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' MEMORIAL ON THE MERITS AND DAMAGES

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15 June 2020

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I. INTRODUCTION

1. Angel Samuel Seda, JTE International Investments, LLC, Jonathan M. Foley, Stephen J. Bobeck, Brian Hass, Monte G. Adcock, Justin T. Enbody, Justin T. Caruso and The Boston Enterprises Trust (together, "**Claimants**") submit this Memorial in respect of their claims against the Republic of Colombia ("**Colombia**" or "**Respondent**"), arising from Colombia's expropriation and/or unlawful treatment of Claimants' investment. Claimants submit this Memorial in accordance with Procedural Order No. 1, dated 7 April 2020, and Rule 31 of the International Centre for Settlement of Investment Disputes ("**ICSID**") Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**").

2. Angel Samuel Seda is a citizen of the United States of America.[1] He is the founder, CEO and sole owner of a property development group based in Colombia, Royal Realty S.A.S. ("**Royal Realty**"),[2] and its affiliate companies that manage a variety of property development projects in Latin America. Through Royal Realty, Mr. Seda also owns shares in Newport S.A.S. ("**Newport**")[3] and Luxé by The Charlee S.A.S. ("**Luxé**").[4]

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

[2] **Exhibit C-012bis**, Royal Realty S.A.S. Certificate of Existence and Good Standing, 20 December 2017; **Exhibit C-180**, Royal Realty S.A.S. Share Ledger, 13 December 2016.

[3] **Exhibit C-014bis**, Newport S.A.S. Certificate of Existence and Good Standing, 6 October 2017.

[4] **Exhibit C-249**, Luxé By The Charlee S.A.S. Certificate of Existence and Good Standing, 28 April 2020.

3. Jonathan M. Foley,[5] Stephen J.Bobeck,[6] Brian Hass,[7] Monte G. Adcock,[8] Justin T. Enbody,[9] and Justin T. Caruso[10] are all U.S. citizens. JTE International Investments, LLC ("**JTE International Investments**"), is a company incorporated in the United States, and is wholly owned by Justin T. Enbody.[11] The Boston Enterprises Trust is also incorporated in the United States.[12]

4. JTE International Investments, Jonathan M. Foley, and The Boston Enterprises Trust, hold shares in Newport. The Boston Enterprises Trust, Brian Hass, Stephen J. Bobeck, Monte G. Adcock, Justin T. Enbody, and Justin T. Caruso all hold shares in Luxé.

5. The Memorial is submitted together with:

   (a) A witness statement by Mr. Seda dated 15 June 2020 ("**Seda Witness Statement**");

   (b) A witness statement by Felipe López Montoya, Vice President of Construction at Royal Property Group, dated 15 June 2020 ("**López Montoya Witness Statement**");

   (c) An expert report on Colombian law by Carlos E. Medellín Becerra, former Minister of Justice and Law of Colombia, dated 15 June 2020 (the "**Medellín Expert Report**");

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[5] *See* **Exhibit C-200**, United States Passport of Jonathan Foley, 7 October 2015.

[6] *See* **Exhibit C-085**, United States Passport of Stephen Bobeck, 16 March 2007.

[7] *See* **Exhibit C-136**, United States Passport of Brian Hass, 3 October 2014.

[8] *See* **Exhibit C-076**, United States Passport of Monte Adcock, 1 September 2000.

[9] *See* **Exhibit C-082**, United States Passport of Justin Enbody, 20 May 2005.

[10] *See* **Exhibit C-184**, United States Passport of Justin Caruso, 8 February 2017.

[11] *See* **Exhibit C-107**, JTE International Investments, LLC Certificate of Formation, 23 May 2013.

[12] *See* **Exhibit C-215**, The Boston Enterprises Trust Formation Instrument, 9 August 2018.

(d) An expert report on Colombian law by Wilson A. Martínez Sánchez, former Deputy Attorney General ("*Vicefiscal General*") of Colombia, (the "**Martínez Expert Report**"); and

(e) An expert report on damages by Daniela M. Bambaci and Santiago Dellepiane A. of BRG, dated 15 June 2020 (the "**BRG Expert Report**").

6. Claimants reserve the right to expand upon the facts and legal arguments set out in this Memorial on the discovery of new evidence and/or to respond to any defenses asserted by Colombia. Claimants also reserve the right to produce further documentary, witness, and expert evidence to supplement and support the claims made in this Memorial**.**

II. EXECUTIVE SUMMARY

7. This case involves a straightforward expropriation without compensation. There can be no dispute that in January 2017, Colombia illegally confiscated the Meritage Project—a large real estate development project just outside of Medellín that was to be comprised of 23 towers of over 400 units, dozens of commercial storefronts, and almost 100 houses. At the time of the expropriation, construction of seven towers was substantially advanced and over 150 units had been sold (generating revenues of over USD 34 million).[13] 700 people were working on the construction of the project, all of whom were forced to stop. As a result of the expropriation, Mr. Seda and a number of the Claimants immediately lost their investment (through their investment vehicle Newport) in the Meritage Project. They were not provided with a shred of compensation.

8. Colombia's actions went beyond simply expropriating the Meritage Project. They were unreasonable, arbitrary, unfair and discriminatory towards Claimants' investments. And Colombia's actions tainted Mr. Seda and his carefully curated hospitality and real estate development brand, such that Mr. Seda's other real estate development projects in Colombia—in which a number of Claimants had also invested—felt an immediate adverse impact. Mr. Seda's reputation as a lifestyle brand developer was premised on his market-leading hotel, The Charlee. Shortly after choosing Colombia as the ideal location to invest, Mr. Seda built The Charlee hotel over the course of 2009-2010. The Charlee quickly gained national and international acclaim and is widely viewed as one of the top hotels in Medellín. It has been

[13] Monetary amounts in Colombian Pesos (COP) have been converted to US Dollars (USD) using contemporaneous yearly average conversion rates from the Central Bank of Colombia, rounded to the nearest million.

featured in The New York Times, Condé Nast, Vogue Travel and publications of similar renown.

9. Mr. Seda's other projects that were affected by Colombia's actions include the Luxé development—a substantially completed real estate development (with a 116-room hotel, 45 houses, 17 residential lots, 18 apartments and substantial amenities)—for which financing was pulled shortly after the Meritage Project's expropriation. Mr. Seda had several other projects in Colombia at various stages of development. Those projects also lost all prospect of being developed as a result of the expropriation of the Meritage Project.

10. Colombia's actions had such a devastating effect on Claimants' broader investment portfolio due to the manner in which Colombia took the Meritage Project. In taking the Meritage, Colombia egregiously misused its Asset Forfeiture Law—which allows the Government to take property or proceeds generated from illicit activity—for what appears to be corrupt purposes. The Asset Forfeiture Law allows for the Government to seize property owned by a drug trafficker on the theory that funds from the drug trafficking may have been used to buy the land and nobody should be allowed to profit knowingly from the fruits of those illicit funds. But—importantly—a cornerstone of the law is that it protects those who may acquire an interest in or purchase a tainted asset as long as they act in "*good faith without fault*." As such, before buying any property, purchasers generally conduct diligence on the title and owners to ensure that it is "*clean*." Conducting such diligence, in itself, protects investors in property as it establishes them as qualified good faith parties who are immune from asset forfeiture proceedings. Dr. Carlos Medellín—the former Minister of Justice and Law of Colombia and one of the fathers of the original Asset Forfeiture Law—has submitted an expert report explaining the background of the Asset Forfeiture Law. And Dr. Wilson Martínez, a former

Deputy Attorney General and primary drafter of the Asset Forfeiture Law at issue in this case, has also submitted a report explaining how the law is meant to be applied. Both find that the law—and, in particular, the concept of qualified good faith—was misapplied here.

11. There was no legitimate basis for the taking of the Meritage Project. The original basis given for Colombia's taking was a false story told to the Attorney General's Office by a drug trafficker, Iván López Vanegas. Upon returning to Colombia after having been extradited and jailed in the United States, and then having been released from jail after successfully appealing his conviction on jurisdictional grounds, Mr. López Vanegas sought to extort Mr. Seda for substantial payments. Mr. López Vanegas approached Mr. Seda in 2014 alleging that in 2004—a decade earlier and eight years after Mr. Seda acquired an interest in the property—his son had been kidnapped and forced to transfer the property. He demanded a payoff. When Mr. Seda spurned his extortion demand, Mr. López Vanegas returned two years later, this time with a lawyer, Victor Mosquera Marín. They threatened to cause trouble for the Meritage Project with the assistance of individuals within the Attorney General's Office if Mr. Seda failed to pay them the money they were demanding. Mr. Seda refused to be extorted, especially since he had done nothing wrong.

12. But Mr. López Vanegas made good on his threats. Despite senior Colombian government officials—and the U.S. government—acknowledging that López Vanegas's kidnapping story was fabricated, the Colombian Attorney General's Office issued "*precautionary measures*" against the property. On 3 August 2016, just days after the extortionists told Mr. Seda that the "*negotiation chapter is closed*," representatives of the Colombian government, including Ms. Alejandra Ardila Polo, the prosecutor assigned to the case, appeared at the property to stop

construction. Mr. López Montoya, who was responsible for overseeing construction of the Project, and was present on site that day, testifies to these events, among others.

13. Mr. Seda was repeatedly told by proxies of the Colombian government and Mr. López Vanegas, both before and after the precautionary measures, that the problem would "*go away*" if he made a payment. By November 2016, Mr. López Vanegas and the Attorney General's Office were seeking a payment of approximately USD 19 million. It is therefore unsurprising that the Director of the Asset Forfeiture Unit—Ms. Andrea Malagón Medina—and the prosecutor assigned to the case—Ms. Ardila Polo—are currently being investigated for corruption. Mr. Seda would not pay a bribe and refused to be extorted. He expected that the rule of law would prevail. But Mr. Seda was wrong. On 25 January 2017, the Attorney General's Office formally issued a resolution to pursue asset forfeiture proceedings over the Meritage Project. Mr. Seda provides a full account of the relevant events in his witness statement.

14. Colombia's basis for commencing asset forfeiture proceedings continued to evolve; no doubt Colombia has realized that it could no longer rely on the blatantly false kidnapping story that initially caused the prosecutor to act. The evolving nature of Colombia's rationale is itself arbitrary conduct and fails to accord Claimants due process. But, in any event, all of the different explanations given by the Attorney General's Office are fundamentally flawed. They all fail to appreciate that Newport is a qualified good faith party that is protected by the law.

15. Newport had engaged one of Colombia's leading fiduciaries, Corficolombiana, to administer the Project (as required by Colombian law if receiving deposits from 20 or more persons), and had obtained a legal study of the title by a leading Colombian law firm specializing in real

estate matters, Otero & Palacio. They both undertook rigorous diligence of the property and cleared the title. Most importantly, given the scale of the investment, Corficolombiana took the extraordinary step of writing to the Attorney General's Office to confirm that there were no concerns with the prior title-holders of the property. In so doing, Corficolombiana made clear that the specific purpose of seeking such information was to gain comfort before moving forward with acquiring the property. The Attorney General's Office wrote back and confirmed that there was "*no record*" of criminal cases or investigations against the property or "*the people or entities*" appearing on the chain of title of the Meritage Property. This Certification of No Criminal Activity gave rise to a legitimate expectation that Claimants could proceed with their investment without further concern.

16. None of this appeared to matter to Colombia. Shockingly, Newport was not even recognized as an "*affected party*" by the court administering the asset forfeiture proceedings. As a result, Newport was not allowed the opportunity to be heard and to demonstrate its good faith status. Drs. Medellín and Martínez explain that this failure breached the procedural protections that the Asset Forfeiture Law provides. And it clearly breached Claimants' right to fair and equitable treatment and full protection and security.

17. What is more, the Meritage property had been previously subdivided from a larger piece of land, which was all tainted by the same alleged illicit conduct, and no action whatsoever has been taken against the sub-divided property, the remainder of which is now owned largely by the family of Mr. López Vanegas's half-brother, all Colombian citizens. This is manifestly discriminatory treatment, once again in violation of Colombia's treaty obligations.

18. As a result of Colombia's conduct, financial institutions and equity investors now fear doing business with Mr. Seda. When Colombia expropriated the Meritage Project, Mr. Seda was automatically tainted as being complicit in illegal activity, or, at the very least, having failed to conduct sufficient diligence on his projects. No one wanted to take the risk of doing business with Mr. Seda. The risk was simply too high. And so one of the leading and most important property developers in Medellín, and indeed Colombia, was effectively—though unfairly—taken out of business.

19. The Government has breached Claimants rights under the *United States-Colombia Trade Promotion Agreement*, which entered into force on 15 May 2012 (the "**TPA**").[14] And despite having had several opportunities over the last three-and-a-half years to fix its mistakes, Colombia has stubbornly refused to do anything. Accordingly, Colombia's breaches have resulted in substantial damages to Claimants. Ms. Bambaci and Mr. Dellepiane of BRG estimate the loss to Claimants to be USD 309.2 million as of 15 June 2020. In addition, given the emotional and reputational harm to Mr. Seda, he is entitled to moral damages in the amount of 10% of the total damages owing.

20. The remainder of this Memorial details the factual, legal and quantum theories upon which Claimants case is based. This Memorial proceeds as follows:

    (a) **Part III** details the facts relevant to this dispute. Specifically, Part III describes Claimants' investment in Colombia and Colombia's wrongful treatment of Claimants' investment;

[14] *See* **Exhibit CL-001**, United States-Colombia Trade Promotion Agreement, 15 May 2012 ("**TPA**").

(b) **Part IV** establishes the jurisdiction of this Tribunal and the law applicable to this dispute;

(c) **Part V** addresses the legal merits of Claimants' claims;

(d) **Part VI** quantifies the substantial damages resulting from Colombia's breaches of the TPA; and

(e) **Part VII** set out Claimants' request for relief**.**

III. FACTS

21. Emerging from decades of drug-fueled violence and civil unrest, Colombia set ahead on a road of economic recovery in the new millennium fueled, in part, by increasing foreign investment. Attracted to the opportunities presented by an increasingly urban and sophisticated middle class in the country, and its investor-friendly policies, Claimants decided to invest in Colombia.

22. As described below, Claimants made significant investments in Colombia to develop state-of-the-art, innovative hospitality and mixed-use luxury real estate projects aimed at a burgeoning young and prosperous middle and upper-middle class in the country. Claimants believed in the future of Colombia and sought to contribute to its growing economy. In the process, Mr. Seda became one of the most innovative and important property developers in the country.

23. Instead of supporting stable foreign investment, Colombia unlawfully and without compensation seized Claimants' most significant investment, the Meritage Project. This seizure halted construction of eight condominium and retail towers, which stand unfinished to this day. The seizures had an immediate ripple effect across Claimants' pipeline of real estate and hotel projects, causing banks to withdraw financing, and halting projects mid-construction, which has prevented Claimants from developing their projects in Colombia.

24. Below we describe the relevant facts giving rise to the Claimants' claims under the TPA.

A. Claimants' Initial Investments In Colombia

1. Colombia Presented An Attractive Hospitality And Real Estate Development Opportunity

25. The extent of Colombia's narcotics trafficking and violent conflict through much of the 1980s and 1990s is widely known. Colombia produced the lion's share of the world's cocaine, including up to 90 percent of cocaine consumed in the United States.[15] Exemplified most famously by Pablo Escobar, a narcotrafficker who was equal parts ruthless and prolific (indeed, Escobar made the Forbes' list of international billionaires for seven years straight, from 1987 until 1993),[16] drug cartels in Medellín at times are thought to have controlled approximately 80 percent of the land in southwest Antioquia, the state in which Medellín lies.[17] Indeed, drug traffickers had infiltrated the Colombian Government to protect their operations and reinforce their power, creating a legacy of corruption.[18] To combat this scourge, Colombia undertook a number of measures to both strengthen anti-trafficking measures and implement policies to promote economic growth. In the early 2000s, Colombia seemed to turn a new page.

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[15] **Exhibit C-090**, UNODC, The Globalization of Crime: A Transnational Organized Crime Threat Assessment, p. 0008 ("*The bulk of the cocaine that enters the United States comes from Colombia. Forensic analyses of cocaine seized or purchased in the USA have repeatedly shown that nearly 90% of the samples originated in Colombia*.")

[16] *See* **Exhibit C-205**, Amanda Macias, *10 facts reveal the absurdity of Pablo Escobar's wealth*, BUSINESS INSIDER, 29 December 2017, https://www.independent.co.uk/news/people/pablo-escobar-worth-wealth-money-how-mucha8133141 html.

[17] *See* **Exhibit C-071**, W. R. Long, *Billionaire Drug Trafficker Rules: Powerful Medellín Cartel Safe in Its Colombia Base*, LOS ANGELES TIMES , 21 February 1988, https://www.latimes.com/archives/la-xpm-1988-02-21-mn-44055-story html, p.0004.

[18] *See e.g.*, **Exhibit C-073**, *El Proceso 8,000*, LA SEMANA, 23 June 1997, https://www.semana.com/especiales/articulo/el-proceso-8000/32798; **Exhibit C-204**, *Los Candidatos Mal Rodeados*, EL ESPECTADOR, 12 December 2017, https://www.elespectador.com/noticias/politica/los-candidatos-mal-rodeados/.

26. Colombia's success story was possible in large part due to the resurgence of its economy, which became less reliant on the narcotics trade and saw increased growth in other sectors, including tourism. The encouragement of investment, and particularly foreign investment, was instrumental to Colombia's economic development. From 2000 onwards, Colombia adopted a number of legal and policy reforms to promote foreign investment. For example, in 2000, Colombia amended its General Regime for Foreign Investment, recorded in Decree 2080 of 2000.[19] Decree 2080 of 2000 represented a significant reform of Colombia's foreign direct investment regime, creating an open market for foreign investment and guaranteeing, *inter alia*, equal treatment and stability for foreign investors.[20] Following Decree 2080, most foreign investment, including investments in the real estate and hospitality sectors, no longer required government authorization.[21]

27. In 2002, Colombians elected President Álvaro Uribe, who campaigned on an agenda of promoting economic growth. During his tenure in office, President Uribe pursued policies to foster economic recovery, in particular, by attracting foreign investors. He often declared that Colombia needed to "*rescue international confidence in* [the] *country*."[22] President Uribe accordingly instituted a host of legal reforms and policies meant to encourage, *inter alia*,

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[19] **Exhibit C-131**, Decree No. 2080 of 2000 and Amendments, 14 July 2014.

[20] **Exhibit C-131**, Decree No. 2080 of 2000 and Amendments, 14 July 2014, art. 2 ("*Investment of foreign capital in Colombia shall be treated, for all purposes, the same as an investment by resident nationals. Consequently, and without prejudice to the terms stipulated in special regulations, no discriminatory conditions or treatment that place investors of foreign capital at a disadvantage compared to resident national investors may be established, nor may investors of foreign capital be afforded more favorable treatment than that afforded to resident national investors*.")

[21] **Exhibit C-131**, Decree No. 2080 of 2000 and Amendments, 14 July 2014, arts. 1, 7. *See also* **Exhibit CL-082**, Hernando Otero and Enrique Gómez-Pinzón, *Colombia*, *in* LATIN AMERICAN INVESTMENT PROTECTIONS (2012).

[22] **Exhibit C-011bis**, R. Farzad, *Extreme Investing in Colombia*, Bloomberg Businessweek, 28 May 2007, p. 0002.

"*foreign investors to invest or expand existing investments in the country*."[23] For example, Colombia further eased the construction permit process with a new construction decree, improved access to credit, eased the tax burden on businesses, strengthened investor protections, and eased property registration requirements, among other investor-friendly reforms.[24] Colombia also entered into a number of investment treaties with other States that provided substantive protections to foreign investors as well as the right to access investor-State dispute settlement,[25] including the United States - Colombia Trade Promotion Agreement ("**TPA**").[26]

28. By 2010, the International Finance Corporation ("**IFC**") ranked Colombia number five in the world for protecting investors,[27] a position it retained in 2011.[28] The IFC in 2010 also ranked Colombia the highest in Latin America for ease of doing business and designated the country as one of the top ten in the world to have made significant reforms for doing business.[29]

29. The city of Medellín, in particular, benefitted from Colombia's economic resurgence. The city capitalized on Colombia's efforts to reinvigorate the economy, acknowledging that to be an urban success story, its economy needed to be responsive to global markets.[30] In 2001, the

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[23] **Exhibit CL-082**, Hernando Otero and Enrique Gómez-Pinzón, Colombia, in LATIN AMERICAN INVESTMENT PROTECTIONS (2012), p. 157, *referring to* Law 963 of 2005 and Decree 2950 of 2005.

[24] **Exhibit C-092**, IFC, Doing Business in Latin America 2010, p. 0049.

[25] **Exhibit CL-082**, Hernando Otero and Enrique Gómez-Pinzón, Colombia, in LATIN AMERICAN INVESTMENT PROTECTIONS (2012), pp. 165-168.

[26] *See* **Exhibit CL-001**, TPA, 15 May 2012.

[27] **Exhibit C-091**, IFC, Doing Business 2010, p. 0126.

[28] **Exhibit C-093**, IFC, Doing Business 2011, p. 0156.

[29] **Exhibit C-092**, IFC, Doing Business in Latin America 2010, pp. 0020-0021.

[30] *See e.g.*, **Exhibit C-001bis**, A. Sánchez-Jabba, *La Reinvención de Medellín*, in L. Galvis (ed.), ECONOMÍA DE LAS GRANDES CIUDADES EN COLOMBIA: SEIS ESTUDIOS DE CASO, pp SP-0043 – SP-0044.

Medellín City Council authorized the mayor to create an institution to attract international investment.[31] On 19 June 2002, the city launched the Agency for International Cooperation of Medellín (*Agencia de Cooperación Internacional* or "**ACI**" in Spanish). Among other things, ACI was responsible for attracting foreign direct investment resources to the city.[32] Sergio Fajardo, who was elected as Mayor of Medellín in 2003, and later became Governor of Antioquia from 2012 to 2016, played a key role in the increased international interest in Medellín in recent years. He proposed a series of development plans for the city aimed at placing Medellín on the world stage by revitalizing its public spaces, ensuring stability and security, and increasing Medellín's integration with the rest of the world by identifying opportunities to increase productivity and tap into global flows of capital.[33]

30. Medellín's various efforts paid dividends. Between 2000 and 2010, commercial activity in Medellín increased by approximately 400%.[34]

2. Claimants Invest In Colombia

31. Claimants were attracted to opportunities available in Colombia. Mr. Seda, the developer of the properties that Colombia treated unlawfully and the Claimant with the largest share of the claim (over 90 percent of damages owed to the Claimants), features at the center of the facts giving rise to this dispute. Mr. Seda began his career at the international accounting and

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[31] *See* **Exhibit C-260**, The Agency for Cooperation and Investment of Medellín, *About Us*, https://www.aciMedellín.org/about-us/?lang=en (last accessed 14 June 2020).

[32] *See* **Exhibit C-260**, The Agency for Cooperation and Investment of Medellín, *About Us*, https://www.aciMedellín.org/about-us/?lang=en (last accessed 14 June 2020).

[33] *See* **Exhibit C-125**, C. Ellis Calvin, *Strategies of Architectural Production and Global Urban Competitiveness in Medellín, Colombia*, COLUMBIA UNIVERSITY, May 2014,

[34] *See* **Exhibit C-070**, PricewaterhouseCoopers, *Investor Ready Cities*, p. 0077.

consulting firm KPMG, where he advised clients such as Sheraton Hotels, Loews Hotel Group, and McGuire Properties. Mr. Seda was particularly inspired by the luxury and lifestyle-based[35] hospitality and mixed-use residential and commercial properties these companies developed. He thereafter gained experience in high-end construction projects in California, USA, where he founded Royal Realty Inc., a Los Angeles-based full-service brokerage and mixed-use development firm.

32. In late 2006, Mr. Seda sought to focus on property development in international markets.[36] In particular, his market research suggested that Latin American markets held great potential and he thus spent months traveling around the region to scout potential opportunities.[37] He visited many Latin American cities to learn more about and assess the investment potential in each. In July 2007, Mr. Seda arrived in Medellín and immediately recognized its distinct advantages as a base for his operations.[38]

33. Mr. Seda recognized that, among other factors, Medellín "*had a burgeoning, well-educated middle class, and a number of multinational companies were opening up offices there, including Philip Morris, Toyota, and Renault*."[39] The growing number of middle- and upper-

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[35] *See* Seda Witness Statement, ¶ 7 ("*Lifestyle properties are high-end, luxurious properties that have unique attributes aimed at improving daily quality of life and offering a comprehensive lifestyle experience, such as fitness facilities, water features, stunning views, landscaping and décor promoting environmental consciousness, seamless indoor-outdoor structures paired with curated art, and areas promoting social interaction, and cultural activity*.").

[36] Seda Witness Statement, ¶ 7.

[37] Seda Witness Statement, ¶¶ 8-9.

[38] *See* Seda Witness Statement, ¶ 7 ("*Lifestyle properties are high-end, luxurious properties that have unique attributes aimed at improving daily quality of life and offering a comprehensive lifestyle experience, such as fitness facilities, water features, stunning views, landscaping and décor promoting environmental consciousness, seamless indoor-outdoor structures paired with curated art, and areas promoting social interaction, and cultural activity*.").

[39] Seda Witness Statement, ¶ 11.

middle class residents in the area were increasingly looking for premium residential and leisure options located in and around the city of Medellín. Moreover, the city had abundant natural beauty, making a number of locations in and around it suitable for premium luxury developments. Yet there were few such options available at the time. As Mr. Seda notes in his statement, despite being "*replete with natural beauty*", "*the market* [in Medellín] *was far from saturated*", making it an attractive venue for investment in real estate development.[40]

34. On 2 November 2007, Mr. Seda established Royal Realty,[41] under the laws of Colombia, as his development vehicle for the projects he envisioned in Latin America.[42] He continues to fully own and control the company.

3. Mr. Seda Develops The Charlee Hotel

35. In 2008, Mr. Seda began to work on his first project in Colombia. His goal was to create a high-end luxury hotel with lifestyle elements that would establish his brand in Colombia and serve as the basis for future developments under that brand (such as Marriott or Starwood).[43] Mr. Seda found a plot of land near the Lleras Park in Medellín, a trendy neighborhood popular with young urban professionals, where he began development of The Charlee Hotel.[44]

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[40] Seda Witness Statement, ¶ 11.

[41] Mr. Seda adopted the same name of his prior company, Royal Realty Inc., in California, but Royal Realty was otherwise an independent company used solely for his ventures in Latin America. *See* Seda Witness Statement, ¶ 13.

[42] **Exhibit C-012bis**, Royal Realty S.A.S. Certificate of Existence and Good Standing, 20 December 2017, p. SP-0002.

[43] Seda Witness Statement, ¶ 7.

[44] Seda Witness Statement, ¶¶ 12, 15-16.

36. One of the prerequisites to developing the property was to conduct a title study on the property. As such, Mr. Seda hired an external law firm, Enfoque Jurídico.[45] Enfoque Jurídico identified and assessed the prior holders of the title to the land, including by checking their names against the list of sanctioned persons published by the United States Treasury Department's Office of Foreign Assets Control ("**OFAC**").[46] While OFAC searches are not required by Colombian law, title studies often incorporate them. The title study, issued on 6 June 2008, found that the property had "*clear title*" as the premises were "*free of attachments, pending litigation, non-attachable family capital, lease through public deed, usufructs, resolutory conditions derived from the form of payment, attachments, filing of complaints, etc.*"[47] The OFAC search was also clear.[48]

37. On 28 June 2008, Mr. Seda applied to register the trademark "*Charlee*" in Medellín, and was granted registration six months later.[49] Construction on The Charlee Hotel started in 2009.[50]

38. In order to finance the construction, and as is commonly done in large hotel developments throughout Latin America, Mr. Seda sold individual suites in the hotel to third-party purchasers, entitling them to remuneration based on a percentage of the hotel's income.[51] He

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45 Seda Witness Statement, ¶ 16.

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

47 **Exhibit C-086**, Letter from Eulalia Warren Londoño to Angel Seda, María Clara Quintero and Clara Inés Bustamante, 6 June 2008, pp. SP-0002 – SP-0003.

48 **Exhibit C-086**, Letter from Eulalia Warren Londoño to Angel Seda, María Clara Quintero and Clara Inés Bustamante, 6 June 2008, pp. SP-0003 – SP-0004.

49 **Exhibit C-026bis**, "*The Charlee*" Trademark Registration, 19 January 2009.

50 Seda Witness Statement, ¶ 16.

51 Seda Witness Statement, ¶ 17.

accordingly engaged a fiduciary, Acción Sociedad Fiduciaria S.A. ("**Acción Fiduciaria**"), to manage the funds related to the development of The Charlee Hotel, including funds from these third-party buyers.[52]

39. Under Colombian law, a private party (such as a property developer) cannot collect funds from 20 or more individuals without being registered as a financial institution, requiring the use of a fiduciary.[53] The use of fiduciaries is common in Colombia because, "[c]*ompared to more mature economies, like the United States, Colombia has relatively underdeveloped long-term commercial financing markets*."[54] Thus, instead of paying funds directly to a developer in the hopes that a project will become viable and that the developer will complete the construction, parties enter into contractual obligations via a fiduciary to hold the funds and release them to the developer under specific conditions, referred to as a "*point of equilibrium*."[55] Individual purchasers or investors thus mitigate risks and ensure that the assets and funds are used only for their intended purposes.[56]

40. In practice, the fiduciary relationship in real estate development projects generally involves a relationship between: (*i*) the land seller; (*ii*) the land buyer and project developer; and (*iii*) the fiduciary. The physical property, and any asset developed on it, is placed into a trust. The fiduciary acts as the trustee, and the trust holds legal title to the property. The fiduciary may also enter into separate agreements with the buyers of units within the planned development.

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[52] Seda Witness Statement, ¶ 19.

[53] Martínez Expert Report, at note 16 (referencing Decree 1981 of 1988).

[54] Seda Witness Statement, ¶ 18.

[55] Seda Witness Statement, ¶ 19.

[56] Seda Witness Statement, ¶ 18.

As described above, once a project developer sells the (as-yet undeveloped) units, it deposits revenues from those sales into the trust. Once a defined equilibrium point is met, the developer can access these funds to progress construction and development of the Project.[57] The equilibrium point is generally met when the project developer has met conditions such as attaining a minimum threshold of sales, delivery of the relevant construction permits, presentation of required certificates, acquiring financing and placing the land in a fiduciary trust. At this point, the trustee also disburses to the seller the monies associated with the sale of the land. Upon completion of the project, ownership of the units is released to the unit purchasers.[58]

41. Accordingly, on 31 March 2009, Mr. Seda signed a fiduciary agreement with Acción Fiduciaria for the development of The Charlee Hotel.[59] The contract provided that the seller of the land on which the project was to be built would place the land into the trust created for the project.[60] As the developer, Mr. Seda's company was responsible for selling units of the future project.[61] Revenues from the sale of the project units were to be deposited directly into the trust.[62] As the fiduciary, Acción Fiduciaria was to act as trustee, holding legal title to the land, funds from unit buyers and other trust assets for the duration of the development of the

[57] Seda Witness Statement, ¶ 19.

[58] Seda Witness Statement, ¶ 19.

[59] *See* **Exhibit C-087**, Fiduciary Contract between Charlee M LTD Inc. and Acción Fiduciaria, 31 March 2009.

[60] **Exhibit C-087**, Fiduciary Contract between Charlee M LTD Inc. and Acción Fiduciaria, 31 March 2009, cl. 2.

[61] **Exhibit C-087**, Fiduciary Contract between Charlee M LTD Inc. and Acción Fiduciaria, 31 March 2009, cl. 11.

[62] **Exhibit C-087**, Fiduciary Contract between Charlee M LTD Inc. and Acción Fiduciaria, 31 March 2009, cl. 12.

Charlee Hotel,[63] and releasing those funds to the developer once the equilibrium point—as defined in the trust agreement—was met.[64]

42. The development of the Charlee Hotel was a success from the outset: units sold quickly, and the city was abuzz with the impending opening of this state-of-the-art hotel.[65]

43. Buoyed by the Charlee's early success, and while construction on the Charlee Hotel was ongoing, Mr. Seda (later joined by a number of the other Claimants) embarked on a second project: a luxury resort and residential complex called Luxé by The Charlee ("**Luxé**"). Luxé included not just a luxury hotel but also a residential community that would have access to many of the amenities offered by the hotel.[66]

44. Unlike the Charlee Hotel, which was located in bustling downtown Medellín, Mr. Seda envisioned Luxé as an out-of-town retreat for Medellín residents.[67] Additionally, the hotel itself would attract out-of-town tourists, corporate retreats, weddings and other gatherings looking for a venue outside the city in more bucolic surroundings.

45. In 2009, Mr. Seda found a 59.5-acre property in Guatapé,[68] a small resort town approximately two hours from Medellín, situated next to its namesake lake. Guatapé is known for its natural

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63 **Exhibit C-087**, Fiduciary Contract between Charlee M LTD Inc. and Acción Fiduciaria, 31 March 2009, cl. 12.

64 **Exhibit C-087**, Fiduciary Contract between Charlee M LTD Inc. and Acción Fiduciaria, 31 March 2009, cl. 12.

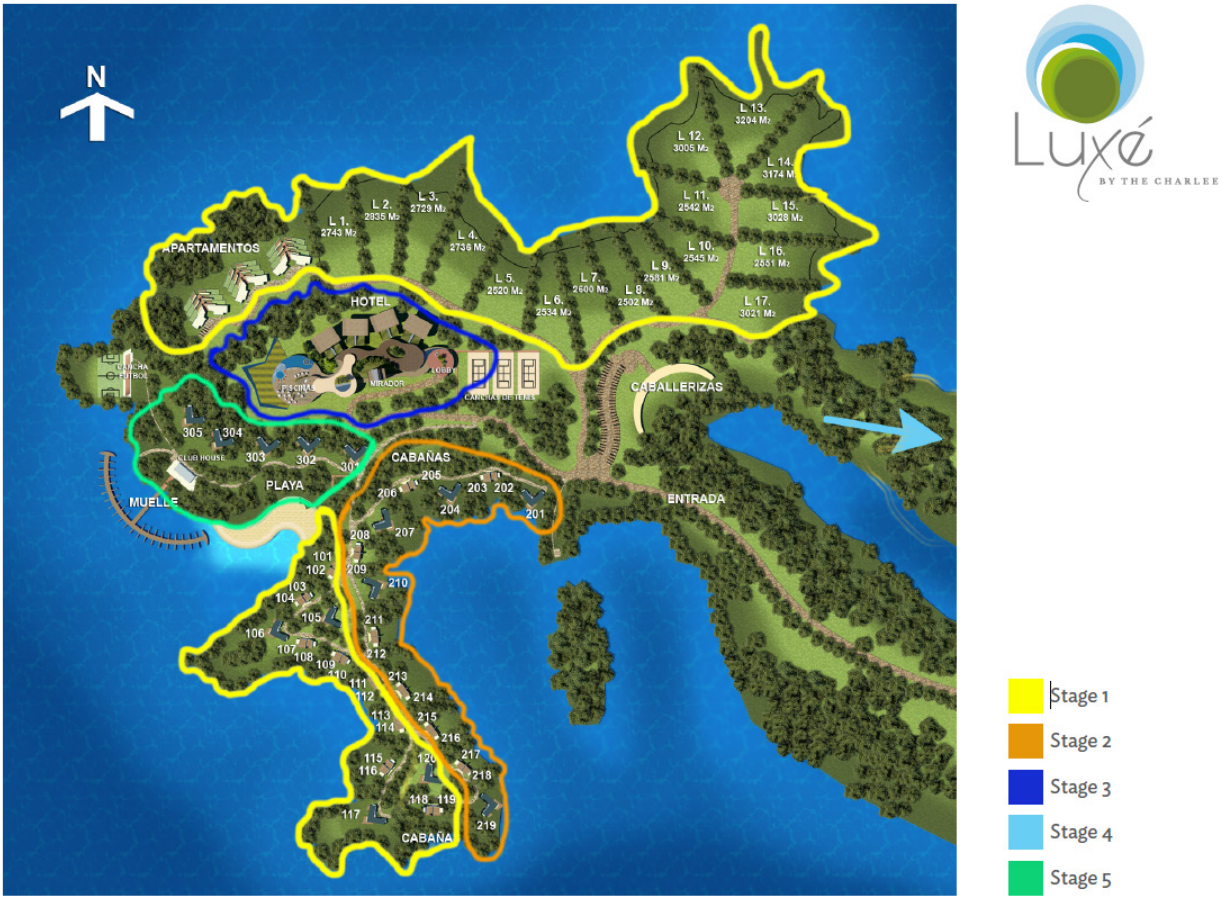
65 Seda Witness Statement, ¶¶ 26-28.

66 Seda Witness Statement, ¶ 21.

67 *See* **Exhibit C-214**, Aerial Video of Luxé by The Charlee, 31 July 2018.

68 Seda Witness Statement, ¶ 23.

beauty, and its lake was already a popular sports venue. Yet land prices were low in 2009, making it an ideal spot for a mixed-use development of the type that Mr. Seda had envisioned.[69]



Appendix A: Luxé by The Charlee Development Plan By Phase

46. On 5 April 2009, Mr. Seda established the entity Luxé by The Charlee S.A.S. ("**Luxé SAS**") to manage the development of Luxé.[70]

[69] Seda Witness Statement, ¶ 22.

[70] *See* **Exhibit C-249**, Luxé By The Charlee S.A.S. Certificate of Existence and Good Standing, 28 April 2020, p. SP-0002.

47. As with the Charlee Hotel, Mr. Seda had thorough due diligence performed on the property.[71] The legal director of Royal Realty conducted a title study, identifying the title holders to the property and finding "*clear title*" as the premise was "*free of attachments, pending litigation, non-attachable family capital, lease through public deed, usufructs, resolutory conditions derived from the form of payment, attachments, filing of complaints, etc.*"[72]

48. As with the Charlee Hotel, and for the reasons outlined above, Mr. Seda engaged Acción Fiduciaria to act as a fiduciary for the development of Luxé.[73] Acción Fiduciaria conducted its own title study in addition to receiving Royal Realty's in-house study.[74] The contract placed the land into the trust created for the Luxé project.[75] Luxé SAS, as developer and promoter, was to deposit revenues from the sale of the project units into the trust.[76] As the fiduciary, Acción Fiduciaria was to act as trustee, holding legal title to the land, funds from unit buyers, and any other trust assets for the duration of the development of the Charlee Hotel.[77] Luxé

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[71] Seda Witness Statement, ¶ 24.

[72] **Exhibit C-088**, Letter from María Isabel Villegas to Juliana Montoya, *attaching* Study of Ownership Titles, 18 November 2009, pp. SP-0003, SP-0005.

[73] Seda Witness Statement, ¶ 24; **Exhibit C-089**, Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009; *see also* **Exhibit C-102**, Amendment No. 1 to Fiduciary Contract between Luxé By The Charlee S.A.S. and Acción Fiduciaria S.A., 25 April 2013.

[74] Seda Witness Statement, ¶ 24; **Exhibit C-088**, Letter from María Isabel Villegas to Juliana Montoya, *attaching* Study of Ownership Titles, 18 November 2009.

