ICSID CASE NO. ARB/19/6

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

Claimants,

v.

THE REPUBLIC OF COLOMBIA

Respondent.

RESPONDENT'S POST-HEARING SUBMISSION

25 August 2022

Counsel for the Respondent
GAILLARD BANIFATEMI SHELBAYA DISPUTES
AGENCIA NACIONAL DE DEFENSA JURÍDICA DEL ESTADO

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I. INTRODUCTION

1. The Claimants accuse Colombia of violating the protection afforded to them under the TPA. They contend that the commencement of Asset Forfeiture Proceedings against the Meritage Lot was part of an extortion scheme, [redacted]

2. Yet, the Claimants have failed to prove their case. The reason is simple: this is a case which is not predicated on facts, but on made-up and self-serving theories, based on unsupported and manufactured evidence. [redacted]

   Against this backdrop, it is unquestionable that the Claimants should not be afforded the TPA's protection and that Colombia's Asset Forfeiture Proceedings at stake in these proceedings are at the core of Colombia's sovereign power: the defence of its essential security.

3. Additionally, the Claimants in these proceedings are only "investors" in name. To recall, Newport funded the development of the Meritage Project primarily with funds received from the unit buyers. Moreover, Royal Property's business model was to obtain land in regions ravaged by civil war and organised criminality at a bargain to reap benefits of up to 1000% on their "investment".

[redacted]

5. Moreover, by commencing premature arbitral proceedings, whilst the Asset Forfeiture Proceedings are still ongoing, the Claimants could obtain double compensation. Meanwhile, the Respondent is also being sued for the same measures over the Meritage Lot by the unit buyers in the domestic courts; the very same individuals and entities that provided Newport with funding but yet– in their vast majority- are suing the State instead of their contractual counter-party: Newport. Shall the unit

buyers prevail, the Claimants would obtain yet another windfall by possibly keeping the unit buyers' financial contributions.

6. To "substantiate" their made-up case, the Claimants have made use of a plethora of methods and resources, [redacted]

7. Additionally, the Claimants put the Respondent in an impossible situation [redacted] This speaks volumes of the Claimants' baseless allegations. The costs and amount of human and material resources that the Respondent has had to devote to defend itself from the plethora of the Claimants' unsubstantiated accusations and as a result of the Claimants' documental requests and procedural incidents are eye-watering.

8. [redacted]

[redacted]

10. Finally, it goes to the essence of any dispute that the contending parties will have opposite interpretations of the law and the facts. Yet, when the contending parties witness the very same events, the expectation is that there should be a modicum of objectivity in the reporting of the events. In this case, however, by means of misrepresentations and distortions in their Post-Hearing Brief ("PHB"), the Claimants have effectively created an alternate reality based on the testimonies and pleadings at the Hearing. As the Respondent shows in this written submission, the vast majority of the Claimants' arguments are based on gross distortions of what was said and done at the evidentiary Hearing.

11. To conclude, this is indeed a "*case is characterized by a highly questionable paradox: the more serious* [the Claimants'] *accusation against the State, the weaker the supporting evidence provided*"[1] as aptly put by the Director General of Colombia's National Agency for the Defense of the State during Colombia's Opening Statement.

II. THE TRIBUNAL IS REQUIRED BY ARTICLE 22.2(B) OF THE US-COLOMBIA TRADE PROMOTION AGREEMENT TO UPHOLD THE RESPONDENT'S INVOCATION OF ITS ESSENTIAL SECURITY EXCEPTION UNDER THAT PROVISION

12. As stated in its Rejoinder and during the evidentiary Hearing,[2] Colombia's primary position is that its invocation of the Essential Security Exception, enshrined in Article 22.2(b) of the TPA, is an obstacle to the Tribunal's jurisdiction—and, even more so, its power—to adjudicate the present dispute. In the alternative, should the Tribunal conclude that this matter is justiciable and that it has jurisdiction over this dispute, the Respondent submits that the Asset Forfeiture Proceedings fall squarely within the scope of Article 22.2(b) of the TPA, such that the initiation of Asset Forfeiture Proceedings in the present case does not constitute a breach of the Respondent's international obligations under the TPA.

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1 Hr. Tr., Day 1, p. 172:15-19 (Respondent's Opening Statement).

2 Respondent's Rejoinder, Section II; Respondent's Reply to Claimants' Application of 7 March 2022, 18 March 2022, Section 3; Respondent's Opening Presentation, pp. 108-149.

13. Throughout these proceedings, the Claimants have repeatedly misrepresented and attacked the Respondent's position with allegations that find no support in the facts or in the law.[3] Thus, the Claimants contend that the Tribunal has jurisdiction over the dispute and that the Respondent must compensate the Claimants for the damages purportedly caused by the Asset Forfeiture Proceedings because, allegedly, "*Article 22.2 (b) serves as an '[e]xception' to the general remedy of restitution* […]. *The provision does not, however, serve as an exemption from liability or limit jurisdiction*".[4] This contention is fundamentally wrong as the Respondent demonstrates.

14. Contrary to the Claimants' contention, Article 22.2(b) does provide a ground for the non-justiciability of the matter or, in the alternative, the Tribunal's lack of jurisdiction to hear the case (**A**). Even if the Tribunal were to find that the matter is justiciable and that it has jurisdiction over the dispute, Colombia's invocation of Article 22.2(b) implies that the impugned measures cannot constitute a breach of the Respondent's obligations under the TPA (**B**) and, in the absence of a breach, no compensation is due (**C**). Before turning to the correct interpretation of Article 22.2(b), it bears recalling the factual background of this dispute which led to the Respondent's invocation of Article 22.2(b).

[redacted]

3 Claimants' Application to Strike the Respondent's Essential Security Exception of 7 March 2022, ¶¶ 5, 11; Claimants' Letter regarding the Respondent's Request for Enhanced Confidentiality Measures of 7 March 2022, ¶ 7.

4 Claimants' PHB, ¶ 301 (b) (ii).

5 Rejoinder, Section III.

6 Hr. Tr. Day 1, p. 171:9-19 (Respondent's Opening). *See also below*, Section II.B.2.

7 Hr. Tr. Day 1, p. 171:9-19 (Respondent's Opening).

16. It is undisputed that in a country that "*disgracefully produces 70 percent of the cocaine in the world*", and where "*billions and billions of dollars in money from drug trafficking are* […] *moved around* […] *through money-laundering systems* […] *sophisticated as one might imagine*",[8] asset forfeiture proceedings are a necessity, and have proven to be one of the most effective tools to fight money laundering, drug trafficking and corruption worldwide.[9]

17. The Colombian Asset Forfeiture Law was created to break the money laundering cycle by specifically targeting the proceeds of drug-trafficking activities and to prevent the transfer of assets acquired with these proceeds to third parties. In the words of Mr. Camilo Gómez, the Director of the ANDJE, this "*is a question of* [stopping structured] *complex business transactions and fiduciary transactions that have made it possible for large expanses of lands of* [illicit] *origin to go unperceived and to make their way into normal economic transactions*".[10]

18. Against this background, the initiation of this arbitration by the Claimants—who invested in Colombia (and, in particular, in Medellin, a region plagued with organized crime) with the full knowledge of the Colombian legal framework, including asset forfeiture laws—is nothing short of asking this Tribunal to pass judgment on the most essential tool available to the State of Colombia to fight organized crime, drug-trafficking and money laundering. [redacted]

19. Perfectly aware of the seriousness of their conduct and of Colombia's entitlement, in that context, to invoke its Essential Security, the Claimants have found no better defence than colourful language such as "*get-out-of-jail-free card*".[12] The Respondent, however, has not invoked the Essential Security Exception of Article 22.2 (b) lightly. Much to the contrary, Colombia's invocation of the exception has been made in good faith and is well founded, as demonstrated below.

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8 Hr. Tr. Day 1, p. 169:10-22 (Respondent's Opening).

9 GAFILAT, "Mutual Evaluation Report on the Republic of Colombia", 2018 (**Exhibit R-130**), ¶ 165; Financial Action Task Force (FATF), What is Money Laundering?, How does fighting money laundering help fight crime?, (**Exhibit R-183**), p. 2.

10 Hr. Tr. Day 1, p. pp. 170:20-171:3 (Respondent's Opening Statement).

11 *See, e.g.,* [redacted]

12 Claimants' PHB, ¶ 297.

A. ALL MEANS OF INTERPRETATION AVAILABLE UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES AND GENERAL INTERNATIONAL LAW LEAD TO THE CONCLUSION THAT, PURSUANT TO ARTICLE 22.2(B) OF THE TPA, THE ARBITRAL TRIBUNAL LACKS THE POWER OR, IN THE ALTERNATIVE, JURISDICTION TO ADJUDICATE THE PRESENT DISPUTE

20. At the Hearing, the Respondent, concurring with the United States—who intervened in the arbitration as the other Contracting Party to the TPA—explained that the effect of Article 22.2(b) is that the invocation by a Contracting State deprives the tribunal seized of the matter of the ability to subject such invocation to any legal assessment. In other words, the matter is simply non-justiciable, namely not susceptible of being subjected to a decision based on law.[13] In the words of the United States, "*once a State Party to the TPA raises the exception, its invocation is non-justiciable*."[14]

21. The logic of non-justiciability is fully consistent with the wording of Article 22.2(b):

> **"*Article 22.2: Essential Security***
>
> *Nothing in this Agreement shall be construed:*
>
> *(a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or*
>
> *(b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.*[2]
>
> [2] *For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.*"

22. In other words, because of the general exception introduced by this provision (*"nothing in this Agreement shall be construed*"), any Contracting Party (here, Colombia), is entitled to "*apply* [] *measures that it considers necessary for* […] *the protection of its own essential security interests*". The added footnote, which is designed to set out the Parties' common intention in relation to this provision, mandates that, when this provision is invoked, "*the tribunal or panel hearing the matter shall find that the exception applies*". The task of the tribunal in that case is thus straightforward: a finding that the exception applies, without any inquiry into the justification or legal validity of the exception as raised. In other words, the tribunal in that case is bound ("shall") to one sole conclusion ("find that the exception applies"), without being called to make any legal assessment at all.[15]

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13 H. Lauterpacht, "The Doctrine of Non-Justiciable Disputes in International Law", *Economica*, No. 24, 1928, pp. 277-317 (**Exhibit RL-265**) p. 289.

14 Hr. Tr. Day 2, p. 388:15-18 (US Opening Statement). *See also*, *Russia - Measures concerning traffic in transit*, Addendum to the Report of the Panel, WTO, WT/DS512/R/Add.1 (**Exhibit RL-264**), p. 108, ¶ 18.

15 On the self-judging nature of the provision, see further *below*, ¶¶ 27-61.

[redacted]

24. Should, however, the Tribunal decide that it has the power to adjudicate the present dispute and make a legal assessment of Colombia's invocation of its Essential Security Exception, the Respondent respectfully submits that the Tribunal still lacks jurisdiction to decide the present dispute.

25. In its written pleadings,[16] the Respondent established that the intention of the TPA Contracting Parties in including Article 22.2(b) was (and has always been) to exclude essential security matters from the jurisdiction of arbitral tribunals.[17] This position, which flows directly from the language of Article 22.2(b), has been thoroughly confirmed by (*i*) the oral submissions delivered by the United States at the Hearing[18] and (*ii*) the *travaux préparatoires* of the TPA.[19]

26. Indeed, the Respondent has demonstrated that its interpretation of the Essential Security Exception in Article 22.2(b)—which fully coincides with that of the United States—is correct, and that once the exception is invoked, the Tribunal must decline jurisdiction to adjudicate this dispute. As demonstrated below, the Claimants' contention that "*the Essential Security Defense does not impact the Tribunal's jurisdiction*" is untenable.[20] Conversely, the Respondent's interpretation of the Essential Security Exception is (*i*) fully consistent with the general rules of interpretation included in the Vienna Convention on the Law of Treaties (the "**VCLT**"), (*ii*) in line with the *effet utile* principle, (*iii*) confirmed by well-established case law interpreting essential security exceptions, (*iv*) reflects the authentic interpretation of the provision, as explained by the United States at the Hearing, and (*v*) is corroborated by the *travaux préparatoires*.

27. **The general rules of interpretation of the VCLT confirm the Respondent's interpretation of Article 22.2(b).** Pursuant to Article 31(1) of the VCLT, a treaty "*shall be interpreted in good faith in*

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16 Respondent's Rejoinder, Section II

17 *See* Respondent's Rejoinder, Section II; Respondent's Letter to the Tribunal dated 18 March 2022, Section 3; Respondent's Opening Statement, pp. 107- 149.

18 Hr. Tr. Day 2, p. 388:15-18, pp. 381:9-390:21 (US Opening Statement).

19 [redacted]

20 Claimants' PHB, ¶ 298 (b).

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[21]

28. When looking at the ordinary meaning of Article 22.2(b), 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.

29. All the terms of the provision expressly reflect the self-judging nature of the exception, leaving no doubt that the State invoking the exception is the sole judge of whether the conditions for the Essential Security Exception to apply are met.[22]

30. Unlike other provisions in treaties concluded by both the United States and Colombia,[23] Article 22.2(b) of the TPA does not include any "objective" or "non-self-judging elements" on the basis of which the Tribunal could assess whether the conditions for the invocation of the exception were fulfilled. This is, of course, purposeful, as confirmed by the United States itself at the Hearing.[24] Indeed, the Contracting Parties intended to limit the scope of jurisdiction of arbitral tribunals established under Chapter 10 and did so by carefully choosing the wording of the Essential Security Exception to deprive arbitral tribunals of any legal basis for assessing whether Article 22.2(b) has been correctly used.

31. This was also made plain in the *travaux préparatoires*. [redacted]

32. [redacted]

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21 Vienna Convention on the Law of the Treaties (**Exhibit RL-221**), Article 22.2(b).

22 To recall, Article 22.2 (b) of the US-Colombia TPA reads as follows: "*Nothing in this Agreement shall be construed* […] *to preclude a Party from applying measures that it considers necessary for* […] *the protection of its own essential security interests*." (Emphasis added).

23 US-Colombia TPA, Article 22.2 (b) ("*nothing in this Agreement*"; "*that it considers necessary*"; "*its own essential security interests*").

24 Hr. Tr. Day 2, pp. 381:9-390:21 (US Opening Statement).

[redacted]

[redacted]

33. At the Hearing, the representative of the United States confirmed the Respondent's interpretation of the ordinary meaning of Article 22.2(b), according to which the provision is self-judging:

> "*I would like to address the essential security interest exception in Article 22.2(b). The language of the Article 22.2(b) is clear, that the exception is self-judging.* […] *The ordinary meaning of the word 'considers' is to come to judge or classify. Under Article 22.2(b), what must be considered or judged or classified is whether the relevant measure is necessary to protect the State's essential security interests. That this determination is made solely by the State Party itself is plain by the use of the word 'it' preceding 'considers.' Thus, the ordinary meaning of the phrase 'it considers' is that the exception is for the Party itself to determine--or in other words, that the exception is self-judging.*"[27]

34. The United States further explained that the language chosen for the essential security exceptions of US investment agreements reflects a long-standing practice intended to convey that arbitral tribunals have no power to adjudicate disputes wherein States invoked such exception:

> "*That Article 22.2(b) is self-judging accords with the long-standing U.S. position that similarly worded essential security interests exceptions in U.S. agreements are to be read as self-judging.*"[28]

35. Notably, to provide greater certainty and avoid any doubts regarding the true meaning of Article 22.2(b), the Parties added a footnote to the provision, leaving no space for interpretation or doubt as to the binding nature of Article 22.2(b) *vis-à-vis* arbitral tribunals and its automatic application whenever one of the Contracting Parties invokes it in arbitral proceedings initiated under Chapter 10.[29]

36. Indeed, as explained by the Respondent in response to a question raised by Arbitrator Perezcano regarding the meaning of the footnote in Article 22.2(b),[30] the footnote does not grant the Tribunal powers to "make a finding" on whether the invocation of Article 22.2(b) fulfils its requirements. Rather, the footnote establishes that the Tribunal has the obligation to apply the Essential Security

[redacted]

27 Hr. Tr. Day 2, pp. 387:9-388:5 (US Opening Statement) (Emphasis added).

28 Hr. Tr. Day 2, pp. 388:6-9 (US Opening Statement). (Emphasis added).

29 Footnote no. 2 reads as follows: "*For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter 10 (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies*." (Emphasis added).

30 Hr. Tr. Day 1, p. 278:8-279:4; Hr. Tr. Day 1, p. 279:1-3 ("*Shall find that the exception applies, shall find, you can make a determination*[.] *which is*[:] [']*I find that the exception applies because I have to, I shall.*[']*It's* [the Tribunal's] *obligation*."

Exception to the dispute, which confirms, if anything, that the Tribunal is left with no power to adjudicate the dispute.

37. The Respondent's interpretation of Article 22.2(b) and its footnote were corroborated by the United States. In its Oral Submissions, the United States made a specific reference to the language of footnote no. 2, noting that its wording made it clear that, "*once a State Party to the TPA raises the exception, its invocation is non-justiciable*":[31]

> "*Further, Footnote 2 to Article 22.2(b) is prefaced with the phrase "for greater certainty," which in U.S. practice confirms that the self-judging nature and non-justiciability of the essential security interests exception is inherent in the language of the exception itself. As a general practice, the United States uses the words "for greater certainty" in its International Trade and Investment Agreements to introduce confirmation regarding the meaning of the Agreement.*"[32]

38. The context of Article 22.2(b) confirms the Respondent's interpretation as explained above, as confirmed by the two following points.

39. *First,* the fact that the Parties placed Article 22.2(b) at the very end of the Treaty is not innocuous. Much to the contrary, the placement of Article 22.2(b) evinces that the intention of the Parties was for it to encompass all treaty provisions, including the investor-State dispute settlement clauses of Chapter 10. Given that the Essential Security Exception applies to all the TPA provisions, including its arbitration agreement, the Tribunal has neither the power nor jurisdiction to adjudicate disputes in which Article 22.2(b) is invoked.[33]

40. Once again, the Respondent's interpretation reflects the intention of the Contracting Parties. For example, [redacted]

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31 Hr. Tr. Day 2, p. 388:6-18 (US Opening Statement).

32 Hr. Tr. Day 2, pp. 388:19-389:6 (US Opening Statement) (Emphasis added).

33 Respondent's Opening Statement, p. 110; Respondent's Rejoinder, ¶ 29.

[redacted] (Emphasis added).

[redacted]

41. *Second*, Article 10.2 of the TPA, provides that, in the event of any inconsistency between the Dispute Settlement Chapter and another Chapter, the other Chapter shall prevail. This means that the Essential Security Exception prevails over the Dispute Settlement Chapter,[36] such that, when the Essential Security Exception is invoked, the Dispute Settlement Chapter cannot be applied.

[redacted]

43. [redacted]

[redacted] (Emphasis added).

36 US-Colombia Trade Promotion Agreement (**Exhibit CL-230**), Article 10.2 (1). *See also*, Respondent's Rejoinder, ¶ 31.

37 US-Colombia Trade Promotion Agreement, Preamble ("*Promote broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production*.").

38 Office of the US Trade Representative, "United States and Colombia Conclude Free Trade Agreement", 27 February 2006 (**Exhibit R-285**); *see also*, Office of the US Trade Representative, "U.S. and Colombia to Begin FTA Negotiations on May 18", 23 March 2004 (**Exhibit R-284**) ("*Colombia courageous fight against narco-trafficking terrorists that threaten democracy and regional stability can be assisted by promoting economic development and hope.*").

39 Notably, given that the Asset Forfeiture Proceedings are still ongoing in Colombia, upholding the Claimants' request can only lead the Tribunal to a premature finding.

44. **The self-judging wording of Article 22.2(b) must also be given effect by virtue of the *effet utile* principle.** As demonstrated, a comparison of the wording of Article 22.2(b) and the language used in seventeen other investment agreements concluded by Colombia shows that the language of Article 22.2(b) is unique and purposeful.[40] The Claimants have neither disputed nor answered the Respondent's demonstration in this regard.[41] In light of the *effet utile* principle, the self-judging character of Article 22.2(b) must be recognized and applied.

45. **International case law interpreting essential security exceptions confirm that provisions similar to Article 22.2(b) of the TPA are self-judging in nature.** The Respondent's argument that the Tribunal lacks jurisdiction over the present dispute by virtue of Article 22.2(b) is fully in line with a plethora of case law of international tribunals interpreting similar essential security exceptions, including the ICJ,[42] the WTO,[43] and investment tribunals.[44]

46. The case law is unanimous: the textual elements of Article 22.2(b), *i.e.*, the self-judging expression par excellence ("*it considers*"), combined with the absence of an introductory *chapeau* and "*limitative qualifying clauses*",[45] constitute "*clear indications* [that] *the text of the treaty* […] *is self-*

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40 Respondent's Rejoinder, ¶¶ 33-43. *See also*, Respondent's Opening Statement, pp. 113-115.

41 For the sake of completeness, the Respondent rejects the Claimants' attempts to construe an analogy between the India-Singapore Comprehensive Economic Cooperation Agreement, which entertain no connection whatsoever with the Respondent and its international economic law treaties. *See* Claimants' PHB, ¶ 301 (b).

42 *Case concerning military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14 (**Exhibit RL-152**), ¶ 222; *Oil Platforms (Islamic Republic of Iran v. United States of America),* Preliminary Objection, Judgment, 12 December 1996, I.C.J. Reports 803, (Annex N to Claimants' Application of 7 March 2022), ¶ 20.

43 *Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019 (**Exhibit RL-192**), ¶¶ 7.62-7.65; *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, WTO, WT/DS567/R, 16 June 2020 (**Exhibit RL-201**), ¶ 7.244.

44 *CMS Gas transmission Company v. Argentina*, ICSID Case No. ARB/01/08, Award, 12 May 2005 (**Exhibit RL-163**), ¶ 370; *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008 (**Exhibit RL-164**), ¶ 187; *LG&E Energy Corp. and others v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (**Exhibit RL-166**), ¶ 212; *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (**Exhibit RL-174**), ¶ 590; *Mobil Exploration and Development Argentina Inc. Suc. Argentina and other v. Argentina*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013 (**Exhibit RL-177**), ¶ 1037; *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017 (**Exhibit RL-188**), ¶ 231; CC*/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016 (**Exhibit RL-184**), ¶ 219.

45 *Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019 (**Exhibit RL-192**), ¶ 7.62-7.65.

judging".[46] The majority doctrine is also consistent with the Respondent's interpretation of Article 22.2(b).[47]

47. The Claimants have failed to engage with either the case law or the doctrine put forward by the Respondent. Instead, the Claimants rely on cases that do not support their case, as demonstrated.[48] Most recently, the Claimants have relied on the decision of the *Eco Oro* tribunal to argue that Article 22.2(b) "*does not* […] *limit jurisdiction*".[49] The *Eco Oro* decision, however, is inapposite for two main reasons.

48. *First*, the provision interpreted by the *Eco Oro* tribunal, *i.e.* Article 2201(3) of the Canada-Colombia FTA, is essentially different from Article 22.2(b) of the TPA, which the Respondent invokes here. For example, the *Eco Oro* provision does not include any of the self-judging elements expressly provided in Article 22.2(b).[50] The scope of the provisions is also different: while Article 22.2(b) of the TPA is aimed at creating a carve-out to the entire US-Colombia TPA (including its dispute settlement and reparation provisions), Article 2201(3) of the Canada-Colombia FTA only applies to the provisions contained in Chapter 8 (Investment) of that treaty.[51] *Second*, the United States expressly rejected the Claimants' analogy between the *Eco Oro* case and the Article 22.2(b) of the TPA,[52] which further confirms that the Claimants' attempt to transpose the *Eco Oro* decision to the case at hand is farfetched, to say the least. There is no commonality whatsoever between the *Eco Oro* case and the dispute at hand: not the facts, not the subject matter, not the exceptions invoked, not the wording of the provisions at stake, not even the parties to the applicable treaties. For these reasons, the Claimants cannot seriously claim that the *Eco Oro* tribunal's findings apply to the case at hand, and there is no sound reason for the Tribunal to follow the Claimants' thwarted logic in this regard.

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46 *Deutsche Telekom AG v. The Republic of India,* PCA Case No. 2014-10, Interim Award, 13 December 2017 (**Exhibit RL-188**), ¶ 231.

47 *See* S. Schill, R. Briese, "'If the State Considers': Self-Judging Clauses in International Dispute Settlement", *Max Planck Yearbook of United Nations Law*, 2009 (**Exhibit RL-216**); H. Schloemann, S. Ohlhoff, "'Constitutionalization' and Dispute Settlement in the WTO: National Security as an Issue of Competence", *American Journal of International Law*, 1999 (**Exhibit RL-213**).

48 *See*, *e.g.*, Respondent's Letter of 18 March 2022, pp. 16-20, where the Respondent debunks the Claimants' arguments on the basis of the ICJ's *Oil Platforms* case and the *LG&E v. Argentina* tribunal.

49 Hr. Tr., Day 1, p.137:2-138:5 (Claimants' Opening); Hr. Tr., Day 2, p.400:11-401:2 (Claimants' Response to the US oral submission); Claimants' PHB, ¶ 301 (b) (ii).

50 A simple reading of Article 22.2 (b) of the US-Colombia TPA (**Exhibit CL-230**) and of Article 2201 (3) of the Canada-Colombia FTA (**Exhibit CL-217**) reveals that the wording of these treaties are not comparable nor similar, as the Claimants contend.

51 Canada-Colombia Free Trade Agreement, Article 2201 (3) (**Exhibit CL-217**) ("*For the purposes of Chapter Eight (Investment*) […]."

52 Hr. Tr. Day 2, p. 390:9-21 (US Oral Submissions). (Emphasis added).

49. **<u>The United States' and Colombia's interpretations of Article 22.2(b) are identical and constitute an authentic interpretation of the TPA that must be taken into account by the Tribunal.</u>** At the Hearing, the Tribunal had the benefit of hearing both Contracting Parties to the TPA, who thus provided their views as to how the terms of Article 22.2(b) shall be read. As previously stated, in its Oral Statement, the United States corroborated the Respondent's position that the meaning to be given to Article 22.2(b) is that the Tribunal has neither the power nor jurisdiction to adjudicate disputes which a State characterizes as falling within the protection of its essential security.[53] This was the meaning that the Contracting Parties gave to the Essential Security Exception of the TPA, as shown in the *travaux préparatoires* of the Treaty,[54] and continues to be the reading of both Contracting Parties to the Treaty.

50. Regardless of whether the Tribunal qualifies the Contracting Parties' common interpretation of Article 22.2(b) as "subsequent agreement" or "subsequent practice" pursuant to the VCLT,[55] the fact is that Colombia and the United States have provided an authentic interpretation of Article 22.2(b) which is biding upon the Tribunal by virtue of Article 31(3) of the VCLT,[56] as the two Contracting Parties' common interpretation of Article 22.2(b) constitutes "*objective evidence of the understanding of the parties as to the meaning of the Treaty*".[57]

51. The Claimants argue that "*Party and Non Disputing Party* […] *submissions during the pendency of arbitration proceedings cannot properly be considered an* 'agreement' *on the interpretation of the TPA*", because that would "*jeopardize*[] *Claimants' due process rights*".[58] The Claimants rely on the reasoning of the arbitral tribunal in *Infinito Gold* to make this allegation. As demonstrated, however, the findings of the tribunal in that case in fact *support* the Respondent's position.

52. In *Infinito Gold*, the arbitral tribunal considered that "*Costa Rica's and Canada's concurrent positions in this arbitration* [did] *not amount to an agreement within the meaning of Article 31(3) of the VCLT*" because the agreement "*evidencing their common intention* […] *would postdate the commencement of this arbitration*".[59] This is clearly not the case here, since the meaning that Colombia and the

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53 Hr. Tr., Day 2, p.387:9-390:21 (Us oral submissions).

54 *See below*, Section II.A.

55 Vienna Convention on the Law of the Treaties (**Exhibit RL-221**), Article 31(3).

56 Vienna Convention on the Law of the Treaties (**Exhibit RL-221**), Article 31(3); Hr. Tr., Day 2, pp.409:10-411:8 (Respondent's Response to the US submission); E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martinus Nijhoff Publishers, 2009), (**Exhibit RL-244**), p. 429.

57 Hr. Tr., Day 2, p.410:8-9 (Respondent's Response to the US submission); ILC-Draft conclusions on subsequent agreements and subsequent practice, (**Exhibit RL-249**).

58 Claimants' PHB, ¶ 310.

59 *Infinito Gold Ltd. V. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (**Exhibit RL-207**), ¶¶ 337-339.

United States attributed to Article 22.2(b) of the TPA, as is clear from the *travaux préparatoires*, has remained unchanged as of the date they launched the TPA's negotiations. In fact, even the vocabulary used by the Contracting Parties to describe the meaning attached to the Essential Security Exception remained the same, including expressions such as "non-justiciable" and "self-judging", as well as the overall opinion that the invocation of the Essential Security Exception is "not subject to judicial review".[60] Accordingly, no breach of the Claimants' due process rights could take place in this case, as there has never been any expectation that Article 22.2(b) could be interpreted differently from the interpretation that is clear from the TPA and which has been consistently sustained by the Contracting Parties since the time of the negotiation and conclusion of the TPA.[61]

53. Further, under public international law, it is common understanding that authentic interpretations do not require any formalities; instead, importance is placed on the existence of a concurrent interpretation of a provision, whatever form it might take, rather than on procedural requirements, as misguidedly suggested by the Claimants.[62] Indeed, contrary to the Claimants' allegations, the TPA does not "*contemplate*[] *a separate and distinct mechanism for the issuance of binding decisions on interpretations of the TPA*".[63] At the Hearing, the United States confirmed that the TPA does not preclude other means of construing authentic interpretations of its provisions:

> "*The TPA Parties expressly included the mechanism to provide interpretations of treaty provisions to Investor-State tribunals in the course of an arbitration for a reason. Indeed, the International Law Commission has commented that subsequent practice may include statements in the course of a legal dispute. Accordingly, where the TPA Parties' submissions in an arbitration evidence their common understanding of a given provision, this constitutes subsequent practice that must be taken into account by the Tribunal under Article 31(3)(b). […] I would note also, in response to comments on this issue, that TPA Article 10.22.3 which concerns interpretations by the Free Trade Commission, and Article 10.20.2 which concerns Non-Disputing Party submissions, merely establish separate mechanisms for the Parties to provide interpretations of their Treaty. Nothing in the TPA text suggests that, in granting the Free Trade Commission the ability to issue binding, authoritative interpretations of*

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60 Hr. Tr., Day 2, p.416:2-6 (US oral submission); Hr. Tr., Day 2, p.245:18 (Respondent's Opening); [redacted]

61 As to the other case law cited by the Claimants in footnote no. 737 of their PHB, they are equally not applicable to the case at hand, as (i) In *Eco Oro*, none of the submissions of the Contracting Parties corroborated the ordinary meaning of the texts, *see 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 (**Exhibit CL-175**), ¶ 836; *Addiko Bank v. Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020 (**Exhibit RL-200**), ¶¶ 288, and (ii) tribunals have consistently accorded interpretative value of non-disputing parties submissions, *see Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (**Exhibit CL-192**), ¶ 223; *A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, n. 761 (**Exhibit RL-259)**. *See also* Hr. Tr., Day 2, pp. 382:19-384:19 (US oral submission).

62 Hr. Tr., Day 2, pp.411:20-412:21 (Respondent's Response to the US oral submission).

63 Hr. Tr. Day 2, p. 412:10-21 (Respondent's Response to the US oral submission); Claimants' PHB, ¶ 312.

> *the TPA, the Parties intended to preclude themselves from issuing […] authentic means of interpretation of TPA provisions through their submissions to investor-State tribunals or to preclude a tribunal from giving such submissions the weight to which they would otherwise would be entitled. So […], whether this Tribunal considers the interpretations presented by the TPA Parties as a subsequent agreement under Article 31(3)(a), a subsequent practice under Article 31(3)(b), or both, on any particular provision, the outcome is the same. The Tribunal must take the TPA Party's common understanding of the provisions of their Treaty into account."*[64]

54. The other cases on which the Claimants rely do not support their position any further, as demonstrated below:

- 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: as demonstrated, the Parties' concordant interpretation does not attempt to change the meaning of Article 22.2(b). In any event, *Magyar* and *Muszynianka* are fundamentally different from the case at hand as, in those cases, Hungary and Slovakia respectively had objected to the jurisdiction of the arbitral tribunal on the grounds of multilateral declarations issued by the EU Member States which did not seek to provide "*an interpretation of the meaning of* [the intra-EU investment treaties at issue]", but were simple declarations explaining the legal consequences of an EU decision. In other words, in those cases, there was no concurrent interpretation of the meaning of a treaty, so naturally the tribunals considered that said declarations could not be considered a subsequent agreement as envisaged by Article 31(3)(a) of VCLT.[65] This is clearly not the case here, as Colombia and the United States share the same interpretation of Article 22.2(b).
- The Claimants also cite the *Eskosol v. Italia* case, arguing that "'*[i]t was not the proper role of Article 31(3)(c) VCLT to rewrite the treaty being interpreted, or to substitute a plain reading of a treaty provision with other rules of international law*".[66] Again, the tribunal's reasoning in that case does not apply here. *First*, the Respondent in this case is not trying to rewrite the Treaty; it is merely relying on the Treaty as written. *Second*, the Claimants' reference to article 31(3)(c) of the VCLT is irrelevant, as this provision has never been raised in these proceedings by the

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64 Hr. Tr., Day 2, pp. 384:20-387:8 (US oral submission).

65 *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019 (**Exhibit CL-168**), ¶¶ 215-218; *Muszynianka Spólka z Ograniczona Odpowiedzialnoscia v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020 (**Exhibit CL-245**), ¶ 340.

66 Claimants' PHB, ¶ 314.

Respondent or by the United States in its capacity of Non-Disputing Party.[67] *Third*, the *Eskosol* tribunal expressly concluded that, when all parties to the treaty agree to a specific rule of international law, this means that the contracting parties share a common understanding of their interpretation of the treaty.[68] This is precisely the case here: the only two Contracting Parties to the TPA, Colombia and the United States, expressly agree on their common interpretation of Article 22.2(b).

- Finally, the Claimants rely on the conclusions of the *Sempra v. Argentina* tribunal to argue that "*even if* [a post hoc] *interpretation were shared today by both parties to the Treaty, it still would not result in a change of its terms*".[69] The Claimants' argument fails since the common interpretation of Article 22.2(b) is not "post-hoc", but is fully consistent with the Parties' understanding of the provision as early as in the negotiation rounds of the TPA. Therefore, unlike the situation in *Sempra*, in this case Colombia and the United Stated did not "*consent*[] *to another text*",[70] but rather have sustained the same position they adopted years ago.

55. **The *travaux préparatoires* of the TPA confirm the Respondent's interpretation of Article 22.2 (b).**

As stated throughout this submission, the *Travaux préparatoires* of the TPA support the Respondent's interpretation of Article 22.2(b) and further demonstrate that the intention of the Contracting Parties to the TPA was to carve out from any tribunal's adjudicating powers all disputes related to those States' essential security interests. Indeed, the *travaux* explicitly establish the self-judging nature of Article 22.2(b) and clarify that the invocation of the Essential Security Exception is not subject to the Tribunal's review.[71]

56. As a preliminary issue, the Respondent firmly rejects the Claimants' attempts to downplay the relevance and the content of the TPA's *Travaux* by contending that the Tribunal has no need to review them because "[t]*here is no ambiguity over the meaning of the words in Article 22.2 (b)*".[72] While it is true that the terms of Article 22.2(b) are unambiguous and show the provision's self-

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67 Claimants' PHB, ¶ 316 ("*Restricting retroactive amendments to change the ordinary meaning of the TPA in light of its context and purpose is especially important where the rights of third parties, such as the Claimants, are implicated*").

68 *Eskosol S.p.A. in liquidazione v. Italian Republic,* ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination, 7 May 2019 (**Exhibit RL-263**), ¶ 125 ("[i]*t is hardly an exception proposition that where all parties to a given treaty have agreed to a particular 'rule[] of international law', then that rule may inform an understanding of their mutual intent in agreeing to particular treaty text*").

69 Claimants' PHB, ¶ 317.

70 Claimants' PHB, ¶ 317.

[redacted]

72 Claimants' PHB, ¶¶ 305-307.

judging character, the *Travaux* are still relevant to the interpretation of the provision. This is confirmed by the practice of arbitral tribunals, which have recognized the importance of the negotiating history in the interpretation of an international treaty, even when the wording of the provision subject to interpretation is clear.[73] As such, the *travaux préparatoires* of various treaties have been referred to for the purposes of confirming the interpretation of a provision.[74] In this case, the *Travaux* of the TPA clearly confirm the Respondent's interpretation of Article 22.2(b).

[redacted]

[73] *See, e.g.*, *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009 (**Exhibit CL-065**), ¶ 57 ("*In any event, courts and tribunals interpreting treaties regularly review the travaux préparatoires whenever they are brought to their attention; it is mythological to pretend that they do so only when they first conclude that the term requiring interpretation is ambiguous or obscure*"); *Hulley Enterprises Limited (Cyprus) v. Russia*, PCA Case No. 2005-03/AA226, Interim Award on Jurisdiction and Admissibility, 30 November 2009 (**Exhibit CL-146**), ¶ 268.

[74] *See, e.g., Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017 (**Exhibit RL-260**), ¶¶ 299-305; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017 (**Exhibit RL-261**), ¶¶ 288-296; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (**Exhibit CL-240**).

[redacted]

[redacted]

60. Given the overwhelming evidence on the record confirming the self-judging nature of Article 22.2(b), the Claimants are quite ill-placed to allege, as they do, that "[n]*owhere in the* travaux *do the Parties state that Article 22.2(b)* […] *would allow the invoking State to deprive the Tribunal of jurisdiction and/or absolve itself of liability*".

[redacted]

77 US-Colombia Trade Promotion Agreement, Annex II, Schedule of Colombia, (**Exhibit CL-230**), II-COL-17.

[redacted]

61. In sum, a proper interpretation of Article 22.2(b) of the TPA leads to the conclusion that, following Colombia's invocation of its Essential Security Exception under Article 22.2(b) of the TPA, the Tribunal must conclude that it does not have the power or, in the alternative, jurisdiction to adjudicate the present dispute.

B. IN THE ALTERNATIVE, SHOULD THE ARBITRAL TRIBUNAL FIND THAT IT HAS THE POWER OR, IN THE ALTERNATIVE, JURISDICTION OVER THE PRESENT DISPUTE, THE RESPONDENT CANNOT HAVE BREACHED ITS TREATY OBLIGATIONS PURSUANT TO ARTICLE 22.2(B) OF THE TPA

62. Should the Tribunal conclude that it has the power to hear this matter or, in the alternative, jurisdiction to adjudicate the present dispute (which it does not), the Claimants' claims should still be dismissed on the merits because the Asset Forfeiture Proceedings fall within the scope of the Article 22.2(b) of the TPA, such that the Respondent cannot have breached any of its treaty obligations arising from the TPA.

63. As demonstrated below, the standard that the Tribunal should apply in order to assess whether the requirements for the fulfilment of the Article 22.2(b) have been fulfilled is a *prima facie* test, namely that the Respondent has adopted measures that it considers necessary for the protection of its own Essential Security interests (**1**). Further, contrary to the Claimants' allegations, the application of Article 22.2(b) to the facts of this dispute prevents the Tribunal from awarding compensation to the Claimants (**2**).[79] All of the Claimants' remaining arguments relating to the application of the Essential Security Exception fail as well (**3**).

1. A prima *facie* test should be applied to determine whether the requirements of Article 22.2(b) of the TPA have been fulfilled

64. Even if the Tribunal disagrees with the self-judging nature of Article 22.2(b) of the TPA (notwithstanding the plethora of evidence confirming its self-judging character, as described above), Article 22.2(b) and its interpretative footnote establish that the Tribunal is bound to apply Article 22.2(b) whenever it is invoked by a State in arbitration proceedings initiated under Chapter 10 of the TPA.[80]

65. As explained at the Hearing in response to a question by Arbitator Perezcano,[81] the Contracting Parties to the TPA have broad discretion to adopt measures to protect their Essential Security

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79 Claimants' PHB, ¶ 303. The Claimants expressly admit that "*whether Colombia can determine and apply whatever measures it considers necessary for the protection of its essential security interests is not at issue here*."

80 US-Colombia Trade Promotion Agreement, Article 22.2 (b), footnote no. 2.

81 Hr. Tr., Day 1, pp.277:20-283 :10 (Tribunal's questions); Rejoinder, ¶¶ 48 et seq.

interests, such that full deference should be given by arbitral tribunals called upon to assess those States' liability in connection with such measures.

66. The standard for the application of Article 22.2(b) is a *prima facie* test that requires four distinct elements: that the host State (*i*) adopts measures (*ii*) that it considers necessary, and (*iii*) that such measures be adopted for the protection of the (*iv*) essential security interests of the State invoking the exception.[82]

67. The Parties agree that elements (*ii*) and (*iv*), *i.e.*, 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.[83] It follows that the Tribunal is only required to assess two objective elements: whether the dispute concerns "measures" within the meaning of the TPA (*i*); and whether these measures could plausibly be expected to protect Colombia's Essential Security interests (*iii*).

68. [redacted]

70. The Parties agree that the standard that the Tribunal must apply when assessing this element is one of plausibility of the measure.[85] Following the findings of the WTO Panel in *Russia – Traffic in transit*, the standard of "*minimum requirement of plausibility*" means that the Tribunal must assess if the measures put in place by the Respondent "*are so remote from, or unrelated to*" the Essential Security interests which the Colombian State is intending to protect, that it would be "*implausible*" to argue that the measures at stake (*i.e.*, the Asset Forfeiture Law, the Asset Forfeiture Proceedings and the

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82 Hr. Tr., Day 1, p.245:1-17 (Respondent's Opening); United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 22.2 ("*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*") (Emphasis added).

83 Rejoinder, ¶ 52; Hr. Tr., Day 1, p. 256:6-11 (Respondent's Opening); Respondent's Opening Presentation, p. 129; Claimants' Application to Strike the Respondent's Essential Security Exception of 7 March 2022.

84 The term "*measures*" includes "*any law, regulation, procedure, requirement or practice*". *See* US-Colombia Trade Promotion Agreement, Article 1.3. For the avoidance of doubt, it is this series of actions combined – as opposed to Colombia's Asset Forfeiture Law or the Asset Forfeiture Proceedings individually considered, for instance – that constitute the package of *measures* that have been adopted for the protection of the Respondent's essential security interests. Hr. Tr., Day 1, p.255:7-18 (Respondent's Opening).

