Article 22.2(b) impacts the State's liability are not binding and indeed cannot controvert the ordinary meaning of the provision. In any event, the U.S. did not even suggest that the Tribunal does not have **jurisdiction** over this dispute.[71]

IV. COLOMBIA HAS NOT RAISED THE ESSENTIAL SECURITY DEFENSE IN GOOD FAITH

32. It speaks volumes that Colombia's first line of defense is to altogether eschew its fundamental obligation under international law to invoke Article 22.2(b) in good faith. Colombia argues that Article 22.2(b) "*does not allow, let alone require, the Tribunal to assess whether the measures were adopted in good faith or in an arbitrary and discriminatory manner*."[72] This directly contradicts Colombia's own position in its Rejoinder.[73] It is also incorrect; Colombia must exercise its discretionary powers "*reasonably and in good faith*" and in a manner that is "*timely and not* [] *arbitrary*."[74] Indeed, the Article 26 of the VCLT mandates that States must

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68 *See* Claimants' PHB, ¶¶ 310-311.

69 Colombia's PHB, ¶ 54.

70 *See* Colombia's PHB, ¶ 54 ("*The Claimants refer to the tribunals' findings in* Magyar v. Hungary *and in* Muszynianka v. Slovakia*, seemingly arguing that* 'an interpretative declaration, as its name indicates, can only interpret the treaty terms; it cannot change their meaning". *This is not disputed*".)

71 *See infra* Section V.

72 Colombia's PHB, ¶ 71.

73 *See* Rejoinder, ¶¶ 43 ("*It is the Respondent's submission that the Tribunal's scope for review of Colombia's invocation of the* [essential security] *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.*"), 55 ("*The Respondent thus enjoys full discretion to define what constitutes its essential security interests, to the extent that such definition is done in good faith.*").

74 **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**, VCLT, 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*

perform their obligations under treaties in good faith.[75] Accordingly, Colombia cannot elide its obligation to invoke Article 22.2(b) in good faith.[76]

33. Colombia asserts that it has raised a defense that could get it off scot-free at the last possible moment, weeks before the Hearing, on the basis of investigations that it reinitiated specifically in response to this Arbitration, in good faith. The facts and circumstances under which Colombia has raised this argument simply do not support Colombia's assertions.

34. Claimants have pointed out two key ways in which Colombia's invocation of the Essential Security Argument defies its good faith obligations.

(a) First, in response to Colombia's initial invocation of this defense in its Rejoinder, Claimants noted that Colombia had simply repurposed its interest in fighting organized crime from being a "*legitimate public welfare objective*" to being an "*essential security interest*" as the basis on which Colombia appeared to be staking its essential security argument (at least at that time) had been known to Colombia since the time it initiated the Asset Forfeiture Proceedings, yet it had failed to raise this defense until the Rejoinder.[77]

(b) Second, Claimants pointed out that Colombia's alleged essential security interest has no plausible connection to the measures in this dispute because Colombia has not even touched, much less disgorged, the proceeds of transfers of the Meritage Lot pertaining to [redacted] it alleges appear in the chain of title, nor touched any of the individuals' other properties or criminal

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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.*").

[75] *See* **Exhibit CL-187**, VCLT, art. 26 ("*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*")

[76] *See* **Exhibit RL-192**, *Russia – Measures concerning traffic in transit, Report of the Panel*, WTO, WT/DS512/R, 5 April 2019, ¶¶ 7.133 (noting that "[t]*he obligation of good faith requires that Members not use the exceptions. . .as a means to circumvent their obligations*" by "*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.*") , 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.***"),

[77] *See* Claimants' Essential Security Submission, ¶¶ 51-56; Claimants' PHB, ¶ 335.

proceeds.[78] This fact remains unchanged as of Colombia's PHB [redacted].[79] Instead Colombia has seized Claimants' investment even though there were no criminal allegations against any Claimants, without even conducting a review of whether Claimants had acted in good faith in making the investment.[80]

35. [redacted]

(a) [redacted]

[78] *See* Claimants' PHB, ¶ 336.

[79] [redacted]

[80] *See* Claimants' Essential Security Submission, section III.B.

[81] [redacted]

[82] [redacted]

[83] Rejoinder, ¶ 46.

[84] *See* [redacted]

[redacted]

(b) [redacted]

(c) [redacted]

85 *See* Claimants' Essential Security Submission, ¶ 71.

