[redacted]

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/19/6

BETWEEN

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

Claimants

and

THE REPUBLIC OF COLOMBIA

Respondent

CLAIMANTS' SUBMISSIONS ON U.S. TREATIES AND [redacted]

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21 December 2022

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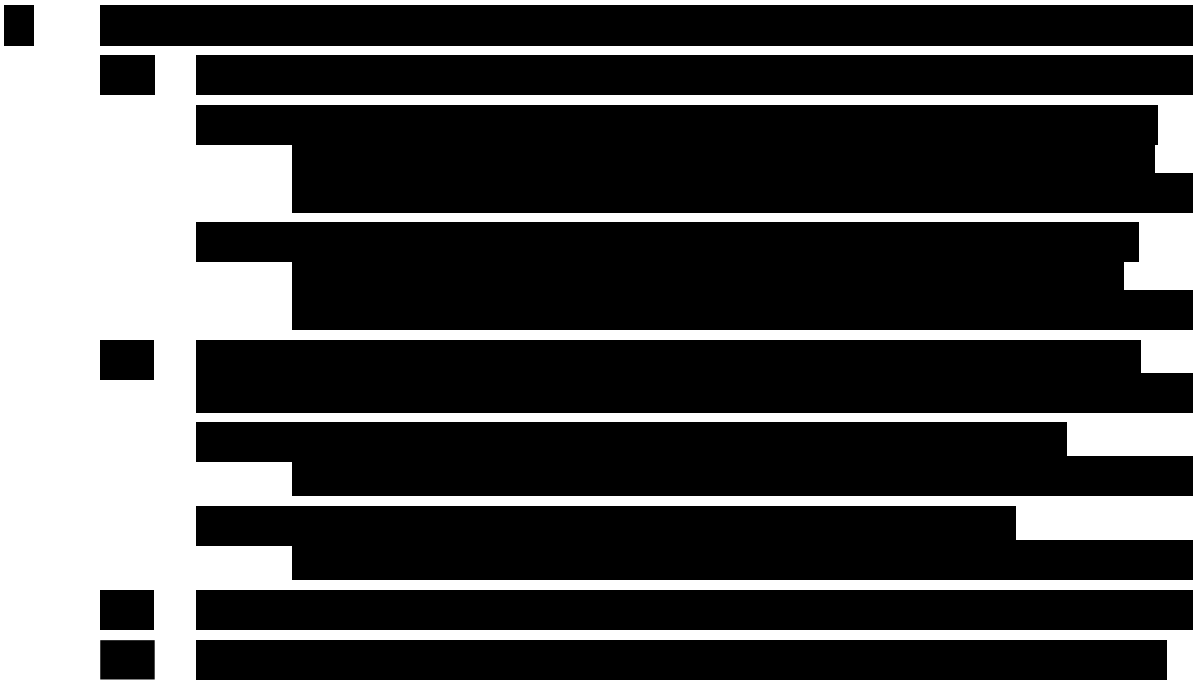

INTRODUCTION

1. Claimants submit this Post Closing Submission ("**Claimants' Post Closing Submission**")[1] pursuant to the Tribunal's instructions at the second hearing dated 3-4 October 2022 for the Parties' Closing Submissions ("**Closing**") that the Parties file written submissions addressing: (*i*) U.S. treaty practice with respect to essential security exceptions worded similarly to Article 22.2(b) of the TPA; and (*ii*) [redacted]

[redacted]

[1] For ease of reference, the Claimants adopt the same definitions contained in Claimants' Memorial on the Merits and Damages dated 15 June 2020 (the "**Memorial**"), Claimants' Reply dated 19 September 2021 (the "**Reply**"), Claimants' Preliminary Response to Colombia's New Essential Security Defense dated 18 April 2022 ("**Claimants' ES Submission**"), Claimants' Post-Hearing Brief dated 21 July 2022 ("**Claimants' PHB**"), and Claimants' Rebuttal on Essential Security dated 13 September 2022 ("**Claimants' ES Rebuttal**"), including the Table of Select Abbreviations and Defined Terms submitted therewith.

[2] *See* **Day 8 Tr.** (Procedural Discussion) 543:7-544:17, 569:5-17.

I. U.S. TREATY PRACTICE CONFIRMS CLAIMANTS' POSITION

2. U.S. Treaty Practice indicates that Article 22.2(b) is a standard provision contained in the U.S. Model BIT that the U.S. includes, generally verbatim, in its investment treaties. As such, if Colombia's interpretation is to be credited, the U.S. has systematically introduced a "*get-out-of-jail-free*" card in nearly all its investment treaties that would allow States to rid themselves of a tribunal's scrutiny and all consequences of their actions the moment the State invokes the provision. Moreover, as Colombia seeks to apply it, any investment in the entire country could lose protection under the TPA on this basis because Colombia considers itself to be "*one of the worst regions and the most dangerous regions*" for investment and investors "*know what* [they're] *doing*" when they invest in Colombia.[3] That would be incompatible with the goal of the TPA, as stated in the preamble and *travaux*, to promote foreign investment by creating a stable economic and legal regime on which investors may rely.

3. But by its plain language, Article 22.2(b) requires that the impugned measures be taken in response to an existing security interest, and not one created *post hoc* for litigation purposes. Here, Colombia has repeatedly confirmed that the alleged transfer of the Meritage Property between [redacted] that motivated the Asset Forfeiture Proceedings, "*could not*" give rise to an essential security interest.[4] Thus, Article 22.2(b) does not apply to this case.

4. But even if it applied, Article 22.2(b) simply provides that "[n]*othing in*" the TPA shall "*preclude*" Colombia from "*applying measures that it considers necessary*" to protect its essential security interests. Colombia argues that the self-judging nature of the provision deprives the Tribunal of jurisdiction or, in the alternative, is a complete defense on liability. Colombia conflates the invocation of the exception with its consequences. The "*self-judging*" nature of the provision merely allows the State to determine what measures to take to protect its essential security interests; it does not impact the consequences the State may face for taking those measures. The consequence of invoking Article 22.2(b) is that the State cannot be "*preclude*[d]" from taking the measures it wants; not absolution from the Tribunal's jurisdiction or liability for breaching other parts of the TPA. That is why the U.S. declared that specifically only the "*invocation*" of Article 22.2(b) is "*non-justiciable*" (with an important exception for good faith); the dispute otherwise must remain reviewable by the Tribunal. In any event, even the invocation of Article 22.2(b) must be reviewed for good faith, a review that Colombia fails.

5. Below Claimants address: (*i*) the contents; and (*ii*) the implications of the U.S.'s submissions.

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[3] **Day 7 Tr.** (Colombia's Closing) 371:19-20; **Day 8 Tr.** (Colombia's Rebuttal) 468:2-4 ("[I]*f you go to a very dangerous region plagued by organized crime and the Cartel of Medellín, you know what you're doing.*").

[4] Respondent's Comments on Claimants' Application, 7 September 2022, p. 8. *See also infra* n. 21, 31.

I.A. The Content Of The U.S.'s Submissions

6. The Tribunal invited the U.S. to submit the relevant excerpts of investment treaties that contained essential security interest exceptions that are similarly worded to the one in the U.S.-Colombia TPA at issue in this Arbitration ("**US Treaty Provisions**"). In so doing, the Tribunal sought to shed light on U.S. treaty practice, in particular with respect to whether or not such provisions are to be considered "*self-judging*".[5] The U.S. submitted excerpts from 17 investment treaties, with largely identical provisions. Such provisions further confirm Claimants' position.