[75] **Exhibit C-089**, Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009, cl. 9.

[76] **Exhibit C-089**, Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009, cl. 1, ¶ 10.

[77] **Exhibit C-089**, Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009, cl. 11.

S.A.S. could only access the funds in the trust once the equilibrium point set out in the trust agreement for the respective phase was met.[78]

49. Under the fiduciary agreement, Luxé's development was to occur over five phases.[79] The first phase contemplated excavation of: (*i*) 17 lots to be developed into single-family custom homes, (*ii*) 25 privately-owned lodge-style cabins or chalets, (*iii*) 18 apartments, (*iv*) a water-front restaurant with a dock, and (*v*) a parking lot.[80] The second phase envisioned the use of a separate lot to be divided into private units including 14 chalets with access to restaurants, bars, a spa, a gymnasium, an auditorium, an aquatic sports club, conference rooms, two tennis courts, golf cart facilities, and a multifunctional sports recreation court.[81] The third phase consisted of 116 private hotel rooms.[82] The fourth phase involved construction of 18 apartments and five chalets.[83] Finally, the fifth phase contemplated construction of six

[78] **Exhibit C-089**, Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009, cl. 11. *See also* **Exhibit C-102**, Amendment No. 1 to Fiduciary Contract between Luxé By The Charlee S.A.S. and Acción Fiduciaria S.A.

[79] **Exhibit C-089**, Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009, cl. 1 ¶ 7; **Exhibit C-102**, Amendment No. 1 to Fiduciary Contract between Luxé By The Charlee S.A.S. and Acción Fiduciaria S.A., pbml. E.

[80] **Exhibit C-089**, Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009, cl. 1 ¶ 7; **Exhibit C-102**, Amendment No. 1 to Fiduciary Contract between Luxé By The Charlee S.A.S. and Acción Fiduciaria S.A., pbml. E.

[81] **Exhibit C-089**, Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009, cl. 1 ¶ 7; **Exhibit C-102**, Amendment No. 1 to Fiduciary Contract between Luxé By The Charlee S.A.S. and Acción Fiduciaria S.A., pbml. E.

[82] **Exhibit C-089**, Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009, cl. 1 ¶ 7; **Exhibit C-102**, Amendment No. 1 to Fiduciary Contract between Luxé By The Charlee S.A.S. and Acción Fiduciaria S.A., pbml. E.

[83] **Exhibit C-089**, Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009, cl. 1 ¶ 7; **Exhibit C-102**, Amendment No. 1 to Fiduciary Contract between Luxé By The Charlee S.A.S. and Acción Fiduciaria S.A., pbml. E.

additional chalets.[84] Thus, the final development was to consist of a mix of privately-owned cabins, apartments, and lots where the owners could design and build custom homes, and a luxury lifestyle hotel with amenities to which hotel guests and unit owners alike would have access.[85]

[84] **Exhibit C-089**, Contract with Acción Fiduciaria for Development of Luxé By The Charlee, 14 December 2009, cl. 1 ¶ 7; **Exhibit C-102**, Amendment No. 1 to Fiduciary Contract between Luxé By The Charlee S.A.S. and Acción Fiduciaria S.A., pbml. E.

[85] Seda Witness Statement, ¶ 23; López Montoya Witness Statement, ¶ 7.

Exhibit C-265: Designs for Luxé by The Charlee

50. Luxé SAS also entered into a contract with Royal Realty to manage the operation of the hotel.[86] Under the agreement, Luxé SAS would develop the Project under the Charlee brand and Royal Realty would manage operations for those hotels.[87] Among other functions, Royal Realty would be in charge of establishing operational policies and protocols, determining rates, managing the finances, marketing, managing inventory, accounting, along with all the day-to-day responsibilities of running a hotel.[88] For its services, Royal Realty would collect a management fee of 3 percent of total revenues and an incentive fee of at least 10 percent of EBITDA depending on the level of revenues.[89] Luxé SAS would additionally pay a 3.75

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

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

[88] **Exhibit C-101**, Management Contract between Luxé by The Charlee S.A.S. and Royal Realty S.A.S., 21 March 2013, art. 1.04.

[89] **Exhibit C-101**, Management Contract between Luxé by The Charlee S.A.S. and Royal Realty S.A.S., 21 March 2013, arts. 3.01 A ("*The Basic Management Fees represent 3% of the management fee for gross sales paid to the Administrator as consideration for its services.*"), 3.01 B ("*The Incentive Management Fees for the Manager shall be equivalent to ten percent (10%) of operational profits, up to 55% of net revenues, after costs and expenses. Also, there are variable fees to incentivize operational efficiency, consisting of 15% of profits, that is, after costs and expenses when these profits exceed 55% of net revenues, and only regarding the sum that exceeds 55% of operational profits.*").

percent fee for the Charlee Brand, held by Royal Realty.[90] As BRG notes, these rates were in line with global best practices.[91]

51. Given its unique offering, "*the demand for Luxé's units and lots was unprecedented*."[92] Within three months of Mr. Seda's sales launch, all lots, apartments and first phase residential units had been sold.[93] Construction of the project began in 2010. Construction on the lots, cabins and apartments was completed by 2014. Construction on the hotel was set to be completed by November 2016 but, for reasons discussed below, remains incomplete.

52. Mr. Seda also successfully attracted a number of new foreign investors in the Luxé Project:

    (a) On 14 February 2012, Mr. Bobeck, the beneficiary of Boston Enterprises Trust, Mr. Adcock, and Mr. Enbody acquired shares in Luxé SAS.[94]

    (b) On 23 April 2013, Mr. Caruso acquired shares in Luxé SAS.[95]

    (c) On 28 February 2015, Mr. Seda transferred his interest in Luxé SAS to Royal Realty.[96]

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[90] **Exhibit C-101**, Management Contract between Luxé by The Charlee S.A.S. and Royal Realty S.A.S., 21 March 2013, art. 3.01 ("*The Charlee brand shall represent*[sic] *1.5% of the gross sales received in accordance to the Rules on Horizontal Property for the Luxe by The Charlee Tourist Complex, as well as to the provisions of the Basic Management Fees under 3.01b*.").

[91] *See* BRG Expert Report, ¶ 80(b), referring to estimates from **Exhibit BRG-050**, Detlefsen H, Glodz M, Historical trends Hotel Management Contracts, HVS, January 2013.

[92] Seda Witness Statement, ¶ 25.

[93] Seda Witness Statement, ¶ 25.

[94] **Exhibit C-226**, Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019, pp. SP-0002 – SP0003, SP-0005, SP-0007.

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

[96] **Exhibit C-226**, Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019, pp. SP-0001, SP-0020.

(d) On 27 November 2015, Mr. Hass, through Haystack Holding LLC, acquired shares in Luxé SAS.[97]

(e) On 30 March 2016, Royal Realty, Mr. Bobeck, the beneficiary of Boston Enterprises Trust, Mr. Adcock, Mr. Enbody, Mr. Caruso, and Mr. Hass subscribed to additional shares in Luxé.[98]

4. Early Success With The Charlee Brand

53. While construction on Luxé was ongoing, the Charlee Hotel's construction was nearing completion. In January 2011, Mr. Seda inaugurated the Charlee Hotel.[99] The 42-room hotel was a novel concept in Medellín—it integrated unique lifestyle elements, such as a rooftop bar, aquarium pool and modern design aesthetic that quickly made it a resounding success.[100] The hotel received rave reviews from Colombian and international travel magazines. For example, Conde Nast Travel's "*hot list*" for "*best new hotels*" featured the Charlee Hotel in 2012,[101] and the New York Times named it "*the city's top boutique hotel*" in 2015.[102] The below pictures depict the unique and innovative style of the Charlee Hotel:

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97 **Exhibit C-226**, Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019, p. SP-0022.

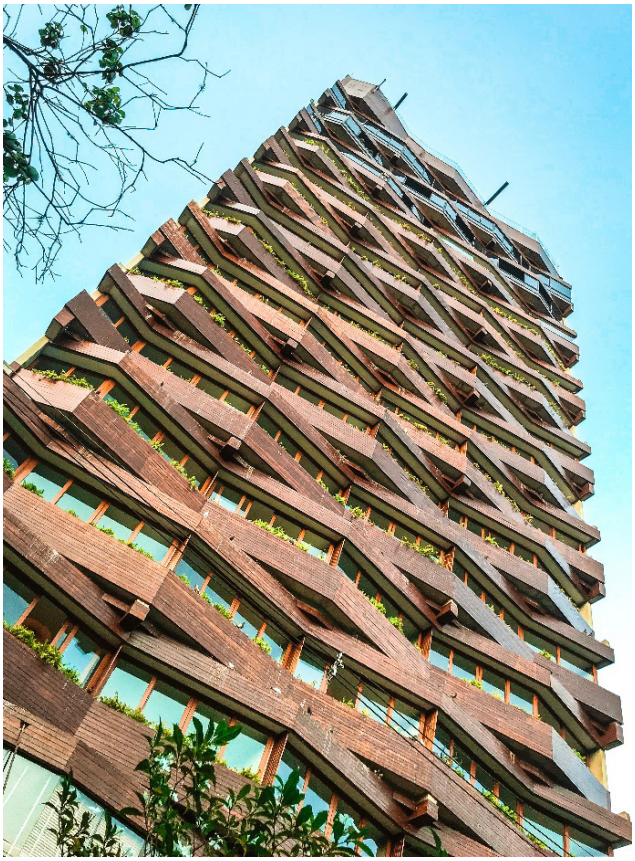
98 **Exhibit C-226**, Luxé by The Charlee S.A.S. Share Ledger, 15 January 2019, pp. SP-0002 – SP-0003, SP-0005, SP-0007, SP-0012, SP-0020 – SP-0022, SP-0024 – SP-0025.

99 Seda Witness Statement, ¶ [26].

100 Seda Witness Statement, ¶ [26].

101 **Exhibit C-016bis**, *Hot List 2012*: *Best New Hotels Under $300*, CONDE NAST TRAVEL, 16 April 2012, https://www.cntraveler.com/galleries/2012-04-16/best-affordable-new-luxury-hotels-deals-hot-list-2012, p. 0002.

102 *See* **Exhibit C-141**, Nell McShane Wulfhart, *36 hours in Medellín*, Colombia, THE NEW YORK TIMES, 13 May 2015.





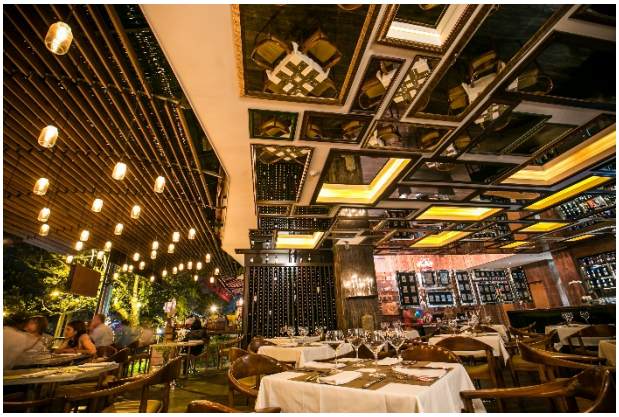


Exhibit C-264: Photographs of The Charlee Hotel

54. The Charlee Hotel's occupancy rates reflected its positive reviews. From 2013-2019, it has consistently maintained occupancy rates[103] between 73 and 80 percent, significantly above average occupancy rates in Medellín hotels, which hover between 50 to 60 percent.[104] Moreover, the Charlee Hotel's average daily rates ("**ADR**")[105] and other metrics significantly outpaced other hotels in the area.[106] From USD 190 in 2013, the ADR grew to between USD 213 and USD 237 for the 2017-2019—a growth of almost 25 percent—despite a significant devaluation of the Colombian peso relative to the U.S. dollar from 2013 to 2019.[107]

55. The success of the Charlee hotel allowed Mr. Seda and Royal Realty to establish a track-record, reputation, and brand recognition in Colombia. This was crucial for a foreign investor like Mr. Seda who did not have established local ties on which developers normally relied in close-knit communities like Medellín.[108] With an established and well-known success story, Mr. Seda had the reputation and credentials necessary to develop a robust pipeline of projects. Investors and banks alike lined up to invest in his projects.

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[103] The occupancy rate represents, in percentage terms, the number of rooms occupied divided by the number of rooms available and is a key revenue metric used in hotel operations. BRG Expert Report, fn. 30.

[104] Seda Witness Statement, ¶ 28.

[105] The ADR represents the average daily rate at which a hotel room was booked during a given calendar year.

[106] *See e.g*, **Exhibit C-068**, 450 Heights Investment Brochure, pp. SP-0085 – SP-0090.

[107] BRG Expert Report, ¶ 40.

[108] Seda Witness Statement, ¶ 72.

B. Claimants Invest In The Meritage Project

1. Locating Property For The Meritage Project

56. Following the success of the Charlee Hotel and the high demand for units at the Luxé project, Mr. Seda embarked on a landmark community project called Meritage ("**Meritage Project**" or "**Project**"). A novel concept in the Colombian market, Meritage was to be a mixed-use project consisting of a luxury hotel with long-term stay hotel suites ("**aparta-suites**"), residential apartments, single-family homes and commercial storefronts.[109] In the early 2010s, Medellín's economy was booming, and along with it, there was a growing middle and upper-middle class seeking residential options further away from the city but that maintained easy access to the city, along with other desirable amenities such as commercial storefronts, parks, gyms etc. Accordingly, Mr. Seda identified an opportunity for a planned community that would offer a convenient commercial and residential mix with access to high-end amenities, such as a gym and restaurant, associated with a luxury hotel.[110] Such a community would need a significant amount of space, and would ideally be located just outside the city.[111]

57. In early 2012, Mr. Seda learned of two additional events that would influence his search for a location for the development. First, there were news reports that a tollbooth on the Las Palmas Highway, a major highway east of Medellín connecting the city to the international airport,

[109] Seda Witness Statement, ¶ 38.

[110] Seda Witness Statement, ¶ 39.

[111] Seda Witness Statement, ¶¶ 38-39.

was going to be moved closer to the airport and further from the city.[112] As Mr. Seda describes it:

> "*Although Medellín was expanding eastward, its expansion had thus far been circumscribed by the tollbooth—people did not want to live beyond the booth because they did not want to pay the USD 10.00 roundtrip toll every time they came to the city. With the tollbooth moving, there was a substantial amount of undeveloped land just a 15-minute drive from the city that could be ideal to support the new community project that* [he] *had envisioned. The proximity to the airport also meant that the community could offer hotel and other hospitality options for travelers*."[113]

58. Second, Mr. Seda learned from news reports that Avianca Airlines, one of the largest airlines in Latin America, would be moving its operations from Bogotá to Medellín. Analysts expected this to bring thousands of jobs and visitors to the area, further increasing the attractiveness of building in this vicinity.[114]

59. Based on these events, Mr. Seda visited a number of potential properties. Among other factors, he assessed these properties based on their *(i)* location; *(ii)* size; *(iii)* possible environmental issues; and *(iv)* price.[115] Working with local real estate agents, he evaluated over a dozen properties.[116] He ultimately identified a 56-hectare property in the neighborhood of Envigado,

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[112] *See e.g.* Seda Witness Statement, ¶ 40; **Exhibit C-096**, C. M. Gómez, *Peaje Al JMC Pasaría a Límites Con Rionegro*, EL COLOMBIANO, 9 November 2012, https://www.elcolombiano.com/historico/peaje_al_jmc_pasaria_a_limites_con_rionegro-PGEC_215820; **Exhibit C-095**, J. G. Duque, *Envigado Propone una Nueva Ubicación de Peaje al Aeropuerto*, EL COLOMBIANO, 31 August 2012, https://www.elcolombiano.com/historico/envigado_propone_una_nueva_ubicacion_de_peaje_al_aeropuerto-NFEC_204797.

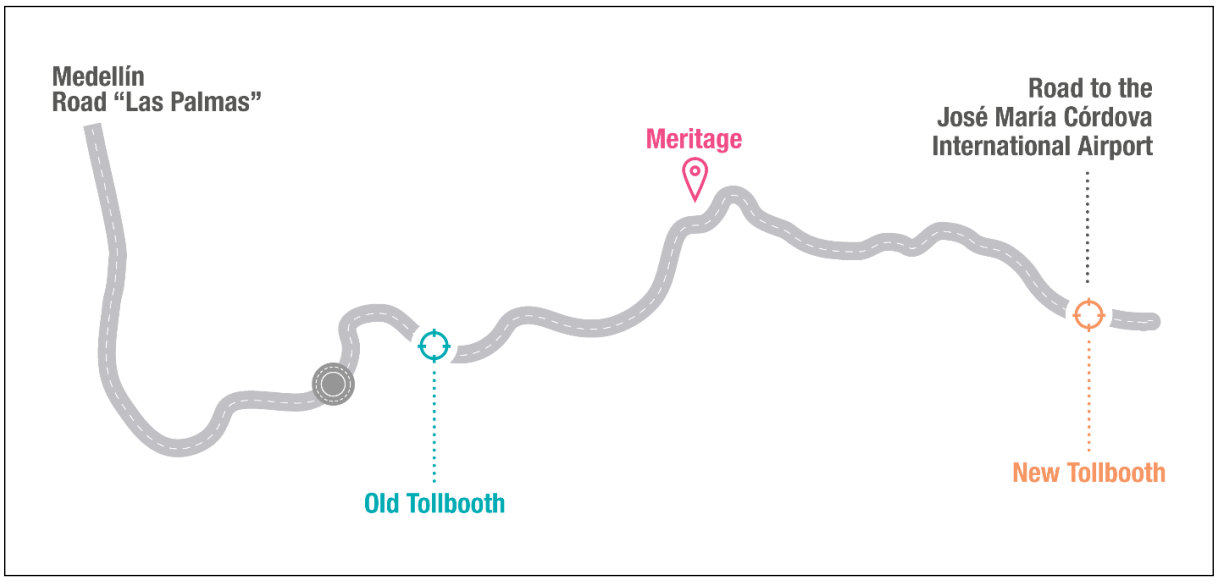
[113] Seda Witness Statement, ¶ 41.

[114] *See e.g.* Seda Witness Statement, ¶ 42; **Exhibit C-018bis**, J. Felipe Sierra Suárez and N. Abrew Quimbaya, *Avianca will transfer its maintenance center to Rionegro*, EL COLOMBIANO, 24 May 2014, https://www.elcolombiano.com/historico/avianca_trasladara_su_centro_de_mantenimiento_a_rionegro-PXEC_295965.

[115] Seda Witness Statement, ¶ 43.

[116] Seda Witness Statement, ¶ 44.

between the current and planned locations of the toll booth, with significant frontage along the Las Palmas highway (the "**Meritage Property**" or "**Property**").[117]



Appendix B: Map of Tollbooths Locations on Las Palmas Highway

60. The land belonged to a company called La Palma Argentina, S.A.S. ("**La Palma**"). Mr. Seda met with La Palma's representatives, who told him that they had acquired the land in October 2007 and had since used it as a cattle farm.[118] According to La Palma's representatives, at the time of purchasing the land, La Palma had asked the Anti-Money Laundering and Asset Forfeiture Unit ("**AML and Asset Forfeiture Unit**")[119] at the Attorney General's Office (*Fiscalía General de la Nación* in Spanish) to confirm that the property and its then-owners were not involved in any criminal or forfeiture proceeding or investigation. The Attorney General's Office had then "*conducted a search of the database*" it maintained and found "[n]*o*

[117] Seda Witness Statement, ¶ 45.

[118] Seda Witness Statement, ¶ 45.

[119] In Spanish, *Unidad Nacional Para La Extincion Del Derecho De Dominio Y Contra El Lavado De Activos*.

record [. . .] *indicating that the real property* [and its sellers] *were involved in any criminal investigation or action and/or forfeiture proceeding*."[120] Mr. Seda had not received such express confirmation directly from the Attorney General's Office for his previous projects and although he nonetheless intended to conduct additional title studies, he found the Government's confirmation to La Palma to be "*reassuring*"; it "*gave* [him] *comfort in moving forward with negotiations for the land*."[121]

61. On 1 November 2012, Mr. Seda, on behalf of Royal Realty, entered into an agreement with La Palma to purchase the Meritage Property ("**Sales-Purchase Agreement**").[122] Under the Agreement, La Palma assumed the obligation to sell and Royal Realty acquired the option to purchase the Meritage Property.[123] The Sales-Purchase Agreement envisioned the creation of a trust into which La Palma agreed to transfer title to the Property and that would manage the funds for development of the Meritage Project.[124] Royal Realty maintained a right to acquire the Property in phases depending on the fulfilment of sales thresholds to be determined by the trustee, to be appointed by Royal Realty.[125]

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120 **Exhibit C-027bis**, Letter from Elsa Maria Moyano Galvis to Maria Cecilia Uribe Quintero, 30 October 2007 (emphasis in original).

121 Seda Witness Statement, ¶ 45.

122 **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, cls. 1, 4.

123 **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, cl. 1.

124 **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, cl. 9.

125 **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, cl. 1(2), pmbl. 7.

Exhibit C-266: Designs for the Meritage Project

2. Corficolombiana Conducts Extensive Due Diligence On Meritage Property

62. Further to signing the Sales-Purchase Agreement, in 2013, Royal Realty appointed Corficolombiana as the fiduciary of the Meritage Project. Corficolombiana falls under the umbrella of GRUPO AVAL, one of the largest and most well-known financial institutions in Colombia.[126]

63. In addition to its reputation, Corficolombiana also brought to the table robust due diligence policies. In particular, it had stringent internal anti-money laundering ("**AML**") and know-your-customer ("**KYC**") policies. This included Corficolombiana's system in place to comply with Colombian regulations regarding the management of AML and terrorist financing risk, or SARLAFT (*Sistema de Administración del Riesgo de Lavado de Activos y de la Financiación del Terrorismo*, in Spanish). Under Colombian law, certain regulated entities, including financial institutions, are required to design, implement and maintain SARLAFT processes under the supervision of the Colombian Financial Superintendence.[127] Specifically, Article 102 of Decree 663 of 1993 requires financial entities to "*adequately know the economic*

[126] *See* Medellín Expert Report, ¶ 93(a).

[127] Martínez Expert Report, ¶ ¶ 49-51.

activity carried out by their clients, its magnitude [and] *the basic characteristics of the transactions in which they engage*."[128] While financial institutions may tailor their specific procedures to carry out this responsibility, the Financial Superintendence had issued general instructions with which financial entities needed to comply.[129]

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[128] **Exhibit C-072**, Decree 663 of 1993, art. 102.

[129] **Exhibit C-270**, Basic Legal External Circular Letter from Financial Superintendence of Colombia, 3 October 2014, Part I, Chapter IV, Title IV, no. 4.2.4.3.2 (noting that compliance officers of supervised entities must:

> *"4.2.4.3.2.1. Ensure effective, efficient and timely operation of the stages that make up the SARLAFT.*
>
> *4.2.4.3.2.2. Submit, at least quarterly, face-to-face and written reports to the Board of Directors or body acting as it, in which it must refer to at least the following aspects:*
>
> *4.2.4.3.2.2.1. Results developed by management.*
>
> *4.2.4.3.2.2.2. Compliance given in relation to sending reports to the different authorities.*
>
> *4.2.4.3.2.2.3. Individual and consolidated development of risk profiles of risk factors and controls adopted, as well as associated risks.*
>
> *4.2.4.3.2.2.4. Effectiveness of mechanisms and instruments established in this Chapter, as well as measures adopted to correct flaws in the SARLAFT.*
>
> *4.2.4.3.2.2.5. Results of corrections ordered by the Board of Directors or body acting as it.*
>
> *4.2.4.3.2.2.6. Documents and decisions issued by control entities and the UIAF.*
>
> *4.2.4.3.2.3. Promote adoption of corrective measures to the SARLAFT.*
>
> *4.2.4.3.2.4. Coordinate internal training programs development.*
>
> *4.2.4.3.2.5. Propose to the administration to update the procedures manual and ensure its dissemination to officials.*
>
> *4.2.4.3.2.6. Collaborate with the authority designated by the Board of Directors in designing methodologies, models and qualitative and/or quantitative indicators of recognized technical value for timely detection of unusual operations.*
>
> *4.2.4.3.2.7. Evaluate reports submitted by the internal audit or whoever executes similar duties or is acting as it, and reports submitted by the statutory auditor and adopt the appropriate measures with respect to shortcomings reported.*
>
> *4.2.4.3.2.8. Design the SARLAFT segmentation, identification, measurement, and control methodologies.*
>
> *4.2.4.3.2.9. Prepare and submit to the approval of the Board of Directors or the body acting as it, the objective criteria for determining suspicious operations, as well as those for determining which of the operations carried out by users will be subject to consolidation, monitoring and analysis of the unusual.*

64. As a regulated entity and fiduciary for the Meritage Project, Corficolombiana was thus required to conduct due diligence on all its clients and counterparties in accordance with SARLAFT.[130] Corficolombiana accordingly reviewed Newport and La Palma Argentina under its SARLAFT procedures. This included maintaining a proprietary customer knowledge form, which contained information required by the Financial Superintendence, for Newport and La Palma.[131] Corficolombiana also verified that none of its customers, users, suppliers or their employees were registered in the OFAC or UN lists.[132]

65. Corficolombiana also made inquiries about the chain of title of the Meritage Property. As was typical, Corficolombiana worked with external advisors specialized in real estate law to conduct property title studies to ensure that there would be no issues with the chain of title. Thus, as Acción Fiduciaria had with Mr. Seda's prior projects, Corficolombiana directed Mr. Seda to obtain a title study of the property on which the Meritage Project was to be built.[133]

66. Corficolombiana recommended a prominent local law firm, Otero & Palacio, with significant experience in conducting title studies.[134] In particular, Otero & Palacio had conducted an "*incalculable*" number of title searches for Bancolombia, one of the largest banks in Colombia,

4.2.4.3.2.10. Comply with obligations related to targeted financial penalties, established in this Chapter.").

130 Martínez Expert Report, ¶ 52.

131 **Exhibit C-033bis**, Petition Response from Corficolombiana to Newport, 26 July 2017, p. SP-0001.

132 **Exhibit C-033bis**, Petition Response from Corficolombiana to Newport, 26 July 2017, p. SP-0001.

133 Seda Witness Statement, ¶ 49.

134 *See* Medellín Expert Report, ¶ 93(c) (acknowledging Otero & Palacio as a "*well-known*" firm in Colombia).

with more than USD 70 billion in assets as of March 2019.[135] Thus, Royal Realty retained the firm to perform the study on the Meritage property.[136]

67. Otero & Palacio conducted a title search on the property going back ten years in the property's ownership history, in accordance with Law 791 of 2001.[137] In addition to performing the detailed and customary title checks, Otero & Palacio, also checked the names of the individuals and legal representatives of entities who appeared in the title history against publicly available databases, including the OFAC list, anti-terrorism lists put together by the United Nations ("**UN list**"), and public source reputational information through channels such as Google.[138] In performing its title search, Otero & Palacio used the same framework that it had successfully employed with the numerous other title searches that it had performed in the past, including those performed to the standards and satisfaction of Grupo Bancolombia.[139] On 7 March 2013, Otero & Palacio issued its report, concluding that the chain of title for the Meritage Property was "*free of encumbrances, conditions subsequent and ownership restrictions*," that "[t]*he title chain for the property during the last 10 years is proper and lacks any defects that may impact the ownership by the current recorded possessor*," and that none of the persons or entities in the transfer history were found in "*the OFAC and UN lists*."[140]

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135 **Exhibit C-216**, Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018, p. SP-0003.

136 Seda Witness Statement, ¶ 49.

137 **Exhibit C-030bis**, Otero & Palacio Title Study and Supplement, 7 March 2013 and 23 July 2013; **Exhibit C-216**, Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018, pp.SP-0028 – SP-0029.

138 **Exhibit C-216**, Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018, pp. SP-00026, SP-0030, SP-0032.

139 **Exhibit C-216**, Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018, p. SP-0029.

140 **Exhibit C-030bis**, Otero & Palacio Title Study and Supplement, 7 March 2013 and 23 July 2013, p. SP-0003. *See also* **Exhibit C-216**, Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018.

3. Corficolombiana Conducts Additional Diligence And The Attorney General's Office Confirms In Writing That The Property And Its Owners Were Not Under Investigation

68. In addition to requesting Otero & Palacio's title study, Corficolombiana undertook additional diligence relating to the Meritage property. Corficolombiana, for instance, ran the list of prior title holders that it had identified through the OFAC list and other restrictive lists and blacklists to which it had access, including Interpol, Europol, National Police of Colombia, lists of politically exposed persons, and other lists prepared by police and financial intelligence authorities of other countries to which Corficolombiana maintained access.[141] None of these searches revealed any red flags.

69. In light of the size and scale of the project, Newport and Corficolombiana took an additional step not commonly carried out as part of the due diligence process. On 22 August 2013, Corficolombiana's external counsel, himself a former Deputy Attorney General of Colombia (*Vicefiscal General*), Francisco Sintura Valera, submitted a "*derecho de petición*"—a formal request pursuant to Colombian law seeking information from a government entity—to the AML and Asset Forfeiture Unit at the Attorney General's Office. This was the same Unit that had provided La Palma with a letter confirming that the Meritage Property had no ties to criminal activity at the time La Palma purchased.[142] Corficolombiana requested the

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The original favorability rating was contingent on Otero & Palacio's review of a Public Deed, which they had requested but not yet received at the time. On 23 July 2013, Otero and Palacio issued an amendment to the study, confirming that they had reviewed the Public Deed, and thereby finalized the title study. The firm accordingly removed the condition from its "*favorable*" rating.

141 **Exhibit C-219**, Testimony of Margarita Maria Betancourt Guzman, 18 September 2018, p. SP-0004. *See also* **Exhibit C-173**, Legal Opinion by Wilson Alejandro Martínez Sánchez, 13 September 2016, pp. SP-0018 – SP-0019.

142 *See supra*, ¶ 60.

Coordinator of the Unit, Danny Julián Quintana Torres, to "*ascertain if the Unit of which you are Coordinator is currently investigating* [the Meritage Property] *in connection with money laundering and/or asset forfeiture proceedings.*"[143] The list Corficolombiana provided to the AML and Asset Forfeiture Unit included all individuals and entities in the ownership history going back decades, as well as persons identified as legal representatives in the entities' then-current corporate records.[144]

70. Corficolombiana took this step out of an abundance of caution in light of the value and prominence of the Project. Mr. Sintura noted in his request that Corficolombiana was seeking this information "*in the fulfillment of its business purpose*" "*to adopt preventive measures in the area of Money Laundering and Asset Forfeiture regarding possible future negotiations of the real property they intend to acquire*."[145] Mr. Sintura further emphasized that Corficolombiana was requesting the Attorney General's Office for this information "*prior to the negotiations involving this real property* [. . .] *with the sole purpose of fulfilling essential preventive measures, taking care not to be used in an operation for Money Laundering or for Financing Terrorism.*"[146] Corficolombiana explained that it sought this information because it intended to "*apply the highest international preventive standards when purchasing real*

[143] **Exhibit C-031bis**, Petition for Information from Fiduciaria Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013.

[144] **Exhibit C-031bis**, Petition for Information from Fiduciaria Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013.

[145] **Exhibit C-031bis**, Petition for Information from Fiduciaria Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013, p. SP-0001.

[146] **Exhibit C-031bis**, Petition for Information from Fiduciaria Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013, p. SP-0001.

property."[147] Thus, Corficolombiana made absolutely clear why it was seeking clearance from the Attorney General's Office with respect to the Meritage property.

71. Submitting "*derechos de petición*" to the Attorney General's Office for information was not a mandatory (nor routine) component of due diligence performed on real property, which was generally limited to title studies.[148] As Ms. Palacio of Otero & Palacio testified in a later proceeding, in her seven years of experience performing title studies, never once had a party requested that she contact the Attorney General's Office for information on prior title holders.[149] In Mr. Seda's experience, the submission of such *derechos de petición* was "*going above and beyond the ordinary due diligence conducted for construction projects in Colombia*." He nonetheless welcomed and encouraged the additional diligence, which was done at Newport's cost.[150]

72. On 9 September 2013, Director Quintana of the Attorney General's Office responded to Corficolombiana's petition stating that the AML and Asset Forfeiture Unit at the Attorney General's Office had "*no record*" of criminal cases or investigations against the property or

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147 **Exhibit C-031bis**, Petition for Information from Fiduciaria Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013, p. SP-0001.

148 Martínez Expert Report, ¶ 70; Seda Witness Statement, ¶ 53.

149 **Exhibit C-216**, Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018, p. SP-0031 ("*QUESTIONING AGAIN BY COUNSEL FOR THE SUMMONED PARTY. QUESTION: Tell the court if when you perform title searches for Bancolombia you must inquire with the Prosecutor's Office regarding the situation with an asset's title holders for the last ten years and/or the situation with the asset. ANSWER: No. QUESTION: In the title searches you have performed these last seven years, have the parties receiving your services ever demanded that you do analyses with the Prosecutor's Office regarding these items that I referred to in my previous question? ANSWER: No*.").

150 Seda Witness Statement, ¶ 53; **Exhibit C-218**, Declaration of Angel Seda in Pinturas Prime Arbitration, 11 September 2018, p. SP-0008. *See also* **Exhibit C-108**, Letter from María Clara Quintero Ochoa to Laura Marcela Gómez Álvarez, 5 July 2013; **Exhibit C-109**, Letter from María Clara Quintero Ochoa to Francisco J. Sintura Varela, 5 July 2013.

"*the people or entities*" appearing on the chain of title of the Meritage Property ("**Colombia's Certification of No Criminal Activity**").[151] Mr. Sintura forwarded the Colombian Government's response to Corficolombiana's legal manager on 17 September 2013, noting that "*as can be seen in the attached document, there is no evidence of any type of investigation related to this property or its owners in the database of*" the AML and Asset Forfeiture Unit at the Attorney General's Office.[152] As Mr. Seda notes in his statement, Colombia's Certification of No Criminal Activity "*confirmed, once more, that the path to continue development of the Project was clear*."[153]

73. At this stage, with the diligence complete, Mr. Seda started making arrangements to progress the Project.[154] Mr. Seda advanced the approvals process for the development of the Meritage Project. On 23 August 2013, the Office of Urban Planning in Envigado confirmed that the parceling license for the Meritage Project "*complies with all* [applicable] *regulations*."[155]

4. Claimants Make Investments In Meritage Through Newport

74. In the meantime, anticipating the continued expansion of Royal Realty's real estate projects beyond the Charlee, on 23 September 2009, Mr. Seda established Newport to undertake the

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[151] **Exhibit C-032bis**, Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Fiduciaria Corficolombiana, 9 September 2013, pp. SP-0002 – SP-0004.

[152] **Exhibit C-032bis**, Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Fiduciaria Corficolombiana, p. SP-0001 (Mr. Sintura noted that the Attorney General's Office had made an error by misidentifying one of the legal representatives of a company on the chain of title. However, Mr. Sintura noted that what mattered was that the Prosecutor's Office had cleared the relevant entity of that representative).

[153] Seda Witness Statement, ¶ 54.

[154] Seda Witness Statement, ¶ 55.

[155] *See* **Exhibit C-111**, Letter from Second Urban Planner of Envigado, 23 August 2013.

development of specific future construction projects.[156] While Royal Realty would continue to represent Mr. Seda's personal interests in the projects, Newport would act as the developer and owner, and allow for additional investors to invest in the Meritage Project.[157] Accordingly, on 9 May 2013, Mr. Seda assigned Royal Realty's rights under the Sales-Purchase Agreement with La Palma to Newport.[158]

75. While Newport was the owner and developer of the Project, Royal Realty would assist Newport with development of the Project and, once it was built, run the operations. On 10 May 2013, Royal Realty entered into shareholding agreements with a number of investors, including the Claimants who invested in the Meritage Project ("**Meritage Claimants**").[159] The Meritage Claimants and other investors in the Meritage Project initially signed shareholding agreements in May 2013 with the Panamanian corporation RR Meritage Associates S.A., to make investments in the Project. However, Mr. Seda and the investors later decided to hold shares directly in Newport.[160] Thus, on 30 March 2016, the Meritage Claimants acquired shares in Newport directly.[161]

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156 Seda Witness Statement, ¶ 20.

157 Seda Witness Statement, ¶ 51.

158 **Exhibit C-103**, Agreement between Royal Realty S.A.S. and La Palma Argentina Y CIA. LTDA., 9 May 2013, cl. 1.

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

160 Seda Witness Statement, ¶ 52.

161 **Exhibit C-227**, Newport S.A.S. Share Ledger, 15 January 2019, pp. SP-0004, SP-0005, SP-0008. On the same day, Royal Realty increased its shareholding in Newport. **Exhibit C-227**, Newport S.A.S. Share Ledger, 15 January 2019, p. SP-0003. On 9 August 2018, the beneficiary of Boston Enterprises Trust transferred his interest in Newport to his wholly owned vehicle Boston Enterprises Trust. **Exhibit C-227**, Newport S.A.S. Share Ledger, 15 January 2019, 15 January 2019, pp. SP-0005, SP-0014.

76. The investors in the Meritage Project agreed that Royal Realty would be responsible for the following activities, among others, with respect to the Meritage Project: (*i*) conduct sales, for which it would receive a sales fee of 4 percent on gross sales; (*ii*) manage the Project's development, for which it would receive a developer fee of 3 percent on gross sales; and (*iii*) manage general construction activities, for which it would receive a fee of 5 percent of the Project's direct construction costs.[162]

77. On 3 December 2013, Newport and Royal Realty entered into a management contract similar to the one between Luxé SAS and Royal Realty.[163] The agreement between Newport and Royal Realty established that Newport would act as the hotel developer under the Charlee brand, starting with the Meritage Project, and Royal Realty would manage operations for those hotels.[164] Among other functions, Royal Realty would be in charge of establishing operational policies and protocols, determining rates, managing the finances, marketing, managing inventory, accounting, along with all the day-to-day responsibilities of running a hotel.[165] For its services, Royal Realty would collect a management fee of 3 percent of total revenues and an incentive fee of at least 10 to 15 percent of EBITDA depending on the level of adjusted

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[162] *See* Seda Witness Statement, ¶ 52; **Exhibit C-276**, Company Agreement of RR Meritage Associates S.A. with Royal Realty, 10 May 2013, arts. 3.03, 3.08; Company Agreement of RR Meritage Associates S.A. with Beneficiary to Boston Enterprises Trust, 10 May 2013, arts. 3.03, 3.08; **Exhibit C-105**, Company Agreement of RR Meritage Associates S.A. with JTE International Investments, LLC, 10 May 2013, arts. 3.03, 3.08; **Exhibit C-106**, Company Agreement of RR Meritage Associates S.A. with Jonathan Foley, 10 May 2013, arts. 3.03, 3.08.

[163] *See supra* ¶ 50.

[164] **Exhibit C-120**, Management Contract between Newport S.A.S. and Royal Realty S.A.S., 3 December 2013.