85 Respondent's Rejoinder, ¶¶ 56-57; Claimants' PHB, ¶¶ 336-337.

[redacted] are related to Colombia's "*fight against organized crime, money laundering and drug trafficking*"[86]

71. As explained at the Hearing, in response to Arbitrator Perezcano's question, the applicable standard does not allow, let alone require, the Tribunal to assess whether the measures were adopted in good faith or in an arbitrary or discriminatory manner.[87] This is clear from Article 22.2 (b) itself, which has no introductory *chapeau* requiring the Tribunal to assess whether the State applied measures in an arbitrary or discriminatory manner. A simple comparison between the language of the TPA's Essential Security Exceptions enshrined in Article 22.2(b) and the TPA's General Exceptions of Article 22.1[88] confirms the Respondent's position in this regard.

[redacted]

86 *Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019 (**Exhibit RL-192**), ¶¶ 7.138-7.139; Respondent's Rejoinder, ¶ 55. In *Russia – Traffic in transit*, for instance, the WTO Panel was called upon to decide whether Russia's transit restrictions in the Ukraine-Russia border (the "*measures*" within the meaning of Article XXI (b) (iii) of the GATT) met the minimum requirements of plausibility in relation to the 2014 Crimea crisis (Russia's essential security interests). The Panel answered positively to that question, finding that the deterioration of Ukraine's relations with Russia and Russia's transit bans, could not be seen as "*being so remote from, or unrelated to, the 2014 emergency, that it is implausible that Russia implemented the measures for the protection of its essential security interests arising out of that emergency*".

87 Hr. Tr., Day 1, pp.275:20-276:12 (Respondent's Opening).

88 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 22.2; General Agreement on Tariffs and Trade, 1994 (**Exhibit RL-222**), Article XXI (b); *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 (**Exhibit CL-175**), ¶ 699.

89 Claimants' PHB, ¶ 337.

90 Claimants' PHB, ¶¶ 280-281. [redacted]

[redacted]

[redacted]

[redacted]

74. [redacted]

[redacted]

96 *See* Respondent's Letter to the Tribunal of 10 June 2022; Respondent's Letter to the Tribunal of 17 June 2022.

[redacted]

[redacted]

[redacted]

79. [redacted]

2. The application of Article 22.2(b) of the TPA to the facts of this dispute prevents the Tribunal from awarding compensation to the Claimants

80. As demonstrated, Article 22.2(b) operates as a derogation from the entirety of the TPA and, therefore, from all obligations under that Treaty .[111] In other words, the application of Article 22.2(b) excludes any assessment of liability under the TPA as, when such an exception to the international obligations contained in the Treaty is invoked, there can be no breach of such international

[redacted]

107 Luxé Share Ledger (**Exhibit C-226**), p. 24. To be clear, Mr. Seda testified that Zing is a shareholder in Luxé up to this day. *See* Third Witness Statement of Mr. Seda, ¶ 19.

108 Luxé Share Ledger (**Exhibit C-226**), p. 24.

109 Claimants' PHB, ¶ 225.

110 Respondent's Rejoinder, ¶ 659.

111 Respondent's Reply to Claimants' Application of 7 March 2022, 18 March 2022, p. 20.

obligations.[112] Absent a breach of an international obligation, pursuant to the most fundamental principles of public international law, reparation simply cannot follow. Indeed, as codified by Article 31 of the Articles on the Responsibility of States for Internationally Wrongful Acts, "[t]*he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*"[113] If there is no internationally wrongful act—and here, there can be no internationally wrongful act, given that Article 22.2(b) operates as an exception to the operation of the international obligations contained in the TPA—there is no obligation to repair. The Respondent, therefore, cannot be ordered to compensate the Claimants for any damages, even assuming they have suffered any, in connection with the measures adopted to safeguard the Respondent's Essential Security interests.[114]

81. At the Hearing, the United States confirmed that "[o]*nce the essential security interest exception is invoked, a tribunal may not, thereafter, find the relevant measure in breach of the Chapter 10 obligation and may not, consequently, order the payment of any compensation in connection with that measure.*"[115] Likewise, the *Travaux préparatoires* of the TPA show that the intended effect of the Essential Security Exception has always been to exempt the Contracting Parties from any consequences as a result of measures adopted to protect their Essential Security interests. [redacted]

82. Faced with the strength of the evidence supporting the Respondent's case, the Claimants desperately attempt to maintain their claim for compensation, suggesting that Article 22.2(b) somehow operates in such a way that the Tribunal could order the Respondent to pay compensation to the Claimants even if it were to conclude that the Respondent has not breached its treaty

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112 Respondent's Reply to Claimants' Application of 7 March 2022, 18 March 2022, p. 20.

113 United Nations General Assembly Resolution A/RES/56/83, 28 January 2002 (**Exhibit RL-267**), Article 31.

114 Respondent's Reply to Claimants' Application of 7 March 2022, 18 March 2022, p. 24.

115 Hr. Tr. Day 2, p. 390:9-21 (US Oral Submissions).

[redacted] (Emphasis added).

obligations.[117] It is stating the obvious that this suggestion contravenes the most basic principles of State responsibility,[118] given that, under the law of State Responsibility, the obligation to make reparation arises when an injury has been caused by an internationally wrongful act.[119] This suggestion also contradicts the provisions of the TPA itself: Article 10.26 of the TPA provides for two different types of remedies, *i.e.* monetary damages or restitution of property, if the arbitral tribunal "*makes a final award against a respondent*".[120] In other words, both under general law of State responsibility and under the TPA, it is trite that absent any breach by the Respondent, no compensation is owed to the Claimants.

83. The Claimants also suggest that Article 22.2(b) operates as to exempt the Respondent from the "*primary remedy available*" under the TPA and the law of State responsibility, *i.e.*, restitution of property, but that it does not bar compensation.[121] This reasoning is simply flawed: there is no such thing as a "*primary*" or "*preferred*" remedy under the TPA or public international law. Nowhere in the TPA or elsewhere will the Tribunal find a provision stating that restitution should prevail over compensation, as the Claimants suggest. On the contrary, Article 10.26 of the TPA provides that the tribunal may award monetary damages and/or restitution of property "*separately or in combination*".[122] Similarly, Article 34 of the ILC's Articles on State responsibility do not establish any order of prevalence between the different forms of reparation available (*i.e.*, restitution, compensation and satisfaction). In the face of the clear rules of international law and the provisions of the TPA, there is simply no legal basis for the Essential Security Exception to apply to one remedy available under to the Treaty (*i.e.*, restitution) and not to the other (*i.e.*, compensation), as suggested by the Claimants. The Claimants' interpretation of Article 22.2(b) must therefore be dismissed.

[redacted]

117 Claimants' PHB, ¶ 320; Hr. Tr. Day 2, pp. 400:2-401:22.

118 Respondent's Letter of 18 March 2022, pp. 20, 23-24.

119 United Nations General Assembly Resolution A/RES/56/83, 28 January 2002 (**Exhibit RL-267**), Article 31.

120 US-Colombia Trade Promotion Agreement, Article 10.26. (Emphasis added).

121 Claimants' PHB, ¶ 301 (b) (ii) ("*Article 22.2 (b) serves as an '[e]xception' to the general remedy of restitution*").

122 US-Colombia Trade Promotion Agreement, Article 10.26 (1).

123 Claimants' PHB, ¶ 320; Hr. Tr. Day 2, pp. 400:2-401:22.

[redacted]

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124 Respondent's Opening Statement, pp. 143-145. *See also*, Respondent's Comments to the Opening Statement by Counsel for the United States of America, Hearing Transcript, Day 2, p. 418:6-16 [redacted] Prof. Reyes' Direct Presentation, Hearing Transcript, Day 4, pp. 1181-1182:19-21. (Emphasis added).

125 As noted by the Respondent's Colombian law expert, Prof. Reyes, the Asset Forfeiture Law was aimed to [redacted] Prof. Reyes' Direct Presentation, Hearing Transcript, Day 4, pp. 1168-1169:18-21.

126 *See below*, Section II.B.2.

[redacted]

[redacted]

3. The Claimants' remaining contentions to prevent the application of the Essential Security Exception must fail

89. For completeness, the Respondent addresses the remains of the Claimants' contentions below.

90. *First*, the Claimants contend that "*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*" because "*the TPA is drafted in the present tense*".[134] As explained by the Respondent at the Hearing,[135] the Claimants' interpretation of Article 22.2(b) is farfetched, since the provision does not establish a time limit for the invocation of the Essential Security Exception.

91. The fact that the TPA is drafted in the present tense only demonstrates that the Tribunal must place itself at the time of the invocation of the exception and analyse whether, at that point in time, the

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[redacted]

129 Claimants' Notice of Dispute, 17 August 2018. At that time, the Claimants were being represented by Arent Fox. [redacted] This would contravene Colombia's law (including its Constitution and the Asset Forfeiture Law), the TPA, and most basic principles of international public policy. Respondent's Rejoinder, ¶ 659.

134 Claimants' PHB, ¶ 328.

135 Respondent's Opening Presentation, p. 132.

Respondent considered that the measures adopted for the protection of its Essential Security interests are necessary to achieve that purpose.

92. The Claimants' reliance on the decisions of the WTO Panels to allege 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 measures taken in protection of that interest*" is misleading.[136] The provision applied by the WTO Panels (*i.e.*, Article XXI (b) (iii) of GATT and Article 73 (b) (iii) of the TRIPS) expressly required that the measures be adopted in a certain period of time in order to fulfil the treaty requirements.[137] This is not the case here, as Article 22.2(b) makes no such requirement.

93. [redacted]

136 Claimants' PHB, ¶ 328.

137 General Agreement on Tariffs and Trade, 1994 (**Exhibit RL-222**), Article XXI (b) (iii), which provides that the measures must be "*taken **in time** of war or other emergency in international relations*". *See also*, *Russia – Measures concerning traffic in transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019 (**Exhibit RL-192**), Section 7.5.5; *Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, WTO, WT/DS567/R, 16 June 2020 (**Exhibit RL-201**), Section 7.4.3.2. For the sake of completeness, to the extent that the Claimants refer to the ICJ decision in *Nicaragua v. USA* to support their allegation that "*it is crystal clear from the text of the provision that essential security interest must be defined at the time the Measure is taken*", Hr. Tr. Day 2, p. 403:20-22; Claimants' Comments on Submission of the United States Government, 3 May 2022, p. 10) the Respondent notes that the Claimants failed to note that the final decision of the ICJ actually supports the Respondent's position that Article 22.2 (b) is self-judging and falls without the scope of the Tribunal's jurisdiction. *See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14 (**Exhibit RL-152**),¶¶ 221-222; Respondent's Letter dated 18 March 2022, p. 17.

[redacted]

95. *Finally*, the Claimants rely on Article 10.4 of the US-Colombia TPA to contend that they are "*entitled to import the same level of substantive protection granted to foreign investors and investments under other Colombian investment treaties*". According to the Claimants, the Respondent's invocation of Article 22.2(b) would lead to US investors being "*subject to less favourable treatment than Swiss investors*".[141] This logic fails on three main grounds. First, the Claimants' argument contradicts the terms of Article 10.4 itself, which expressly bars the importation of investor-State dispute settlement mechanisms through its MFN clause.[142] Second, the Claimants' request to import a more favourable treatment from another treaty concluded by Colombia falls short of the requirements for the MFN clause to operate. For instance, the Claimants fail to set out the precise basis on which they seek to apply Article 10.4 of the TPA, and to specify what better treatment they

138 Claimants' PHB, ¶ 346.

139 *See above,* Section II.B.2.

140 For the avoidance of doubt, the Asset Forfeiture Proceedings in dispute are not against Mr. Seda or any of the Claimants but target exclusively the Meritage Lot. *See below*, Section V.A.2.

141 Claimants' PHB, ¶¶ 349-350.

142 US-Colombia Trade Promotion Agreement, Article 10. 4 ("*Article 10.4:* […] *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.2 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.*"). (Emphasis added).

are seeking to obtain. Third, the MFN clause of the TPA cannot import third treaty provisions to bypass the express exclusions provided in the treaty.[143]

C. THE CLAIMANTS' ATTEMPT TO REDISCUSS THE ADMISSIBILITY OF THE RESPONDENT'S ESSENTIAL SECURITY EXCEPTION IS ABUSIVE AND MUST BE DISMISSED

96. In Procedural Order no. 9, the Tribunal decided to dismiss the Claimants' contention that the Respondent's invocation of Article 22.2(b) was time-barred.[144] Notably, the Tribunal referred to its duty to ascertain its jurisdiction at any time in the proceedings. On this basis alone, the Claimants' attempt to rediscuss the admissibility of the Respondent's invocation of Article 22.2 (b) (as well as the Claimants' arguments that the objection "*is not a jurisdictional defense*" and is "*time-barred*") must be dismissed.[145]

97. Moreover, the Claimants' position that the Tribunal cannot decide on matters of justiciability, but "[o]*nly* [on] *questions of jurisdiction and competence*",[146] lacks legal grounds, and in any event, is beside the point. A discussion on the contours of "justiciability" and "jurisdiction" does not take the Claimants very far. It is the Tribunal's duty, as it has already decided,[147] to ascertain the scope of its mandate (if any). In this respect, regardless of the sanction requested by the Respondent and the characterization by the Tribunal (namely, non-justiciability of the matter or lack of jurisdiction by the Tribunal), the proper interpretation of Article 22.2(b) leads to the conclusion that the Tribunal must refrain from adjudicating the present dispute.

98. For the avoidance of doubt, the Respondent emphasises that it has invoked the Essential Security Exception in good faith and that it was not in a position to invoke Article 22.2(b) prior to its Rejoinder.[148]

99. In sum, pursuant to Article 22.2(b) of the TPA, the Arbitral Tribunal does not have the power or, in the alternative, jurisdiction to adjudicate the present dispute concerning the measures adopted by the Respondent to protect its Essential Security interests, *i.e.* the fight against and prevention of

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143 Respondent's Opening Presentation, pp. 146-149; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (**Exhibit RL-163**), ¶ 377; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (**Exhibit CL-203**), ¶ 109.

144 Procedural Order no. 9, ¶ 11. To the extent that the Claimants argue that Article 22.2 (b) "*has no jurisdictional impact*" because its text "*is clear that it does not affect the jurisdiction of this Tribunal as it contemplates the Tribunal making a '*finding' *if Article 22.2(b) is invoked*", the Claimants' argument is circular; it on a wrong interpretation of Article 22.2 (b), which the Respondent has repeatedly address. *See above*, Section II.A.

145 Claimants' PHB, ¶ 319.

146 Claimants' PHB, ¶ 325.

147 Procedural Order no. 9, ¶ 11.

148 *See* Respondent's Letter of 18 March 2022, pp. 4 et seq.

organized crime, money laundering and drug trafficking. In the alternative, if the Tribunal were to consider that the Respondent's Essential Security Exception can only be interpreted as a defense on the merits (*quod non*), the measures that the State of Colombia has considered necessary for the protection of its own Essential Security interests fall within the scope of Article 22.2(b) of the TPA, such that the Respondent has not breached any of its treaty obligations under the TPA. In any case, the Claimants are not entitled to compensation in connection with the impugned measures, which have been adopted by Colombia to protect its Essential Security interests.

III. THE CLAIMANTS HAVING PREMATURELY INITIATED THE ARBITRAL PROCEEDINGS WHILST THE ASSET FORFEITURE PROCEEDINGS ARE ONGOING COULD ACTUALLY RESULT IN THEM BEING COMPENSATED MULTIPLE TIMES

100. It is undisputed that the Claimants decided to invest in Colombia. A necessary corollary of their investment in Colombia is that they invested within the existing Colombian legal framework, including Article 34 of the Colombian Constitution, which provides the State's power to determine "*via a judicial decision, the forfeiture of assets acquired by means of illicit enrichment*",[149] and the Asset Forfeiture Law ,which regulated the forfeiture of assets acquired by illicit means.

101. The Colombian legal framework also includes mechanisms and remedies available to redress any damages caused by wrongful conduct attributable to the State. For example, Article 90 of the Colombian Constitution provides that the State "*shall be financially liable for unlawful damages attributable to it, caused by the action or inaction of public authorities*".[150]

102. As explained by the Respondent at the Hearing, the domestic courts have the authority to determine (i) whether a party qualifies as a good faith party without fault under the Asset Forfeiture Law, and (ii) whether that party is entitled to compensation. In this case, the Asset Forfeiture Proceedings are still ongoing, so it is premature for the Claimants to appear before an international tribunal to claim for compensation, when no asset has been forfeited and they have multiple remedies available under Colombian law.[151]

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149 Political Constitution of Colombia, 1991 (**Exhibit C-5**), Article 34 ("*assets acquired by illegal means to the detriment of the Treasury or resulting in severe deterioration of social morals shall be subject to forfeiture by judicial order*").).

150 Political Constitution of Colombia, 1991 (**Exhibit C-5**), Article 90.

151 *See* Hr. Tr., Day 1, pp. 300:9-301:1 (Respondent's Opening) ("[T]*he expectation is that Colombian law will apply. It's not that international will not apply. It's that you have to respect Colombian law, and you have to comply with what it says.* […] *So, you cannot then not do due diligence, going through a legal framework which is complex enough and with the conditions that we're seeing and what we're seeing unfolding in the criminal investigations, and then say, I'm going to go to an international tribunal and ask them to determine that I'm a bona fide buyer and therefore I'm entitled to compensation. That's not the way it works*."); Hr. Tr., Day 1,

103. At the Hearing, the United States confirmed that "*an act of a domestic court (or an administrative tribunal) that remains subject to appeal has not ripened into the type of Final Act that is sufficiently definite to implicate State Responsibility, unless such recourse if obviously futile or manifestly ineffective*".[152] This means that, "*the International Responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective*".[153]

104. Up to recently, it was evident that the Claimants were, and are, attempting to have this Tribunal adjudicate measures taken in the ongoing Asset Forfeiture Proceedings in which Newport has had the opportunity to participate during the initial phase of the proceedings, and is now participating as affected party.[154] What was not evident, and has now been revealed, is the Claimants' strategy to have Colombia judged – and condemned to pay compensation – not only twice, but thrice and potentially more times, as the Respondent demonstrates.

105. What has also come to light is that in domestic proceedings initiated by various Meritage unit buyers against the Colombian State,[155] [redacted]

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p. 270:3-13 (Respondent's Opening) ("[I]*f you have a damages issue, you can take it up with the Courts, and this is what you have in the Constitution of Colombia. Article 90. If there is actual omission of the Authorities that has caused harm, you can seek damages from the State.* [….] *So,* [the Claimants] *are not remedy-less. They have remedies, and they can seek damages from the Courts in Colombia in the event that the Courts at the end of the day find for them and find that Newport is a bona fide without fault third party*").

152 Hr. Tr., Day 2, p. 394:14-20 (USA Presentation).

153 Hr. Tr., Day 2, pp. 393:21-394:3 (USA Presentation).

154 *See above*, Section V.A.2(b).

155 Mr. Seda has made it explicit to the buyers of the Meritage units (*i.e.*, the unit buyers) that he will not reimburse them the money they invested in the Meritage Project. *See*, *e.g.*, Letter from Victor Alonso Perez Gomez to Administrative Tribunal of Medellín 20, 14 December 2021 (**Exhibit R-311**), p. 170 (noting that Mr. Seda informed the unit buyers that the project failed and the unit buyers' funds "were lost"). The unit buyers have therefore commenced multiple domestic proceedings against the Attorney General's Office attempting to have Colombia declared liable for the commencement of the Asset Forfeiture Proceedings and obtain compensation (for over USD 40 million), presumably, from the "deeper pocket" of the State, which is not different from the Colombian taxpayers. The proceedings initiated by unit buyers include (i) File number n°2018-0154 before the Tribunal 20, Medellín; (ii) File number n°2018-1959 before the Administrative Tribunal, Office 5, First Oral Chamber, Medellín; (iii) File number n°2018-1926 before the Administrative Tribunal, Fourth Oral Chamber, Medellín; (iv) File number n°2018-0258 before the Tribunal 13, Medellín; (v) File number n°2018-0438 before the Tribunal 14, Medellín; (vi) File number n°2018 -0878 before the Administrative Tribunal, Section three, Sub-section B, Bogotá; (vii) File number n°2019-1656 the Administrative Tribunal, Oral Unit, Medellín, Judge Jorge León Arango; (viii) File number n° 2019-0298 before the Tribunal 16, Oral Chamber, Medellín; (ix) File number n°2019-2280 before the Administrative Tribunal, Fourth Oral Chamber, Medellín; (x) File number n° 2019-0243 before the Tribunal 12, Oral Chamber, Medellín; (xi) File number n°2019-3035 before the Administrative Tribunal, Third Oral Chamber, Medellín, judge Martha Nury Velasquez Bedoya; (xii) File number n°2020-0205 before the Tribunal 7, Oral Chamber, Medellín; (xiii) File number n° 2020-0217 before the Tribunal 20, Oral Chamber, Medellín; (xiv) File number n° 2021-00829 before the Administrative Tribunal, Fourth Oral Chamber, Medellín; (xv) File number n° 2020-00298 before the Administrative Tribunal 20, Medellín; (xvi) File

[redacted]

107. The surfacing of the above-referred documentation in the domestic proceedings begs the question of their provenance. To recall, Article 10.21 (Transparency of the Arbitral Proceedings) of the TPA provides an exhaustive list of the documentation of the arbitral proceedings which should be made available to the public, including the Parties' written submissions, transcripts of hearings and the tribunal's decisions.[159] Notably, neither expert reports nor exhibits to the memorials should be made public. Therefore, *a contrario*, expert reports and exhibits are confidential and their disclosure or dissemination to third parties constitutes a breach of confidentiality. [redacted]

number n°2020-0468 before the Administrative Tribunal, Oral Unit, Medellín; (xvii) File number n° 2021-1408 before the Administrative Tribunal, Oral Unit, Medellín, Judge John Jairo Alzate López .

156 *See* Letter from Victor Alonso Perez Gomez to Administrative Tribunal of Antioquia – First Oral Chamber, 19 April 2022 (**Exhibit R-313**).

157 Memorandum to Ana Catalina Noguera from Paula Espinosa, 3 August 2020 (**Exhibit C-328**).

158 *See* Letter from Victor Alonso Perez Gomez to Administrative Tribunal of Medellín 20, 14 December 2021 (**Exhibit R-311**).

159 Article 10.21.1 of the TPA provides as follows: "*Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Parties and make them available to the public: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 10.20.2 and 10.20.3 and Article 10.25; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal.*"

160 Dr. Hernández Second Witness Statement, para. 8; Hr. Tr., Day 3, p. 744:2-9.

[redacted]

108. The Claimants' pattern of outmost disregard for the confidentiality of reserved investigations, official judicial acts and arbitral proceedings does not stop here. [redacted]

109. [redacted] Much to the contrary, campaigning against the Asset Forfeiture Proceedings on various fronts – including through the press and in multiplicity of proceedings before different *fora*, supported by the same evidence (including prefabricated evidence and evidence obtained through questionable means), has extremely grievous consequences:

110. ***First***, as a matter of due process and liability, Colombia is being subjected to multiple proceedings and its very same conduct is being adjudicated by multiple bodies, namely an international arbitral tribunal, a specialized court in Asset Forfeiture Proceedings and multiple domestic courts in action commenced against it by the unit buyers (in addition to the public trial by the press). Effectively, this is not a case of double jeopardy, but of triple or multiple jeopardy – a scenario that should be avoided.[163] ***Second***, in relation to compensation, in addition to the double dipping the Claimants would benefit from, should Newport prevail in the Asset Forfeiture Proceedings, as well as in the present arbitration, Newport will obtain an additional windfall by walking away with its double

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161 *See* Rejoinder, ¶¶ 308-316. The Respondent anticipates that, as customary, the Claimants will accuse the Respondent of leaking documentation. Unfortunately for the Claimants, it would defy logic for a State to provide those acting against it documentation to support their claims. [redacted]

162 *See* Rejoinder, ¶¶ 655-657.

163 *See* E. Gaillard, "Abuse of Process in International Arbitration", ICSID Review, 2017, pp.1-21 (**Exhibit RL-248**), pp.13-16; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (**Exhibit CL-183**), 19 December 2012, ¶ 253; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002 (**Exhibit CL-028**), ¶ 49.

compensation[164] and not having to reimburse the unit buyers for their investment.[165] Instead, it will fall on the Respondent to pay not once but (at least) three times for the same measure.[166]

111. The Respondent reserves its rights in connection with the [redacted] including applying for measures to prevent further breaches.

IV. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMANTS AND THEIR CLAIMS

112. The Claimants brought the claims against the Respondent on the basis of the TPA and the ICSID Convention. However, the Claimants have not met their burden of proving that the jurisdictional requirements set out in both the TPA and the ICSID Convention are met. In particular, the Respondent has demonstrated that the Claimants have not made a protected "investment" under the TPA and the ICSID Convention (**A**) and, in any case, the Tribunal cannot exercise jurisdiction over the vast majority of the claims which do not concern the Meritage Project (**B**). Moreover, neither Mr. Brian Hass (**C**) nor the Boston Enterprises Trust are entitled to bring investment claims before this Tribunal (**D**).[167]

A. THE CLAIMANTS HAVE NOT MADE A PROTECTED "INVESTMENT" UNDER THE TPA AND THE ICSID CONVENTION

113. It is undisputed that the jurisdiction of the ICSID Convention is restricted to legal disputes "*arising directly out of an investment*".[168] The term "investment" in Article 25 of the ICSID Convention

[redacted]

165 As explained, the developments in the project made between May 2013 and the valuation date were mostly financed by third party contributions, including unit buyers. *See below*, ¶ 434.

166 Notably, if the Claimants are found to be good faith third parties without fault, the provisional measures would be lifted and the affected parties would be entitled to compensation, as explained in this PHB.

167 *See* Counter Memorial, Section III; Rejoinder, Section IV; Respondent's Opening Presentation, slides 107-173; Hr. Tr., Day 1, pp. 274:518; 289:15-299:2 (Respondent's Opening).

168 ICSID Convention, Article 25.

comprises of at least three elements: a commitment or allocation of resources, a risk and a certain duration.[169] Similarly, under the TPA, the term "investment" is defined as assets "*that ha*[ve] *the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk*".[170]

114. As demonstrated, a "*global assessment*" of the Claimants' purported investments (as suggested by the Claimants[171]) shows that these do not bear the "*characteristics of an investment*": the Claimants failed to show (*i*) that they provided any significant contribution of capital or other resources into the Meritage Project, (*ii*) that they assumed any risk, or (*iii*) that they had any qualified expectation of gain or profit.[172]

115. In any event, the Claimants have failed to show that they have unencumbered rights over their alleged "*investments*". As demonstrated, by the time the request for arbitration was filed on 25 January 2019, most of the Claimants' shares in Newport and Luxé (as well as Mr. Seda's shares in Royal Realty) had been pledged as a collateral in favour of their funder, Tenor Capital (through Downie North LLC).[173] While the Claimants have acknowledged that Tenor Capital has a financial interest in the arbitration (high enough for a representative of Tenor Capital, Mr. Amariglio, to be present throughout the Hearing), they have consistently refused to disclose Tenor Capital's precise stake and financial interest in the arbitration.[174]

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169 *See* Counter Memorial, ¶ 252; Rejoinder, ¶¶ 513-514. The Claimants have argued that the ICSID Convention does not include a definition of "investment" and does not require any "cumulative criteria". *See*, *e.g.*, Hr. Tr., Day 1, pp. 159:16-160:1 (Claimants' Opening). The Claimants' argument is moot, given that the TPA clearly provides that an "investment" must bear the characteristics of an investment. In any event, the Claimants must meet the jurisdictional requirements under both the ICSID Convention and the TPA. *See below*, ¶ 120.

170 US-Colombia TPA, Article 10.28. *See also* Rejoinder, ¶¶ 515-519.

171 *See* Reply, ¶ 169.

172 *See* Respondent's Opening Presentation, slides 154-155; Hr. Tr., Day 1, pp. 289:18-291:9 (Respondent's Opening); Rejoinder, ¶¶ 512-528; Counter Memorial, ¶¶ 247-262. As explained, the Meritage Project was mainly financed by third parties, including unit buyers – most of which were Colombian nationals, and Banco de Bogotá. This means that the real contributions were made – and the risks were assumed – by Colombian nationals.

173 Respondent's Opening Presentation, slides 157-160.

174 *See* Email from the Claimants of 20 April 2022. The Claimants' refusal to disclose Tenor Capital's actual interest in the arbitration raises two main questions: (i) what is the role and financial stake of Tenor Capital in the arbitration and whether Tenor Capital is the interested party behind the Claimants' claims, and [redacted] *See above*, Section II.B.2.

B. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMS THAT DO NOT CONCERN THE MERITAGE PROJECT

116. Under the ICSID Convention, the jurisdiction of the Tribunal is restricted to legal disputes "*arising out of an investment*".[175] Similarly, the TPA restricts the Tribunal's jurisdiction to claims which have a "*legally significant connection*" to the disputed measure.[176] The Claimants do not deny that a causal link is required for the Tribunal to exercise jurisdiction. Instead, they argue that it is sufficient to show a "*relationship of apparent proximity between the challenged measure and the claimant or its investment*".[177]

117. The Parties agree that the disputed measure in this case is the Asset Forfeiture Proceedings against the Meritage Project. This means that the relevant "*investment*" to assess the Tribunal's jurisdiction is the Claimants' purported investment in the Meritage Project. It is undisputed that only around 30% of the damages claimed concern losses allegedly suffered with respect to the Meritage Project; the remaining 70% of the damages claims (*i.e.* almost USD 140 million) concern the Claimants' Other Projects, including future hypothetical projects.[178] Evidently, the vast majority of the Claimants or their claims do not have a "*legally significant connection*" – or any connection at all – between the claimed damages and the Asset Forfeiture Proceedings or the Meritage Project. What is more, contrary to the Claimants' allegations, there is not even an "*apparent proximity*" between the Asset Forfeiture Proceedings against the Meritage Project and many of the Claimants – who purportedly

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175 Article 25 of the ICSID Convention. *See also Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997 (**Exhibit RL-157**), ¶ 24; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003 (**Exhibit RL-161**), ¶ 26; Rejoinder, ¶ 536; Counter Memorial, ¶ 249; Hr. Tr., Day 1, p. 274:15-16 (Respondent's Opening).

176 US-Colombia TPA, Article 10.1.1; Submission of the USA, ¶¶ 3-4; *Methanex Corporation v. United States of America*, UNCITRAL, First Partial Award, 7 August 2002 (**Exhibit RL-160**), ¶ 147; *Bayview Irrigation District and Others v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007 (**Exhibit RL-167**), ¶ 101; Rejoinder, ¶¶ 536-540; Hr. Tr., Day 1, pp. 294:14-296:7 (Respondent's Opening). Article 10.16 further explained that an investor may submit to arbitration claims that the respondent "*has breached an obligation under Section A*".

177 Claimants' PHB, ¶ 292. Notably, the Claimants also acknowledged that a causal link is required for the Claimants to be entitled to damages (*see* Reply, ¶ 182). The issue is dealt extensively in the damages section of this PHB. *See below*, Section VI.A. However, the Tribunal should not reach the damages section with respect to the claims in connection with the Other Projects, as it has been demonstrated that it does not have jurisdiction over these claims and, in any event, the Respondent did not breach any obligation with respect to the Claimants' Other Projects and with respect to the Claimants that do not hold an interest in the Meritage Project. *See below*, V.C.2.

178 Respondent's Opening Presentation, slides 165-166; Rejoinder, ¶¶ 540-543; Counter Memorial, ¶¶ 263-266; Hr. Tr., Day 1, pp. 295:12-296:7 (Respondent's Opening).

invested in the Claimants' Other Projects but not in the Meritage Project. Accordingly, these claims fall beyond the Tribunal's jurisdiction.[179]

C. MR. HASS DOES NOT HAVE STANDING BEFORE THIS TRIBUNAL

118. It is undisputed that Mr. Brian Hass's alleged investment in the Luxé Project (he did not have any connection with the Meritage Project) was made through a company incorporated in the Island of Nevis (*i.e.*, Haystack Holdings LLC) and a discretionary trust established in the Bahamas (*i.e.*, the Hass Family Discretionary Trust). Pursuant to the Trust Agreement, Mr. Hass does not have any control over the Trust and could even be "*excluded from the class of the Beneficiaries*" at any time. More importantly, he does not have "*any ascertainable right, title, or interest to any portion of the Trust Estate*", including the shares in Luxé (held indirectly through Haystack Holdings).[180]

119. As demonstrated, investment tribunals have considered that discretionary beneficiaries of discretionary trusts cannot be deemed to have made an investment, as they do not have rights or interests over the trust property "*but only the hope of benefiting from the Trust*". Such hope or expectation "*is not an asset*".[181] This is exactly the case of Mr. Hass. Accordingly, he does not have standing before this Tribunal.

D. THE BOSTON ENTERPRISES TRUST IS BARRED FROM SEEKING INVESTMENT PROTECTION BEFORE THIS TRIBUNAL

120. The Parties agree that the scope of this Tribunal's adjudicative power is circumscribed by both the ICSID Convention and the TPA.[182] This means that for the Tribunal to have jurisdiction, the

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179 The Claimants' allegation that "*Colombia was aware of the Claimants' investments in Luxé but nevertheless did not take steps to minimize or mitigate the harm caused to Luxé as a direct result of the Asset Forfeiture Proceedings*" is misconceived (*see* Claimants' PHB, ¶ 293). *First*, as explained, it is completely unreasonable to expect that before initiating asset forfeiture proceedings against a lot, the Attorney General's Office would check who is behind any project that is being or potentially will be developed on that lot, check which other projects those parties may have in Colombia (and abroad) – regardless of the stage of development – and adopt measures to minimize or mitigate the harm to any such existing or potential project. *Second*, it is the Claimants – not the Respondent – who should have taken measures to minimize or mitigate any potential harm to the Project. Instead, they acted negligently and unreasonably by failing to procure financing from Colpatria or any other source (including their own funds) to complete a project which they represent was almost finalized and expected to be very profitable. *See below*, ¶¶ 354-355.

180 *See* Rejoinder, ¶¶ 545-547. The Claimants' argument is solely based on Mr. Hass being "*the ultimate beneficial owner of the shares*" (*See* Claimants' PHB, ¶ 295). However, the Claimants have failed to provide any evidence of Mr. Hass being the ultimate beneficial owner of the Luxé shares held by Haystack Holdings.

181 *Prenay Agarwal, Vinita Agarwal and Ritika Mehta v Oriental Republic of Uruguay*, PCA Case No. 2018-04, Award, 6 August 2020 (**Exhibit RL-202**), ¶ 224. *See also* Rejoinder, ¶¶ 548-551.

182 *See* Counter Memorial, ¶ 243; Memorial, ¶ 336

jurisdictional requirements set out in both the ICSID Convention and the TPA must be met.[183] Thus, regardless of how broadly the term "*investor*" is defined in the TPA, only those investors that fall within the scope of Article 25 of the ICSID Convention have standing to claim before an ICSID Tribunal.

121. Under the ICSID Convention, only natural or juridical persons may initiate arbitration against a Contracting State. As confirmed by Prof. Schreuer, "*for purposes of the* [ICSID] *Convention, the quality of legal personality is inherent in the concept of 'juridical person' and is part of the objective requirements for jurisdiction*".[184]

122. In this case, it is undisputed that the Boston Enterprises Trust does not have legal personality. Accordingly, it cannot have standing to claim before an ICSID Tribunal. In other words, even assuming that the Boston Enterprises Trust is a protected investor under the TPA, it does not meet the jurisdictional requirements of Article 25 of the ICSID Convention and, therefore, it does not have standing before this Tribunal constituted in accordance with the ICSID Convention.[185]

123. In any event, the Boston Enterprises Trust did not own or control any shares in Newport (or Luxé) at all relevant times. Under the TPA, an investor must own or control the investment at three relevant times: (i) the time of the purported breach, (ii) the submission of a claim to arbitration, and (iii) the resolution of the claim.[186]

124. As demonstrated, the Boston Enterprises Trust was established and acquired its shares in Newport on 9 August 2018, *i.e.*, two years after the Precautionary Measures were imposed on the Meritage Lot on 3 August 2016 and just a week before the Claimants filed their Notice of Dispute. A few months later, on 8 November 2018, the Boston Enterprises Trust acquired its shares in Luxé. This means that the Boston Enterprises Trust did not even exist at the time of the purported breach, and it did not own any shares in Luxé at the time the Notice of Dispute was filed. Accordingly, it cannot

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183 The "double-barrelled test" has been widely acknowledged by investment tribunals. *See*, *e.g.*, *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018 (**Exhibit RL-103**), ¶ 243 ("*most tribunals have applied such a double-barrelled test in regard to the jurisdictional requirement of an 'investment'. However, this equally applies to the other jurisdictional requirements that may be expressed in both the ICSID Convention and in the applicable investment treaty*"); *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB126, Award, 4 May 2021 (**Exhibit RL-206**), ¶ 665; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (**Exhibit RL-43**), ¶¶ 108-109; *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011(**Exhibit CL-139**), ¶¶ 343-351. Notably, all these awards have been rendered after the annulment of the *MHS v. Malaysia* award to which the Claimants refer in their PHB (¶ 285) and none of these have been annulled.

184 ICSID Convention, Article 25; Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) (**Exhibit RL-129**), ¶ 693.

185 *See* Rejoinder, ¶¶ 558-563. The Boston Enterprise Trust may be entitled to bring investment claims under other fora available under the TPA (subject to it fulfilling all the relevant jurisdictional conditions).

186 *See* Submission of the United States of America, 26 February 2021, ¶ 15. *See also* Rejoinder, ¶ 556.

be allowed to bring claims in connection to an alleged breach that took place years before the trust came to exist.[187]

V. THE RESPONDENT DID NOT BREACH ITS INTERNATIONAL OBLIGATIONS VIS-À-VIS THE CLAIMANTS

125. As extensively demonstrated, the Respondent has not breached its international obligations vis-à-vis the Claimants. In particular, the Respondent did not expropriate the "Meritage Property" (**A**) and did not breach its obligations to accord National Treatment (**B**), fair and equitable treatment (**C**) and full protection and security (**D**).

A. THE RESPONDENT DID NOT EXPROPRIATE THE CLAIMANTS' ALLEGED INVESTMENT IN THE MERITAGE PROJECT

126. The Claimants' expropriation claims should be rejected for two independent reasons: *first*, the Asset Forfeiture Proceedings are not expropriatory in nature (**1**), and *second*, the Asset Forfeiture Proceedings are a legitimate exercise of Colombia's regulatory powers (**2**).

1. The Asset Forfeiture Proceedings are not expropriatory in nature

127. Paragraph 1 of Annex 10-B of the TPA, sets a *conditio sine qua non* for an action or series of actions to constitute an expropriation: it has to interfere with "*a tangible or intangible property interest in an investment*".[188] In this case, it is undisputed that the Claimants did not have any "*property interest*" over the Meritage Lot or the Meritage Project.[189] On this basis alone, the Claimants' expropriation allegations should be dismissed.

128. In any event, Annex 10-B of the TPA also provides that to determine whether an action or series of actions constitutes an expropriation, a case-by-case, fact-based inquiry is to be performed, considering, among others, the economic impact of the government action (**a**), the measure's

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187 Contrary to the Claimants' allegations, whether the transfer of shares to the Boston Enterprises Trust was an "*internal corporate reorganization*" is irrelevant (*see* Claimants' PHB, ¶ 296). Investment tribunals have found that restructuring an investment after a breach has taken place just to gain access to arbitration is abusive. *See*, *e.g.*, *Mobil Corporation, et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (**Exhibit CL-143**), ¶¶ 188, 205). [redacted]

188 *See* Annex 10-B of the TPA, ¶ 1.

189 *See* Rejoinder, ¶¶ 574-576.

interference with the reasonable investment-backed expectations (**b**) and the character of the government action (**c**). As demonstrated, a fact-based inquiry shows that the Asset Forfeiture Proceedings are not expropriatory.

a. *Economic impact of the measure*

129. It is well-established that an expropriation requires the total and permanent deprivation of property rights and the destruction of the economic value of the investment.[190] This has been confirmed by the United States at the Hearing:

> "[I]*n the context of an expropriation claim, a substantive element of that claim is that there must exist a permanent deprivation of the relevant investment.* […] *Conversely, it is well-established that a temporary reversible measure leading to an ephemeral deprivation does not result in an expropriation*. […] *Therefore, a non-binding final determination or a ruling that is subject to challenge cannot cause the kind of permanent and irreversible deprivation that is required as a substantive element of expropriation."* [191]

130. As demonstrated, there is no evidence that the Asset Forfeiture – which are temporary in nature – had a permanent economic impact on the Meritage Project.[192]

b. *Interference with "reasonable investment-backed expectations"*

131. Reasonable investment-backed expectations can only arise from the regulatory framework existing at the time of the purported investment was made, and on the basis of specific commitments made to the investor.[193]

132. As demonstrated, the Claimants could not have reasonably expected not to be subject to Colombian law, including the Asset Forfeiture Law.[194]

c. *Character of the government action*

133. As demonstrated, this element requires an assessment of the nature and the character of the government action.[195] For example, the United States confirmed at the Hearing that "*the International Responsibility of States may not be invoked with respect to non-final judicial acts, unless recourse to further domestic remedies is obviously futile or manifestly ineffective*".[196] Moreover,

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190 *See* Counter Memorial, ¶¶ 294-298. *See*, among others, *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020 (**Exhibit RL-119**), ¶¶ 624-628 (the tribunal considered that a measure in force for five years was not expropriatory).

191 *See* Claimants' Opening, Hearing Transcript, Day 2, p. 391:5-392:4.

192 *See* Counter Memorial, ¶¶ 353-354; Rejoinder, ¶¶ 583-585.

193 *See* Counter Memorial, ¶ 294.

194 *See* Counter Memorial, ¶ 586; Rejoinder, ¶¶ 355-357. *See also below*, ¶¶ V.C.1(c)

195 Rejoinder, 588; CM, ¶ 294.

196 Hr. Tr., Day 2, p. 393:21-394:3 (USA Presentation).

"[A]*n act of a domestic court (or an administrative tribunal) that remains subject to appeal has not ripened into the type of Final Act that is sufficiently definite to implicate State Responsibility, unless such recourse if obviously futile or manifestly ineffective*".[197]

134. The government action at stake is the Asset Forfeiture Proceedings against the Meritage Lot. To recall, asset forfeiture was enshrined in the 1991 Colombian Constitution "*as an instrument for the pursuit of assets acquired through illicit enrichment*".[198] Already in 1997 – *i.e.*, ten years before Mr. Seda's arrival to Colombia – the Colombian Constitutional Court had held that asset forfeiture is, by nature, not expropriatory. This has been confirmed, *inter alia*, by the Claimants' expert at the Hearing.[199] Moreover, the Asset Forfeiture Proceedings were initiated and conducted in accordance with Colombian law. Notably, the Claimants have not argued – let alone shown – that the domestic remedies available would be "*obviously futile or manifestly ineffective*".[200] Therefore, there is no basis to allege that the Asset Forfeiture Proceedings are expropriatory.