7. The U.S. Treaty Provisions demonstrate that Article 22.2(b) of the TPA is identical to the essential security provision in the 2004 and 2012 U.S. Model BITs, which are consistently featured in the U.S. Treaty Provisions. The only difference is that some U.S. treaties, like the TPA here, contain the clarificatory footnote noting that if invoked, the exception shall apply. As the U.S. has stated, however, this footnote does not change the meaning of the provision; rather, it merely clarifies the meaning of the provision.[6]

8. Accordingly, it is the U.S.—not Colombia—that has a consistent practice of including essential security provisions in its investment treaties. In this respect, the U.S. Treaty Provisions undermine Colombia's argument that Article 22.2(b) is an exceptional provision, included in the TPA specifically to combat drug trafficking.[7] Instead, the U.S. Submission makes clear that Article 22.2(b) is a typical provision that the U.S. includes in its investment treaties with countries all over the world, the majority of which are not afflicted by significant drug trafficking. Conversely, and tellingly, Colombia has signed treaties contemporaneously with the TPA that contain no essential security provisions at all.[8] The inclusion of the provision in the U.S.-Colombia TPA thus does not appear to carry with it an inherent policy objective (contrary to Colombia's suggestion).[9]

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5 *See* **Day 8 Tr.** 543:20-544:9 (Procedural Discussion); **Day 2 Tr.** 388:6-9 (U.S. NDPS).

6 *See* **Day 2 Tr.** 389:2-389:12 (U.S. NDPS) ("*As a general practice, the United States uses the words 'for greater certainty' . . . to introduce confirmation regarding the meaning of the Agreement. In other words,* ***the phrase 'for greater certainty' signals that the text it introduces reflects the understanding of the United States and the other Treaty Party or Parties of what the provisions of the Agreement would mean, even if the text following the phrase were absent***." (emphasis added)).

7 *See* **Day 7 Tr.** 239:9-22 (Colombia's Closing) ("*There's a reason why the State—the two States put that text in the Treaty. Colombia, by the way, if I recall correctly, there are 17 BITs and TPAs in which Colombia has this in its Treaties. And again, there's a reason why, because Colombia is engaged in one of the worst efforts worldwide in relation to narco trafficking and armed and bloody crime. These are some of the worst organizations worldwide, now having relationship with the Hezbollah. I mean, we're talking about extremely serious wrongdoing around the world.*") .

8 *See, e.g.*, **Exhibit CL-069**, Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments (signed 17 March 2006, entry into force 6 October 2009).

9 *See infra* ¶¶ 41-43.

9. As such, the U.S. Treaty Provisions are consistent with Claimants' position on the correct interpretation of Article 22.2(b). If anything, they reinforce Claimants' position, which (unlike Colombia's) has remained consistent throughout this Arbitration:

(a) Article 22.2(b) is inapplicable because Colombia has repeatedly confirmed that its alleged essential security interest arose only *after* Colombia undertook the measures at issue;[10]

(b) Under a proper interpretation of Article 22.2(b) pursuant to the Vienna Convention on the Law of Treaties ("**VCLT**"), Colombia's invocation of Article 22.2(b) neither impacts this Tribunal's jurisdiction nor extinguishes Colombia's liability;[11] and

(c) Colombia has failed to raise the Essential Security Defense in good faith.[12]

10. Below Claimants explain that the U.S. Treaty Provisions either affirmatively confirm or have no impact at all on Claimants' position.

I.B. The U.S. Treaties Confirm That The Essential Security Exception Is Inapplicable Here

11. Article 22.2(b), like the other U.S. Treaty Provisions, allows a State Party to "*apply*[] *measures that it consider***s** *necessary for* [. . .] *the protection of its own essential security interests*."[13] The use of the present tense, which is consistent across all the U.S. Treaty Provisions, means that the Party invoking the provision must have considered the measures in question necessary to its essential security interests at the time such Party applied the measures. The essential security provision is not meant to serve as a *post hoc* justification for the imposition of measures, but as the actual reason for taking the measures.

12. The U.S. has consistently used this wording in all its essential security provisions since at least 2001. Notably, the U.S. has used this language consistently even after the ICJ rendered its 1986 decision against the U.S. in *United States v. Nicaragua*, in which, interpreting an essential security provision,[14] the court concluded that to be covered by the exception in the relevant treaty, the measures "*must have been, **at the time they were taken**, measures necessary to protect its essential security interests*."[15] In that case, the

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[10] *See* Claimants' ES Submission, Section II; Claimants' PHB, Section VI.C; Claimants' ES Rebuttal, Section II; **Exhibit CD-1**, Claimants' Opening Statement, slides 199-200; **Exhibit CD-6**, Claimants' Closing Submission, slides 231-36.

[11] *See* Claimants' ES Submission, Section I; Claimants' PHB, Section VI.A; Claimants' ES Rebuttal, Section III; **Exhibit CD-1**, Claimants' Opening Statement, slides 192-95; **Exhibit CD-6**, Claimants' Closing Submission, slides 237-47.

[12] *See* Claimants' ES Submission, Section III; Claimants' PHB, Section VI.D; Claimants' ES Rebuttal, Section IV; **Exhibit CD-1**, Claimants' Opening Statement, slides 201-204; **Exhibit CD-6**, Claimants' Closing Submission, slides 253-56.

[13] **Exhibit CL-230**, US-Colombia Trade Promotion Agreement (all chapters) (signed 22 November 2006, entry into force 15 May 2012) ("**TPA**"), art. 22.2(b) (emphasis added).

[14] *See* **Exhibit RL-152**, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Judgment of 27 June 1986, p. 115-16, ¶ 221 ("*the present Treaty shall not preclude the application of measures:* [. . .] *(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests*").

[15] **Exhibit RL-152**, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Judgment of 27 June 1986, p. 141, ¶ 281 (finding the "*chronological*

ICJ found that the essential security exception did not apply to the U.S.'s measures where the U.S. President had declared that the U.S.'s security was impacted by Nicaragua only after taking measures against Nicaragua.[16] The ICJ's interpretation has since been consistently upheld by WTO panels, which have only applied the exception to measures taken in response to specific circumstances and facts.[17] It is thus unsurprising that Colombia cannot point to a single court or tribunal (because there is none) that has found that the exception covers measures where the State has uncovered "*new facts*" and "*special circumstances*"[18] after—in this case, several years after—implementing the measures in an attempt to justify them *post hoc* and avoid international liability for its conduct.

13. Colombia's attempt to distinguish the *Nicaragua* case is unpersuasive. Colombia argues that the absence of the "*it considers*" language in the 1965 US-Panama Treaty of Friendship, Commerce and Navigation Treaty ("**FCN Treaty**") renders the *Nicaragua* case inapposite.[19] This argument is fundamentally flawed for two reasons. First, the "*it considers*" language is only relevant to the question of whether or not the treaty is self-judging; it has no bearing on the temporal question of when a party must identify and articulate its essential security concern, which is what the ICJ considered. Colombia conflates these issues, attempting to distinguish the case by focusing on the wrong principle.

14. Second, the fact that the FCN Treaty lacks the "*it considers*" language actually bolsters Claimants' position. In the *Nicaragua* case, the ICJ went through a temporal analysis and concluded that timing was a critical issue in the invocation of the essential security exception even where the text of the treaty was silent on the matter. In the TPA, however, the treaty language expressly indicates that the essential security exception is available only where a party "*considers*" a given measure necessary, *i.e.* in the present tense. Thus, there is an even stronger indication in the TPA that in order for a State's measures to be covered by the essential security exception, the State's essential security purpose must be identified at the time the measures are taken.

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sequence of events" critical because in order for activities "*to be covered by* [an essential security provision] *they must have been, at the time they were taken, measures necessary to protect its essential security interests*." (emphasis added).

16 *See* **Exhibit RL-152**, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Judgment of 27 June 1986, p. 141, ¶ 281 ("*Thus the finding of the President of the United States on 1 May 1985 that 'the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States', even if it be taken as sufficient evidence that that was so,* ***does not justify action by the United States previous to that date***.") (emphasis added).

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

18 **Day 1 Tr.** 253:3-254:2 (Colombia's Opening); Colombia's Opening, slide 234.

19 *See* **Day 7 Tr.** 222:9-12 (Colombia's Opening); **Day 8 Tr.** (Colombia's Rebuttal) 511:9-512:19, 517:1-14.