[165] **Exhibit C-120**, Management Contract between Newport S.A.S. and Royal Realty S.A.S., 3 December 2013, art. 1.04.

gross income to revenue.[166] To the extent Newport would use the Charlee Brand, held by Royal Realty, it was also obliged to pay a 1.5 percent fee of revenues.[167]

5. Corficolombiana And Newport Enter Trust Agreements To Manage Meritage's Development

78. Acting in reliance on the diligence they performed—and in particular, the clear title study and *Colombia's* Certification of No Criminal Activity—Corficolombiana and Newport established a trust structure to manage the development of the Meritage Project.[168] On 17 October 2013, Corficolombiana and Newport entered into two trust agreements: (*i*) the Presales Trust Agreement;[169] and (*ii*) the Administration and Payment Trust Agreement.[170]

79. The purpose of the Presales Trust Agreement was to collect and manage funds from the ultimate third-party purchasers of commercial and residential units ("**Unit Buyers**") in the Meritage Project.[171] Under the Agreement, Corficolombiana, as trustee, would enter into separate trust agreements to receive funds from the Unit Buyers and manage those funds until

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166 **Exhibit C-120**, Management Contract between Newport S.A.S. and Royal Realty S.A.S., 3 December 2013, arts. 3.01A ("*The Basic Management Fees represent 3% of the management fee for gross sales paid to the Administrator as consideration for its services.*") 3.01B ("*The Incentive Management Fees for the Manager shall be equivalent to ten percent (10%) of operational profits, up to 55% of net revenues, after costs and expenses. Also, there are variable fees to incentivize operational efficiency, consisting of 15% of profits, that is, after costs and expenses when these profits exceed 55% of net revenues, and only regarding the sum that exceeds 55% of operational profits.*").

167 **Exhibit C-120**, Management Contract between Newport S.A.S. and Royal Realty S.A.S., 3 December 2013, art. 3.01 ("*The Charlee brand shall represent[sic] 1.5% of the gross sales received in accordance to the Rules on Horizontal Property for the Luxe by The Charlee Tourist Complex, as well as to the provisions of the Basic Management Fees under 3.01b.*").

168 Seda Witness Statement, ¶¶ 54-55.

169 **Exhibit C-034bis**, Presales Trust Agreement, 17 October 2013.

170 **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013.

171 **Exhibit C-034bis**, Presales Trust Agreement, 17 October 2013, cl. 2.1, rec. 3; Seda Witness Statement, ¶ 55.

Newport, as trustor, met the equilibrium point.[172] Attaining the equilibrium point required, among other things, attaining a minimum threshold of sales, delivery of the relevant construction permits, presentation of required certificates, acquiring financing and placing the land in a fiduciary trust.[173] Once the conditions were met, Corficolombiana would disburse the funds to Newport, also the beneficiary of the Agreement, for the development of the Meritage Project.[174] The Meritage Project consisted of eight phases, each requiring the timely fulfillment of these equilibrium conditions.[175]

80. The purpose of the Administration and Payment Trust Agreement was to manage the funds and land required for the construction and development of the Meritage Project.[176] Once Newport met the equilibrium conditions for a phase, funds from the Unit Buyers held in the Presales Trust would be governed by the Administration and Payment Trust Agreement to be used for the development of the Meritage Project.[177] Corficolombiana was to make payments and disbursements to Newport from the Administration and Payment Trust and Newport was obliged to use those resources to pay suppliers and contractors providing services to carry out the construction project.[178] After construction was complete, Newport[179] was to prepare draft

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172 **Exhibit C-034bis**, Presales Trust Agreement, 17 October 2013, cls. 5.2, 7.

173 **Exhibit C-034bis**, Presales Trust Agreement, 17 October 2013, cl. 4.2.

174 **Exhibit C-034bis**, Presales Trust Agreement, 17 October 2013, cl. 8.

175 **Exhibit C-034bis**, Presales Trust Agreement, 17 October 2013, cl. 1.3(i), 4.1.

176 **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, cl. 5.

177 **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, cls. 8, 13.

178 **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, cl. 13.A.14, 24.

179 The Administration and Trust Payment Agreement provided that the operator of the Meritage Project would carry out these activities. *See* **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, cl. 3. As set out in paragraph 77, Royal Realty and Newport later entered into an agreement whereby Royal Realty assumed the responsibilities of the operator.

deeds of transfer of title to the Unit Buyers for Corficolombiana to sign.[180] Newport would then process registration of the deeds of transfer and would physically deliver the units to the Unit Buyers,[181] and the common areas to the administration firm or condominium association in charge of managing them.[182] Corficolombiana would then sign and grant the public deeds of transfer to the Unit Buyers.[183] At the conclusion of the Project, triggering liquidation of the Administration and Payment Trust, Corficolombiana was to transfer any assets remaining in the Administration and Payment Trust, including funds and title to the land, to Newport.[184]

81. Under the Administration and Payment Trust Agreement, the Meritage Project was initially conceived to progress in eight phases (each, a "**Phase**"), as follows:[185]

(a) Phase 1: A commercial area with 18 retail units and eight towers of long-term stay luxury hotel suites, or "*aparta-suites*," housing 142 such units that would be within a so-called "*aparta-hotel*";

(b) Phase 2: Eight towers of aparta-suites with 144 units within the aparta-hotel;

(c) Phase 3: Seven towers of aparta-suites with 126 units within the aparta-hotel;

(d) Phase 4: 48 residential single family homes;

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[180] **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, cl. 14.A.1.

[181] **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, cl. 14.A.2-14.A.3.

[182] **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, cl. 14.A.4.

[183] **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, cl. 14.A.4.

[184] **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, arts. 14.B.2, 33.2 (noting that upon liquidation of the Trust, the Fiduciary will "*transfer to the Trustor or the person designated in writing, the existing properties in the Trust*.").

[185] **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, art 1(m); *see also* **Exhibit C-034bis**, Presales Trust Agreement, 17 October 2013, recital 1; Seda Witness Statement, ¶ 57.

(e) Phase 5: 45 residential single family homes; and

(f) Phases 6-8: Future developments to be determined via additional agreements between Newport and Corficolombiana.

82. Corficolombiana and Newport subsequently amended the Administration and Payment Trust Agreement four times, primarily to modify the scope of the Phases.[186]

6. Newport Commences Development Of The Meritage Project

83. With the key development agreements in place, Mr. Seda commenced development of the Meritage Project. In mid-2013, Mr. Seda established sales offices to sell the residential and commercial units available under Phase 1.[187] The units sold quickly.[188] Indeed, the Meritage Project was among the best selling projects in the state of Antioquia and the highest selling project in the zone / sector of Las Palmas.

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[186] On 15 November 2013, Newport and Corficolombiana amended the definition of the Phases in the Administration and Payment Trust Agreement by specifying the area that would be associated with the developments for each Phase. **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, Amendment No. 1, 15 November 2013, cl. 2. On 1 August 2014, Newport and Corficolombiana signed another amendment to the Administration and Payment Trust Agreement to amend the definition of the Phases. Initially noting that the developments for Phases 6 to 8 were to be ascertained for the future, Newport had decided that Phase 6 would now encompass a commercial zone of over 2,500 square meters, located on the second floor of the retail building that was to be built as part of Phase 1. Developments for Phases 7 and 8 were, again, left to be determined in the future. **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, Amendment No. 2, 1 August 2014, cl. 1. On 15 February 2016, Newport and Corficolombiana modified the Administration and Payment Trust Agreement by identifying the plans for the sub-phases of Phase 4 and Phase 5. Phase 4A and 4B would consist of 26 and 38 lots respectively; and Phase 5A would consist of 26 lots and the remaining Phase 5 sub-phases would be reserved for future developments. **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, Amendment No. 3, 15 February 2016, cl. 1. On 18 May 2016, Corficolombiana and Newport signed a fourth amendment to the Administration and Payment Trust Agreement to account for the financing provided by Banco de Bogotá. The bank was designated a creditor of Newport and a beneficiary of the Agreement along with Newport. **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, Amendment No. 4, 18 May 2016, cl. 1.

[187] Seda Witness Statement, ¶ 59.

[188] López Montoya Witness Statement, ¶ 15.

84. Given its record-setting status as one of the largest mixed-use developments in Antioquia and the high demand for units, the Meritage Project generated a lot of local interest and publicity.[189] Banners advertising the project were displayed at the property, visible to all those traveling to or from the airport along the highway next to the Project. Mr. Seda engaged in numerous successful marketing campaigns via various social media platforms.[190] For example, he organized various events onsite at the Meritage, such as "*hikes, yoga, and other fitness gatherings, which were attended by hundreds of people and generated a lot of interest in the Project*." Mr. Seda also garnered a lot of publicity via large-scale email campaigns[191] and by attending many real estate fairs at which he would promote the Meritage Project.[192] Prominent brands, such as Diesel, which was launching a furniture line at the time, partnered with Mr. Seda and ran a joint advertising campaign.[193] The Meritage was also featured in various high-profile magazines, including in *El Tesoro* magazine, *Propiedades* magazine, and in the Avianca in-flight catalogue.[194] Before long, the Meritage Project was well-known in Medellín and Colombia more generally.[195] The Map below illustrates the various phases (Phases 7 and 8, though planned, are not depicted as their locations had not yet been determined).

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189 Seda Witness Statement, ¶ 61.

190 Seda Witness Statement, ¶ 61.

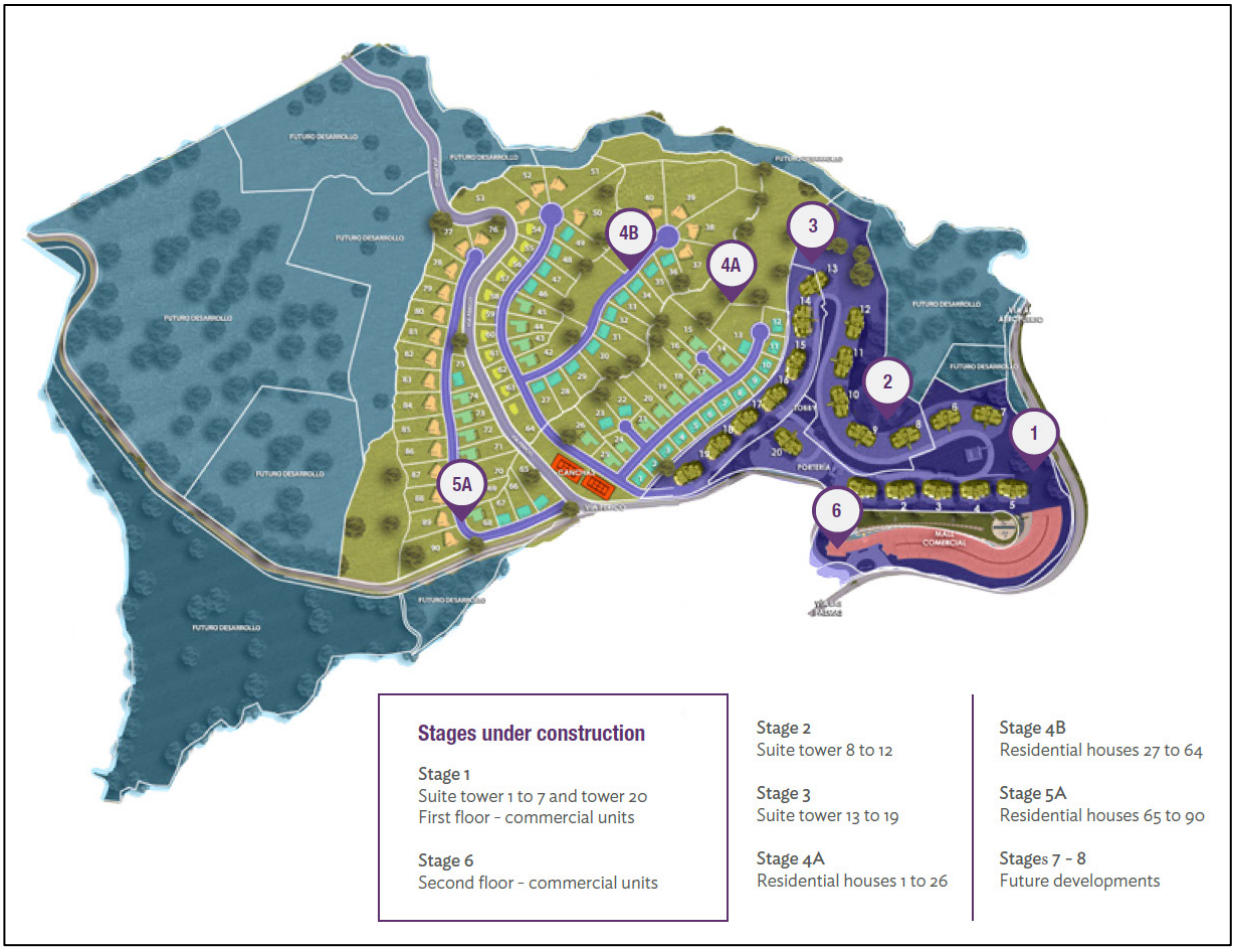
191 **Exhibit C-110**, Meritage Project Brochure, August 2013.

192 **Exhibit C-127**, Photo from Real Estate Fair, June 2014.

193 **Exhibit C-097**, Diesel Meritage Advertising Campaign, 2013-2014.

194 **Exhibit C-098**, Meritage Advertisement in Avianca In-Flight Catalogue, 2013-2014; **Exhibit C-099**, Meritage Advertisement in *El Tesoro* Magazine, 2013-2014; **Exhibit C-118**, Meritage Advertisement in *Propiedades* Magazine, October 2013.

195 Seda Witness Statement, ¶ 61.



Appendix C: Meritage Development Plan by Phase

7. Iván López Vanegas Attempts To Extort Mr. Seda

85. In early 2014, a person identifying himself as Iván López Vanegas began calling Royal Realty's offices and leaving messages for Mr. Seda.[196] Mr. López Vanegas claimed to be the rightful owner of the Meritage Property, claiming his son Sebastián López Betancur had been kidnapped a decade previously and forced to sign over the Property. Mr. López Vanegas

[196] Seda Witness Statement, ¶ 62.

demanded that Mr. Seda pay him COP 2 billion (USD 660,000) to "*go away*" and threatened to interfere with the Project if he was not paid.[197]

86. As a prominent and successful businessperson in Colombia, Mr. Seda was aware that real estate developments often attracted unscrupulous individuals demanding payoffs.[198] Thus, "*while being approached by anyone for a 'shakedown'* [was] *concerning*", it was not surprising in Colombia.[199] Mr. Seda was confident in the diligence that had been completed the previous year, did not find Mr. López Vanegas's claims credible, and was not going to agree to make an extortion payment. Mr. Seda informed his fiduciary representative at Corficolombiana and his in-house counsel of Mr. López Vanegas's attempted "*shakedown*" and all agreed that the proper course of action was to reject Mr. López Vanegas's demands and instead focus on developing the Meritage Project.[200] The reaction was the same when Mr. López Vanegas managed to obtain a meeting with Corficolombiana's president shortly thereafter, during which he made the same extortionate demands.

8. Meritage Project Begins Construction of Phases 1 and 6

87. Mr. Seda continued to focus on developing the Meritage Project. On 25 November 2014, Newport, Corficolombiana, and La Palma signed a third, and final, trust agreement to govern title to the Meritage Property ("***Parqueo* Agreement**" or "***Parqueo* Trust**").[201] The *Parqueo*

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197 Seda Witness Statement, ¶ 63.

198 Seda Witness Statement, ¶ 63.

199 Seda Witness Statement, ¶ 64. *See, e.g.,* **Exhibit C-189**, *Hemos Tenido Obras Que No Han Podido Arrancar Por Extorsiones en Medellín*, LAFM, 15 May 2017, https://www.lafm.com.co/colombia/camacol-tenido-obras-no-podido-arrancar-extorsiones-Medellín.

200 Seda Witness Statement, ¶¶ 64-65.

201 **Exhibit C-029bis**, *Parqueo* Trust Agreement and Amendment, 25 November 2014, pp. SP-0001 – SP-0021.

Agreement envisaged that La Palma would "*park*" (*parqueo* in Spanish) the land in a trust and, once the relevant equilibrium conditions for a Phase had been met, the land associated with that Phase would be transferred to the Administration and Payment Trust for development.[202]

88. On 23 December 2014, the Office of Urban Planning in Envigado issued a construction license to Newport authorizing the construction of Phases 1 and 6 (the first stage of the aparta-hotel and a number of retail units)[203] and Phase 7A of the Meritage Project, confirming that the Project complied with the relevant land use regulations, and Newport had submitted the required architectural, engineering and environmental studies.[204]

89. By February 2015, Newport had achieved the equilibrium point for Phases 1 and 6 of the Project, as it had met or exceeded, among other conditions, the sales thresholds and obtained the required licenses.[205] Newport was thus ready to commence construction and development of the Project.[206] In preparation for this, Newport, Corficolombiana and La Palma needed to formalize the transfer of land into the Administration and Payment Trust.

90. On 6 February 2015, Newport, Corficolombiana and La Palma signed an amendment that changed the beneficiary of the *Parqueo* Trust from Newport to La Palma.[207] Since Newport's

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202 **Exhibit C-029bis**, *Parqueo* Trust Agreement and Amendment, 25 November 2014, cl. 3.4.

203 *See* Seda Witness Statement, ¶ 68. *See also supra* ¶ 81 and fn. 186.

204 *See* Seda Witness Statement, ¶ 70; **Exhibit C-020bis,** Resolutions from Municipality of Envigado, 23 December 2014, pp. SP-0001 – SP-0004; López Montoya Witness Statement, ¶ 16.

205 *See* **Exhibit C-139**, Letter from Newport S.A.S. to Fiduciaria Corficolombiana, 9 February 2015.

206 Seda Witness Statement, ¶ 68; López Montoya Witness Statement, ¶ 20.

207 **Exhibit C-029bis**, *Parqueo* Trust Agreement and Amendment, Amendment No. 1, 6 February 2015. In Colombia, it is common for land owners to update the registered tax value of their property prior to its sale. *See* **Exhibit C-272**, Law 14 of 1983, 6 July 1983, art. 13. This allows the sales price for the land to more closely match the land's registered tax value, thus lowering the capital gains tax assessed on the property. In this case, as the Meritage Project was being developed, the value of the remaining phases of the Property was inflating. Thus, La Palma would have to pay higher capital gains tax for every phase it transferred to the *Parqueo* trust. La

role was to develop the Project, it did not need temporary title to the land through the *Parqueo* Trust.[208] In any event, La Palma was under a contractual obligation to transfer the plot of land when the equilibrium point of each phase was achieved.[209] Thus, the *Parqueo* Trust would serve simply as an instrument in which the land would be parked until the equilibrium point of a particular phase was achieved, at which time the relevant plot of land would be transferred to the Administration and Payment Trust.[210]

91. To implement this agreement for Phases 1 and 6, on 12 February 2015, the Superintendence of Notaries and Recordation executed a deed numbered 361 officially recording a number of transactions relating to the Meritage Property ("**Deed 361**"), including:[211]

(a) La Palma's transfer of ownership over the Meritage Property to the *Parqueo* Trust;[212]

(b) The subdivision of the Property into lots for construction associated with the Phases of the Meritage Project;[213]

(c) The transfer of the plots on which Phases 1 and 6 of the Meritage Project were to be built from the *Parqueo* Trust to the Administration and Payment Trust.[214]

Palma therefore requested an amendment to the *Parqueo* trust to be the beneficiary, so that it could reappraise the value of the land prior to its transfer to the Administration and Payment Trust, and therefore pay capital gains taxes that better accounted for the appreciation in land value.

208 Seda Witness Statement, ¶ 69.

209 **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, cl. 1(2), rec. 7.

210 Seda Witness Statement, ¶ 69.

211 **Exhibit C-140**, Deed 361, 12 February 2015.

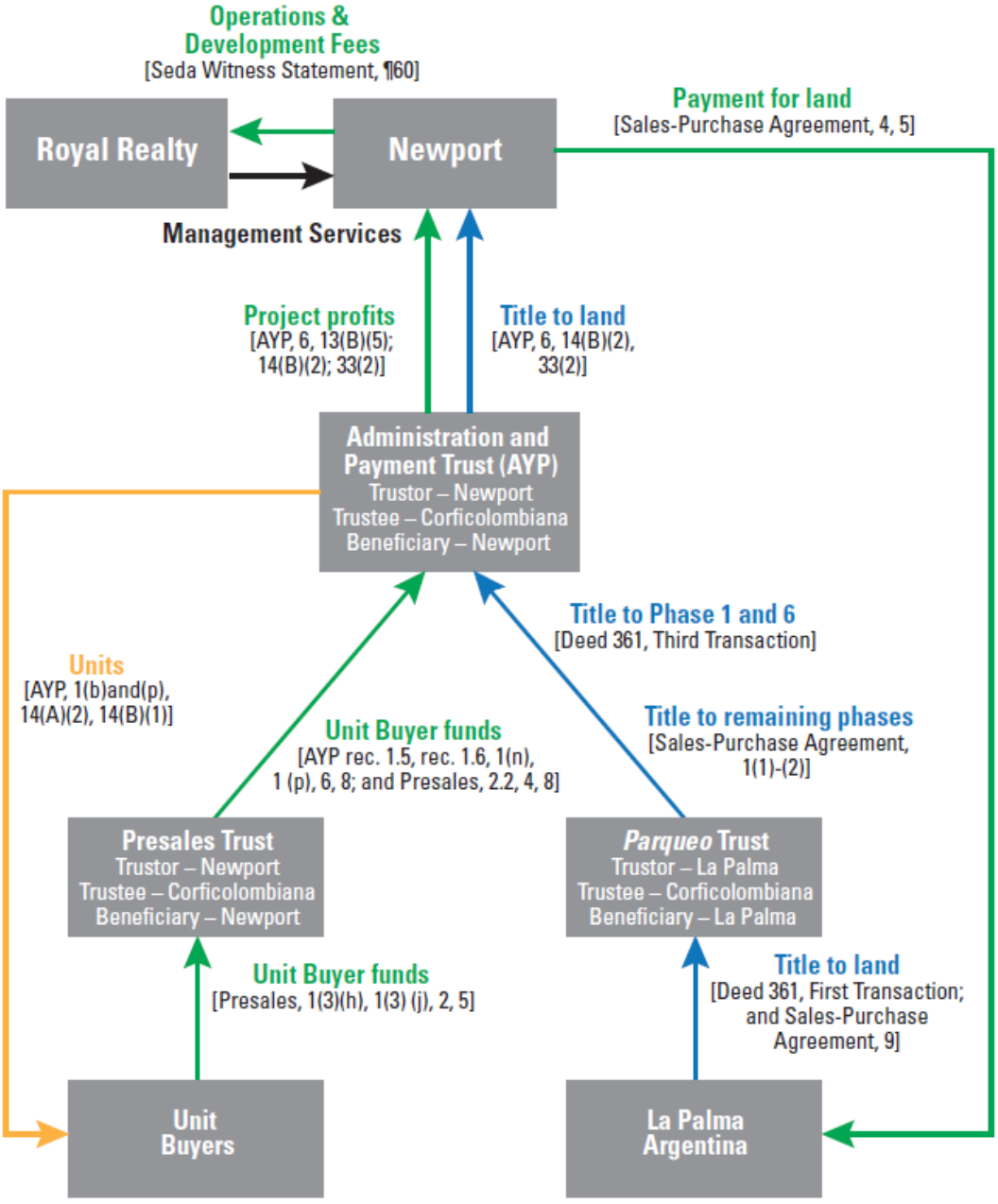
212 **Exhibit C-140**, Deed 361, 12 February 2015, pp. SP-0001 – SP-0009.

213 **Exhibit C-140**, Deed 361, 12 February 2015, pp. SP-0010 – SP-0037.

214 **Exhibit C-140**, Deed 361, 12 February 2015, pp. SP-0038 – SP-0051. *See in particular*, p. SP-0041, cl. 5 ("*On instructions given with the execution of this document, NEWPORT S.A.S., in its capacity as the Settlor of the MERITAGE Trust, and on instructions given with the execution of this document, LA PALMA ARGENTINA Y*

92. With the Phases 1 and 6 parcels of the Meritage Property in the Administration and Payment Trust, Newport was now their beneficial owner and thus began construction on these phases of the Project. The following diagram shows the flow of funds and title to the land and units between the various parties involved in the transaction, including Newport and Royal Realty, the developers and operators, La Palma, the seller of the land, Corficolombiana, the trustee and fiduciary, and the Unit Buyers.

CIA S.A.S., in its capacity as the Settlor of the MERITAGE LA PALMA ARGENTINA Trust, the Trustee, in its capacity as representative and administrator of the MERITAGE Trust, hereby conveys to MERITAGE Trust, for the account and at the risk of, NEWPORT S.A.S., as a commercial trust, the right of dominion and ownership that it currently has and exercises regarding the real property described below.").



Appendix D: Meritage Trust Structure

93. Over the course of 2015 and early 2016, Newport continued to sell units in the Meritage Project and advance the permitting and construction of the Project. On 4 December 2015, the Municipality of Envigado granted an urbanism license for all phases of the Meritage Project.

This was a "*green light*" from the Municipality for development of all proposed phases of the Project.[215]

94. Mr. Seda also sought bank financing for the Meritage Project. The success of the Charlee Hotel had given Mr. Seda a "*sufficiently robust reputation in Colombian markets*" such that banks were more than willing to offer financing for his projects.[216] In 2016, Mr. Seda approached two banks—Banco de Bogotá and Scotiabank Colpatria S.A. ("**Colpatria**")—seeking financing for the Meritage Project.[217] On 5 April 2016, Banco de Bogotá approved a loan of up to COP 35 billion (approximately USD 11.5 million at the time) to finance the development of the Meritage Project, pending its due diligence process.[218]

95. By April 2016, Newport had received most of the necessary land use and environmental permits and engineering and architectural plans needed for Phases 1 and 2. Newport had also sold nearly all the residential units and all the commercial units for Phase 1, and a number of the Phase 2 units.

9. Mr. López Vanegas Submits A False Complaint To The Attorney General's Office

96. Although Mr. Seda did not learn this until years later, having been rebuffed in his extortion attempts by Mr. Seda and Royal Realty, on 3 July 2014, Mr. López Vanegas had filed a formal

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[215] *See* López Montoya Witness Statement, ¶¶ 18-19; **Exhibit C-020**, Resolutions from Municipality of Envigado, pp. SP-0005-SP-0006, SP-0007-SP-0009.

[216] Seda Witness Statement, ¶ 72.

[217] Seda Witness Statement, ¶ 71; López Montoya Witness Statement, ¶¶ 23-24.

[218] Seda Witness Statement, ¶ 74; **Exhibit C-150**, Letter from Banco de Bogotá to A. Seda, 5 April 2016; López Montoya Witness Statement, ¶¶ 23-24.

denuncia or criminal complaint with the Attorney General's Office's headquarters in Bogotá, Colombia.[219] Mr. López Vanegas's complaint was a complete fabrication. Mr. López Vanegas acknowledged that he had been turned in by two of his former accomplices and extradited to the United States in 2003 to stand trial, where he was convicted on evidence that he was involved in a scheme to smuggle tonnes of Colombian cocaine to Europe via Venezuela on the private jet of a Saudi Arabian prince operating under diplomatic cover.[220] At the trial, another drug trafficker, Juan Gabriel Usuga, testified that in 1998, Mr. López Vanegas approached him to engage in "*financial transactions or deals in Europe*" involving a Saudi Arabian prince.[221] Further to this plan, Mr. López Vanegas held several meetings with Mr. Usuga and his drug cartel "*across the globe*" to plan the shipment of cocaine from Venezuela to Paris, France, for distribution in Europe, and later the transport of between 10 or 20 tonnes of cocaine to Saudi Arabia.[222] Mr. López Vanegas was to receive a commission from Mr. Usuga's group for each kilogram of cocaine transported.[223] Subsequently, U.S. law enforcement authorities arrested Mr. Usuga, who agreed to cooperate. He recorded a number of conversations with Mr. López Vanegas between April 2000 and March 2001, in which Mr. López Vanegas confirmed his participation in the Paris deal and extensively discussed the monies he was allegedly owed as a result of that deal.[224] After a two-month trial, a jury found Mr. López Vanegas guilty of

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

220 **Exhibit C-130**, Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014, p. SP-0001.

221 **Exhibit C-036**, *United States v. López-Vanegas*, 493 F.3d 1305 (11th Cir. 2007), 26 July 2007, p. 0003.

222 **Exhibit C-036**, *United States v. López-Vanegas*, 493 F.3d 1305 (11th Cir. 2007), 26 July 2007, pp. 0003-0005.

223 **Exhibit C-036**, *United States v. López-Vanegas*, 493 F.3d 1305 (11th Cir. 2007), 26 July 2007, p. 0004.

224 **Exhibit C-036**, *United States v. López-Vanegas*, 493 F.3d 1305 (11th Cir. 2007), 26 July 2007, p. 0005.

conspiracy to possess with intent to distribute large quantities of cocaine and the U.S. court sentenced him to 280 months—almost 24 years—in prison.[225]

97. In his complaint, Mr. López Vanegas claimed that in 2004, while he was in the United States standing trial, his son, Sebastián López Betancur, had been kidnapped by members of a drug cartel called the "*Office of Envigado*" (*Oficina de Envigado*) and forced to sign over ownership of property that had been owned by Mr. López Vanegas, and that the drug cartel had subsequently engineered a complex series of transfers of the land.[226]

98. After his conviction in the United States was overturned on jurisdictional grounds in 2007,[227] Mr. López Vanegas reported that he wanted to reclaim the land and so met with an individual affiliated with the cartel, known as "*Borracho*" (drunkard), who told Mr. López Vanegas that he and all his family members would be killed if he tried to reclaim the land.[228]

99. Apparently undeterred by the threat, Mr. López Vanegas claimed that four years later, in December 2011, he met with another individual affiliated with the drug cartel, Hector Restrepo Santamaría, alias "*Mad Dog*" ("*Perra Loca*"), who offered him his choice of USD 5 million or COP 10 billion plus attorney fees, as compensation for the land, which Mr. López Vanegas said he refused. Mr. López said that "*Mad Dog*" then offered him a beachfront property in the

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225 **Exhibit C-036**, *United States v. López-Vanegas*, 493 F.3d 1305 (11th Cir. 2007), 26 July 2007, p. 0002. *See also* **Exhibit C-130**, Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014, p. SP-0001.

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

227 Mr. López Vanegas's attorneys argued successfully that his cocaine smuggling scheme took place entirely outside the United States, and was therefore not subject to the jurisdiction of its courts. *See* **Exhibit C-036**, *United States v. López-Vanegas*, 493 F.3d 1305 (11th Cir. 2007), 26 July 2007, p. 0008.

228 **Exhibit C-130**, Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014, pp. SP-0003 – SP-0004.

resort city of Cartagena, although he warned that the property lacked proper documentation.[229] Mr. López Vanegas told the Attorney General's Office that after waiting for several years for "*Mad Dog*" to provide him with the promised titles to said beachfront property ("*Mad Dog*" himself was extradited to the United States in 2012 and imprisoned for money laundering),[230] Mr. López Vanegas decided to come forward and make his complaint to the Attorney General's Office.[231]

100. Mr. López Vanegas did not mention to the Attorney General's Office that part of the land he claimed to be the rightful owner of happened to be the site of a brand new and successful real estate development known as Meritage Luxury, nor did he mention that he had spent the prior several months harassing the developers of the Meritage Luxury and demanding money from them.[232]

101. Mr. López Vanegas also failed to explain why he and his son, Sebastián, had never reported the kidnapping that had supposedly taken place ten years earlier.[233] The reason, as documented in the Attorney General's Office's own evidence, and acknowledged in public statements by

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229 **Exhibit C-130**, Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014, pp. SP-0003 – SP-0004.

230 Mr. Santamaría was released on 2 February 2017. *See* **Exhibit C-300**, Record of Héctor Restrepo Santamaría from the Federal Bureau of Prisons' Federal Inmate Locator Database, *available at* https://www.bop.gov/inmateloc/.

231 **Exhibit C-130**, Iván López Vanegas Complaint to Prosecutor 24, 3 July 2014, p. SP-0004. *See also* **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0045.

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

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

senior officials of the Attorney General's Office, is that the kidnapping story was a fabrication to further his scheme to extort money from the Meritage Project developers.[234]

102. The Prosecutor who took Mr. López Vanegas's statement, Prosecutor (*Fiscal*) No. 24 of the Organized Crime section, referred the matter via a *compulsa de copias* to another unit of the Attorney General's Office, the Money Laundering and Asset Forfeiture Unit, where it was assigned to Prosecutor No. 37.[235] This was the very same Unit that had previously issued the letters to La Palma and Corficolombiana confirming that the Meritage Property had no links to criminal activity.

103. Prosecutor No. 37 in turn passed it on to a unit of the Judicial Police assigned to the Superintendence of Notaries and Registry, which performed some preliminary property searches, and then dropped the matter altogether.[236] The case remained dormant for almost 18 months.

C. Further Expansion Of Real Estate Projects In Colombia

104. As noted above, Mr. Seda's vision was to leverage the successful Charlee brand into further projects. Mr. Seda now had access to cash flows from the operations of the Charlee Hotel and increased access to financing from banks, now that his reputation as a developer had been further cemented by projects such as Luxé and Meritage. He accordingly launched a number

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234 *See* **Exhibit C-167**, Transcript of TeleAntioquia Interview with Claudia Carrasquilla, 6 August 2018; **Exhibit C-067bis**, Letter from Michael J. Burdick to Aimer Fredy Alonso Triana, 21 November 2016.

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

236 **Exhibit C-132**, Prosecutor 72's Response to Prosecutor 37's Request to Investigate Iván López Vanegas Complaint, 27 August 2014.

of mixed-use and hospitality projects in Colombia under the Charlee Lifestyle brand in parallel with the development of Luxé and Meritage. These included:

105. **Tierra Bomba**: In 2013, Mr. Seda identified Tierra Bomba, an island in Cartagena, a popular resort town in Colombia, as a promising site for the development of a mixed-use resort hotel project. Although Cartagena itself was already a popular tourist destination, the island of Tierra Bomba had not yet seen the benefits of this tourism. New development had only recently been permitted on the island, and the island was not well connected to the mainland. Yet, it was only a 7-minute boat trip from the Cartagena shore.[237] The map below shows the location for the project:

Appendix G: Map of Tierra Bomba

[237] Seda Witness Statement, ¶ 30.

106. Mr. Seda envisioned capturing a section of the market that was looking for a secluded beach vacation that was still relatively accessible from the mainland. As a first mover, he could also establish dedicated boat services to transport people to the planned resort.

107. The project would have an 80-room luxury hotel, 80 apartments, 50 cabins, as well as recreational amenities including a restaurant, a café, and a gym.[238] Approximately 570 people would be employed in constructing the project, with a further 390 people employed to operate the project once construction was complete.[239] The rendering below sets out the development planned for the project.

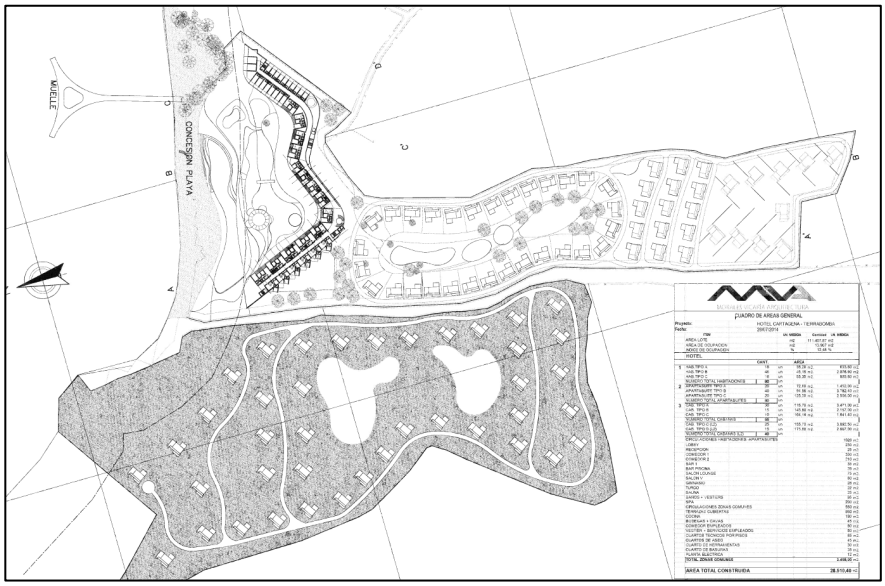

Exhibit C-129: Tierra Bomba Plan

108. Mr. Seda, along with some other investors, established RDP Cartagena S.A.S. as a development vehicle for the Tierra Bomba Project.[240] In 2014, Mr. Seda put deposits on 15

238 *See* **Exhibit C-066bis**, Presentation to Native Tierra Bomba Community, 19-21 January 2016, p. SP-0006.

239 Seda Witness Statement, ¶ 31.

240 *See* **Exhibit C-112**, RDP Cartagena S.A.S. Investment Agreement with Roger Khafif, 1 September 2013; **Exhibit C-113**, RDP Cartagena S.A.S. Investment Agreement with Maria Álvarez & CIA S.C.A., 1 September 2013; **Exhibit C-114**, RDP Cartagena S.A.S. Investment Agreement with Gustavo Velasquez – Paula Hoyos, 1

acres of land.[241] He also developed the initial designs for the project and commenced the entitlement process.[242] This included engaging counsel, completing advanced design work, and working with both the local municipality and the planning director's office. This also included a consultation process with the indigenous community in Tierra Bomba given the attendant benefits the development would bring to the area, such as potable water, environmental benefits such as trash and waste management, and employment and economic opportunities.[243] The sales process was expected to begin in early 2017, construction in 2020, with the hotel scheduled to begin operations in August 2022.[244]

109. In addition to the plan to develop a resort in Tierra Bomba, in 2016, Royal Realty entered into a verbal agreement with Vicente Caro, to manage a hotel that Mr. Caro was building on Tierra Bomba.[245]

110. **Santa Fé de Antioquia**: In 2015, Mr. Seda identified an opportunity for a mixed-use development in the municipality of Santa Fé, about a 1.5-hour drive from the city of Medellín. Santa Fé is known for its colonial buildings and is regarded as a weekend destination for Medellín residents.

September 2013; **Exhibit C-115**, RDP Cartagena S.A.S. Investment Agreement with Ashmina Foundation, 1 September 2013; **Exhibit C-116**, RDP Cartagena S.A.S. Investment Agreement with Inversiones Blue Sky, 1 September 2013; **Exhibit C-117**, RDP Cartagena S.A.S. Investment Agreement with Packy S.A.S., 1 September 2013.

241 **Exhibit C-134**, Promise to Purchase Contract Between Angel Seda and Jaime Alfredo Sánchez Varga, 19 s; **Exhibit C-128**, Promise to Purchase Contract between Angel Seda and Ramon Antonio Duque Marin, 17 June 2014; **Exhibit C-124**, Promise to Purchase Contract between Angel Seda and Jaime Francisco Martínez Pinilla and Edilia Rosa Sánchez Hoyos, 6 March 2014.

242 *See*, *e.g.*, **Exhibit C-129**, Development Plan of the Project, July 2014.

243 *See* **Exhibit C-066**, Presentation to Native Tierra Bomba Community, 19-21 January 2016.