135. In sum, the Claimants are not entitled to compensation because the Asset Forfeiture Proceedings are not expropriatory in nature.

2. The Asset Forfeiture Proceedings are a legitimate exercise of Colombia's regulatory powers

136. Pursuant to Annex 10-B of the TPA, "*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*".[201] As clarified by the United States at the Hearing, State practice does not support a further requirement of proportionality,[202] contrary to what has been stated by the Claimants in their PHB.[203]

137. As demonstrated, the Asset Forfeiture Proceedings aim to protect a legitimate public welfare objective (**a**) and were initiated and are conducted in accordance with the due process of law (**b**), in a non-discriminatory basis (**c**) as a *bona fide* application of the Asset Forfeiture Law (**d**).

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197 Hr. Tr., Day 2, p. 394:14-20 (USA Presentation). *See also Apotex Inc. v. The Government of the United States of America*, NAFTA, UNCITRAL, Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 282.

198 Expert Report of Dr. Carlos Medellín, ¶ 18.

199 Hr. Tr., Day 4, p. 1048:12-15 (Dr. Martínez' Presentation). *See also* Rejoinder, ¶ 358.

200 Much on the contrary, the Claimants were quite vocal about the recent decision by the Supreme Court of Bogotá which recognized Newport as an affected party. *See* Hr. Tr., Day 1, p. 53:12-19.

201 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Annex 10-B, ¶paragraph 3(b). *See also* Hr. Tr., Day 2, p. 392:6-11 (US Presentation); Counter Memorial, ¶¶ 287-291; Rejoinder ¶¶ 591-594.

202 Hr. Tr., Day 2, p. 392:14-19 (Statement of Non-Disputing Parties).

203 *See*, Claimants' PHB, ¶ 35.

a. *The Asset Forfeiture Proceedings were initiated and are conducted to protect a legitimate public welfare objective*

138. Contrary to the Claimants' allegations,[204] it is clear that Colombia initiated and is conducting the Asset Forfeiture Proceedings to protect a legitimate welfare objective.

139. In their PHB, the Claimants unsuccessfully insist in restricting the application of the regulatory powers doctrine to measures falling within the two groups of measures set by the *Magyar v. Hungary* tribunal.[205] As demonstrated, this is contrary to paragraph 3(b) of Annex 10-B of the TPA, which expressly states that non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives would only constitute indirect expropriation "*in rare circumstances*."[206] Moreover, the Claimants' approach fails when confronted with the practice of investment tribunals, even in the absence of explicit provisions such as the one in paragraph 3(b) of Annex 10-B of the TPA. For example, in *Muhammet v. Turkmenistan* the tribunal found that the seizure and sealing of the claimants' offices, warehouse, equipment, computers, documents and a construction site for a cultural centre project were not an unlawful interference with the claimants' investment in Turkmenistan, to the extent that these were conducted within the limits of the law of Turkmenistan.[207]

140. Further, even if the Claimants' proposed standard under *Magyar v. Hungary* were applicable (*quod non*), it is clear that the Asset Forfeiture Proceedings initiated by Colombia consist of measures which are "*aimed at abating threats that the investor's activities may pose to public health, environment or public order*".[208]

141. *First*, it is uncontroversial that the Asset Forfeiture Law was adopted by Colombia as a vital tools to fight against drug trafficking and corruption worldwide, and has been internationally recognized for its efficacy in targeting the proceeds of crime.[209] As acknowledged by the Claimants' expert, Mr.

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204 *See*, Claimants' PHB, ¶¶ 33-34.

205 *See*, Claimants' Reply, ¶ 236.

206 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Annex 10-B, paragraph 3(b). ("**Except in rare circumstances**, 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.") (emphasis added).

207 *See,* Muhammet *Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 (**Exhibit RL-206**), ¶¶ 941, 968.

208 *See*, Claimants' PHB, ¶ 34. *See also, Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019 (**Exhibit CL-168**), ¶ 366. The Respondent notes that the two categories identified by the *Magyar* tribunal are alternative, hence it suffices for the Respondent to prove that the Asset Forfeiture Proceedings belongs to either category for the test to be met.

209 *See, e.g.* Hr. Tr., Day 1, p. 168:9-16 (Respondent's Opening) ("*MR. GOMEZ: […] "The actions that the Claimants consider to be in violation of the Trade Protection Agreement between Colombia and the United States are an exercise of the State's regulatory activity on the basis of the notion of asset forfeiture, which has been*

Martínez, the Asset Forfeiture Law is "an international standard that is the Model Law on asset forfeiture for Latin America, which was developed by the UN office on drug and crime" and continued to affirm that "*the intent of the law is to help countries to go after the proceeds that funds criminal organizations*".[210]

142. [redacted]

b. *The Asset Forfeiture Proceedings were initiated and are conducted in accordance with the due process of law, in full compliance of the Asset Forfeiture Law*

143. In their PHB, the Claimants blatantly state that "*Colombia's actions* [in the Asset Forfeiture Proceedings] *also denied Claimants' investment basic due process*,"[215] and that "*Colombia initiated the Asset Forfeiture Proceedings on the basis of a false story contrived by a convicted drug trafficker in furtherance of a corrupt extortion scheme*".[216] The thesis advanced by the Claimants is based on a misrepresentation and conflation of the proceedings and standards established by the Asset Forfeiture Law, as the Respondent briefly clarifies (**i**).

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recognized as one of the main tools in the fight against drug trafficking and corruption worldwide"); *see also,* Hr. Tr., Day 1, p. 180:10-18 (Respondent's Opening Statement) ("*MS. HERRERA: […] In fact,* […] *the Colombian asset forfeiture proceedings have been internationally recognized as an effective tool to fight criminal activities and to deprive criminal enterprises of their illicit assets. Here you have that recognition by the GAFILAT, which is the Financial Action Task Force in Latin America, that surveys and tries to prevent and combat money laundering"*); GAFILAT, "Mutual Evaluation Report on the Republic of Colombia" 2018 (**Exhibit R-130**), ¶ 165 ("*Forfeiture has proven to be very effective in depriving criminal enterprises of their illicit assets*").

210 Hr. Tr., Day 4, p. 1047:12-20 (Dr. Martínez' Presentation).

211 *See* Rejoinder, Section II.F.1.

212 *See* Claimants' Reply, ¶ 4.

213 *See above*, Section II.

214 *See above*, Section II.B.2.

215 Claimants' PHB, ¶ 94.

216 Claimants' PHB, ¶ 95.

144. Contrary to the Claimants' allegations, the Asset Forfeiture Proceedings were initiated in full compliance with due process requirements and evidentiary standards provided under Colombia's law. Their commencement was based on the existence of reasonable grounds regarding the illegal origin of the Meritage Lot (**ii**) and the imposition of the Precautionary Measures was in accordance with the law and twice reviewed and confirmed by the competent Colombian Courts (**iii**).

145. [redacted] Moreover, throughout the Proceedings, the Attorney General's Office treated Newport as an *afectado* and the Superior Tribunal of Bogota included Newport as a participant in the Trial Phase of the Proceedings. Therefore, Newport's status of bona fide third party without fault would be assessed and determined by the competent Judge, as mandated by the Asset Forfeiture Law (**v**). The Respondent also explains why the duration of the Asset Forfeiture Proceedings is not unreasonable considering the circumstances of the case, including its complexity and the onset of the COVID-19 pandemic (**vi**).

146. Finally, the Respondent briefly addresses the Claimants' groundless allegations as to the existence of an "extortion scheme" to explain the initiation of the Asset Forfeiture Proceedings are absolutely lacking in evidence (**vii**) as well as the Claimants' *ex post* arguments relating to the Respondent's alleged failure to disgorge profits (**viii**) and the [redacted]

(i) The Claimants' misrepresentations of the Asset Forfeiture Law, its stages and the applicable standard of proof

147. Prior to delving into the actual facts of the case, the Respondent is compelled to correct, once again, the Claimants' deliberate conflation of the stages and standards of proof applicable under the Asset Forfeiture Law. As explained by Counsel for the Respondent at the Hearing,[217] asset forfeiture requires the completion of two distinct stages: *first,* an "Initial Stage", within the Unit of Asset Forfeiture, leading to the issuance of the formal Request for Asset Forfeiture or for dismissal of the

[217] *See,* Hr. Tr., Day 1, p. 181:15-22-182:14 (Respondent's Opening).

action, to be submitted before the competent judge.[218] *Second,* and in the event that the Attorney General's Office files a formal request for the Asset Forfeiture Proceedings to continue (the *Requerimiento*), the Initial Stage is followed by a "Trial Stage", before the competent Specialized Asset Forfeiture judge.[219] This Trial Stage ends with the issuance of a Final Decision by the competent judge, which will ultimately resolve the request for forfeiture on the merits.[220]

148. With the correct legal framework for the Asset Forfeiture Proceedings, the Claimants' strategy to support their allegation that "[t]*he Asset Forfeiture Proceedings* [w]*ere* [a]*rbitrary* [a]*nd* [d]*enied Claimants* [b]*asic* [d]*ue* [p]*rocess*" becomes clear:[221] by confusing the timeline of facts and distorting the legal standards applicable throughout the Asset Forfeiture Proceedings, the Claimants apply to the very first decisions adopted by Ms. Ardila and Mr. Caro in the Initial Stage of the Asset Forfeiture Proceedings (the Precautionary Measures, the Provisional Determination of the Claim and the *Requerimiento*), the stringent standard of proof that the Asset Forfeiture Law prescribes for the Court's Final Decision that end the proceedings. As the Respondent demonstrates, the Claimants' narrative is deliberately misleading, and incorrect as a matter of Colombian law.

149. To recall, as already explained by Dr. Reyes in his first expert report and as addressed during his presentation at the Hearing,[222] the actions and legal standards of proof prescribed by the Asset Forfeiture Law for each one of the different stages in the Asset Forfeiture Proceedings evolve as the investigation progresses, as follows:

150. (a) Initial or pre-procedural stage (Article 117): in preparation for the determination of the Claim, the prosecutor in charge of the file investigates and collects "***serious and reasonable***" evidence from which the Attorney General's Office can "***infer*** *the* ***probable existence*** *of assets whose origin or destination is part of the causes*" of the asset forfeiture.[223] Pursuant to Article 10 of the Asset

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218 *See,* Hr. Tr., Day 4, p. 1176:8-14 (Prof. Reyes' Presentation) ("*The prosecutor, based on the evidence that he or she have collected, and what the affected parties submit to them, makes a decision that may be: to request the judge to declare inadmissibility of the asset forfeiture action, or to recognize the affected parties and to order the forfeiture of assets*").

219 *See,* Hr. Tr., Day 4, p. 1176:5-14 (Prof. Reyes' Presentation).

220 *See,* Hr. Tr., Day 4, p. 1177: 2-5 (Prof. Reyes' Presentation).

221 Claimants' PHB, Section III.C.

222 Dr. Reyes' First Expert Report, ¶ 20 ("[…] [T]he level of proof required by the law for each of the stages that make up the action for asset forfeiture is different, taking into account that it is a judicial action that begins with information that leads to an initial phase of investigation by an Attorney General, whose evolution may go as far as the issuing of a sentence by a judge. As the proceedings progress, the evidentiary requirements become more demanding, until the certainty required to pass sentence is reached, ordering the asset forfeiture or recognising its inadmissibility."); Hr. Tr., Day 4, p. 1175:2-19 (Prof. Reyes' Expert Presentation).

223 Law 1708 of 2014 (**Exhibit C-003bis**), Article 117 (emphasis added); *see also*, Hr. Tr., Day 4, p. 1177:6-10 (Prof. Reyes' Expert Presentation).

Forfeiture Law, during this Initial Stage, the proceedings strictly confidential, even to the *afectados* and intervening parties.[224]

151. (b) Adoption of anticipated precautionary measures (Article 89): to the extent that there exist "***serious grounds*** *for considering their imposition indispensable and necessary*", the Attorney General's Office may adopt precautionary measures before the issuance of the Provisional determination of the claim.[225] As further explained, this was precisely the case with the Precautionary Measures on the Meritage Lot, since it was urgent to prevent the assets subject to forfeiture from being further transferred and diluted;[226]

152. (c) Provisional determination of the claim (Article 126): before submitting the formal forfeiture petition before the competent Specialized Judge, the Prosecutor in charge of the case must issue the provisional determination of the claim "*when the evidence collected during the initial phase* ***indicates*** *that the conditions for the asset forfeiture are met*".[227] At this stage, the Prosecutor may also order precautionary measures, "[t]*o the extent that these have not been ordered during the initial stage*."[228] Pursuant to the Asset Forfeiture Law, the purpose of the provisional determination of the claim is to "*guarantee the right of opposition*," to which effect the resolution is notified to the affected parties, for them to gain access to the full case file and submit their objections, together with their underlying evidence.[229] Within 30 days following the expiration of the term for the submission of objections by the affected parties, the Prosecutor must submit before the Judge the formal forfeiture petition, or the request for the Judge to dismiss the forfeiture action.[230] For the avoidance of doubt, contrary to what the Claimants have argued,[231] once an asset forfeiture petition has been filed, only the competent judge may order its dismissal.[232]

153. (d) Final decision on the merits (Article 148): requires that one of the causes established by Article 16 of the Law 1708 as grounds for asset forfeiture be proven.[233] As clearly explained by Dr. Reyes at the Hearing, this final decision will contain the Judge's findings on two aspects: *first*, whether the

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224 Law 1708 of 2014 (**Exhibit C-003bis**), Article 10.

225 Law 1708 of 2014 (**Exhibit C-003bis**), Article 89 (emphasis added).

226 *See below*, Section V.A.2(b)(iii).

227 Law 1708 of 2014 (**Exhibit C-003bis**), Article 126 (emphasis added).

228 Law 1708 of 2014 (**Exhibit C-003bis**), Article 126 (emphasis added).

229 Law 1708 of 2014 (**Exhibit C-003bis**), Articles 126, 131.

230 *See*, Law 1708 of 2014 (**Exhibit C-003bis**), Article 131.

231 Claimants' Reply, ¶ 83.

232 *See*, Law 1708 of 2014 (**Exhibit C-003bis**), Article 131. *See also*, Respondent's Rejoinder, ¶¶ 253-255; Second Expert Report of Dr. Reyes, ¶ 12.

233 Dr. Reyes First Expert Report, ¶ 22; Law 1708 of 2014 (**Exhibit C-003bis**), Articles 16, 148.

ground for asset forfeiture has been established, and hence the asset forfeiture action should prosper,[234] and *second,* if there are bona fide third parties without fault.[235]

154. That is: the investigation process begins with the finding of "*serious and reasonable*" evidence to infer the probable existence of one of the grounds for asset forfeiture set forth by the Code,[236] but firm evidence of the merits of the forfeiture action is only required for the rendering of the final decision on the merits.

155. In order to clarify the Claimants' misrepresentations, the Respondent addresses the relevant facts chronologically to demonstrate that, at each stage of the Asset Forfeiture Proceedings, the Specialized Prosecutors in charge of the investigation fully complied with the applicable standard of proof and procedure, diligently obtaining increasing evidence of the illicit origin of the Meritage Lot.

(ii) The initiation of the Asset Forfeiture Proceedings complied with the standard required by the Law

156. In light of the standards of proof defined above, the initiation of the Asset Forfeiture Proceedings requires a finding of "*serious and reasonable*" evidence to infer the probable existence of one of the grounds for asset forfeiture set forth by the Law.[237] As shall be demonstrated, this standard was duly satisfied by the Attorney General's Office at the very onset of the investigations, prior to the adoption of the Precautionary Measures.

157. In the narrative presented by the Claimants in their PHB, "[t]*he Attorney General*['s] *Office* [] *unreasonably and arbitrarily initiated the Asset Forfeiture Proceedings on the basis of a known lie*."[238] [redacted][239]

234 *See,* Hr. Tr., Day 4, p. 1177:2-3 (Prof. Reyes' Expert Presentation).

235 *See,* Hr. Tr., Day 4, p. 1177:3-4 (Prof. Reyes' Expert Presentation).

236 *See*, Law 1708 of 2014 (**Exhibit C-003bis**), Article 16.

237 Hr. Tr., Day 4, p. 1177:6-12 (Prof. Reyes' Expert Presentation); Law 1708 of 2014 (**Exhibit C-003bis**), Article 117 (emphasis added).

238 Claimants' PHB, ¶ 99.

239 Claimants' PHB, ¶¶ 95, 99.

[redacted]

[redacted]

[redacted]

241 Claimants' PHB, ¶ 95 ("While in its pleadings, Colombia attempted to distance the basis of the Asset Forfeiture Proceedings from López Vanegas's false kidnapping story […]").

[redacted]

246 Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014 (**Exhibit C-130**), p. 3.

247 López Vanegas Tutela Action, 6 May 2016 (**Exhibit C-037bis**), p. SP-0052.

248 Judicial Police Report to Prosecutor 37, 4 September 2014 (**Exhibit C-133**), p. 2.

249 Judicial Police Report to Prosecutor 37, 4 September 2014 (**Exhibit C-133**).

250 Judicial Police Report to Prosecutor 37, 4 September 2014 (**Exhibit C-133**), p. 3.

160. [redacted]

161. [redacted]

162. Indeed, during this period, Mr. Iván López Vanegas and his representatives conducted numerous in-person inquiries at the Money Laundering and Organized Crime units, and proceeded to file two formal "rights of petition", before Prosecutor 24 of Organized Crime and Prosecutor 37 of Asset Forfeiture.[257]

[redacted]

252 Judicial Police Report to Prosecutor 37, 4 September 2014 (**Exhibit C-133**), p. 3.

253 Claimants' PHB, ¶ 100.

254 Claimants' PHB, ¶ 96(a) (emphasis added).

255 Claimants' PHB, ¶¶ 99-100.

256 *See,* López Vanegas Tutela Action, 6 May 2016 **(Exhibit C-037bis)**

257 *See* López Vanegas Tutela Action, 6 May 2016 (**Exhibit C-037bis**). Specifically: in December 2015, Victor Mosquera contacted Prosecutor No. 24 of Organized Crime by phone (SP-0051); on 25 January 2016, Mosquera conducts in-person inquiries at the Money Laundering Unit about the stage of the investigations (SP-0051); at an unspecified time following this last event, another in-person inquiry was conducted at the Organized Crime Unit (SP-0051); on 29 February 2016, Mr. López Vanegas filed a formal "right of petition" (*derecho de petición*) before Prosecutor 24 of Organized Crime (p. SP-0052); subsequently, Mr. López Vanegas filed a second right of petition before Prosecutor 37 of Asset Forfeiture (p. SP-0053).

163. It is no "coincidence" that, during this period, following the numerous complaints submitted by Mr. López Vanegas, the investigation relating to Mr. López Vanegas' complaint expedited. Despite the Claimants' innuendo, the acceleration of the file in March 2016 was anything but "sudden", it was rather generated by Mr. López Vanegas' insistence.[258] On 28 March 2016, the Superintendence of Notaries and Registry commenced their investigation into the title deeds mentioned by Mr. López Vanegas, which would ultimately result in the 8 April 2016 report that led to the initiation of the Asset Forfeiture Proceedings into the Meritage.[259] The extensive inspections carried out by the Superintendence, which included visits to 19 Notaries throughout Medellín to review the notary protocols of the 52 deeds mentioned by Mr. López in his complaint, revealed a series of grave irregularities, in addition to Mr. López Vanegas' involvement in the chain of transfer of the Meritage Lot.[260] Later, Ms. Ardila confirmed that Mr. Sebastián López had not been in Colombia when the deed by which he had allegedly sold the land had been signed.[261] [redacted]

[redacted]

258 Further, based on the former prosecutor's inactivity, it was only reasonable for Ms. Malagón to assign the matter to a different prosecutor and, given the complexity of the file, to grant a separate file to the Meritage investigation.

259 Judicial Police Report, Superintendence of Notaries and Registry (Ministry of Justice), 8 April 2016 **(Exhibit AA-1)**.

260 Judicial Police Report, Superintendence of Notaries and Registry (Ministry of Justice), 8 April 2016 **(Exhibit AA-1).** As noted in the Respondent's Rejoinder, these irregularities included: "irregularities with the signatures of the deeds, including signatures unmatching those registered in the respective ID cards, amongst them, that of Mr. Sebastián López; several public deeds containing scratches, scuffs and corrections without having been duly amended, as required by law; powers of attorney without the necessary legal requisites; irregularities regarding the dates in which the deeds were created and their registration in the notary protocols, some of which had been incorporated among the protocols pertaining to a different year altogether; Sellers represented by agents without a mandate ("Agente Oficioso"), whose actions were not subsequently ratified." (*see*, Rejoinder, ¶ 107).

261 Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 72.

262 Judicial Police Report, Superintendence of Notaries and Registry (Ministry of Justice), 8 April 2016 **(Exhibit AA-1)**, p. 23. *See also*, Petition to the Asset Forfeiture Court, 4 May 2017 **(Exhibit C-024bis)**, p. 33.

[redacted]

165. [redacted]

166. It is in this context that, by Resolution No. 125 of 18 April 2016, the Director of the Asset Forfeiture Unit created file No. 13641, which was assigned to Prosecutor 44, Ms. Alejandra Ardila.[265] As the Respondent has stated once and again throughout the arbitration,[266] the Claimants' insistence that the Attorney General's Office initiated the Asset Forfeiture Proceedings based on a false "kidnapping story" on which the Prosecutors relied in the context of an unproven collusive scheme simply holds no water.[267]

(iii) The imposition of the Precautionary Measures fully complied with Article 89 of the Asset Forfeiture Law, as twice confirmed by Colombian courts

167. [redacted]

263 Attorney General's Office, Resolution No. 125, 18 April 2016 (**Exhibit C-153**), p. 1.

264 Hr. Tr., Day 4, p. 1177:6-13 (Prof. Reyes' Expert Presentation); Law No. 1708 of 2014 (**Exhibit C-003bis**), Article 117 (emphasis added).

265 Attorney General's Office Resolution No. 125, 18 April 2016 (**Exhibit C-153**).

266 *See,* Counter Memorial, ¶ 63; Rejoinder, ¶ 368.

267 Claimants' PHB, ¶ 97.

268 *See,* López Vanegas Tutela Action, 6 May 2016 **(Exhibit C-037bis)**, ¶ 231.

[redacted]

168. The Precautionary Measures were adopted in accordance with the applicable standard of proof. To tarnish the legality of the Precautionary Measures, the Claimants adduce that, at the Hearing, "Ms. Ardila confirmed that she seized the Meritage Property after she reviewed very limited evidence."[269] The Claimants' statement is disingenuous:

169. *First*, the Claimants' statement undermines the profuse documentary evidence mentioned above. It is worth noting that, contrary to the Claimants' attempts to minimize it,[270] the *Tutela* brief comprised 58 pages and was accompanied by 29 Annexes including, among others, copies of all the title deeds in the chain of transfer of the Meritage Lot and an interview conducted by a private investigator of Mr. Luis José Varela Arboleda, [redacted]

170. As clearly explained by Ms. Ardila at the Hearing, the *Tutela* action and its many annexes, together with the Report of the Superintendence of Notaries and Registry obtained at the initiation of the investigation, were among the documents that she considered as the basis for the imposition of the Precautionary Measures:

> "*Amongst the evidence obtained, we got a tutela action that was submitted by Iván López together with other documents, and amongst those documents, there were some Title Studies that were conducted by two law firms. And we were able to determine that it was evident that the origin of those properties that were the subject of the Asset Forfeiture Action was illicit because of the drug-trafficking activities that had been conducted by Iván López Vanegas. Also, it was evident that there were multiple changes, physical changes and legal changes, that these pieces of land had suffered.*"[272]

171. [redacted]

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269 Claimants' PHB, ¶ 96.

270 *See*, e.g., Claimants' PHB, ¶ 97, where the Claimants falsely state that the *Tutela* action, as well as the Judicial Police Report of 8 April 2016, "relied heavily on López Vanegas' testimony."

271 *See*, López Vanegas Tutela Action, 6 May 2016 **(Exhibit C-037bis)**, pp. 57-58.

272 Hr. Tr., Day 3, p. 778:9-779:4 (Ms. Ardila's Cross-Examination)

273 Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**).

[redacted] it goes to the very nature of the Asset Forfeiture Proceedings and anticipated precautionary measures under Article 89 of the Asset Forfeiture Law that the *Fiscalía* is not required to fully prove the illegal origin of the asset, but rather that it has "serious grounds for considering their imposition indispensable and necessary."[275]

172. Moreover, as explained by Dr. Reyes at the Hearing, the objective of Precautionary Measures under the Asset Forfeiture Law is none other but to "*prevent the assets from being transferred or traded and becoming part of the economic transit and being diluted in legal transactions, which implied that the State loses their possibility to forfeit these assets*".[276] Thus, in order not to deprive the measures of their efficacy, it is indispensable for these measures to be swiftly applied, at the onset of the proceedings. This circumstance has also been underscored by Mr. Caro, who testified that the adoption of Precautionary Measures is the habitual practice in asset forfeiture proceedings, since otherwise "the action could be rendered useless, because if the Parties or the person that holds the ownership becomes aware that there is this process under way, the Asset Forfeiture Proceedings under way, the most logical and natural action would be to immediately sell the assets so that the State would not go after them."[277]

173. As noted by Ms. Ardila at the Hearing, this was precisely the rationale behind the urgency with which she proceeded to impose the Measures on the Meritage Lot: "*the urgency was based by the Office of the Prosecutor precisely on that aspect, to avoid persons who might invest in that project that was being built on a lot with illicit origin might lose their money*"[278] This is fully consistent with the position adopted by Ms. Ardila in the Resolution by which she adopted the Precautionary Measures.[279]

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274 *See below*, Section V.A.2(b)(i).

275 Law 1708 of 2014 (**Exhibit C-003bis**), Article 89.

276 Hr. Tr., Day 4, p. 1179:4-9 (Prof. Reyes' Presentation). This is precisely in line with the purpose of Asset Forfeiture Proceedings, as described by Dr. Reyes at the Hearing, which is to prevent drug-traffickers from "create[ing] new mechanisms to conceal their assets; so, when they were convicted, they did serve time, but they help all or part of their assets, which were punt in the name of third parties." (Hr. Tr., Day 4, p. 1169:16-21 (Prof. Reyes' Expert Presentation)).

277 Hr. Tr., Day 3, p. 916:10-18 (Mr. Caro's Cross).

278 Hr. Tr., Day 3, p. 856:13-17 (Ms. Ardila's Cross).

279 Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution 22 July 2016 (**Exhibit C-022bis**), p. 70 ("*And in the case at hand, the Prosecutor's Office considers that is necessary to order precautionary measures such as those provided for in § 88 [sic] of Law 1708, as it has not found any other measure that would produce the same desired end, which is to prevent that the assets subject to forfeiture continue being transferred and negotiated as has happened since 2014 to this date. Also, to prevent that people unrelated to this situation continue acquiring real property in the construction project known as "MERITAGE," which is currently under construction, given that at this initial stage a minimum of evidence has been gathered which would suggest an illegal provenance of these assets*").

[redacted]

175. Moreover, the *Fiscalía* was not under an obligation to confirm the existence of bona fide third parties upon the adoption and imposition of the Precautionary Measures. As acknowledged by the Claimants' expert during the Hearing, Asset Forfeiture Proceedings are initiated by a finding that the origin of the assets is tainted by illegality.[282] The determination of whether there are bona fide third parties whose rights must be safeguarded is posterior .[283]

176. At the Hearing, however, Counsel for the Claimants questioned Ms. Ardila with regards to her evaluation of CORFI's status as bona fide third party in the Resolution by which she imposed Precautionary Measures.[284] Once again, the Claimants' attempt to cast a shadow on Ms. Ardila's conduct of the Asset Forfeiture Proceedings is based on nothing but a misrepresentation of the Asset Forfeiture Law. In fact, as noted by Ms. Ardila, both in the Resolution of Precautionary Measures itself and in her responses to Ms. Champion, this confirmation was not required by the Asset Forfeiture Law at that point in time.

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280 Hr. Tr., Day 2, p. 555:2-5 (Mr. Seda's Cross-Examination) ("MR. SEDA: […] they [(the *Fiscalía*)] were looking into this particular asset based on the fact of a trumped-up kidnapping story, not because [Mr. López Vanegas] was this drug-trafficker.").

281 Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. 66.

282 Hr. Tr., Day 4, p. 1049:17-1050:2 (Dr. Martínez' Expert Presentation) ("DR. MARTÍNEZ: […] Indeed, when carrying out an asset forfeiture investigation, the first thing we run into are assets, -- and first thing that is investigated is the origin, and the destination of those assets to determine whether they are tainted by illegality. If that is the case, they can move on with the investigation; but, If not, that asset forfeiture action has to come to an end.").

283 Hr. Tr., Day 4, p. 1050:3-11 (Dr. Martínez' Expert Presentation).

284 Hr. Tr., Day 3, p. 845:6-9 (Ms. Ardila's Cross-Examination). In a similar vein, Ms. Champion also referred to Mr. López Montoya being "MS. CHAMPION: […] And he was also shocked that the Asset Forfeiture Unit would take such drastic action on the word of a drug dealer without even trying to discuss the issues of good faith and other key things with Newport or Corficolombiana." (Hr. Tr., Day 1, p. 44:4-8 (Claimants' Opening Statement).

177. As further clarified by Ms. Ardila in the event of anticipated precautionary measures adopted under Article 89 of the Asset Forfeiture Law, "the law does not require the Office of the Attorney General to make reference to [the existence of bona fide third parties, but] only to the objective requirements that must be contained in a decision on Precautionary Measures."[285] This is one of the main differences between precautionary measures adopted with the Provisional Determination of the Claim, under Article 87 of the Asset Forfeiture Law, and those based on Article 89 while, "the initial phase of the procedure had not concluded."[286] In yet another demonstration of their self-serving misconstruction of the Asset Forfeiture Law, the Claimants refer to Article 87 of the Law to argue that Ms. Ardila should have analysed their good faith at this stage.[287] The Claimants' reliance on Article 87 is incorrect, since it applies to provisional measures adopted together with the Provisional Determination of the Claim- a different scenario altogether from the anticipated Precautionary Measures adopted with respect to the Meritage.[288]

178. The Precautionary Measures adopted by Ms. Ardila were twice confirmed by Colombian Courts. As explained by Counsel for Colombia during its Opening Statement, the Asset Forfeiture Law provides for adequate guarantees, including legality control proceedings before the competent courts.[289] As clearly explained by Dr. Reyes, and contrary to the Claimants' characterization of the legality control as mere rubber-stamp proceedings,[290] "[t]here is a legality control over the provisional measures before a supervisory judge. That legality control concerns two issues: the formal legality of the measure, and the material legality, which has to do with contents of the measure."[291] Further, as also noted by Dr. Reyes, the decision issued on the first instance may be subject to appeal.[292]

179. In exercise of these procedural guarantees, on 26 September 2016, CORFI filed a request for the control of legality of the Precautionary Measures before the First Criminal Court of the Specialized Circuit for Asset Forfeiture of Antioquia, seeking to obtain a declaration of the illegality of the seizure

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285 Hr. Tr., Day 3, p. 849:3-6 (Ms. Ardila's Cross-Examination).

286 Hr. Tr., Day 3, p. 845:10-12 (Ms. Ardila's Cross-Examination).

287 Claimants' PHB, ¶ 118(b).

288 Asset Forfeiture Law (**Exhibit C-003bis**), Article 87. The Article expressly provides that "At the time the prosecutor renders its provisional determination to proceed with the asset forfeiture claim, the Prosecutor shall order, by way of an independent and reasoned order, the precautionary measures which it deems applicable in order to avoid that the assets in question can be hidden, negotiated, encumbered, removed, transferred or suffer any deterioration, misdirection, or destruction or for the purpose of stopping their illicit use or destination. In any case, the rights of the rights of third parties acting in good faith without fault must be safeguarded." (emphasis added).

289 *See*, Hr. Tr., Day 1, p. 182:10-16 (Respondent's Opening Presentation).

290 *See*, e.g., Claimants' Reply, ¶ 85.

291 Hr. Tr., Day 4, p. 1179:10-14 (Prof. Reyes' Expert Presentation) (emphasis added).

292 Hr. Tr., Day 4, p. 1180:2-6 (Prof. Reyes' Expert Presentation).

of the Meritage Lot.[293] Newport, on the other hand, as acknowledged by the Claimants' expert, did not file a similar request.[294] As discussed at the Hearing, CORFI's application was twice rejected, since the legality of the Precautionary Measures was upheld by Colombian courts both on the first instance[295] and on appeal.[296]

180. It bears recalling that during the control of legality proceedings, the Ministry of Justice participated as an intervening party, requesting that the Precautionary Measures be maintained, as did the Inspector General's Office.[297] As noted by Dr. Reyes, the fact that the Precautionary Measures were confirmed by Colombian Courts in the first instance and on appeal, entails that:

> "[T]*he necessity, reasonableness, and proportionality of the Precautionary Measures, were known and supported by* ***seven public officials*** *of a number of agencies such as the Attorney General's Office, the Judiciary, the Ministry of Justice, and the Office of the Inspector General, which is the supervising agency of the Government.*"[298]

181. Against this backdrop, the Claimants' farfetched corruption allegations cannot stand.

(iv) Finally, the Claimants' *ex post* contention regarding the attachment of CORFI's fiduciary rights should be dismissed

182. At the Hearing, Counsel for the Claimants ventured that "the correct course of action would have been to attach the payment rights of the Trustee and to identify who was a good-faith buyer."[299] As acknowledged by the Claimants' expert, CORFI did not make this allegation when challenging the Precautionary Measures in its control of legality motions before the Colombian courts.[300] Moreover,

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293 Corficolombiana's Control of Legality Petition, 26 September 2016 (**Exhibit C-043bis**).

294 *See,* Hr. Tr., Day 4, p. 1133:11-13 (Dr. Martínez' Cross-Examination) ("*MS. HERRERA: Do you know if Newport asked for a legality oversight? MR. MARTÍNEZ: I understand it didn't*")

295 Decision by Asset Forfeiture Court on Control of Legality Petition, 20 October 2016 (**Exhibit C-044bis**), pp. 22-23. The Asset Forfeiture Judge founds that "As a matter of fact, the Prosecutor has gathered persuasive elements of proof which make it possible to establish [the existence of] illegal activities […] based on which it is concluded that it is necessary and urgent to order precautionary measures of confiscation, seizure and suspension of the power of disposal over the property.")

296 Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017 (**Exhibit C-47bis**). The Superior Tribunal of Bogotá found that "The appellant is getting ahead of the debate and seeks to obtain a decision on the merits of the case, even though the proper course of the proceedings has yet to unfold. […] [T]here is no argument showing the lack of minimally sufficient evidence upon which to base the imposition of the precautionary measures."

297 Hr. Tr., Day 4, p. 1182:7-14 (Prof. Reyes' Presentation) ("*DR. REYES: […] The Judge's decision was appealed, and ultimately upheld by three Superior Justices of the Superior Court of Bogotá. The Ministry of Justice was an intervening party, and it requested that the Precautionary Measures be maintained. The Inspector General's Office did not oppose the imposition nor the confirmation of the Precautionary Measures*")

298 Hr. Tr., Day 4, p. 1182:14-21 (Prof. Reyes' Expert Presentation) (emphasis added).

299 Hr. Tr., Day 1, p. 77:12-15 (Claimants' Opening Presentation).

300 S*ee,* Corficolombiana's Control of Legality Petition, 26 September 2016 (**Exhibit C-043bis**); Hr. Tr., Day 4, p. 1137:14-21 (Dr. Martínez' Cross)) ("*MS. HERRERA: [...] In this document, Corficolombiana –and this was*

Mr. Martínez noted during cross-examination that he did not address this possibility in the legal opinion he drafted for CORFI to file before the Colombian courts at the time.[301] Evidently, this was yet another eleventh-hour argument brought by the Claimants, which has no support in the law. In this sense, Article 88 of the Asset Forfeiture Law is clear in that precautionary measures should apply to the asset connected to the grounds for forfeiture-[302] in this case, undisputedly, the Meritage Lot. The Attorney General's Office continued to gather and analyse evidence of illegalities in the chain of transfer of the Meritage Lot

183. Following the imposition of the Precautionary Measures, Ms. Ardila continued her investigations towards the issuance of the Provisional Determination of the Claim.

[redacted]

185. At the Hearing, Ms. Ardila summarized her conclusions arising from this stage of the negotiations:

[redacted]

prepared specifically by Mr. Fransciso José Sintura Varela as the attorney for Corficolombiana, well, in this document, is there any kind of representation in the senses that the measure that should have been adopted was not an attachment measures on the Lot but rather on the fiduciary rights? MR. MARTÍNEZ: In my understanding, no").

301 *See*, Legal Opinion by Wilson Alejandro Martínez, 13 September 2016 (**Exhibit C-173**); Hr. Tr., Day 4, p. 1135:11-15 (Dr. Martínez's Cross)) ("*MS. HERRERA: Do you see—you say here that the measures should have not been imposed on the Lot but on the fiduciary rights. That's your opinion. Do you say that here? MR. MARTÍNEZ: I do not recall saying that here*").

302 Law 1708 of 2014 (**Exhibit C-003bis**), Article 88.

303 *See*, Respondent's Rejoinder, ¶¶ 120-128.

304 Hr. Tr. Day 3, p. 815:3-7 (Ms. Ardila's Cross) ("MS. ARDILA […] At that time, the Fiscalía thought that the holders of the piece of property were just frontmen, because they did not have the financial capacity to hold a piece of property of that value, such as the Santamaría de Las Palmas Lot."). *See*, Rejoinder, ¶¶ 120-128.

305 *See,* Respondent's Rejoinder, ¶ 123. Notably, at the Hearing, the Claimants did not contest any of Ms. Ardila's findings during the investigations leading to the Provisional Determination of the Claim.

[redacted] Based on the new information revealed in the course of the investigations, Ms. Ardila cited as the grounds for the Asset Forfeiture Proceedings the following grounds: (i) assets which are the direct or indirect product of an illicit activity (Article 16(1)); (ii) assets resulting from a partial or total physical or legal transformation or conversion of the product, tools, or material subject matter of illicit activities (Article 16(3)); (iii) assets which are a part of an unjustified increase of wealth, where there are elements of knowledge which make it possible to reasonably consider that they are the result of illicit activities (Article 16(4)).[308]

187. As explained above, the evolving standard of proof under the Asset Forfeiture Law requires the existence of evidence "*indicat*[ing] *that the conditions for the asset forfeiture are met*".[309] This standard had been exceedingly met by the *Fiscalía*, for which reason on 5 April 2017, the formal Petition for Asset Forfeiture (*Requerimiento*) was issued and submitted before the Specialized Courts.[310]

188. As Counsel for the Claimants acknowledged at the Hearing, as the proceedings progressed, the Prosecutors further developed their case against the Meritage Lot, in which the relevance of Mr. López Vanegas' declaration for the investigations became close to naught when compared to the findings arising from the *Fiscalía's* extensive evidentiary efforts, including witness interviews, database searches and profuse documentation.[311] What counsel for the Claimants mischaracterized as "*pivot*[ing] *rationales*" was in fact nothing other than the natural progression of the investigations

306 Hr. Tr. Day 3, p. 779:4-14 (Ms. Ardila's Cross-Examination).

307 Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 119.

308 Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017 (**Exhibit C-023bis**), p. 1.

309 Law 1708 of 2014 (**Exhibit C-003bis**), Article 126. On 6 March 2017, the then Director of the Asset Forfeiture Unit, Dr. Andrea Malagón, resolved to assign the Meritage case to Dr. José Iván Caro (*see*, Attorney General's Office Resolution No. 0091, 7 March 2017 (**Exhibit C-318**)).

310 Petition to the Asset Forfeiture Court, 4 May 2017 **(Exhibit C-024bis)**.

311 Hr. Tr. Day 1, p. 53:4-11 (Claimants' Opening Statement) ("*Colombia also pivoted rationales for the proceeding rather than relying on MR. López Vanegas's discredited kidnapping story. The determination of claim relies more on his criminal background and asserting that the Lot was tainted and therefore, subject to asset forfeiture, seemingly regardless of who held the land currently*")

conducted by the *Fiscalía* in good faith and in accordance with the due process requirements provided in the Asset Forfeiture Law.

[redacted]

312 Witness Statement of Mr. López Montoya, ¶ 29 ("*This same agent explained that the two unidentified persons in civilian clothing with whom I had spoken earlier were from the U.S. Embassy in Bogotá*").

313 First Witness Statement of Mr. Seda, ¶ 126 [redacted]

314 Witness Statement of Ms. Alejandra Ardila, ¶ 39.

315 Witness Statement of Ms. Alejandra Ardila, ¶ 40.

[redacted]

320 Claimants' PHB, ¶ 97 ("*the Attorney General's Office knew that López Vanegas was a convicted drug trafficker and that his kidnapping story was a lie*.") The Respondent notes that the letter is dated 21 November 2016, that is over three months after the application of the Precautionary Measures, to which the Claimants refer in the corresponding section of their PHB.

[redacted] *see also,* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 **(Exhibit RL-223)**, Article 9.

[redacted]

200. As suggested by Counsel for the Respondent to Mr. Seda, there may be no other plausible explanation for this series of events, [redacted] not *vice versa*.[327] Mr. Seda's groundless conspiracy theory further proves Colombia's representative's statement at the Hearing:

[redacted]

323 Hr. Tr. Day 2, p. 642:6-10 (Mr. Seda's Cross-Examination).

[redacted]

325 Hr. Tr. Day 2, p. 651:3-6 (Mr. Seda's Cross-Examination).

[redacted]

327 Hr. Tr. Day 2, p. 658:9-16 (Mr. Seda's Cross-Examination).

"[t]he Claimants' case is characterized by a highly questionable paradox: the more serious their accusation against the State, the weaker the supporting evidence provided."[328]

(v) Ms. Ardila and Mr. Caro granted Newport *afectado* status, which approach has been since confirmed by the Superior Tribunal of Bogotá

201. Among their sundry allegations of Colombia's breach of due process, the Claimants falsely affirm that Claimants were denied the opportunity to properly participate in the proceedings that led to the seizure of the Meritage Project.[329] As the Respondent demonstrates, the Attorney General's Office granted Newport full rights to participate in the proceedings, which have now been confirmed by the Superior Tribunal of Bogotá.