15. Colombia's attempts to distinguish WTO jurisprudence, by arguing that the GATT provision "*expressly required that the measures be adopted in a certain period of time in order to fulfil the treaty requirements,*"[20] are similarly inapposite. The timing of the measures is not relevant here; what is relevant is when the essential security interest arose. And the essential security interest must arise—logically and under the plain reading of Article 22.2(b), as established by consistent jurisprudence—prior to a Party taking the measures.

16. The U.S. has implicitly confirmed its position on this reading by keeping the language of the provision consistent despite that jurisprudence. This is not only logical, but also serves as an important check on the State's ability to misuse the provision as a "*get-out-jail-free*" card by engaging in fishing expeditions to evade liability by concocting essential security excuses long after taking the measures.

17. This is precisely what Colombia has done here. Colombia acknowledges that it "*could not raise the Exception at the inception of the proceedings*"[21] and "*was not in a position to invoke Article 22.(b) prior to its Rejoinder*"[22] based only on the knowledge it had of the alleged historical transfers of the Meritage Property between [redacted] members (which is what had supposedly prompted Colombia to undertake the Asset Forfeiture Proceedings). Rather, it was only when [redacted] in the course of this Arbitration that they were able to formulate an essential security interest to invoke Article 22.2(b). According to Colombia, the essential security interest arose [redacted] in 2021-2022 for the stated purpose of aiding Colombia's defense in this Arbitration.[24] Colombia has confirmed [redacted] Likewise, Dr. Caro disclaimed any knowledge [redacted] Accordingly, it is undisputed that Colombia did not

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20 Colombia's PHB, ¶ 92 (referring (in n. 137) to the fact that GATT Article XXI(b)(iii) provides that the exception only applies to certain types of measures, which are "*taken **in time** of war or other emergency in international relations*") (emphasis in original); **Day 7 Tr.** 221:4-8 (Colombia's Opening).

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

22 Colombia's PHB, ¶ 98.

23 **Day 1 Tr.** 253:3-254:2 (Colombia's Opening) ("*Now, there are **new facts** and special circumstances* [. . .] *these are **new facts** and new circumstances indeed.* [redacted]

24 [redacted]

25 **Day 1 Tr.** 208:13-14 (Colombia's Opening).

26 [redacted]

"*apply*[] *measures*" to protect its essential security interests as it was not even aware of those "*essential security interests*" until its Rejoinder, over five years after it took the measures.[27]

18. Colombia's sole response to Claimants' argument has been that Colombia is allowed to invoke Article 22.2(b) at any time in the proceedings.[28] But even if that were true—*quod non*[29]—the question of when Colombia can invoke the defense is not at issue here. Rather, the question is whether Colombia can develop an essential security interest *post hoc*, after taking the impugned measures, and then seek to apply Article 22.2(b) to absolve itself. The answer to that question must be no.

19. Accordingly, Dr. Poncet's inquiry about whether "*any measure adopted in the context of this asset forfeiture* [that aims to fight against organized crime]*, by definition,* [is] *something that relates to an Essential Security Interest*"[30] is not at issue here. Colombia already concedes that not every asset forfeiture proceeding, even if it purports to fight organized crime, invokes an essential security interest. In its Counter-Memorial, Colombia had already identified the need to fight drug trafficking as a reason for implementing the Asset Forfeiture Proceedings and has stated that it "*could not raise the Exception*" on just this basis.[31] Indeed, according to Colombia itself, none the reasons for which it claims to have initiated the Asset Forfeiture Proceedings here—including the Property's supposed connection to [redacted], the (false) kidnapping story, the alleged transfers of the land among individuals who supposedly lacked the funds to buy the land—placed Colombia "*in a position to invoke Article 22.(b)*".[32] Accordingly, Colombia does not consider the general goal to fight organized crime, for

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[redacted]

27 *See* Colombia's Opening, slide 123 ("*there are* 'new facts' *and* 'special circumstances' [. . .] *that prompted the invocation of the essential security exception*"); Respondent's Comments on Claimants' Application, 7 September 2022, p. 8 ("[T]*he Respondent did not and could not raise the Exception* [*i.e.*, the Essential Security Defense] *at the inception of the proceedings* [redacted] **Day 1 Tr.** 211:7-9 (Colombia's Opening) ("[T]*hese proceedings were not started* [redacted] *They were started because of Iván López*"), 253:3-254:2 ("*Now, there are new facts and special circumstances. Ms. Herrera Bernal went through that, I will—I will just say one word. . .* [T]*he context is that in Asset Forfeiture Proceedings, regarding* [redacted] *because there was the beginning of the Asset Forfeiture Proceedings. I just say now we know.*") (Colombia's Opening); **Day 4 Tr.** 994:20-995:3 (Caro Cross) ("*Q. And you talk* [redacted] *and others, but this is all information that would not have been available to anybody in 2012 and 2013; correct? A. Yes, that is correct, because the progressive nature of the investigation establishes it in that fashion.*").

28 *See* Colombia's PHB, ¶ 90; **Day 8 Tr.** 513:6-8 (Colombia's Rebuttal) ("*And also the time limit—there is, as you will see, Article 22.2 does not have any time limit*.").

29 *See* Claimants' ES Submission, Section II; Claimants' PHB, Section VI.C; Claimants' ES Rebuttal, Section II (explaining that Colombia has invoked this affirmative defense in an untimely manner).

30 **Day 8 Tr.** (Claimants' Rebuttal) 419:4-6.

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

32 Colombia's PHB, ¶ 98.

which Colombia claims to have undertaken the Asset Forfeiture Proceedings,[33] to be sufficient to give rise to an essential security interest. [redacted]

20. Colombia has not claimed that every asset forfeiture is protected by the essential security provision because the TPA does not grant such a broad carve out. As Colombia avers, the country, and Medellín in particular, has long been plagued by drug trafficking and associated violent criminal activity.[35] The protections in the TPA would be worthless if Colombia could use its history as a basis to ward off any challenges to measures taken in relation to investments made in Medellín or indeed the real estate sector in Colombia. That would contravene the very reason the US and Colombian entered into the TPA—to provide a path forward for Colombia to move past its history of drug trafficking by creating an inviting and stable environment for foreign investment.[36]

21. Realizing the fatal flaw in its argument, at the Closing, Colombia appeared to float yet another argument—that the measure had a "*continuous nature*" as the Asset Forfeiture Proceedings were ongoing and accordingly "*you have to take into account the evolution of the facts*".[37] But that is an astounding concession. Essentially, Colombia's case now is that it could take Claimants' investment without any basis at the time and then hold it for years until it finds some reason to justify its taking. That cannot be how the U.S. intended parties to apply Article 22.2(b). Colombia must have a basis for taking the measure in the first place. In this regard, the disputed measure at issue here is the improper initiation of the Asset Forfeiture Proceedings without regard for Claimants' good faith status, which shut down the Project and has permanently deprived Claimants of the value of their investment.[38] Thus, it is Colombia's basis for initiating, not continuing, the Proceedings that is at issue here. In any event, according to Colombia, the reason that the Proceedings have stalled for over six years in Colombian courts is the apparent scarcity of judges and the COVID-19 pandemic.[39]

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33 *See* Counter Memorial, ¶¶ 303, 428, 472.

34 *See* Rejoinder, ¶ 46.

35 *See* **Day 7 Tr.** (Colombia's Closing) 371:19-20; **Day 8 Tr.** (Colombia's Rebuttal) 466:20-467:5, 468:2-4.

36 *See* **Exhibit CL-230**, TPA, prmbl. ("*The Government of the United States of America and the Government of the Republic of Colombia, resolved to:* [. . .] ***PROMOTE*** *broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production*") (emphasis in original). *See also* Claimants' PHB, ¶ 301(c); Colombia's PHB, ¶ 42, n. 36; **Day 1 Tr.** 247:3-8 (Colombia's Opening); Claimants' ES Rebuttal, ¶ 18.

37 **Day 7 Tr.** 221:19-20 (Colombia's Closing).