244 Seda Witness Statement, ¶¶ 31-32.

245 Seda Witness Statement, ¶ 33.

111. In December 2015, Royal Realty, along with additional investors,[246] purchased a 63.8-hectare parcel of land in Santa Fé with the intent of developing a waterfront property along the Cauca River.[247] The planned development was to consist of a 250-room apart-hotel and 180 residential plots.[248] Approximately 400 people would be employed in constructing the project, with a further 620 people employed to operate the project once construction was complete.[249] Mr. Seda expected to commence pre-sales for the project in mid-2017, with construction commencing in September 2018.[250]

112. Prior to purchasing the land, Mr. Seda commissioned a title study conducted by Rodríguez Azuero at Contexto Legal in November 2015, which indicated that title was free and clear.[251]

113. **450 Heights**: On 1 September 2013, Mr. Seda established Interpalmas S.A.S as an investment vehicle to develop the 450 Heights project,[252] a mixed-use commercial, residential, and hotel development, like Meritage. In 2014, Mr. Seda identified a suitable property located on the outskirts of the city, minutes from the affluent district of El Poblado and Medellín's international airport.[253] He entered into negotiations to purchase the land from the sellers.

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246 *See* **Exhibit C-145**, Royal Beverages S.A.S. Investment Agreement with Mónica Betancur, 22 December 2015.

247 *See* **Exhibit C-146**, Land Transfer Deed between Royal Realty S.A.S., Mónica Betancur, Nicolas Navarro and Paola Diez, and Fabiola Jaramillo Correa, 22 December 2015.

248 **Exhibit C-065bis**, Santa Fé de Antioquia Land Use Certificate, 9 May 2017.

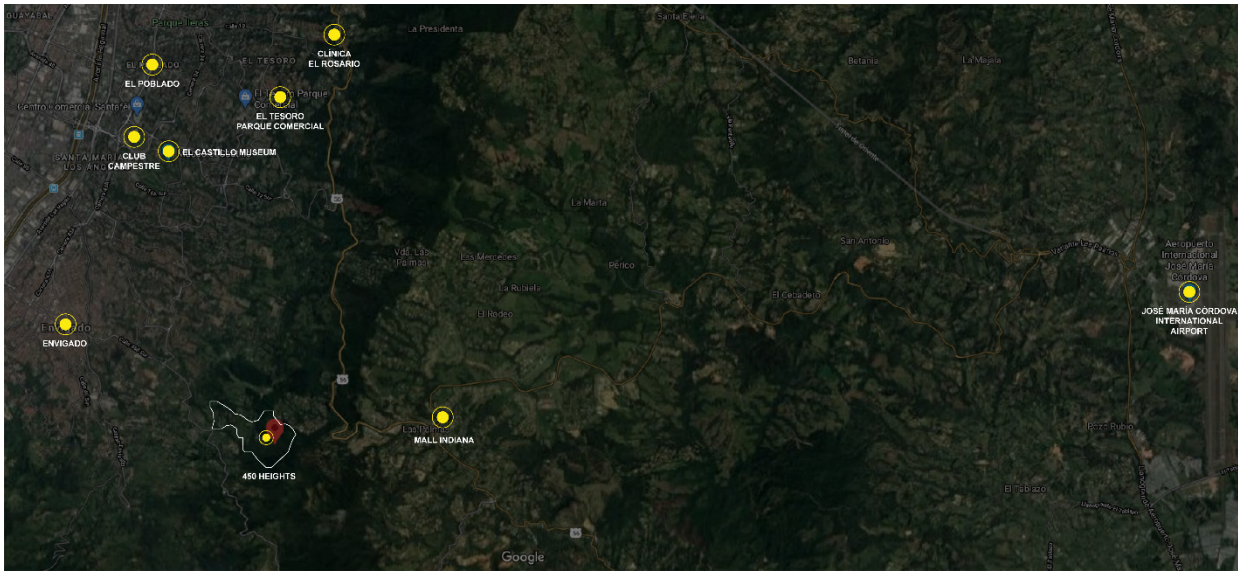
249 Seda Witness Statement, ¶ 35.

250 Seda Witness Statement, ¶ 35.

251 *See* **Exhibit C-144**, Sante Fe Title Study by Rodriguez Azuero Contexto Legal, 30 November 2015.

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

253 **Exhibit C-068bis**, 450 Heights Investment Brochure, pp. SP-0009 – SP-0010.



Appendix H: Map of 450 Heights Plot

114. The 450 Heights project was to include a 100-room hotel along with a residential area offering 83 condominium units, 300 loft suites, and 61 other residential properties.[254] The development would also incorporate 140 commercial units, including restaurants, cafes, shops, offices, an outdoor movie theater, and 10,000 square meter park in a 250,000 square meter lot to be called Highland Park.[255] Approximately 900 people would be employed in constructing the project, with a further 700 people employed to operate the project once construction was complete.[256]

115. By January 2017, Mr. Seda had completed several studies of the land, including geological surveys, water studies, and land surveying, and was in the design phase of the project.[257] Sales

254 **Exhibit C-068bis**, 450 Heights Investment Brochure, p. SP-0004.

255 **Exhibit C-068bis**, 450 Heights Investment Brochure, p. SP-0044 – SP-0049.

256 Seda Witness Statement, ¶ 36.

257 *See* **Exhibit C-068bis**, 450 Heights Investment Brochure; **Exhibit C-069**, 450 Heights Topography Map; **Exhibit C-094**, 450 Heights Land Survey, 18 September 2011.

of 450 Heights units were scheduled to commence by the end of 2017, with construction beginning 12 to 18 months later, and hotel operations commencing by 2020.[258]

116. In addition to the above, Royal Realty had commenced planning and preparatory work on a number of other real estate development projects in Colombia. This included the planned development of three hotels on the banks of the Represa de Prado Dam, close to the Department of Tolima and only 200 kilometers from Bogotá.[259] Between May 2014 and April 2016, Mr. Seda purchased three plots of land in Prado,[260] placed a deposit on fourth piece of land,[261] and brought two additional investors on board.[262] In addition, as part of a broader strategy to leverage Royal Realty's status as a well-known property development firm, the company continued seeking opportunities to develop projects in other parts of Colombia including Villa de Leyva, Cali, Barranquilla, Bogotá, and Amazonas.[263]

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117. The successes of the Charlee Hotel, Luxé and Meritage projects cemented the lifestyle and luxury brand that Mr. Seda had developed since his arrival in Colombia. Every project thereafter that Mr. Seda initiated, incrementally and together, further contributed to his brand,

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258 Seda Witness Statement, ¶ 36.

259 Seda Witness Statement, ¶ 37; **Exhibit C-064bis,** Prado Tolima Investment Fund Brochure, pp. 11-13.

260 *See* **Exhibit C-126**, Land Transfer Deed between RVP Land Fund S.A.S. and Helbert Evaristo Sarmiento Arias and Others, 17 May 2014; **Exhibit C-148**, Land Transfer Deed between RVP Land Fund S.A.S. and Gomez H CIA S.A.S., 26 February 2016; **Exhibit C-143**, Land Transfer Deed between Angel Seda and Zahir Hoyos Hoyos, 9 October 2015.

261 *See* **Exhibit C-142**, Promise to Purchase Agreement between RVP Land Fund I S.A.S. and Sandra Liliana Conde Mora and Ricardo Sánchez Cardozo, 9 September 2015.

262 **Exhibit C-154**, Corporate Agreement for RVP Land Fund S.A.S., 15 April 2016, p. 1; **Exhibit C-155**, Corporate Agreement for RVP Land Fund S.A.S., 15 April 2016, p. 1.

263 **Exhibit C-147**, Charlee Brand Royal Group Projections, 2016.

reputation and experience developing hospitality projects. By April 2016, Mr. Seda was on track to fulfilling his goal of creating a successful portfolio of hospitality and mixed-use projects in Colombia.

D. Mr. López Vanegas Resurfaces With Extortion Demands

1. Mr. López Vanegas Renews Extortion Attempts

118. After almost two years of silence, Mr. López Vanegas once again contacted Mr. Seda, this time via an attorney, Victor Mosquera Marín. Mr. Mosquera had developed a niche practice representing high profile political figures accused of corruption, including Álvaro Uribe Vélez,[264] the former president of Colombia who was accused of witness tampering, Álvaro Hernán Prada,[265] a congressman also accused of witness tampering, and Andrés Felipe Arias,[266] the former Minister of Agriculture accused of misappropriation of public funds.

119. On 7 April 2016, Mr. Mosquera wrote to Mr. Seda, claiming that Mr. López Vanegas was the "*legitimate owner*" of the Meritage Property, who was "*arbitrarily and illegally dispossessed*" of the Property when he was "*forced to abruptly leave the country due to reasons beyond his control,*" an apparent reference to his extradition.[267] Mr. Mosquera presented no proof of these assertions, and failed to mention Mr. López Vanegas's record as an extradited

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[264] **Exhibit C-291**, LaFM Article re *Ante la CIDH Presentan Medidas Cautelares A Favor Del Senador Álvaro Uribe*, 3 August 2018.

[265] **Exhibit C-292**, Blu Radio Article re *'Le Expliqué Todo A La Corte, Aporté Toda La Verdad': Álvaro Hernán Prada*, 6 November 2019.

[266] **Exhibit C-293**, Las2Orillas Article re *El Abogado Víctor Mosquera Intenta Evitar La Cárcel A Andrés Felipe Arias*, 1 March 2017.

[267] **Exhibit C-151**, Letter from Victor Mosquera Marin to Angel Samuel Seda, 7 April 2016; Seda Witness Statement, ¶ 75.

and convicted drug trafficker. Mr. Mosquera asked for a meeting with Mr. Seda "*with the aim of exploring an alternative resolution to the dispute, by means of direct negotiations*," and if no agreement could be reached then Mr. López Vanegas was "*willing to begin the appropriate domestic or international legal actions*."[268] Deeming it baseless, Mr. Seda initially ignored the request.

120. In a harbinger of what was to come, the day after Mr. Mosquera wrote to Mr. Seda—and two years after Mr. López Vanegas had initially filed his complaint with the Organized Crime Unit, a different unit, the Asset Forfeiture Unit, now headed by a new Director, Andrea del Pilar Malagón Medina ("**Ms. Malagón**"), suddenly assigned the case to Prosecutor No. 44, Alejandra Ardila Polo ("**Ms. Ardila**").[269] This was the first of many coincidences in timing between the outreach of Mr. López Vanegas and his representatives and actions taken by Ms. Malagón and Ms. Ardila, though all of this was unknown to Mr. Seda at the time.

121. And on 18 April 2016, Prosecutor No. 44, Ms. Ardila, apparently relying solely on the stale complaint filed by Mr. López Vanegas two years previously, initiated an asset forfeiture investigation into the Meritage Property.[270]

122. Shortly thereafter, on 27 April 2016, Mr. Mosquera sent Mr. Seda another request for a meeting, the purpose of which was supposedly "*to make available to* [Mr. Seda], *based on our office's due diligence, the exhibits and evidence we have regarding the legitimate ownership*

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[268] **Exhibit C-151**, Letter from Victor Mosquera Marin to Angel Samuel Seda, 7 April 2016.

[269] **Exhibit C-153**, Attorney General's Office Resolution No. 125, 8 April 2016.

[270] **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017.

of the asset in dispute, and which we would like for you to be aware of prior to any legal proceedings before the corresponding jurisdictions."[271] Though Mr. Seda had refrained from responding until now, he decided to do so in light of Mr. Mosquera's threats that he would take legal action against the Meritage Project.[272] Thus, on 3 May 2016, Mr. Seda agreed to meet Mr. Mosquera and Mr. López Vanegas.[273] Mr. Mosquera, however, abruptly responded that his law firm had "*exhausted the approach with the opposing party and as per the client's specific instructions*" and "*must proceed* [with] *his defense*."[274] Mr. Seda did not know what legal action Mr. López Vanegas, who had no valid claim of ownership, could feasibly take.[275] He soon found out.

2. Mr. López Vanegas Files A *Tutela*

123. On 6 May 2016, Mr. López Vanegas filed a constitutional protection action, or *tutela*, before the Bogotá Superior Court, alleging that the Organized Crime Unit was not acting on his complaint promptly enough.[276] He named a number of interested parties including Royal Realty, Corficolombiana, and La Palma.[277] Mr. López Vanegas later added Newport and the Attorney General's Office's Asset Forfeiture Unit to the legal action.[278]

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[271] **Exhibit C-156**, Email from Víctor Mosquera Marín to Angel Seda and J. Evans, *attaching* Letter from Víctor Mosquera Marín to James Evans; and Letter from Víctor Mosquera Marín to Angel Samuel Seda, 27 April 2016; Seda Witness Statement, ¶ 76.

[272] Seda Witness Statement, ¶ 77.

[273] **Exhibit C-157**, Email chain between Víctor Mosquera Marín and Angel Seda, 3 May 2016.

[274] **Exhibit C-157**, Email chain between Víctor Mosquera Marín and Angel Seda, 3 May 2016.

[275] Seda Witness Statement, ¶ 77.

[276] **Exhibit C-037bis**, López Vanegas *Tutela* Action, 6 May 2016.

[277] **Exhibit C-037bis**, López Vanegas *Tutela* Action, 6 May 2016, p. SP-0017.

[278] *See* **Exhibit C-039bis**, Decision on López Vanegas *Tutela* Action, 23 May 2016, p. SP-0001.

124. The Organized Crime Prosecutor responded to Mr. López Vanegas's allegations, stating that the complaint was now being processed by the Attorney General's Office's AML and Asset Forfeiture Unit.[279] The Asset Forfeiture Unit responded that it had not violated any constitutional rights as it was still in the initial stage of evaluating and processing Mr. López Vanegas's complaint.[280] It observed that the asset forfeiture aspect of Mr. López Vanegas's complaint was separate and independent from any penal investigations arising from the complaint.[281] Finally, the Asset Forfeiture Unit informed the court that it had not disclosed the investigation because, pursuant to Colombian Asset Forfeiture law, the initial stage of such investigations must remain confidential.[282]

125. On 17 May 2016, Royal Realty and Newport filed a response to Mr. López Vanegas's *tutela*, noting that his petition did not impute any criminal conduct to Royal Realty and Newport.[283] The response stressed that necessary title studies and diligence had been performed and that the Attorney General's Office had provided confirmation that there was no criminal investigation of any type against prior owners of the Property.[284] Given that Newport took all the necessary measures to acquire rights to develop the Property, it was a good faith purchaser whose rights must be respected.[285] The response further described the harm that would come to the Property should Mr. López Vanegas's *tutela* be granted—construction on

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279 **Exhibit C-039bis**, Decision on López Vanegas *Tutela* Action, 23 May 2016, p. SP-0007.

280 **Exhibit C-039bis**, Decision on López Vanegas *Tutela* Action, 23 May 2016, p. SP-0004 – SP-0005.

281 **Exhibit C-039bis**, Decision on López Vanegas *Tutela* Action, 23 May 2016, p. SP-0004 – SP-0005.

282 **Exhibit C-039bis**, Decision on López Vanegas *Tutela* Action, 23 May 2016, p. SP-0004 – SP-0005.

283 **Exhibit C-038bis**, Newport's Response to López *Acción de Tutela*, 17 May 2016, p. SP-0002; Seda Witness Statement, ¶¶ 79-81.

284 **Exhibit C-038bis**, Newport's Response to López *Acción de Tutela*, 17 May 2016, pp. SP-0002 – SP-0003.

285 **Exhibit C-038bis**, Newport's Response to López *Acción de Tutela*, 17 May 2016, p. SP-0003.

the Project had begun, bank loans were being processed, and thus any interruption would trigger a serious financial collapse of the Project, affecting not only Newport, but also more than 150 purchasers of units in the Project and their families.[286]

126. Indeed, on the same day that Newport filed its response, Royal Realty and Newport received yet another title study of the Meritage property from another law firm, Osorio & Moreno,[287] which Colpatria, the Colombian affiliate of Scotia Bank, had commissioned, as part of its own due diligence. This study found that the title to the Property was free from any conflicts or limitations, just like the prior studies.[288]

127. After filing a response to Mr. López Vanegas's *tutela*, an attorney from La Palma advised Mr. Seda that the Attorney General's Office knew that Mr. López Vanegas was a criminal trying to extort Mr. Seda. The attorney also told Mr. Seda that the Attorney General's Office was asking for a bribe of COP 500 million (USD 175,000), noting that "*these things don't move without help*."[289] Mr. Seda had no interest in paying bribes and knew he had done nothing wrong; accordingly, he ignored the request.

128. On 23 May 2016, the court issued a decision on Mr. López Vanegas's *tutela* action,[290] declaring that Mr. López Vanegas's actions against Royal Realty, Newport, as well as La Palma and Corficolombiana, were inadmissible.[291] The court agreed that the Asset Forfeiture

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[286] **Exhibit C-038bis**, Newport's Response to López *Acción de Tutela*, 17 May 2016, p. SP-0003.

[287] **Exhibit C-160**, Osorio & Moreno Abogados, Title Study, 17 May 2016.

[288] Seda Witness Statement, ¶ 83.

[289] Seda Witness Statement, ¶ 82.

[290] **Exhibit C-039bis**, Decision on López Vanegas *Tutela* Action, 23 May 2016.

[291] **Exhibit C-039bis**, Decision on López Vanegas *Tutela* Action, 23 May 2016, p. SP-0013.

Unit had not violated Mr. López Vanegas's rights as the initial stage of the investigation was ongoing, and, by law, this stage of asset forfeiture investigations were closed to the public.[292] The court also found that investigation of the asset forfeiture portion of Mr. López Vanegas's complaint was separate and independent from investigation of the criminal conduct surrounding the alleged kidnapping of Mr. López Vanegas's son in the complaint.[293] But the court found it insufficient that the only action taken by the Organized Crime Unit had been to send copies of the file to the Asset Forfeiture Unit.[294] Therefore, the court ordered the Organized Crime Unit, before which Mr. López Vanegas had filed his original complaint, to determine within 15 calendar days whether or not to open an investigation into the criminal conduct alleged in Mr. López Vanegas's complaint.[295] Claimants have been unable to ascertain how the Organized Crime Unit responded to the court's order—what is clear is that no one appears to have been charged or convicted of any offense related to the alleged kidnapping of Sebastián López Betancur.

129. Meanwhile, Newport was close to reaching agreement on financing terms with Banco de Bogotá. As a regulated financial institution, Banco de Bogotá was required to conduct its own diligence, including following its SARLAFT process.[296] In addition, on 26 May 2016, Banco de Bogotá received a title study it had independently commissioned of the Meritage Property, which also concluded that the land was "*unencumbered*."[297] Accordingly, less than two weeks

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[292] **Exhibit C-039bis**, Decision on López Vanegas *Tutela* Action, 23 May 2016, p. SP-0010 – SP-0011.

[293] **Exhibit C-039bis**, Decision on López Vanegas *Tutela* Action, 23 May 2016, p. SP-0009.

[294] **Exhibit C-039bis**, Decision on López Vanegas *Tutela* Action, 23 May 2016, p. SP-0010.

[295] **Exhibit C-039bis**, Decision on López Vanegas *Tutela* Action, 23 May 2016, p. SP-0013.

[296] *See supra* ¶ 63.

[297] **Exhibit C-161**, Daniel C Pardo, Study for Banco de Bogotá, 26 May 2016, p. SP-0004.

later, on 2 June 2016, Banco de Bogotá registered a mortgage of COP 2 billion (USD 660,000), pursuant to the fulfillment of certain conditions by Newport.[298]

3. Mr. López Vanegas Threatens Mr. Seda With Asset Forfeiture Against Meritage

130. Though the court had dismissed Mr. López Vanegas's *tutela* action against Royal Realty and Newport, the *tutela* had exposed that even if the Organized Crime Unit did not think Mr. López Vanegas's complaint was even worthy of its attention, the Asset Forfeiture Unit was looking at it. Mr. Seda was worried about further actions Mr. López Vanegas might take to impede development of the Property and signs soon began to emerge that the Asset Forfeiture Unit might be involved in the corruption.[299]

131. In June 2016, as he was leaving Charlee Hotel's parking lot, a man claiming to represent the Attorney General's Office approached Mr. Seda and asked him to pay the requested amount (COP 500 million) to prosecutors from the Attorney General's Office.[300] Mr. Seda firmly rejected the man's offer but he was shaken by the aggressive tactic.

132. Accordingly, on 2 June 2016, Mr. Seda wrote to Mr. Mosquera, emphasizing that Newport was a good faith buyer, and that "[w]*e are definitely not going to pay your client any compensation.…… Very simple… Simple*."[301]

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298 **Exhibit C-277**, Banco de Bogotá Mortgage, 2 June 2016.

299 Seda Witness Statement, ¶ 87.

300 Seda Witness Statement, ¶ 87.

301 **Exhibit C-162**, Email chain between Víctor Mosquera Marín and Angel Seda, 6 June 2016.

133. On 8 June 2016, Mr. Seda met with Mr. Mosquera and another representative of Mr. López Vanegas, Mr. Gabriel Valderrama, at the JW Marriott Hotel in Bogotá.[302] Mr. Valderrama and Mr. Mosquera took on a far more threatening tone than they had in Mr. Mosquera's written communications. Mr. Mosquera told Mr. Seda that he was underestimating Mr. Mosquera's power and influence, and that Mr. Mosquera had the necessary connections within the Attorney General's Office—specifically with Ms. Malagón and Ms. Ardila—to bring an end to the Meritage Project. Mr. Seda insisted that he would not pay under any circumstances. Mr. Mosquera suggested that Mr. Seda meet with Mr. López Vanegas in Miami, because Mr. López Vanegas could not leave the United States (for reasons undisclosed).[303]

134. On 10 June 2016, Mr. Seda met with Mr. López Vanegas, Mr. Mosquera and Mr. Valderrama at the Marriott Marquis hotel in Miami.[304] Mr. López Vanegas and Mr. Mosquera repeated their threats, emphasizing their connections with Ms. Malagón and Ms. Ardila at the Attorney General's Office, and asked Mr. Seda to pay COP 56 billion (USD 19 million) or they would ensure that the Attorney General's Office would seize the Meritage property.[305] Mr. Mosquera specifically said that he regularly communicated with Ms. Malagón and that if he asked, she would place the Meritage property into asset forfeiture proceedings. In an even more concerning turn of events, Mr. López Vanegas showed Mr. Seda pictures of Mr. Seda's three children, and Mr. Valderrama, without warning, took a picture of Mr. Seda.[306] Terrified

[302] Seda Witness Statement, ¶ 89.

[303] Seda Witness Statement, ¶ 90.

[304] Seda Witness Statement, ¶ 91.

[305] Seda Witness Statement, ¶ 91.

[306] Seda Witness Statement, ¶ 91.

and unnerved, Mr. Seda fled the meeting.[307] Mr. Valderrama pursued him to the curb, apologizing and asking him to return. Mr. Seda got into a taxi and drove away. Mr. Valderrama texted him to apologize for the threatening nature of the meeting, sending Mr. Seda a text message saying "[f]*orgive me and let's restart the conversation!!!*"[308] Mr. Seda did not respond.

135. More than a month later, on 25 July 2016, Mr. Valderrama contacted Mr. Seda again over text asking to speak urgently. The conversation progressed as follows:

> "*Valderrama: Warm greetings ángel. I can call you or you call me!!!*
> *It's very important that we talk!!!*
>
> *Seda: I'm not interested… Thank you.*
> *If you contact me or threaten me I will call the team that is already aware…*
> *Both Army and National Police. [Any] legal problem you handle it behind lawyers.*
>
> *Valderrama: Ángel, warm greetings, understood. The negotiation chapter is closed."*[309]

4. Consistent With Mr. López Vanegas's Threats, The Attorney General's Office Seizes Meritage

136. On 3 August 2016, just *seven days* after Mr. Seda had rejected Mr. Valderrama's final overtures,[310] Mr. López Montoya, the Vice President of Construction for Royal Realty, was on his way to work when he received a call from someone at the Meritage on-site sales office

[307] Seda Witness Statement, ¶ 91.

[308] **Exhibit C-163**, WhatsApp chain between Angel Seda and Gabriel Valderrama, 10 June 2016. *See also* Seda Witness Statement, ¶ 91.

[309] **Exhibit C-163**, WhatsApp chain between Angel Seda and Gabriel Valderrama, 25 July 2016 (emphasis added). *See also* Seda Witness Statement, ¶¶ 93-94.

[310] **Exhibit C-165**, Certificate of Seizure of the Meritage Property, 3 August 2016.

informing him that several police trucks from the Technical Investigation Team ("*Cuerpo Técnico de Investigación*" or **CTI**, in Spanish), an arm of the judicial police, had shown up at the Meritage site that morning. He quickly rushed to the site, as did Mr. Juan Pablo Lopera, Royal Realty's in-house counsel. He was greeted by two men who appeared to be foreigners, possibly from the U.S., but who did not identify themselves.[311]

137. Mr. López Montoya went to the sales office, where a senior CTI agent told him, "*The prosecutors will arrive soon and will explain what is happening. Prosecutor Alejandra Ardila Polo is very nice. You should talk to her and you'll see how quickly this situation can be resolved*."[312] He also told Mr. López Montoya that the two foreigners were from the U.S. Embassy in Bogotá and had decided to come along to "*observe the seizure process*."[313] Soon thereafter, Ms. Ardila entered and told Mr. López Montoya that "*she was executing a judicial resolution authorizing the seizure of the Meritage lot as a consequence of a complaint received a few months ago about a kidnapping of one of the former owners of the lot*."[314] Ms. Ardila further explained that "*the Colombian Government was now taking over administration of the Meritage lot and construction would have to cease immediately, with no further sales permitted*."[315] Mr. López Montoya explained to her that it must be a mistake because extensive diligence had been done, even showing her the Attorney General's Office's Certification of No Criminal Activity, which she told him was "*a great document*," that would "*be very useful*

311 López Montoya Witness Statement, ¶¶ 26-28.

312 López Montoya Witness Statement, ¶ 29.

313 López Montoya Witness Statement, ¶ 29.

314 López Montoya Witness Statement, ¶ 30.

315 López Montoya Witness Statement, ¶ 30.

to [him]," but said she would "*proceed with the seizure" anyway*.[316] In Mr. López Montoya's observation, the officials did not know what they were seizing. They had the wrong topical map, seemed unable to determine the appropriate boundaries for the seizure, and knocked on a neighbor's door in confusion.[317] Ms. Ardila Polo expressed surprise to Mr. López Montoya that construction on the property was so advanced, she told him that she and her "*team had no idea there was a project being built on the land*."[318] Indeed, structural construction was near complete for five of the aparta-hotel towers, with interior walls, exterior walls, plumbing, sewer lines, electricity cables, and ceilings all near completion, and foundations laid for the commercial buildings.[319] The below photos show the status of some of the construction shortly before the seizure:

Exhibit C-268: Photographs of the Meritage Lot (July 2016)

138. As the prosecutors and agents were preparing to leave, Mr. Lopera asked for a copy of the Certificate of Property Seizure ("*Acta de secuestro del inmueble*").[320] The Certificate referenced a resolution dated 22 July 2016, authorizing the imposition of precautionary

[316] López Montoya Witness Statement, ¶ 31.

[317] López Montoya Witness Statement, ¶¶ 31-32.

[318] López Montoya Witness Statement, ¶ 32.

[319] Seda Witness Statement, ¶ 95; López Montoya Witness Statement, ¶ 25.

[320] López Montoya Witness Statement, ¶ 33.

measures, but when they asked her for a copy, Ms. Ardila Polo refused to provide it and said that Corficolombiana—which she claimed was the titleholder—would have to come to the Attorney General's Office to obtain a copy.[321] The Certificate itself provided no details on the reason for the seizure, its duration or impact.[322] It simply identified the "*lot of land*" and the project "*under construction*" on the land[323] were now placed under seizure pursuant to the implementation of precautionary measures related to asset forfeiture.[324]

139. When they finally obtained a copy, as described below, it turned out, the resolution had been issued on 22 July 2016, just days before Mr. Valderrama's message to Mr. Seda that the "*negotiation chapter is closed*."[325] The resolution ordered the imposition of precautionary measures ("*medidas cautelares*" in Spanish) on the Property ("**Precautionary Measures Resolution**") based on the complaint filed by Mr. López Vanegas more than two years previously.[326] The precautionary measures prohibited transfer or sale of the property, and sequestered and embargoed the property, precluding any further construction. They also marked the first step in *extinción de dominio* or asset forfeiture proceedings against the Meritage Project ("**Asset Forfeiture Proceedings**").

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321 López Montoya Witness Statement, ¶ 33.

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

323 **Exhibit C-165**, Certificate of Seizure of the Meritage Property, 3 August 2016, section VI.

324 **Exhibit C-165**, Certificate of Seizure of the Meritage Property, 3 August 2016, section III.

325 Seda Witness Statement, ¶ 94.

326 *See supra* ¶ 96.

E. Colombia Wrongfully Pursues Asset Forfeiture Proceedings Against Meritage

1. Asset Forfeiture Under Colombian Law

140. Given the country's history, during the 1980s and early 1990s, the Colombian National Constituent Assembly enshrined in the country's Constitution the court's right to authorize forfeiture of assets acquired through illicit enrichment. This constitutional provision was later enforced through a series of legislative measures, the purpose of which was to disgorge wealth generated by illegal activities. Ultimately, on 20 January 2014, Colombia enacted Law 1708 of 2014 ("**Asset Forfeiture Law**"), which set out a comprehensive code for the regulation of the asset forfeiture process in Colombia, including definitions, applicable procedures, the grounds on which asset forfeiture may proceed and fundamental guarantees for parties.[327]

a. Grounds For Asset Forfeiture

141. As explained in the expert report of Dr. Carlos Medellín, former Minister of Justice and Law, there are 11 possible grounds for asset forfeiture under the Asset Forfeiture Law, which "*can be grouped into those having to do with the unlawful origin of the asset, and those having to do with its unlawful disposition.*"[328] The grounds are as follows:

> "***Article 16. Grounds.*** *Forfeiture shall be declared under the following circumstances:*
>
> *1. Assets which are the direct or indirect product of an illicit activity.*
>
> *2. Assets which correspond to the material subject matter of the illicit activity, except where the law provides for their destruction.*

[327] *See* **Exhibit C-0003bis**, Law No. 1708, 20 January 2014.

[328] Medellín Expert Report, ¶ 31.

3. Assets resulting from a partial or total physical or legal transformation or conversion of the product, tools, or material subject matter of illicit activities.

4. 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.

5. Assets used as a means or tool for the performance of illicit activities.

6. Assets which, in accordance with the circumstances in which they were found or their particular characteristics, make it possible to establish that they are intended for the performance of illicit activities.

7. Assets representing revenues, income, fruits, profits, and other benefits arising from the above assets.

8. Assets of legal origin which are used to conceal assets of illicit origin.

9. Assets of legal origin which are physically or legally mixed with assets of illicit origin.

10. Assets of legal origin whose value is equivalent to any of the assets described in the preceding numbers whenever the action is inadmissible due to the recognition of the rights of a third party acting in good faith without fault.

11. Assets of legal origin whose value corresponds or is equivalent to that of assets being the direct or indirect product of an illicit activity when the location, identification, or physical assignment of the same is not possible."[329]

b. Rights And Guarantees Under The Asset Forfeiture Law

142. As Dr. Medellín explains, "*in asset forfeiture proceedings, the parties to the Action are the Attorney General's Office and the Affected*."[330] Article 1 of the Asset Forfeiture Law defines

[329] **Exhibit C-003bis**, Law 1708, 20 January 2014, art. 16.

[330] Medellín Expert Report, ¶ 35.

the Affected Person as a "*person who affirms being the owner of some right to the asset that is the subject of the asset forfeiture proceeding, and who has standing to take part in the process.*" [331] As explained in detail below, given the myriad of ownership interests and rights that may be at issue in an asset forfeiture, the standard for who constitutes an affected (or "*interested*") party is necessarily broad.

143. First, affected parties have a right to due process. Article 29 of the Political Constitution of Colombia establishes that "[d]*ue process will apply to all judicial and administrative proceedings*."[332] Specifically, with regard to asset forfeiture, the Asset Forfeiture Law states: "*In the exercise and processing of the asset forfeiture action, the right to due process enshrined in the Political Constitution and this Law shall be guaranteed.*"[333] As former Minister of Justice and Law Medellín explains, "[t]*he Constitutional Court has recognized that one of the fundamental rights that make up legal 'due process' is the 'right to a defense, understood as the use of all legitimate and adequate means to be heard and to obtain a favorable decision.'*"[334] This right includes the "*power of a person to participate actively, by providing evidence and arguments, in a process that would affect their rights or assets.*"[335]

144. Second, parties to an asset forfeiture action are protected by a presumption of good faith, enshrined in Article 7 of the Asset Forfeiture Law ("*Presumption of Good Faith*"), which provides: "*Good faith is presumed in all legal action or transaction related to the acquisition*

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331 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 1.

332 **Exhibit C-005bis**, 1991 Political Constitution of Colombia, art. 29.

333 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 5.

334 Medellín Expert Report, ¶ 72, *citing* **Exhibit CMB-005**, Constitutional Court of Colombia, Ruling C-341, 4 June 4, p. 17.

335 Medellín Expert Report, ¶ 72.

or use of the assets, as long as the titleholder proceeds in a diligent and prudent manner, without any fault."[336]

145. Third, and relatedly, parties are entitled to the right to property lawfully obtained in good faith without fault, in accordance with Articles 3 of the Asset Forfeiture Law ("*Right to Property*"): "*Asset forfeiture shall have as its limit the right to ownership legally obtained in good faith without fault and exercised in accordance with the social and ecological function inherent therein.*"[337]

146. As Dr. Medellín explains in his expert report:

> "[t]*here are two different types or degrees of good faith in the Colombian legal system with different characteristics and effects: 'simple good faith,' which is what is presumed in every legal process or business deal, and 'qualified good faith,' which must be proven, and implies the need for the holder of the right to act diligently and prudently*."[338]

147. The Constitutional Court of Colombia has explained that "*simple*" good faith requires "*acting with loyalty, rectitude, and honesty*."[339] In the context of acquiring property, the court explained, it refers to good faith as acting with "*the conscience of having acquired the domain of the thing by legitimate means, exempt from fraud and all other vice*."[340]

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336 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 7.

337 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 3.

338 Medellín Expert Report, ¶ 77.

339 **Exhibit C-077**, Constitutional Court of Colombia, Judgment C-1007, 18 November 2002, p. 74.

340 **Exhibit C-077**, Constitutional Court of Colombia, Judgment C-1007, 18 November 2002, p. 74.

148. By contrast, qualified good faith—a longstanding doctrine that the Constitutional Court has recognized as applying in Colombia for more than 40 years[341]—requires active behavior on the part of the individual. It demands the consciousness to act with fidelity, integrity, and honesty, in addition to behaving diligently, objectively, and actively. It is not presumed, but rather must be proven.[342] The Court explained in one of its rulings:

> "*In addition to simple good faith, there is good faith with superior consequences, and thus denominated qualified, right-creating, or without fault. This qualified good faith has the power to create a legal reality or give rise to the existence of a legal right or situation that did not previously exist. Creative good faith or qualified good faith, properly interprets a maxim passed on from ancient to modern law: 'Error communis facit jus,' and which has been developed in our country by doctrine for more than forty years, specifying that 'This maxim indicates that if someone makes a mistake or commits an error during the acquisition of a right or in a situation, believing he has acquired a right or put himself in a legally protected situation, and it turns out that such right or situation does not exist except by appearances, normally, and in accordance with what was said when explaining the concept of simple good faith, such right will not be acquired. But if the error or mistake is of such a nature that any prudent and diligent person would have also made it, due to the appearance of the right or situation, where it is impossible to discover falsehood or lack of existence, we unavoidably find ourselves before the so-called qualified good faith or good faith without fault.'*"[343]

149. Critically, even <u>if</u> a property has been tainted by illegality for asset forfeiture purposes, thus rendering transactions associated with it invalid as there was no legitimate right that could

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341 **<u>Exhibit C-077</u>**, Constitutional Court of Colombia, Judgment C-1007, 18 November 2002, p. 74.

342 Medellín Expert Report, ¶ 79.

343 **<u>Exhibit C-077</u>**, Constitutional Court of Colombia, Judgment C-1007, 18 November 2002 (internal quotes omitted). pp. SP-0075 – SP-0076.

be transacted, a finding of qualified good faith is sufficient to create a *new* right.[344] As Dr. Medellín has explained:

> "[G]*ood faith without fault does not erase illegality in the chain of ownership, given that he who never had a right cannot transmit it. In reality what occurs – and the reason it is an inviolable limit to asset forfeiture that must be respected – is that by virtue of* [the good faith without fault], *a new right emerges, and for this reason also it is called 'right-creating.'"*[345]

150. Specifically, the Constitutional Court has stated:

> "*Qualified or right-creating good faith has clear applicability to the situation of assets acquired by purchase or exchange that came directly or indirectly from an illegal activity. Thus, if someone acquires a property with all the formalities required by law to acquire the property, and if that property comes directly or indirectly from an illegal activity, in reality, the purchaser did not receive any right, since no one can transfer a right that he does not have, and asset forfeiture would be legally appropriate; but if he acted in good faith without fault, the third party may be protected by the legal system to the point of considering that, due to the effect of his qualified good faith, the right to the property has been fully settled in his or her head, and therefore, that asset is not subject to forfeiture.*"[346]

151. Dr. Medellín explains that:

> *"In order to enjoy this protection, third parties acting in good faith without fault must demonstrate that their actions exceeded the consciousness to act correctly and that they took objective and diligent actions aimed at verifying the conditions and possible defects of the asset they were trying to obtain to verify the lawful origin and the chain of ownership of the asset being acquired, in*

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[344] Medellín Expert Report, ¶ 81 ("*good faith without fault does not remedy the existing illegality in the chain of title, because those who never had the right cannot transmit it; instead, a new right arises, that is why it is called 'creator of right'*.")

[345] Medellín Expert Report, ¶ 81.

[346] **Exhibit C-077**, Constitutional Court of Colombia, Judgment C-1007, 18 November 2002, p. SP-0076.

> *such a way that any other diligent person in the same position would have acted in the same way, making the same mistake.*"[347]

152. The Colombian Constitutional Court confirmed this analysis, explaining that: "*even an asset acquired by means of a purchase or exchange came, directly or indirectly, from unlawful activity, the third-party acquirer must be protected if he demonstrates that he acted in good faith without fault, and hence, will not have to suffer the consequences of asset forfeiture*."[348]

153. As Former Deputy Attorney General Wilson Martínez explains in his expert report, given these presumptions and rights under the Asset Forfeiture Law:

> "*The Attorney General's Office has the affirmative obligation to seek and collect evidence that may allow it to determine, to a degree of sufficient certainty, if the affected party acted in good faith without fault. It follows from this that the Attorney General's Office may only bring a forfeiture action if it positively determines that a third party did not act with good faith without fault.*"[349]

c. Asset Forfeiture Process Under The Asset Forfeiture Law

154. Against the backdrop of these fundamental rights and protections, asset forfeitures under the Asset Forfeiture Law proceed in two phases: (*i*) the first, or "**Initial Phase**," consists of the investigation and initiation of the proceedings by the Attorney General's Office; and (*ii*) the second phase, known as the "**Trial Phase**," is handled by the court.[350] Appendix E provides a summary of the asset forfeiture process under the Asset Forfeiture Law.