202. The Attorney General's Office granted Newport the status of *afectado*. Seemingly, the Claimants have failed to understand when they filed their two Memorials, and apparently have still not fully understood,[330] that the Attorney General's Office recommended in the *Requerimiento* submitted before the Specialized Asset Forfeiture Court that Newport be included in the Asset Forfeiture Proceedings as an *afectado*, with full rights to participate during the trial stage.[331] This was made evident during Mr Seda's cross-examination. Indeed, Mr. Seda was "unaware" of this circumstance:

> "*MS BANIFATEMI: […] Are you aware that, in April 2017, the Prosecutor recommended that Newport be admitted as an affected party? "Yes" or "no".*
>
> *MR. SEDA: No, no one has ever told me that the Fiscalía recommended us to be an affected party. Never."*[332]

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328 Hr. Tr. Day 1, p. 172:15-19 (Respondent's Opening Statement).

329 Claimants' PHB, ¶ 144.

330 *See*, Claimants' PHB, ¶ 120 ("*Claimants pointed out that Colombian authorities had failed even to acknowledge Newport as an affected party, and accordingly did not even bother to assess whether it was a good faith third party*"). *See also,* Hr. Tr. Day 1, p. 62:10-13 (Claimants' Opening) ("She should have identified Newport at that stage as an affected party and assessed whether or not they were a good-faith third party").

331 Petition to the Asset Forfeiture Court, 4 May 2017 (**Exhibit C-024bis**), p. 151. This was also confirmed at the Hearing by Ms. Ardila and Mr. Caro. *See also*, Hr. Tr., Day 3, p. 779:15-22 (Ms. Ardila's Cross-Examination) ("*MS. HERRERA: Ms. Ardila, you included as an affected party at the initial stage of the Asset Forfeiture Proceedings, did you include Newport as an affected party? MS. ARDILA: Of course. Newport was included as an affected party via Dr. Gladys Lucia Sánchez, its representative, and also the fiduciary, Corficolombiana."). In addition, Ms. Ardila gave notice to Newport of the issuance of the Determination of Claim "so that they could put forward their opposition vis-à-vis the asset forfeiture action and file evidence that would show that they were third parties in good faith without fault, if they wished to do so*") *See*, Hr. Tr., Day 3, p. 857:20-858:3 (Ms. Ardila's Cross). *See also* Hr. Tr., Day 3, pp. 912:19-913:5 (Mr. Caro's Direct) ("*MS. HERRERA: Mr. Caro, did you include Newport as an affected party in the Requerimiento or in the application before the courts dealing with asset forfeiture cases? MR. CARO: Yes. Upon my analysis, and upon verifying who are claiming rights over the Lot, I recognized a company called "Newport" as the affected party in the proceeding. And, in that situation, I Referred that to the judiciary*").

332 Hr. Tr., Day 2, p. 617:10-12 (Mr. Seda's Cross).

203. In a similar vein, the Claimants' expert, during cross-examination, was also unaware of the Attorney General's inclusion of Newport as *afectado* [333]

204. On 17 August 2017, the Second Criminal Judge Specialized in Asset Forfeiture of Antioquia rendered its *Avocamiento* order. Among other findings, described in detail in the Respondent's Counter Memorial and Rejoinder,[334] the Second Criminal Court found that Newport lacked in rem rights over the Meritage Lot, and hence could not be considered an *afectado* under Article 30 of Law 1708 of 2014.[335] Thus, it was the Asset Forfeiture Court, not the Prosecutors, who did not considered Newport an *afectado*.[336]

205. The Judge's rationale was based on the fact that Newport "was not registered in the real property recordation sheets as possessors of rights related to the assets to be forfeited."[337] This, in fact, is in line with the statements made by Claimants' expert, Dr. Martínez, by which "[t]he general rule is that the affected parties are the holders of the Real Property rights, that is the general rule."[338] As counsel for the Claimants has acknowledged when asked by the President, the Promise Sale Agreement between Newport and La Palma did not provide for the transfer of title.[339] This was also confirmed by Mr. Seda in his cross -examination, where he stated that "the acquirer of the property is CORFI."[340] Hence, the conclusion reached by the Second Criminal Judge is within legal parameters.

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333 Hr. Tr., Day 4, pp. 1097:4-1098:5 (Dr. Martínez' Cross) ("MS*. HERRERA: Now, you see at the top of that page, it says: Identification and place of notification of Affected Persons and intervening persons." […] The first says Gladys Lucía Sánchez Barreto in her capacity as legal representative of Newport, correct? MR. MARTÍNEZ: That is correct.* […] *MS. HERRERA: Hence, the affected party would be Newport. MR. MARTÍNEZ: Yes." This is to be confronted with paragraph 61 of Mr. Martínez' First Expert Report, where he states: "regarding Newport particularly, its right to participate in the forfeiture proceedings as an affected party was not respected*").

334 Counter Memorial, ¶¶ 213-241; Rejoinder, ¶¶ 286 *et seq*.

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

336 Hr. Tr., Day 3, pp. 905:21-906:1-5 (Tribunal's Questions to Dr. Ardila) ("MS. *ARDILA: [I]n this case, the position of the Attorney General's Office was to allow the participation in that process- in those proceedings to the Newport company. The Judge decided at the time that there was no legal link with the plot of land and, therefore, decided that Newport was not an affected party*").

337 Asset Forfeiture Court Avocamiento Order, 17 August 2018 (**Exhibit C-057bis**), p. 66.

338 Hr. Tr., Day 4, p. 1104:12-14 (Dr. Martínez' Cross).

339 Hr. Tr., Day 1, p. 60:11-15 (Claimant's Opening) ("*PRESIDENT SACHS: May I just put a question? Even though that Contract, the 2012 SPA Contract, did not provide for transfer of title? MR. MOLOO: Correct. That did not provide for the transfer of title.") This reasoning was also confirmed by the Claimants' expert, Mr. Martínez, upon being questioned regarding this point by Arbitrator Perezcano: "MR. PEREZCANO: [W]ell, one thing is the promise of the Contract, and the other is the actual sales Contract. But here there was no purchase and sale; correct? MR. MARTÍNEZ: Mhm Mhm. MR. PEREZCANO: I've read the civil code—I think it's under Title VIII, if me memory serves me well- regulates the Contract for sale, the promise to enter into the Contract is at a different article…. There was no Sales Contract here; correct? MR. MARTÍNEZ: No. There was no sales Contract, that's right. There was a Trust Agreement where there was a transfer of the property, and, in one of those, that's where the transfer is*"). Hr. Tr., Day 4, p. 1154:3-16 (Tribunal's Questions to Dr. Martínez).

340 Hr. Tr., Day 2, p. 499:2-10 (Mr. Seda's Cross). *See also*, Claimants' PHB, ¶ 8 ("[Newport] *had also engaged the nation's leading fiduciary, Corficolombiana, and hired the firm recommended by Corficolombiana to conduct a*

206. The Superior Tribunal of Bogota partially revoked the decision in the first instance, granting Newport the right to fully participate in the Trial Phase of the Proceedings and submit evidence of its compliance with the standard of good faith required by the Asset Forfeiture Law. As addressed by both Parties at the Hearing, on 22 April 2022 the Superior Tribunal of Bogota issued its decision on appeal, by which it found that "Newport S.A.S. is entitled to participate in the case, given that it has a pecuniary right with respect to the affected properties".[341]

207. In their PHB, the Claimants argue that "*Colombia defended its actions by arguing that Claimants were not, in fact, affected parties*"[342] and that "*Colombia´s position proved wrong*".[343] Contrary to the Claimants' representations, the Respondent's position in this arbitration is and always has been to demonstrate that the decision by the Asset Forfeiture Court had not been arbitrary and had been based on legal grounds, contrary to the Claimants' allegations. The possibility that the decision in the first instance be revoked had in fact been addressed by Dr. Reyes in his Second Expert Report;[344] moreover, the fact that independent judges and courts reach different decisions proves that due process of law has been followed.

208. As explained by Dr. Reyes at the Hearing, Newport's appeal had the effect of staying the Asset Forfeiture Proceedings entirely.[345] Therefore, following the Decision on Appeal, Newport will be allowed to participate in the Trial Stage of the Asset Forfeiture Proceedings as an *afectado*, with full access to the proceedings, as from their initiation, which will only strictly take place following the decision on appeal.[346] As explained by Dr. Caro, this entails that Newport and CORFI will both have "full guarantees, mindful of due process, to show before the Judges of the Republic of Colombia that

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title study"); Hr. Tr., Day 1, p. 24:5-7 (Claimants' Opening) ("*Mr. Seda again ensured that all diligence was done on the property and hired a fiduciary to administer the funds for the Project*"); Hr. Tr., Day 1, p. 28:4-8 (Claimants' Opening) ("*Mr. Seda then contacted Corporación Financiera Colombiana, known as "Corficolombiana," to serve as the fiduciary for the Project. Corficolombiana is one of the largest fiduciaries in Colombia*").

341 Decision by the Superior Tribunal of Bogota, 22 April 2022 (**Exhibit C-436**).

342 Claimants' PHB, ¶ 120.

343 Claimants' PHB, ¶ 121.

344 *See*, Second Report of Dr. Yesid Reyes, ¶¶ 85-86, 88 ("It *is true, as stated by expert Medellín Becerra in his second report, that there is a possibility that the second instance court confirms the decision that Newport S.A.S. is not an affected party. But it is also undeniable that it is theoretically feasible that the decision may be revoked, in the event that the court of second instance accepts the submissions of the appellants.* […] *Although I am convinced that the arguments of the court of first instance are legally and logically sound, it is undeniable that they might not be shared by its hierarchical superior through arguments endowed with similar legitimacy. It is precisely the theoretical possibility of proceedings being decided in favor of one of the parties and against the interests of the other that characterizes adversarial systems*")

345 Hr. Tr., Day 4, p. 1184:6-10 (Prof. Reyes' Presentation).

346 Dr. Reyes Second Report, ¶ 81.

they are good-faith third parties without fault."[347] In other words, as acknowledged by Counsel for the Claimants at the Hearing, Newport will "have the opportunity to prove its good faith." [348]

209. As reiterated at the Hearing, crucially, the final decision on Newport's status as bona fide third party is still pending. At the Hearing and in their PHB, the Claimants stressed that Ms. Ardila and Mr. Caro had not conducted an assessment of Newport's good faith in the Provisional Determination of the Claim and the *Requerimiento*.[349] *First,* this is yet another example of the Claimants' distortion of the Asset Forfeiture Law: as explained above, the final determination as to the existence of a good faith third party is to be made by the Specialized Judge in the Final Decision on the merits, after all evidence has been produced and analysed, thus concluding the Trial Stage of the proceedings.[350] As explained by Mr. Caro, "[i]*n all cases, it is for Judge who hears the case on asset forfeiture to establish whether Newport is a good-faith third party*".[351]

210. *Second,* as noted by Mr. Moloo at the Hearing, Mr. Caro devoted 15 pages of the *Requerimiento* to address the existence of good-faith third parties in relation to the Meritage Lot, where he conducted a detailed analysis of the due diligence applied by CORFI in relation to the Meritage Project. [352]

211. Not satisfied by this, at the Hearing and in their PHB, the Claimants took issue with the analysis conducted by Mr. Caro, stating thar Mr. Caro had "conflated CORFI's good-faith assessment with Newport's".[353] The Claimants' argument is surprising, to say the least, considering that the Claimants

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347 Hr. Tr., Day 4, p. 1024:11-17 (Tribunal's Questions to Mr. Caro).

348 Hr. Tr., Day 1, p. 53:20-22 (Claimants' Opening).

349 Claimants' PHB, ¶ 126 ("Even *the Determination of Claim and the Requerimiento, which formally instituted the Asset Forfeiture Proceedings, fail to conduct any assessment of Newport's good faith status. Me. Caro acknowledges that the had conflated Corficolombiana's good-faith assessment with Newport's*"); *see also*, Hr. Tr., Day 4, p. 939:10-15 (Mr. Caro's Cross).

350 *See below*, Section V.A.2(b)(i).

351 Hr. Tr., Day 3, pp. 913:14-914:3 (Mr. Caro's Direct) ("*MS. HERRERA: Mr. Caro, who has jurisdiction to decide whether Newport is a Good-faith third party without fault? MR. CARO: In all cases, it is for the Judge who hears the case on asset forfeiture to establish whether Newport is a Good-faith third party. MS. HERRERA: So, that Decision as to whether Newport is a Good-faith third party, is it outstanding? MR. CARO: Yes, it is to be decided before the Court so that is the Court the one to establish whether it is a Good-faith third party or not*")

352 Hr. Tr., Day 3, p. 937:5-8. (Mr. Caro's Cross).

353 Claimants' PHB, ¶ 126. Another argument used by the Claimants to object to Mr. Caro's conduct of the Asset Forfeiture Proceedings is that "Article 152 [of the Asset Forfeiture Law] requires that the Attorney General's Office 'identify; locate, gather, and file the elements of proof' that make it possible to determine whether an affected party acted in good faith when acquiring its rights." (*See*, Claimants' PHB, ¶ 123) The Claimants' continue to conflate the stages of the Asset Forfeiture Proceedings in yet another attempt to artificially bolster their position. As easily demonstrated by a review of Article 152, this provision applies only once the trial stage of the Asset Forfeiture Proceedings has begun: "The facts being discussed within the asset forfeiture proceedings must be proven by the party who is in the best position to obtain the elements of proof which are necessary to prove them." (emphasis added). This is further confirmed by the fact that the provision is included in Chapter 1, Title V of the Asset Forfeiture Law, which deals with the rules of evidence applicable during the trial stage of the Asset Forfeiture Proceedings (*see*, Law 1708 of 2014 (**Exhibit C-003bis**), Article 152).

and Mr. Seda in particular have once and again highlighted their reliance on CORFI's due diligence in relation to the Project.[354] The Claimants' strategy is evident: when it works in their favour, the Claimants shield behind CORFI's due diligence to demonstrate their own; when it doesn't, they are quick to differentiate between CORFI's conduct and Newport's.

212. Further, as explained by Mr. Caro, the reason why he focused on CORFI is that Newport was associated to the Meritage Lot through a commercial trust where CORFI, as the trustee was the natural spokesperson of the property.[355] This is fully consistent with Colombian Trust Law,[356] and was further confirmed by the Claimants' expert during Cross-Examination.[357]

(vi) The duration of the Asset Forfeiture Proceedings is not unreasonable in view of the complexity of the case and the circumstances, and the Claimants still have prospects of recovery under Colombian law

213. The duration of the Asset Forfeiture Proceedings is not unreasonable considering the average duration of asset forfeiture proceedings and the complexity of the Meritage case. In their PHB, the Claimants insist on the fact that the Asset Forfeiture Proceedings have been ongoing for six years.[358] The concern over the duration of the Asset Forfeiture Proceedings was also voiced by Arbitrator Poncet at the Hearing, in his questions to Counsel,[359] Ms. Ardila,[360] and Mr. Caro.[361] However, the length of the Proceedings is not unreasonable, in light of the various circumstances that have affected their normal development.

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354 Hr. Tr., Day 2, p. 499:2-10 (Mr. Seda's Cross-Examination). *See also*, Claimants' PHB, ¶ 8: "[Newport] had also engaged the nation's leading fiduciary, Corficolombiana, and hired the firm recommended by Corficolombiana to conduct a title study." Hr. Tr., Day 1, p. 24:5-7 (Claimants' Opening Statement) ("MS. CHAMPION: […] Mr. Seda again ensured that all diligence was done on the property and hired a fiduciary to administer the funds for the Project."); Hr. Tr., Day 1, p. 28:4-8 (Claimant's Opening Statement) ("MS. CHAMPION: […] Mr. Seda then contacted Corporación Financiera Colombiana, known as "Corficolombiana," to serve as the fiduciary for the Project. Corficolombiana is one of the largest fiduciaries in Colombia.") (emphasis added).

In fact, the Petition to the Attorney General's Office on which the Claimants have so extensively relied to argue their alleged due diligence was actually requested by Mr. Sintura, acting on behalf of Corficolombiana, as the Claimants themselves acknowledged during their Opening Statement.

355 Hr. Tr., Day 4, p. 974:11-14 (Dr. Caro's Cross) *See also* Hr. Tr., Day 3, p. 938:20-939 ("*since the property was registered in the name of Corficolombiana, as an autonomous property and as it was tied in through the fiduciary contract, that is where the judgment of reproach is put forward that it is not a good-faith third party*"); Hr. Tr., Day 3, p. 938:2-11.

356 *See,* Respondent's Rejoinder, ¶ 299.

357 Hr. Tr., Day 4, p. 1134:7-14 (Mr. Martínez' Cross) ("*I ask you: Corficolombiana, is it the spokesperson of the Trust of the Meritage Lot? MR. MARTÍNEZ: Yes. I understand that the Trustee is Corficolombiana. MS. HERRERA: So, Corficolombiana has to defend that asset. MR. MARTÍNEZ: Yes, that's right.*").

358 *See e.g.*, Claimants' PHB, ¶ 9 ("T]*he Asset Forfeiture Proceedings and the seizure of the Meritage Project has continued now for over six years*"). *See also* Claimants' PHB, ¶¶ 23, 281, 122, 144.

359 Hr. Tr., Day 1, pp. 61:22-62:4 (Claimants' Opening).

360 Hr. Tr., Day 3, pp. 902:9-903:1 (Tribunal's Questions to Dr. Ardila).

361 Hr. Tr., Day 4, p. 1030:3-8 (Tribunal's Questions to Dr. Caro).

214. As noted by Dr. Caro at the Hearing, prompted by Arbitrator Poncet's question, complex asset forfeiture cases may normally last for four or five years.[362] This circumstance has existed for decades, including when Mr. Seda decided to invest in Colombia- in fact, proceedings have shortened as a result of the amendments to the Asset Forfeiture Law introduced by Law 1849 of 2017 to enhance their efficiency.[363] The complexity of the Meritage Case cannot be understated. In fact, as noted by Counsel for the Respondent, the case file is substantial given the quantity and length of the documents filed in the proceedings.[364] In Mr. Seda's own words, "it's a huge file of thousands and thousands and thousands of documents."[365] Precisely, the copies of the file submitted by the Respondent in the record of these arbitration proceedings comprise Exhibits R-204 through R-226, summing 8.550 pages in total, consisting of all the case developments until 24 April 2017.[366] Subsequently, as pointed out by Dr. Reyes, there have been no significant developments since the proceedings were stayed as a consequence of the submission by Newport of its appeal.[367]

215. In addition to its length of the file, the Meritage case involves various interested parties (CORFI, Newport, La Palma, unit buyers, etc.), as well as a highly intricated contractual structure, which the judicial authorities must carefully consider.[368]

216. Further, the specialized nature of asset forfeiture proceedings entails an additional strain on the resources available to attend these cases. As expressed by Mr. Caro at the Hearing, specialized Asset Forfeiture Prosecutors and courts have an immense workload, being that each asset forfeiture Prosecutor is in charge of about 120 cases. In a similar fashion, specialized Asset Forfeiture Judges have about 200 cases each, there being only four magistrates at the national level to attend to

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362 Hr. Tr., Day 4, p. 1028:9-11 (Tribunal's Questions to Mr. Caro).

363 Hr. Tr., Day 4, p. 1028:14-17 (Questions from the Tribunal to Mr. Caro) (MR. CARO: "Indeed, that is why, with the Amendment to the Asset Forfeiture Law, through [Law] 1849 of 2017, procedural stages were abbreviated in order to make the overall procedure more expeditious.").

364 Hr. Tr., Day 1, p. 230:6-11 (Respondent's Opening). Further, as noted by Ms. Ardila, the Asset Forfeiture Law is relatively new procedure, especially at the time that the Precautionary Measures were adopted and the Asset Forfeiture Proceedings were initiated (Hr. Tr., Day 3, p. 903:12-21 (Questions from the Tribunal to Ms. Ardila) ("MS.ARDILA: […] this is a procedure that started because of the passing of a law in mid-2014. When the decisions were made to issue Precautionary Measures in the case in connection with the Meritage plot of land, well, I think only two years had elapsed from the time the law was implemented. I can say that I'm a pioneer in the implementation of this law, although I was not involved in the drafting of the law")).

365 Hr. Tr., Day 2, p. 611:18-20 (Mr. Seda's Cross-Examination).

366 *See*, **Exhibit R-204** to **Exhibit R-226**.

367 Hr. Tr., Day 4, p. 1184:6-10 (Prof. Reyes' Expert Presentation) ("DR. REYES: […] The Trial Court Decision was appealed, but since in that Decision, evidence was also denied; the appeal stayed the proceedings until the Tribunal issued a decision on appeal.")

368 *See*, Asset Forfeiture Court Avocamiento Order, 17 August 2018 (**Exhibit C-057bis)**;Asset Forfeiture Court Decision on Amended Requerimiento, Judicial District of Antioquia, 12 December 2018 (**Exhibit C-060bis**).

appeals.[369] This strain was aggravated during the COVID-19 pandemic, which caused the Colombian judiciary to suspend procedural terms for several months, resulting in further delays in ongoing proceedings.[370]

217. Notably, with the rendering of the decision on appeal by the Superior Tribunal of Bogotá, great progress has been made in the Proceedings.[371] As a result of this decision, the proceedings in the first instance will be continued by the Asset Forfeiture Judge.[372] As explained by Dr. Caro at the Hearing while replying to Arbitrator Poncet's questions, considering their current stage, the Asset Forfeiture Proceedings may be resolved within a year from the date of the Hearing.[373]

218. In the event that the competent Judge ultimately rejects the *Fiscalía*'s forfeiture request, the Precautionary Measures over the Meritage Lot will be lifted, and the Claimants could obtain compensation before Colombian courts. Contrary to what was stated by Counsel for the Claimants, the Meritage Lot is not "gone".[374] Much to the contrary, as explained by Mr. Caro: "[i]f the property's returned, then the investors or owners of the property are autonomous in terms of what they're going to do with it, whether they're going to continue to move forward with the construction of the Project or whether they decide to use it for some other activity."[375]

219. Moreover, the Claimants will receive compensation from Colombia in the event that the Asset Forfeiture Judge ultimately decides that asset forfeiture should not proceed.[376] As explained by Counsel for Colombia during the Hearing, the Claimants may seek redress before the Colombian

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369 Hr. Tr., Day 3, pp. 910:18-911:3 (Direct Examination of Mr. Caro). As explained by Dr. Reyes, the Chamber of the Superior Court that decides on appeals against first instance decisions in Asset Forfeiture Proceedings is composed of three magistrates (Hr. Tr., Day 4, p. 1180:3-6 (Prof. Reyes' Expert Presentation). Hence, three of the four magistrate need to work jointly to issue each decision on appeals.

370 *See*, Hr. Tr., Day 4, p. 1036:16-19 ("MS. HERRERA: Mr. Caro, at this stage of COVID in Colombia, were there any agreements to extend deadlines? MR. CARO: Yes, there was an agreement.").

371 Decision by the Superior Tribunal of Bogota, 22 April 2022 (**Exhibit C-436**).

372 Hr. Tr., Day 4, p. 1029:6-11 (Questions from the Tribunal for Mr. Caro).

373 Hr. Tr., Day 4, p. 1029:12-20 (Questions from the Tribunal for Mr. Caro) ("ARBITRATOR PONCET: So, what is your expectation of the time by which there will be a final decision and--the Final Decision in this case as far as Newport is concerned? [MR. CARO]: […] I would estimate one year it could be less, we will already deciding or rather the Judge will be deciding, the fate of the property that's associated with that Asset Forfeiture Proceeding.").

374 Hr. Tr., Day 1, p. 62:5-8 (Claimants' Opening Statement).

375 Hr. Tr., Day 4, p. 1031:2-7 (Questions from the Tribunal for Mr. Caro).

376 Hr. Tr., Day 4, p. 1037:11-15 (Mr. Caro's Redirect) ("*It the Judge and the Tribunal decide to proceed or not with the asset forfeiture, clearly Newport and Corficolombiana have all of the actions available to them to enforce them if any harm has been caused*").

courts.[377] More precisely, under Article 90 of the Colombian Political Constitution, the Claimants may request compensation from the Colombian state for any damages caused by the State's unlawful actions or omissions.[378] That is: even in the event that the Colombian courts resolve that the Asset Forfeiture Proceedings were unwarranted, the Claimants are not remedy-less under Colombian Law.

(vii) [redacted]

(viii) The Claimants' theory on disgorgement of profits is entirely inapplicable to the case at hand

221. In their PHB, the Claimants argue that "*Colombia* [f]ailed to [t]arget [i]llicit [p]roceeds."[380] As purported basis for their argument, the Claimants cite to Article 16(10) of the Asset Forfeiture Law, which provides that forfeiture may proceed against "[a]ssets of legal origin whose value is equivalent to any of the assets described in the preceding number whenever the action is inadmissible due to the recognition of the rights of a third party acting in good faith without fault."[381] Based on this provision, Mr. Martínez' stated at the Hearing that "[i]n Colombia, it is constitutional to go after lawful property when they're equivalent to unlawful property in the same conditions."[382] Hence,

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377 Hr. Tr., Day 1, p. 270:3-13 (Respondent's Opening) ("[I]f you have a damages issue, you can take it up with the Courts, and this is what you have in the Constitution of Colombia. Article 90. If there is actual omission of the Authorities that has caused harm, you can seek damages from the State. Yes, that's in the Constitution of Colombia. So, they're not remedy-less. They have remedies, and they can seek damages from the Courts in Colombia in the event that the Courts at the end of the day find for them and find that Newport is a bona fide without fault third party.").

378 Political Constitution of Colombia, 199 (**Exhibit R-238**), Article 90.

379 *See below*, Section V.A.2(d).

380 Claimants' PHB, ¶ 151.

381 Law 1708 of 2014 (**Exhibit C-003bis**), Article 16(10).

382 Hr. Tr., Day 4, pp. 1066:20-1067-10 (Further Redirect Examination of Dr. Martínez) ("MR. MARTÍNEZ: […] In Colombia, it is constitutional to go after lawful property when they're equivalent to unlawful property in the same conditions. The Court conditioned the interpretation of this provision, and the condition is very clear. The Court says you can go after this piece of property only if that property is held by the individual that

according to the Claimants' proposition, Colombia should have initiated asset forfeiture proceedings targeting Mr. López Vanegas' lawful assets, for a value "equivalent" to the Meritage Lot.

222. Unfortunately for the Claimants, their reasoning is based on a flawed premise, since it presupposes that the asset originally pursued is unavailable, "due to the recognition of the rights of a third party acting in good faith without fault."[383] This is clearly not the case at hand, in which there has been no pronouncement by the competent Court regarding CORFI's and Newport's status as bona fide third parties. As explained by Mr. Reyes during his cross-examination:

> "[E]*quivalent assets could be pursued whenever it is inadmissible because of the recognition of the rights of a good-faith third party without fault. Why is it important to be this specific? Because the only one that can recognize rights of a good-faith third party [without] fault is the Judge in the Judgment. So whenever there is a final judgment that says that it is not possible to forfeit an asset because it is in the hands of a good-faith third party without fault, that proceeding comes to an end, and the Office of the Attorney General may initiate another one, another proceeding to pursue assets of equivalent value.*"[384]

223. Once again, the Claimants' flamboyant argument has done nothing but evince their miscomprehension of the application of the Asset Forfeiture Law.

(ix) [redacted]

225. [redacted]

participated in the illegal activity. The Court limits the scope of these provisions IT says this cannot be applied vis-à-vis third parties. It can only be applied when the person holding the property participated in the illegal activity.").

383 Law 1708 of 2014 (**Exhibit C-003bis**), Article 16(10).

384 Hr. Tr., Day 4, pp. 1219:13-1220:6 (Dr. Reyes' Cross-Examination)

[redacted]

See also, Hr. Tr. Day 3, p. 877:14-21 (Ms. Ardila's Cross).

228. [redacted]

229. *Third*, the Claimants' reliance on *Krederi v. Ukraine* in support of their allegation is inapposite, since: (**i**) the Tribunal in *Krederi* dealt with a claim for denial of justice, which has not been raised in this arbitration;[398] (**ii**) the quote on which the Claimants rely reflects the Tribunal's understanding regarding "serious defects in the adjudicative process", predicated from Court decisions;[399] (**iii**) the Tribunal in *Krederi* expressly applied a "demanding standard", on which basis it dismissed in its entirety of the Claimants' claims.[400]

230. *Fourth, and finally*, as confirmed by Mr. Caro, [redacted] In any event, by the date that Mr. Caro received the Judicial Police's report, the *Fiscalía* had already filed the *Requerimiento* before the Colombian courts, on 7 December 2016-[402] in Mr. Caro's own words, "the proceeding was already in the hands of the Judges."[403] Ultimately, the Claimants' laments for the purported infringement of their due process rights boil down to generic complaints with no real bearing on the actual defense of the Claimants in the Asset Forfeiture Proceedings.

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396 Directorate of National Special Prosecutor, 14 February 2017 (**Exhibit C-410**), p. 30; *See also*, Hr. Tr., Day 4, p. 1004:5-14 (Mr. Caro's Cross Examination).

397 Hr. Tr., Day 4, p. 1005:10-19 (Mr. Caro's Cross) [redacted]

398 *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17 (**Exhibit RL-103**), ¶ 442 et seq.

399 *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17 (**Exhibit RL-103**), ¶ 461-467.

400 *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17 (**Exhibit RL-103**), ¶ 463.

401 Hr. Tr., Day 4, pp. 1004:21-1005:2 (Mr. Caro's Cross).

402 Newport's First Petition to Assert Forfeiture, 12 July 2016 (**Exhibit C-048bis**).

[redacted]

231. [redacted]

c. *The Asset Forfeiture Proceedings were initiated and are conducted in a non-discriminatory basis*

232. Unable to maintain their contention on the illegality of the Asset Forfeiture Proceedings, the Claimants have now focused on their allegation that "*Colombia* [h]*as* [s]*eized* [o]*nly* [t]*he Meritage Property* [i]*n* [a] [d]*iscriminatory* [m]*anner*,"[404] devoting a 20-page section of their PHB to it. As the Respondent demonstrates, the argument holds no water. Indeed, the Claimants' artificial and superficial assimilation of the adjacent property and other lots linked at one point in time to Mr. López Vanegas to the Meritage Lot fails to account for the peculiarities of the Meritage Lot and for those of the specific properties. Further, the Claimants ignore the investigations undertaken by Colombia on the properties with links to Mr. López Vanegas.

233. The Parties agree that the assessment of whether a measure is discriminatory is fact-specific and based on a three-pronged test, *i.e.*, whether (i) similar cases, are (ii) treated differently, (iii) without reasonable justification.[405] As the Respondent explains, the analysis of each of these requirements debunks the Claimants' allegations:

(i) The Meritage Lot is not in "like circumstances" to the other properties allegedly belonging (or having belonged to) Mr. López Vanegas, including the so-called "Sister Property"

234. Contrary to the Claimants' (unsurprising) misrepresentation, the Respondent has consistently disputed the Claimants' accusations of discrimination based on a purported "differential and singular seizure of the Meritage Property".[406] As the Respondent illustrates, the Claimants' claims are based on artificially created comparisons between properties and situations which can, in fact, be easily differentiated:

235. Several "red flags" were unique to the Meritage Lot: In their PHB, the Claimants state that the so-called "Sister Property" "shares a nearly identical history of title transfers" with the Meritage Lot, and that it "suffers from precisely the same alleged 'defects' in title that Colombia alleges infect the

404 Claimants' PHB, Section III.B.

405 Rejoinder, ¶ 631; Reply, ¶ 274.

406 Claimants' PHB, ¶ 39; *see*, Rejoinder, ¶¶ 631-638.

Meritage Property."[407] This is but one more in the long line of misrepresentations made by the Claimants in their last submission. The Claimants' statement is wrong: the chains of transfer of the "Sister Property" and the Meritage Lot deviated in September 2006, *i.e.*, practically ten years before the Asset Forfeiture Proceedings were initiated.[408] During this period, and as squarely arises from the Claimants' own demonstrative Appendix,[409] several red flags considered by the *Fiscalía* to initiate and continue the Asset Forfeiture Proceedings were unique to the Meritage Lot, in particular:

[redacted]

407 Claimants' PHB, ¶ 38. The Claimants insist several times in their PHB on this misrepresentation (*see*, e.g., ¶ 43, 49, 58).

408 *See*, Appendix F to the Claimants' Memorial on Merits; Appendix A to the Respondent's Counter-Memorial.

409 *See*, Appendix F to the Claimants' Memorial.

[redacted]

[redacted]

237. There were justifiable doubts as to whether the so- called "Sister Property" was tainted by illicit funds: Further, the Claimants' discrimination allegations are disproven by the fact that, at the time in which the Asset Forfeiture Proceedings began, there were reasonable grounds for Ms Ardila's decision to prioritize the asset forfeiture investigations regarding the Meritage Lot over the investigations into the so-called "Sister Property". As Ms. Ardila explained at the Hearing, upon analysing the chain of transfer of the Meritage Lot prior to the adoption of the Precautionary Measures,[418] it was not apparent to her that the so -called "Sister Property" had an illicit origin, for two reasons: [redacted] and, *second,* that Ms. Ardila saw elements indicating that the "Sister Property" had always belonged to Mr. Jaime Orozco Vanegas, regarding whom there was no proof of illegal activity.

238. As described by Ms. Ardila, on 12 August of 1994, Mr. López Vanegas and Mr. Jaime Orozco Vanegas, through Sierralta López y Cía and Entrelagos Orzco Vanegas y Cia, respectively, acquired 75% and 25%, respectively, of Lots 001-057747478 and 001-0592104 from Agrícola Las Granjas.[420] In Ms. Ardila's words, "from the outset—and that is starting in 1994 […] the percentage of property for each corporation was fully identified."[421]

239. Both Lots were later consolidated as Lot 01-657878, with a total surface area of 742,234 m^2.[422] According to Ms. Ardila's interpretation at the time, when the Lots were split again in 2006, leading to the creation of what the Claimants have called the "Sister Property", Entrelagos Orozco y Vanegas

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417 *See*, Claimants' PHB, ¶ 47.

418 Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016 (**Exhibit C-022bis**), p. SP-0068.

419 *See above*, Section V.A.2(b).

420 Hr. Tr., Day 3, p. 833:6-16 (Ms. Ardila's Cross). *See also,* Appendix A to Counter Memorial, p. 2; Deed No. 1554, 12 August 1994, (**Exhibit R-8**), p. 59.

421 Hr. Tr., Day 3, p. 833:17-20 (Ms. Ardila's Cross).

422 Hr. Tr., Day 3, p. 834:21-22 & p. 835:1-5 (Ms. Ardila Cross). *See also,* Appendix A to Counter Memorial, p. 2; Deed No. 348, 23 February 1995 (**Exhibit R-10**). Note that the Claimants' Appendix B is inaccurate in this regard, since it portrays the consolidation of the lots as having taken place in the same act by which Mssrs. Vanegas and Orozco acquired the property, on 12 August 1994.

"recovered 25 percent of the initial asset."[423] That is the exact percentage he had first acquired. Ms. Ardila's understanding is confirmed by two facts: (**i**) in 2006, the "Sister Property" was registered under the name of Entrelagos Orozco Vanegas y Cía, the same company that had initially acquired 25% of the Lot from Agrícola Las Granjas[424] and (**ii**) the surface area of the Sister Property coincides exactly, to the square meter, with the participation of Entrelagos Orozco in the property acquired in 1994.[425]

240. The Claimants argue that Ms. Ardila's explanation "makes no sense" because of the consolidation of the Sister Property with the "tainted Property" from López Vanegas.[426] However, Ms. Ardila's rationale was precisely that the 25% of the land corresponding to Mr. Orozco had always been distinguishable and, after the lot was re-split in 1997, this land was precisely identified as Lot 001-930484. Thus, the so-called "Sister Property" corresponds to the land originally owned by Mr. Jaime Orozco through Entrelagos Orozco Vanegas y Cía.

241. As further explained by Ms. Ardila, in 2016, and to date, the Attorney General's Office had no evidence that Mr. Jaime Orozco Vanegas, legal representative of Entrelagos Orozco, had carried out illegal activities.[427] The Claimants reject Ms. Ardila's explanation based on her recognition that Mr. Orozco, as Mr. López Vanegas' half-brother, must have known that his brother had gone to jail for drug trafficking.[428] As is self-evident, having knowledge of illegal activities is not, *per se*, a crime, nor an indication of illegal activity. The Claimants' attempt to delegitimize Ms. Ardila's explanation holds no water.

[redacted] To be clear: Ms. Ardila did not discard the possibility of conducting Asset Forfeiture Proceedings against the "Sister Property". As the Respondent explains below, she requested that further investigations into its chain of transfer be conducted in order to determine the existence of sufficiently solid grounds for asset forfeiture. That

423 Hr. Tr., Day 3, p. 834:16-22 (Ms. Ardila's Cross).

424 Appendix F to the Claimants' Memorial.

425 Hr. Tr., Day 3, pp. 834:18-835:5 (Ms. Ardila's Cross). As explained by Ms. Ardila at the Hearing, Mr. Jaime Orozco had a participation of 25% in Lot 001-65l78, whose surface area is 742.234 m^2, while the surface area of the "Sister Property" is precisely equivalent to 25% of 742.234 (185-558 m^2).

426 Claimants' PHB, ¶ 50.

427 Hr. Tr., Day 3, p. 835:6-14 (Ms. Ardila's Cross Examination).

428 Claimants' PHB, ¶ 53; Hr. Tr., Day 3, p. 838:7-10 (Ms. Ardila's Cross Examination), 838:7-10 ("A. Do you think Jaime Orozco knew that his brother had gone to jail for narcotics trafficking? I think we can assume he did. Don't you think so? A. I think so, yes. Clearly.").

is, contrary to the Claimants' allegations, Ms. Ardila was simply exercising diligence in the application of Article 117 of the Asset Forfeiture Law, according to which asset forfeiture proceedings may only be initiated after having established the existence of minimum elements of proof as to the illicit origin of an asset.[429] The Claimants' attempts to mischaracterize Ms. Ardila's prudence, both as a "red flag" for their baseless corruption narrative[430] and a discriminatory act[431] must fail.

243. Most of the assets historically linked to Mr. López Vanegas, as reported by the Superintendence of Notaries and Registry, were outside the temporal scope of the Asset Forfeiture Proceedings: Throughout the Hearing, the Claimants incessantly repeated their allegation as to the "47 properties" connected to Mr. López Vanegas arising from the report of the Superintendence of Notaries and Registry of 8 April 2016.[432] As stated by its Counsel at the Hearing, the Respondent does not accept this figure,[433] which is yet another of Claimants' misrepresentations.

244. As explained by Ms. Ardila during her cross-examination, when queried as to her investigations regarding the chart from which the Claimants' allegedly obtained this figure, "most of the properties [in the chart] were acquired in a different time frame,"[434] considering the period during which the *Fiscalía* presumed that Mr. López Vanegas had been involved in illicit activities, starting in 1994.[435] Therefore, any properties purchased by López Vanegas prior to 1994 were presumed by the *Fiscalía* to not have been obtained with illicit funds.[436] This straightforward explanation discards the vast majority of the "47 properties" on which the Claimants have insisted.

245. At the Hearing, Ms. Ardila also explained that several properties appearing in the chart as having been purchased by Mr. López Vanegas after 1995 could not be investigated for the simple reason that the property records had been closed.[437]

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429 Law No. 1708 of 2014, Enacting The Asset Forfeiture Law, 20 January 2014 (**Exhibit C-003bis**), Article 117.

430 *See*, Claimants' PHB, ¶ 114.

431 *See*, Claimants' PHB, Section III.B.

432 Hr. Tr., Day 1, pp. 39:19-40:2 (Claimants' Opening Statement); Hr. Tr., Day 1, p. 75:4-20 (Claimants' Opening Statement); Hr. Tr., Day 3, p. 793:18-19 (Ms. Ardila Cross Examination); Judicial Police Report, Superintendence of Notaries and Registry (Ministry of Justice), 8 April 2016 (**Exhibit AA-1**).

433 Hr. Tr., Day 1, p. 312:1-3 (Respondent's Opening Statement).

434 Hr. Tr., Day 3, p. 798:15-17 (Ms. Ardila's Cross).

435 Hr. Tr., Day 3, p. 812:3-20 (Ms. Ardila's Cross). As explained by Ms. Ardila, "*the method approved by the Asset Forfeiture Court of Colombia is to go back five years. […] This case, the decision of the Fiscalía was to go back four years. This is not a straight-jacket kind of thing. It's just a judicial practice." As arises from the Decision of the US Court of Appeals for the Eleventh Circuit in the case of US v. Iván López Vanegas, of 26 July 2007, the drug-trafficking conspiracy with which Mr. López had been associated took place as from mid-September 1998*". *See United States v. López-Vanegas*, 493 F.3d 1305 (11th Cir. 2007) (**Exhibit C-036bis**).

436 Hr. Tr., Day 3, p. 799:5-9 (Ms. Ardila's Cross).

437 Hr. Tr., Day 3, pp. 803:22–804:16 & p. 805:12-15 (Ms. Ardila's Cross) ("*MS. ARDILA: […] It could not be subject to any attachment because it doesn't exist, legally speaking."); Ms. Ardila's explanation is clearly paraphrased*

[redacted]

(ii) The Meritage Lot has been treated similarly to other assets affected by comparable wrongful conduct

247. The *Fiscalía* consistently targets assets with illicit origin: As explained, the Meritage Lot simply cannot be compared to any of the other properties showing connections to Mr. López Vanegas, since: [redacted] and (ii) most properties fall within the relevant temporal scope, or their registrations have been cancelled. Therefore, the Meritage Lot should be compared to other plots displaying similar evidence of connections with organized crime. Moreover, it bears mentioning that the Attorney General's Office does not know of the existence of all the possible assets with an illicit origin transacted by criminal organizations – that is impossible. In some instance like the present one, the Attorney General's Office learnt of that situation upon reviewing criminal complaints, like the one of Mr. López Vanegas, and investigating the property as Colombia did.

[redacted]

249. Ms. Ardila requested the investigation of the Sister Property and other assets: Moreover, although at the time that the Precautionary Measures were adopted, Ms. Ardila had not considered the

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by Ms. Champion herself: "[I]f I understand, I think what you're saying is when property is subdivided, that the Lot Numbers change, and so a lot number that may have one meaning one year may no longer exist in five years"). *See*, Hr. Tr., Day 3, p. 804:19-805:1 (Ms. Ardila's Cross Examination)). This is the case, for instance, of Lot 50C-170713.