38 *See* **Day 7 Tr.** 109:1-6 (Claimants' Closing) ("*In sum, the initiation of the Asset Forfeiture Proceedings against the Meritage Project, without any rational policy purpose, violated the FET protection in Article 10.5 of the TPA: And It's also a reason why this is an indirect expropriation under Article 10.7.1(a) of the TPA.*"). *See also* Memorial, Section V; Reply, Section V; Claimants' PHB, Section III.

39 *See* **Day 4 Tr.** 1028:3-15 (Caro Redirect) ("*Q. Mr. Caro, you have been asked with respect to--about the duration of proceedings; and, in that regard, bearing in mind the COVID situation, what impact has that had in Colombia? A. These*

22. To be clear, Claimants are not challenging the Asset Forfeiture Law itself. In fact, had Colombia properly applied the Law, it would have assessed and recognized Claimants' good faith status before seizing and declaring forfeiture over the entire Project. It did not, and accordingly Colombia's abusive application of the Asset Forfeiture Law forms the basis for Claimants' claims here. Colombia's "*new facts*" and "*circumstances*" which were discovered for and during this Arbitration—not as a result of any investigation stemming from the Asset Forfeiture Proceedings—cannot retroactively justify Colombia's failure to even consider Claimants' good faith, much less its sweeping decision to halt and end the Project rather than apply the Law properly and seize the illicit proceeds gained from the transfer of the Property.

23. In sum, the U.S. Treaty Provisions, by consistently using the word "*considers*", in its present tense, confirm that a State must take a measure for an essential security purpose existing at the time of the measure. As Colombia has repeatedly acknowledged that its essential security interest did not arise until it filed its Rejoinder, it cannot retroactively invoke Article 22.2(b). Simply put, on Colombia's own case, Article 22.2(b) cannot apply here.

I.C. The U.S. Treaty Provisions Confirm That Invoking Essential Security Does Not Void Jurisdiction or Liability

24. The U.S. Treaty Provisions do not disturb Claimants' position that Colombia's invocation of Article 22.2(b) neither impacts this Tribunal's jurisdiction nor extinguishes Colombia's liability. Claimants have set out their position out in detail under VCLT Article 31, including on: (*i*) the ordinary meaning of Article 22.2(b); (*ii*) in its context; and (*iii*) in light of its object and purpose. Claimants have also explained that: (*iv*) the *travaux preparatoires* do not impact their interpretation; and there is no (*v*) "*subsequent* agreement" between the U.S. and Colombia here that can change the meaning of Article 22.2(b), as interpreted under VCLT Article 31. Below Claimants address how the U.S. Treaty Provisions support each of these arguments.

I.C.1. The U.S. Treaty Provisions Confirm The Ordinary Meaning Of Article 22.2(b)

25. As Claimants have set out in their submissions, the ordinary meaning of Article 22.2(b), including its footnote, simply limits this Tribunal's ability to "*preclude*" Colombia from taking measures it considers are necessary for its essential security.[40] This means that while the Tribunal cannot provide restitutive relief, it can (and, in this case, should) order Colombia to compensate Claimants for its breaches of the TPA.[41] The ordinary meaning of Article 22.2(b) makes clear that it is aimed at preserving the State's

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are aspects to be taken into account, first of all, we have the complexity of the case toward the temporal nature of the case. Second, COVID-19 clearly obviously delayed the proceedings or the progress in judicial proceedings, but we should also bear something else in mind, and that is the following: Judges are only for all of Colombia. Each judge may have about 200 cases, and a Tribunal may have about 80 cases."). *See also* **Day 7 Tr.** 339:4-20 (Colombia Closing).

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

[41] *See* Claimants' ES Submission, ¶¶ 2, 9, 11, 15, 17, 30, 69, 77; Claimants' PHB, ¶¶ 15, 298(a), 301(a), 301(b)(ii), 308; Claimants' ES Rebuttal, ¶¶ 15, 20.

ability to take measures it considers necessary, not shielding it from having to compensate investors when those measures breach the TPA.

26. Colombia's main response has been to harp on the "*self judging*" nature of Article 22.2(b). This is also what prompted the Tribunal's request for the U.S. Treaty Provisions, and accordingly merits a closer examination.

27. A self-judging provision allows a State to determine for itself which measures it requires for a stated goal. Here, Colombia argues that Article 22.2(b) is self-judging because it allows the State to adopt measures "*it considers necessary*" for the protection of its essential security interests.[42] However, Claimants are not disputing whether Article 22.2(b) is self-judging. That question is irrelevant to the analysis of the consequences of invoking Article 22.2(b). As Claimants have explained, while a provision's self-judging nature may be relevant to the question of whether the State has properly invoked it, the provision has no impact at all on the consequence of the State's invocation.[43]

28. Colombia however conflates the question of whether Article 22.2(b) is self-judging with whether it allows Colombia to escape liability and this Tribunal's review. This is why, when faced with Dr. Poncet's question about the applicability of *Eco Oro* (which opines specifically on the consequence of invoking an exception provision),[44] Colombia simply replied that the provision in *Eco Oro* was not self-judging.[45] Yet nowhere in the *Eco Oro* decision does that tribunal rely on the non-self-judging nature of the clause there to find that Colombia must be liable for its breaches of the Treaty.[46] Indeed, the *Eco Oro* tribunal found that Colombia had properly invoked the exception as it had taken the measures for the protection of its environment in that case.[47] Still, Colombia was liable for damages because, despite applying the exception properly, Colombia had failed to comply with its other obligations under the TPA in respect of the investors in that case. Accordingly, while "*it cannot be prohibited from adopting or enforcing*" those measures, Colombia had to compensate the investors.[48] Whether those measures were necessary for the

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42 *See* **Day 8 Tr.** (Colombia's Rebuttal) 495:1-6 ("*Now, the self-judging is important because it says 'it considers.'*"), 496:14-17.

43 *See* Claimants' PHB, ¶ 303; Claimants' ES Rebuttal, ¶¶ 17, 29; **Day 1 Tr.** 137:11-20 (Claimants' Opening); **Day 7 Tr.** 179:17-21, 182:1-5 (Claimants' Closing); **Day 8 Tr.** 399:16-402:18, 417:11-21 (Claimants' Rebuttal).

44 *See* **Exhibit CL-217**, Canada-Colombia Free Trade Agreement, Chapter 22 (signed 21 November 2008, entry into force 15 August 2011), art. 2201(3) ("[N]*othing in this agreement shall be construed to prevent a Party from adopting or enforcing measures necessary* [. . .] *to protect human, animal or plant life or health*").

45 *See* **Day 8 Tr.** 510:14-20 (Colombia's Rebuttal) (stating, in reference to the treaty provision at play in *Eco Oro*, "*It doesn't say 'it considers.' You do not have that very important language . . . It doesn't have the 'it considers,' so it's not self-judging*.")

46 *See* **Exhibit CL-175**, *Eco Oro Minerals Corp. v. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶¶ 623-699, 743-821, 826-837.

47 *See* **Exhibit CL-175**, *Eco Oro Minerals Corp. v. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 636.

48 **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 836 ("***Whilst the Tribunal accepts that the State cannot be prohibited from adopting or enforcing an environmental measure in accordance with Article 2201(3),***

stated goal, and the *Eco Oro* tribunal accepted that they were, did not impact that tribunal's decision that Colombia was liable for breaching that treaty.

29. It is worth noting that where States have intended to void jurisdiction and liability upon invocation of an essential security provision, they have done so expressly, and not relied on the self-judging nature of the clause (which has no logical or textual connection to the consequence of invoking the exception, as discussed above). For example, the **Singapore-India** Comprehensive Economic Cooperation Agreement ("**CECA**") provides that:

> [W]*here the disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a security exception as set out in Article 6.12 of the Agreement, any discussion of the disputing Party taken on such security consideration shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal*.[49]

30. None of the U.S. Treaty Provisions include such language. This demonstrates that the U.S. Treaty Provisions do not intend to have such a wide-reaching impact, as they could have adopted such express language carving out jurisdiction and liability but did not do so. Even the in the U.S.-Singapore FTA lacks such language indicating the U.S.'s reticence to adopt it.