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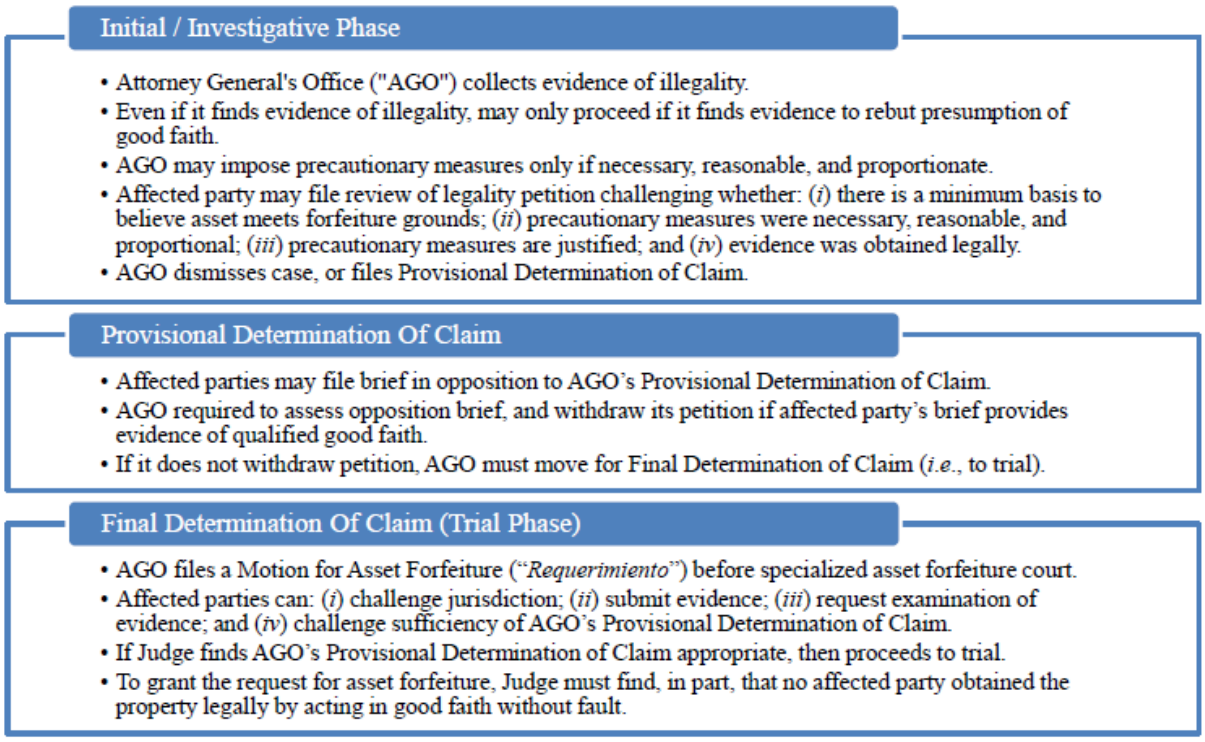
[347] Medellín Expert Report, ¶ 82.

[348] **Exhibit C-077**, Constitutional Court of Colombia, Judgment C-1007, 18 November 2002, p. SP-0077.

[349] Martínez Expert Report, ¶ 40.

[350] **Exhibit C-003bis**, Law No. 1708, 20 January 2014, arts. 137-47.



Appendix E: Summary Of Proceedings Under Asset Forfeiture Law

155. As depicted in Appendix E, in the Initial Phase, the Attorney General's Office may initiate proceedings where there is a "*serious and reasonable basis to proceed*."[351] During this phase, the Attorney General's Office is required to, among other activities, "[s]*earch for and collect the proof which makes it possible to reasonably conclude that there is no good faith without fault*."[352] Upon the conclusion of the Attorney General's Office's investigation, the Attorney General's Office may either dismiss the case or issue a provisional determination of the claim (*fijación de la pretension* in Spanish) to proceed with asset forfeiture.[353] At this stage, affected

[351] **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 117 ("*The asset forfeiture action shall be conducted ex officio by the Office of the Attorney General of Colombia based on information of which he or she gains knowledge, always provided that there is a serious and reasonable basis which makes it possible to conclude that assets probably exist whose origin or intended use is covered by the grounds set forth in this present law.*")

[352] **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 118(5).

[353] **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 123.

parties may file oppositions.[354] Thirty days after the deadline to file oppositions, the Attorney General's Office may present to the competent judge a formal petition for forfeiture (*Requerimiento* in Spanish), which triggers the Trial Phase.[355]

156. In exceptional circumstances, the Attorney General's Office may, prior to issuing a determination of the claim, impose precautionary measures.[356] The Attorney General's Office may only do so "*in cases of apparent urgency or when serious grounds have been established which make it possible to consider*" the measures "*indispensable and necessary*"[357] 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.*"[358] In any event, the imposition of precautionary measures requires that "*the rights of third parties acting in good faith without fault must be safeguarded.*"[359]

157. Importantly, as Dr. Martínez explains, under "*the previous legislation it was mandatory, as a general rule, to adopt precautionary measures on the burdened assets. The new Code* [the Asset Forfeiture Law] *introduces the principles of necessity, proportionality, and reasonability to precautionary measures, which means such measures acquired an exceptional nature.*"[360]

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354 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 129.

355 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, arts. 131-132.

356 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 89.

357 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 89.

358 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 87.

359 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 87.

360 Martínez Expert Report, ¶ 28(c).

2. The Attorney General's Office Wrongfully And Unjustifiably Imposed Precautionary Measures On The Meritage Project

158. In imposing precautionary measures on the Meritage Project, the Attorney General's Office disregarded the express safeguards and procedures enshrined in the Asset Forfeiture Law (as outlined above).

159. First, the Attorney General's Office launched the proceeding wrongly, ignoring the good faith presumption that protected Claimants' investment in the Meritage Project, and without conducting the thorough, independent, and impartial investigation required by law.

160. As Dr. Martínez explains:

> "*The Office of the Attorney General* [. . .] *had the obligation to presuppose simple good faith and to undertake a comprehensive and fair investigation. During that investigation, and as a prerequisite for beginning a forfeiture action, the Prosecutor is obligated to gather the necessary evidence to completely refute the existence of good faith without fault on the part of the affected party.*"[361]

161. "*The Attorney General's Office*," Dr. Martínez explains, "*has the affirmative obligation to seek and collect evidence that may allow it to determine, to a degree of sufficient certainty, if the affected party acted in good faith without fault. It follows from this that the Attorney General's Office may only bring a forfeiture action if it positively determines that a third party did not act with good faith without fault.*"[362] Dr. Martínez plainly concludes that Colombia did not meet the standard. In his words, "*the Attorney General's Office did not refute the existence*

[361] Martínez Expert Report, ¶ 78(a).

[362] Martínez Expert Report, ¶ 40.

of good faith without fault on the part of the affected party, and still brought the asset forfeiture action."[363]

162. Here, in direct contravention of the requirement to establish "*serious and reasonable*" grounds to initiate the forfeiture process, the Attorney General's Office proceeded solely on the word of a drug trafficker. The Attorney General's Office knew that Mr. López Vanegas was not a credible source of information. Indeed, the Coordinating Advisor of the Legal Group with responsibilities over the Judicial Police for the Superintendence of Notaries and Registrar[364] had noted that, based on the review of the U.S. court judgment, "*it may be inferred that Mr. Iván López Vanegas is involved in illegal activities since 1989 approximately*,"[365] and had thus suggested that the Asset Forfeiture Unit "*request a copy of the complete file from the United States, given that it comprises essential evidence for these proceedings.*"[366]

163. As Dr. Martínez explains, "[*i*]*n this case, the Attorney General's Office based its initial case for precautionary measures and forfeiture on the allegations of a person who claimed that the transfer of the property two decades prior had been done under coercion and as the result of a kidnapping.*"[367] The prosecutor at the Organized Crime Unit (where Mr. López

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363 Martínez Expert Report, ¶ 78(a).

364 *Asesor Coordinador del Grupo Juridico con funciones de Policia Judicial de la Superintendencia de Notario y Registro* in Spanish.

365 **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, SP-0051 (emphasis added).

366 **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0051.

367 Martínez Expert Report, ¶ 57.

Vanegas had originally filed his complaint), even recognized that "*it is necessary to determine whether the alleged events claimed by Mr. López Vanegas happened or not*."[368]

164. The Attorney General's Office did not follow either suggestion; rather, the Attorney General's Office affirmatively ignored evidence that the events claimed by Mr. López Vanegas did *not* happen. Ultimately, the Attorney General's Office found the "*existence of reasonable grounds*" to impose precautionary measures because, based on Mr. López Vanegas's testimony, the assets in question "*were acquired through punishable conduct such as kidnapping, threats, and personal misrepresentation*."[369] The Resolution was therefore based almost entirely on Mr. López Vanegas's unsupported and incredible claim that the property transfer had occurred under duress during his son's alleged kidnapping.[370]

165. All of this was improper. Dr. Martínez explains that:

> "*In order to be able to impose precautionary measures under this supposition* [of the alleged kidnapping]*, the Attorney General's Office was obligated to investigate the circumstances of mode, time, and place in which Corficolombiana, as the administrator and representative of the autonomous patrimony denominated the Meritage Trust, acquired the property that is the object of the asset forfeiture action. Moreover, the Attorney General's Office should have undertaken an investigation to establish whether the asset that was the object of the asset forfeiture was within one of the eleven (11) causes that the applicable law in Colombia recognizes as grounds for asset forfeiture.*"[371]

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368 **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0028.

369 **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0084.

370 *See* **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, pp. SP-0065 – SP-0066.

371 Martínez Expert Report, ¶ 57.

166. From there, Dr. Martínez explains:

> "[I]*n the event that it could establish that the asset was within one of the grounds for asset forfeiture, the Attorney General's Office should have investigated to determine whether there was good faith without fault at the time of acquiring the asset. And, in this sense, the Attorney General's Office should have investigated to verify whether the arguments advanced by Newport and the fiduciary in opposition to the asset forfeiture were valid.*"[372]

167. Even the Attorney General's Office recognized that there is a presumption of good faith, and that "[i]*n every case the rights of third parties acting in good faith without fault shall be protected*," yet from the outset, it has failed to follow through on this fundamental protection.[373]

168. Indeed, Colombia has not come close to meeting its procedural obligations to gather the required evidence to overcome the procedural protections afforded to the purchaser of the asset at issue. The Resolution contained no assessment of third parties that had acted in good faith—including Claimants or their investment vehicle, Newport—and how their rights would be impacted by the precautionary measures. Instead, the Attorney General's Office deferred this obligation until after imposing the precautionary measures,[374] claiming that such rights would have to be "*compromised*" during the investigation.[375] This ignored the Asset Forfeiture Law's express mandate that "*the rights of good faith third parties without fault must be safeguarded*," even during the imposition of precautionary measures.

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372 Martínez Expert Report, ¶ 58.

373 **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, pp. SP-0060 – SP-0062.

374 *See* **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. 56.

375 **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, pp. SP-0064 – SP-0065.

169. Second, as Dr. Medellín and Dr. Martínez explain, Newport's diligence suffices to grant it qualified good faith buyer status, which—even if the land *had* been tainted by illegality—would grant it a new, clean right to title, and thus make it ineligible for asset forfeiture.[376] That would have been dispositive of any precautionary measures.

170. As Dr. Medellín explains, and as the Colombian Constitutional Court has recognized repeatedly, in determining whether a party has acted with good faith without fault under Colombian law, the Attorney General's Office (and later the asset forfeiture court) must evaluate the objective, diligent, and active steps that a purchaser took to ascertain the legality of the asset that he or she was acquiring. The question is whether the purchaser "*took objective and diligent actions aimed at verifying the conditions and possible defects of the asset they were trying to obtain to verify the lawful origin and the chain of ownership of the asset being acquired, in such a way that any other diligent person in the same position would have acted in the same way*."[377]

171. In this case, Dr. Medellín reviewed the case files and concluded that:

> "*In the case of Newport and its principal representative, Mr. Seda, it is clear that its actions exceeded the consciousness to act correctly and undertook diligent and objective acts to verify the legal origin and the chain of title of the asset that it was acquiring through the hiring of top-qualified professionals – Corficolombiana as fiduciary, and the law firm of Otero & Palacios for the performance of a title study.*"[378]

[376] Medellín Expert Report, ¶ 83.

[377] Medellín Expert Report, ¶ 82.

[378] Medellín Expert Report, ¶ 15.

172. Otero & Palacio in particular had conducted an "*incalculable*" number of title searches for Bancolombia, one of the largest banks in Colombia, with more than USD 70 billion in assets as of March 2019. Dr. Medellín concludes that these acts, on their own, would satisfy the standard of qualified good faith on the part of Newport SAS and Mr. Seda.[379]

173. Former Deputy Attorney General Martínez concurs in this analysis. He explains that:

> "*Newport, as developer of the Meritage project, my professional opinion is that it met its due diligence obligations, and as such, acted in good faith without fault by engaging well-qualified professionals to conduct the title study on the land and financial diligence on the sellers of the land. Newport fully met its responsibility by engaging a well-established fiduciary, Corficolombiana, to oversee the financial aspects of the transaction, and by engaging a prominent law firm specializing in title studies, Otero & Palacios, to conduct the title study.*"[380]

174. In addition to Newport's diligence by hiring of qualified professionals, Dr. Medellín also highlights that "*the objective and diligent acts aimed at verifying the legal status of the asset went to an extreme by presenting a petition to the National Anti-Money Laundering and Asset Forfeiture Unit of the Attorney General's Office, seeking confirmation that neither the property, nor its proprietors 'current or former' were subject to any action.*"[381]

175. The mere fact that Corficolombiana and Newport sought Colombia's Certification of No Criminal Activity is, *per se*, evidence of good faith (*i.e.*, objective, reasonable steps taken to ascertain relevant facts). Seeking and obtaining the letter represents a genuine attempt to obtain information to which Corficolombiana and Newport would not have had access directly. It is

379 Medellín Expert Report, ¶ 15.

380 Martínez Expert Report, ¶ 65.

381 Medellín Expert Report, ¶ 15.

obvious that an illegitimate party—or a party trying to be willfully blind to another's misconduct—would not contact law enforcement authorities to ask about an asset if it were trying to conceal something about such asset. Colombia utterly fails to credit this good faith.

176. But even beyond Newport's diligence, the record also supports that the fiduciary, Corficolombiana, also conducted robust diligence and met its obligations under law that also entitle it to qualified good faith. Dr. Medellín explains: "*Corficolombiana* [] *acted diligently through its compliance with the particular diligence obligations on its clients—the participants of the trust agreements—as established by the Money Laundering and Terrorism Financing Risk Management System ('SARLAFT,' in Spanish).*"[382] Specifically, as Dr. Martínez explains:

> *"Corficolombiana, as administrator and representative of the free-standing trust created for implementing the Meritage real estate project, had the duty to verify the identity and background of the persons with whom it was undertaking the purchase agreement for the land where the project was to be built, that is, its clients, as required by Art. 102 of [Organic Law of the Financial System], which it in fact did. Furthermore, it had the duty to research information in any available open sources to verify if there were any warnings that may indicate that one of these persons was connected to illegal activities, which it also did (through restricted parties lists, etc.).*"[383]

177. Dr. Martínez concludes that "*Corficolombiana fully complied with its obligations regarding due diligence.*"[384] In his analysis, Corficolombiana complied in two principal ways.

178. First, "*Corficolombiana undertook its diligence as to the trustors and the seller of the land to determine who was the owner or main beneficiary behind the relevant companies. It did so,*

[382] Medellín Expert Report, ¶ 15.

[383] Martínez Expert Report, ¶ 66.

[384] Martínez Expert Report, ¶ 67.

in part, by researching names on the data bases of restricted parties lists, oversight lists, checklists or 'black lists.'"[385]

179. Second, "*it fulfilled its duty to analyze the chain of titles through the hiring (by Newport) of the Otero y Palacios law firm, which prepared a title study regarding the property at issue.*"[386]

> "[C]*ontinuing its efforts to analyze the legality of the chain of titles, Corficolombiana took the extraordinary step of drafting and submitting a formal request for information to the Office of the Attorney General of the Nation*[,] *in which it asked if any there were any investigations under way or if there were any court orders pending against any the holders of real rights over the asset in question. The Head Prosecutor of that unit (representing the Office of the Attorney General of the Nation) replied to that request on Sept. 9, 2013, by confirming that the mission information system of the Office of the Attorney General of the Nation did not include any records of active investigation or court orders again*[st] *any of those persons. I consider this to be an extraordinary due diligence measure.*"[387]

180. The conclusion of this diligence was clear. As Dr. Martínez explained:

> *"The result of that diligence was conclusive, in the sense that there was no information available that would lead one to think that the property could hold some connection to some criminal event. That is to say, at the time the purchase transaction was executed there was no information available to indicate that the plot of land could satisfy one of the valid grounds for asset forfeiture. I believe that any other diligent person, under the same circumstances, would have had at his disposal the same information and would have reached the same conclusion.*"[388]

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[385] Martínez Expert Report, ¶ 68.

[386] Martínez Expert Report, ¶ 69.

[387] Martínez Expert Report, ¶ 70.

[388] Martínez Expert Report, ¶ 71.

181. Third, even if the Attorney General's Office had overcome the relevant presumptions of good faith and legality, and could have initiated asset forfeiture proceedings here—*quod non*—it did so arbitrarily, and without regard for the protections afforded to Newport under the Asset Forfeiture Law. As Dr. Martínez explains:

> "[E]*ven if the Attorney General's Office had been in the position to overcome the presumption on good faith – which I conclude it did not do – the Asset Forfeiture Code required that any precautionary measure was to be imposed was reasonable, necessary, and proportional. In other words, a precautionary measure, or any action against an asset that is ordered in a forfeiture action, must be as constrained as possible while satisfying the State's needs, without infringing (or as little as possible) on the rights of third parties who acted in good faith. In this case, the Attorney General's Office did not respect those principles.*"[389]

182. There were no exceptional circumstances here warranting the imposition of precautionary measures on the Meritage Project. As explained above, there was no reasonable basis to impose the measures—the only basis supplied by the Attorney General's Office was a plainly fraudulent kidnapping account invented by a former drug dealer.[390]

183. Moreover, the measures were not necessary. The Meritage Project—consisting at the time of five large towers for which the structural construction had been completed and two additional towers under construction, among other concrete structures—did not pose a "*flight risk*." It was not at risk of being "*hidden, negotiated, encumbered, removed, transferred or* [] *suffer*[ing] *any deterioration, misdirection, or destruction or for the purpose of stopping their illicit use or destination*"—quite the opposite, as a result of the imposition of precautionary

[389] Martínez Expert Report, ¶ 59.

[390] *See supra* ¶ 162.

measures and the halt to construction, the Attorney General's Office has caused significant deterioration and destruction to the value of the assets.[391]

184. Most tellingly, the Attorney General's Office argued that it was necessary to halt the transfer of the Meritage Property, because "*there* [was] *an inherent risk that persons unrelated to the demonstrated criminal activities have acquired in good faith the assets that are at issue in this forfeiture investigation*."[392] Of course, its acknowledgement that there are good faith third parties that were *unrelated* to any criminality should have been dispositive of the question of whether asset forfeiture on the land and the Meritage Project was permissible. The Attorney General's Office ignored this obvious contradiction.

185. And, finally, the measures were not proportional. Even assuming there *had been* some illegality in the chain of title decades prior, as the Attorney General's Office seemingly contends in the local court proceedings, the solution—as required by Colombian law—would have been for the Attorney General's Office to trace and seek forfeiture of the proceeds from that original, tainted transaction. Article 16 of the Asset Forfeiture Law provides that forfeiture is appropriate against "[a]*ssets of legal origin whose value is equivalent to any of the assets described in the preceding numbers whenever the action is inadmissible due to the recognition of the rights of a third party acting in good faith without fault*."[393] That is to say, the Asset Forfeiture Law provides that in instances in which an asset is tainted by prior illegality but there is a subsequent, good faith purchaser, the proper recourse for the state is to leave the *asset*

391 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 87.

392 **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0088.

393 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 16.

undisturbed to the good faith purchasers, and instead trace (and seize, if appropriate) the *proceeds* of the original transaction from the relevant upstream parties.

186. In this case, the Attorney General's Office acted arbitrarily and unreasonably, ignoring the requirements of the Asset Forfeiture Law. Instead of enacting a targeted measure that protected good faith buyers' rights while seeking disgorgement from parties that the Attorney General's Office determined to have engaged in illegality, the Attorney General's Office imposed the broadest possible measure against the Meritage lot: it seized the land, the project on top of it, and in so doing, the rights of the fiduciary, Newport, and the individual unit buyers.

3. The Precautionary Measures Halt Development Of The Meritage Project

187. The seizure of the Meritage Property generated a lot of media coverage.[394] National publications reported that the Prosecutor's Office had imposed precautionary measures on the Meritage property because it was linked to drug trafficking activity. Although they did not attribute any wrongdoing to Mr. Seda, he and his companies inevitably became linked with the scandal. Needless to say, this was very damaging to the reputations of Mr. Seda and his companies, which he had painstakingly built from scratch since his arrival in Medellín, almost a decade earlier.[395]

188. In addition to the negative publicity, the precautionary measures order also shut down further development of the Project. On 8 August 2016, Newport notified one of its biggest

394 *See* **Exhibit C-042bis**, Colombian Press Articles on Imposition of Precautionary Measures, August 2016.

395 Seda Witness Statement, ¶¶ 72, 99, 108, 111, 113-115, 152; **Exhibit C-288**, Interview of Angel Seda on Canal Uno, 26 May 2015, https://www.youtube.com/watch?v=weHtFTPO0vM.

subcontractors, Mensula Construction, to suspend construction activities until further notice.[396] Newport also ceased sales of the units and homes in accordance with the precautionary measures.[397]

189. Critically, the precautionary measures threw into doubt financing for the Project. On 10 August 2016, Banco de Bogotá triggered its acceleration clause in light of the precautionary measures.[398] The Promissory Note signed with Banco de Bogotá allowed the bank to demand repayment if the Property was attached or if "*any of the grantors becomes connected to an investigation related to terrorism, money laundering or crimes against public trust or property*".[399] Corficolombiana and Newport had agreed to these provisions in light of their extensive due diligence, including the title study and Colombia's Certification of No Criminal Activity. Mr. Seda had not expected such a *volte face* by the Attorney General's Office.

4. The Attorney General's Office Refuses To Release The Precautionary Measures Resolution

190. The Attorney General's Office refused to provide the Newport representatives on site with the Precautionary Measures Resolution. Accordingly, on 17 August 2016, Mr. Sintura, counsel for Corficolombiana, and formerly a high ranking prosecutor at the Attorney General's Office, went to the Asset Forfeiture Unit in person to request a copy of the Resolution on Precautionary

396 **Exhibit C-041bis**, Letter from Angel Samuel Seda to Jorge Humberto Díaz, 8 August 2016.

397 Seda Witness Statement, ¶ 102; López Montoya Witness Statement ¶ 40.

398 **Exhibit C-168**, Letter from Jaime Andrés Toro Aristizabal to Angel Samuel Seda, *attaching* Letter from Juan Maria Robledo Uribe to Jaime Alberto Sierra Giraldo, 11 August 2016; López Montoya Witness Statement ¶ 39.

399 **Exhibit C-168**, Letter from Jaime Andrés Toro Aristizabal to Angel Samuel Seda, *attaching* Letter from Juan Maria Robledo Uribe to Jaime Alberto Sierra Giraldo, 11 August 2016, p. SP-0002.

Measures.[400] Surprisingly, however, the director of the Asset Forfeiture Unit, Ms. Malagón, refused to hand over the resolution and then refused to meet with him to explain why.[401]

191. Under the Asset Forfeiture Law, while the Initial Phase of asset forfeiture proceedings was confidential, the Attorney General's Office was required to, "*as of the moment when precautionary measures are imposed*" provide "*the affected party* [. . .] *access to the entirety of the file so that he/she may exercise his/her right to rebuttal and go before a forfeiture judge to petition for* [control of legality] *proceedings*."[402] Ms. Malagón's refusal to do so violated express and fundamental due process protections under Colombian law.

192. On 18 August 2016, Mr. Sintura sent a letter to the Asset Forfeiture Unit reiterating Corficolombiana's request for a copy of the Precautionary Measures Resolution.[403] Mr. Sintura's letter pointed out the grave implications of continuing the sequestration, noting that it had halted the work of approximately 500 direct employees and more than 250 indirect employees, as well as jeopardized the interests of over 150 Unit Buyers, many of whom had already paid substantial portions of their units' costs.[404] A swift resolution to the matter was therefore in everyone's interest. However, the Attorney General's Office still failed to respond.

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400 *See* **Exhibit C-021bis**, Letter from Corficolombiana to the *Fiscalía*, 18 August 2016, ¶ 5.

401 *See* **Exhibit C-021bis**, Letter from Corficolombiana to the *Fiscalía*, 18 August 2016, p. SP-0002.

402 Martínez Expert Report, ¶ 28(e). *See also* **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 13.

403 **Exhibit C-021bis**, Letter from Corficolombiana to the *Fiscalía*, 18 August 2016, ¶¶ 2-5, 7.

404 **Exhibit C-021bis**, Letter from Corficolombiana to the *Fiscalía*, 18 August 2016, ¶ 6.

193. Mr. Sintura followed up again in writing with Ms. Ardila specifically for a copy of the resolution. Ms. Ardila confirmed receipt of the request with a stamp,[405] but still did not respond. Ultimately, Mr. Sintura secured a copy of the Precautionary Measures Resolution from another official at the Prosecutor's Office.[406]

5. Corficolombiana Defends The Project Against Asset Forfeiture

194. Corficolombiana, the fiduciary and trustee of the Meritage Project, pursued available legal avenues to lift the precautionary measures on the Meritage Project. Under the Asset Forfeiture Law, once precautionary measures are imposed by the Attorney General's Office, parties may submit a petition to the competent asset forfeiture court for control of legality ("*control de legalidad*" in Spanish)[407]—a process where the court reviews the "*formal and material legality of the precautionary measure*."[408] The grounds on which the court may declare the measures illegal are:

> "*1. Whenever there are no sufficient minimum elements of judgment to consider that the assets related with the measure are likely linked with some grounds for asset forfeiture.*
>
> *2. Whenever the material performance of the precautionary measure is not shown to be necessary, reasonable, and proportional in order to achieve its ends.*
>
> *3. Whenever the decision to impose the precautionary measure has not been justified.*

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405 **Exhibit C-169**, Letter from Francisco José Sintura Varela to Alejandra Ardila Polo, 13 August 2016.

406 Seda Witness Statement, ¶ 102.

407 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 111 ("*these decisions can be submitted for subsequent procedural legality control to the competent asset forfeiture judges*.").

408 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 112.

4. Whenever the decision to impose the precautionary measure is based on proof which was obtained illegally."[409]

195. Accordingly, on 26 September 2016, Corficolombiana, as the fiduciary of the property, filed a request for control of legality ("*control de legalidad*") before the First Criminal Court of the Specialized Circuit for Asset Forfeiture of Antioquia ("**First Criminal Court**") to declare the precautionary measures illegal.[410] Corficolombiana premised its request on three principal arguments.

196. First, it highlighted the good faith due diligence undertaken in evaluating the ownership records of the Meritage Property.[411] As noted above, the Asset Forfeiture Law required the Attorney General's Office to safeguard the rights of good faith third parties, including in the imposition of precautionary measures,[412] yet the Attorney General's Office had made no effort to even attempt this assessment in its Precautionary Measures Resolution.[413]

197. In support of its good faith status, Corficolombiana presented as an expert witness Dr. Wilson Martínez, the same authority on whom the Attorney General's Office had purported to rely in the Precautionary Measures Resolution, and who is serving as Claimants' expert witness in these proceedings.

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409 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 112.

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

411 **Exhibit C-043bis**, Corficolombiana's Control of Legality Petition, 26 September 2016, pp. SP-0002 – SP-0004.

412 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 87 (entitled "*Purposes of the precautionary measures*" providing "[i]*n any case, the rights of third parties acting in good faith without fault must be safeguarded*.")

413 *See supra* ¶ 168; **Exhibit C-043bis**, Corficolombiana's Control of Legality Petition, 26 September 2016, pp. SP-0005 – SP-0006.

198. Dr. Martínez noted in his opinion in the local court proceeding that "*whenever an entity complies with the minimum requirements of prudence that are required by the law*," it must be found to have acted in good faith without fault.[414] For financial entities like Corficolombiana, this meant complying with the controls and procedures set forth in its SARLAFT. Thus, as long as Corficolombiana complied with its SARLAFT obligations, "*the State is under obligation*" to recognize that Corficolombiana's (and thus its clients') rights were acquired in good faith without fault.[415] Corficolombiana had not only complied with its SARLAFT obligations but gone far and beyond including: (*i*) running prior title holders through the OFAC list twice (through Otero & Palacio's study and by itself); (*ii*) searching the names of prior title holders in various restrictive lists to which it had access including those furnished by Interpol, Europol, etc.; and (*iii*) "*as an enhanced due diligence measure, without being under obligation to do*," obtaining Colombia's Certification of No Criminal Activity.[416]

199. Second, Corficolombiana argued that the measures were not necessary, reasonable, or proportional to their end goals, in violation of the Asset Forfeiture Law.[417] As noted above, the Asset Forfeiture Law only authorizes the imposition of precautionary measures at such an early stage of the investigation in exceptional circumstances.[418]

200. Third, Corficolombiana argued that the measures were not adequately tied to a compelling State interest, such as avoiding the property being transferred or destroyed, or stopping its

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414 **Exhibit C-173**, Legal Opinion by Wilson Alejandro Martínez Sánchez, 13 September 2016, p. SP-0015.

415 **Exhibit C-173**, Legal Opinion by Wilson Alejandro Martínez Sánchez, 13 September 2016, p. SP-0015.

416 **Exhibit C-173**, Legal Opinion by Wilson Alejandro Martínez Sánchez, 13 September 2016, pp. SP-0019 – SP-0018.

417 **Exhibit C-043bis**, Corficolombiana's Control of Legality Petition, 26 September 2016, pp. SP-0006 – SP-0007.

418 *See supra* ¶ 156.

ongoing, illicit use.[419] As Corficolombiana pointed out, the Precautionary Measures Resolution failed to indicate why such extreme measures—impacting the rights of 188 Unit Buyers (whose rights as third parties without fault the Attorney General's Office also failed to address) and over 750 jobs—were warranted where over 10 years had passed since the alleged kidnapping that triggered the measures.[420]

201. Finally, Corficolombiana also detailed the irregularities of the sequestration process, including the Attorney General's Office's refusal to hand over the Precautionary Measures Resolution to Newport's or Corficolombiana's representatives.[421]

202. On 20 October 2016, the First Criminal Court upheld the legality of the precautionary measures.[422] In what now appeared to be a trend of Colombian authorities' refusal to share documents or provide reasons or due process, the court failed to inform or notify Corficolombiana's counsel, Mr. Sintura, of its decision, even though he had filed the petition and attended court on the same date that the decision was rendered.[423]

203. In its decision, the court limited its analysis to whether any of the four narrow bases under Article 112 of the Asset Forfeiture Law were met here and decided that they were not.[424] The court refused to consider the lack of credibility of Mr. López Vanegas's statements, apparently

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419 **Exhibit C-043bis**, Corficolombiana's Control of Legality Petition, 26 September 2016, p. SP-0011.

420 **Exhibit C-043bis**, Corficolombiana's Control of Legality Petition, 26 September 2016, p. SP-0011.

421 **Exhibit C-043bis**, Corficolombiana's Control of Legality Petition, 26 September 2016, pp. SP-0005 – SP-0006.

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

423 *See* **Exhibit C-045bis**, Corficolombiana Appeal to First Instance Decision Corficolombiana's Control of Legality Petition, 26 October 2016, p. SP-0001.

424 *See supra* ¶ 194.

deferring to the Attorney General's Office's reliance on them.[425] The court then concluded that the Attorney General's Office had provided reasons for imposing precautionary measures, simply reproducing them word-for-word in the decision, without assessing their persuasiveness or whether they warranted precautionary measures in any meaningful manner.[426]

204. As noted above, and by Dr. Martínez in his expert report in this Arbitration, in order to adopt precautionary measures, the Attorney General's Office must demonstrate, with evidence, that the measures are reasonable, necessary and proportional.[427] The judicial oversight function of the court requires it not just to accept the Attorney General's Office's assertions that it has met these requirements, but also to assess them and furnish reasons for its decision.[428] The court failed to do this.

205. Moreover, the court refused to consider evidence submitted by Corficolombiana on its status as a good faith third party.[429] The court appeared to consider it sufficient that affected parties were allowed to file a petition and be heard and file a control of legality petition, but held that the four limited bases under Article 112 of the Asset Forfeiture Law did not allow the court to consider the matter of good faith in control of legality proceedings.[430] Rather, the court

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425 **Exhibit C-044bis**, Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016, p. SP-0020.

426 **Exhibit C-044bis**, Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016, pp. SP-0021 – SP-0023.

427 *See supra* ¶ 181.

428 *See* Martínez Expert Report, ¶ 28(d); **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 112(2).

429 **Exhibit C-044bis**, Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016, pp. SP-0023 – SP-0024.

430 **Exhibit C-044bis**, Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016, pp. SP-0023 – SP-0024.

argued that matters of good faith would only be addressed at the stage when the Attorney General's Office filed a determination of claim, though this would mark the end of the investigative phase by the Attorney General's Office.[431] The Court thus completely ignored the Attorney General's Office's affirmative obligation under the Asset Forfeiture Law to "*safeguard*" the rights of good faith third parties during the precautionary measures stage.[432]

206. On 26 October 2016, Corficolombiana appealed the lower court's decision upholding the precautionary measures to the Bogotá Superior Court, Asset Forfeiture Division.[433] Again, Corficolombiana noted that the Asset Forfeiture Law enshrined the rights of good faith third parties and precluded the imposition of precautionary measures that impacted such rights.[434] Highlighting the absurdity of the lower court's refusal to address the rights of good faith third parties at the precautionary measures stage, Corficolombiana noted:

> "[I]*t is not possible to issue precautionary measures in connection with an immovable asset when it is known that it was acquired by a good-faith third party, that is, have the Attorney General's Office file its claims, advise the third party to attend the proceedings and assert its status, as it appears to have been construed in the judge's ruling. It would be equivalent to causing an unfair harm to an individual by issuing a precautionary measure, so that in the action he may assert his status, have it so acknowledged and then belatedly lift the attachment, while the individual endures the harm caused by the temporary restriction. No!! Precautionary measures are limited in their application out of respect to good faith with due diligence,*

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431 **Exhibit C-044bis**, Decision by Asset Forfeiture Court Corficolombiana's Control of Legality Petition, 20 October 2016, p. SP-0024.

432 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 87.

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

434 **Exhibit C-045bis**, Corficolombiana Appeal to First Instance Decision Corficolombiana's Control of Legality Petition , 26 October 2016, pp. SP-0001 – SP-0002.

which must be acknowledged when it is claimed and proved, as was the case here."[435]

207. Corficolombiana noted that the court's decision denied the fiduciary and its clients access to justice and substantive legal review, condemning them to lengthy proceedings where they have to prove once again that they are good faith third parties, despite the Attorney General's Office's obligation to observe their rights under the Asset Forfeiture Law.[436] In the meantime, the Project, its managers, related financial entities, investors, unit buyers and employees, to name just a few, continued to suffer "*incalculable*" harm.[437]

6. Mr. Seda Reaches Out To The U.S. Embassy

208. In or around the end of August 2016, another man claiming to represent the Attorney General's Office approached Mr. Seda as he was leaving the Charlee Hotel. He told Mr. Seda to pay the requested amount to "*keep the situation under control*." Mr. Seda refused to speak with him, and walked away.[438]

209. Mr. Seda was "*highly alarmed*" by the circumstances.[439] He sought help from the U.S. Embassy in Bogotá,[440] and hired private security to protect his family.[441] Mr. Seda met with

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435 **Exhibit C-045bis**, Corficolombiana Appeal to First Instance Decision Corficolombiana's Control of Legality Petition , 26 October 2016, p. SP-0002 (emphasis added).

436 **Exhibit C-045bis**, Corficolombiana Appeal to First Instance Decision Corficolombiana's Control of Legality Petition , 26 October 2016, p. SP-0010.

437 **Exhibit C-045bis**, Corficolombiana Appeal to First Instance Decision Corficolombiana's Control of Legality Petition , 26 October 2016, p. SP-0010.

438 Seda Witness Statement, ¶ 103.

439 Seda Witness Statement, ¶ 104.

440 *See* Seda Witness Statement, ¶ 104; **Exhibit C-171**, Email chain between Angel Seda and U.S. Embassy Bogotá, 2 September 2016.

441 *See* Seda Witness Statement, ¶¶ 104-105; **Exhibit C-172**, Email from Angel Seda to Elizabeth Garcon, with attachments, 7 September 2016.

Embassy officials and discussed a potential meeting with Michael J. Burdick, the Deputy Legal Attaché to the Federal Bureau of Investigation ("**FBI**").[442]

210. In an attempt to gather more evidence to provide to the U.S. Embassy, Mr. Seda met with Mr. Mosquera on 27 October 2016 at a restaurant in Bogotá. Mr. Mosquera physically searched Mr. Seda, required him to remove electronic devices including his mobile phone from his possession, and place his backpack on the next table.[443] At the meeting, Mr. Mosquera made a blatant extortion attempt. He told Mr. Seda that he had "*an agreement with Malagón and Ardila, and that he spoke with Malagón on a weekly basis.*"[444] He told Mr. Seda that if he paid Mr. López Vanegas "*COP 56 billion (USD 18 million) or, alternatively, made López Vanegas a partner in the Meritage Project, Mosquera would direct Malagón to declare Newport a good faith buyer, thereby ending the asset forfeiture proceedings against the Meritage Property*."[445]

211. Mr. Seda agreed to meet with Mr. Mosquera and Mr. López Vanegas in Miami on 29 October 2016.[446] Again, Mr. Seda was physically searched and required to surrender his electronic devices before the meeting.[447] At this meeting, Mr. Mosquera "*reiterated his claim that he would use his relationship with Malagón to ensure that the Fiscalía declared Newport a good faith purchaser if* [Mr. Seda] *paid the requested sum. He further suggested that [Mr. Seda] put the money in a fiduciary account with instructions to release the money once the*

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442 *See* Seda Witness Statement, ¶ 116; **Exhibit C-179**, Email chain between Michael Burdick and Angel Seda, 1 December 2016.