438 Claimants' PHB, ¶ 61.

439 *See, e.g.,* Hr. Tr., Day 1, pp. 39:18-40:2; p. 75:5-11 (Claimants' Opening).

440 *See*, Rejoinder, ¶ 694 et seq.

[redacted]

evidence regarding the Sister Property and other properties owned by Mr. López Vanegas sufficient to impose Precautionary Measures, she requested the initiation of a separate investigation into these assets.[442] Ms. Ardila even provided the case file number for these proceedings, initiated with number 13757.[443]

250. According to the Claimants, "there is no such document on the record showing this purported investigation."[444] However, contrary to the Claimants' allegations, Exhibits R-227 through R-232 contain the copies of the first actions adopted in these asset forfeiture investigations,[445] [redacted] This investigation, assigned to Mr. Caro, is not "dormant",[447] but rather culminated with the issuance and submission of the *Requerimiento* filed by the Respondent as Exhibit R-87.[448]

251. The Claimants' allegations that "Exhibit R-87 contains no record of any investigation against the Sister Property" are incorrect, as a brief review of the document demonstrates.[449] In effect, the section devoted to the "Procedural Background" of the investigation clearly states that "[t]he origin of this investigation arises from the letter of 14 December 2016, by which Prosecutor 44 for Asset Forfeiture [Ms. Ardila] requested the initiation of asset forfeiture proceedings over the assets belonging to [redacted] That is: not only did Ms. Ardila request that the properties held by [redacted] including the Sister Property, be investigated, but she also requested that all the other individuals included in the chain of transfer of the Meritage Lot be also included in this investigation, thus debunking the Claimants' allegations as to the inexistence of investigations regarding "other alleged criminal's properties".[451] On that occasion, Mr. Caro

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442 Hr. Tr., Day 3, pp. 806:22-807:7 (Ms. Ardila's Cross) ("*MS. ARDILA: […] I asked the Asset Forfeiture Direction that a new file number be assigned, and that was assigned to me under number 13757, and that was to continue the whole investigation*"; Hr. Tr., Day 3, p. 821:19-21 (Ms. Ardila's Cross).

443 Hr. Tr., Day 3, p. 821:19-21 (Ms. Ardila's Cross) ("*MS. ARDILA: […] I repeat: the new case to which I already referred is file 13757, which I submitted to the Prosecutor that received the case in 2017*").

444 Claimants' PHB, ¶ 45.

445 Asset Forfeiture Proceedings File No. 13757, Main Folder No. 1, 2, 5, 7, 9, 10 (**Exhibits R-227 to R-232**).

446 Asset Forfeiture Proceedings File No. 13757, Main Folder No. 1 (**Exhibit R-227**), p. 1.

447 Claimants' PHB, ¶ 68.

448 Request for Asset Forfeiture in file nº 110016099068201613757, 27 November 2017 (**Exhibit R-87**).

449 Claimants' PHB, ¶ 46.

450 Request for Asset Forfeiture in file nº 110016099068201613757, 27 November 2017 (**Exhibit R-87**), p.4.

451 Claimants' PHB, ¶ 70.

considered the presence of evidence indicating the existence of illegal activities by [redacted] to "define the strategic objectives for investigation", focusing the proceedings on the assets owned by these individuals.[452]

[redacted]

452 *See*, Request for Asset Forfeiture in file nº 110016099068201613757, 27 November 2017 (**Exhibit R-87**), p. 13.

453 *See*, Rejoinder, ¶ 692; [redacted]

454 *See above*, Section V.A.2(b)(1); Law No. 1708 of 2014, Enacting The Asset Forfeiture Law, 20 January 2014 (**Exhibit C-003bis**), Article 10.

[redacted]

457 *See above*, Section V.A.2(b).

458 Claimants' PHB, ¶ 57.

(iii) Lastly, any existing differential treatment , *quod non*, was justified in light of the circumstances of the case

255. Finally, to the extent that any differential treatment could be identified, it was justified in light of the circumstances of the case. In particular, as referred, the Precautionary Measures were urgently required in the present case to protect the unit buyers and the general public from continuing to invest in the Meritage Project.[459]

d. *The Asset Forfeiture Proceedings are a* bona fide *application of the Asset Forfeiture Law*

256. Contrary to the Claimants' allegations, it has been demonstrated that the Asset Forfeiture Proceedings were a *bona fide* application of the Asset Forfeiture Law.

[redacted]

459 *See above*, Section V.A.2(b)(iii).

460 Claimants' PHB, ¶ 99.

461 Claimants' PHB, Section III.C.1.

462 Claimants' PHB, ¶¶ 102-104.

463 Rejoinder, ¶¶ 644-645; Hr. Tr., Day 3, p. 781:5-13 (Ms. Ardila' Cross).

464 *See* Appendix A to the Rejoinder. [redacted] *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019 (**Exhibit CL-125**), ¶ 729.

[redacted]

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465 *See above*, Section V.A.2(b)(ii). [redacted]

466 Claimants' PHB, ¶ 113.

467 Hr. Tr., Day 3, p. 780:3-10 (Ms. Ardila's Cross Examination); Hr. Tr., Day 3, p. 779:15-22 (Ms. Ardila's Cross Examination); [redacted]

468 Ms. Ardila's Witness Statement, ¶ 46.

469 Claimants' PHB, ¶ 104.

470 Claimants' PHB, ¶ 104.

471 Hr. Tr., Day 3, p. 860:12-21 (Ms. Ardila's Cross Examination) [redacted]

[redacted]

474 Claimants' PHB, ¶¶ 101, 105.

475 Claimants' PHB, ¶ 105.

[redacted]

477 *See also*, Rejoinder, ¶ 407.

478 Hr. Tr., Day 3, p. 883:3-21 (Ms. Ardila's Cross-Examination) [redacted]

265. *Finally,* [redacted]

[redacted]

[redacted]

479 *See below*, ¶ 270.

480 Claimants PHB, ¶ 106.

[redacted]

482 Hr. Tr., Day 3, pp. 699:17-701:3 (Mr. Hernández's Cross-Examination). [redacted]

483 Hr. Tr., Day 3, pp. 699:17- 701:3 (Dr. Hernández's Cross Examination) [redacted]

[redacted]

484 Hr. Tr. Day 3, p. 739:19-22 (Mr. Hernández's Cross-Examination) [redacted]

485 Claimants PHB, ¶ 106.

486 Hr. Tr., Day 3, pp. 700:10-701-1 (Mr. Hernández's Cross-Examination).

[redacted]

488 Hr. Tr., Day 3, p. 739:19-22 (Mr. Hernández's Cross-Examination) [redacted]

[redacted]

489 Claimants' PHB, ¶ 112.

490 Reply, ¶¶ 142-143.

491 Reply, ¶ 145.

492 Respondent's Opening Presentation, pp. 104-106.

493 Claimants' PHB , ¶ 107.

494 494 [redacted]

[redacted] To avoid these false accusations, Colombian authorities would have to stop any possible actions – and prevaricate – for fear of the Claimants accusations. Something that, of course, the Respondent cannot do.

271. [redacted] The Claimants' pivotal claim was *de facto* abandoned.

495 Claimants' PHB, ¶ 108.

496 Reply, ¶ 147.

497 Claimants' PHB, ¶ 99.

274. Claimants' "Red flag" no. 7 – The fact that Ms. Malagón is not a witness in these proceedings is indicia of corruption.[498] it goes without saying that the fact that Ms. Malagón is not a witness in these proceedings is not "*indicia of corrupt conduct*", let alone of a "*extortion scheme*" within the Colombian Attorney General's Office. Further, the Respondent produced all documents related to the investigations conducted against Ms. Malagón, and so no adverse inferences can be made on the basis that the Respondent attempted to hide information from this Tribunal or acted uncooperatively with regards to the production of evidence in this arbitration. The Claimants' request for the Tribunal to make a finding of corruption on these grounds is therefore disingenuous.[499]

275. In conclusion, the Claimants cannot seriously ask the Tribunal to make a finding on corruption on the basis of the "red flags" methodology, simply because there are no dots to be connected here. The Claimants have not discharged their burden of proof regarding their allegation that the Attorney General's Office acted in corruption when initiated the Asset Forfeiture Proceedings.[500] To allow the Claimants to switch their burden of proof to the Respondent on the basis of a wrong application of the red flags methodology would be to condone the Claimants' attempt to circumvent their obligation to meet its evidentiary burden.[501] For these reasons, the Claimants' allegations that the Asset Forfeiture Proceedings was the result of a corrupt scheme must be outright dismissed.

* * *

276. In sum, the Respondent's measures were, by nature, not expropriatory. In any event, the measures were a legitimate exercise of regulatory power, as they "*were conducted following alleged irregularities*" in the Meritage Lot, in accordance with Colombian law. As such, the actions "*were not expropriatory or a contribution to the expropriation of the Claimants' investment but were carried out within the police powers of the State*".[502]

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498 Claimants' PHB, ¶ 109.

499 For completeness, the Respondent is not in a position to call Ms. Malagón to testify in these proceedings as Ms. Malagón is no longer a public officer of the Colombian State.

500 To recall, the Claimants mistakenly contend that the burden of proof of (or lack of it) corruption shifts to Colombia (Claimants' PHB, ¶ 110).

501 *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013 (**Exhibit CL-090**), ¶¶ 4.876, 4.879; Union Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, 31 August 2018 (**Exhibit CL-119**), ¶ 7.114 ("with a case dependent upon circumstantial evidence (as in the present case), it is often a question of joining up the dots; but there have first to be dots in the evidence adduced before the tribunal"); *Karkey Karadeniz v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**Exhibit CL-114**), ¶ 543.

502 *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021 (**Exhibit RL-206**), ¶¶ 941, 968.

B. THE RESPONDENT DID NOT BREACH ITS OBLIGATION TO ACCORD NATIONAL TREATMENT

277. In order to succeed in the national treatment claim, the Claimants must show that (i) a foreign investor, (ii) has received treatment less favourable, (iii) than other investors in "like circumstances", (iv) without any reasonable justification.[503] As confirmed by the United States, this standard is "*intended to prevent discrimination on the basis of nationality*".[504] As demonstrated, the Respondent's treatment of the Claimants (if any) was not discriminatory, let alone on the basis of their nationality.

a. *The Asset Forfeiture Proceedings cannot be regarded as less favourable treatment against a foreign national*

278. As demonstrated, the Claimants' allegations should be dismissed *prima facie* because there were no measures adopted by the Respondent against a foreign investor, let alone any differential or discriminatory treatment *due to* the foreign nationality of an investor. In fact, the Asset Forfeiture Proceedings were initiated against the Meritage Lot, a land plot located in the municipality of Envigado (Colombia) and owned by La Palma Argentina and CORFI as trustee of the Meritage La Palma Trust,[505] both of which are – undisputedly – Colombian companies.

b. *The Claimants did not receive "less favorable treatment" than other investors "in like circumstances"*

279. As demonstrated, the comparisons drawn by the Claimants between the Meritage Lot and other properties with connections to Mr. López Vanegas, including the so-called "Sister Property" are inapposite. [redacted]

280. Moreover, the Attorney General's Office has undertaken investigations to confirm that no grounds for forfeiture exist with regards to the lots to which the Claimants have unsuccessfully try to assimilate the Meritage Lot.[507] To the extent that any of these properties present sufficient evidence to justify the submission of a claim for asset forfeiture, they will receive the treatment accorded to the Meritage Lot, in full compliance with the Asset Forfeiture Law.

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503 *See* Counter Memorial, ¶¶ 482-487; Rejoinder, ¶¶ 672-673; Claimants' PHB, ¶ 75.

504 US Submission, ¶ 50.

505 *See*, Counter Memorial, Section II.C.

506 *See above*, Section V.A.2(c).

507 *See above*, Section V.A.2(c).

281. In this regard, the argument made by Counsel for the Claimants at the Hearing in the sense that the standard of National Treatment implied a treatment by which "*if their property wasn't taken, then neither should this property have been taken*" is nothing but incongruous, and confirms the Claimants' disregard for Colombia's efforts in the fight against organized crime.[508] Indeed, the logic proposed by the Claimants would entail that, to the extent that a National Treatment obligation exists, Colombia may not target assets held by foreign nationals to the extent that it has not exhausted all investigations against all Colombian nationals possibly implicated in money laundering activities. The Respondent objects to this unjustified curtailing of the Respondent's ability to combat wrongdoing within its territories.

c. *Any differential treatment is justified in light of the circumstances of the case*

282. Even accepting, *quod non*, that the Meritage Lot was indeed treated differently when compared to other assets "in like circumstances" (which it was not), as explained at length by Ms. Ardila upon the issuance of the Precautionary Measures and by the Respondent,[509] the differential treatment would be justified in light of the ongoing development of the Meritage at the time. Given the scale of the Meritage Project, as highlighted by Counsel for the Claimants at the Hearing,[510] its continuation given the possibility of forfeiture would have entailed a risk to the general public. As explained, this is precisely what Ms. Ardila sought to prevent when she imposed the Precautionary Measures, later twice confirmed by the Colombian Courts as being compliant of the requirements established under the Asset Forfeiture Law.

C. THE RESPONDENT TREATED THE CLAIMANTS' ALLEGED INVESTMENT FAIRLY AND EQUITABLY

283. As demonstrated, Article 10.5 of the TPA is limited to "*the customary international law minimum standard of treatment*" and does not require "*treatment in addition to or beyond that which is required by this standard*". A fact-specific assessment is required to determine whether the host State's conduct is in accordance with the fair and equitable treatment standard. The threshold for finding a breach of FET is high and should, in any event, be assessed in light of the high measure of deference afforded to States to regulate their internal matters.[511] The Claimants' claims with respect to the Meritage Project (**1**) and the Other Projects (**2**) do not satisfy the high threshold required for

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508 Hr. Tr., Day 1, p. 70:17-71:2 (Claimants' Opening).

509 *See below*, Section V.A.2(b)(iii).

510 *See, e.g.,* Hr. Tr., Day 3, p. 866:7-13 (Ms. Ardila's Cross).

511 *See* Counter Memorial, ¶¶ 365-382; Rejoinder, ¶¶ 721-744.

the Respondent's conduct to constitute a breach of the autonomous FET standard – let alone the customary minimum standard of treatment under Article 10.5 of the TPA.

1. The Respondent treated the Claimants' alleged investment in the Meritage Project fairly and equitably

284. As extensively demonstrated, the Respondent has treated the Claimants and their alleged investment in the Meritage Project fairly and equitably. In particular, the Asset Forfeiture Proceedings were not arbitrary or unreasonable and were initiated and conducted in accordance with the fundamental procedural protections and were not discriminatory. In addition, the Respondent acted transparently and did not violate the Claimants' expectations (if any). For the purposes of this PHB, the Respondent will focus on the Claimants' arguments raised in their PHB and show that the Asset Forfeiture Proceedings were not arbitrary and were initiated and conducted in accordance with the most fundamental procedural protections (**a**), were not discriminatory (**b**) and did not frustrate the Claimants' expectations (if any) (**c**).[512]

a. *The Asset Forfeiture Proceedings were not arbitrary or unreasonable and were initiated and conducted in accordance with the fundamental procedural protections*

285. As demonstrated,[513] under the TPA, a breach of due process only amounts to a breach of the FET standard when it results in denial of justice.[514] This means, as noted by the United States, that there is no international breach as long as the domestic system of law "*conforms to 'a reasonable standard of civilized justice' and is fairly administered*".[515] To recall, as the Claimants themselves acknowledge, the Claimants have at no point in the arbitration made a denial of justice claim.[516] On this basis alone, their claims that the Respondent has violated "*its due process obligations*" must be rejected as they could not constitute a breach of the FET standard in the TPA.[517]

286. Further, even if it were to be understood, *quod non*, that a denial of justice is not required for a breach of FET to take place under the TPA, it is widely agreed that "*not every process failing or*

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512 For the sake of completeness, the Respondent refers to Section IV.B of its Counter Memorial and Section V.C of its Rejoinder, where demonstrated in detail that the Claimants' claims are flawed as a matter of law and facts.

513 *See*, Counter Memorial, ¶ 401; Rejoinder, ¶¶ 771 *et seq*.

514 Counter Memorial, ¶ 401.

515 Submission of the United States of America, 26 February 2021, ¶ 45.

516 *See,* Claimants' PHB, ¶ 141 ("Claimants have not alleged a denial of justice in this Arbitration, and the language of the TPA does not support a finding that a denial of justice is a precondition to a breach of due process."). *See also,* Reply, ¶ 325 ("*Claimants here have not advanced a denial of justice claim in name or content*").

517 Reply, ¶ 343.

imperfection" could amount to a breach of the FET standard.[518] Throughout the arbitration, the Claimants have tried once and again to turn the arbitration into an appeal on the Prosecutors' decisions with regards to the Asset Forfeiture Proceedings, measuring the Prosecutor's conduct against an *ex post* standard of procedural perfection applied with the benefit of hindsight. This is incorrect as a matter of law and of fact. As explained at length, the conduct of the Asset Forfeiture Proceedings was fully in accordance with the Asset Forfeiture Law and in pursuit of rational policy objectives.

287. Even accepting, *quod non*, any of the Claimants' arguments regarding possible flaws in the Asset Forfeiture Proceedings, these would not satisfy the stringent standard applicable under International Law. As explained, all of the decisions issued by the Prosecutors and Colombian courts throughout the Asset Forfeiture Proceedings have been reasoned and adopted within legal parameters.[519] In particular, the differences in the construction and application of the Asset Forfeiture Law that led to the revocation on appeal of the decision that decided on Newport's status as *afectado* are nothing but demonstrations of the natural discrepancies that are inherent to the administration of Justice.[520]

288. In light of the above, the Claimants' allegations that Colombia's behaviour in relation to the Claimants' due process rights with regards to the Asset Forfeiture Proceedings breached the FET standards under the TPA should be dismissed.

b. *The Asset Forfeiture Proceedings are not discriminatory*

289. As extensively demonstrated, the Respondent did not discriminate against the Claimants. Much on the contrary, the Meritage Lot (assuming the FET obligation extends to "*covered investments*" and that the Meritage Lot is one, both of which are denied) have been afforded the same treatment as other assets in "*like circumstances*" and the Asset Forfeiture Proceedings were fully justified in the circumstances.[521]

c. *Colombia did not frustrate the Claimants' legitimate expectations*

290. As demonstrated, the concept of "legitimate expectations" is not considered as an element of the FET standard under the TPA. Even assuming that the protection of legitimate expectations would

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518 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award 23 September 2010 (**Exhibit CL-076**), ¶ 9.3.40. *see also*, *e.g.*, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012 (**Exhibit RL-53**), ¶ 299.

519 *See above*, Section V.A.2(b).

520 *See above*, Section V.A.2(b).

521 *See* Counter Memorial, ¶¶ 384-396, 442-445; Rejoinder, ¶¶ 757-760. *See also above*, Section V.A.2(c).

fall within the FET standard under the TPA, the Claimants could not have had any objective reasonable expectation that the Respondent would refrain from applying its own laws to investors and assets within Colombia, including the Asset Forfeiture Law.[522]

291. It is undisputed that when the Claimants invested in Colombia, they accepted their submission to Colombian law. It is also undisputed that legitimate expectations are assessed against the regulatory framework of the Host State,[523] in this case, *inter alia*, the Asset Forfeiture Law, the applicable Anti Money Laundering, 'know your client' and due diligence obligations, including those incumbent upon Newport.[524]

[redacted]

293. As provided by law firm Rodriguez Azuero in the title study of the Santa Fe lot commissioned by Mr. Seda, the Land Restitution Civil Court of the Highest Court of the Antioquia District has stated that "*title study does not suffice to infer good faith without fault to acquire a premise*" and "*there should be extremely diligent inquiries regarding the social and political context and the effects caused by the internal armed conflict in order to have certainty that none of the holders of the ownership real right was kicked out or forced to abandon their land or that any of the grounds [Victims Law 1448/2011 or **Asset Forfeiture Law]** have been configured*".[527]

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522 *See* Counter Memorial, ¶¶ 412-426; Rejoinder, ¶¶ 784-798.

523 *See* Counter Memorial, ¶¶ 294, 425; Rejoinder, ¶ 788; Hr. Tr., Day 1, pp. 304:17-22, 327:3-6 (Respondent's Opening).

524 *See* Counter Memorial, ¶ 469; Rejoinder, ¶ 795; Dr. Reyes' Second Expert Report, ¶¶ 142-143, 161-162.

525 *See* Hr. Tr., Day 2, p. 444:16-22 (Mr. Seda's Cross) ("*MS. BANIFATEMI:* […] *Identify land plots in previously dangerous region. The perception of danger causes prices to be fixed at a bargain. That's what you say, correct? [MR. SEDA] A. Yes.*").

526 Prado Tolima Investment Fund Brochure (**Exhibit C-064bis**), p. 9 ("*Taking into account that the Company believes that it can acquire first-class lands costing less than 54,000, which is Colombian pesos, per square meter in the Prado Region, Tolima. If one assumes an average sales price of 40,000 in Colombian pesos, per square meter, the return on the Investment has a potential to reach more than 1000 percent during the Investment phase*"). *See also* Hr. Tr., Day 2, p. 488:12-17 (Mr. Seda's Cross).

527 Santa Fe Title Study by Rodriguez Azuero Contexto Legal, 30 November 2015 (**Exhibit C-144**), p. 2-3.

294. Yet, the Claimants had made legal contortions to lower the standard of due diligence applicable to them, as well as those applicable to CORFI as the representative of the Meritage La Palma Trust. In so doing, the Claimants have misrepresented the applicable standards of due diligence, both in scope and in time and done precisely what they have falsely accused Colombia of doing,[528] namely conflated the duties of Newport and CORFI, as further shown below:

295. *First*, the Claimants have purposefully misrepresented the applicability and extent of the KYC, Anti Money Laundering, and SARLAFT obligations,[529] shifting back and forth the responsibility of the due diligence from Newport to CORFI and diluting it to a point of making it and any AML obligation provided under Colombian law nugatory. In their written statement and during the course of the Hearing, Mr. Seda and Dr. Martínez continued to misrepresent the obligations incumbent on both CORFI and Newport, contradicting each other and contradicting the position of CORFI as follows:

296. Indeed, Mr. Seda insisted on his reliance on CORFI being a regulated entity and having a SARLAFT system as a key element for him to consider that the due diligence has been thorough,[530] stating that in relation of whether Newport had complied with the required due diligence: "*I think as we know, we didn't--we were under Contract to purchase the property, but the acquirer of the property is CORFI, so they're doing the due diligence that's required by them, and I'm relying on them doing that due diligence, so I have a reliance on that they're going to do that work right. They're going to acquire the property, that property's going to get deposited into a Trust structure, so they have to do it. They have to do it*" [531] A statement that the Claimants reiterate in their PHB.[532]

297. Then, Dr. Martínez, who had stated in his expert report that the fact that Newport S.A.S. decided to "*work with financial institutions of superior commercial reputation (which typically perform their own due diligence)*" is evidence of the good faith and lack of culpability with which Newport S.A.S.

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528 Claimants' PHB, ¶¶ 126, 165.

529 Claimants' PHB, ¶¶ 158-161, 175-176; Hr. Tr., Day 2, p. 462:9-19 (Mr. Seda's Cross); Hr. Tr., Day 4, pp. 1071:6-1072:9, p. 1123:9-13 (Dr. Martínez's Cross) ("*In my opinion, based on my information, Newport did not have that level of revenue, and they did not have the oversight of the Superintendency of Corporations. Therefore, this Circular did not apply to Newport*").

530 Hr. Tr., Day 2, pp. 462:13-463:4 (Mr. Seda's Cross) ("*But what really gave me comfort was the combination of this title search, which as we're referencing, went back 10 years, using Corficolombiana which is a nationally recognized a trust fiduciary by the largest financial conglomerate in the country, them going back 60 some odd years, writing the Attorney General's Office, getting a certificate that we relied on and felt very proud about when we received it, understanding that Corficolombiana is a financially regulated entity that has obviously approved SARLAFT and diligence process.*" (emphasis added)

531 Hr. Tr., Day 2, p. 499:1-10 (Mr. Seda's Cross).

532 Claimants' PHB, ¶ 161 ("*Nonetheless, Newport hired fiduciaries like Corficolombiana to implement rigorous SARLAFT processes in advance of commencing major Projects*").

would have acted in this case,[533] submitted that the only obligation CORFI had was to conduct due diligence on its client (*i.e.* Newport),[534] whereas Newport had essentially no obligations whatsoever,[535] since it had merely signed a sale purchase agreement –not a sales contract– and hence was not the owner of the property.[536] Yet, when confronted with CORFI's response to Mr. Seda's right of petition of 26 July 2017, which notes that Mr. Seda should bear in mind that "*it was not Fiduciaria but the Trustor Newport which directly negotiated the acquisition of the project plots with the Company La Palma Argentina S.A.S. without intervention of the Fiduciary in said pre contractual stage. Nor must we lose sight that according to Decree 1023 of 2012, an external circular letter, 304 000001 of 19 February 2014 of the Superintendence of Companies, Non financial companies operating in Colombia are required to design and implement an adequate internal system of self control and risk management LA FT, that includes but it is not limited to, and this is important, that is to say, includes but is not limited to due diligence and the knowledge of customers or counterparts*",[537] Dr. Martínez considered that, his client, CORFI was wrong as Newport had no

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533 *See,* Dr. Martínez's First Report, ¶ 79.

534 Hr. Tr., Day 4, pp. 1071:6-1072:9 (Dr. Martínez's Cross) ("*My position after looking at the documents in this case, is that the only obligated party I have found in this case, well, is the fiduciary, Corficolombiana. In this connection, the applicable regulation is the Organic Statute of the Financial System, which governs the relations between the institution and the clients and the counterparts. […] we have to draw a difference between the due diligence of Corficolombiana should have in connection with its clients and Newport and La Palma, and also the due diligence that it should have vis à vis third parties. The only due diligence that it had regarding their clients and counterparts is the due diligence that we call enhanced or heightened, which consists in doing everything possible to identify not only directors, administrators and representatives, but also partners, shareholders, beneficiaries, and controlling shareholders of these companies regarding their clients and counterparts as well. In my opinion, Corficolombiana did not have to do an enhanced due diligence regarding third parties with whom it did not hold a contractual relationship as clients or counterparts.*")

535 Hr. Tr., Day 4, pp. 1121:6-1122:8 (Dr. Martínez's Cross) (In answering to counsel's question regarding the Exhibit C-33bis, reply by CORFI to a request for information from Mr. Angel Samuel Seda, dated July 26, 2017, and CORFI's statement that "*in the particular case of the establishment of the trusts related to the Meritage Project, it is important to note that it was not Fiduciaria but the Trustor Newport which directly negotiated the acquisition of the project plots with the Company La Palma Argentina S.A.S. without intervention of the Fiduciary in said pre contractual stage. Nor must we lose sight that according to Decree 1023 of 2012, an external circular letter, 304 000001 of 19 February 2014 of the Superintendence of Companies, Non financial companies operating in Colombia are required to design and implement an adequate internal system of self control and risk management LA FT, that includes but it is not limited to, and this is important, that is to say, includes but is not limited to due diligence and the knowledge of customers or counterparts*" and asked […] *Q. But [Newport] is compelled to implement a system, and here it says, or at least in the opinion of Corficolombiana [Dr. Martínez replies] A. In a wrong opinion by Corficolombiana. [Newport] is not obliged to do so. Q. So, Corficolombiana was also wrong in that*". *See also* Dr. Reyes First Report, ¶¶ 67-68.

536 Hr. Tr., Day 4, p. 1127:10-19 (Dr. Martínez's Cross)("*given the nature of this Contract, Newport is a non-obligated subject; right? So, Newport has no due diligence obligation at the time because it is signing a promise to sell Contract. La Palma is undertaking to later on in the future to execute a Purchase and Sale Agreement with the final holder of the property right. For this purpose, it was Corficolombiana. It was a financial institution that is supervised and it has the obligation to conduct a due diligence as it did, indeed*").

537 Petition Response from Corficolombiana to Newport (**Exhibit C-033bis**).

obligation of Money Laundering/ know your client.[538] The situation, which can an only be described as farcical, illustrates the failed efforts of the Claimants to mock Colombian laws on due diligence and anti-money laundering.

298. Conversely, the Respondent has set the record straight: In his response to counsel for the Claimants, Dr. Caro impressed the fact that "*in spite of the fact that Newport is not a financial institution, it is a company; and, as such, it must meet SARLAFT regulations, this in accordance with the provisions set forth in or by the Superintendence of Companies*"[539]. This was but a corroboration of the expert testimony of Dr. Reyes, whom completely disavowed Dr. Martínez's arguments regarding the lack of due diligence and anti-money laundering incumbent on Newport, clarifying that:

> "[E]*xternal circular 304-000001 states is that the implementation of the self-control and risk management system "is mandatory and shall be implemented no later than December 31, 2014". This means that, by the time the irrevocable management trust agreement was signed on November 25, 2014, giving rise to the Meritage La Palma Argentina trust, these controls had been published by the Superintendence of Companies nine months before and should have been implemented."* [540]

299. Further adding that "*even when hypothetically Newport S.A.S. were not obliged in 2014 by the Circular in question, neither did it follow the recommendations indicated in it as a "good administration practice*" and noting that:

> "*External Circular 304-000001* […] *establishes the following: "corporations under the supervision of the Superintendency of Corporations that are not included in this Circular must comply with what is foreseen in External Circular 100-004 of 2009".* [External Circular 100-004 of 2009]*, with which the companies that do not fall within the scope of application of Circular 304-000001 "must" (used in the imperative form) comply, according to Circular 304-000001, provides that it is the "responsibility of the partners, shareholders, administrators and tax auditors of the companies, to avoid that, shielded by the corporate purpose, laws be broken or damages be caused to society, reason why it is imperious that these people set effective measures internally to their organizations, so as to avoid them being used for said purposes". This circular also provides that "it is considered pertinent to recall the recommendations established by the Financial Information and Analysis Unit -UIAF-, on its website www.uiaf.gov.co", among which it is pertinent to highlight the following: a. "Always ask the origin of the goods and money with which you are going to do business*".[541]

300. This is in stark contrast with Mr. Martínez's opinion on extremely limited SARLAFT and Money Laundering obligations for CORFI and no obligation for Newport, which has been disproven. Dr. Martínez untenable position comes as no surprise, as he acknowledged at the hearing that he could

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538 Hr. Tr., Day 4, p. 1122:1-8 (Dr. Martínez's Cross).

539 Hr. Tr., Day 4, pp. 964:10-965:2 (Dr. Caro's Cross).

540 Dr. Reyes Second Report, ¶ 164.

541 Dr. Reyes Second Report, ¶¶ 168-170.

not be impartial in his expert testimony before the Tribunal,[542] as he had previously provided an opinion to CORFI on the Asset Forfeiture Proceedings, which was paid by Newport.[543] By then, Mr. Martínez was the partner of Mr. Sintura, CORFI's attorney, in the law firm "Sintura-Martínez".[544]

301. ***Second***, Newport and CORFI's due diligence were patently insufficient. In the words of Ms. Palacio, the title study conducted by her law firm 'Otero & Palacio' was limited to "*a concept of the legal, civil, and possible defects that the property may have, or if it has any affectation, or if it has any liens, but not in matters of investigation, because that is not my scope*".[545] Furthermore, Ms. Palacio made it clear that she limited the study to 10 years as that was what she proposed to Newport, but that "[..] *it* [was] *simply a proposal. If the client says no, I want you to do the entire chain of recordation of titles, it can be done so it covers the entire chain*".[546]

302. As explained by Dr. Reyes, the object of this civil law title studies is circumscribed in scope as its aim is merely to check that the transmission of the property as registered in the deeds has been made with the formal requirements of the law and that there are no encumbrances hindering its transmission.[547] Dr. Reyes further added that it is common for this type of studies to include express disclaimers, as shown in the Rodriguez Azuero title study for the Santa Fe de Antioquia Project (stated above)[548] and that these type of studies are also limited in time, usually to 10 years, since their purpose is not to check for irregularities that can give rise to asset forfeiture proceedings. Given that asset forfeiture proceedings are not subject to statute of limitations, a 10-year study will not suffice.[549]

303. When confronted with the limited scope of the titles studies, Mr. Seda unsuccessfully attempted to disclaim his responsibility by alleging reliance on Otero & Palacio's work.[550] Faced with the evident

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542 Hr. Tr., Day 4, pp. 1094:18-1095:4 (Dr. Martínez Cross) ("*At the time when I gave an opinion to Corficolombiana, and once I assumed a legal position in that case, I have in one way another lost my impartiality because I have already taken a position*").

543 Legal Opinion by Wilson Alejandro Martínez Sánchez, 13 September 2016 (**Exhibit C-173**), p. SP-0025; Hr. Tr., Day 4, p. 1088:11-18 (Dr. Martínez Cross).

544 Dr. Martnez First Report; ¶ 10; Hr. Tr., Day 4, pp. 1079:18-1080:5, p. 1081:2-3, 1087:18-1088:16 (Dr. Martínez Cross) ("Q. […] *So, from 2013 to 2017, you were not did not have a working relationship with Francisco José Sintura? A. Francisco José Sintura and myself are the two Shareholders of a company that is devoted to providing advisory services having to do with risks of asset laundering and terrorism financing. Now I don't remember the exact date when it was incorporated, but it must have been around 2013*").

545 Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018 (**Exhibit C-216**), p. 6-8.

546 Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018 (**Exhibit C-216**), p. 6-8. *See also* Hr. Tr., Day 2, p.460: 4-7 (Mr. Seda's Cross).

547 Dr. Reyes First Report, ¶ 60.

548 Dr. Reyes First Report, ¶¶ 60-65.

549 Dr. Reyes First Report, ¶ 66; *see* Counter Memorial, ¶¶ 75-77; Rejoinder, Section III.E.1.

550 Hr. Tr., Day 2, pp. 458:9–459:16 (Mr. Seda's Cross).

shortcomings of the study and after acknowledging that he gave "*zero*" instructions to Otero & Palacio for a more comprehensive study,[551] even after observing that the Osorio & Moreno Title study extended to 20 years[552] – as asked by the President of the Tribunal – [553], Mr. Seda then referred to a purported in-house title study, not in the record,[554] and was unable to answer what other searches the in-house counsel had conducted.[555]

304. In yet another effort to minimize the extent of the required due diligence, the Claimants have argued that the title study did not reveal that Sierralta López and Cia's legal representative was Iván López Vanegas.[556] Moreover, they contend that a proper due diligence does not entail searching for the legal representatives of companies, but just the companies' owners.[557] Both contentions have proven to be false.

305. As shown by the Respondent, a more comprehensive search, such as the one performed by the law firm Osorio & Moreno, reveals the existence of Deed 1554 of 12 August 1994, pursuant to which Mr. Lopez Vanegas, as representative of Sierralta López and Cia, acquired the Meritage lot in 1994. In fact, Mr. Seda begrudgingly had to accept that had Otero & Palacio conducted a search of 20 years, "*they would* [have found] *this deed potentially*"[558]. As demonstrated, Sierralta López y Cia, and its representative Iván López Vanegas are in the chain of title record and the information was "discoverable" just with a proper title search.

306. Moreover, the names of the legal representatives of the companies, involved in the transactions at a given point in time, appear in transaction-deeds, which openly contradicts the Claimants' express position pursuant to which the required due diligence did not extent to the legal representatives. In

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551 Hr. Tr., Day 2, p. 461:14- 462:5 (Mr. Seda's Cross).

552 Osorio & Moreno Abogados, Title Study, 17 May 2016 (**Exhibit C-160**), SP-0014; *See also,* Mr. Seda Cross Examination, Hr. Tr., Day 2, p. 475:13-22.

553 Mr. Seda Cross Examination, Hr. Tr., Day 2, p. 481:3-7 ("*PRESIDENT SACHS: This didn't give you the idea to go back to your lawyers and to ask them, well, the bank said it would be more prudent to go back 20 years, could you do that for me also? THE WITNESS: Well, no*").

554 Mr. Seda Cross Examination, Hr. Tr., Day 2, p. 505: 4-11 ("*PRESIDENT SACHS: Is that title study on the file? THE WITNESS: No. It's just--it's an informal title study we do in-house* […] *Q. So, we do not have that on record, right? A. No, we do not have that on record*").

555 Mr. Seda Cross Examination, Hr. Tr., Day 2, p. 505:14-22 ("*Q. And how did you conduct that due diligence? Was it a Google search? How did you do that? A. I gave it to our in-house counsel, and he did whatever I assume is his policy and processes*").

556 Claimants' PHB, ¶¶ 178-179.

557 Hr. Tr., Day 4, pp. 1115:8- 1116:15 (Dr. Martínez Cross) ("*I understand that for that reason […] information is being requested in connection with individuals that are currently included as registered, but to go beyond this would have been* […] *an absurd standard*").

558 Mr. Seda Cross Examination, Hr. Tr., Day 2, p. 472:12-13.

fact, Mr. Sintura's own right of petition to the Attorney General's Office regarding the Meritage lot requested the Attorney General's Office to check both owners and legal representatives.[559]

307. Evidently, finding Mr. Lopez Vanegas involvement in the transaction of the Meritage Lot was anything but impossible. It was rather so feasible that other law firms with just a modicum of diligence found it, just as easy as Mr. Lopera found the information on the criminal activities of Mr. López Vanegas.[560]

308. Notably, in response to the questions of Arbitrator Perezcano, the Claimants' expert Dr. Martínez had to acknowledged that, as set forth by Colombian Constitutional Court, due diligence must be such *"that it is impossible for any prudent person* […] *to discover the non- existence of the apparent situation*".[561] This was clearly not the case with the Meritage.

309. Despite all of the above, and desperate to save their baseless contention that the title studies were complete and sufficient, the Claimants now retort that although the Osorio & Moreno title study – commissioned by Scotiabank – and the title study in the Quartier Project went back 20 years and identified Mr. Lopez Vanegas as the representative of Sierralta, they "*did not identify any issues with that entity based on publicly available information*",[562] just as CORFI had not identified any issues.[563] The argument fails: as explained above, and as specifically disclaimed in the Osorio & Moreno study,[564] the scope of this type of studies are restricted to verify the chain of title and the existence of encumbrances. That is even more the case as regards to the studies commissioned by the banks, which are exclusively for purposes of providing a loan, as opposed to acquiring a property.

310. Finally, as regards the applicable standard of due diligence to the present case, and confusing a decision of the Constitutional Court regarding the constitutionality of a norm, specifically articles

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559 Petition for Information from Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013 (**Exhibit C-031bis**),p. 69 ("*CORFICOLOMBIANA wishes to verify whether any inquiry, investigation, or process whatsoever of a criminal nature is underway against any of the following individuals, who hold the positions of managers, assistant managers, legal representatives, members of the board of directors and shareholders of the legal entities mentioned above in Items 1.2.1. to the 1.2.5., as former or current owners of the real property that is the subject matter of this request*").

560 Mr. Seda Second Witness Statement, ¶ 7 ("And when I asked Juan Pablo Lopera, our in-house counsel, to conduct an Internet search of López Vanegas' name, it revealed that he had previously been convicted of drug trafficking charges in the United States").

561 Hr. Tr., Day 4, p. 1149:10-15; p. 1150:4-6 (Tribunal's Questions to Dr. Martínez) (Referring to the Constitutional Court's decision C- 327, "*ARBITRATOR PEREZCANO: So this is where I would ask you to help me out. This leads me to understand that due diligence must be such that it is impossible for any prudent person--and this is what the Decision of the Court itself says--to discover the non-existence of the apparent situation.* […] *THE WITNESS: Yes. I was saying that the answer to the question---I could answer by saying that you could well be right*").

562 Claimants' PHB, ¶ 181.

563 Claimants' PHB, ¶¶ 178 (d)-181.

564 Osorio & Moreno Abogados, Title Study, 17 May 2016 (**Exhibit C-160**), SP-0015.

16.10 and 16.11 of Law 1708 of 2014, with a decision on a "*case*", the Claimants argue that the due diligence standard set forth by the Constitutional Court regarding the scenarios in said articles, applies to the entirety of Article 16 of the Asset Forfeiture Law. This is not true. First, the Claimants obviously ignore the parameters of the Constitutional Court's decisions on constitutionality issues. In the decision, he Court clearly states the constitutionality of all other paragraphs of article 16, namely, those related to asset forfeiture proceedings over property of illicit origin or destination, that have been studied by the Court in previous decisions and declared *res judicata.*[565] To the contrary, the charges brought against paragraphs 16.10 and 16.11 of Law 1708 of 2014 have not been analysed by the Court and hence, there is no constitutional *res judicata.*[566] Second, the Claimants contention that the standard of due diligence established in relation to equivalent assets of licit origin (which are the assets that paragraphs 10 and 11 regulate) "must" apply to the entirety of Article 16, epitomises the Claimants utter disrespect for the Colombian Courts and the Respondent's normative jurisdiction. A law sanctioned by the Colombian Congress cannot be modified at will by the investors to fit their cases. Similarly, the Claimants cannot substitute the Constitutional Court changing at will a question, which is constitutional *res judicata*. The Colombian Constitutional Court cannot change its position on a provision (paragraphs 1 to 9 of Article 16) in connection to which it has already passed judgement (constitutional *res judicata*) but on strictly limited grounds and needs to do so by expressly analysing the exact same provision over which it had previously passed judgement. This is clearly not the case here.[567]

311. Finally, Claimants' characterization of Dr. Reyes explanation at the Hearing is but another example of their alternative reality narrative. A careful review of Dr. Reyes' expert report and explanation at the Hearing demonstrated the very different rationale that informs the paragraph of Article 16 applicable to illicit assets and that of paragraphs 10 and 11 of Article 16, regarding forfeiture –not of illicit assets– but the equivalent licit assets when no illicit assets are available.

312. This is made clear in the resolutive part of the decision where the Court concludes:

> "[T]*he Court will condition the constitutionality of paragraphs 10 and 11 of Article 16 of Law 1708 of 2014, to specify, on the one hand, that in these hypotheses the asset forfeiture shall operate only when the holder of the right is the same person who has*

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565 *See*, Dr. Reyes' Second Expert Report, ¶¶ 185-186 ("*In relation to the constitutionality of paragraphs 1 to 9 of Article 16 of Law 1708 of 2014, i.e., all those referring to forfeiture of assets that have directly or indirectly an illicit origin, the Court did not rule in Decision C-327 of2020, because with respect to them there was already constitutional res judicata.*")

566 Constitutional Court, Judgment C-327/20, 19 August 2020 (**Exhibit CMB-014**) "*As it can be seen, the Court's analysis does not deal with assets that are "the fruit of honest labor", **which are the subject of this proceedings***." (emphasis added).