86 *See* Colombia's Reply on Essential Security, 18 March 2022, pp. 8-9.

87 *See* Claimants' Essential Security Submission, ¶ 41.

88 *See* Claimants' Essential Security Submission, ¶ 42.

89 [redacted]

90 [redacted]

91 [redacted]

[redacted]

36. [redacted].

37. In any event, it is patent that Colombia's newest allegations hold no water.

38. [redacted].

92 [redacted].

93 [redacted].

94 [redacted]

95 [redacted]

96 [redacted]

(a) [redacted]

(b) [redacted]

97 Respondent's Comments on Claimants' Application, 7 September 2022, p. 6.

98 [redacted]

99 [redacted]

100 Claimants' Application to the Tribunal, 3 September 2022, ¶ 13.

101 Respondent's Comments on Claimants' Application, 7 September 2022, p. 10.

(c) [redacted]

39. [redacted]

(a) [redacted]

(b) [redacted]

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102 *See infra* ¶ 41.

103 *See* Respondent's Comments on Claimants' Application, 7 September 2022, pp. 4, 8.

104 [redacted]

105 [redacted]

[redacted]

40. [redacted]

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106 [redacted]

107 [redacted]

108 [redacted]

109 *See* [redacted]

110 [redacted]

111 [redacted]

[redacted]

41. [redacted]

112 [redacted]

113 *See* Claimants' Application to the Tribunal, 3 September 2022, ¶¶ 8-9.

114 [redacted]

115 *See* [redacted]

116 *See* [redacted]

117 *See* [redacted]

[redacted]

42. [redacted]

43. [redacted]

44. [redacted]

[redacted]

124 [redacted]

125 [redacted]

126 [redacted]

127 [redacted]

[redacted]

45. [redacted]

46. [redacted]

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128 [redacted]

129 [redacted]

130 [redacted]

131 [redacted]

132 [redacted]

133 [redacted]

[redacted]

47. [redacted]

V. COLOMBIA ACKNOWLEDGES THAT THE BELATED ESSENTIAL SECURITY DEFENSE HAS NO JURISDICTIONAL IMPACT AND IS THUS TIME-BARRED

48. While Colombia initially sought to introduce its essential security defense as a challenge to this Tribunal's jurisdiction, during the Hearing, it changed its position to argue that the essential security exception is "*not even a question of jurisdiction*" but of "*justiciability*" in an attempt to align itself with the U.S.'s submissions on the matter.[137] As Claimants explained in their PHB, while ICSID Rule 41(2) gives the Tribunal discretion to consider its jurisdiction or competence at any stage of the proceeding, it does not do the same for matters of justiciability.[138] Claimants explained that matters of justiciability, as opposed to jurisdiction or competence, rely on Party invocation and argument, and cannot be determined *sua sponte* by

134 [redacted]

135 [redacted]

136 *See* Claimants' PHB, ¶¶ 10, 152.

137 **Day 2 Tr.** 416:13-20 (Colombia's Reaction to U.S. Submission).

138 *See* Claimants' PHB, ¶ 325.

the Tribunal, which is why the procedural rules governing the Arbitration must restrict their delayed invocation.[139]

49. Rather than attempt an answer, Colombia simply labels Claimants' argument "*abusive*"—a habit they frequently employ.[140] The word choice is curious, and Colombia's repeated resort to it is tiresome. At any rate, as Claimants have explained, while the Tribunal admitted Colombia's belated argument "*as a jurisdictional objection*" on a preliminary basis, the Tribunal did not "*take a definite view on the legal nature of Respondent's defence*."[141] Accordingly, the Tribunal has not made a finding as to whether the defense does in fact impact its jurisdiction, and the propriety of Colombia's conduct has not yet been adjudicated. In the event that the Tribunal finds that the Essential Security Defense does not have a jurisdictional impact (which it does not, as Colombia now admits), then the Defense is time-barred under Procedural Order No. 1 and ICSID Arbitration Rule 26.[142] Colombia does not meaningfully contest this.[143]

50. Accordingly, the Essential Security Defense should be dismissed as time barred, as the text shows and Colombia acknowledges, that the Defense is not jurisdictional.