443 Seda Witness Statement, ¶ 117.

444 Seda Witness Statement, ¶ 117.

445 Seda Witness Statement, ¶ 117.

446 Seda Witness Statement, ¶ 118.

447 Seda Witness Statement, ¶ 118.

Fiscalía lifted the proceedings against the Meritage Property."[448] The next day, Mr. Mosquera emailed Mr. López Vanegas's cell phone number to Mr. Seda, and asked him to negotiate with Mr. López Vanegas directly.[449]

212. Mr. Seda made further attempts to gather information from Mr. Mosquera and Mr. López Vanegas, keeping up "*the pretense that* [he] *was still interested in negotiating a resolution, in the hopes that he would reveal in writing the extortion scheme that he was engaged in with the Fiscalía*."[450] On 9 November 2016, Mr. Mosquera responded in writing, demanding approximately COP 56 billion (or approximately USD 18 million at that time).[451] Without the cooperation of the Attorney General's Office, Mr. Mosquera could not have made such an offer; he did not have any legal authority to cease the asset forfeiture proceedings.

213. Unwilling to be extorted, Mr. Seda rejected the offer and pleaded with Mr. Mosquera to cease the extortion,[452] which was harming innocent parties, and told him that while Mr. López Vanegas may have Ms. Ardila and Ms. Malagón in his pocket now, "*at some point* [they] *would be replaced*" and the Colombian authorities would "*see what* [he was] *doing...they'll see the injustice.*"[453]

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448 Seda Witness Statement, ¶ 118.

449 Seda Witness Statement, ¶ 118.

450 Seda Witness Statement, ¶ 119.

451 Seda Witness Statement, ¶ 120; **Exhibit C-177**, Email chain between Angel Seda and Víctor Mosquera Marín, 10 November 2016.

452 Seda Witness Statement, ¶ 120.

453 Seda Witness Statement, ¶ 119; **Exhibit C-177**, Email chain between Angel Seda and Víctor Mosquera Marín, 10 November 2016.

214. Mr. Mosquera told Mr. Seda to negotiate directly with Mr. López Vanegas but Mr. Seda declined.[454]

215. Though Mr. Seda did not ultimately meet with Mr. Burdick, in March 2017, he learned that on 21 November 2016, following his conversations with Mr. Seda, Mr. Burdick had sent a letter to the National Police of Colombia.[455] Mr. Burdick informed Colombian authorities that Mr. López Vanegas's son Sebastián López Betancur was not a kidnapping victim but had willingly transferred the property to pay an alleged drug debt of his own.[456] In fact, as the FBI attaché confirmed, Mr. López Betancur "*appeared in a nightclub in Medellín during his alleged kidnapping*."[457] The letter confirmed beyond a doubt that the kidnapping story, on which the Attorney General's Office had premised the precautionary measures, was a hoax, made up in order to file a false complaint that Mr. López Vanegas could use to extort Mr. Seda.

216. Mr. López Vanegas's fraudulent claims were now laid bare before the highest Colombian authorities. The Attorney General's Office could thus no longer pretend to take Mr. López Vanegas's kidnapping story seriously, or indeed justify the asset forfeiture proceedings on this basis.

217. Mr. Seda continued to meet with U.S. Embassy officials. However, on 29 November 2016, he received a letter from the U.S. Consul General in Bogotá, stating that the Embassy was

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454 Seda Witness Statement, ¶ 121; **Exhibit C-177**, Email chain between Angel Seda and Víctor Mosquera Marín, 10 November 2016.

455 Seda Witness Statement, ¶ 122; **Exhibit C-067bis**, Letter from Michael J. Burdick to Aimer Fredy Alonso Triana, 21 November 2016.

456 **Exhibit C-067bis**, Letter from Michael J. Burdick to Aimer Fredy Alonso Triana, 21 November 2016.

457 **Exhibit C-067bis**, Letter from Michael J. Burdick to Aimer Fredy Alonso Triana, 21 November 2016.

unable to provide him with any physical security or legal assistance, and that he must take any further steps with Colombian authorities.[458] Mr. Seda was not optimistic—after all, the Colombian authorities were in all likelihood part of the extortion racket that had targeted him. Nevertheless, he pursued the available legal remedies and sought to further notify Colombian law enforcement authorities, as described below.

7. Newport Challenges The Precautionary Measures

218. With Corficolombiana having had limited success before the court, on 7 December 2016, Newport petitioned the Asset Forfeiture Unit directly to dismiss the proceeding and lift the precautionary measures.[459] Article 124 of the Asset Forfeiture Law authorizes the Attorney General's Office to dismiss asset forfeiture proceedings "*at any time*" where, *inter alia*, "[i]*t is shown that the assets in question are in the name of third parties acting in good faith without fault*."[460] Given that the Attorney General's Office itself had made no evident attempt to "*search for and collect the proof*"[461] of Newport's good faith status, Newport's petition presented this evidence to the Attorney General's Office. This included, among other evidence, Otero & Palacio's title study and the Colombian Government's own Certification of No Criminal Activity.[462]

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458 **Exhibit C-178**, Letter from J. R. Walsh to A. Seda, 29 November 2016.

459 **Exhibit C-048bis**, Newport's First Petition to Attorney General's Office Asset Forfeiture Unit, 7 December 2016.

460 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 124(4).

461 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 118(5).

462 **Exhibit C-048bis**, Newport's First Petition to Attorney General's Office Asset Forfeiture Unit, 7 December 2016, p. SP-0013 – SP-0014; **Exhibit C-032bis**, Petition Response from Attorney General Office of Asset Forfeiture and Anti-Asset Laundering to Fiduciaria Corficolombiana, 9 September 2013; **Exhibit C-030bis**, Otero & Palacio Title Study and Supplement, 7 March 2013 and 23 July 2013.

219. The Asset Forfeiture Unit failed to respond. Newport supplemented its petition on 14 December 2016, sending additional evidence supporting Newport's status as a third-party acting in good faith without fault, including a certification by Corficolombiana confirming the source of funds for the Meritage Trust.[463] Again, Newport's petitions were met with silence.

220. A few months after the seizure of the Meritage, persons at the Attorney General's Office's anti-corruption unit contacted Mr. Seda to request a meeting regarding allegations made against Ms. Malagón. On 5 December 2016, Mr. Seda went to the headquarters for the Attorney General's Office in Bogotá and met with Daniel Hernández and Oscar Martínez, prosecutors at the Attorney General's Office. These individuals informed Mr. Seda that they were from a special Anti-Corruption Unit at the Attorney General's Office.[464]

221. Mr. Seda had a second meeting with Mr. Hernández and Mr. Martínez on 16 December 2016, which was also attended by his colleague Felipe López Montoya, and Francisco Sintura, Corficolombiana's outside counsel. At that meeting, Mr. Seda conveyed his story of how he had been extorted by Mr. López Vanegas with the help of his representatives, Mr. Mosquera and Mr. Valderrama, who had claimed to have the ability to influence Ms. Malagón and Ms. Ardila specifically. Mr. Hernández conveyed that the Anti-Corruption Unit was investigating Ms. Malagón and Ms. Ardila in a number of other cases in which they were believed to have been extorting individuals for payment after having initiated asset forfeiture proceedings against their properties. Mr. Hernández also stated that Newport was a good faith buyer and

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

464 Seda Witness Statement, ¶ 124.

that the forfeiture proceeding against the Meritage should be terminated. The Anti-Corruption Unit officials further stated that the Attorney General's Office would be conducting a special review of the case against Ms. Malagón on 22 December 2016.[465] They advised Mr. Seda to make a formal complaint, which Mr. Seda did on 19 December 2016.[466]

222. In his complaint, Mr. Seda reported Mr. López Vanegas's extortion attempts.[467] Mr. Seda explained the circumstances that had led him to believe that Mr. López Vanegas was working with the Attorney General's Office. He noted, for example, that the Prosecutor's Office had imposed precautionary measures just a week after he refused to answer Mr. Valderrama's text message, further to which Mr. Valderrama stated that the "*negotiation phase was over*."[468] He also explained that Mr. López Vanegas and his representatives had repeatedly claimed that they were working with the Attorney General's Office and that if Mr. Seda paid the demanded sums, the Attorney General's Office would lift the measures.[469]

223. Mr. Seda, however, never heard back from the Anti-Corruption Unit. Over a month after this meeting, Mr. Seda followed up with the Attorney General's Office only to be told that despite this substantial evidence of corruption, they had decided to do nothing.[470] It appears

[465] Seda Witness Statement, ¶ 125; López Montoya Witness Statement, ¶ 42.

[466] **Exhibit C-181**, A. Seda Complaint to *Fiscalía General*, 19 December 2016.

[467] **Exhibit C-181**, A. Seda Complaint to *Fiscalía General*, 19 December 2016, p. SP-0003.

[468] **Exhibit C-181**, A. Seda Complaint to *Fiscalía General*, 19 December 2016, p. SP-0003.

[469] **Exhibit C-181**, A. Seda Complaint to *Fiscalía General*, 19 December 2016, p. SP-0003.

[470] Seda Witness Statement, ¶ 128.

that Colombian authorities stopped pursuing the investigation, which has been marked "*inactive*," without any notice or explanation to Mr. Seda.[471]

224. In the meanwhile, investors in the Meritage Project began to demand to withdraw from the Project.[472] On 3 January 2017, Royal Realty was forced to purchase almost 350,000 shares (approximately 20 percent) from a Colombian investor who no longer wished to be associated with the Meritage Project in light of the negative publicity it had received.[473]

225. On 23 January 2017, after the Asset Forfeiture Unit again ignored the additional evidence provided in the second petition, Newport filed a third petition with the Unit requesting to set aside the precautionary measures on the basis that more than six months had elapsed since their imposition.[474] This violated Article 89 of the Asset Forfeiture law, which imposes a six-month time limit for the Attorney General's Office to either close the case or pursue it in court, beyond which the precautionary measures cannot be extended.[475] The Asset Forfeiture Unit, however, once again ignored Newport's petition and instead proceeded to order the formal initiation of the asset forfeiture process.

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471 *See* **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, p. 85; **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, p. 85 (both noting that the status of Mr. Seda's reported complaint was "*inactive*").

472 Seda Witness Statement, ¶ 106.

473 Seda Witness Statement, ¶ 106; **Exhibit C-227**, Newport S.A.S. Share Ledger, 15 January 2019, p. SP-0003.

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

475 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 89 (*"These precautionary measures may not be extended for more than six (6) months, which is the period within which the prosecutor must define whether the action must be dismissed or whether, to the contrary, it is necessary to issue a resolution of provisional determination to proceed with the asset forfeiture claim."*).

F. Colombia Presses Ahead with Asset Forfeiture Proceedings in Violation of Newport's Procedural Rights

1. The Attorney General's Office Institutes Asset Forfeiture Proceedings

226. On 25 January 2017, more than six months after it rendered the Precautionary Measures Resolution, the Asset Forfeiture Unit filed its *fijación provisional de la pretension* ("**Determination of the Claim**"), ordering the formal initiation of the asset forfeiture proceeding.[476] While Mr. Seda and the other Meritage Claimants had, up to now, hoped that the Attorney General's Office would ultimately recognize that Mr. López Vanegas's allegations were patently false and lift the precautionary measures, the Determination of the Claim sounded the death knell on any such expectation. Under the Asset Forfeiture Law, the Determination of the Claim was "*not subject to any remedy*";[477] it merely provided affected parties the opportunity to submit oppositions,[478] following which the Attorney General's Office was required to submit an official petition for forfeiture, *Requerimiento* in Spanish, (or a declaration to dismiss the proceedings) to the competent court to initiate the Trial Phase of the asset forfeiture proceedings.[479]

227. Thus, the Determination of the Claim effectively foreclosed any real possibility of developing the Project as it would be mired in court proceedings for the foreseeable future. Even if the court ultimately rejected the Attorney General's Office's claim for asset forfeiture,

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

477 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 126.

478 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 129

479 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 131.

the Project's cessation in the interim would be fatal to it—investors and unit buyers would bring claims (as some did), funding would dry up, existing construction would deteriorate and the reputational damage caused by the proceedings would all hamper restarting development.[480]

228. Besides its grave impact on the Project, the Determination of the Claim was premised on unreasonable and arbitrary bases that failed to apply fundamental safeguards applicable to Claimants under the Asset Forfeiture Law.

229. Crucially, the Attorney General's Office utterly failed to even consider Newport's rights as a third party acting in good faith without fault—which, as experts Drs. Medellín and Martínez confirm, would have been dispositive to the entire asset forfeiture proceeding—despite its express obligation to do so enshrined in the Asset Forfeiture Law.[481] Instead, the Attorney General's Office's submissions focused entirely on Corficolombiana's diligence. And even then, the Attorney General's Office did not even attempt to "*search for and collect the proof which makes it possible to reasonably conclude that there is no good faith without fault*" with regard to Corficolombiana's diligence before issuing the Determination of the Claim.[482] While the Attorney General's Office had previously (incorrectly) asserted in its Precautionary Measures Resolution that it could delay this obligation until later, the Attorney General's Office was undoubtedly required to carry out this essential function prior to the Determination of the Claim. The Attorney General's Office even acknowledged its affirmative

480 *See* Seda Witness Statement, ¶ 115; López Montoya Witness Statement, ¶ 38.

481 *See supra* ¶ 161.

482 **Exhibit C-003bis**, Law 1708, 20 January 2014, art. 118(5) (requiring the Attorney General's Office to "[s]*earch for and collect the proof which makes it possible to reasonably conclude that there is no good faith without fault*.").

obligation noting that, "*the Prosecutor's Office is obligated to collect evidence that may prove an absence of good faith that is free from fault.*"[483]

230. First, as Claimants' experts Dr. Medellín and Dr. Martínez have explained, a party that acts with qualified good faith in the purchase of a property obtains a new ("*clean*") right to title to such property *even if* there had been some prior deficiency in the title that would have ordinarily created a basis for asset forfeiture.[484] The Colombian Constitutional Court has acknowledged this repeatedly, and the Attorney General's Office plainly acknowledges it, noting that the resulting new title is "*worthy of recognition and legal protection*."[485]

231. Second, as the Attorney General's Office also acknowledges a fiduciary such as Corficolombiana meets the standard of qualified good faith by complying with the SARLAFT diligence process.[486] In this same regard, former Deputy Attorney General Martínez explains in his expert report: "*when a financial entity has satisfied the procedures contained in its SARLAFT, it can be stated that it acted in good faith without fault, and then it assumes an*

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[483] **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, p. SP-0115 (emphasis added). *See also* **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, p. SP-0123 ("*once the illegality of the provenance of the assets being subjected to asset forfeiture has been proved, it shall be understood that the object of the legal transactions that gave rise to their acquisition violates constitutional and legal precepts on property, and therefore those transactions and contract related to those assets shall in no case constitute good title and shall be considered void from the beginning. The preceding does not impact the rights held by third parties acting in good faith that if free from fault.*") (emphasis in original deleted, emphasis added)

[484] Martínez Expert Report, ¶ 35; Medellín Expert Report, ¶ 81.

[485] **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, p. SP-0123.

[486] *See* **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, pp. SP-0127 – SP-0128; **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, p. SP-0139 ("*the Fiduciary, given this actual non-compliance with the SARLAFT system, cannot be considered a third party acting in good faith and free from fault, when it is obvious it has ignored the rules regarding "know your client" and SARLAFT's rules*").

unassailable position in which the State is obligated to recognize and protect its ownership rights."[487]

232. The Attorney General's Office further acknowledges, and Claimants' expert agrees,[488] that the requirements for a compliant SARLAFT system are established in Article 102 of Decree 663 of 1993.[489] Article 102(2) outlines the "*mechanisms and rules of conduct*" that financial institutions must adopt, which are to:

> "*a. Adequately know <u>their clients'</u> type of economic activity, its breadth, the basic features of their regular transactions, and, specifically, the activities of individuals making demand, fixed term or savings deposits, or those delivering assets in trust or trust assignment; or those depositing in safety boxes,*
>
> *b. Determine the frequency, volume and features of **their user**<u>s'</u> financial transactions,*
>
> *c. Determine <u>their clients'</u> volume and movements of funds to ensure they are in line with their economic activities,*
>
> *d. (Subsection amended by § 1 of Law 1121 of 2006. New text as follows:) Immediately and fully report to the Information and Financial Analysis Unit any relevant information regarding the handling of assets or liabilities or other funds, whose amount or features are not in line with <u>their clients'</u> economic activities, or their users' transactions when their number, or the sums handled, or their specific features, may reasonably lead to a suspicion that the they are using the entity to transfer, handle, take advantage of, or invest moneys or resources originating from criminal activity or that are intended to finance such activity.*"[490]

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[487] Martínez Expert Report, ¶ 75.

[488] Martínez Expert Report, ¶ 73.

[489] *See* **<u>Exhibit C-023bis</u>**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, p. SP-0127 ("*Thus, in § 102 et seq. of the Financial System's Organic Code, in accordance to § 22 of Law 964 of 2005, the Financial Superintendence of Colombia set the basic criteria and parameters that monitored entities must follow in the design, implementation and operation of the aforesaid system.*").

[490] **<u>Exhibit C-023bis</u>**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, p. SP-0127.

233. The Attorney General's Office nevertheless, without support or explanation, concludes that "*Corficolombiana did not use the appropriate means it had at its disposal for verifying the origin of the asset* [. . .] *because had it done so, it would have noticed that Mr. IVÁN LÓPEZ VANEGAS, legal representative of SIERRALTA LÓPEZ Y CIA (titleholder in 1994), was in prison for the crime of drug trafficking in the United States of America*."[491] According to the Attorney General's Office, "*Corficolombiana could have performed this verification by simply using open-source information*." Now that it was becoming clear that Mr. López Vanegas's story was fabricated, the Attorney General's Office had no choice but to shift its rationale for initiating Asset Forfeiture Proceedings. Instead of relying on the kidnapping allegations, the Attorney General's Office was now focusing on Mr. López Vanegas's criminal background.

234. As a preliminary matter, and to be very clear, Mr. López Vanegas's name was not in the chain of title for any entity that conducted a title search for the Meritage Property as of 2013.[492] Indeed, the list of individuals and entities that Corficolombiana submitted to the Attorney General's Office for verification went back to *1950*—Mr. López Vanegas' name was not on that list because of his own efforts to hide his ownership of the property by changing the name of the entity through which he exercised that ownership interest from Sierralta López to Inversiones Nueve S. A. ("**Inversiones Nueve**"), and installing his son Mr. López Betancur as its legal representative. Therefore, records Corficolombiana obtained for its diligence in 2013 reflected Mr. López Betancur's name as the then-current director of Inversiones Nueve. Mr.

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491 **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, p. SP-0128.

492 The arbitrator in the *Pinturas Prime* arbitration brought by unit buyers noted the same – that Mr. López Vanegas was not an owner of the property during the relevant time period or any time period, and the legal representative of Sierralta López during the relevant time period was Sebastián López. *See* **Exhibit C-231**, Pinturas Prime Arbitration Decision, 21 February 2019, p. SP-0037.

López Betancur's name thus *was* on Corficolombiana's list submitted to the Attorney General's Office for verification of criminal activity. The Attorney General's Office confirmed that there were no criminal records relating to Mr. López Betancur.[493] The Attorney General's Office simply ignored this evidence. Not until August 2017, after his extortionate campaign against Mr. Seda and the Meritage became public, did Mr. López Vanegas re-activate the dormant Inversiones Nueve and shortly thereafter, he was re-instated General Manager and legal representative of the company.[494]

235. In addition, Otero & Palacio checked both UN and OFAC sanctions lists. Even dating back to 1994 and through the present day Mr. López Vanegas does not appear on the UN Security Council or OFAC lists.[495] Therefore, even if Mr. López Vanegas's name had been checked against these lists, it would not have appeared there – and that is true to this day. Indeed, the Attorney General's Office itself did not discover any criminal activity linked to Meritage's chain of title until Mr. López Vanegas filed a complaint, disclosing his own claimed connection to the property along with his false kidnapping story.[496] Accordingly, Colombia's argument that Corficolombiana should have extended diligence to an arbitrary period not required by statute, and that it could have found more information about persons not then—and not currently—on any sanctions list, and which the Attorney General's Office was only able to

493 *See supra* ¶¶ 72.

494 *See* **Exhibit C-225**, Certificate of Existence and Representation - Inversiones Nueve S.A of 7 November 2018, at p. 4 (indicating that Mr. López Vanegas was designated the company's General Manager and legal representative as of 30 October 2017).

495 **Exhibit C-100**, U.S. Dept. of the Treasury, Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List, from 1 January 1994 through 31 December 2013; **Exhibit C-271**, United Nations Security Council Consolidated List, consolidated through 21 May 2020.

496 *See above* ¶ 96.

identify after launching an investigation into the matter triggered by a formal complaint, is unavailing.

236. Moreover, what the Attorney General's Office appears to argue—*post hoc*—is that the requirement under Article 102 extends to every person on the chain of title.[497] But that is contrary to the plain language of the regulation, which confirms that diligence need only be run **on the fiduciary's clients**.

237. To be clear, SARLAFT requires diligence on the identity, source of funds, and financial wherewithal of the parties transacting with the fiduciary (*i.e.*, Newport and La Palma). There is no dispute that Corficolombiana did this. As Deputy Attorney General Martínez explains, the requirement does ***not***, however, extend to other persons, such as those on a chain of title.[498] This is a logical requirement. It would be impossible to conduct the same type of due diligence required by Article 102 on third parties (*i.e.*, not the clients at issue in a transaction) because the fiduciary does not have—and cannot get—access to the kind of information that Article 102 seeks (*e.g.*, details of financial wherewithal and source of funds, etc.).

238. Corficolombiana conducting the required diligence under the SARLAFT standards should have been dispositive of the asset forfeiture action. The Attorney General's Office recognized this.[499] To avoid this inescapable conclusion, however, the Attorney General's Office invented an arbitrary standard of diligence that is plainly unsupported by the applicable regulation.

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[497] *See also* **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, pp. SP-0134 – SP-0138.

[498] Martínez Expert Report, ¶ 53.

[499] *See e.g.* **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, p. SP-0050.

239. Importantly, even if it could be said—*quod non*—that either Newport or Corficolombiana were unable to discover some relevant fact as part of their diligence, they are nonetheless protected under qualified good faith. As Dr. Medellín explains, "*the good faith without fault standard is not one of perfection.*"[500] As explained in detail above, the Constitutional Court of Colombia has repeatedly explained that the doctrine of "*common error*" applies to qualified good faith. As Dr. Martínez explains the standard, if "*any other diligent person would have had the same information and would have committed the same error*," then such error is a "*common error*" and it nonetheless permits a third party to secure qualified good faith protection.[501]

240. Corficolombiana undoubtedly acted with good faith when it carried out its due diligence of the Meritage Property: it implemented the necessary SARLAFT procedures required under Colombian law, which by itself is sufficient to grant it good faith status.[502] But Corficolombiana went beyond this. It directed Newport to hire a capable and experienced law firm, Otero & Palacio, to conduct a title study. Both Otero & Palacio and Corficolombiana ran the names of prior title holders through OFAC and Corficolombiana additionally ran those names through other restricted lists. Moreover, Corficolombiana submitted to the Attorney General's Office a request to verify that the Property was not tied to any criminal activity, including a list of individuals that had owned the property, and the then current legal representatives of the entities that had owned the property, going back decades. In response to this letter, Corficolombiana received confirmation that was "*no record*" related to any of

[500] Medellín Expert Report, ¶ 98.

[501] Martínez Expert Report, ¶ 72; *see also* Medellín Expert Report, ¶ 82.

[502] Martínez Expert Report, ¶ 73.

them.[503] It is difficult to imagine that any entity would doubt the contents of such an express certification from the Attorney General's Office. Indeed, the Attorney General's Office's failure to even address this critical piece of evidence in its Determination of the Claim speaks volumes.

241. Critically, other title studies conducted on the Meritage Property, including by Osorio & Moreno for Colpatria Bank,[504] and by Mr. Pardo for Banco de Bogotá,[505] both venerated financial institutions in Colombia with their own rigorous SARLAFT and due diligence procedures, also found no indication of the information the Attorney General's Office was relying on to subject the property to Asset Forfeiture Proceedings. In other words, to the extent Corficolombiana made an error, it was a case study in "*common error*" meeting the standard for qualified good faith. This should have been determinative of Corficolombiana's good faith status as it shows that equally placed financial institutions conducted due diligence in parallel on the Property at or around the time as Corficolombiana and found no evidence of fraudulent transfers. As Dr. Martínez notes, under the doctrine of common error, if any other diligent person, under the same circumstances, with the same information at their disposal, would arrive at the same conclusion, that diligence must be credited good faith status.[506]

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503 *See supra* ¶ 72.

504 **Exhibit C-160**, Osorio & Moreno Abogados, Title Study, 17 May 2016.

505 **Exhibit C-161**, Daniel C Pardo, Study for Banco de Bogotá, 26 May 2016, p. SP-0004.

506 Martínez Expert Report, ¶ 72.

2. Newport Files A *Tutela* Action

242. On 10 February 2017, Newport filed a constitutional protection, or *tutela*, action with the Supreme Court of Justice, Penal Division.[507] In its *tutela*, Newport requested the court order the Asset Forfeiture Unit to respond to Newport's three petitions of 7 and 14 December 2016 and 23 January 2017, in which it sought protection from the asset forfeiture proceedings because it was a third party acting in good faith without fault.[508] This was the only recourse available to Newport, given that the Attorney General's Office had refused to address Newport's petitions in its Determination of the Claim.

243. Around the same time, on 21 February 2017, the Bogotá Superior Court, Asset Forfeiture Division, upheld the 20 October 2016 decision to deny Corficolombiana's petition to set aside the precautionary measures.[509] The Superior Court, like the lower court, declined to address Corficolombiana's good faith arguments on the basis that they did not apply to an analysis under Article 112 of the Asset Forfeiture Law, which set out the purpose and scope of control of legality processes.[510] The court, again, ignored the safeguards in place for good faith third parties, including in Article 87 of the Asset Forfeiture Law, which required precautionary measures to recognize and respect the rights of good faith third parties. The Superior Court's dismissal of Corficolombiana's appeal meant that the precautionary measures continued to remain in place and the Asset Forfeiture action went forward.[511]

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507 **Exhibit C-052bis**, Newport *Tutela* Action, 17 February 2017.

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

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

510 **Exhibit C-047bis**, Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017, pp. SP-0014 – SP-0015.

511 **Exhibit C-047bis**, Appellate Decision on Corficolombiana's Control of Legality Petition, 21 February 2017, pp. SP-0015 – SP-0016.

3. The Court Orders The Attorney General's Office To Respond To Newport's Multiple Petitions

244. On 28 February 2017, the Supreme Court of Justice granted Newport's petition, holding that the Asset Forfeiture Unit violated Newport's fundamental rights guaranteed under the Colombian Constitution, include access to administration of justice and due process, and that the Attorney General's Office's failure to respond to Newport's petitions violated Newport's due process rights.[512] The court ordered the Asset Forfeiture Unit to respond to Newport's petitions within 48 hours.[513]

245. In a response dated 4 March 2017, well over 48 hours later, the Asset Forfeiture Unit claimed that it could not conclude that Newport was a good faith third-party buyer.[514] However, the Attorney General's Office did not identify what conduct by Newport deprived it of the presumption of good faith. It merely stated:

> "[T]*his Delegate* [of the Attorney General's Office] *informs that does not accept recognition to NEWPORT S.A.S. as a third party acting in good faith and free from fault, as the evidence collected during the Initial Phase of this investigation, allows to reasonably infer* [. . .]*that upon NEWPORT S.A.S. such good faith and free from fault condition cannot be advocated based on the arguments raised by the Asset Forfeiture Temporary Pretension Ruling dated January 25th, 2017, whereby the National Prosecutor's Office developed the thesis aimed at proving a lack of due diligence on the purchase of the real estate that are currently subject to the asset forfeiture proceeding.*"[515]

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

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

514 **Exhibit C-054bis**, Attorney General's Office Asset Forfeiture Unit Response to Newport's Petitions, 4 March 2017.

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

246. The Attorney General's Office then went on to cite its findings regarding Mr. López Vanegas's history as a drug trafficker, but failed to explain why Newport's due diligence efforts, including engaging a highly reputable fiduciary like Corficolombiana,[516] commissioning a title study from Otero & Palacio,[517] and relying on express Certifications of No Criminal Activity from the same Attorney General's Office,[518] disqualified Newport from preserving its good faith status. In other words, just as it had done with Corficolombiana,[519] the Attorney General's Office found that Newport lacked good faith without any analysis whatsoever.

247. It bears noting that the experts in this matter, Dr. Medellín, a former Minister of Justice and Law of Colombia (who was a key contributor to the original asset forfeiture statute in Colombia), and Dr. Martínez, a former Deputy Attorney General of Colombia (who was the lead author of the Asset Forfeiture Law—the statute applicable to the Meritage asset forfeiture proceeding), each conclude in their respective reports that Newport in fact exceeded the standard of diligence for a transaction such as this one. Unlike the Attorney General's Office, the Claimants' experts reach this conclusion based on an assessment of Newport's actions, and not merely hindsight. Former Minister of Justice and Law Medellín explains that the standard of diligence of a "*third party acting in good faith without fault is not one of perfection: to take shelter from the protection of this legal standard, a buyer should demonstrate that he acted*

[516] *See supra* ¶ 62.

[517] *See above* ¶ 66.

[518] *See above* ¶ 69.

[519] *See above* ¶ 233.

diligently with objective actions aimed at verifying the conditions and possible defects of the good that is intended to be obtained."[520]

248. Dr. Medellín concludes:

> "*In my opinion, any prudent or diligent person would have acted in the same way as Mr. Seda and Newport SAS, without having been able to discover the alleged wrongfulness that affects the asset, in such a way that a common error is configured, an essential element that, in addition to the sincere and loyal belief that they have acquired the right, as well as the fulfillment of the other conditions required by civil law, they constitute them as third parties acting in good faith without fault, so that their rights should be recognized and respected.*"[521]

249. On 27 March 2017, Newport filed its opposition to the Determination of the Claim, raising the following arguments: (*i*) the property was legitimately acquired by Newport in good faith with the proceeds stemming from lawful activity; (*ii*) as an affected third party with rights to present evidence and intervene, Newport had a legitimate interest to oppose the action; (*iii*) the Determination of Claim failed to respect legal formalities.[522]

250. The Attorney General's Office once again ignored Newport's opposition. In this regard, Dr. Martínez concludes: "*the Attorney General's Office* [. . .] *disregarded all of the evidence submitted by Newport and the fiduciary to demonstrate the width and depth of their due diligence as to the knowledge of the persons selling the asset*."[523]

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[520] Medellín Expert Report, ¶ 98.

[521] Medellín Expert Report, ¶ 96.

[522] **Exhibit C-055bis**, Newport's Opposition to Determination of the Claim, 9 March 2017.

[523] Martínez Expert Report, ¶ 58.

4. Attorney General's Office Files Formal Asset Forfeiture Request

251. On 5 April 2017, the Attorney General's Office filed its formal asset forfeiture request, known as the "***Requerimiento***", with the Special Asset Forfeiture court.[524] With its *Requerimiento*, the Attorney General's Office formally requested the court to commence the asset forfeiture proceeding based on the same claims it had articulated in the Determination of the Claim.[525] This officially marked the beginning of the Trial Phase of the Asset Forfeiture Proceedings.

252. Like before, the Attorney General's Office only discussed Corficolombiana's good faith status, ignoring completely the rights of Newport (and other affected third parties). And like before, the Attorney General's Office argued that Corficolombiana was undeserving of good faith status because it had not applied SARLAFT diligence to each and every prior title holder, in contravention of the applicable standard for SARLAFT diligence required under Colombian law.[526]

253. But the deficiencies in Colombia's *Requerimiento* are not limited to its incorrect articulation of the diligence standard; its arguments made in addition to those in Determination of the Claim regarding the diligence performed are equally unfounded, unreasonable and arbitrary.

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[524] **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017.

[525] **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017.

[526] *See supra* ¶¶ 232.

254. First, the Attorney General's Office asserts in the *Requerimiento* that the title study upon which Newport and Corficolombiana relied (conducted by the prominent firm of Otero & Palacio) did not go back far enough.[527] Recognizing that Otero & Palacio had conducted a ten-year title study (that effectively went back further to 1997 because there were no relevant transactions between 1997 and 2003), the Attorney General's Office insisted that the study should have gone back even further to 1994. If it had done so, Colombia argues in the *Requerimiento,* Corficolombiana would have determined that the legal representative of one of the titleholders at that time, Sierralta López & CIA, was Iván López Vanegas, and that in 2003 there were media reports that he had been imprisoned in the United States on narcotics charges.[528]

255. Tellingly, the Attorney General's Office cited no law, rule, or regulation that required the diligence to extend to the period it suddenly demands in the *Requerimiento*. Otero & Palacio's standard practice was to do a 10-year title study based on the 10-year statute of limitations period for civil actions relating to land.[529] As Ms. Palacio of Otero & Palacio has testified, the limitations period for claims to land was changed from 20 years to 10 years,[530] so the standard

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527 **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, pp. SP-0142 – SP-0143.

528 **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, pp. SP-0079; SP-0142 – SP-0143.

529 **Exhibit C-078**, Law 791 of 2002, art. 1 ("*Redúzcase a diez (10) años el término de todos las prescripciones veintenarias, establecidas en el Código Civil, tales como la extraordinaria adquisitiva de dominio,* ***la extintiva****, la de petición de herencia, la de saneamiento de nulidades absolutas.*") (emphasis added).

530 **Exhibit C-078**, Law 791 of 2002, art. 1 ("*Redúzcase a diez (10) años el término de todos las prescripciones veintenarias, establecidas en el Código Civil, tales como la extraordinaria adquisitiva de dominio,* ***la extintiva****, la de petición de herencia, la de saneamiento de nulidades absolutas.*") (emphasis added); **Exhibit C-216**, Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018, p. SP-0004.

period for title studies was adjusted accordingly.[531] Notably, the arbitrator in the case in which Ms. Palacio testified rejected the argument that the title study should have gone beyond 10 years in view of the change in the law.[532] This is yet another example of the Attorney General's Office trying to make up its own, arbitrary rules *post hoc* without regard to what the specific, written rules were at the time of the events. Taken to its logical conclusion, the Attorney General's Office's new requirement—not found in any law, rule, or regulation—means, in effect, that the fiduciary must study every entity on the chain of title, and study each *past* legal representative for every such company, presumably *ad infinitum*. This approach is not only not required by law, but is plainly impractical.

256. Moreover, it is worth noting that, as outlined above, even if Corficolombiana had gone back to 1994 and performed "*open source*" searches on every prior title holder, it would not have come across Mr. López Vanegas's name based on then current records.[533] Second, Colombia argues Corficolombiana should have known that two (separate) prior titleholders—that is, owners prior to La Palma—Mr. José Luis Varela Arboleda, and Ms. Tatiana Gil did not have the financial wherewithal to buy the property when they did, thus suggesting that they were a conduit for someone else.[534]

257. The Attorney General's Office's argument is truly inexplicable, and in any event inapposite to the situation at hand. Neither Mr. Varela nor Ms. Gil—who had been owners of the property

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[531] **Exhibit C-216**, Testimony of Ana María Palacio Bedoya in Pinturas Prime Arbitration, 28 August 2018, SP-0004.

[532] **Exhibit C-231**, Pinturas Prime Arbitration Decision, 21 Febrero 2019, p. SP-0037.

[533] *See supra* ¶ 234.

[534] **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, pp. SP-0131 – SP-0139.

many years prior—were parties to the fiduciary transactions related to the Meritage Project. Corficolombiana could not have obtained access to their private account records and detailed financial information for either of them.[535] It therefore had no basis to evaluate Mr. Varela and Ms. Gil's financial wherewithal or the source of their funds when they purchased the property (separately) many years prior. Of course, such diligence would have been the responsibility of the regulated financial institutions involved in *those* respective transactions, not Corficolombiana's.

258. Third, the Attorney General's Office remarkably argues that Corficolombiana could not rely on the Attorney General's Office's own letters confirming the lack of criminal history of the persons on the chain of title because its official letters "*cannot be considered carte blanche, so that the Public Prosecutor of the Nation, following the inquiry, may not in the future be able to investigate events it may become aware of*" by Corficolombiana.[536] According to the Attorney General's Office, (*i*) such letters cannot preclude that Office from "*in the future investigating additional facts at to which it has knowledge;*" and (*ii*) the Attorney General's Office cannot provide information on investigations because the proceedings are confidential.[537] The Attorney General's Office's arguments are inapposite to the question at hand: whether Corficolombiana and Newport acted in good faith without fault by requesting and relying on these letters. As noted above, the mere fact that Corficolombiana and Newport

[535] **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, pp. SP-0131 – SP-0139.

[536] **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, p. SP-0140.

[537] **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, p. SP-0140.

sought Colombia's Certification of No Criminal Activity is, *per se*, evidence of good faith (*i.e.*, objective, reasonable steps taken to ascertain relevant facts).[538] Colombia utterly fails to credit this good faith.

259. Equally misplaced is the Attorney General's Office's argument about not being able to lose its right to investigate future facts. This is a strawman of its own creation. Neither Corficolombiana nor Newport have *ever* argued that the Attorney General's Office's letters preclude the Government from taking lawful action against potential wrongdoers. Instead, what they have argued is that such letter precludes the Attorney General's Office (or estops it) from taking adverse action against the recipient, who requested the letter in good faith, and is entitled to rely on its contents in good faith.[539] The fact that the letter would preclude the Attorney General's Office from going after a good faith party merely means that prosecutors are now forced to re-direct their efforts—as required by the Asset Forfeiture Law—to focus not on the good faith buyers, but on the assets of wrongdoers while respecting the rights of subsequent, good faith parties.[540]

260. Finally, the Attorney General's Office's statement on the confidentiality of proceedings is misplaced for two principal reasons. First, the Attorney General's Office did not add a disclaimer in its letter stating that it only contained information about public proceedings and not any active (non-public) investigations. An investor may not be faulted for relying on the Government's own words. Many law enforcement agencies around the world, including the

538 Medellín Expert Report, ¶ 15; *see also* Martínez Expert Report, ¶ 70;

539 **Exhibit C-055bis**, Newport's Opposition to Determination of the Claim, 9 March 2017, pp. SP-0016 – SP-0017; *see also* **Exhibit C-043bis**, Corficolombiana's Control of Legality Petition, 26 September 2016.

540 *See* Martínez Expert Report, ¶ 60.

U.S. FBI, state as a regular matter that they neither confirm nor deny the existence of ongoing investigations. Colombia could have done so here, but did not. It must now live with the consequences of its statements. A party contacting the Government in good faith is entitled to rely on the Government's responses. Second, it is not true as a matter of law that the *existence* of investigations is confidential. Colombian law requires transparency, and while prosecutors need not make the *facts* or *evidence* arising from their investigation public, they are required to confirm its existence.[541] And of course, if any investigations were truly confidential, a good faith buyer would not ever have known—despite conducting diligence—that any prior owners posed a problem, particularly if such owners were not listed on any restrictive list.

261. In sum, with the *Requerimiento*, Colombia persisted in denying rights to good faith third parties. It refused even to address Newport's rights. Colombia further continued to argue that Corficolombiana did not acquire good faith status based on allegations that are unsupported by Colombian law or, indeed, common sense.