567 Political Constitution of Colombia, 1991 (**Exhibit C-005bis**), Article 243 ("*The rulings issued by the Court in the exercise of jurisdictional review shall constitute res judicata.*").

> *carried out the underlying illegal activities that support the persecutory powers of the State, and, on the other hand, to point out that the aforementioned restriction is applicable without prejudice of the rights of third parties acting in good faith without fault, in whose favor in-rem titles have been constituted over the legal properties subject to asset forfeiture."*[568]

313. That is, the restricted due diligence applies only in connection with assets held by, and obtained with licit funds, by the same person who has committed an illicit activity when the assets acquired with money of that illicit activity cannot be forfeited, but in those events where over such assets a third party holds rights *in rem* –as could be a mortgage– the good faith of that third party should be evaluated in light of a lower standard of due diligence.

314. ***Third*,** even assuming that the due diligence was complete and that neither CORFI nor Newport could have possibly found Iván López in their title analysis and searches (*quod non*), Mr. Seda knew since early 2014 of Mr. Lopez, a convicted criminal[569] who claimed ownership. Even in that scenario, he decided not to request Colombian authorities to confirm Mr. López's claims and update his due diligence. This is fatal for the Claimants' claims.[570]

315. Attempting to redress this fatal flaw, the Claimants and their expert claim that requesting an updated due diligence would mean that due diligence would have to be made *ad infinitum*.[571] This is wrong. As cogently explained by Dr. Reyes, in cases – like the Meritage – which involve a complex business structure with several interconnected transactions developing over time and where ownership rights are only to be finally acquired and vested with the fulfilment of a series of conditions, there is an obligation to actualise the due diligence if new information comes to light that calls into question the licit origin of the property.[572]

316. This scenario is clearly distinguishable from cases where there is just a one-off sale transaction which occurs in a short period of time and the property is transferred and vested in the buyer.[573]

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568 Constitutional Court, Judgment C-327, 19 August 2020 (**Exhibit CMB-014**), ¶ 7.5.

569 Mr. Seda Second Witness Statement, ¶ 7.

570 Counter Memorial, ¶¶ 85-90; Rejoinder, Section III.E.4.

571 Claimants' PHB, ¶ 167.

572 Hr. Tr., Day 4, p. 1229:1-19 (Tribunal's Questions to Dr. Reyes) ("*THE WITNESS:* […] *The facts that I have had the opportunity to know are a good example because they show a continuous negotiation in which the Project continues to have actions that require that good faith be assessed. That is why I don't think that that stage has been closed. In the example given to me by the President, the negotiation ended. He bought the piece of property as a no fault good-faith third party, and the only thing that the Fiscalía could eventually do is to go and prosecute an equivalent asset of the person that committed the illegal act. But in this specific case, a number of actions continued taking place. I understand that the Project is still pending, it hasn't been finished. That is why there is this obligation of reviewing good faith on that project or a new one, of course, if the circumstances change*").

573 Hr. Tr., Day 4, p. 1229:1-19; pp. 1232:16—1233:20 (Tribunal's Questions to Dr. Reyes).

317. As expressly acknowledged by the Claimants' expert Dr. Martínez, Newport has no ownership of the Meritage lot.[574] Newport might eventually acquire property assuming several stages on the project have been completed and conditions met.[575] Hence, in the present case, Newport was obliged to actualise its due diligence upon learning about Lopez Vanegas' claim.

318. The Claimants alleged that since Dr. Reyes agreed that Bogotá's Superior Tribunal in its decision of the 22 April 2022 "*anchored the afectado statute of Newport in the sale -purchase promise*" that is the date in which the due diligence should be assessed. This is plainly wrong. The Tribunal considered that Newport could participate in the proceedings as it had a patrimonial [576] and not an *in rem* right –having entered into a sale purchase agreement. A personal right is not a right *in rem*, and, as explained earlier in this PHB, even the Claimants' expert Mr. Martinez knows that there is no transfer of ownership. The Claimants' conflation of the issues is deceitful.

319. Faced with the facts that *(i)* as acknowledged by Dr. Martínez, Newport has no ownership of the Meritage Lot,[577] *(ii)* as a complex structure project, several phases were pending for the ownership rights to be consolidated as regards Newport and the aera beneficiaries, and that *(iii)* upon learning Mr. Iván López's claims of ownership over the Meritage Lot, Mr. Seda "*did not redo diligence*",[578] nor did he actualize it with State authorities, but instead continued with the project, the Claimants now come up with the novel theory that due diligence was refreshed by CORFI.

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574 Hr. Tr., Day 4, pp. 1107:15-1108:5 (Dr. Martínez's Cross) ("*MR. MARTÍNEZ [..] A. Of course, the question you must ask is whether Newport has some right for the property to be assigned to it at some point in time, and the answer would have been yes, that is in the Trust Contract. […]. Q. Yes, but in the future--so, this the way it could be interpreted. A. Yes, and look at what it says here, it says: "To claim for the compliance of the obligation." The rule itself is saying it is towards the future. Q. So we are in agreement: it is not at the present when we have the asset is the lot. A. Right*").

575 Hr. Tr., Day 4, pp. 1107:15-1108:5 (Dr. Martínez's Cross).

576 Decision of the Superior Tribunal of the Judicial District of Bogotá, Asset Forfeiture Chamber, 22 April 2022 (**Exhibit C- 436**) (Recalling the Chamber's opinion in the case file 11001312000101201500068 01, where it stated:"[…]; *finally, article 30 [of the Asset Forfeiture Law] establishes that "any person, natural or legal, who claims to be the holder of rights over any of the assets that are subject of the action" may appear in the dispute, which means that, in a broad interpretation of this provision, the aforementioned appellant was given the possibility to participate in the proceedings, but it should be noted that this only enables him to challenge the asset forfeiture; however, this Court is not authorized to recognize rights such as those he claims to hold...*". And finding that "*From the foregoing, the Court concludes that the corporation Newport S.A.S. has the legal capability to attend the proceedings, since it has a patrimonial right over the affected properties. Therefore, in extension of article 30 ibid., it must concur to the procedure with the possibility of participating and intervening, only with the attributions provided by law, without this entailing the declaration or recognition of a right that corresponds to another forum*").

577 Hr. Tr., Day 4, p. 1107:15-22 (Dr. Martínez's Cross).

578 Hr. Tr., Day 2, p. 536:1-6 (Mr. Seda's Cross) (*"Q. You did not deem necessary, given the situation, and that you have a claim by someone who says, I'm the rightful owner, to restart maybe a due diligence, a serious one, not a Google one, to have an attorney maybe look at the chain of title, to go as far as possible far back in time. You did not do that, right? A. [MR. SEDA] We did not redo diligence. Again, no*"). (emphasis added)

320. Yet, the novel and the belated argument fails as *(i)* it was incumbent on Newport to actualize the due diligence with the State authorities, yet Mr. Seda contented himself with allegedly asking Ms. Giraldo [579] and CORFI and once again, failed to perform his own due diligence; *(ii)* contrary to what the Claimants allege, the Legal Director of CORFI, Ms. Betancourt Guzman [580] did not actually "refresh" the due diligence but merely "*verified once again how the business deal* [with La Palma] *had taken place, we verified the title studies, we verified the searches that Mr. Sintura had performed and once again the tool we have the tool is to search in the list for people whose name appear in the title transfer of the property and those who appear, especially for La Palma Argentina, that was generated. In other words, La Palma Argentina transfers it to me, there is clear title, and so they rechecked it again in 2014, and everything turned up clean"*.[581] Re-checking the (patently insufficient) titles studies, verifying the (incomplete) petition right of Mr. Sintura to the Attorney General's Office, and rechecking the (incomplete) lists – in particular, *vis-à-vis* La Palma – is nothing more than looking to old information.

321. [redacted]

322. Evidently, this is as clear a case of wilful disregard of a patent ground for asset forfeiture for the sake of economic gain as it can be. The TPA is neither meant, nor should it be used to, protect investors who behave in this fashion.

323. ***Fourth***, the Claimants cannot rely on the response of the Attorney General's Office to the right of petition presented by CORFI, nor does the filing of the petition demonstrate good faith. The Claimants have purposefully titled simple responses to rights of petition to the Attorney General's Office as certificates of clean title. Nonetheless, naming a qualified response as a certificate does not

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579 Hr. Tr., Day 2, p. 522:15-523:18 (Mr. Seda's Cross).

580 Testimony of Margarita María Betancourt Guzmán in Pinturas Prime Arbitration, 18 September 2018 (**Exhibit C-219**), p.1.

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

582 Mr. Seda Second Witness Statement, ¶ 7.

change its nature, as calling a goat a cow does not make the goat a cow. As recalled by Dr. Caro: "*the function of the Prosecutorial Office, as I indicated in the Requerimiento, its mission is not to certify. It cannot be held as an approval to conduct acts with legal effects*".[583]

324. The Respondent has amply demonstrated that the responses provided by the Attorney General's Office are *(i)* limited in time, as they are based on information a given unit of the Attorney General' Office has at a given date,[584] which might well exclude initial investigations on asset forfeiture proceedings or on criminal activities, which are – by law – subject to reserve[585] and *(ii)* circumscribed by the very own terms of the request.

325. Indeed, as explained by Dr. Reyes,[586] the responses of the Asset Forfeiture Unit of the Attorney General's Office to Newport were carefully worded to underscore the limitations on the information; a fact that Mr. Seda could only agree with during the Hearing.[587]

326. Further, it is undisputed that when providing its response to a request for information, as the one made by Mr. Sintura, the Attorney General's Office is not required to look "*at the corporate history of the entities listed*" and is only required to look at the persons or entities listed in the request.[588] In the present case, and despite counsel for the Claimants' repeated efforts to portray the list of entities and individuals presented by Mr. Sintura to the Attorney General's Office as a "complete" list,[589] the one presented by Mr. Sintura was based on information of the persons and entities in the

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583 Hr. Tr., Day 4, p. 1019: 4-7 (Dr. Caro's Re-Direct).

584 Counter Memorial, ¶ 71-73, 82-84; Rejoinder, Section III.E.3. *See also* Hr. Tr., Day 4, p. 1018:8-1019:3 (Dr. Caro Re-Direct) ("*Please note that in this response a clarification is made. Here it in capital letters, in bold and underlined. To date, the record of the legal and natural persons, this doesn't appear that are listed as follows. As I said yesterday, this is an exact snapshot of the time when the information is requested. This, to mean, that a day later, a week later, a few years later, well, an investigation can be commenced, including by the individuals asking for this information*"); Mr. Seda Cross Examination, Hr. Tr., Day 2, p. 484:18--485:9.

585 Hr. Tr., Day 4, p. 1204:18-1205:11 (Dr. Reyes's Cross).

586 Hr. Tr., Day 4, pp. 1207:13-1208:9 (Dr. Reyes's Cross).

587 Hr. Tr., Day 2, pp. 484:14 -485:9 (Mr. Seda's Cross) ("*Q. So, this is what you refer to when you say the Fiscalía, itself, gave a certificate that the title was clean, right? A. That's correct. Q. […] you see that the response, so it says: Subject matter right of petition response, right? And it says: "With the purpose of responding to the referenced request, I hereby state the following." And it then says: "Having consulted the consolidated system of information this unit manages, to date, there is no record of the people or entities listed below." So, when it says "to date," this means 9 September 2013, right? This is as of 9 September 2013, correct? A. Yeah. As of the date of due diligence, yeah*").

588 Hr. Tr., Day 4, p. 1018: 8-14 (Dr. Caro's Re-Direct).

589 Hr. Tr., Day 3, pp. 851:20-852:6 (Dr. Ardila's Cross) (Counsel for Claimants misleading representations: "*Q. You're aware that Corficolombiana, through its outside counsel, Francisco Sintura, former Deputy Attorney General, submitted a complete list of the owners of the property going all the way back to its origins, legal representatives for the entities that owned it and other names, and obtained a certification that there were no investigations relating to any of those owners? You're aware of that; right? "Yes" or "no."*") (emphasis added).

chain of title provided in the study of Otero & Palacio, which, as already demonstrated above, was incomplete and was missing the information on Sierralta y Cia and Mr. Lopez Vanegas.

327. ***Finally***, as stated by Mr. Caro[590] and further corroborated by Mr. Reyes:

> "[B]*y mandate of Article 10 of that law, all asset forfeiture investigations are confidential, and I quote, "even for the procedural subjects or intervening parties, the parties of the procedure and other intervening parties." So, a person who is familiar with that law during that initial phase should not send any request to the Prosecutor for information that the law classifies as confidential, even for Parties to the proceeding and the intervening parties, and I place emphasis on the intervening parties because that means that neither the Ministry of Justice, nor the Office of the Inspector General, which is an oversight agency of the State, can demand or request that information of a prosecutor in the Asset Forfeiture Unit.*"[591]

328. It follows from Dr. Reyes' explanation that, *a fortiori*, neither CORFI nor Newport are entitled to receive information on investigations into asset forfeiture proceedings. Needless to say, Dr. Martínez, who acted as Vice Attorney General – albeit for six weeks –[592] and who praises himself to be an expert in asset forfeiture proceedings, [593] must have known about the confidentiality of the asset forfeiture investigations, as must have Mr. Sintura, former Attorney General in the early nineties.[594]

329. Yet, after being confronted during his cross-examination with a scenario where a right of petition was used to give a patina of "legality" to a money laundering operation, and after admitting that he would not be surprised that in the early 90's – when Mr. Sintura was Attorney General – drug traffickers could have used rights of petition before the Attorney General's Office to evade capture, Dr. Martínez had to admit that "*the fact that there is a request for information to the Office of the Attorney General*" was not *per se* proof of good faith.[595] This is hardly consistent with Dr. Martínez's

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590 Hr. Tr., Day 4, p. 1019: 8-12 (Dr. Caro's Re-Direct) ("[T]*hose who know about asset forfeiture know that it is not a good practice, through a right to petition, to ask whether properties are undergoing Asset Forfeiture Actions*").

591 Hr. Tr., Day 4, pp. 1204:18-1205:11 (Dr. Reyes's Cross).

592 Hr. Tr., Day 4, p. 1083:12-21 (Dr. Martínez's Cross).

593 Hr. Tr., Day 4, p. 1085:1-11 (Dr. Martínez's Cross).

594 Hr. Tr., Day 4, p. 1083:3-11 (Dr. Martínez's Cross).

595 Dr. Martínez First Report, ¶ 48 ("*This certification by the Attorney General's Office is critical for me in analyzing this case. While the government has not explained a standard of diligence to be followed by a buyer, undoubtedly directly asking the Attorney General's Office if there was cause for worry regarding the lot and the persons connected to it completely demonstrates the good faith on the part of the buyer/developer, Newport, and the fiduciary company, Corficolombiana, in order to obtain trustworthy information on the lot in question. If asking the government directly does not constitute reasonable, adequate, and good faith diligence, I cannot think what would*"). *See also* Dr. Martínez Cross Examination, Hr. Tr., Day 4, p. 1110:1-4 ("A. […] *If your question is, whether the only--the fact that there is a request for information to the Office of the Attorney General, and if that is a condition to prove good faith, the answer is "no."*")

opinion expressed in his First Report regarding how CORFI's petition to the Attorney General's Office was the epitome and absolute proof of CORFI and Newport's good faith. [596]

330. To sum up, as demonstrated, [redacted] (ii) a response to a right of petition is framed by the petition request, therefore, the petitioner, and not the authority, is liable for the omission in the request. This is clearly the case here, where the list of persons and entities provided by CORFI resulted from a deficient title study and therefore omitted the information regarding Sierralta and Iván López; (iii) given the secrecy imposed by the law as regards the initial investigations in asset forfeiture proceedings and criminal investigations, a response from the Attorney General's Office cannot be relied upon as an assurance that no asset forfeiture proceedings could be commenced against a given asset, (iv) also – and related – it is not a good professional practice, nor is it evidence of good faith, to present a petition to the Attorney General's Office for purposes of relying on it, let alone to shift the burden of due diligence from the acquiror to the State.

2. The Respondent did not breach the FET standard with respect to the Claimants' alleged investments in the Other Projects

331. The Parties agree that the disputed measure is the Asset Forfeiture Proceedings initiated against the Meritage Lot and that no measure has been adopted directly against the Claimants' Other Projects. Yet, the Claimants aver that the Respondent breached its FET obligation under the TPA by placing the Other Projects "*in the line of fire*". The Claimants' allegations are wrong as a matter of law and facts.

332. *First*, according to the Claimants, the FET obligation under the TPA requires the Respondent "*to take measures to protect the 'legitimate expectations'*" of the Claimants that "*means will be sought by the authorities of the host State to avoid any unnecessarily adverse effect on those interests or at least to minimise or mitigate the adverse effects*".[598] The fact that the Claimants refer to the award in *Rompetrol v. Romania* to interpret the TPA, and not to the TPA itself, speaks volumes about their interpretation and application of the TPA.[599]

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596 Dr. Martínez First Report, ¶ 48 ("[U*]ndoubtedly directly asking the Attorney General's Office if there was cause for worry regarding the lot and the persons connected to it completely demonstrates the good faith on the part of the buyer/developer, Newport, and the fiduciary company, Corficolombiana, in order to obtain trustworthy information on the lot in question. If asking the government directly does not constitute reasonable, adequate, and good faith diligence, I cannot think what would*").

597 Respondent's Rejoinder, ¶¶ 203-204.

598 *See* Claimants' PHB, ¶ 214.

599 As demonstrated, the Claimants' reliance on the *Rompetrol* decision is inapposite because the *Rompetrol* tribunal assessed the "*cumulative effect*" of a series of "procedural irregularities" during criminal investigations

333. Unlike Article 3(1) of the Netherlands-Romania BIT applicable in *Rompetrol v. Romania*, Article 10.5 of the TPA requires that "*covered investments*" be treated in accordance with the minimum standard of treatment.[600] Article 10.5 also provides that the FET standard "*do*[es] *not create additional substantive rights*" to the host State.[601] The concept of "*legitimate expectations*" is not considered as an element of the FET standard under the TPA.[602] On this basis alone, the Claimants' claims should be dismissed, as they clearly exceed the scope of the FET standard under the TPA.

334. *Second*, the Claimants allege that "*Colombia knew, or should have known, that all other projects being spearheaded by Mr. Seda and the Royal Property Group, including Luxé and the Development Projects, 'stood directly in the link of fire'*".[603] As a matter of fact, this is simply wrong. More importantly, adopting the Claimants' position would impose an unreasonably heavy burden on the Respondent, as it would be required to determine the identity of any party related to an asset that is subject to Asset Forfeiture Proceedings regardless of their connection with the asset, investigate what other projects those parties may have in Colombia and abroad – regardless of the stage of development –, and adopt measures to minimize or mitigate the harm to any such existing or potential project.[604] This exceeds by far the scope of the FET obligation, let alone the minimum standard of treatment under customary international law in Article 10.5 of the TPA.

335. *Third*, the Claimants' claim is based on a set of facts that have been proven wrong: the Asset Forfeiture Proceedings were initiated and conducted in accordance with Colombian Law and Colombia's international obligations.[605] The Respondent cannot be expected to restrain from initiating asset forfeiture proceedings in accordance with its laws and Constitution for risk that it would "*taint*[] *the reputation of any parties publicly associated with the* [asset]", or to predict any consequence of a legitimate measure, let alone to adopt measures "*to minimise or mitigate adverse*

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initiated against the claimant's principal. The tribunal clearly noted that its finding that Romania had breached the FET standard to a "*limited extent*" was "*based entirely on the facts of the present case*". *See* Counter Memorial, ¶ 474.

600 *See* Rejoinder, ¶¶ 721-735. The Claimants' position seems to have evolved as it had initially argued that the Respondent breached the FET standard with respect to the Claimants that invested in the Other Projects. This was clearly inconsistent with Article 10.5 of the TPA, which extends only to "*covered investments*". *See* Rejoinder, ¶ 801.

601 *See* TPA, Article 10.5(2).

602 *See* Rejoinder, ¶¶ 785-787.

603 Claimants' PHB, ¶¶ 216-217.

604 This is particularly burdensome as the Claimants were developing their projects through special purpose vehicles. For example, the Luxé Project was being developed by Luxé by the Charlee S.A.S.

605 *See above*, Section V.A. In particular, it had been demonstrated that the Asset Forfeiture Proceedings were not initiated as part of "*a corrupt and extortionate scheme*", as claimed by the Claimants. *See* Claimants' PHB, ¶ 220.

effects" of such legitimate measure (which is ongoing) on other assets and investors unrelated to the measure or the asset subject to forfeiture.

336. *Fourth*, the tribunal in *Rompetrol v. Romania*, on which the Claimants rely, confirmed the need of "*sufficient causal nexus between the claimed illegality and the asserted loss*".[606] This means that "*in the absence of evidence establishing the necessary causal nexus, the Respondent cannot be held responsible under international law for the failure of*" the Claimant's Other Projects.[607] As demonstrated, the Claimants have failed to show a causal link between the Asset Forfeiture Proceedings and the harm allegedly suffered by the investor.[608]

D. THE RESPONDENT ACCORDED FULL PROTECTION AND SECURITY TO THE CLAIMANTS' ALLEGED INVESTMENT

337. As demonstrated, under Article 10.5 of the TPA, the obligation to accord FPS applies only with respect to "*covered investments*" and "*requires each Party to provide the level of police protection required under customary international law*". On this basis alone, the Claimants' claims that the Respondent breached the standard by "*engag*[ing] *in a sustained and increasingly hostile campaign to tarnish Mr. Seda's reputation*" must be rejected.[609] In any event, the FPS standard is one of due diligence and carries a very high threshold.[610] As demonstrated, the Claimants have failed to demonstrate that the Respondent engaged in any "*campaign*" against Mr. Seda or any of the Claimants, let alone that any of the Respondent's acts meet the very high threshold for a breach of FPS to exist.

[redacted]

606 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (**Exhibit CL-089**), ¶ 288. In this case, it is not disputed that a causal link is required. *See* Rejoinder, ¶ 803; Counter Memorial, ¶ 474; Reply, ¶ 364.

607 *Silver Ridge Power BV v. Italian Republic*, ICSID Case No. ARB/15/37, Award, 26 February 2021 (**Exhibit CL-192**), ¶ 526

608 *See below*, Section VI.A. As demonstrated, there is also no evidence that Mr. Seda's reputation was damaged as a result of the Respondent's conduct.

609 *See* Counter Memorial, ¶¶ 501-506; Rejoinder, ¶¶ 812-817.

610 *See* Counter Memorial, ¶¶ 507-511; Rejoinder, ¶¶ 818-822.

611 Claimants' PHB, ¶ 223 (a).

[redacted]

[redacted]

615 Angel Seda Statement attached to Request for Police Protection, 11 October 2017 (**Exhibit C-202**); *see also*, Respondent's Counter-Memorial, ¶ 542; Respondent's Rejoinder, ¶¶ 489-490.

[redacted] The Claimants' arguments that the Respondent denied Mr. Seda's request for a permit for an armored car is misleading, as the Claimants fail to inform the Tribunal that Mr. Seda never appealed the Security Superintendence's decision, even though he was given the opportunity to do so. *See* Respondent's Counter Memorial, ¶ 544.

617 Claimants' PHB, ¶ 223(e).

[redacted]

[redacted]

619 Claimants' PHB, ¶ 224.

[redacted]

econd Witness Statement of Dr. Hernández, ¶ 30.

622 Claimants' PHB, ¶ 224(c).

623 *See above*, Section V.A.2(d).

[redacted]

VI. THE CLAIMANTS ARE NOT ENTITLED TO THE DAMAGES CLAIMED

347. The Claimants seek to obtain compensation in excess of USD 255.8 million for the damages allegedly incurred with respect to their projects (most of which are in development or hypothetical) in Colombia, in addition to 10% for moral damages allegedly suffered by Mr. Seda. As demonstrated, the Claimants are not entitled to the damages claimed.

348. As a preliminary matter, it has been demonstrated that the Tribunal has no authority under the TPA to award damages that a claimant allegedly incurred in its capacity as an investor for violations of obligations that only extend to covered investments.[625] For example, with respect to the Other Projects, the Claimants only claim a breach of the FET standard. Pursuant to Article 10.5 of the TPA, the minimum standard of treatment (including the FET standard, to the extent that it falls within the minimum standard of treatment) is to be accorded only to "*covered investments*".[626] Accordingly, the Tribunal does not have the authority to award damages that the Claimants allegedly suffered in their capacity as investors in the Other Projects (or for any other breach of obligations that only extend to covered investments).

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624 In this regard, Respondent also takes issue with the Claimants' insinuations that Colombia would have leaked information to the press. [redacted] *ee* Respondent's Rejoinder, ¶¶ 655-656.

625 *See* Submission of the United States of America, 26 February 2021, ¶ 62.

626 United States-Colombia Trade Promotion Agreement, 15 May 2012 (**Exhibit CL-001**), Article 10.5.

349. Even if the Tribunal had the authority to award damages in connection with the Other Projects, the Claimants are not entitled to compensation with respect to their alleged investments in the Other Projects because there is no causal link between the Respondent's actions and the Claimants' alleged damages (**A**).

350. In any event, the amounts claimed by the Claimants – both with respect to the Meritage Project and the Other Projects – are highly speculative and exaggerated and would overcompensate the Claimants (**B**). The Claimants are also not entitled to moral damages (**C**) or costs,[627] and the pre-award interest should be calculated on the basis of the risk-free rate (**D**).

A. THE CLAIMANTS ARE NOT ENTITLED TO COMPENSATION WITH RESPECT TO THEIR ALLEGED INVESTMENT IN THE OTHER PROJECTS

351. The Parties agree that if the Tribunal were to find that it had jurisdiction and that the Respondent breached its international obligations *vis-à-vis* the Claimants (all of which is denied by the Respondent), only the damages incurred "*by reason of, or arising out of*" the State's unlawful conduct are compensable.[628] The existence of a "*sufficient causal link*" between the disputed measures and the damages claimed is, therefore, a *conditio sine qua non* for an award on damages.

352. The Parties also agree that (i) the disputed measure in this arbitration is the Asset Forfeiture Proceedings initiated against the Meritage Project and (ii) there is no legal connection between the Meritage Project and any of the Claimants' Other Projects.[629] Yet, over two thirds of the damages claimed by the Claimants (*i.e.* 69%) concern the Claimants' Other Projects, including projects in development and future hypothetical projects.[630] As demonstrated, the Claimants are not entitled to compensation with respect to the Other Projects as the Claimants have failed to show that (i) their "*Project Portfolio*" was viable but for the Asset Forfeiture Proceedings, (ii) the "*Project Portfolio*" was "*destroyed*", and (iii) the damages claimed in connection with any such destruction were incurred "*by reason of, or arising out of*" the Asset Forfeiture Proceedings against the Meritage Lot.

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627 *See* Respondent's Rejoinder, Section VI.G.

628 *See* Claimants' PHB, ¶ 231.

629 *See* Respondent's Opening Presentation, slide 251. Many of the Claimants do not even have a legal connection to the Meritage. As demonstrated, the claimed damages could therefore not have been reasonably foreseen to ensue from the Asset Forfeiture Proceedings. *See also* Rejoinder, ¶¶ 873-876.

630 *See* Respondent's Opening Presentation, slide 250.

353. **Luxe**: the Claimants' claim USD 44.3 million in connection with the alleged losses with respect to the Luxé Project.[631] Yet, the Claimants have failed to show the causal link between the Asset Forfeiture Proceedings and the failure to complete the Luxé Hotel.

354. ***First***, the Claimants argue that, as a result of the Asset Forfeiture Proceedings, Colpatria withdrew its financing for Luxé and Mr. Seda could no longer borrow money to finalize the Project. However, the Claimants have failed to show any documentary evidence that Colpatria had agreed to provide additional financing for the project, let alone that the bank decided to (or was entitled to[632]) withdraw its financing due to the Asset Forfeiture Proceedings against the Meritage Project (or that the Luxé Project was halted due to any such decision).[633] The Claimants argue that "*it was firmly in Colpatria's economic interest to finish financing the Luxé Project so that the Project could commence operations and Colpatria could collect on its loan*".[634] Yet, they insist that Colpatria unilaterally decided to halt financing, without any contractual ground to do so.

355. Even assuming that Colpatria did stop disbursing funds, the Claimants failed to show that they sent any written correspondence to Colpatria claiming the disbursements allegedly due, as a diligent businessman would have done. The Claimants' lack of reaction is particularly striking as it appears that it was not the first time that Colpatria had breached its obligations to disburse the funds which, according to Luxé's legal representatives, "*led to the bankruptcy of* [Luxé] *and the failure of the project*". Further, Luxé acknowledged that Colpatria's decision to cease the disbursements had nothing to do with the Asset Forfeiture Proceedings but was rather made "*with the sole intention of keep*[ing] *the project for itself and continue with its economic exploitation*".[635]

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631 Assuming there is a causal link between the Respondent's actions and any losses suffered in connection with the Luxé Project, the maximum compensation due should be USD 3.7 million. *See* Dr. Hern Second Report, Table 6.4.

632 The loan was granted to Luxé by the Charlee S.A.S., a company that had no direct link to Newport S.A.S. *See* Loan Approval Letter from Colpatria, 23 September 2014 (**Exhibit C-135**).

633 The Claimants rely solely on the unsubstantiated statement of Mr. López Montoya that the Colpatria bank orally communicated its decision to withdraw financing, which the Claimants seek to validate by alleging that "*Colombia declined to cross-examine Mr. López Montoya at the Hearing*" (*see* Claimants' PHB, ¶ 218(a)). Pursuant to paragraph 18.10 of Procedural Order No. 1, the fact that the Respondent did not call Mr. Montoya to testify "*does not imply that the Party accepts the substance of* [his] *statement*" (*see also* Email from the Claimants (Ms. Kahloon) to ICSID (Ms. Marzal) of 21 April 2022). This is particularly the case when the Claimants have failed to provide any of the documents that typically are signed in connection with a bank loan (which are not unfamiliar to the Claimants, as they had signed similar documents in connection with the Banco de Bogotá loan to finance Phase 1 of the Meritage Project (*see* Letter from J. Toro Aristizabel to A. Seda, 11 August 2016 (**Exhibit C-168**)), even though the Respondent has consistently pointed out to the absence of documentary support of the alleged loans. *See*, *e.g.*, Rejoinder, ¶¶ 859-860.

634 *See* Claimants' PHB, ¶ 238.

635 Statement of Defense filed on behalf of Luxe SAS and Angel Seda, 25 January 2018 (**Exhibit C-382**), pp. 2-3.

356. ***Second***, assuming *quod non* that the Colpatria Bank would have decided to stop disbursing loans to the Luxé Project as a result of the Asset Forfeiture Proceedings, there is no evidence that the Claimants tried to obtain financing from alternative sources, including other banks or own funds.[636] There is also no evidence that the Claimants tried to sell the project to alternative investors[637] or that "*nobody would buy from or transact with the Royal Property Group*".[638]

357. ***Third***, as demonstrated, by the time the Precautionary Measures against the Meritage Lot were adopted, the Luxé Project was significantly delayed, had experienced severe cost overruns and financing had dried up.[639] Clearly, none of these could be attributable to the Respondent.

358. **"Projects in Development":** the Claimants claim USD 26 million with respect to the Tierra Bomba Project, USD 13.5 million with respect to the 450 Heights and USD 41 million with respect to the Santa Fé de Antioquia Project.[640] Again, the Claimants have not established a causal link between the Asset Forfeiture Proceedings and the damages claim in relation to these projects.

359. For the Tierra Bomba Project, Mr. Seda had entered into promises to purchase three lots, knowing that the prospective sellers did not have legal title to the lot and that the lots were in irregular

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636 Notably, if the project would have been as profitable as the Claimants assume, no reasonable investor would have let the project fail, in particular when "*completion of construction and commencement of operations was near*", as alleged by the Claimants (*see* Claimants' PHB, ¶ 237, stating that the hotel should have been completed just four months after the Preliminary Measures were imposed and before the Asset Forfeiture Proceedings against the Meritage Project were initiated in January 2017). Instead, a reasonable investor would have contributed the necessary equity to complete the project. *See*, *e.g.*, Hr. Tr., Day 5, p. 1507:2-7 (BRG's Cross) ("*if you have a project that is solvent with attractive positive NPVs, according to all known information is an attractive project, you're not going to kill it or assume to be dead because there could be cash short-falls at some point*").

637 *See* Dr. Hern Second Report, ¶ 121. The Claimants argue that by August 2016, Paladin Realty Partners was looking to invest in Luxé but halted discussions due to the Asset Forfeiture Proceedings (See Claimants' PHB, ¶ 218(b)). This is contradicted by the evidence in the record, which shows that in August 2016 Mr. Krell, the Managing Director of Paladin Realty Partners, was still interested in "*continuing the relationship and learning about the Luxe/Charlee model*" (s*ee* Email from Alejandro Krell to Angel Seda, 8 August 2016 (**Exhibit C-379**)). Mr. Krell also offered to speak a few days later. By November 2016, the Parties were still negotiating the potential investment in Luxé (*see* Email from Alan Schneider to Alejandro Krell, 19 November 2016 (**Exhibit C-381**)). The reason why Paladin Realty Partners decided not to invest in Luxé (assuming they did not invest in the project, which is not proven) is not clear from the record. Similarly, the evidence offered by the Claimants does not support their allegation that buyers "*were no longer willing to risk purchasing property developed by the Royal Realty Group*" (*see* Claimants' PHB, ¶ 218(d)). The two exhibits to which the Claimants refer, Exhibits C-263 and C-262, refer to unit buyers in the Meritage Project and do not at all suggest that potential buyers would have lost their interest in other Royal Realty's projects.

638 *See* Claimants' PHB, ¶ 234.

639 *See* Rejoinder, ¶¶ 861-866; Respondent's Opening Presentation, slides 252-254; Hr. Tr., Day 5, p. 1505:4-1507:11 (BRG's Cross).

640 Assuming there is a causal link between the Respondent's actions and any losses suffered in connection with the Development Projects, the maximum compensation due should be USD 720,000 for the Tierra Bomba and USD 2 million for the 450 Height, Santa Fé de Antioquia and the Royal Realty Brand. *See* Dr. Hern Second Report, Table 6.4.

situation.[641] The three contracts were terminated some four years later, "*by mutual consent and without any dispute whatsoever, upon reciprocal benefit*" of the Parties.[642] While two of the three cancellation agreements mention the situation with the Meritage, it is clear from the documents that the Asset Forfeiture Proceedings were not the actual reason to terminate the contracts but, instead, these were terminated by reasons not attributable to the Respondent.[643] In any case, there is no evidence that the Claimants tried to find other lots in Tierra Bomba, which would have been the reasonable thing to do if the project would have been as profitable as the Claimants represent.[644]

360. For the remaining "Projects in Development" there is simply no documentary evidence of any loss incurred "*by reason of, or arising out of*" the Asset Forfeiture Proceedings. On the contrary, the evidence shows that investors seeking to divest from Mr. Seda's other projects (for undisclosed reasons) in 2017, accepted interests in the Santa Fé de Antioquia Project.[645]

361. **Future hypothetical projects and lost fees:** there is no evidence that as a result of the Asset Forfeiture Proceedings, Mr. Seda – or any of the Claimants – could not have developed new projects or continued providing management services. It is undisputed that Mr. Seda still operates the Charlee Hotel in Colombia.[646] In fact, the Claimants acknowledge that the Charlee brand was not affected and "*young professionals in Medellin still view Charlee as a good place to be*".[647] Yet, there is no evidence that the Claimants tried to develop other projects under the Charlee brand or otherwise use their know-how to develop or manage other projects in Colombia or abroad. Also, there is no causal link between the failure of any future hypothetical project (assuming a hypothetical project could fail!) or the lost fees claimed and the Asset Forfeiture Proceedings. On

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641 Promise to Purchase Contracts of 6 March 2014 (**Exhibit C-124**), 17 June 2014 (**Exhibit C-128**), and 19 September 2014 (**Exhibit C-134**).

642 Cancellation of Promise to Purchase Agreements of 1 March 2017 (**Exhibit C-186**), 3 August 2017 (**Exhibit C-193**) and 15 August 2017 (**Exhibit C-194**).

643 For example, in stark contradiction to the Claimants' allegations (*see* Claimants' PHB, ¶¶ 239-240), one of the cancellation agreements that mentions the Meritage also expressly states that the termination results from the delays in legalizing the lot. *See* Cancellation of Contract between A. Seda and R. Duque, 15 August 2017 (**Exhibit C-194**), Eighth. The other agreement that refers to the Meritage seems to have included a similar provision, but the version of the agreement submitted by the Claimants is incomplete. *See* Cancellation of Contract between A. Seda and J. Vargas, 3 August 2017 (**Exhibit C-193**), pp. 2-3. In addition to not having been regularized by August 2017, it is also clear from the documents that Mr. Seda had failed to pay the full price for the lots as per the contracts. *See* Hr. Tr. Day 1, pp. 339:5-340:12 (Respondent's Opening)).

644 There is also no evidence, for example, that the Claimants met the requirements to obtain the necessary approval from the indigenous population in the island.

645 *See* Rejoinder, ¶¶ 869-870.

646 It has also been demonstrated that, contrary to the Claimants' allegations, Mr. Seda has not been "*chased out of Colombia*". *See* Respondent's Opening Presentation, slide 260; Hr. Tr., Day 1, pp. 340:13-341:21 (Respondent's Opening).

647 Hr. Tr., Day 5, p. 1339:11-12 (JLL's Re-Direct). *Cf.* Mr. Seda's testimony that other investors in the Charlee Hotel "*campaigned aggressively to oust him*". *See* Claimants' PHB, ¶ 233.

the contrary, the evidence shows that despite the Asset Forfeiture Proceedings, Mr. Seda continued receiving offers to act as consultant with respect to real estate projects in Colombia and still had the know-how to do so.[648]

362. In sum, "[t]*he causal relationship between* [Colombia]*'s actions and the reduction in value of* [the Claimants'] *other business operations are too remote and uncertain to support this claim*", so the Claimants are not entitled to any damages with respect to any losses suffered in connection with the Other Projects.[649]

B. THE CLAIMANTS' DAMAGES ASSESSMENT IS SPECULATIVE AND EXAGGERATED

363. The Parties agree that, to the extent that any compensation is due to the Claimants (which is denied by the Respondent), said compensation should reflect the "*fair market value*" ("FMV") of the Claimants' alleged investment.[650] In addition, it is not disputed that the Claimants' Projects which are subject to valuation are not going concerns: they are either under construction, in very early stage of development or simply non-existent or hypothetical. Still, the Claimants' expert, BRG, applied the Discounted Cash Flow ("DCF") method (generally referred to by the Claimants as the "Income Approach") to assess the Claimants' alleged losses. According to the Claimants, "*the Income Approach is the place to start* [] *because you can modulate the drivers*".[651] As demonstrated by the Respondent, this is precisely the reason why, in this case, the DCF method cannot be applied: the drivers are too uncertain (**1**), so BRG had to resort to speculation and exaggerated assumptions which resulted in an inflated – and unreliable – damages assessment (**2**).

364. As a preliminary matter, the Respondent notes that in the absence of substantive arguments to rebut Dr. Hern's opinions, the Claimants try to attack Dr. Hern's credibility by rehashing once and again that he lacks understanding of the Colombian real estate and hospitality sector.[652] The Claimants' repeated attempts to delegitimize Dr. Hern's expert opinion failed: Dr. Hern has over 20 years of experience as an economist and quantum expert in investment and commercial

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648 WhatsApp Chain between C. Rodriguez and A. Seda, 13 September 2017 (**Exhibit C-197**). According to the WhatsApp message, by September 2017 they had been negotiating for six months, meaning that the negotiations started in or around March 2017 (*i.e.* months after the Precautionary Measures had been adopted and the Asset Forfeiture Proceedings were initiated).

649 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (**Exhibit CL-021**), ¶ 115.

650 *See* Claimants' PHB, ¶ 248.

651 Hr. Tr., Day 1, p. 146:7-10 (Claimants' Opening).

652 *See*, *e.g.*, Claimants' PHB, ¶¶ 245, 251, 259, 266, 278.

arbitrations, including in Latin America,[653] and in a wide range of industries, including real estate.[654] On the specific issues concerning the Colombian real estate market, Dr. Hern's opinion is confirmed by CBRE, whom the Claimants recognize as real estate experts.[655] The fact that Dr. Hern has not been to Colombia or visited the Charlee, Meritage and Luxé do not make him any less competent to value the Claimants' alleged damages in accordance with generally accepted economic principles. By contrast, while BRG may have been to Colombia and visited the Claimants' Projects, their valuation fails on multiple grounds, as explained below.

1. The DCF approach applied by BRG is not the appropriate methodology to assess the Claimants' alleged losses

365. As demonstrated below, the DCF methodology is not applicable to the Claimants' Projects which are subject to valuation as none of these are going concerns (**a**). The most appropriate method to assess the Claimants' alleged damages is cost approach applied by Dr. Hern (**b**). In any event, a DCF valuation on the basis of the data available yields results which are consistent with those resulting from a cost approach (**c**).

a. *The DCF methodology cannot apply to the Claimants' Projects which are not going concerns*

366. It is not disputed that the test set out by the tribunal in *Rusoro v. Venezuela* should be used to determine whether the DCF methodology is appropriate to valuate damages to investments that are not going concerns.[656] The Parties disagree as to whether the conditions set out by the tribunal in *Rusoro v. Venezuela* are met in this case. According to the Claimants' expert, BRG, the Claimants' Projects "*satisfy five very clear of those conditions and a sixth in an important way*".[657] As demonstrated, however, the Claimants' Projects do not meet at least five of the six conditions set out by the tribunal in *Rusoro v. Venezuela*:

367. ***First***, the Claimants do not have any relevant track record in Colombia. The Claimants' damages experts, BRG, confirmed that none of the projects subject to valuation were operational as of the Valuation Date,[658] so they had to refer "*to a track record in a broader sense as a developer, including the hotel business. In the hotel business, we look at the Charlee, yes*", and to "[t]*he sale and delivery*

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653 *See* Dr. Hern First Report, p. 114.

654 Hr. Tr., Day 6, pp. 1658:15-1659:3 (Dr. Hern's Cross).

655 *See*, *e.g.*, Claimants' PHB, ¶ 255.

656 *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016 (**Exhibit CL-108**), ¶ 758. *See also Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018 (**Exhibit CL-121**), ¶¶ 621-623.