31. Article 22.2(b)'s ordinary meaning, as advanced by Claimants, is also consistent with the principle of *effet utile*. The principle of *effet utile* stands for the basic proposition that the interpreter must give provisions "*their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text*".[50] This is precisely what Claimants' interpretation does. Claimants' interpretation takes into account the ordinary meaning of every word of Article 22.2(b), in a manner that reduces conflict between the provision and the rest of the TPA. By contrast, Colombia's proposed interpretation forces into conflict

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it cannot accept Canada's statement that in such circumstances payment of compensation is not required*. This does not comport with the ordinary meaning of the Article when construed in the context of the FTA as a whole and specifically in the context of Chapter Eight.*" (emphasis added). *See also Id.* at ¶ 832 ("*Colombia also provided no justification as to why it is necessary for the protection of the environment not to offer compensation to an investor for any loss suffered as a result of measures taken by Colombia to protect the environment, nor explained how such a construction would support the protection of investment in addition to the protection of the environment.*"), ¶ 833 ("*To be an exception to Chapter Eight must equally mean there are applicable provisions in Chapter Eight, such that there must be circumstances in which an investor needs to seek recourse to arbitration with respect to a measure which comes with the meaning of Article 2210(3)* [sic]*, which can only be to claim compensation for losses suffered as a result of such measure.*"), ¶ 837 ("*Accordingly,* ***the Tribunal does not find that Article 2201(3) operates to exclude Colombia's liability to pay compensation to Eco Oro for its damages suffered as a result of Colombia's breach*** *of Article 805*").

[49] **Exhibit CL-210**, India-Singapore Comprehensive Economic Cooperation Agreement (signed 29 June 2005, entry into force 1 August 2005), Annex 5 (emphasis added). *See* Claimants' ES Submission, ¶¶ 21-22; Claimants' ES Rebuttal, n. 50.

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

Chapters 10 and 22, and deprives Chapter 10 of all meaning at the cost of Article 22.2(b). Any conflict, however, is obviated if Article 22.2 is given its ordinary meaning, which does not automatically give the respondent State in an arbitration unilateral power to divest Chapter 10 of all effect, thus further weighing in favor of adopting the plain meaning of Article 22.2.

32. Indeed, Colombia cannot and has not identified any alleged absurdity or impossibility that would arise from an interpretation that the Tribunal is precluded from ordering restitutive relief but retains jurisdiction to order compensatory relief.[51] Instead Colombia's argument with respect to *effet utile* remains fixated on its contention that "*the self-judging character of Article 22.2(b) must be recognized and applied*."[52] As repeatedly noted by Claimants, the self-judging nature of Article 22.2 does not impact the consequences of invoking the Article, only the circumstances under which Colombia can invoke it.[53]

33. Likewise, the caselaw relied upon by Colombia only confirms that "*provisions similar to Article 22.2(b) of the TPA are self-judging in nature*."[54] Whether a treaty is self-judging does not obviate jurisdiction or liability. The case law relied on by Colombia only goes so far as to confirm that the language "*it considers necessary*" reflects the Contracting States' intention for the relevant exception clauses to be self-judging and not whether the exception clauses prevent a tribunal from ordering compensatory relief. For example, the tribunals in *CMS v. Argentina*, *El Paso v. Argentina*, and *Mobil v. Argentina* analyzed Article XI of the Argentina-US BIT and concluded in each case that the BIT was not self-judging and further that Argentina could not invoke the exception because it contributed to creating the situation of necessity at issue.[55] These tribunals did not opine on whether, if the Article XI applied, it would prevent an order of compensatory relief.[56]

34. In sum, the U.S. Treaty Provisions do nothing to further Colombia's conflation of the "*self judging*" nature of the provision with the consequences of its invocation. Whether or not the Treaty is self-judging, the ordinary meaning of Article 22.2(b) only ensures that the Tribunal does not "*preclude*" or prevent Colombia from adopting certain measures—it does not discuss jurisdiction, liability or the right to

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51 *See generally*, Colombia's PHB, ¶ 44.

52 Colombia's PHB, ¶ 44.

53 *See supra* ¶¶ 26-28.

54 Colombia's PHB, ¶ 45.

55 *See* **Exhibit RL-174**, *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 589-610, 656; **Exhibit RL-163**, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶ 329, 373-74; **Exhibit RL-177**, *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, ¶¶ 1048-56, 1124.

56 *See* **Exhibit RL-174**, *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 589-670; **Exhibit CL-163**, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶ 350-74; **Exhibit RL-177**, *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, ¶¶ 1037-1071, 1105-1125.

compensation. This interpretation is supported by the context and object and purpose of the TPA, as discussed below.

I.C.2. The U.S. Treaty Provisions Confirm That The Context Of Article 22.2(b) Supports Claimants' Interpretation

35. Claimant's reading is also supported by the context given that provisions of the TPA that exclude liability and jurisdiction do so in express terms.[57]

36. The only contextual argument that Colombia raises in support of its position is that Article 22.2(b) resides in the "*Exceptions*" chapter. According to Colombia this must mean that upon invoking Article 22.2(b), Colombia is exempted from its obligations under the remainder of the Treaty. This argument fails for the following reasons.

37. First, Colombia's reading is not supported by the ordinary meaning of the word "*exception*", which means when "*something is not included in a rule, group, or list*".[58] It is not a synonym of the word "*exemption*", which means "*to excuse someone or something from a duty*".[59] Accordingly, the mere placement of Article 22.2(b) in the Exceptions chapter merely confirms that if the State invokes the provision, it cannot be "*preclude*[d]" from implementing the impugned measures, which is an "*exception*" to the general rule that allows investment tribunals to award restitution (or trade panels to order withdrawal of trade measures).

38. Indeed, the *Eco Oro* tribunal similarly interpreted a provision that was located within the "*Exceptions*" chapter of the Canada-Colombia FTA[60] and also provided that "[n]*othing in the Agreement shall be construed*" to "*prevent*" Colombia from taking environmental measures.

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[57] *See* Claimants' Essential Security Submission, ¶¶ 18-20, referring to **Exhibit CL-230**, TPA, art. 10.18.1 ("[n]*o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach*"), Annex 10-E (the "*claimant may not submit*" certain claims "*to arbitration until one year after the events that gave rise to the claim*"), art. 10.18.2 ("[n]*o claim may be submitted to arbitration under this Section unless*" the claimant "*consents in writing*" and submits a written waiver "*of any right to initiate or continue before any administrative tribunal or court*"), n. 2 to art. 10.4 (providing that the MFN protection in the TPA "*does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreement*"), art. 10.7.5 (noting that the expropriation "*Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights*"), and Annex 10-B ("*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*").

[58] **Exhibit CL-227**, Cambridge English Dictionary, Definition of "*exception*," available at https://dictionary.cambridge.org/us/dictionary/english/exception, p. 1.

[59] **Exhibit CL-228**, Cambridge English Dictionary, Definition of "*exempt*," *available at* https://dictionary.cambridge.org/us/dictionary/english/exempt, p. 1.

[60] *See* **Exhibit CL-217**, Canada-Colombia Free Trade Agreement, Chapter 22 (signed 21 November 2008, entry into force 15 August 2011) (entitled "*Exceptions*").

39. Second, the U.S. Treaty Provisions undermine Colombia's argument because the same provisions are found both in BITs (which lack Exceptions chapters)[61] and in free trade or trade protection agreements (which include such chapters).[62] If all the similarly worded U.S. Treaty Provisions are to be applied in the same way, then the presence in an "*Exceptions*" chapter cannot change their meaning.

40. Accordingly, Colombia's arguments regarding the placement of the provision in the Exceptions chapter are unavailing. Rather, the context of the TPA, which includes express carve outs of jurisdiction and liability when it intends to so, support the ordinary meaning of Article 22.2(b).