5. The Court Refused To Allow Newport To Defend Itself In The Proceedings

262. Once the Attorney General's Office files a *Requerimiento*, the receiving court must confirm and formally accept its jurisdiction over the asset forfeiture action; a phase known as the "***avocamiento***", or undertaking, phase.[542] In issuing the *avocamiento* phase, the court examines

[541] **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 6.

[542] **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 137 ("*Upon receipt of the petition for forfeiture filed by the Office of the Attorney General of Colombia, the judge shall assume jurisdiction through an order to proceed, which shall be personally notified.*")

the *Requerimiento* to determine whether it meets the pleading requirements under Article 132 of the Asset Forfeiture Law.[543]

263. On 17 August 2017, the Second Criminal Court Specialized in Asset Forfeiture of Antioquia rendered its *avocamiento* order finding that Newport was not entitled to defend its rights in the Asset Forfeiture Proceedings before the court because it was, according to the court, not apparently affected by the Proceedings.[544] In other words, the court made the remarkable finding, one that goes directly against the broad definition of affected parties in the 1708 law, that the developer of the Meritage Project, representing the interests of several investors who had already poured substantial sums into the Project, was not affected by the Asset Forfeiture Proceedings. The court critically failed to consider the relevant agreements and transactions that indisputably gave Newport the right to participate in the Proceedings.

264. The court acknowledged that the Asset Forfeiture Law defines parties affected by asset forfeiture.[545] Affected Parties are "*in the case of tangible assets* [. . .] *any person* [. . .] *who claims to have any property right in the assets that are the subject of the asset forfeiture proceeding*" and "*in the case of personal or credit rights, any person* [. . .] *who claims to have authority to demand compliance with the respective obligation*."[546]

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543 These requirements include: (i) the property's identification; (ii) the precautionary measures adopted against the property; (iii) the formulation of the Determination of Claim; (iv) the factual and legal bases supporting the Determination of Claim; (v) the evidence supporting the Determination of Claim; and (vi) the identification and place of notification of the affected parties recognized during the process. **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 132.

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

545 **Exhibit C-057bis**, Asset Forfeiture Court *Avocamiento* Order, 17 August 2017, p. SP-0016.

546 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 30.

265. As Claimants' legal expert, former Minister of Justice and Law Medellín explains, the definition of "*affected party*" under the statute is necessarily broad. Article 1 of the Asset Forfeiture Law defines an "*affected person*" in a forfeiture action as the "*person who affirms being the owner of some right to the asset that is the subject of the asset forfeiture proceeding, and who has standing to take part in the process*."[547] Former Minister Medellín explains that:

> "[U]*nder a comprehensive and systematic interpretation of Law 1708 of 2014, any natural or legal person, which is the holder of some right or rights to an asset that is the object of an asset forfeiture action shall be 'affected' and shall be recognized as such.*"[548]

266. Moreover:

> "[T]*he failure to recognize a person, natural or juridical, as affected in an asset forfeiture proceeding means depriving said person of the opportunity to exercise the right to a defense and to present contrary evidence. This fundamental deprivation results in the denial of each and every constitutionally and legally enshrined right, including those found in international treaties and conventions on human rights ratified by Colombia*."[549]

267. Dr. Medellín's analysis is entirely consistent with the legislative history (*exposición de motivos*) of the Asset Forfeiture Law, which makes clear that the drafters of the legislation recognized and intended that the scope of "*afectados*"—and the corresponding standing to appear in court and present argument and evidence—would be necessarily broad. In fact, the legislative history makes clear that while Colombian legal proceedings are ordinarily oral

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547 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 1.

548 Medellín Expert Report, ¶ 58.

549 Medellín Expert Report, ¶ 91.

proceedings, the asset forfeiture proceeding would have to be a written proceeding because of the large number of interested parties. It explains:

> "*This bill proposes that the proceedings remain in writing. Although it is true that there is a trend toward oral proceedings in Colombian law, the discussions held in the Drafting Commission reached the conclusion that the characteristics of asset forfeiture proceedings make it very difficult and inconvenient to change their written nature for the time being. The principal argument for this conclusion is that asset forfeiture proceedings must involve all possible interested parties, understood as the persons with any material* ["real"] *interest in the property subject to forfeiture. This means that those entitled to participate in asset forfeiture proceedings include not only the owner, but also the holders of all other material* ["real"] *interests in the property, such as the mortgage holder, the lienholder, the holder of the right of use, the possessor, etc.*"[550]

268. The legislative history further notes that "[a]*s a consequence of the foregoing, asset forfeiture proceedings, unlike other proceedings, are characterized by the concurrent participation of a great number of parties, all in different situations and with different interests*."[551] In fact, as the legislative history makes clear, the drafters were concerned that so many parties would have to present arguments that currently available courtrooms would not be large enough to accommodate the relevant participants. To wit: the large number of participating parties "*poses a problem for pursuing the proper course of asset forfeiture proceedings, for several reasons* [. . . including] [o]*n the one hand, specially sized hearing*

[550] **Exhibit C-302**, Legislative History to House of Representatives Draft Bill No. 263 -- Asset Forfeiture Code, 2013, sec. 3.5 (emphases added).

[551] **Exhibit C-302**, Legislative History to House of Representatives Draft Bill No. 263 -- Asset Forfeiture Code, 2013, sec. 3.5.

rooms would be required to house a great number of parties, which are not available at this time."[552]

269. It is clear that Newport met that low threshold. As established above, as of the date of the court's decision, Newport was already the beneficial owner of the title of the plot of the Meritage Property associated with Phases 1 and 6 of the Project.[553] This plot had been transferred on 12 February 2015 from the *Parqueo* to the Administration and Payment Trust, of which Newport was the beneficiary.[554] This transaction was registered in Deed 361, following all the required formalities under Colombian law.[555] In other words, when the Project was completed and the Administration and Payment trust, having served its purpose, was liquidated, Newport would inherit, among other remaining assets in that trust, title to the land.[556] As former Deputy Attorney General Martínez explains, in its capacity as a beneficiary of the Administration and Payments Trust, "*Newport had an irrevocable right to receive the title to the lot at the time of liquidation of the trust, but it also enjoyed the same right to receive title in the event that the project could not be completed*."[557]

270. Moreover, as noted above, on 12 February 2015, La Palma also transferred the entirety of the Meritage Property into the *Parqueo* trust.[558] This transaction was also registered in Deed

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[552] **Exhibit C-302**, Legislative History to House of Representatives Draft Bill No. 263 -- Asset Forfeiture Code, 2013, sec. 3.5.

[553] *See supra* ¶ 92.

[554] *See supra* ¶¶ 91-92.

[555] *See supra* ¶ 91.

[556] **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, cls. 14.B.2, 33.

[557] Martínez Expert Report, ¶ 62.

[558] *See supra* ¶ 91.

361. Corficolombiana was required to transfer the remaining parcels of land (*i.e.*, those associated with Phases other than 1 and 6 of the Project) based on instructions from La Palma.[559] In turn, La Palma was obligated, under its Sales-Purchase Agreement with Newport (assigned from Royal Realty), to instruct Corficolombiana to transfer title to the land associated with these phases upon the fulfillment of the relevant equilibrium points or early prepayment by Newport.[560] Thus, as the Project progressed and the equilibrium points were met, the titles to other parcels of the Meritage Property would also be transferred to the Administration and Payment Trust and, upon completion of the Project and liquidation of the trust, to Newport.

271. Accordingly, Newport held both property and personal rights over the Meritage Property and Project. Newport held a defined personal right to have the title to the land transferred to it when certain conditions were met, and the expectation of acquiring real property rights upon the completion of the Project.[561]

272. The court, nevertheless, refused to acknowledge Newport's rights over the Meritage Project. Instead, the court leveled perplexing and unsupported charges at the agreements on which Newport's rights were based, seemingly implying that Newport had conducted itself in an unlawful manner. In particular, the court focused on the Sales-Purchase Agreement between Royal Realty and La Palma, finding that it was "*cumbersome, awkward*" and "*not-at-*

559 **Exhibit C-029bis**, *Parqueo* Trust Agreement and Amendment, Amendment No. 1, 6 February 2015, cl. 3.

560 *See* **Exhibit C-019bis**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012, cls. 1(1)-(2), 9.

561 *See also* Martínez Expert Report, ¶¶ 61-63.

all clear" but did not explain which provisions it found confusing or why.[562] The court also accused the parties of "*unprincipled behavior*," for entering into an agreement assigning rights under the Sales-Purchase Agreement from Royal Realty to Newport, but again the court failed to explain why it found the assignment disagreeable.[563] Indeed, the assignment was done as a routine business manner to separate Royal Realty as manager of the Meritage and many other projects, from Newport as developer specifically of the Meritage project,[564] and certainly permitted by Colombian law.[565] The court then concluded, without referencing any legal provisions, that the Sales-Purchase Agreement "*did not meet the legal requirements and therefore its validity is deficient*" but that if it were a legally enforceable contract, it did not give Newport real rights over the Property.[566]

273. In any event, the court wholly ignored the trust agreements and Deed 361, which gave formal effect to the Sales-Purchase Agreements and crystallized Newport's beneficial ownership of the Property. Indeed, the court spent just one paragraph of its decision discussing the trusts and Deed 361 without reference to any of the individual provisions of the trust agreements or the transactions set out in the Deed.[567] The court again made an unsubstantiated accusation that the trusts and Deed were a "*scam*" without explaining why or indeed who such a scam would benefit and how.[568] Indeed, the trust agreements were based on standardized

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562 **Exhibit C-057bis**, Asset Forfeiture Court *Avocamiento* Order, 17 August 2017, p. SP-0110.

563 **Exhibit C-057bis**, Asset Forfeiture Court *Avocamiento* Order, 17 August 2017, p. SP-0111 – SP-0112.

564 *See* Seda Witness Statement, ¶¶ 47, 51.

565 **Exhibit C-195**, Newport's Appeal Against the Avocamiento Order, 24 August 2017, pp. SP-0024 – SP-0025.

566 **Exhibit C-057**, Asset Forfeiture Court Avocamiento Order, 17 August 2017, p. SP-0113; *see also* **Exhibit C-057**, Asset Forfeiture Court Avocamiento Order, 17 August 2017, pp. SP-0115 – SP-0120.

567 **Exhibit C-057bis**, Asset Forfeiture Court *Avocamiento* Order, 17 August 2017, pp. SP-0113 – SP-0114.

568 **Exhibit C-057bis**, Asset Forfeiture Court *Avocamiento* Order, 17 August 2017, p. SP-0114.

agreements supplied by one of the State's most prominent fiduciaries, Corficolombiana, and were authorized by, among others, Corficolombiana's legal department.[569]

274. By refusing to even review the plain language of the trust agreements and the Deed that spelled out Newport's rights to the Meritage Property, the court created an untenable situation: Newport's conduct—and in particular, whether it conducted sufficient diligence to be considered a third party acting in good faith without fault—would be on trial, but Newport would be denied the opportunity to participate in the proceedings and adduce evidence in its defense. Newport had already suffered significant damage and stood to permanently lose the Meritage Project and its investment as a result of the proceeding.

275. Critically, Newport was required to enter into such trust agreements with a fiduciary under Colombian law to develop real estate projects with multiple buyers.[570] Yet the court's decision effectively meant that by following the requirements of Colombian law, Newport was being held to have relinquished its rights in its own Project. The court's conclusion—spurred by the Attorney General's Office's unyielding opposition to giving Newport a simple opportunity to be heard was not only counterfactual but inconsistent with fundamental notions of due process under Colombian law. Thus, it is unsurprising that both former Minister of Justice and Law Medellín and former Deputy Attorney General Martínez readily conclude that the failure to recognize Newport's affected party status constituted a violation of the procedural guarantees enshrined in the Asset Forfeiture Law.[571]

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569 **Exhibit C-294**, Pinturas Prime Testimony of David Piedrahita, 18 September 2018.

570 *See supra* ¶ 39.

571 Martínez Expert Report, ¶ 63 (The failure to recognize Newport's standing "constitutes a violation of [Newport's] procedural rights."); Medellín Expert Report, ¶ 99 ("*Newport SAS, despite being the titleholder to rights over the asset that is the object of the proceeding, was not recognized as an affected party at the trial stage, which is*

276. On 24 August 2017, Newport appealed the court's *avocamiento* decision (undertaking the asset forfeiture proceeding).[572] Newport pointed out that it had rights to the Meritage Property, as evidenced by the transactions registered under Deed 361.[573] Newport also expressed its confusion at the court's unjustified accusations and explained that all the agreements it had entered into for the development of the Property were legally enforceable.[574] Newport further noted that the court could not explain why Corficolombiana would have "*lent itself to guarantee* [. . .] *illegal*" transactions and the creation of an allegedly unlawful trust arrangement.[575] After all, Corficolombiana "*is a nationally recognized financial entity that was created precisely to carry out fiduciary transactions, and if it guaranteed and signed the fiduciary business deal with LA PALMA ARGENTINA and NEWPORT SAS, it is because it was sure of its legality.*"[576]

277. On 11 September 2017, Newport filed a supplemental brief to its appeal, adding further clarifications to the transactions carried out under Deed 361 which give rise to Newport's rights to the Meritage Property.[577] To this day, Newport's appeal remains unanswered.

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precisely where the litigation will take place and evidence will be presented to determine the appropriateness of the asset forfeiture[.] *In light of this, I consider that this situation creates the possible violation of the fundamental guarantees that Newport SAS enjoys, such as the right to have access to the proceeding, the right to the presumption of good faith, the right to present evidence and rebut that of the Attorney General of the Nation, as well as the right to present factual and legal arguments that support its opposition to the request for asset forfeiture, and the recognition of its status as a third party acting in good faith without fault*.").

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

573 **Exhibit C-195**, Newport's Appeal Against the *Avocamiento* Order, 24 August 2017, pp. SP-0005 – SP-0011.

574 **Exhibit C-195**, Newport's Appeal Against the *Avocamiento* Order, 24 August 2017, pp. SP-0013 – SP-0016.

575 **Exhibit C-195**, Newport's Appeal Against the *Avocamiento* Order, 24 August 2017, p. SP-0016.

576 **Exhibit C-195**, Newport's Appeal Against the *Avocamiento* Order, 24 August 2017, p. SP-0016.

577 **Exhibit C-196**, Newport's Memorial Complementing Its Appeal, 11 September 2017.

6. Asset Forfeiture Proceedings Against Meritage Continue

278. On 7 May 2018, the Second Criminal court Specialized in Asset Forfeiture of Antioquia rejected the Attorney General's Office's *Requerimiento* petitioning the court to initiate the Asset Forfeiture Proceedings finding that it lacked, "*among other relevant procedural aspects, the information regarding the identification and location of the assets involved.*"[578] The court nevertheless decided to maintain the precautionary measures imposed on the property.[579]

279. On 25 May 2018, the Attorney General's Office filed an amended *Requerimiento*, but only amended the description and identification of the property.[580] Despite the court's rejection of its prior *Requerimiento* on substantive grounds, the Attorney General's Office made no substantive amendments to its reasoning for initiating Asset Forfeiture Proceedings against Meritage, including its dismissal of Corficolombiana's arguments that it was a third party who had acted in good faith without fault.[581]

280. On 5 October 2018, Newport filed another petition with the Second Criminal court Specialized in Asset Forfeiture of Antioquia presenting documentary evidence of Newport's status as a third party acting in good faith without fault.[582] This evidence included the Sales-Purchase Agreement, the trust agreements, Deed 361, and title studies performed on the

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[578] **Exhibit C-058bis**, Asset Forfeiture Court Decision on First *Requerimiento*, 7 May 2018, p. SP-0002.

[579] **Exhibit C-058bis**, Asset Forfeiture Court Decision on First *Requerimiento*, 7 May 2018, p. SP-0015.

[580] *See* **Exhibit C-059bis**, Attorney General's Office, Amended *Requerimiento*, 25 May 2018, pp. SP-0013 – SP-0024.

[581] *See* **Exhibit C-059bis**, Attorney General's Office, Amended *Requerimiento*, 25 May 2018, pp. SP-0076 - SP-0086.

[582] **Exhibit C-223**, Newport's Petition to Asset Forfeiture Court in Response to Amended *Requerimiento*, 5 October 2018.

Meritage Property.[583] The petition also served to preserve Newport's rights to present testimonial evidence of its status as a third party acting in good faith without fault.[584] Newport indicated it intended to present the following witnesses to be questioned by the asset forfeiture court for this purpose: (*i*) Angel Seda; (*ii*) Ana María Palacio and Catalina Otero who conducted the title studies on behalf of Newport; and (*iii*) Monica Martínez Arango, a real estate expert and legal advisor to Newport in relation to the creation of the trusts for development of Meritage Project.[585] Newport was never able to present this evidence, however, as the court has thus far refused to allow it to participate in the Proceedings.

281. On 12 December 2018, the Second Criminal court Specialized in Asset Forfeiture of Antioquia rejected the Attorney General's Office's amended *Requerimiento* again for deficiencies in the description and identification of the property.[586] On 19 December 2018, the Attorney General's Office filed a second amended *Requerimiento* with additional description of the property.[587] Again, the Attorney General's Office made no changes to its reasoning, including its analysis of good faith third parties.

282. On 14 June 2019, the Specialized Asset Forfeiture court accepted the Attorney General's Office's second amended *Requerimiento*, declaring the Asset Forfeiture Proceedings to be procedurally sound. In so doing, the court continued to deny Newport the right to defend itself

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583 **Exhibit C-223**, Newport's Petition to Asset Forfeiture Court in Response to Amended *Requerimiento*, 5 October 2018.

584 **Exhibit C-223**, Newport's Petition to Asset Forfeiture Court in Response to Amended *Requerimiento*, 5 October 2018, p. SP-0006.

585 **Exhibit C-223**, Newport's Petition to Asset Forfeiture Court in Response to Amended *Requerimiento*, 5 October 2018, p. SP-0006.

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

587 **Exhibit C-056bis**, Second Amended *Requerimiento*, 19 December 2018.

in the Proceedings.[588] The court simply adopted its reasoning from its earlier *avocamiento* order and did not engage with Newport's appeals and additional information on its rights to the Property.

283. On 20 June 2019, Newport appealed this decision, arguing that the court erred in failing to afford Newport the presumption of good faith as set forward in unequivocal language under the 1708 law, failed to afford Newport due process in being able to present evidence of its good faith and failed to recognize Newport as an affected third party acting in good faith and free from fault.[589] Newport pointed out that the Asset Forfeiture Law defines "*affected*" parties broadly, and Newport certainly fell within the category of an "*affected*" party under Articles 1 and 30 of Law 1708.[590] Newport further explained again how the trust agreements, as well as Deed 361 gave Newport rights to the Meritage Property.[591] Newport also noted that the court's decision to exclude Newport from the Asset Forfeiture Proceedings violated Newport's rights to due process, as well as the judicial guarantees Colombia agreed to provide when it ratified the American Convention on Human Rights (*Pacto de San José de Costa Rica*).[592] Yet, the same court recognized La Palma Argentina's standing to participate in the proceeding on account of it being a "*beneficiary*" of relevant trusts—the exact position that Newport held. The court's arbitrary and unreasonable decision to continue seizure of the Meritage Project but

[588] **Exhibit C-236**, Specialized Asset Forfeiture Court's Decision on Second Amended *Requerimiento*, 14 June 2019, p. SP-0328.

[589] **Exhibit C-237**, Newport's Appeal Against Decision to Accept Corrected *Requerimiento*, 20 June 2019.

[590] **Exhibit C-237**, Newport's Appeal Against Decision to Accept Corrected *Requerimiento*, 20 June 2019, p. SP-0003.

[591] **Exhibit C-237**, Newport's Appeal Against Decision to Accept Corrected *Requerimiento*, 20 June 2019, pp. SP-0004 – SP-0012.

[592] **Exhibit C-237**, Newport's Appeal Against Decision to Accept Corrected *Requerimiento*, 20 June 2019, pp. SP-0013 – SP-0014.

precluding the developer and owner of that project, Newport, from participating in the proceedings and asserting its rights violated Newport's fundamental due process rights under Colombian and international law. The court has not yet responded.

G. Claimants Notify Colombia of Dispute

284. Faced with the loss of the Meritage Project and having been excluded from the opportunity to even assert their rights before Colombian authorities, on 17 August 2018, Claimants filed a notice of intent to arbitrate under the TPA.[593] Claimants explained that the *Fiscalía* and now the Colombian courts had continually ignored their petitions and persisted in maintaining a seizure of the Meritage property. The Attorney General's Office's consistent refusal to acknowledge its own express certifications of clean title was particularly egregious conduct in light of the fact that the asset forfeiture law provides for a presumption of good faith as well as due process rights under Colombian and international law to affected parties such as Newport. Colombia's actions had already caused significant damage to not only the Meritage Project, but also other projects in which Claimants invested. Most importantly, Mr. Seda's reputation as a developer in the country had suffered greatly.

H. Colombia Attempts Early Sale Of The Property

285. In a letter dated 6 July 2017, the Colombian Society of Special Assets ("**SAE**" by its initials in Spanish) requested the Asset Forfeiture Unit to authorize the early disposal of the Meritage property because the "*management or custody* [of the Meritage Project was] *result*[ing] *in*

[593] **Exhibit C-008bis**, Notice of Intent to Submit the Claim to Arbitration, 17 August 2018.

losses or expenses that are disproportionate to their value or administration."[594] Newport did not become aware of SAE's intentions to sell the property until early September 2018, when Newport learned from Corficolombiana that on or about 24 August 2018, the SAE ordered the early disposal of the Meritage property due to its difficult administration.[595]

286. On 20 December 2018, the SAE issued a notice declaring that the Project was "*being readied for the preparation of a commercial appraisal* [. . .] *followed by a short-term sale process*."[596] Such a sale would, of course, cause Claimants to lose their investment in the Project permanently and irrevocably.

287. On 16 September 2019, Mr. Seda received a letter from Corficolombiana notifying him that the court had denied the SAE's request for early disposal because it was improper to seize "*fiduciary rights of third parties not found to have engaged in any illegal act* [in the asset forfeiture proceeding], *nor the target of the Attorney General's Office in any other proceeding*."[597]

288. Corficolombiana thus informed Mr. Seda that the land had been removed from the process for early disposal, and further stated that the Attorney General's Office "*will request that the seizure action against the Meritage Property be lifted, which will allow the development of the*

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[594] **Exhibit C-061bis**, Letter from Ivonne Alexandra Moreno Valderrama to Victor Alonso Perez Gomez, 20 December 2018, p. SP-0002.

[595] Seda Witness Statement, ¶ 150.

[596] **Exhibit C-061bis**, Letter from Ivonne Alexandra Moreno Valderrama to Victor Alonso Perez Gomez, 20 December 2018, p. SP-0002.

[597] **Exhibit C-239**, Letter from Corficolombiana to Angel Seda, *attaching* SAE Resolution, 16 September 2019, p. SP-0001.

real estate Project to go forward."[598] The Attorney General's Office thus seems to have acknowledged that seizure of the Project was patently improper, though clinging to the formalistic notion that a real estate development project could be separated from the land on which it sits and proceed unaffected by an asset forfeiture proceeding against that land, which does not take into account reality.[599] Because Newport has been shut out of the asset forfeiture proceedings, it is unclear whether the Attorney General's Office has ever made such a request. What is clear, as the Vice President of the SAE has acknowledged, is that the Meritage Property and Project remain under seizure and Asset Forfeiture Proceedings continue, making any development impossible.[600]

I. Colombia Fails To Act On Significant Evidence Of Corruption In The Money Laundering And Asset Forfeiture Units, And Specifically Regarding The Meritage Case And Officials Involved In It

289. Since the Meritage was seized, evidence has emerged indicating that the extortion scheme against Mr. Seda and Newport was part of a longstanding pattern and practice of corruption in

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[598] **Exhibit C-239**, Letter from Corficolombiana to Angel Seda, *attaching* SAE Resolution, 16 September 2019, p. SP-0001.

[599] *See, e.g.*, **Exhibit C-240**, Letter from Gibson Dunn to Corficolombiana. In a recent interview, the Vice-President of the SAE acknowledged this problem. *See* **Exhibit C-287**, El Espectador, *They Say that Disposal Is the Only Way Out: The Actions of the SAE in the Meritage*, 20 January 2020, p. SP-0003 ("*This means that, since we are unable to have a property with an ability to develop the real estate project, we are going to have a half-finished project in permanent state of deterioration*.").

[600] *See* **Exhibit C-287**, El Espectador, *They Say that Disposal Is the Only Way Out: The Actions of the SAE in the Meritage*, 20 January 2020, p. SP-0005 (noting that "*[a]t this moment, any type of intervention is completely halted on the lot*", and acknowledging that an asset forfeiture proceeding can last 7-30 years).

the Asset Forfeiture Unit.[601] Colombia is well aware of this problem,[602] and recently created the SAE as a separate agency for selling seized asserts in order to combat corruption by separating the asset forfeiture proceedings from the actual sale of the assets. But the corruption also now appears to extend to the SAE, as set forth below. And this pattern of corruption has specifically manifested itself in the Meritage case, prompting the former Attorney General, Néstor Humberto Martínez, to order that an investigation be opened into a group of "*various cases*," including the Meritage, "*in which there appear to be grave irregularities*."[603]

290. As described previously, Mr. Mosquera repeatedly claimed to Mr. Seda that he could influence Ms. Malagón and Ms. Ardila, and that for the right payment to Mr. López, he would ensure that adverse action was not taken against the Meritage. And when Mr. Seda refused to back down, Ms. Malagón and Ms. Ardila did exactly what Mr. Mosquera predicted they would do.

291. It was Ms. Malagón who issued the resolution instructing the Asset Forfeiture Unit to investigate Mr. López Vanegas's claims relating to the Meritage.[604] And it was Ms. Malagón who supervised Ms. Ardila, the prosecutor who executed and signed the precautionary

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601 The Asset Forfeiture Unit was previously combined with Anti-Money Laundering and was made an independent unit in 2014. **Exhibit C-121**, Presidential Decree No. 016 of 2014, 9 January 2014, art. 2.3.

602 *See* **Exhibit C-287**, El Espectador, *They Say that Disposal Is the Only Way Out: The Actions of the SAE in the Meritage*, 20 January 2020, p. SP-0007 (noting problem with members of drug cartels returning to Colombia and forming cartels to reclaim lands they believe belong ot them).

603 *See* **Exhibit C-295,** Laura Palomino, WRadio *Attorney General Investigates Possible Irregularities in the Meritage Case*, 25 February 2020, https://www.wradio.com.co/noticias/actualidad/fiscalia-investiga-posibles-irregularidades-en-caso-meritage/20190225/nota/3868593.aspx.

604 **Exhibit C-153**, Attorney General's Office Resolution No. 125, 8 April 2016.

measures resolution that put a halt to development of the Meritage.[605] Indeed, following his meetings with prosecutors from the Anti-Corruption Unit, Mr. Seda reported the extortionate scheme against him to Colombian authorities, who then failed to take action on it.[606]

292. Yet incredibly, to add insult to injury, on 16 January 2018, the Attorney General's Office contacted Mr. Seda, requesting his appearance at the Attorney General's Office at 10 AM on 20 February 2018 to investigate a criminal complaint filed by Mr. Mosquera against Mr. Seda, claiming defamation based on Mr. Seda's December 19, 2016 complaint describing the extortionate scheme against him.[607] Mr. Seda was flabbergasted, including because it was clear someone within the Attorney General's Office had provided Mr. Mosquera with the complaint, a non-public document under normal circumstances.[608]. On 15 February 2018, Mr. Seda responded to the notice stating that it would be impossible for him to appear as requested on account of the serious threats against his life and resulting danger.[609]

293. Mr. Seda is not the only person to have complained of Ms. Malagón's corruption only to have the Attorney General's Office fail to take action. Recently, an ex-prosecutor, Hilda Niño Farfán, confirmed in multiple media reports that she has information about Ms. Malagón's corruption with respect to asset forfeiture proceedings and *regarding the Meritage Project*

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

606 *See* **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, pp. SP-0084 – SP-0085; **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, p. SP-0087 (both noting that the status of Mr. Seda's reported complaint was "*inactive*"). *See also supra* ¶ 220.

607 **Exhibit C-206**, Attorney General's Notice to Appear for Questioning, 16 January 2018.

608 Seda Witness Statement, ¶ 142.

609 **Exhibit C-207**, Letter from Angel Samuel Seda to Local Prosecutor 218, 15 February 2018.

specifically. Ms. Niño is a former senior-level prosecutor for the Attorney General's Unit assigned to the Justice and Peace Court from 2013 to 2017. She was recently sentenced to 5 years and 4 months in jail pursuant to a plea agreement she reached with Colombian authorities in connection with accepting bribes from narcotraffickers in exchange for reduced jail sentences.[610]

294. As part of her plea deal, Ms. Niño agreed to provide information on other corrupt members of the Attorney General's Office.[611] Ms. Niño offered to provide testimony regarding dozens of corruption cases, including regarding an extensive bribery scheme involving at least six members of the Asset Forfeiture Unit involved in an extensive bribery scheme, including Ms. Malagón.[612] According to media reports, Ms. Niño offered to provide a first-hand account of how Ms. Malagón used her position to advance the interests of the Office of Envigado cartel in various cases, including the Meritage matter.[613]

295. Inexplicably, the Attorney General's Office has apparently only agreed to hear Ms. Niño's testimony as to ten of the dozens of matters as to which she offered testimony, specifically

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610 **Exhibit C-244**, *Ex Prosecutor Hilda Niño Farfán is Sentenced to Five Years in Prison*, El Tiempo, 24 February 2020, https://www.eltiempo.com/justicia/cortes/corte-condena-a-la-exfiscal-hilda-nino-farfan-a-5-anos-anos-de-prision-465750.

611 **Exhibit C-247**, Sandrine Gagné-Acoulon, *Colombia: Convicted Prosecutor to Testify against Colleagues*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT, 3 March 2020, https://www.occrp.org/en/daily/11736-colombia-convicted-prosecutor-to-testify-against-colleagues.

612 **Exhibit C-247**, Sandrine Gagné-Acoulon, *Colombia: Convicted Prosecutor to Testify against Colleagues*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT, 3 March 2020, https://www.occrp.org/en/daily/11736-colombia-convicted-prosecutor-to-testify-against-colleagues.

613 **Exhibit C-245**, *Las 'narcolimosnas' que recibió fiscal que ahora es testigo protegida*, EL TIEMPO, 1 March 2020, https://www.eltiempo.com/unidad-investigativa/la-exfiscal-hilda-nino-declarara-contra-fiscales-activos-y-exmagistrado-467748.

excluding corruption in the Meritage case.[614] Counsel for Ms. Niño confirmed to Colombian news sources that, although Ms. Niño may still be providing incriminating evidence against Ms. Malagón, she will not be discussing information related to the Meritage project at this time.[615]

296. Ms. Niño's allegations serve to further confirm the arbitrary, capricious and corrupt nature of Colombia's confiscation of Claimants' investment. It is therefore unsurprising—and profoundly disappointing—that Colombia has thus far resisted investigating the corruption reported by Ms. Niño in relation to the Meritage.

297. Yet more evidence of Ms. Malagón's corruption has emerged since the Meritage seizure.[616] In 2019, former Colombian senator Otto Bula made public a series of recorded conversations including with persons claiming to be agents of the Asset Forfeiture Unit and Ms. Malagón specifically.[617] Mr. Bula is a wealthy businessman who served as a senator in the 2000s, and was convicted for accepting bribes from the Brazilian construction conglomerate Odebrecht in

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614 **Exhibit C-246**, *Former prosecutor Hilda Niño points to former prosecutor Andrea Malagón*" W Radio, 2 March 2020; **Exhibit C-248**, *Exfiscal Niño empezó a hablar de corrupción en las entrañas del búnker*, El Tiempo, 9 March 2020, https://www.eltiempo.com/unidad-investigativa/exfiscal-nino-empezo-a-hablar-de-corrupcion-en-las-entranas-del-bunker-470434.

615 **Exhibit C-248**, *Exfiscal Niño empezó a hablar de corrupción en las entrañas del búnker*, El Tiempo, 9 March 2020, https://www.eltiempo.com/unidad-investigativa/exfiscal-nino-empezo-a-hablar-de-corrupcion-en-las-entranas-del-bunker-470434.

616 **Exhibit C-229**, Catalina Vargas Vergara, *¿Un cartel para recuperar bienes incautados al interior de la Fiscalía?*, el espectador, 15 February 2019, https://www.elespectador.com/noticias/judicial/un-cartel-para-recuperar-bienes-incautados-al-interior-de-la-fiscalia/.

617 **Exhibit C-228**, Laura Palomino, *Three Former Employees of the Attorney General's Office Were Mentioned By Otto Bula*, W Radio, 15 February 2019, https://www.wradio.com.co/noticias/judicial/tres-exfuncionarios-de-la-fiscalia-fueron-mencionados-por-otto-bula/20190215/nota/3864539.aspx.

exchange for helping to secure its contract to build a highway.[618] As a result of these criminal charges, some of Bula's properties were subject to asset forfeiture proceedings, which he claims were marred by corruption.[619]

298. In 2019, Mr. Bula released audio recordings that appear to document high-ranking government officials engaging in corrupt acts.[620] According to Mr. Bula, these recordings demonstrate an extortion and bribery scheme involving Ms. Malagón, former Deputy Attorney General Jorge Perdomo, and former director of the AML and Asset Forfeiture Unit, Danny Julián Quintana.[621] Specifically, Mr. Bula told the Attorney General's Office that in April of 2018, Mr. Perdomo approached him via an intermediary with an offer: if Mr. Bula paid him COP 6 billion (around USD 2 million), Mr. Perdomo would use his influence within the Attorney General's Office, and specifically with Ms. Malagón, to bring an end to asset forfeiture cases against Mr. Bula and return some of his assets.[622] The parties negotiated the sum down to COP 4 billion, and Mr. Bula recorded a meeting where he was given instructions to make a COP 2 billion "*down payment*" after which Ms. Malagón would meet with his lawyer

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618 **Exhibit C-299**, Abel Cardenas, *Condenan a Otto Bula a 5 Años de Cárcel y Multa de $ 6.600 Millones*, El Tiempo, 13 January 2020, https://www.eltiempo.com/justicia/cortes/condenan-a-otto-bula-por-escandalo-de-odebrecht-451444.

619 **Exhibit C-299**, Abel Cardenas, *Condenan a Otto Bula a 5 Años de Cárcel y Multa de $ 6.600 Millones*, El Tiempo, 13 January 2020, https://www.eltiempo.com/justicia/cortes/condenan-a-otto-bula-por-escandalo-de-odebrecht-451444.

620 **Exhibit C-232**, *Los 46 audios de la red que negociaba bienes en poder de la Fiscalía*, El Tiempo, 24 February 2019, https://www.eltiempo.com/justicia/investigacion/los-audios-de-la-red-que-negociaba-bienes-en-poder-de-la-fiscalia-330616.

621 **Exhibit C-229**, Catalina Vargas Vergara, *¿Un cartel para recuperar bienes incautados al interior de la Fiscalía?*, el espectador, 15 February 2019, https://www.elespectador.com/noticias/judicial/un-cartel-para-recuperar-bienes-incautados-al-interior-de-la-fiscalia/.

622 **Exhibit C-229**, Catalina Vargas Vergara, *¿Un cartel para recuperar bienes incautados al interior de la Fiscalía?*, el espectador, 15 February 2019, https://www.elespectador.com/noticias/judicial/un-cartel-para-recuperar-bienes-incautados-al-interior-de-la-fiscalia/.

and begin the process of returning his assets, which would be completed when Mr. Bula paid another COP 2 billion.[623]

299. While the Attorney General's Office has failed to disclose details regarding pending investigations into Ms. Malagón in response to Mr. Seda's requests,[624] Ms. Malagón appears to have been under official investigation since at least August 2016.[625] Ms. Malagón has also

[623] **Exhibit C-228**, Laura Palomino, *Three Former Employees of the Attorney General's Office Were Mentioned By Otto Bula*, W Radio, 15 February 2019, https://www.wradio.com.co/noticias/judicial/tres-exfuncionarios-de-la-fiscalia-fueron-mencionados-por-otto-bula/20190215/nota/3864539.aspx ("*Bula says that Alfredo Mendoza asked him for 6,000 million and that he assured him that the specialized director of extinction of the Prosecutor's Office, Andrea Malagón, would return two properties in Montería*"); **Exhibit C-233**, Otto Bula's Statement Entangles Eduardo Montealegre's Attorney General's Office, RCN Radio, 28 February 2019 ("*In another part of the recording - which is already in the possession of the Attorney General's Office - direct reference is made to the prosecutor Andrea Malagón*, [with Otto Bula] *asking Mendoza if he had already spoken to her. 'Have you already negotiated with your Malagón* [. . .] *does she take care of everything in there?' asks Bula. To which* [Mendoza] *responds almost immediately 'Of course'." See also* **Exhibit C-230**, Catalina Vargas, "*Otto Bula protests are just revenge": former director of Domain Extinction*, EL ESPECTADOR, 18 February 2019, https://www.elespectador.com/noticias/judicial/manifestaciones-de-otto-bula-son-solo-venganza-exdirectora-de-extincion-de-dominio-articulo-840449; **Exhibit C-234**, Laura Palomino, *La conversación entre Otto Bula y Alfredo Mendoza Fortich*, W Radio, 28 February 2019, https://www.wradio.com.co/noticias/actualidad/la-conversacion-entre-otto-bula-y-alfredo-mendoza-fortich/20190228/nota/3870328.aspx; **Exhibit C-185**, *Millionaire assets of former Colombian senator arrested by Odebrecht are frozen*, NOTICIAS SIN, 27 February 2017, https://noticiassin.com/congelan-millonarios-bienes-de-exsenador-colombiano-detenido-por-odebrecht.

[624] *See* Seda Witness Statement, ¶ 129.

[625] **Exhibit C-250**, Response by National Prosecutor's Office to *Derecho de Petición* by Angel Seda, 5 May 2020.

been accused of abusing her power,[626] operating under conflict of interest,[627] and committing irregularities in investigations.[628]

300. Malagón abruptly resigned from the Attorney General's Office in the middle of 2018, but the reasons for that resignation have never been disclosed, nor has she been publicly disciplined or charged with any crime.

301. Ms. Ardila, like Ms. Malagón, has been the subject of controversy, complaints, and investigations for criminal activity, corruption and abuse of power within the Attorney General's Office. It has been publicly reported that Ms. Ardila is being investigated by the

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[626] *See e.g.*, **Exhibit C- 221,** Sylvia Charry, *Investigation of former director of extinction of the Prosecutor's Office in the Supercundi case*, Blu Radio, 25 September 2018, https://www.bluradio.com/nacion/investigan-exdirectora-de-extincion-de-dominio-de-fiscalia-por-caso-supercundi-191650-ie430; **Exhibit C-208**, Adrian Alsema, *Central Colombia supermarkets looted after prosecution claims FARC money laundering links*, Colombia Reports, 20 February 2018, https://colombiareports.com/amp/central-colombia-supermarkets-looted-prosecution-claims-farc-money-laundering-links; **Exhibit C- 220,** *Bogotá Court refers the case of the Mora Urrea brothers to the JEP*, El Tiempo, 24 September 2018, https://www.eltiempo.com/justicia/investigacion/tribunal-de-Bogotá-remitio-a-la-jep-caso-de-hermanos-mora-urrea-272582. These articles note that Ms. Malagón was accused of abusing her authority by baselessly accusing two brothers who operated a supermarket chain of being front men for the FARC, thus tarnishing their reputation and business. The brothers filed a request for disciplinary action against Ms. Malagón.