657 Hr. Tr., Day 5, pp. 1402:19-1403:5 (BRG's Presentation).

658 Hr. Tr., Day 5, p. 1479:2-6 (BRG's Cross).

of Phases 1, 2 and 5 of Luxe", even though these are not hotels but "*real estate track record*".[659] The Claimants' also refer to the sale of Phase 1 of the Meritage Project as evidence of their real estate track record.

368. Despite the Claimants' efforts to "create" a track record, the only operating project that Mr. Seda had in Colombia is the Charlee Hotel.[660] Given the notorious differences between the Charlee Hotel and the Claimants' Projects which are subject to valuation – with respect to location, target audience and scale[661] – the alleged success of the Charlee Hotel cannot serve as track record of the Claimants' other Projects.[662] As established, the Charlee Hotel is a 42-room boutique hotel, [redacted] whereas (i) the Meritage Project was planned as a mixed-use community project located in a suburb of Medellín,[664] including a commercial area with 18 retail units, an apart-hotel with 430 long-term stay luxury hotel suites (so-called "aparta-suites") and 93 development lots for residential single-family homes;[665] (ii) the Luxé Project, located two hours away from Medellín, included 43 cabins, 18 apartments, 17 lots

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659 Hr. Tr., Day 5, p. 1480:4-16 (BRG's Cross). For real estate, the Claimants also rely on the "almost complete sale of Phase 1 and the construction that was ongoing in both Meritage and Luxe" (*see* Hr. Tr., Day 5, p. 1480:16-21 (BRG's Cross)). However, as explained, Phase 1 of the Meritage Project was sold at a loss.

660 Eventually, BRG started changing its position as to the relevance of the Charlee and stated that "*the track record we use is The Charlee, but that's not the only source of information we use in our forecast*", and then conceded that "[w]*e don't focus our revenues based on The Charlee*", "*we don't base our forecast on The Charlee operating cash flows. We just use it as a benchmark. We have specific forecasts for each hotel based on the specific characteristics, locations, et cetera, which we validate then with hotel transactions per key*". *See* Hr. Tr., Day 5, pp. 1484:2-1485-15 (BRG's Cross).

661 As acknowledged by the Claimants' damages experts, BRG, "*the different hotels* […] *were in different areas and attracting different kind of public or of customers*". Hr. Tr., Day 5, p. 1522:18-20 (BRG's Cross).

662 The Claimants also attempt to compare the Charlee with Faena and Selina. The Claimants' Projects, however, are not comparable to the Faena and Selina chains because the Claimants' hotels do not have a conceptual unity, but rather they consist of a 42-room hotel in central Medellin (*i.e.*, the Charlee Hotel), a 116-room hotel in a lake resort in Guatapé, two hours away from Medellín, (*i.e.*, the Luxé hotel), long-term aparta-suites in the suburbs of Medellín (*i.e.* the Meritage aparta-hotel), a 100-room hotel outside of Medellín (*i.e.*, the 450 Heights hotel), a 250-room aparta-hotel 1.5 hours away from Medellín and a 80-room hotel in an undeveloped island in Cartagena. The success of one of this can in no way indicate that any of the other projects would succeed.

[redacted]

664 *See* Claimants' PHB, ¶ 6.

665 *See* Mr. Seda's First Witness Statement, ¶ 57.

and a hotel with 116 guest rooms;[666] (iii) the 450 Heights Project was planned as a mixed-used project including 100 hotel rooms, 83 condos, 300 loft suites, 61 houses, 140 commercial units, a business center, a playground and a daycare;[667] (iv) the Santa Fé de Antioquia Project is a waterfront mixed-use project located 1.5 hours away from Medellín, including 180 residential lots and a 250-room aparta-hotel;[668] and (v) the Tierra Bomba Project was mixed-use project in Tierra Bomba, an undeveloped island in Cartagena, including a 80-room hotel, a residential complex with 80 apartments, 110 cabana units and recreational amenities.[669]

369. Neither could the sale of Phase 1 of the Meritage Project be regarded as track record of the Claimants' alleged success.[670] As explained by Dr. Hern, the Meritage Project "*was supposedly phased over eight phases. Only Phase 1 has been -- has reached equilibrium, so that was the sale of units in Phase 1. But when I look at the cash flows that have been generated from Phase 1, Phase 1 appears to be loss-making. So, even for the Meritage, where there has been some development of Phase 1, we still don't have any history of positive cash flows being generated from that project*".[671]

370. Against this background, the Claimants' allegation that it is "*sufficiently certain*" that their alleged investments would have made profits because they had a "*portfolio that was already operating successfully*", is fully unsubstantiated.[672] Accordingly, BRG's valuation – which is based on the assumption that the Claimants' Projects were "*all premised and anchored around the creation of a previously established lifestyle brand of hospitality projects and real estate*" – is flawed.[673]

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666 *See* Mr. Seda's First Witness Statement, ¶ 23. It is the Respondent's understanding that the Claimants only claim damages with respect to the Luxé hotel, which was still in construction at the time the Asset Forfeiture Proceedings were initiated.

667 Heights Investment Brochure (**Exhibit C-068**), p. 4.

668 *See* Mr. Seda's First Witness Statement, ¶ 35.

669 *See* Mr. Seda's First Witness Statement, ¶ 31.

670 The Claimants' allegation that the Meritage Project had reached the equilibrium point for Phases 1 and 6 in February 2015 is misleading. As explained by Mr. Seda, following an amendment of the Administration and Payment Agreement on 1 August 2014, it was decided that Phase 6 – which was undetermined when the project was first conceived – "*would be built as part of Phase 1*". *See* Claimants' PHB, ¶ 253(a) *c.f.* Mr. Seda First Witness Statement, ¶¶ 57 and 66. Similarly misleading is the Claimants' representation that "*construction was about to begin on Phase 2 and 3 towers*". While Mr. Seda mentioned that they "*were also getting ready to begin construction*", there is no evidence that any actual progress had been made, including to obtain funding for said construction (despite Mr. Seda's statement that Banco de Bogotá had approved a loan for the project and "*orally committed to providing additional funding*").

671 Hr. Tr., Day 6, p. 1633:10-22 (Dr. Hern's Presentation).

672 Claimants' Opening Presentation, slide 220. Notably, the Claimants' expert distanced herself from the table included by the Claimants in their Opening Presentation: "*I didn't write this. This is Claimants' Opening. I don't know this comparison*" (Hr. Tr., Day 5, p. 1529:3-4 (BRG's Cross)).

673 Hr. Tr., Day 5, p. 1399:4-7 (BRG Presentation).

371. In any event, whatever track record Mr. Seda may have had, is irrelevant when considering the high-risk nature of his business. As confirmed by Mr. Seda, his strategy was to go to remote locations that were viewed as unattractive (and even dangerous) by Colombian nationals, and try to develop them in the hope that he could create "*attractive developments*" that "*other people follow*" (and thus make extraordinary gains).[674] Assuming that Mr. Seda's high-risk projects would succeed just because he had one operating hotel – the Charlee Hotel in central Medellín – is not reasonable.

372. ***Second***, the Claimants do not have reliable projections of the Projects' future cash flows. At the Hearing, the Claimants' damages experts, BRG, confirmed that to conduct the DCF valuation they relied mostly on business plans.[675] It is undisputed that the Claimants' business plans have not been verified by impartial third parties.[676] As such, the Claimants' unverified business plans do not satisfy the elements of "*objectivity and impartiality*" required to be relied upon for a DCF valuation.[677]

373. Moreover, it has been demonstrated that the Claimants' business plans on the basis of which BRG valuated the Claimants' alleged damages are highly unreliable. To begin with, Mr. Seda confirmed that all the investment decks, most of which are undated, are "*for the most part,* [] *evolving documents*".[678] Mr. Seda himself was unable to confirm when these were prepared, so it cannot be ascertained whether BRG relied on the last version of the documents (as opposed to undated drafts).

374. Moreover, BRG admitted that "*the whole point*" of the Claimants' business plan was to "*replicate the lifestyle brand*" that had been successful with the Charlee Hotel in other locations, including rural and remote locations "*being sought to be established*", such as Guatapé and Santa Fé de Antioquia.[679] However, as explained, assuming that the success of the Charlee Hotel – a 42-room

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674 Hr. Tr., Day 2, p. 438:15-443:19 (Mr. Seda's Cross).

675 Hr. Tr., Day 5, pp.1471:13-1473:1 (BRG's Cross). See also Claimants' PHB, ¶ 256(a).

676 This is not disputed by the Claimants. Instead, the Claimants aver that the business models "*were verified by market-based inputs provided by JLL and STR*". *See* Claimants' PHB, ¶ 256. This is, however, not an appropriate "verification" but an *ex-post* cross-check performed by BRG. As demonstrated by the Respondent, BRG's cross-checks are flawed. *See below*, Section VI.B.2(b).

677 *See*, *Merrill & Ring Forestry L. P. v. Government of Canada*, NAFTA, ICSID Case No. UNCT/07/1, Award, 31 March 2010 (**Exhibit RL-41**), ¶ 259 ("*we find Canada's criticism of the Harvest Plan, which was based on information supplied by Merrill & Ring, to be valid. Neither the Ruffle Report, which simply re-evaluated the information supplied by the Investor and the ensuing adjustments introduced, appears to contribute an independent source of evaluation. Without for a moment questioning the professional competence of those intervening at one stage or another, the fact is that objectivity and impartiality might be compromised in such studies*"); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (**Exhibit CL-048**), ¶ 368 ("[t]*he Tribunal will use as a starting point SITS' audited financial statements. They have been audited by a highly qualified firm of independent auditors, which confirmed the reliability of the accounting records, and no evidence has been submitted to the Tribunal which proves otherwise*").

678 Hr. Tr., Day 2, p. 437:2-3 (Mr. Seda's Cross).

679 Hr. Tr., Day 5, pp. 1487:19-1488:11 (BRG's Cross).

boutique hotel, located in a pink area in central Medellin and targeting an adult audience – could be replicated in the Claimants' Projects which are very different in nature is quite optimistic, to say the least. Indeed, BRG acknowledged that the fact that the "*lifestyle brand*" was successful in the Charlee Hotel in central Medellín, did not mean that it would work in other settings.[680]

375. Finally, as confirmed at the Hearing, the business plans on the basis of which BRG valued the Claimants' alleged damages are inconsistent with reality. For example, it has been demonstrated that the business plans assume EBITDA margins which are at odds with the real estate and hospitality market[681] and with the Claimants limited "*track record*", as they double the profit margins of all comparable Colombian and international hotels, including The Charlee Hotel (which, according to the Claimants, has outperformed the market).[682]

376. ***Third***, unlike the case with commodities, in the real estate and hospitality businesses where the Claimants invested, it is not possible to predict the price of products or services with reasonable certainty. The Claimants' expected cash flows are particularly difficult to forecast given that the Claimants' Projects (other than the Charlee Hotel, which the Claimants acknowledge has not been affected by the Asset Forfeiture Proceedings) have no history of generating positive cash flows or profits.[683]

377. In any event, as explained by Dr. Hern, hotel and real estate cash flows are driven by location-specific demand, supply and competitive factors which are difficult to estimate without operating history.[684] As explained above, given the difference in nature between the Charlee Hotel and the Claimants' Projects, it is not possible to rely on the profits of the Charlee Hotel to forecast the profits of the Claimants' Projects.

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680 Hr. Tr., Day 5, pp. 1486:12-1489:4 (BRG's Cross). This is particularly the case when the Claimants did not even have the funds to develop the projects, as explained below.

681 *See* below, ¶¶ 396-397, 413-414.

682 Hr. Tr., Day 6, p. 1639:16-22 (Dr. Hern's Presentation). Contrary to the Claimants' allegations, the evidence does not show that the Charlee would have outperformed the market in terms of profitability. As explained by Dr. Hern, "*over 2014 to 2016--the profitability is, you know, very similar to the Colombian luxury market which is the other five star hotels in Colombia and very similar to other emerging markets*." *See* Hr. Tr., Day 6, pp. 1683:16-1684-9 (Dr. Hern's Cross).

683 Dr. Hern's PPT Presentation, slide 9. *See* Hr. Tr., Day 6, p. 1633:15-22 (Dr. Hern's Cross). As explained by Dr. Hern, around 80% of the damages claimed by the Claimants come from hotel-related activities. *See* Hr. Tr., Day 6, pp. 1632:20-1633:9 (Dr. Hern's Cross). None of the hotels were operating or even fully built.

684 Hr. Tr., Day 6, p. 1672:11-21 (Dr. Hern's Cross).

378. ***Fourth***, there is no evidence that the Claimants had sufficient self-generated cash to finance the projects or had procured sufficient funding to develop the Projects, including to build the Meritage Hotel.[685]

379. ***Fifth***, the risks inherent to the Projects in early stages are difficult to quantify in the absence of comparator data. Therefore, it is not possible to calculate a meaningful WACC.

380. In sum, given that the Claimants' Projects are not going concerns and that there is no reliable data to support a DCF valuation, the methodology applied by the Claimants to assess their alleged damages does not result in "*the most rigorous and reliable estimate of the fair market value of the Claimants' investments*".[686] Much on the contrary, it results in a grossly inflated valuation made on the basis of exaggerated and unreliable assumptions, as explained below.

b. *The cost approach is the most appropriate method to assess the Claimants' alleged damages*

381. At the hearing, Dr. Hern confirmed that he did "*consider*[] *other possible approaches to quantify damages*", including the DCF approach proposed by the Claimants, but found them to be "*too speculative*" because "*we* [don't] *have the right data to be able to quantify damages using those approaches*".[687] Dr. Hern referred, in particular, to the very early-stage nature of the Claimants' projects, the Claimants' lack of track record and the absence of reliable comparators:[688]

> "*The Projects haven't been constructed. They haven't--we don't have a historical set of data to tell us about the cash flows for these projects. We don't have other projects that are existing that, I think, are comparable to these projects. So there's a myriad*

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685 Hr. Tr., Day 6, p. 1642:17-20 (Dr. Hern's Cross); *See* Seda Witness Statement, ¶ 59; Felipe López Montoya Witness Statement, ¶ 45.

686 Claimants' PHB, ¶ 244.

687 Hr. Tr., Day 6, pp. 1624:15-1625:3 (Dr. Hern's Presentation). The Claimants' argument that "*Mr. Maugeri of CBRE* […] *confirmed that he has used the DCF approach for 'undeveloped project[s]' that are 'not in development'*" (*see* Claimants' PHB, ¶ 255) is particularly disingenuous. *First*, as explained by Dr. Hern at the Hearing, a DCF approach could be used for undeveloped projects when there is reasonable certainty about the inputs for a DCF valuation. In this case, where there is "*limited amount of data*" and "*too much speculation about the valuation drivers*", the DCF method is not appropriate (*see* Hr. Tr., Day 6, pp. 1672:3-1674:14 (Dr. Hern's Cross)). *Second*, to apply the residual DCF method to value *land* (as opposed to *undeveloped project*, which are subject to valuation in this case), CBRE estimated the cash flows that could be generated from developing that land and subtracted all the development costs (except the cost of the land which was subject to valuation). In other words, the land value was calculated as the difference between the net present value ("NPV") of revenues and costs (*i.e.*, Land value = NPV (revenues from development) – NPV (development costs excluding land)), on the assumption that the project's NPV, once the land costs are taken into account, should be Zero. As explained by Dr. Hern, this is precisely what is to be expected in a competitive market, such as the real estate and hospitality market, and this is why the cost approach is appropriate in this case and why the valuation using the cost approach is largely consistent with the valuation using a reasonable DCF approach. *See* Hr. Tr., Day 6, pp. 1678:17-1680:22 (Dr. Hern's Cross) (explaining that the Claimants' Projects' NPV should tend towards zero); *cf.* Claimants' PHB, ¶ 252 (alleging that it is "*simply not reasonable to assume that Claimants' Projects would have achieved zero NPV over their lifetime*").

688 Hr. Tr., Day 6, p. 1674:5-14 (Dr. Hern's Cross).

> *of factors I think why the DCF in this particular case, hospitality but also early stage in Colombia, lack of comparators, makes it very speculative*".[689]

382. Instead, the cost approach applied by Dr. Hern is appropriate to assess the Claimants' alleged losses. As explained by Dr. Hern, the method he applied involved drawing on the Claimants' historical costs with respect to the Projects, as reported in the financial statements, and carrying these forward to the valuation date at a risk-free rate.[690] As demonstrated, the criticisms made by the Claimants to the cost approach are misconceived.

383. ***First***, the Claimants criticize the cost approach because allegedly it "*doesn't capture the value of the developments, themself – the location, the design, the architecture, the aesthetic – and therefore it doesn't reflect fair market value*".[691] Contrary to the Claimants' allegations, the Projects' costs are directly impacted by their location, design, architecture, aesthetic and many other factors, including the "*additional debt*" provided by Royal Realty to the Projects, which Dr. Hern considered in his valuation even though it had not been considered by BRG.[692]

384. ***Second***, the Claimants also criticized the cost approach for not appropriately reflecting the FMV of an asset and not taking into account the changes in the value of assets over time.[693] As explained by Dr. Hern, the cost approach is consistent with the FMV as it "*does not ignore future cashflows or intangibles; instead it assumes cashflows will generate 'competitive' returns and cover costs of investments*", including the cost of capital.[694] Dr. Hern further explained that in the case of hotel and real estate projects, the cost approach accurately reflects the value of assets over time. In particular, Dr. Hern explained that contrary to the Claimants' suggestion, hotel and real estate projects do not depreciate as quickly as "*used cars*".[695] In any event, Dr. Hern confirmed that the method is particularly apposite in this case as the Claimants had incurred their costs shortly before the valuation date.[696]

385. In light of the above, assuming that the Claimants are entitled to damages (which is denied), these should be assessed by reference to the historical costs reported in the financial statements carried forward to the valuation date at the risk-free rate. While the Claimants allege that the cost approach

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689 Hr. Tr., Day 6, pp. 1669:12-1670:2 (Dr. Hern's Cross).

690 *See* Hr. Tr., Day 6, p. 1626:8-1627:16 (Dr. Hern's Presentation); Dr. Hern's PPT Presentation, slide 6.

691 Hr. Tr., Day 5, p. 1403:13-16 (BRG's Presentation).

692 *See* Hr. Tr., Day 6, p. 1627:9-16 (Dr. Hern's Presentation).

693 Hr. Tr., Day 1, pp. 146:20-147:8 (Claimants' Opening).

694 *See* Dr. Hern PPT Presentation, slide 7. *See also* below, ¶¶ 386-392.

695 Hr. Tr., Day 6, p. 1631:7-14 (Dr Hern's Presentation).

696 Hr. Tr., Day 6, pp.1631:15-1632:4 (Dr. Hern's Presentation).

is not appropriate in this case, they have not challenged the cost-based valuation performed by Dr. Hern. Therefore, if the Tribunal were to understand that the Claimants are entitled to damages and that the cost approach is applicable to assess the damages due, the Tribunal should apply Dr. Hern's unchallenged valuation.

c. *In any event, a DCF valuation on the basis of the data available yields results which are consistent with those resulting from a cost approach*

386. For the sake of completeness, and even though it has been demonstrated that the DCF approach "*is too speculative to be reliable in this case*",[697] Dr. Hern tried to perform a DCF valuation of the Claimants' alleged investment on the basis of the data available, "*for the Tribunal to see what I thought a DCF approach would produce*".[698] Dr. Hern concluded that a corrected DCF (*i.e.*, replacing BRG's exaggerated assumptions with reasonable assumptions) is "*broadly consistent*"[699] with the cost approach, thus confirming that cost approach is reasonable and appropriate in this case. As explained by Dr. Hern, this outcome is fully consistent with the economic principle pursuant to which "*in competitive markets an asset is worth no more than the cost of replacing its constituent parts*":[700]

> "[W]*hen we think about competitive markets and underpinning an awful lot of competition policy is the premise that, in competitive markets, prices are driven down to costs. That's what happens in competitive markets. We end up with prices being driven down to costs. [] So, in that context, the future cash flows of those projects end up being driven down to the costs, to the investment costs that are put into those projects over time to generate those cash flows.*"[701]

387. The Claimants, in a convoluted manner, criticize Dr. Hern's approach on the basis that "*Dr. Hern's preference of this methodology relies on an erroneous assumption that the Colombian real estate and hospitality market is perfectly competitive*".[702] The Claimants' criticism is fundamentally flawed and based on multiple misrepresentations.

388. ***First***, as explained by Dr. Hern, the cost approach is the most appropriate method for estimating damages in this case because (i) the DCF method applied by BRG is inappropriate "*because the Claimants' projects were all early-stage projects with no history of successful commercial operations of generating positive cash flows or profits*", so performing a DCF valuation "*would therefore require too many speculative assumptions*"[703] and (ii) "*in cases of early-stage start-up businesses with no*

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697 Dr. Hern PPT Presentation, slide 10.

698 Hr. Tr., Day 6, p. 1634:12-14 (Dr. Hern's Presentation).

699 Dr. Hern's PPT Presentation, slide 10.

700 Dr. Hern's PPT Presentation, slide 7.

701 Hr. Tr., Day 6, pp. 1629:21-1630:11(Dr Hern's Cross). *See also* Dr. Hern Second Report, ¶ 21, 72-74.

702 Claimants' PHB, ¶ 251.

703 Dr. Hern Second Report, ¶ 46.

operating history and such uncertain prospects where cash-flows cannot be reliably estimated, like that of the Claimants', valuation and damages literature favours the cost approach".[704]

389. Nevertheless, in his second report, Dr. Hern attempted a corrected DCF valuation of the Claimants' alleged investment, on the basis of the data available. Dr. Hern's corrected DCF is fully in line with his original assessment of the Claimants' alleged damages on the basis of the cost approach. As explained, this is fully consistent with the economic principles applicable to competitive markets, as the hospitality and real estate markets are:

> "*In competitive markets, the value of a firm or project can be estimated based on the cost of the firm's assets. This is because threat of competitive entry means that firms can only expect to earn a so-called return on their investments, i.e. return equal to the cost of capital, and as a result, the net present value (NPV) of the future cash-flows should be equal to the investment needed to generate them. In markets where there is a high degree of competition, the cost approach and the DCF approach would therefore be expected to produce similar outcomes in terms of market value.*"[705]

390. ***Second***, as acknowledged by the Claimants' themselves, Dr. Hern clearly admitted that "[n]*othing is perfectly competitive*".[706] However, as explained by Dr. Hern, the principle that "*an asset is worth no more than the cost of replacing its constituent parts*" does not apply exclusively to "*perfectly competitive markets*"[707] but to any competitive market, including the real estate and hospitality markets, which are generally regarded as being competitive because "[i]*t's easy to enter. There is no particular IP associated with the activities of those industries. It's easy to buy land, it's easy to develop land. It's easily available*".[708] In fact, Mr. Seda's business model as explained by him at the Hearing

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704 Dr. Hern Second Report, ¶ 66 et seq.

705 Dr. Hern Second Report, ¶ 21. *See also* ¶¶ 72-73 ("*In competitive markets, firms can reasonably expect to generate what is referred to as normal returns, i.e. returns that compensate the firm's investors for the risks they are taking, as represented by the opportunity cost of capital. The reason for this is that if for example firms could earn higher than normal returns, i.e. excess returns, in a competitive market, other firms would spot this opportunity and enter the market and start producing a competing product or service. As a result of new entry (or indeed threat of new entry) of competitors, any excess returns would be eroded or competed away until the point where firms would only be able to earn a 'normal return', equivalent to the cost of capital*").

706 Hr. Tr., Day 6, p. 1682:6-8 (Dr. Hern's Cross).

707 Hr. Tr, Day 6, pp. 1681:16-1682:17 (Dr. Hern's Cross).

708 Hr. Tr., Day 6, p. 1679:7-14 (Dr. Hern's Cross). *See also* Dr. Hern Second Report, ¶ 74 (explaining that in the hospitality and real estate industries there is "*a large number of firms operating in the markets, well understood products with low switching cost between them, and new firms free to enter and exit the market*"). Contrary to the Claimants' allegations, one does not need to be an expert in the real estate or hospitality industry in Colombia – let alone to have been in Colombia and stayed at the Claimants' hotels – to conduct the analysis of whether these are competitive markets. Moreover, the fact that the hospitality industry could be "*capital-intensive*" and "*illiquid*" does not make it any less competitive, to the extent that there "*aren't huge barriers to entry, to buy land, to develop that land for real estate or hotels*", which is not disputed by the Claimants. *See* Hr. Tr., Day 6, pp. 1679:7-14, 1630:18-1631:3 (Dr. Hern's Cross). On the contrary, it is confirmed by Mr. Seda's testimony that (i) the Colombian State had created a "*strong incentive*" for hotels to establish in Colombia by providing "*a full tax holiday for 30 years*", of which the Claimants intended to benefit, and (ii) noting that as "*a young American who was 32 years old*" he could "*buy a piece of property, and never experience any issues*".

could only work in a competitive market, where other developers would be able to "*follow*" him to convert undeveloped destinations into "*popular tourism destinations*".[709]

391. Being competitive markets, economists, such as Dr. Hern (and Ms. Bambachi and Mr. Dellepiane if they were to apply basic economic principles) would expect "*the Net Present Value of those types of projects to tend towards zero*".[710]

392. For the sake of clarity, this does not mean that the investors in a competitive market would not have a return of their investment. Rather, it means that investors in a competitive market are expected to recover the cost of capital (including a reasonable return) but no excess returns.[711]

2. Even if the DCF method were to apply, the Claimants' valuation is grossly exaggerated

393. Even assuming that the DCF method would be appropriate in this case (which is not, as demonstrated above), the DCF valuation performed by BRG is highly speculative and based on exaggerated and unreliable assumptions.[712]

394. As demonstrated above, there is no causal link between the Respondent's conduct and the damages claimed by the Claimants with respect to the Other Projects, so if any damages are due, it could only be the losses with respect to the Meritage Project (*i.e.* less than 30% of damages claimed). For the sake of completeness, in this section the Respondent refers to the damages claimed with respect to all the Claimants' Projects and in particular to the damages claimed by the Claimants with respect

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None of these would have been possible in a non-competitive market. *See* Mr. Seda Second Witness Statement, ¶ 66; Hr. Tr. Day 2, p. 442:6-11 (Mr. Seda's Cross)..

709 Hr. Tr., Day 2, p. 443:10-19 (Mr. Seda's Cross). *See also* Claimants' PHB, ¶ 272, where the Claimants rely on Mr. Dickinson to suggest that the Claimants' chosen locations could have eventually developed into "*popular tourism destinations*".

710 *See* Hr. Tr., Day 6, pp. 1679:2:14 (Dr. Hern's Cross). Contrary to the Claimants' misrepresentations, this does not mean that they "*would have invested in a business venture that was not expected to make money*" or that the projects would not be "*valuable*" (*see* Claimants' PHB, ¶ 257).

711 *See* Hr. Tr., Day 6, p. 1687:3-11 (Dr. Hern's Cross).

712 BRG were unable to confirm the most basic assumption underlying their damages assessment, *i.e.* how they valued Mr. Seda's alleged losses: "*Q. So, you just assumed that because Mr. Seda owns shares in the Company, that owns shares in the Company that owns the Project, that necessarily any loss to the Project is a loss to Mr. Seda pro-rata to his indirect share? A. (Ms. Bambachi) Unless instructed differently, we would, but I cannot confirm whether we did it this way*" (*see* Hr. Tr., Day 5, pp. 1446:19-1447:4 (BRG's Cross)). What BRG did confirm is that even though they assumed that any loss to the Meritage Project is a loss to Mr. Seda, they "*don't make an analysis and we haven't made an analysis exactly on the Shares and how the Shares are held*" (*see* Hr. Tr., Day 5, p. 1451:8-10 (BRG's Cross)). BRG's assessment has many other flaws, which make its valuation highly unreliable. For example, BRG confirmed that they did not make any discount for minority shareholders who did not have control over the investment.

to hotel operations (**a**), real estate operations (**b**), lost fees (**c**) and the hypothetical future projects (**d**). The relevant cross-checks confirm that the Claimants' valuation is highly overstated (**e**).[713]

a. *Hotel operations*

395. The Claimants claim USD 77.1 million for losses related to hotel operations, of which only USD 25.5 million concern the Meritage Project.[714] BRG's exaggerated DCF valuation is driven by exaggerated assumptions with respect to EBITDA margins, discount rate, failure rate and average daily and occupancy rates, as explained below.

396. EBITDA margins: BRG assumed EBITDA margins between 38 and 56%, without any support. Dr. Hern showed that these margins are much higher than any potential benchmarks, including the Charlee Hotel[715] and adjusted the EBITDA margins to 19-22%, in line with the EBITDA margins of other international luxury hotels (21%), Colombian luxury hotels (19%), emerging market hotels (20%) and the Charlee Hotel (22%).[716] This reduced BRG's DCF valuation by USD 51-61 million (*i.e.*, 66-79%).

397. While the Claimants criticize the dataset used by Dr. Hern,[717] BRG did not even bother to provide any valid support for the EBITDA margins it assumed. Rather, BRG simply took the business plans and assumed that the information provided therein is "*reasonable*".[718] Yet, as demonstrated by Dr. Hern, the information is far from reasonable: it is "*two times higher than we see for relevant benchmarks*", including the Charlee Hotel (to the extent that it could be considered as a relevant benchmark).[719]

398. Discount rate: BRG assumed a WACC of 7.9%. As explained by Dr. Hern, this is unrealistic in the circumstances:

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713 Contrary to the Claimants' assertion (*see* Claimants' PHB, ¶ 257), the Respondent does – and has consistently – object to the assumptions relied upon by BRG for its DCF valuation, which are unreliable and speculative.

714 *See* Dr. Hern's PPT Presentation, slide 12.

715 Dr. Hern's PPT Presentation, slide 17.

716 As explained by Dr. Hern, the EBITDA margin for the Charlee Hotel for the 2013-2017 period is 21%. *See* Second Report, fn. 110. The Claimants criticize Dr. Hern for using "*inappropriate comparators for hotel EBITDA*". *See* Claimants' PHB, ¶ 262. In doing so, the Claimants overlook that Dr. Hern considered not only Colombian luxury hotels, but the Claimants' only operating hotel – the Charlee Hotel. The Claimants failed to explain why the Charlee Hotel (which EBITDA margins are largely consistent with those of hotels in Colombia and abroad) would not be an appropriate comparator.

717 Dr. Hern acknowledged that the dataset he used is not perfect but "*it has to still be relevant*". *See* Hr. Tr., Day 6, p. 1702:7-11 (Dr. Hern's Cross). Notably, this is the exact reason why Dr. Hern insists that the DCF method should not be applied: due to the lack of reliable data. Against this background, a different method should be applied, as opposed to applying the DCF with exaggerated and unreliable assumptions.

718 According to the Claimants, BRG cross-checked the information with "*market data*" provided by JLL. However, as demonstrated, the market data on which BRG relied, which concerns operating hotels in touristic hubs in Latin America and the Caribbean, is highly irrelevant. *See above*, Section VI.B.2(e).

719 Hr. Tr., Day 6, p. 1639:9-22 (Dr Hern's Presentation) ("*if we compare these projects to The Charlee, it appears as though that these projects are around two times more profitable than The Charlee Hotel has been*").

> "[T]*he projects, themselves, have taken out debt at the rates of 10 to 11 percent, and it's impossible for the Cost of Capital, which is a weighted average of equity and debt, it's impossible for that number to be below the cost of capital of the projects because the Cost of Equity is always higher than the Cost of Debt*."[720]

399. Dr. Hern adjusted the discount rate to 12-19%, which he considered to be "*the best data available*" and consistent with other real estate developers' WACCs in Colombia.[721] As explained by Dr. Hern, the discount rate he applied is still rather conservative, as the Claimants had offered investments in their projects at internal rates of return ("IRRs") of 25-28% in 2016. This means that "*they would be giving away free money associated with these projects if they thought the true Cost of Capital was 8 percent but they're willing to offer investments at a promised or expected rates of return of 25 to 28*".[722] Adjusting the discount rate as suggested by Dr. Hern reduced BRG's DCF valuation by USD 56-81 million (*i.e.*, 72-105%).

400. Failure risk: BRG assumed 0% failure risk for the Meritage and Luxé Projects and 23% failure risk for the Other Projects.[723] Considering that none of the Claimants' hotels are operational or even built (and, as demonstrated, the Claimants did not even have sufficient funding to build them), the assumed failure rate is simply unrealistic.[724]

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720 Hr. Tr., Day 6, p. 1641:1-9 (Dr. Hern's Presentation). The Claimants' criticisms of Dr. Hern's discount rate (*see* Claimants' PHB, ¶ 275) are flawed: (i) as demonstrated, Dr. Hern relied on the actual cost of debt of the projects, which is appropriate as the Claimants have not shown that they would be able to borrow money more cheaply in the future; (ii) from an economic perspective, the arithmetic average approach applied by Dr. Hern is the correct approach, as opposed to the geometric approach applied by BRG; (iii) Dr. Hern used the same beta as BRG, but removed the inappropriate application of the "Blume adjustment" by BRG (*see* Dr. Hern's detailed explanation in his Second Report, ¶ 277); (iv) there is no evidence that hotels with casinos have higher beta risk (*i.e.* variability of cash flows) than hotels without casinos or that the effect of casino hotels is material in the Damodaran sample, as most hotels in the sample do not have casinos (whereas it has been clearly shown by JLL that the value per room of hotels with casinos is significantly higher than the value per room of hotels without casinos); and (v) Dr. Hern relied on Colombian government bond yields, which are commonly accepted as the closest available proxy of the local risk-free-rate and are routinely used in CAPM applications. There is no evidence that Colombian government bonds are not liquid (or less liquid than the alternative EMBI JPM index presented by the Claimants).

721 *See* Dr. Hern's PPT presentation, slide 21. Dr. Hern warned against the limitations to obtain relevant data (which, again, make the DCF method unreliable in this case). *See* Hr. Tr., Day 6, p. 1694:10-22 (Dr. Hern's Cross).

722 Hr. Tr., Day 6, p. 1641:10-20 (Dr. Hern's Presentation). Contrary to the Claimants' allegations (*see* Claimants' PHB, ¶ 276), while the discount rates do not need to be identical to the internal rates of return of the projects (for example, the IRR offered to potential investors could be slightly higher than the true discount rate to entice investors to invest in the project as opposed to other investment opportunities), the IRRs of a project offered to potential investors should be close to the true WACC (and in no case three times higher, as BRG assumes). *See* Dr. Hern Second Report, fn. 123; Dr. Hern's PPT Presentation, slides 18 and 21.

723 The Claimants' new allegation in their PHB that "*failure rates are not frequently used to discount the value of even completely undeveloped projects*" is belied by their own experts having assessed *ex proprio motu* "*the probability of success*" as part of their DCF valuation. *See* Claimants' PHB, ¶ 267 *cf.* BRG First Report, Section IV.3.1.

724 *See* Dr. Hern's PPT Presentation, slide 19.

401. With respect to the Meritage and Luxé Projects, Dr. Hern explained that "*given the early stage nature*" of the projects, the failure risk cannot be zero:[725]

> "[I]*t doesn't seem to make sense to be assuming zero percent failure risk when we have, you know, so many potential risks associated with this Project in terms of can the Projects raise financing, can the Projects complete construction in time, are there going to be other macroeconomic risks associated with the Project that affect the profitability -- you know, we simply don't know*".[726]

402. Moreover, any track record of the Charlee Hotel, cannot be relied upon to assume that these yet-to-be-built hotels would have succeeded:

> "*Charlee is a very different business from what these projects are. These -- many of these projects are multiple times bigger than Charlee. The Charlee is a hotel complex. These projects are combinations of real estate and hotels. They have many, many more units than The Charlee hotel. They're outside of Medellin, sometimes in quite rural areas. It just doesn't make sense to be assuming that these projects have 0 percent failure risks*".[727]

403. Even the Claimants' damages expert, BRG, acknowledged that the Meritage and Luxé Projects are subject to risks[728] and that "*there's a chance this goes through, there's a chance it doesn't*".[729] BRG further admitted that "*one could*" apply a failure rate for Meritage and Luxé, but they chose not to because the projects had reached the equilibrium point and were being constructed.[730]

404. BRG admitted that many of the phases of the Meritage Project "*were not even in the market yet*",[731] so they could not have reached the equilibrium point. Notably, the only phase that had reached the equilibrium point, was loss making:

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725 Hr. Tr., Day 6, p.1642:10-14 (Dr. Hern's Presentation).

726 Hr. Tr., Day 6, p. 1646:9-21 (Dr. Hern's Presentation).

727 Hr. Tr., Day 6, p. 1643:5-15 (Dr. Hern's Presentation).

728 For example, BRG acknowledged that the Meritage Project "*still has risks inherent*". *See* Hr. Tr., Day 5, p. 1519:2-6 (BRG's Cross). JLL also acknowledged that a project that has started, may still fail ("*Q. So, I understand that you consider that a project may still fail even if it has started already, is that correct? A. (Mr. Ruiz) Yes.*"). *See* Hr. Tr., Day 5, p. 1293:2-5 (JLL's Cross). BRG stated that they accounted for the projects' failure risks, *inter alia*, by using a discount rate. This is incorrect. BRG's WACC does not reflect the Claimants' Projects failure risk, as BRG relies on comparators which are established companies which, by definition, cannot – and do not – reflect the failure risk of start-up companies. *See* Dr. Hern's Second Report, ¶ 148.

729 Hr. Tr., Day 5, p. 1493:9-20 (BRG's Cross).

730 Hr. Tr., Day 5, p. 1490:13-22 (BRG's Cross). Yet, BRG confirmed at the Hearing that having reached the equilibrium point "*doesn't guarantee*" that a project will not fail. *See* Hr. Tr., Day 5, pp. 1495:16-1496:2 (BRG's Cross). At the Hearing, BRG came up with a new reason not to apply the failure rate: it is "*an established brand applied to an established area, not far from the hub where the brand was created*". Hr. Tr., Day 5, p. 1491:9-12 (BRG's Cross). This, however, is completely irrelevant because, as explained, the concept of the Projects was completely different (in the words of Mr. Dellepiane, "*the proof of concept hadn't taken place*") and the Claimants did not provide any evidence that a young professional that goes to have a drink at the rooftop of the Charlee Hotel – as Mr. Ruiz – would feel attracted to any of the Claimants' Other Projects.

731 Hr. Tr., Day 5, p. 1521:11-16 (BRG's Cross).

> "[O]nly Phase I being started, being pre-sold, Phase I was not yet even fully constructed. Phase II, which is the big hotel complex was not constructed, had no pre-sales. Phases III and VIII or IV to VIII are very limited pre-sales, not yet constructed. Financing for all the projects had not been raised. There was no clear evidence that the project was profitable. Phase I was actually loss-making".[732]

405. With respect to other phases with limited pre-sales, unit buyers had claimed for reimbursement of the amounts paid due to the delays in reaching the equilibrium point. For example, on 28 March 2016 – *i.e.*, 5 months before the Precautionary Measures against the Meritage Lot were adopted – a buyer of a unit of Phases 4 and 5 requested to be reimbursed due to the failure to reach the equilibrium point for those Phases at the foreseen date.[733]

406. Also, with respect to the Luxé, it is artificial to apply a 0% failure rate. As explained above, the Luxé hotel had run into delays and overruns some years before the Preliminary Measures were imposed on the Meritage Lot and, due to the currency depreciation, the project required additional financing which, according to the Claimants, was agreed only "*orally*" (without any contract or guarantee such as promissory note, as is customary).[734]

407. With respect to the 450 Heights, Santa Fé de Antioquia and Tierra Bomba projects, BRG acknowledged that it is "*important to risk the projects previous to their equilibrium point*".[735] BRG further acknowledged that that there was no guarantee that these projects would work, so they "*risk these quite heavily*".[736] Yet, BRG assumed a failure risk of only 23%, meaning that the projects had more than 75% chances of success. This is inconsistent with BRG's own assertion that the projects should be risked "*quite heavily*".

408. In any event, Mr. Seda's business model should be considered when assessing the failure risk of the Claimants' alleged investments. At the Hearing, Mr. Seda acknowledged that his business strategy

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732 Hr. Tr., Day 6, p. 1642:7-20 (Dr. Hern's Presentation).

733 *See* Jorge Herrera Sales Price Phase, 29 February 2016, (**Exhibit BRG-157**), p. 2 ("*solicitamos la devolución total de los aportes que hemos depositado para el proyecto Meritage, ya que el plazo para alcanzar el punto de equilibrio de la etapa IV y V, en la cual somos inversionistas, se cumplió desde el pasado 17 de octubre de 2015 y no deseamos continuar con esta inversión*").

734 In particular, BRG conceded that even when having the financing, "*it's not completely impossible*" that a project fails, but that it was unlikely. *See* Hr. Tr., Day 5, p. 1501:10-13 (BRG's Cross). BRG also said it would be "*extremely unlikely*" that due to a change in the Exchange Rate, the financing would become no longer sufficient to cover the costs (Hr. Tr., Day 5, 1513:9-10 (BRG's Cross)). Yet, this is exactly what the Claimants say that happened to Luxe, way before the precautionary measures were imposed on the Meritage Project. As explained by Mr. Montoya, in March 2016, they had to enter into negotiations "*to increase the agreed credit limit due to unexpected changes in the currency exchange rate*" which resulted in the original loan "*no longer cover*[ing] *the cost of construction*". *See* Witness Statement of Mr. López Montoya, ¶ 45. BRG was unable to explain how what they considered to be an "*extremely unlikely*" scenario ended up happening.

735 Hr. Tr., Day 5, p. 1428:2-5 (BRG's Presentation).

736 Hr. Tr., Day 5, pp. 1488:17-1489:13 (BRG's Cross).

consisted in selecting areas which were not attractive (or even dangerous) and where the "*perception of danger cause prices to be fixed at a bargain*". As "*a first arriver*", he expected to create "*attractive developments*" in the hopes that "*other people follow*".[737] For this, he expected very high returns, of up to "*more than 1000 percent*".[738] For example, Mr. Seda acknowledged that until recently the Guatapé region, where the Luxé Project is located, suffered from severe violence issues, without track record of touristic destination and where Colombians "*would not buy real estate*".[739] Following Mr. Seda's business model, the project could have eventually become a popular touristic destination or completely fail, but this was just a gamble.[740] For the Tierra Bomba Project, the Claimants' had entered into promise agreements with respect to lots which either had an irregular title and/or the seller selling the lot did not own them.[741] In these circumstances, assuming that all the project would have succeeded and been profitable, is untenable.