I.C.3. The U.S. Treaty Provisions Confirm That The TPA's Object And Purpose Support Claimants' Reading of Article 22.2(b)

41. Claimants reading of Article 22.2(b) is supported by the object and purpose of the TPA, which is to promote economic development and provide alternative economic alternatives to drug crop production, which is precisely what Claimants' investment aimed to do.[63]

42. Colombia, on the other hand, has focused exclusively on the TPA's goal of combating drug crop production (to the exclusion of the mutually supportive goal of economic development) to argue that Article 22.2(b) must be read in a manner that requires complete capitulation by this Tribunal to Colombia's invocation of the provision.[64] Indeed, Colombia's position during the Closing devolved to representing Colombia as such a dangerous haven for drug traffickers and money launders that it should have effectively put off any foreigner from investing in the country.[65] This position is untenable, as it negates the fundamental purpose of the TPA.

43. Colombia's singular emphasis on combating drug production, moreover, is undermined by U.S. Treaty Provisions which are consistently present in a range of countries, most of which do not share Colombia's history. Colombia has acknowledged that the provision was "*unique*" among Colombian treaties.[66]

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61 *See* US Submission, p. 3 (demonstrating that identical provisions appear in the US-Rwanda BIT, the US-Uruguay BIT, the US-Mozambique BIT, and the US-Bahrain BIT).

62 *See* US Submission, pp. 3-5 (demonstrating that identical provisions appear in the United States-Mexico-Canada Agreement, the US-Panama TPA, the US-Korea FTA, the US-Peru FTA, the Dominican Republic-Central America FTA, the US-Oman FTA, the US-Bahrain FTA, the US-Morocco FTA, the US-Australia FTA, the US-Chile FTA, and the US-Singapore FTA).

63 *See* Claimants' PHB, ¶¶ 34(b), 301(c); Claimants' ES Rebuttal, ¶ 18; **Day 1 Tr.** 247:5-8.

64 *See* Rejoinder, Section II; Colombia's PHB, Section II.A; **Day 1 Tr.** 244:13-268:15 (Colombia's Opening); **Day 2 Tr.** 416:5-417:16 (Colombia Reply to NDPS); **Day 7 Tr.** 223:4-22, 224:15-225:6, 228:13-231:8, 235:1-4, 236:9-20, 237:20-239:7 (Colombia's Closing).

65 *See* **Day 7 Tr.** 371:19-20 (Colombia's Closing) ("*they are investing in* ***one of the worst regions and the most dangerous regions***" (emphasis added)); **Day 8 Tr.** 465:2-6 (Colombia's Rebuttal) ("*The point is that when you do attempt to invest in a region which is plagued by violence and by organized crime, the least you should do is that you should engage in due diligence and to know where you're going essentially.*"), 466:20-467:3, 468: 2-4.

66 *See* **Day 8 Tr.** 516:1-4 (Colombia's Rebuttal) (" *this provision that you have in front of you is exceptional, it's quite unique*"), 516:16-517:1 *("ARBITRATOR PONCET:* [. . .] *So, you're saying it's unique to Colombia or are you saying it's unique, period? MS BANIFATEMI: It's unique to the treaties entered into by Colombia*.").

Indeed, an analysis of Colombian treaty practice exposes the State's inconsistent practice with respect to the nature and scope of exception clauses included in investment instruments.[67] Colombia has not identified any treaties that are in force that contain a similarly worded exception.[68] Rather, the Colombian treaties all include different formulations of exceptions clauses, indicating that Colombia does not approach the exceptions clause with any specific policy purpose in mind. Had it been so vital to Colombia to maintain a get-out-jail-free card with respect to any investment in an area of Colombia previously impacted by drug trafficking (i.e. all of Medellín and certain other parts of the country), Colombia would either not have entered into agreements granting protections to foreign investors or would have included an exemption clause like the one found in the Singapore-India CECA[69] in every single investment treaty it concluded. Colombia has done neither. Instead, Colombia entered into the TPA and wholesale accepted the U.S. Model BIT's language at the time as the template for that TPA. And it is known that the primary goal of the TPA, and indeed all other U.S. treaties with investment protections, is to encourage foreign investment by offering robust protections to investors.[70]

I.C.4. The U.S. Treaty Provisions Do Not Impact The *Travaux*'s Implications

44. As the ordinary meaning of Article 22.2(b) is clear, inquiry into the *travaux* is unnecessary. But even the *travaux* merely highlights the U.S.'s strong desire for investor protections and is silent on the effect of invoking the essential security provision on the Tribunal's jurisdiction or State's liability.[71] Colombia's argument that Article 22.2(b) was included to combat drug trafficking is further undermined by the TPA's *travaux préparatoires*, which demonstrate that throughout the negotiation process, the U.S. repeatedly rejected Colombia's attempts to include a broad public order exception in the Treaty.[72] Accordingly, interpreted under the VCLT, Article 22.2(b) cannot be read to deprive this Tribunal of jurisdiction or absolve Colombia of its wrongdoing.

45. Colombia again conflates the "*self-judging*" nature of the clause with the consequences of its invocation to misconstrue two excerpts from the *travaux*. Colombia points to (i) an excerpt from the *travaux* in which a U.S. delegate provides that "[t]*he invocation of* [the essential security] *exception is not subject to court review*" and (ii) a Colombian delegate opines that "*it is a self judging exception*".[73] These are reflections on the same issue—that the provision is self-judging and accordingly a tribunal cannot review

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67 *See* Rejoinder, ¶¶ 34-35. All of the instruments identified by Colombia were signed **after** the TPA.

68 While the BIT between Colombia and the Republic of Korea includes a similarly worded exception, this treaty has not yet entered into force after being signed in July 2010. *See* **Exhibit RL-228**, Free Trade Agreement between the Republic of Colombia and the Republic of Korea, 21 February 2013.

69 *See supra* ¶ 29.

70 *See, e.g.*, **Exhibit CL-230**, TPA, prmbl.

71 *See* Claimants' PHB, ¶¶ 304-308; Claimants' ES Rebuttal, ¶¶ 24-29; [redacted]

72 *See* [redacted]

73 [redacted]

whether the measures the State took were, in fact, necessary for its stated purpose (and can only review whether the invocation was made on good faith basis, as discussed further below). That is precisely why the U.S. delegate states that only the "*invocation*" of the objection is not subject to review, not that the measures taken by the State are no longer subject to review with respect to whether the measures could be a basis for a liability finding. Neither the provision on its face, nor anything in the *travaux* precludes the Tribunal from reviewing the State's measures. The U.S. Treaty Provisions do nothing to undermine this reading.

I.C.5. The U.S. Treaty Provisions Confirm There Is No Subsequent Agreement On Article 22.2(b)

46. As Claimants have noted, VCLT 31(3)(a)[74] does not convert party submissions offered as legal arguments in the context of a dispute into "*subsequent agreement*" between the treaty parties on the interpretation of a provision.[75] This is because: (*i*) party arguments in a dispute cannot constitute "agreement" on interpretation;[76] (*ii*) the TPA has a specific mechanism to issue authoritative interpretation—through a Free Trade Commission established pursuant to the TPA—which has not taken a view on this provision;[77] and (*iii*) the coincidence of the same interpretation by a Party and Non-Disputing Party submissions cannot modify or amend a treaty provision.[78]

47. Colombia's position on whether or not the U.S. submissions constitute a subsequent agreement under VCLT 31(3)(a) has wavered. Colombia originally argued that "*the fact that the same things would be found in the submissions of the U.S. and Colombia* [. . .] *makes it* [. . .] *a subsequent agreement between the Parties*"[79] but it has since acknowledged, consistent with jurisprudence,[80] that interpretive

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74 "*There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*." **Exhibit CL-187**, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (open for signature 23 May 1969; entry into force 27 January 1980), art. 31(3)(a).

75 *See* Claimants' PHB, ¶¶ 309-18; Claimants' ES Rebuttal, ¶¶ 30-31.