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[139] It is for this reason that tribunals have consistently held that Parties cannot invoke justiciability defenses, such as those arising under denial of benefits provisions, in a retroactive manner. *See, e.g.*, **Exhibit CL-118**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶ 239; **Exhibit CL-094**, *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. The Republic of Kazakhstan*, SCC Case No. V116/2010, Award, ¶ 745; **Exhibit CL-215**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, ¶ 225; **Exhibit CL-188**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 14 July 2014, ¶ 718; **Exhibit CL-038**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 162.

[140] *See* Respondent's PHB, Section II.C.

[141] Procedural Order No. 9, 28 March 2022, ¶ 11.

[142] *See* Procedural Order No. 1, Sections 14.2, 14.3 ("*In the first exchange of submissions (Memorial and Counter-Memorial), the parties shall set forth all the facts and legal arguments on which they rely including any expert opinion evidence the parties submit in support of their respective cases. Allegations of fact and legal arguments shall be presented in a detailed, specified and comprehensive manner, and shall respond to all allegations of fact and legal arguments made by the other party* [. . .] *In their second exchange of submissions (Reply and Rejoinder), the parties shall limit themselves to responding to allegations of fact and legal arguments made by the other party in the first exchange of submissions, unless new facts have arisen after the first exchange of submissions which justify new allegations of fact and/or legal arguments.*"); ICSID Rules, Rule 26(3) ("*Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.*"). *See also* Claimants' PHB, ¶ 319; Essential Security Submission, Section II; **Day 1 Tr.** 138:6-139:1.

[143] *See* Colombia's PHB, Section II.C.

VI. THE TPA'S MFN CLAUSE PRECLUDES APPLICATION OF THE ESSENTIAL SECURITY DEFENSE

51. 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. As explained in Claimants' PHB, the MFN protection in Article 10.4 precludes Colombia from applying the Essential Security Defense because Colombia is precluded from depriving Swiss investors and their investments in Colombia, which are protected by the Colombia-Swiss BIT, of treaty protection.[144]

52. Colombia's attempt to limit the scope of application of Article 10.4 in this case should be rejected. None of Colombia's three arguments can prevail.[145] **First**, Colombia contends that Article 10.4 does not apply because the TPA precludes application of the MFN protection to dispute settlement mechanisms. However, Claimants have already explained that application of Article 10.4 does not concern dispute resolution and is instead a general exception to substantive obligations under the TPA.[146] Colombia has no answer to this argument. **Second**, Colombia contends that Claimants have not met the requirements for the MFN clause to operate. However, Claimants have particularized the specific better treatment they are entitled to in order to harmonize their treatment as American investors with Swiss investors in Colombia, whose treaty protection is unfettered by a unilateral essential security exception.[147] **Third**, Colombia suggests, without reference to the language of Article 22.2(b), that Article 10.4 cannot be used to harmonize exclusions between treaties. However, nothing in the text of Article 10.4 can be construed to limit application of Article 10.4 to Article 22.2.[148]

53. Accordingly, even assuming adoption of Colombia's interpretation of Article 22.2(b) (which is incorrect for the reasons set out in Section III above) Article 10.4 of the TPA functions to harmonize the standard of treatment between Swiss and American investors and precludes the application of Article 22.2(b) in this Arbitration.

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144 *See* Claimants' PHB, ¶¶ 348-52.

145 *See* Colombia's PHB, ¶ 95.

146 *See* Claimants' PHB, ¶ 351.

147 *See* Claimants' PHB, ¶ 350.

148 *See* Claimant's PHB, ¶¶ 351-52. *See also* **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.*").

VII. REQUEST FOR RELIEF

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

(a) DECLARE that Colombia has breached its obligations to Claimants under the TPA;

(b) ORDER Colombia to pay Claimants in excess of USD 255.8 million to be updated as of the date of the Award;

(c) ORDER Colombia to pay Mr. Seda 10 percent of the total damages owed to him in moral damages;

(d) ORDER Colombia to pay the Award net of taxes;

(e) ORDER Colombia to pay all of the costs and expenses of the Arbitration, including Claimants' legal fees, the fees and expenses of any experts, the fees and expenses of the Tribunal, and ICSID's other costs;

(f) REJECT the new items for relief at paragraphs 974(a)-(b) added by Respondent to the Rejoinder; and

(g) AWARD such other relief as the Tribunal considers appropriate.

Dated: 13 September 2022

Respectfully submitted for and on behalf of Claimants

Gibson Dunn & Crutcher LLP

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Gibson, Dunn & Crutcher LLP