409. In sum, determining the right failure rate is in itself a speculative exercise. As explained by Dr. Hern, given the characteristics of the projects, namely "*unique development plans in quite unique areas of Colombia*", "*we have very little data to tell us what is the right failure risks for these types of investments*."[742] For this exercise, Dr. Hern assumed a failure rate of 50%, which is in line with the failure rates reported by Damodaran (applied in a conservative manner).[743] This reduced BRG's DCF valuation by USD 35 million (*i.e.*, 45%).

410. Average daily and occupancy rates: BRG assumed average daily and occupancy rates for the Claimants' hotels that are higher than the average performance of the Colombian luxury hotel market, including the Charlee Hotel. According to BRG, their assumption was based on "*forecasts*" and "*evidence from the Charlee in Medellín*".[744] However, even assuming that the information of the Charlee Hotel would be accurate (which is uncertain, as JLL admitted that the conclusion that the Charlee Hotel outperformed other hotels in terms of average daily rate is based on a handpicked

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737 Hr. Tr., Day 2, p. 443:10-19 (Mr. Seda's Cross).

738 Hr. Tr., Day 2, p. 447:1-5 (Mr. Seda's Cross). There is no evidence that any of Mr. Seda's Projects would have actually yielded such high returns.

739 Hr. Tr., Day 2, p. 441:19-22 (Mr. Seda's Cross).

740 Hr. Tr., Day 5, pp. 1310:10-1311:7 (JLL's Cross).

741 *See*, *e.g.*, Rejoinder, ¶ 867. The project was also subject to approval by the indigenous population on the island, which had not been obtained.

742 Hr. Tr., Day 6, pp. 1643:16-1644:1 (Dr. Hern's Presentation).

743 *See* Dr. Hern Second Report, ¶ 153.

744 Hr. Tr., Day 5, p. 1468:9-11 (BRG's Cross). BRG also acknowledged that there is no actual data to back their assumption: "*I cannot source information on occupancy from the Luxé because it was not finished yet by the time of Date of Valuation*". Neither was the Meritage Hotel finished. *See* Hr. Tr., Day 5, p. 1468:16-20 (BRG's Cross).

and non-exhaustive sample[745]) and relevant (which is not, due to the different locations, type of accommodation and scale), there is no basis to assume that any of the Claimants' yet-to-be-built hotels would outperform the Charlee Hotel, which had itself outperform the market. More importantly, there is no evidence that any such "outperformance" would result in higher profit margins, as explained by Dr. Hern.[746]

411. Dr. Hern adjusted the average daily and occupancy rates' assumptions to be consistent with available comparators. This reduced BRG's DCF valuation by around USD 7 to 42 million (*i.e.*, 9 to 55%).[747]

b. *Real estate operations*

412. The Claimants claim USD 21 million for losses related to real estate operations, of which only USD 9.7 million concern the Meritage Project. BRG's exaggerated DCF valuation is driven by exaggerated assumptions with respect to EBITDA margins, discount rate, failure rate and speed of sales, as explained below.

413. EBITDA margins: BRG assumed EBITDA margins for the Meritage and Tierra Bomba real estate projects of 29% and 42% respectively, without any support. Dr. Hern showed that these margins are much higher than any potential benchmarks, including other Colombian real estate developers (16%) and emerging market real estate developers (19%).[748] CBRE also confirmed that BRG's assumptions regarding profit margins are severely overstated[749] and that the "*most probable range*" for the Colombian real estate market would be between 12 and 15% and noted that for a very comparable project, the developer's profit was expected to be around 14%.[750]

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745 Hr. Tr., Day 5, pp. 1321:14-1322:6 (JLL's Cross).

746 Hr. Tr., Day 6, pp. 1683:16-1684:13 (Dr. Hern's Cross).

747 *See* Dr. Hern Second Report, ¶ 165.

748 Dr. Hern PPT Presentation, slide 20. The Claimants criticize the Colombian real estate developers used by Dr. Hern as a potential benchmark. *See* Claimants' PHB, ¶ 260. However, (i) the EBITDA margin for Colombian real estate developers is largely in line with CBRE's estimated EBITDA margins for the Colombian real estate market, (ii) the Claimants have failed to provide any alternative dataset, and (iii) as explained, Dr. Hern has in any event relied on the higher EBITDA margins expected in other emerging markets, which had not been disputed by the Claimants.

749 The Claimants attempt to discredit CBRE's expert opinion by stating that "*CBRE did not identify its survey respondents, making it impossible to examine whether their businesses, and therefore margins, would be comparable to Claimants*" so one would need to "*blindly rely on CBRE's judgment*". *See* Claimants' PHB, ¶ 261. Following the Claimants' logic, JLL's report, which is largely based on "*a proprietary database* [] *including some data that might not otherwise be available*", would be similarly unreliable.

750 See CBRE Presentation, slides 9, 15. *See* Hr. Tr., Day 5, p. 1360:2-5 (CBRE's Presentation). The Claimants' experts, JLL, showed pictures of what they represent is one of CBRE's samples "*to give a sense of what this looks like*". *See* Hr. Tr., Day 5, p. 1272:15-17 (JLL's Presentation). However, CBRE confirmed this is not the "*emblematic*" case of a very comparable case that they came across in their survey. *See* Hr. Tr., Day 5, p.1342:9-13 (CBRE's Presentation).

414. Dr. Hern adjusted the EBITDA margins to 19%, in line with EBITDA margins expected in other emerging markets (and higher than the EBITDA margins for Colombian real estate developers). This reduced BRG's DCF valuation by USD 16 million (*i.e.* 74%).

415. Discount rate: BRG assumed a WACC of 7.7%. As explained by Dr. Hern, this is "*implausible*"[751] in the circumstances as it is much lower than the Claimants' Projects own cost of debt (*i.e.*, 10.5% for the Meritage and 11.2% for the Luxe). CBRE confirmed that BRG understated the discount rate for real estate projects:

> "*So, we generally have a range between 13.2 and 31.3 from our findings, from our respondents, eliminating the higher end and the lower end of the spectrum, we're generally in a range between 18 and 25%*".[752]

416. Dr. Hern adjusted the WACC to 12.1-15.5%, which is still conservative even following the Claimants' own conduct, as they had offered investments in their projects at IRR of 25-28% in 2016. This reduced BRG's DCF by USD 5-8 million (*i.e.* 22-40%).[753]

417. Failure risk: BRG assumed 0% failure risk for the Meritage and Luxé Projects and 23% failure risk for the Other Projects. According to BRG, the Meritage and Luxé Projects cannot fail because "*the proof of concept had been established and the presales took place*".[754] BRG, however, failed to account for the real risks to which the Projects are subject, including risks concerning insufficient demand, any phase of the project not reaching the equilibrium point (for example, by March 2016, some phases of the Meritage Project had already failed to reach the equilibrium point in time and investors had sought to withdraw from the project[755]), any phase of the project not being profitable (for example, the only phase of the Meritage Project that had reached equilibrium point was not profitable), construction risks (for example, the Luxé Project had experienced several delays and cost overruns unrelated to the disputed measures[756]), etc.[757] It also ignores that "*a project may still fail even if it has started already*", as confirmed by the Claimants' real estate experts, JLL.[758]

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751 Dr. Hern's PPT Presentation, slide 18.

752 Hr. Tr., Day 5, p. 1354:3-14 (CBRE Presentation). See also CBRE's PPT presentation, slide 11.

753 Dr. Hern's PPT Presentation, slide 21.

754 Hr. Tr., Day 5, p. 1424:13-16 (CBRE Presentation).

755 Jorge Herrera Sales Price Phase, 29 February 2016, (**Exhibit BRG-157**), p. 2.

756 Hr. Tr., Day 1, p.336:6-16 (Respondent's Opening). A report dated September 2015, *i.e.,* a year before the precautionary measures were adopted, shows that the project was expected to be delayed by at least 8 months. It also shows that the works, which had commenced in 2013, were suspended in November 2014 and re-started in April 2015 for reasons unrelated to the Respondent's measures (which were adopted over a year later) and that by September 2015 there was insufficient staff and "*the number of workers engaged in fishing works should be increased*". *See* **Exhibit BRG-097**.

757 *See* Dr. Hern's PPT Presentation, slide 22; Hr. Tr., Day 6, p. 1646:9-21.

758 Hr. Tr., Day 5, p. 1293:2-5 (JLL's Cross).

418. At the Hearing, JLL acknowledged that there were a number of problems with the failure rates provided in its written report and "*recalculated failure rates*" to account for some of Dr. Hern's criticisms. These adjustments resulted in the failure rate being increased to more than double: from 10% to 21.5% for Medellín and 25.4% for Cartagena.[759] Yet, the adjustments made by JLL were made in an arbitrary fashion to artificially keep a lower failure rate.[760] As demonstrated by Dr. Hern, a proper reading of the data included in the *Galería Inmobiliaria* on which JLL relied results in failure rates in the range of 30-55% for Medellín and 25-85% for Cartagena.[761]

419. Dr. Hern adjusted the failure rate to 50%, which is in line with the failure rates reported by Damodaran (applied in a conservative manner).[762] This reduced BRG's DCF valuation by USD 9 million (*i.e.*, 41%).

420. Speed of sales: BRG's assumptions on speed of sales on the basis that for Phase 1 of the Luxé Project "*20 units were sold in first month*",[763] is highly misleading. It is clear from BRG's own analysis that the only additional historical data available, referring to Phase 1 of the Meritage Project (which the Claimants themselves describe as having been sold quickly), shows a speed of sale of up to 5 times

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759 JLL PPT Presentation, slide 41. Hr. Tr., Day 5, pp. 1276:3-1277:4 (JLL's Presentation). Remarkably, the difference between JLL's and Dr. Hern's assessment is mainly driven by JLL's failure to consider Dr. Hern's criticism that JLL calculated the failure rate over very long periods of data, which are mostly irrelevant to assess the risks to which the Claimants' Projects were actually subject. As shown by Dr. Hern, failure rates had significantly increased in the relevant period when the Claimants' intended to develop their projects (and up to 2017). JLL's argument that "*shortening the timeframe to just five years would lead to biased results as it would fail to account for real estate market cycles*" is highly misleading: the Claimants' Projects would have followed the cycle during which they were launched and developed, so if that was during a cycle that led to many failures – as it was – they would have been exposed to an increased risk of failure. *See* Dr. Hern Second Report, ¶¶ 291-292.

760 For example, JLL acknowledged that its approach to treat all ongoing projects as successful was incorrect. Yet, instead of following Dr. Hern's reasonable approach (*i.e.*, to limit the analysis using data up to 2017, where around 75% of the projects are completed), JLL arbitrarily decided to "*use*[] *2021 information but did not include projects that were launched after 2017*". In an attempt to justify this, JLL and the Claimants misleadingly argue that Dr. Hern "*removed all the ongoing projects from the denominator of the failure rate calculation, leading to exponential increases in the failure rate that are simply not realistic*". *See* Claimants' PHB, ¶ 266. What Dr. Hern actually did is consistently exclude the ongoing projects from 2017 onwards from both the denominator (*i.e.*, total projects) and the numerator (*i.e.* "failed + cancelled + suspended projects") of the failure rate formula to come up with the failure rate at the valuation date (to be clear, for the reasons explained, Dr. Hern did not rely on the data from 2017 onwards that is displayed on slide 42 of JLL's presentation, but only on the data up to 2017). *See* Dr. Hern Second Report, ¶ 294. In any event, as may be seen from Dr. Hern's Figures F.3 and F.4, excluding the ongoing projects from the failure rate calculation is not what drives the main difference between Dr. Hern's and JLL's calculations.

761 Dr. Hern PPT Presentation, slide 22; Dr. Hern Second Report, Appendix F. It is clear from Dr. Hern's report that he did not assume that "*every project in 2021 in all cities in Colombia have failed*", as claimed by JLL and the Claimants. Rather, Dr. Hern's position on the basis of the evidence available is that 100% of the projects initiated in 2021 were still in progress, so it was not possible to classify them as successful, as JLL had done. Accordingly, Dr. Hern excluded all those projects from the calculation. *See* Dr. Hern Second Report, ¶ 291.

762 *See* Dr. Hern Second Report, ¶ 153.

763 Hr. Tr., Day 5, pp. 1415:22-1416:13 (BGR's Cross).

lower than 20, *i.e.* 3.9 units per month. Remarkably, these figures fail to consider the long-term sales absorption. As explained by JLL, "*when a project enters the market there is a peak of sales during the first months of the pre-sale phase, and slowly the sales absorption rate decreases as the project advances*".[764] The long-term average sale rate for projects that JLL considered to be comparable to those of the Claimants range between 0.79 and 3.15 units per month,[765] while the long-term average in the market ranges between 0.3 and 0.5 units per month.[766]

421. To show the effect of the Claimants' exaggerated assumptions on BRG's DCF valuation, Dr. Hern adjusted only the speed of sales for 450 Heights – which is the project for which BRG assumes the greatest increase in the speed of sales (*i.e.*, 14.4 units per month[767]) – to be consistent with the speed at which phase 1 of the Meritage project was sold during its first months (*i.e.*, 3.9 units per month).[768] This adjustment reduces BRG's DCF valuation by USD 3 million (*i.e.*, 15%).

c. *Lost fees*

422. The Claimants claim USD 85.9 million for lost fees, of which only USD 28.2 million concern the Meritage Project. This claim is fully unsubstantiated. To begin with, there is no evidence that the Royal Realty lost the opportunities to generate fees from providing management services to the Claimants or other projects by third parties.[769] It is not even certain that Royal Realty would have operated the Claimants' yet-to-be-built hotels. For example, the brochure of the Meritage Project states that "*hotel services may vary according to the operator of the hotel*".[770]

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764 JLL PPT Presentation, slide 43. CBRE also explained that when a project is launched, many developers "*invite the most recurrent clients, friends, family members or other investors who are very close to them to come forward and buy units. And at that point in time, certainly there will be a greater level of sales, normally, than in subsequent months*". *See* Hr. Tr., Day 5, p. 1356:1-8 (CBRE's Presentation. Given the Claimants' intention to launch several projects within a short timeframe, it is unrealistic to assume that the most recurrent clients, friends and family would have kept up with the speed of sales during the initial months of Phase 1 of the Meritage Project.

765 JLL PPT Presentation, slide 43. *See* Hr. Tr., Day5, pp. 1277:6-1278:20.

766 CBRE PPT Presentation, slide 14; Hr. Tr., Day 5, p. 1358:1-6 (CBRE's Presentation).

767 *See* BRG PPT Presentation, slide 23.

768 Given that Dr. Hern relied on the actual data of Phase 1 of the Meritage Project as reported by the Claimants, the Claimants' criticisms to CBRE's methodology to assess the speed of sales is highly irrelevant (in addition to fallacious). *See* Claimants' PHB, ¶ 263.

769 As noted by Dr. Hern, it is (still) not clear on what basis the Claimants argue that they were unable to collect their share of cabaña rental profits from Luxé phases 1, 2 and 5 but they do not make the same argument with respect to the Charlee Hotel. Removing Luxé cabañas rental profits reduces BRG's DCF damages associated with the Luxé by USD 6 million. *See* Dr. Hern's Second Report, ¶ 172; Rejoinder, ¶ 866.

770 *See* Meritage Sales Brochure (**Exhibit C-006**). Notably, the contract produced as "Meritage Hotel Management Contract" does not seem to refer to the yet-to-be-built Meritage Hotel but rather to a "Site" described in an annex that was not produced but which by December 2013 had been "*subject to improvements in a building or buildings containing approximately 270 Rooms for Guests*". *See also* Management Contract between Newport and Royal Realty (**Exhibit BRG-049** and **C-120**) in Spanish original (the English translation provided as BRG-049 and C-120 seems to be the English translation of a different contract between different parties).

423. In any event, BRG's lost fees valuation is driven by the exaggerated assumptions with respect to hotel and real estate operations. As explained by Dr. Hern, BRG's assumed Royal Realty profit margins are not only grossly exaggerated (*e.g.*, 95% for Tierra Bomba) but also unsupported by Royal Realty's historical accounts, which show losses in most years during 2011 and 2016:

> "[I]*f it was true that it was a very profitable operator, we should at least expect to see those profits generated in their accounts, but we don't. We see over the period 2011 to 2015 negative profits in most of those years. So, you know, no evidence up to that point in time that the Company was profitable and, therefore, little evidence to validate these calculations of lost fees*". [771]

424. There is also no evidence that the Royal Realty brand (to the extent that one single operating hotel could be regarded as a "brand") had any exceptional value[772] or that it was negatively impacted by the Asset Forfeiture Proceedings, as it is undisputed that the Charlee Hotel – which gave rise to the "brand" and is the only project operating under that brand – is still operating in Medellín. Moreover, the Claimants did not lose any know-how as a result of the Asset Forfeiture Proceedings, so they could still apply their know-how to the Claimants' Projects or other projects in Colombia or abroad.[773]

425. Dr. Hern adjusted the lost fees calculation in light of the corrected assumptions for hotel and real estate operations.[774] This reduced BRG's valuation of lost fees to a maximum of USD 5 to 13 million (*i.e.*, 6-15%).[775]

d. *Future hypothetical projects*

426. The Claimants claim USD 15.6 million for future hypothetical projects that do not even exist on paper and for "*the prospect of many more management Contracts for other projects that were in the*

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771 Hr. Tr., Day 6, p. 1648:2-9 (Dr. Hern's Presentation); Dr. Hern Second Report, ¶ 222.

772 *See* Dr. Hern's PPT Presentation, slide 33.

773 As demonstrated, after the Asset Forfeiture Proceedings had been initiated against the Meritage Project, Mr. Seda still received offers to provide consulting services to other real estate developers. *See* Whatsapp Chain between C. Rodriguez and A. Seda (**Exhibit C-197**) ("*Given your experience in the sector, we would like to invite you to work with us as a consultant*"). Also, it bears noting that none of the Claimants other than Mr. Seda are related to the Royal Realty or Charlee brand, so there cannot be the slightest doubt that they could have continued investing in Colombia or abroad.

774 *See above*, Sections VI.B.2(a) and (b).

775 As explained by Dr. Hern, however, this corrected value is not the relevant estimate of damages because (i) it assumes that fees collected by Royal Realty are pure profit, whereas "*there might be additional costs that are not accounted for in this Agreement*" (*see* Hr. Tr., Day 6, p. 1725:4-8 (Dr. Hern's Cross); Dr. Hern Second Report, ¶ 222). Notably, the Claimants' assumption that the fees collected by Royal Realty are pure profit is belied by Royal Realty's historical accounts, which, as demonstrated, show losses in most years during 2011 and 2016; and (ii) it fails to take into account that the Claimants maintain their know-how, so they could use the time and resources to provide services to other projects. *See* Dr. Hern Second Report, ¶¶ 38 and 236(B).

pipeline".[776] This claim is entirely speculative as there is no evidence that any such hypothetical futures projects would ever exist. On this basis alone, the Claimants' claim should be dismissed.[777]

427. Even if such hypothetical projects would ever come to exist, the Claimants are not entitled to compensation as there is no evidence that the Claimants could not pursue these projects as a result of the Asset Forfeiture Proceedings. As noted by Dr. Hern:

> "[T]*here's very little evidence to back up what these projects would be", so "the basis for a damage claim is very weak because it's not, in my view, been clearly established why that project has been lost, you know, why could the ideas for that project, if those ideas existed, not be sold to another investor, why could those ideas not be-- not still be pursued*".[778]

428. This is unchallenged. In fact, the evidence in the record shows that third parties were still willing to work with Mr. Seda on real estate projects.[779]

429. In any event, the valuation of these hypothetical projects is also speculative, as it is based on the Claimants' exaggerated assumptions for real estate operations.[780] Dr. Hern adjusted BRG's calculation in light of the corrected assumptions for real estate operations. This reduced BRG's valuation to USD 0 to 3 million.

* * *

430. *In sum*, applying the DCF method with the "corrected" assumptions gives results which are consistent with the cost approach originally applied by Dr. Hern, as shown in the table summarizing the valuations pursuant to Dr. Hern's cost approach, Dr. Hern's corrected DCF approach and the Claimants' exaggerated DCF approach:

Source of damage[781]	Dr. Hern's Cost Approach	Dr. Hern's "Corrected" DCF	BRG's exaggerated DCF
Meritage only	USD 1.1 million	USD 0 to 2 million	USD 35.2 million
All projects (including Meritage)	USD 5.5 million	USD 3 to 7 million	USD 98.1 million
Lost fees/lost Royal Realty brand value	USD 2.1 million	Maximum of USD 5 to 13 million	USD 85.9 million

776 Hr. Tr., Day 1, p. 158:21-159:1 (Claimants' Opening).

777 As explained by Dr. Hern, "*Future hypothetical projects should not be included in any damages calculation as a matter of principle*". *See* Dr. Hern's PPT Presentation, slide 24; Hr. Tr., Day 6, p. 1648:10-1649:3 (Dr. Hern's Cross).

778 Hr. Tr., Day 6, pp. 1648:10-1649:3 (Dr. Hern's Cross).

779 *See* Whatsapp Chain between C. Rodriguez and A. Seda (**Exhibit C-197**).

780 While the Claimants applied a 23% failure rate to the real estate and hotel operations other than the Luxé and Meritage (for which they assumed a 0% failure rate), for the hypothetical projects they assumed a 39% failure rate. The assumption that non-existent projects would have over 61% chances of success defies any logic.

781 Based on Dr. Hern's PPT Presentation, slide 10 and Dr. Hern's Second Report, Table 5.13.

Future hypothetical projects	USD 0 million	USD 0 to 3 million	USD 15.6 million
TOTAL[782]	USD 7.6 million	USD 3 to 10 million	USD 199.6 million

e. *Cross-checks*

431. Dr. Hern cross-checked BRG's DCF valuation "*against the prices that have been paid by the Investors in these projects into the Project Companies*".[783] Dr. Hern's cross-checks confirm that BRG's valuation is grossly overstated.

432. For example, Dr. Hern compared BRG's valuation of the Meritage Project as of the valuation date (*i.e.*, COP 163 billion) against the implied valuation of the Meritage Project on the basis of the original capital investment in May 2013 (*i.e.*, COP 2.25 billion)[784] and found that BRG's valuation is 72-times higher than the original investment made by the Claimants.[785]

433. At the hearing, the Claimants' damages experts, BRG, tried to justify this difference by explaining (rather erratically) that the initial capitalization of COP 2.25 billion could not be compared to their valuation of COP 163 billion some years later because "*the company in this case has actually sold out all of its offering in Phase 1, began to sell, began to construct, and this is now a real thing, it's on track*".[786] This, however, cannot justify a 72-time increase in value. In the words of Dr. Hern:

> "[I]*f BRG's DCF calculation is right, then the valuation of that project has increased by 72 times over that period, and that, to me, doesn't make sense economically because over the period from May 2013 to the end of 2016, very little has actually happened in the context of the Meritage Project. We have Phase I, yes, where there has been sales of the units, but Phase I is still only 20 percent or so constructed. We have no operational history, no sales of units for the hotel. We have a very limited number of sales for some of the other phases. But yet, if BRG's calculation is right, the valuation of the Project has increased by 72 times, so economically that doesn't really make sense, in my mind*".[787]

434. It must also be noted that the developments in the project made between May 2013 and the valuation date were mostly financed by third party contributions, including unit buyers and banks (and not by the Claimants' contributions).

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782 Excluding pre-award interest.

783 Hr. Tr., Day 6, p. 1636:9-12 (Dr. Hern's Presentation). At the Hearing, it became clear that the Claimants' damages experts, BRG, "*didn't ask to see the documents*" evidencing transactions with shares to check if they represented the FMV or not and just assumed they are irrelevant without further analysis. As explained by BRG, they merely asked "*for the nature of these exchanges of shares, and [were] instructed that they were not transactions as one would expect in the market*" but "*corporate reorganizations or Parties wanting to leave the equity*". *See* Hr. Tr., Day 5, pp. 1555:21-1556:15, 1568:14-19; 1570:12-15 (BRG's Cross).

784 *See* Company Agreement of RR Meritage Associates S.A. (**Exhibit BRG-048**), p. 31.

785 See Dr. Hern's PPT Presentation, slide 13, Hr. Tr., Day 6, pp. 1636:13-1637:1 (Dr. Hern's Presentation).

786 Hr. Tr., Day 5, p. 1545:7-13 (BRG's Cross).

787 Hr. Tr., Day 6, p. 1637:6-20 (Dr. Hern's Cross).

435. Dr. Hern also cross-checked BRG's valuation of the Meritage Project against a purchase option dated February 2016, *i.e.*, just a few months before the valuation date, and concluded that BRG's DCF valuation of the Meritage Project is 26 times higher than the implied valuation of the project in February 2016.[788] In his third witness statement, Mr. Seda stated that the transaction – contained in a letter with a "Royal Property Group" letterhead and sent by a shareholder and legal representative of Royal Realty Group, Mr. James Evans – was not an arms-length share transaction. In particular, Mr. Seda explained that Mr. Evans was "*a former employee of Royal Realty*" that "*did not have any shares in RR Meritage*" and "*was on his way out of the company at this point and I understand that he was trying to sell shares that did not belong to him*".[789] However, as noted by Dr. Hern, the evidence referred to by Mr. Seda "*didn't clearly tell* [] *that* [the transaction] *didn't happen*".[790] What the evidence in the record does show is that (i) Mr. Evans was a shareholder in RR Meritage Associates (with a 3% interest),[791] and (ii) in any event, the purchase option does not refer to Mr. Evans' shares but to diluted shares following additional capital contributions to the company.[792]

436. In his third witness statement, Mr. Seda also explained that two transfers in the shareholding of Luxé, which implied value is 6 and 8 times that of BRG's DCF valuation, were "*simply internal transfer of shares*" between himself and his companies.[793] Even assuming that "*these were no arm's-length transactions and therefore cannot reflect the market value of the companies at the time*",[794] this does not apply to the transaction between Royal Realty and Haystack Holdings of 16 December 2015,[795] by which the Claimant Brian Hass allegedly acquired his indirect shares in the Luxé Project just a few months before the Preliminary Measures were imposed on the Meritage Lot.[796] As explained by Dr. Hern:

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788 Dr. Hern's PPT Presentation, slide 14

789 Mr. Seda's Third Witness Statement, ¶ 18.

790 Hr. Tr., Day 6, p. 1719:4-11 (Dr. Hern's Cross).

791 *See* Company Agreement of RR Meritage Associates S.A. (**Exhibit BRG-048**), p. 31.

792 Letter from James Evans to Roger Khafif (**Exhibit RH-033**). *See also above*, footnote 105.

793 Mr. Seda Third Witness Statement, ¶ 19.

794 Claimants' PHB, ¶ 258.

795 The date of the transaction is uncertain, as in de document produced as Exhibit C-359 ("Luxe Claimants' Capital Contributions") it is recorded as 16 December 2015 and in Luxé Share Ledger Haystack Holdings LLC (**Exhibit C-226**), it is recorded as having bought its shares on 27 November 2015.

796 *See* Hern's PPT Presentation, slide 14, Hr. Tr., Day 6, p. 1638:1-12 (Dr. Hern's Presentation). Notably, at the Hearing it became clear that BRG did not review or even asked for evidence of these transactions and assumed they were not relevant. *See* Hr. Tr., Day 5, pp. 1570:2-1571:3 (BRG's Cross). Conversely, Dr. Hern did ask for evidence of these transactions. The documents concerning the transfer of shares to Haystack Holdings – which confirms Dr. Hern's conclusions in his written reports – was on page 70 of a 105-page document containing "Luxé Claimants' Capital Contributions" produced by the Claimants with their Reply (but not referred to by the Claimants in their Reply). Remarkably, while the document is responsive to the Respondent's Request No. 52,

> "[T]*he price that was paid for that purchase is 35.2 billion. Again, if that's right, there's a clear mismatch in the valuation that's been put forward by BRG of 155 billion against the implied valuation of the assets in [November] 2015 of 35 billion*".[797]

437. At the Hearing, the Claimant' damages experts, BRG, declared that the transaction with Haystack could not reflect the FMV because it was either a corporate reorganization or sold by shareholders wanting to leave the equity.[798] A proper analysis of this transaction suggests that it was neither: (i) it could not have been a corporate reorganization, because the shares were sold to a then third party, Haystack Holdings, which appears to be unrelated to Mr. Seda and Royal Realty, and (ii) it was not sold by shareholders wanting to leave the equity but by Royal Realty, who remained the majority shareholder of Luxé. The Claimants' failure to even mention this transaction in their PHB speaks volumes.

438. In sum, even if the Tribunal were to disregard the transactions that show that BRG's DCF valuation is up to 72 times higher than the Projects' implied value, the price at which Haystack Holdings acquired Luxé's shares in December 2015 (*i.e.* just a few months before the Precautionary Measures were imposed on the Meritage Lot), confirms that BRG's DCF valuation is grossly exaggerated. On the contrary, it is highly unlikely that as of the valuation date a buyer acting "*on an arm's length basis*"[799] would have been willing to pay USD 255 million for the Claimants' non-operative projects, including for the future hypothetical projects.[800]

439. Conversely, BRG's alleged "*cross-checks under a market-based approach*", on the basis of the data provided by JLL,[801] are inappropriate.

440. For the hotel operations, BRG relied on transaction prices of fully operational hotels in Latin America and the Caribbean provided by the Claimants' hospitality expert, JLL.[802] While JLL acknowledged that the valuation of a specific hotel "*would depend very much on the nature of this specific hotel to be*

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the Claimants had not produced it in the document production phase of the arbitration. *See* Luxe Claimants' Capital Contributions (**Exhibit C-359**); Procedural Order No. 2 of 18 February 2021.

797 Hr. Tr., Day 6, p. 1638:1-12 (Dr. Hern's Presentation).

798 Hr. Tr., Day 5, p. 1568:9-19 (BRG's Cross).

799 *See* definition of FMV in the Claimants' PHB, ¶ 248.

800 *See*, *e.g.*, *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018 (**Exhibit CL-121**), ¶ 623 ("*there is, like in all valuations, an element of common sense. It seems highly unlikely that in August 2011 any informed buyer would have been willing to pay more than USD 300 M for the shareholding of Cengiz Libya, a company with a new book value of USD 49.2 M and whose books of contracts was limited to two construction projects in a remote region of Libya, which were still in their initial stages*").

801 Claimants' PHB, ¶ 244.

802 Hr. Tr., Day 6, pp. 1649:4-1650:5 (Dr. Hern's Presentation).

valued",[803] the hotels with which the Claimants' experts attempted to compare the Claimants' hotels are not comparable, so BRG's cross-check is inappropriate:[804]

441. *First*, the Claimants' hotels are not operational or even built, so they are exposed to additional costs and risks to which fully operational hotels are not exposed. At the Hearing, the Claimants' hospitality expert, JLL, conceded that yet-to-be-built hotels are not comparable to fully built and operational hotels:

> "*Someone would not pay just for the plans to build a hotel. They would not pay the same amount because you have to go through all the development risk and all that.*"[805]

442. *Second*, according to the Claimants, comparing yet-to-be-built hotels in undeveloped destinations in Colombia with hotels in popular tourism hubs in Latin America and the Caribbean, as they attempt to do, is justified "*when the country in question lacks transaction data from the relevant period*".[806] However, there is no indication that in this case there are no comparable hotels in Colombia. In fact, JLL referred at the Hearing to many other luxury hotels in Colombia (including in Medellín and Cartagena), but considered that "[n]*one of these would necessarily be direct competition with the Charlee Hotel*":[807]

> "[T]*he Charlee Hotel, 42 rooms and an independent luxury lifestyle hotel would really not compete at all with, say, the Hilton Corferias, which is like a 430-room group-oriented hotel positioned at the upper upscale end of the market. And I think you could say the same thing about the Grand Hyatt Hotel that's over 300 rooms or the Hyatt Regency in Cartagena that's 200 and something rooms. So, these would not necessarily compete with each other*".[808]

443. Instead, JLL considered that upscale and luxury hotels elsewhere in Latin America and the Caribbean – including chain hotels with over 300 rooms (*e.g.*, the Hilton Los Cabos Beach & Golf Resort) – would be comparable because "*if a visitor is thinking about going* [to Colombia]*, they may well think, maybe I'll go to Costa Rica or maybe the Dominican Republic, Mexico, elsewhere in South America*".[809] This is simply unsustainable, in particular in light of JLL's own concession that "*not every area of a country is equally developed*" so one should "*look*[] *at individual tourist markets within the country*".[810] In

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803 Hr. Tr., Day 5, p. 1309:1-7 (JLL's Cross).

804 As noted by Dr. Hern, the absence of reliable comparators is one of the reasons why the DCF method should not be applied in this case.

805 Hr. Tr., Day 5, p. 1304:4-7 (JLL's Cross).

806 Claimants' PHB, ¶ 271.

807 Hr. Tr., Day 5, p. 1317:20-22 (JLL's Cross).

808 *See* Hr. Tr., Day 5, pp. 1318:2-1319:2; 1321:3-13 (JLL's Cross).

809 Hr. Tr., Day 5, p. 1252:8-12 (JLL's Presentation).

810 Hr. Tr., Day 5, pp. 1307:20-1308:15 (JLL's Cross). JLL's testimony also makes clear that in addition to the location, other factors may strongly impact the valuation of a hotel. For example, in their second report, JLL

this case, Guatapé – and undeveloped, inland destination, described by JLL as "*a weekend destination for people who live in the area*"[811] – is not comparable to Cartagena within Colombia, let alone to Cabo San Lucas in Mexico or Montego Bay in Jamaica.[812]

444. When challenged on its double-standards to assess which hotels could be regarded as comparable, JLL's only explanation was that "*everyone is entitled to their own opinion*".[813] Yet, when said opinion is relied upon to assess the damages allegedly suffered by the Claimants, the opinion cannot be arbitrary and unsubstantiated – as JLL's (and BRG's) opinion on comparators appears to be.

445. *Third*, as explained by Dr. Hern, the "comparator" hotels charge multiple times higher room rates than five-star hotels in Colombia, including the Charlee (which, according to the Claimants, outperform the Colombian market in terms of average daily rate). Accordingly, their value per room cannot be comparable to the Claimants' yet-to-be-built hotels in Colombia.[814]

446. *Fourth*, BRG's reliance on the alleged comparable hotels provided by JLL is particularly unwarranted in light of their criticism of Dr. Hern for comparing the Claimants' hotels with a sample "*based on hotel chains and include portfolios exceeding, in some cases, a hundred hotels, which is not comparable to operations of a single hotel, which is the value we're looking for*".[815] The Claimants cannot be allowed to cherry-pick comparable hotels at their convenience, as they have repeatedly attempted to do.

447. *In sum*, "*there's no reason to expect that the valuation of hotels that have not yet started construction should be anything like fully developed, fully operational hotels in other markets*".[816] Therefore, BRG's cross-check for hotel operations is inappropriate.

448. Similarly irrelevant are the cross-checks applied by BRG to validate its DCF valuation of the real estate operations, as they do not look at market prices or transaction prices of projects in development, as the Claimants' Projects were (at best, as many of them were future hypothetical projects). As such,

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had removed four hotels of the original 30-hotel sample. The total worth value of the 26 hotels left dropped from USD 3 billion to UD 2 billion, *i.e.* one third of the value.

811 Hr. Tr., Day 5, p. 1312:13-15 (JLL's Cross).

812 The Claimants try to force the comparison by referring to Mr. Dickinson's explanation that "*many of the transactions in the sample set consisted of developments that initially were in undeveloped tourist regions, which evolved to become popular tourism destinations*". *See* Claimants' PHB, ¶ 272. What the Claimants fail to mention is that the valuation of these same hotels was likely significantly lower before the region became a popular tourism destination, so to make a fair comparison, one would need to look at the value of the so-called comparable hotels *before* the region became a popular tourism destination.

813 Hr. Tr., Day 5, p. 1319:1-2 (JLL's Cross).

814 Dr. Hern's PPT presentation, slide 25; Hr. Tr., Day 6, p. 1650:6-21 (Dr. Hern's Presentation).

815 Hr. Tr., Day 5, pp. 1422:20-1423:3 (BRG's Presentation).

816 Hr. Tr., Day 6, pp. 1650:20-1651:5 (Dr. Hern's Presentation). Dr. Hern also noted that "*there's development construction failure risk associated with the Colombian hotels that are not present in the other markets*".

the Claimants failed to take into account a number of relevant valuation drivers, including failure risks (among many others).[817] In any event, the prices and profit margins (but also discount rate and speed of sales) assumed by BRG are significantly higher than any potential benchmark, including Colombia real estate developers and emerging market real estate developers.[818]

C. THE CLAIMANTS ARE NOT ENTITLED TO MORAL DAMAGES

449. Mr. Seda claims moral damages in an amount equivalent to 10% of the overall claim value.[819] Contrary to the Claimants' allegations, Mr. Seda is not entitled to moral damages in the circumstances of the case and, even if he would be entitled to moral damages (which he is not), the amount claimed is excessive and arbitrary.[820]

450. *First*, as demonstrated, moral damages may only be awarded in exceptional circumstances involving (i) severe State conduct, such as "*physical threat, illegal detention or other ill-treatments in contravention of the norms according to which civilized nations are expected to act"* and (ii) serious damage to the investor's physical health, grave mental suffering or a substantial loss of reputation.[821] None of these elements have been met in this case:

(i) The Respondent has consistently acted in accordance with its international obligations. Contrary to the Claimants' allegations, Mr. Seda has not been subject to "*retaliatory and harassing tactics*",[822] let alone subject to physical threat, illegal detention or similarly severe ill-treatment (this is not even alleged by the Claimants). Therefore, Mr. Seda's situation cannot reasonably be assimilated to that of the investors in *von Pezold v. Zimbabwe*, who were "*humiliated, threatened with death and assaulted*".[823]

(ii) There is no evidence of serious damage to Mr. Seda's physical or mental health or to his reputation.[824]

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817 *See* Rejoinder, ¶ 925; Dr. Hern Second Report, ¶¶ 95-96.

818 *See above*, ¶¶ 413-414. Presumably, this is driven by BRG's and JLL's assumption of prices that are much higher than the market prices (as well as the actual prices at which units at the Meritage Project were sold). *See* CBRE PPT Presentation, slide 6. Hr. Tr., Day 5, pp. 1346:1-1351:2 (CBRE's Presentation).

819 *See* Claimants' PHB, ¶ 281.

820 *See* Opening Presentation, slides 271-273; Hr. Tr., Day 1, p. 346:4-11 (Claimant's Opening); Rejoinder, Section VI.F.

821 *See*, *e.g.*, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 (**Exhibit CL-99**), ¶ 910.

822 *See above*, ¶¶ 338-346.

823 *See* Claimants' PHB, ¶ 281, quoting *Bernhard Friedrich Arnd Rüdiger von Pezold, et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (**Exhibit CL-102**), ¶ 898.

824 As demonstrated, real estate developers remained interested in having Mr. Seda as a consultant.

451. *Second*, contrary to the Claimants' unsubstantiated allegations, there is no reason "*to award moral damages in an amount commensurate to the size of the claim in question*",[825] in particular where a large portion of the claim is made by other Claimants unrelated to Mr. Seda. In any event, the amount claimed (which is still uncertain, as even in their PHB the Claimants refer both to 10% "*of the overall claim value*"[826] and "*of the total damages owed to* [Mr. Seda]"[827]) is exorbitant in relation to the amounts awarded by investment and other tribunals to victims,[828] including the tribunal in *von Pezold v. Zimbabwe* which awarded USD 1 million for conduct involving humiliation, threats, death, assault, firearms put to the claimants' heads and kidnapping, stretched over a number of years, throughout which the police was aware of the acts and did not act.[829]

D. THE PRE-AWARD INTEREST SHOULD BE CALCULATED ON THE BASIS OF THE RISK-FREE RATE

452. The Claimants insist that pre-award interest be calculated on the basis of the Claimants' cost of debt.[830] Assuming that the Claimants are entitled to pre-award interest, it should be calculated on the basis of the risk-free rate.

453. As explained, pre-award interest is intended to compensate the Claimants for "*foregoing a certain amount of money x in the future with certainty*".[831] This is precisely what the risk-free rate is intended to compensate, *i.e.*, the opportunity cost of receiving the damages awarded (if any) at a future date.[832] Conversely, "[t]*he Claimants' own cost of debt is irrelevant in this context, as it does not represent compensation for the Claimants foregoing a certain amount of money x and receiving the same amount of money in the future with certainty*".[833] In other words, the Claimants' cost of debt would overcompensate the Claimants by awarding a premium above the risk-free rate to which the Claimants are not entitled.

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825 Claimants' PHB, ¶ 281.

826 Claimants' PHB, ¶ 281.

827 Claimants' PHB, ¶ 353.

828 *See* Respondent's Opening, slide 273; Respondent's Rejoinder, ¶¶ 966-968. As demonstrated, the decision of the *Al Kharafi v. Libya* tribunal of 2013, which is not "*recent*" as represented by the Claimants (but previous to the *von Pezold* decision of 2015), is inapposite.

829 Notably, the *von Pezold* tribunal considered UD 5 million to be "*excessive*". *See Bernhard Friedrich Arnd Rüdiger von Pezold, et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 (**Exhibit CL-102**), ¶ 921.

830 Claimants' PHB, ¶ 279.

831 Dr. Hern Second Report, ¶ 255. *See also* ¶¶ 254-258.

832 *See* Dr. Hern PPT Presentation, ¶ 26; Hr. Tr., Day 6, pp. 1650:22-1652:7 (Dr. Hern's Cross.

833 Dr. Hern Second Report, ¶ 255.

454. Dr. Hern suggests that the U.S. risk-free rate should be used, given that the damages have been calculated in US dollars.[834] His proposed approach produces higher damages than applying a Colombian risk-free rate.

VII. THE RESPONDENT'S REQUEST FOR RELIEF

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

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

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

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

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

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

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

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

25 August 2022

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834 While the tribunal in *Eco Oro v. Colombia*, to which the Claimants refer, found that "*the US Treasury Bill rate is not a commercially reasonable rate*" in that specific case, it did not hold that the claimants' cost of debt would be a commercially reasonable rate. *See* 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 (**Exhibit CL-175**), ¶¶ 907, 913. Notably, the Claimants have not referred to any case where the claimants' cost of debt was applied as a fair pre-award interest. By contrast, investment tribunals have held that "*the rate of interest to be taken into account is not the rate associated with corporate borrowing but the interest rate the amount of compensation would have earned had it been paid after the expropriation. Since the awarded compensation is in dollars, the Tribunal considers that the average rate of interest applicable to US six-month certificates of deposit is an appropriate rate of interest*". *See, e.g.*, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 February 2007 (**Exhibit RL-48**), ¶ 396.

Respectfully submitted on behalf of the Respondent,

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

AGENCIA NACIONAL DE DEFENSA JURÍDICA DEL ESTADO