76 *See* **Exhibit CL-168**, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, ¶ 218 ("[A]*n interpretative declaration, as its name indicates, can only interpret the treaty terms; it cannot change their meaning: Unlike interpretation, the subsequent modification of a treaty can hardly be left to informal agreements as the amendment must be on the same legal level as the original treaty as foreseen in the treaty*.").

77 *See* **Exhibit CL-230**, TPA, art. 20.1(3)(c); **Exhibit C-347**, *Colombia TPA Free Trade Commission Outcomes, available at* https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa/free-trade-commission-outcomes. *See also* Claimants' PHB, ¶ 312

78 *See* Claimants' PHB, ¶¶ 309-18; Claimants' ES Rebuttal, ¶¶ 30-31.

79 **Day 7 Tr.** 236:3-7 (Colombia's Closing).

80 *See* **Exhibit CL-168**, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019, ¶ 218; **Exhibit CL-245**, *Muszynianka Spólka z Ograniczona Odpowiedzialnoscia v. Slovak Republic*, PCA Case No. 2017-08, Award, 7 October 2020, ¶¶ 223-25 ("*In the face of such clear text, interpretative declarations pursuant to Article 31(3)(a) of the VCLT cannot be employed as 'a trump card to allow States to offer new interpretations of old treaty language, simply to override unpopular treaty interpretations based on the plain meaning of the terms actually used.'* [. . .] *Under Article 31(3)(a) of the VCLT, subsequent agreements must be considered, together with the context, as interpretative tools only. They may thus clarify the meaning or scope of a treaty provision, but 'cannot modify treaty obligations'—their value is limited to 'interpreting [a] treaty in accordance with the general rule of interpretation of treaties'*."); **Exhibit RL-263**, *Eskosol S.p.A. in*

declarations offered by treaty parties during the course of an arbitration cannot modify the provisions of the TPA.[81] The U.S. Treaty Provisions do not disturb Claimants' position.

48. In any event, Colombia mischaracterizes the U.S.'s NDP submissions in these proceedings. In its oral submissions, the U.S. stated that the "*invocation* [of Article 22.2(b)] *is non-justiciable*", which Colombia falsely equates with its submission that "*the present dispute is non justiciable*".[82] The scope of the U.S.'s submission is much narrower than that of Colombia's, as explained above, and is consistent with what the U.S. delegate provided during negotiations for the TPA.[83]

49. As for the U.S.'s statement in its submission that the invocation of Article 22.2(b) is a defense to the merits, this submission lacks binding, or indeed instructive, value. First, as set out above, the U.S. submission here is not a binding interpretation but a legal argument offered in the context of an ongoing dispute.[84] Second, the U.S. does not provide any support for its submission—as set out above, this position has no textual basis and is not supported by the context, object and purpose, or even the *travaux*.[85] Accordingly, the Tribunal should not give the US's legal submissions here any weight. In similar circumstances, the *Eco Oro* tribunal declined to apply Canada's identical submissions—that if the provision applies, it excuses the State's liability and concomitant obligation to compensate—to its interpretation.[86]

I.D. The U.S. Treaties Confirm That Essential Security Exceptions Must Be Invoked In Good Faith

50. The U.S. Treaty Provisions do not disturb Claimants' argument that Colombia's invocation of Article 22.2(b) is subject to a review by this Tribunal for good faith.

51. The literature and jurisprudence is uniform that a State must invoke an essential security provision in good faith.[87] In fact, the obligation applies to any provision, as VCLT Article 26 provides that States

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liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination, 7 May 2019, ¶ 126.

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

82 Colombia Closing, slide 16 (citing Rejoinder, ¶ 23 and **Day 2 Tr.** 388:15-18 (U.S. NDPS)).

83 *See supra* ¶ 44.

84 *See supra* ¶¶ 46-48.

85 *See supra* ¶¶ 25-43.

86 *See* **Exhibit CL-175**, *Eco Oro Minerals Corp. v. The Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, ¶ 836 ("*Whilst the Tribunal accepts that the State cannot be prohibited from adopting or enforcing an environmental measure in accordance with Article 2201(3),* ***it cannot accept Canada's statement that in such circumstances payment of compensation is not required. This does not comport with the ordinary meaning of the Article*** *when construed in the context of the FTA as a whole and specifically in the context of Chapter Eight.*")

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

must "*perform*[every treaty] *in good faith*".[88] Thus, Colombia cannot escape this obligation, regardless of whether the treaty provision is self-judging.

52. The U.S. Treaty Provisions confirm that Colombia must invoke Article 22.2(b) in good faith. Much of the jurisprudence interpreting the similarly worded GATT provision and related commentary which confirms the good faith obligation had been rendered while the U.S. entered into the treaties listed in its submission.[89] Yet the U.S. did not amend its model BIT, nor the essential security language it included in the BITs to exclude good faith review from the scope of the tribunal's mandate.

53. It is telling that Colombia has reversed its position on whether it needs to act in good faith. Colombia argued in its Rejoinder that "*the Tribunal's scope of review of Colombia's invocation of the exception is strictly circumscribed to an examination of whether the exception* [. . .] *has been invoked in good faith by Colombia*".[90] In its Closing, however, Colombia argued that this was only its position in the alternative and that its primary position is that it does not need to invoke Article 22.2(b) in good faith.[91] Colombia's reversal of its position highlights its trepidation over the review of its invocation of the exception, which was not made in good faith.

54. The facts and circumstances underpinning Colombia's admittedly "*evolving*"[92] rationale for invoking Article 22.2(b) highlights that it has invoked the provision in bad faith.

55. First, Colombia's inability to articulate its rationale for invoking Article 22.2(b) in a consistent manner confirms the pretextual basis on which it has invoked the exception. Colombia's latest explanation for

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to circumvent their obligations" by "*re-labelling* [public welfare] *interests that it had agreed to protect and promote within the system, as 'essential security interests', falling outside the reach of that system.*") , 7.138 ("***The obligation of good faith*** [. . .] ***applies not only to the Member's definition of the essential security interests*** *said to arise from the particular emergency in international relations****, but also, and most importantly, to their connection with the measures at issue.***" (emphases added)); **Exhibit CL-225**, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment, (2020) I.C.J. REPORTS 300, 11 December 2020, ¶ 73 ("*The Court has repeatedly stated that, where a State possesses a discretionary power under a treaty, such a power must be exercised reasonably and in good faith*"); **Exhibit CL-214**, Alexander Orakhelashvili, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW (2008), p. 548 ("*In terms of substance, what we surely know is that the involvement of political factors cannot make these clauses non-justiciable or exempt them from the normal regime of treaty interpretation"*); **Exhibit CL-206**, *Free Zones of Upper Savoy and the District of Gex*, Judgment, 7 June 1932, 1932 P.C.I.J. (Ser. A/B) No. 46, p. 167; **Exhibit CL-234**, Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1987), p. 117.

88 **Exhibit CL-187**, VCLT, art. 26.

89 *See infra* n. 87.

90 Rejoinder, ¶¶ 43, 55 ("*The Respondent thus enjoys full discretion to define what constitutes its essential security interests, to the extent that such definition is done in good faith.*").

91 *See* **Day 7 Tr.** 237:20-238:4 (Colombia's Closing) ("*I will start with the end, which is that, as you will have understood from our submission, we have a series of alternatives: One, it's not justiciable; two, you do not have jurisdiction. In the event that you decide against us that you do have jurisdiction, we are—we have invoked this in good faith and I will address that later on.*"), 240:1-2 ("*So, if Colombia says this is my Essential security, that should be enough.*").

92 *See* **Day 1 Tr.** 259:7-18 (Colombia's Opening).

why it is entitled to rely on Article 22.2(b) is virtually unrecognizable from the explanation initially offered (belated in itself) in its Rejoinder.

(a) [redacted]

(b) After its first rationale for the belated invocation of Article 22.2(b) was debunked by Claimants, Colombia cobbled together a series of alleged "*new facts*" in its next submission that supposedly underpinned its essential security interest.[96] These included allegations that [redacted] had been involved in the prior transfers of the Meritage Property.[97] Claimants, however, pointed out that these were not "*new fact*[s]" as Mr. López Vanegas had made such allegations before the Attorney General's Office in 2014 and 2016, which Colombia had discussed and relied upon in its Counter Memorial, but chosen not to raise as an essential security interest.[98]

(c) [redacted]

93 [redacted]

94 [redacted]

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

97 Colombia's Reply on Essential Security, 18 March 2022, pp. 8-9, 13, 22-23.

98 *See* Claimants' ES Submission, ¶¶ 41-42; Claimants' ES Rebuttal, ¶ 35(b).

99 [redacted]

[redacted]

56. Second, the way in which Colombia has arrived at its newest essential security interest demonstrates that Colombia has not acted in good faith. Two months before its Rejoinder was due, in November 2021, Colombia embarked on a concerted effort to use its law enforcement apparatus to concoct a defense for itself in these proceedings. At this time, Colombia began "*attempting to collect evidence*" against Mr. Seda to determine whether to add him to the list of those "*accused*" of kidnapping López Vanegas's son.[106] The farcical nature of this investigation is obvious—Colombia has repeatedly acknowledged López Vanegas and his son are alleged drug traffickers who fabricated the kidnapping story.[107] And at the time the alleged kidnapping took place, in 2004, Mr. Seda was in the U.S. and had not yet set foot in Latin America—a fact that is easily verified with his passport information.[108]

57. [redacted]

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102 Claimants' PHB, ¶ 39(b).

103 Claimants' PHB, ¶ 39(b).

104 *See infra* ¶¶ 82-85.

105 Respondent's Comments on Claimants' Application, 7 September 2022, p. 8. *See also* Claimant's PHB, ¶¶ 340-42; Claimants' ES Rebuttal, ¶ 35(c). *See also supra* n. 24, 99.

106 Rejoinder, ¶ 425; [redacted]

107 *See* **Exhibit C-067bis**, Letter from Michael J. Burdick to Aimer Fredy Alonso Triana, 21 November 2016; **Exhibit C-167**, Transcript of TeleAntioquia Interview with Claudia Carrasquilla, 6 August 2018 (senior official of the Attorney General's Office notes in a television interview that "*this attempt of* [López Vanegas] *to portray themselves as victims of an alleged kidnapping that never occurred cannot be described as anything other than that.*"); Memorial, ¶ 433; Seda 1 WS, ¶ 122; Reply, ¶ 254; **Exhibit CD-1**, slide 88. At no point in this Arbitration has Colombia commented on this evidence that the kidnapping was feigned. *See* Counter Memorial, ¶ 141.

108 *See* Seda 1 WS, ¶¶ 7-10.

[redacted]

58. Third, Colombia's pretextual and bad faith invocation of Article 22.2(b) is made apparent [redacted]

59. [redacted] Colombia's exhortations of limited prosecutorial resources in light of the absence of any proceedings (criminal or asset forfeiture) against [redacted] thus fall flat. [redacted]

60. Accordingly, Colombia has not invoked Article 22.2(b) in good faith.

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109 [redacted]

111 *See* Claimants' PHB, ¶ 336; Claimants' ES Rebuttal, ¶ 34(a).

112 *See* **Exhibit R-242**, El Tiempo, "Los incómodos nexos de influyentes palmeros con alias Maracuyá", 29 November 2020.

113 *See* **Exhibit C-409**, EL TIEMPO, *The Shadow Of The Mafia Over A Million-Dollar US Lawsuit Against Colombia*, 13 February 2022.

114 *See* "Atención | Fiscalía pidió casa por cárcel en contra del fiscal Daniel Hernández, el llamado fiscal "estrella" del caso Odebrecht," SEMANA, 2 December 2022, available at: https://www.semana.com/nacion/articulo/atencion-fiscalia-pidio-casa-por-carcel-en-contra-del-fiscal-daniel-hernandez-el-llamado-fiscal-estrella-del-caso-odebrecht/202239/.

115 *See infra* ¶¶ 119, 130.

116 *See infra* ¶¶ 17, 55, 57.

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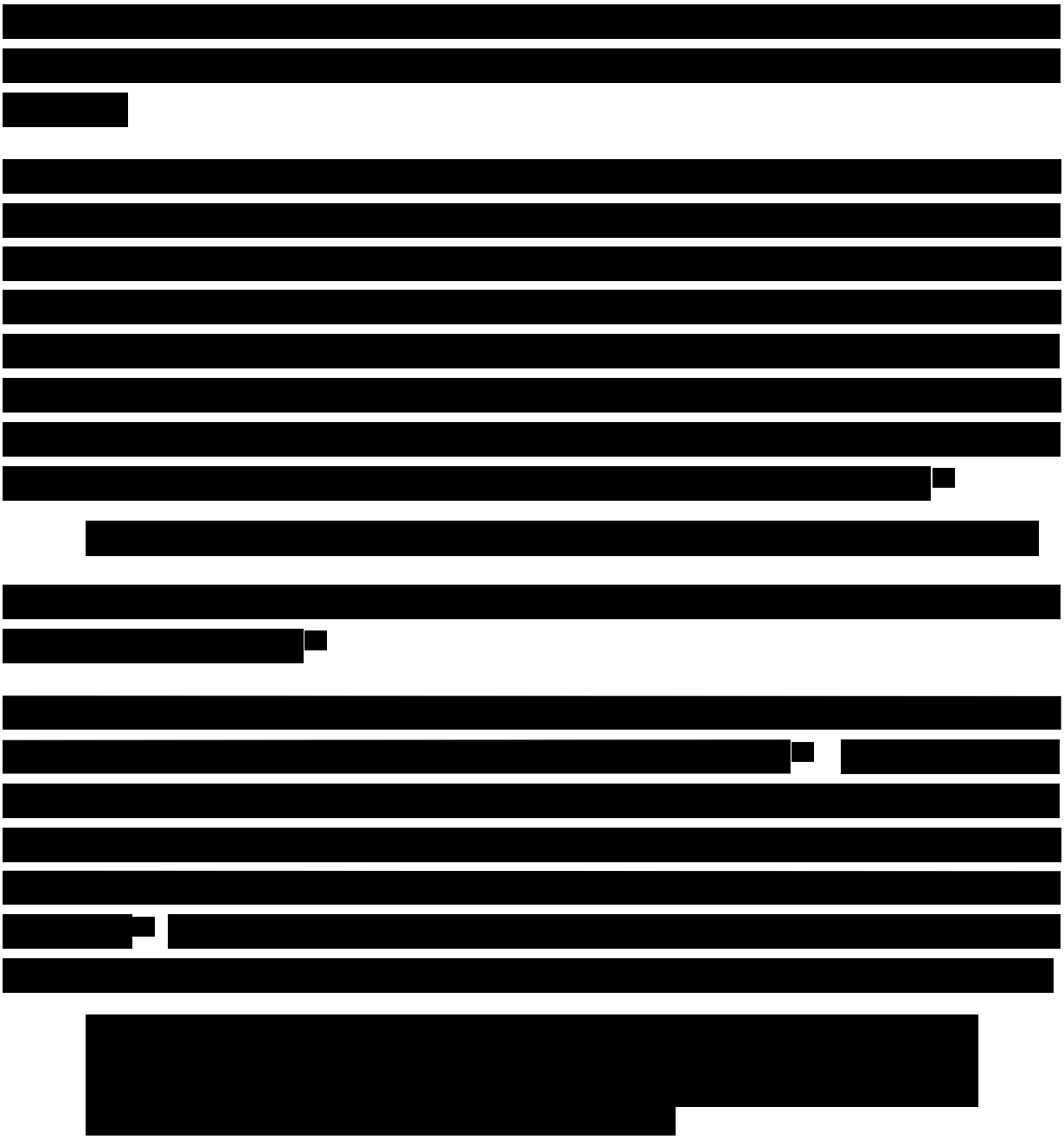

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Dated: 21 December 2022

Respectfully submitted for and on behalf of Claimants

Gibson Dunn & Crutcher LLP

Gibson, Dunn & Crutcher LLP