[627] *See e.g.*, **Exhibit C-191**, Luz Carime Hurtado, *Amaury Blanquicet's accusations are false: Director of Domain Extinction*, Blu Radio, 20 July 2017, https://www.bluradio.com/judicial/acusaciones-de-amaury-blanquicet-son-falsas-directora-de-extincion-de-dominio-147703; **Exhibit C-190**, *The sentimental past that the prosecution's director of domain extinction has in trouble*, Caracol Radio, 19 July 2017, https://caracol.com.co/radio/2017/07/20/judicial/1500505885_892269 html; **Exhibit C-192**, *Domain Extinction Director responds and denies Blanquicet*, El Nuevo Día, 22 July 2017, http://m.elnuevodia.com.co/nuevodia/tolima/ibague/400624-directora-de-extincion-de-dominio-responde-y-desmiente-a-blanquicet. These articles note that Ms. Malagón was involved in an asset forfeiture process against an organization, whose executive she was in a personal relationship with.

[628] *See e.g.* **Exhibit C-188**, *They declare illegal the seizure of the assets of José Byron Piedrahíta*, Mi Región 360, 10 April 2017, https://miregion360.com/declaran-ilegal-el-embargo-de-los-bienes-de-jose-byron-piedrahita/; **Exhibit C-187**, Nelson Matta Colorado, *Judge declared illegal the seizure of assets to José Piedrahíta*, El Colombiano, 10 April 2017, https://www.elcolombiano.com/blogs/revelacionesdelbajomundo/juez-declaro-ilegal-el-embargo-de-bienes-a-jose-piedrahita/8742. These articles describe a case where Ms. Malagón ordered precautionary measures against an individual based on a number of irregularities, including a false claim that the individual had not paid income taxes.

Attorney General's anti-corruption unit for her conduct in at least three cases where complaints have been lodged against her.[629]

302. The anti-corruption investigation includes scrutiny of Ms. Malagón's appointment of Ms. Ardila in several high profile cases, as well as Ms. Ardila's romantic and financial relationship with a private attorney, Nelson Humberto Espinosa Olaya, who has represented defendants in cases prosecuted by Ms. Ardila. Indeed, in addition to information that suggests that prosecutors from the Attorney General's Office were using the threat of asset forfeiture proceedings to extort potential targets, there is further, troubling evidence to suggest that they were also involved in a kickback scheme involving the SAE. The SAE's own records confirm that since at least 2015, Mr. Espinosa Olaya has been designated by the SAE as a depositary ("*depositario*") of the SAE's seized assets for several key cities in Colombia. For instance, the SAE's Resolution No. 273 of 25 April 2016 confirms that the SAE designated Mr. Espinosa Olaya as "*Provisional Companies Depositary*" ("*Depositario Provisional Sociedades*") and "*Liquidator of Companies*" ("*Liquidador de Sociedades*") for 20 jurisdictions—the most jurisdictions of any of the persons designated by the SAE—including the capital of Bogotá, the state of Antioquia, in which Medellín sits, and the city of Miami, Florida in the United States.[630]

303. At the very least, Mr. Espinosa Olaya's appointment as depositary and liquidator of assets seized by his partner's (Ms. Ardila's) office represents a grave conflict of interest. To be sure,

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629 *See* **Exhibit C-246**, Laura Palomino, *Former prosecutor Hilda Niño points to former prosecutor Andrea Malagón*, W Radio, W Radio, 2 March 2020, https://www.wradio.com.co/noticias/actualidad/la-exfiscal-hilda-nino-senala-a-la-exfiscal-andrea-Malagón/20200302/nota/4019087.aspx.

630 *See* **Exhibit C-289**, Sociedad De Activos Especiales S.A.S Resolution 273, 25 April 2016.

Ms. Ardila had a financial incentive to place properties under SAE administration because her partner directly profited from such administration. Under SAE regulations, the depositary can earn a percentage of any income he or she derives from the asset that it manages.[631]

304. In 2018, after a number of complaints were made against Ms. Ardila, she was removed from the Asset Forfeiture Unit and her cases re-assigned to other prosecutors.[632] While Ms. Ardila still works at the Attorney General's Office, the reasons for her re-assignment have not been disclosed, and like Ms. Malagón, she has not been publicly disciplined or charged with any crime.

305. Separately, evidence has also emerged demonstrating the falsity of López Vanegas's kidnapping story, and the Attorney General's Office's knowledge of its falsity, while it continues to rely on it—and Mr. López Vanegas's shattered credibility more generally—in the asset forfeiture proceeding against the Meritage property. First, as previously mentioned, the FBI's Deputy Legal Attaché sent a letter to the Attorney General's Office in November of 2016, informing it of the falsity of Mr. López Vanegas's kidnapping story.[633] Then, on 5 August 2018, Ms. Claudia Carrasquilla, who was then the Director of the Organized Crime Unit at the Attorney General's Office and had previously served in Antioquia, declared on

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631 *See* **Exhibit C-290**, Sociedad De Activos Especiales S.A.S rule, sec. 5.4 ("*Fees*") (explaining that the compensation that a depositary receives for a particular asset depends on the asset and its current condition but, for example: "*In the case of productive assets, the monthly fees will be a percentage calculated from the monthly gross income generated in the administration of each of the assets delivered to the depositary*").

632 **Exhibit C-301**, *Manzanas Podridas en la Justicia II*, La Republica, 20 December 2019, https://www.larepublica.co/analisis/jorge-hernan-pelaez-500047/manzanas-podridas-en-la-justicia-ii-2946302; **Exhibit C-242**, *Las Manzanas Podridas de la Justicia III*, La Republica, 10 January 2020, https://www.larepublica.co/analisis/jorge-hernan-pelaez-500047/las-manzanas-podridas-de-la-justicia-iii-2950470.

633 **Exhibit C-067bis**, Letter from Michael J. Burdick to Aimer Fredy Alonso Triana, 21 November 2016.

national television that "*no other term* [but fraudulent] *can be used to refer to this act of pretending to be the victim of a kidnapping that never occurred*."[634] So while one official of the Attorney General's Office was publicly deriding the kidnapping story, the Attorney General's Office was nonetheless continuing to rely on that story—and on Mr. López Vanegas's credibility more generally—to pursue the asset forfeiture against the Meritage, citing it in January of 2017 in the Determination of Claim (*Fijación de Pretensión*),[635] and in the April 2017 in the *Requerimiento*.[636]

306. Mr. Seda sought information pursuant to Colombian law regarding the existence of investigations into Mr. López Vanegas and his representatives, Mr. Mosquera and Mr. Valderrama.[637] But the Attorney General's Office stonewalled, saying that it was unable to reveal the requested information due to "*confidentiality concerns*" on 29 May 2020.[638]

J. Colombia's Wrongful Acts Have Harmed Claimants' Investments

307. The unlawful application of the Asset Forfeiture Proceedings have significantly harmed the value of Claimants' investments. In particular, the Meritage Project is no longer viable, and other projects that were in development have also been stalled as a result of Mr. Seda and his companies being tied to the Asset Forfeiture Proceedings. Indeed, Mr. Seda's vision to

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634 **Exhibit C-167**, Transcript of TeleAntioquia Interview with Claudia Carrasquilla, 6 August 2018 (emphasis added).

635 **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, pp. SP-0116 – SP-0117; SP-0121.

636 **Exhibit C-024bis,** Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, pp. SP-0120 – SP-0129.

637 **Exhibit C-280**, Derecho de Petición to Attorney General's Office re Criminal Proceedings Involving López, Mosquera, and Valderrama, 17 May 2020.

638 **Exhibit C-258**, Attorney General's Response to Derecho de Petición re Criminal Proceedings against López, Valderrama, and Mosquera, 29 May 2020.

build a pipeline of luxury residential and hospitality properties, built on over a decade of experience in the region building a luxury lifestyle brand, in Colombia has all but come to an end. Meanwhile, Mr. Seda has suffered not only financial losses and attacks on his reputation, but also threats on his life and family, and continued harassment by the Colombian State. These are discussed below.

1. The Meritage Project Is No Longer Viable

308. The Asset Forfeiture Proceedings have fully halted any development on the Meritage Project. No sales, construction or further development of the Project is possible. Financing has dried up. Moreover, the stalled development has led to the deterioration of the construction site such that any future development would have to raze to the ground what exists and build over it again. Indeed, Newport is still paying for minimal upkeep of the site such as security guards.[639] As Mr. Seda notes:

> "*The effect of the asset forfeiture proceedings has been devastating for the Meritage project. The sequestration order maintains effect as the courts deliberate on the forfeiture process. In the meantime, financing has completely dried up as no bank wants to touch a property tainted by an asset forfeiture process. Even if financing could be made available in the event that the precautionary measures were lifted, the project has been halted for so long that we would have to start construction from scratch to ensure structural integrity of the buildings.*"[640]

309. In other words, Colombia's actions have deprived the Meritage Project of all value.

[639] Seda Witness Statement, ¶ 150.

[640] Seda Witness Statement, ¶ 152.

Exhibit C-269: Photographs of the Meritage Lot (July 2019)

310. Moreover, a number of the residential and commercial unit buyers in the Meritage Project have already sought legal action against, among other parties, Newport. On 1 August 2017, eight unit buyers filed a demand for arbitration against Corficolombiana, Newport and the Meritage Trust, demanding, *inter alia*, restitution of the monies they had already paid towards their units.[641] Newport was forced to defend itself in these local arbitration proceedings. On 15 October 2019, the arbitrator ultimately dismissed all the claims.[642] The threat of further claims against Newport from other unit buyers nevertheless persists.

2. Mr. Seda's Project Pipeline Has Lost Substantial Value

311. In addition to the total deprivation of value of Meritage, Claimants' other projects have also suffered significant harm. The reputational harm caused by the Asset Forfeiture Proceedings to Mr. Seda and his companies has resulted in third parties reneging on oral or written agreements to help develop the other projects. Crucially, banks are no longer willing

641 Seda Witness Statement, ¶ 149; **Exhibit C-062bis**, Demand for Arbitration, Pinturas Prime S.A. et al. v. Fiduciaria Corficolombiana S.A., Meritage Trust and Newport S.A.S., Medellín Chamber of Commerce, 1 August 2017.

642 Seda Witness Statement, ¶ 149.

to lend to Mr. Seda or his projects because of the Asset Forfeiture Proceedings over Meritage. Banks and real estate companies fear that, despite Mr. Seda's indisputably blameless role, any project involving him could result in asset forfeiture proceedings, particularly in light of the Attorney General's Office's novel and uncertain requirements on what constitutes adequate due diligence to be considered a good faith party. Below are details specific to each of Claimants' projects that were in development or pre-development.

312. **Luxé by Charlee**: As noted above, construction on the lots, cabins and apartments was completed by 2014.[643] The hotel was approximately 80 percent complete but not operational yet. Construction on the hotel was set to be completed by December 2016, with operations commencing in January 2017. However, shortly after the imposition of the precautionary measures in August 2016, Colpatria Bank stopped disbursing financing for the Luxé project.[644] At the time, the Bank indicated that it would be able to start disbursing the loans again after the precautionary measures were lifted but since this never came to pass, the Luxé project has been sitting in limbo. Without the funds, the hotel remains unfinished, non-operational, and in fact, deteriorating with each passing day.

[643] *See supra* ¶ 51.

[644] Seda Witness Statement, ¶¶ 109-10.


Exhibit C-267: Photographs of Luxé by The Charlee (July 2019)

313. **Tierra Bomba**: By August 2016, the project was close to receiving final permits from the municipality and had begun to prepare for pre-sales starting in early 2017.[645] However, after Colombia launched the Asset Forfeiture Proceedings, the sellers of the land backed out of the project and Mr. Seda cancelled the land purchase contracts.[646] Investors in the Tierra Bomba project also sought to withdraw from the project. For example, on 3 January 2017, Colombian investors (who had also invested in the Meritage Project) divested their shares in RDP Cartagena (and Newport). Mr. Seda did not have the funds to pay them—the reputational damage he had suffered as a result of the proceedings against Meritage curtailed his access to credit—and therefore had to offer them land he held in Santa Fé de Antioquia instead.[647]

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645 Seda Witness Statement, ¶ 111.

646 **Exhibit C-193**, Cancellation of Promise to Purchase Contract between Angel Seda Jaime Alfredo Sánchez Vargas, 3 August 2017; **Exhibit C-194**, Cancellation of Promise to Purchase Contract between Angel Seda and Ramon Antonio Duque Marin, 15 August 2017; **Exhibit C-186**, Cancellation of Promise to Purchase Contract between Angel Seda and Jaime Francisco Martínez Pinilla and Edilia Rosa Sánchez Hoyos, 1 March 2017.

647 **Exhibit C-183**, Agreement between Royal Realty and Greenpark & Maria Álvarez Y CIA, 3 January 2017.

314. Furthermore, in 2017, Mr. Caro, with whom Royal Realty was discussing an agreement to manage his hotel, refused to move forward with executing a written contract once he learned of Colombia's actions against Meritage.[648] He noted that having met with his consultants, "*we have determined that we must put an end to the negotiation process for the operation of our hotel, since we don't want the situation that's going on with the Meritage project to affect us in the near future*."[649]

315. **Santa Fé de Antioquia**: In 2017, the local municipality approved the construction of a 250-room hotel, and 180 residential lots.[650] However, since Colombia launched the Asset Forfeiture Proceedings, Mr. Seda has been unable to find any bank willing to finance this project or investors willing to contribute funds to the project.[651] Indeed, as noted above, Mr. Seda had to offer a portion of his property to investors who wanted to divest from his other projects because he did not have access to funds otherwise to repay them.[652]

316. Moreover, following the measures, other investors with whom Mr. Seda had purchased the property for the project were unwilling to move forward on the basis that it would be impossible for them to find buyers for the units and additional investors due to the reputational damage caused by the Meritage proceedings.[653] In October 2018, two of the partners with

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[648] *See* **Exhibit C-197**, WhatsApp from Tierra Bomba Manager.

[649] *See* **Exhibit C-197**, WhatsApp from Tierra Bomba Manager.

[650] **Exhibit C-065bis**, Santa Fé de Antioquia Land Use Certificate, 9 May 2017.

[651] Seda Witness Statement, ¶¶ 112-13.

[652] **Exhibit C-183**, Agreement between Royal Realty and Greenpark & Maria Álvarez Y CIA, 3 January 2017.

[653] Seda Witness Statement, ¶ 113.

whom Mr. Seda had purchased the property transferred their interest in the property back to Royal Realty, removing themselves entirely from the project.[654]

317. **450 Heights**: Presales of 450 Heights units were scheduled to commence in December 2017, with construction taking approximately 24 months, and hotel operations commencing in 2020.[655] Following the Asset Forfeiture Proceedings the land sellers cut ties with Mr. Seda and his company.[656]

318. While the loss of each individual project creates specific losses for Claimants, the loss of all Mr. Seda's projects is greater than the sum of the parts. Mr. Seda arrived in Colombia with a vision to build a brand for luxury lifestyle residential and hospitality properties. With the Charlee Hotel, he was able to establish a successful brand of the "*Charlee Hotels*" which he leveraged to build a robust project pipeline that would further cement his brand.[657] Mr. Seda's pipeline was indeed set to expand as Mr. Seda's existing ventures started generating cash flows.[658] Since the imposition of the precautionary measures on the Meritage Project, Mr. Seda's reputation as a property developer has been so adversely affected that he has been unable to secure additional funding for any other projects in the pipeline. By instituting the Asset Forfeiture Proceedings against the Meritage Project, however, Colombia set off a domino effect that toppled Mr. Seda's entire pipeline of projects and also tarnished his brand such that it can no longer be used to develop any new projects.

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654 *See* **Exhibit C-224**, Land Transfer Deed between Royal Realty S.A.S., and Nicolas Navarro and Paola Diez, 17 October 2018.

655 Seda Witness Statement, ¶ 114.

656 Seda Witness Statement, ¶ 114.

657 *See supra* section III.C.

658 Seda Witness Statement, ¶ 115.

3. Mr. Seda Continues To Be Harassed And Threatened

319. Indeed, rather than protect him, Colombian authorities have continued to harass and threaten Mr. Seda. In addition to the financial and reputational harm Mr. Seda has suffered due to Colombia's actions, he also continues to be threatened and harassed in the country.

320. First and foremost, Mr. Seda suffered an assassination attempt that Colombian authorities failed to take seriously. On 26 September 2017, as Mr. Seda was leaving work, a man and woman on a motorcycle fired a number of rounds at Mr. Seda's car.[659] Mr. Seda filed a police report and even reached out the U.S. embassy to seek protection.[660] Two days after the attempt on his life, a man repeatedly attempted to contact Mr. Seda's daughter, identifying himself as a friend of her mother, and telling her that her mother had asked him to pick her up from school. When Mr. Seda called him back, the man denied he had called, even though it was apparent from the call log that he had—five times.[661] Remarkably, despite these incidents, Colombian authorities later denied Mr. Seda's request for a permit for an armored car.[662]

321. Then, on 14 February 2018, FBI agents appeared at his residence in the U.S. while he was away and questioned the mother of his children and household staff.[663] They said they were conducting a search based on a newly published OFAC list with names of individuals against

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659 Seda Witness Statement, ¶ 137.

660 Seda Witness Statement, ¶¶ 138, 140; **Exhibit C-202**, Angel Seda Statement attached to Request for Police Protection, 26 September 2017; **Exhibit C-199**, Email from Elizabeth Gracon to Angel Seda, 3 October 2017; **Exhibit C-201**, Email from Angel Seda to Elizabeth Gracon, Pierre Richard Prosper, Timothy Feighery and Lee Caplan, 8 October 2017.

661 Seda Witness Statement, ¶ 139.

662 Seda Witness Statement, ¶ 141.

663 Seda Witness Statement, ¶ 143.

whom the U.S. Government had imposed sanctions. When Mr. Seda reached out to the FBI later, they informed him that the Colombian Attorney General's Office had sent them an alert that Mr. Seda was related to various Colombian drug traffickers listed in the new OFAC list.[664] Mr. Seda was shocked by the baseless accusation, but was forced to hire attorneys and a team of investigators to respond to the U.S. Government's detailed requests.[665]

322. And while failing to pursue Mr. Seda's criminal complaint regarding the extortionate scheme against him, those same authorities contacted Mr. Seda to investigate a criminal complaint filed by Mr. Mosquera against Mr. Seda on the basis of his complaint, which someone at the Attorney General's Office clearly leaked to Mr. Mosquera.[666] Yet those same authorities refused to respond to Mr. Seda's requests regarding investigations into the persons who perpetrated the extortionate scheme, Mr. López Vanegas, Mr. Mosquera, and Mr. Valderrama.[667] The Attorney General's Office responded on 29 May 2020 that it was unable to reveal the requested information due to confidentiality concerns.[668]

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664 Seda Witness Statement, ¶ 144.

665 **Exhibit C-213**, Letter from Andreus Podberesky to OFAC, 10 May 2018.

666 Seda Witness Statement, ¶ 142.

667 **Exhibit C-280**, Derecho de Petición to Attorney General's Office re Criminal Proceedings Involving López, Mosquera, and Valderrama, 17 May 2020; **Exhibit C-258**, Email from Paula Ximena Baquero Guzmán to Angel Seda, 29 May 2020.

668 **Exhibit C-258**, Email from Paula Ximena Baquero Guzmán to Angel Seda, 29 May 2020.

K. The Attorney General's Office Does Not Appear to Have Taken Any Action Against Mr. López Vanegas's Other Properties—Including Part of the Same Lot From Which the Meritage Lot Was Carved

323. When the precautionary measures were imposed on the Meritage, the Attorney General's Office relied on the bogus kidnapping story that Mr. López Vanegas had first told them more than two years before.[669] Since then, no doubt aware of both the falsity of the kidnapping story as well as its facial absurdity, the Attorney General's Office has shifted its focus to the connection between the land and Mr. López Vanegas's history of narcotics trafficking, though the Attorney General's Office itself was apparently not aware of it until Mr. López Vanegas himself brought it to their attention with his criminal complaint and *tutela*, given that it issued a Certification of No Criminal Activity regarding the property just months before Mr. López Vanegas filed his criminal complaint.[670] Indeed, despite the Attorney General's Office's allegation that purchasers were required to make this connection from "*open sources*," multiple good faith purchasers, including financial institutions, failed to detect it in multiple rounds of due diligence, a practical case study in "*common error*" creating a qualified good faith without fault.

324. But the disingenuousness of the Attorney General's Office's position is also apparent from its failure to apply the same standards to Mr. López Vanegas's other properties. He is the current owner of at least four, as confirmed by the Superintendence of Notary and Registry.[671]

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669 **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0066.

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

671 **Exhibit C-281**, Derecho de Petición to Superintendence of Notary and Registry re Iván López's Properties, 15 May 2020; **Exhibit C-282**, Superintendence of Notary and Registry's Response to Derecho de Petición re Iván López Properties, 25 May 2020.

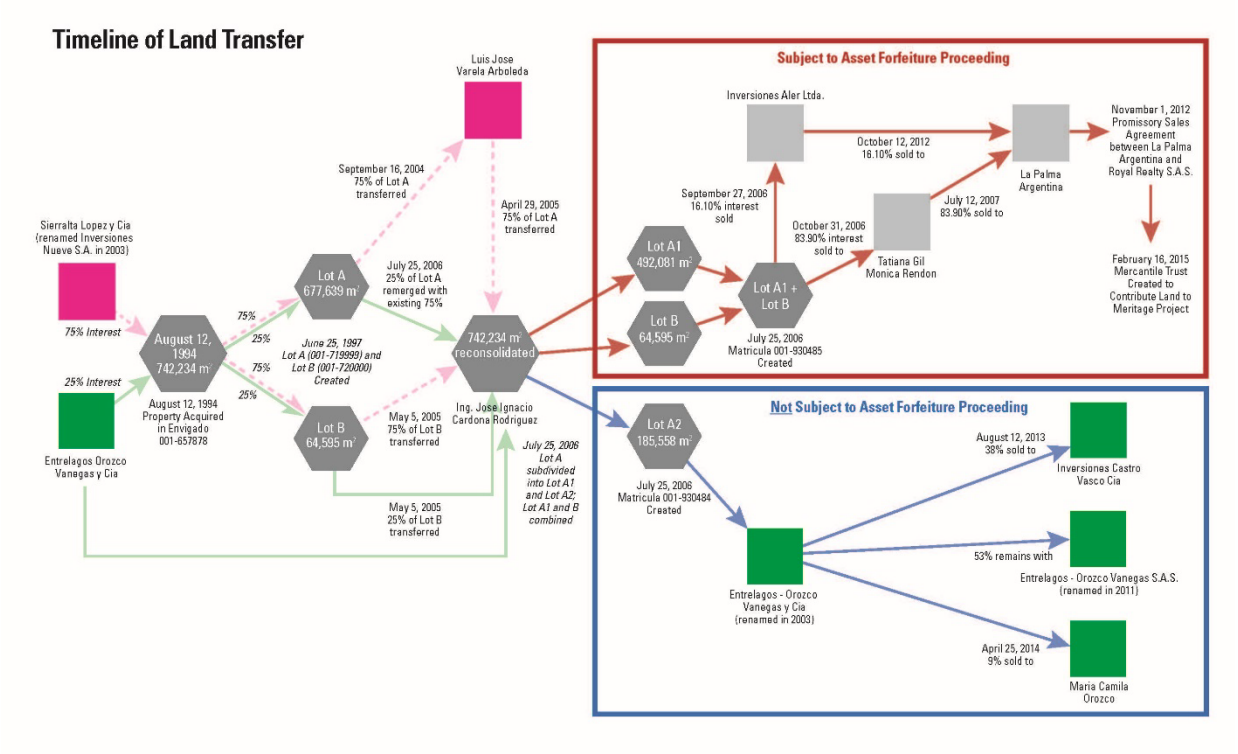
Moreover, the Attorney General's Office itself has connected him to dozens of properties (47), whether or not he currently holds them.[672] The Attorney General's Office refused to confirm whether there were any asset forfeiture actions against other properties affiliated with Mr. López Vanegas, or his company, Inversiones Nueve, citing "*confidentiality concerns*."[673] Based on property records, however, it does not appear that there are any asset forfeiture proceedings against these properties.[674]

325. Most telling, however, is the Attorney General's Office's failure to act even on additional lots that come from the same parent property as the Meritage Property, which shared a common ownership history, including the 16 September 2004 transfer that was supposedly the result of Mr. López Betancur's kidnapping. This history is illustrated in the chart below (Appendix F):

672 **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, p. SP-0026.

673 **Exhibit C-283**, Derecho de Petición re Asset Forfeiture Proceedings re Iván López or Sierralta Properties, 17 May 2020; **Exhibit C-284**, Response to Derecho de Petición re Asset Forfeiture Proceedings re Iván López or Sierralta Properties, 1 June 2020.

674 *See, e.g.*, **Exhibit C-252**, Superintendence of Registry Certificate of Tradition for Lot No. 001-1172710, 18 May 2020; **Exhibit C-253**, Superintendence of Registry Certificate of Tradition for Lot No. 001-1172711, 18 May 2020; **Exhibit C-254**, Superintendence of Registry Certificate of Tradition for Lot No. 001-930484, 18 May 2020.



Appendix F: Timeline of Land Transfer

326. As the chart illustrates, on 12 August 1994, Mr. López Vanegas and his half-brother, Jaime Orozco Vanegas, acting through their respective companies, Sierralta López y Cia and Entrelagos Orozco Vanegas y Cia, purchased several parcels of land in the Municipality of Envigado, Antioquia, Colombia. The lands were consolidated into a single lot owned 75% by Sierralta López and 25% by Entrelagos Orozco Vanegas.[675]

675 *See, e.g.*, **Exhibit C-252**, Superintendence of Registry Certificate of Tradition for Lot No. 001-1172710, 18 May 2020; **Exhibit C-253**, Superintendence of Registry Certificate of Tradition for Lot No. 001-1172711, 18 May 2020; **Exhibit C-254**, Superintendence of Registry Certificate of Tradition for Lot No. 001-930484, 18 May 2020.

327. In June 1997, the land was divided into two lots—Lot A (001-719999) and Lot B (001-720000)—each of which was held in common, with Sierralta López owning a 75% interest and Entrelagos Orozco Vanegas owning a 25% interest.[676]

328. In 2003, following the arrest and extradition of Mr. López Vanegas to the U.S., Sierralta López was renamed Inversiones Nueve and Mr. López Vanegas was removed as legal representative and replaced by his son, Sebastián López.[677] In September 2004, Inversiones Nueve transferred its 75% interest in Lot A to an individual named Luis José Varela Arboleda.[678]

329. A decade later, during the same time period he began extorting Mr. Seda, and after the same land had been through multiple subsequent transfers, Mr. López Vanegas first reported to the Attorney General's Office that this September 2004 transfer was the result of Sebastián being kidnapped by a drug gang and forced to transfer the land.[679] Despite this delay in reporting, and despite the fact that two years had passed since he had reported the alleged kidnapping to the Attorney General's Office, the Attorney General's Office relied on Mr.

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676 *See, e.g.*, **Exhibit C-252**, Superintendence of Registry Certificate of Tradition for Lot No. 001-1172710, 18 May 2020; **Exhibit C-253**, Superintendence of Registry Certificate of Tradition for Lot No. 001-1172711, 18 May 2020; **Exhibit C-254**, Superintendence of Registry Certificate of Tradition for Lot No. 001-930484, 18 May 2020.

677 *Compare* **Exhibit C-031bis**, Petition for Information from Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013, p. SP-0029, *with* **Exhibit C-225**, Certificate of Existence and Representation - Inversiones Nueve S.A., 7 November 2018; *see also* **Exhibit C-079**, Letter from L. Maria Carvajal Velez to Sierralta López y CIA S. En C., attaching 9 September 2003 Deed 2379, 14 October 2003; **Exhibit C-075**, Deed 1668, 26 August 1998. The name of Entrelagos Orozco Vanegas was also changed slightly, to Entrelagos-Orozco Vanegas. *See* **Exhibit C-212**, Certificate of Existence and Representation - Entrelagos Orozco Vanegas S.A.S., 24 April 2018.

678 **Exhibit C-210**, Superintendence of Registry Certificate of Tradition for Lot No. 001-719999 (Closed), 20 April 2018; **Exhibit C-080**, Deed 1762, 16 September 2004.

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

López Vanegas's claim of kidnapping as the basis for the imposition of precautionary measures on the Meritage property in 2016.[680]

330. The facts suggest, however, that the land transferred to Mr. Varela Arboleda remained in the control of Mr. López Vanegas's half-brother, Mr. Orozco Vanegas, if not in the control of Mr. López Vanegas himself, because in April 2005, Mr. Orozco Vanegas hired a land engineer named José Ignacio Cardona Rodríguez to develop the property and consolidated all interests in the entire original lot—including the interests held by Varela Arboleda and Inversiones Nueve—in Mr. Cardona's name.[681] As Mr. Cardona told the Attorney General's Office, at Mr. Orozco Vanegas' direction, he filed an application with local planning officials to develop the entire 742,234 square meter holding, which was granted on August 23, 2005.[682]

331. According to Mr. Cardona, planning continued until January 2006, when a new federal decree (*Decreto 097 of 2006*) was issued, prohibiting the subdivision of rural lands without a Municipal Zoning Plan (*Plan de Ordenamiento Territorial*).[683] Because the new decree would have delayed the development of the land for several years, according to Mr. Cardona, Mr. Orozco Vanegas decided to abandon the plan.

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680 **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, pp. SP-0040 – SP-0046.

681 **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, pp. SP-0085 – SP-0091; *see also* **Exhibit C-210**, Superintendence of Registry Certificate of Tradition for Lot No. 001-719999 (Closed), 20 April 2018; **Exhibit C-251**, Superintendence of Registry Certificate of Tradition for Lot No. 001-720000 (Closed); **Exhibit C-081**, Deed 738, 29 April 2005.

682 *See* **Exhibit C-083**, Resolution RLU-82 -2005 - Urban Planning License is granted, 23 August 2005.

683 **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, 25 January 2017, pp. SP-0085 – SP-0091.

332. The lot was subsequently re-consolidated and re-subdivided to restore Lot B to its original form, and subdivided Lot A into two parcels Lot A1 and Lot A2. Lot A2 was declared the property of Entrelagos Orozco Vanegas, while Lot A1 was combined with Lot B, and declared the property of Mr. Cardona.[684]

333. According to Mr. Cardona, Mr. Orozco Vanegas continued to control the land following the July 25, 2006 sub-division and arranged for the sale of the 556,676 square meter combined lot to third parties, with Inversiones Aler purchasing 16.10 percent interest in September 2006 and sisters Tatiana Gil and Monica Rendon purchasing an 83.90 percent interest in October 2006. The Gil-Rendon interest was later sold to La Palma Argentina, which after several years of civil litigation with Inversiones Aler bought out the remaining 16.10 percent interest.[685] The entire lot was then purchased for the Meritage Project, as depicted in the upper box in the chart. Meanwhile, a majority interest in Lot A2 remains in the hands of the Mr. Orozco Vanegas's company and his daughter, María Camilo Orozco. This is depicted in the lower box in the above chart.

334. Despite this shared ownership history—including the very transaction that Mr. López Vanegas claims to have been compelled by his son's kidnapping, and which the Attorney General's Office has found to be suspect based on the fact that Mr. Varela Arboleda claims to be a fruit seller who did not have the means to purchase the property—the Attorney General's Office does not appear to have ever taken action against Lot A2. Indeed, a title study issued

684 **Exhibit C-254**, Superintendence of Registry Certificate of Tradition for Lot No. 001-930484, 18 May 2020; **Exhibit C-211**, Superintendence of Registry Certificate of Tradition for Lot No. 001-930485 (Active), 20 April 2018.

685 **Exhibit C-211**, Superintendence of Registry Certificate of Tradition for Lot No. 001-930485 (Active), 20 April 2018.

on March 3, 2014 in connection with the transfer of a 9 percent ownership interest in Lot A2 to Jaime Orozco's daughter, María Camila Orozco Echeverri, identifies the property as free from encumbrances or limitations affecting the right to take ownership of it.[686] The Attorney General's Office is fully aware of the relationship between this lot and the Meritage lot, and of this specific title study, because it is in the files for the asset forfeiture proceeding and is specifically referred to in the 5 April 2017 Requerimiento.[687]

335. What is more, at no point from the time that Royal Realty and Mr. Seda began their diligence to purchase the Meritage lot to the present day, has Mr. López Vanegas's name appeared on the key international watch lists, including the U.S. Treasury's OFAC lists or those of the U.N. Security Council. These watch lists are critical due diligence tools because they identify designated individuals who are implicated in transnational crime, such as money laundering, drug trafficking, or financing of terrorism. Colombia does not appear to have taken any steps to ensure that Mr. López Vanegas is added to such lists despite basing its asset forfeiture proceeding against the Meritage on Mr. López Vanegas's illicit activities.

686 **Exhibit C-123**, Guzman & Monroy Title Study, 3 March 2014.

687 **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, p. SP-0115.

IV. THE TRIBUNAL HAS JURISDICTION TO DECIDE THE DISPUTE

336. This Tribunal has jurisdiction over the present dispute as the requirements of the TPA and Article 25 of the ICSID Convention have been met.

A. The Requirements Of The TPA Have Been Met

1. Claimants Are Protected Investors That Have Made An Investment Under The TPA

337. Claimants are qualifying "*investor*[s]" who have made a protected "*investment*" in Colombia for the purposes of the TPA.

a. Claimants Are Protected Investors

338. The TPA protects both natural and juridical persons. Article 10.28 of the TPA defines "*investor of a Party*" as:

> "*[A] Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.*"[688]

339. The TPA further clarifies that a "*national*" is "*a natural person who has the nationality of a Party according to Annex 1.3 or a permanent resident of a Party*." With respect to the United States, a "'*national of the United States*" is "*as defined in the existing provisions of the*

[688] **Exhibit CL-001**, TPA, art. 10.28.

Immigration and Nationality Act." Pursuant to the United States Immigration and Nationality Act, a "'*national of the United States means* [. . .] *a citizen of the United States*."[689]

340. Angel Samuel Seda is a citizen of the United States, who has made an investment in Colombia through shareholdings in Newport and Luxé SAS.[690] Jonathan Michael Foley is a citizen of the United States that has made an investment in Colombia through shareholdings in Newport SAS.[691] Justin Tate Caruso, Stephen John Bobeck, Brian Hass, Monte Glenn Adcock, and Justin Timothy Enbody are citizens of the United States who have made an investment in Colombia through shareholdings in Luxé SAS.[692] Therefore, each of the natural person Claimants is a protected investor pursuant to the terms of the TPA.

341. Article 1.3 of the TPA defines an "*enterprise*" as "*any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association*,"[693] and more specifically for the purposes of Chapter 10 of the TPA, an "*enterprise of a Party*" is "*an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there*."[694]

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689 **Exhibit C-122**, United States Immigration and Nationality Act, 8 USC 1101, § 22(A).

690 **Exhibit C-119**, United States Passport of Angel Seda, 15 October 2013.

691 **Exhibit C-200**, United States Passport of Jonathan Foley, 7 October 2015.

692 *See* **Exhibit C-085**, United States Passport of Stephen Bobeck, 16 March 2007; **Exhibit C-136**, United States Passport of Brian Hass, 3 October 2014; **Exhibit C-076**, United States Passport of Monte Adcock, 1 September 2000; **Exhibit C-082**, United States Passport of Justin Enbody, 20 May 2005; **Exhibit C-184**, United States Passport of Justin Caruso, 8 February 2017.

693 **Exhibit CL-001**, TPA art. 1.3.

694 **Exhibit CL-001**, TPA art. 10.28.

342. The Boston Enterprises Trust is a trust formed under the laws of Arizona, United States and has made an investment in Colombia through shareholdings in Newport and Luxé SAS.[695] JTE International Investments is incorporated in Delaware, United States and has made an investment in Colombia through shareholdings in Newport SAS.[696] Therefore, the enterprise Claimants are protected investors pursuant to the terms of the TPA.

b. Claimants Have Made An Investment For The Purposes Of The TPA

343. Article 10.28 of the TPA defines a protected "*investment*" as, in relevant part:

> "[E]*very asset that an investor owns or controls, directly or indirectly, that has 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. Forms that an investment may take include:*
>
> *(a) an enterprise;*
>
> *(b) shares, stock, and other forms of equity participation in an enterprise;*
>
> [. . .]
>
> *(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;*
>
> [. . .]
>
> *(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.*"[697]

[695] **Exhibit C-215**, The Boston Enterprises Trust Formation Instrument, 9 August 2018.

[696] **Exhibit C-107**, JTE International Investments, LLC Certificate of Formation, 23 May 2013.

[697] **Exhibit CL-001**, TPA art. 10.28.

344. Claimants' investments in Colombia are comprised of a "*bundle of rights*"[698] including Claimants' shares in Newport, Luxé SAS, or both,[699] which were the owners and developers of the Meritage and Luxé projects respectively. Additionally, Mr. Seda is the sole owner of Royal Realty, which had rights to development and management fees from Newport and Luxé SAS for the development of the Meritage and Luxé projects, and the operation of their hotels thereafter. Moreover, Mr. Seda was actively developing other real estate and hospitality projects in Colombia, including Tierra Bomba, 450 Heights and Santa Fé, in which he invested to, *inter alia*, attract investments, acquire the land, advance design and secure permits.[700] Therefore, Claimants own both direct and indirect investments protected by the terms of the TPA.

2. The Parties Have Provided Their Written Consent To ICSID's Jurisdiction

345. In accordance with Article 10.18(2)(a) of the TPA, the Parties have provided their written consent to ICSID's jurisdiction over this dispute. Colombia provided its consent to arbitration in Article 10.17(1) of the TPA.[701] Claimants provided written consent to arbitration in their

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698 *See, e.g.*, **Exhibit CL-074**, *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, ¶ 96; **Exhibit CL-113**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶ 358; **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 303; **Exhibit CL-086**, *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, ¶ 66. These cases recognize the basic principle that "*an investment is not a single right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing.*" **Exhibit CL-074**, *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, ¶ 96.

699 *See supra* ¶¶ 2-4.

700 *See supra* section III.C.

701 *See* **Exhibit CL-001**, TPA, Art 10.17(1) ("*Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.*").

Notice of Intent, dated 17 August 2018,[702] and reaffirmed their consent in the Request For Arbitration, dated 25 January 2019.[703]

3. All Remaining Requirements Of The TPA Have Been Met

346. Article 10.16 of the TPA provides, in relevant part:

> "*1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:*
>
> *(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim*
>
> *(i) that the respondent has breached*
>
> *(A) an obligation under Section A,*
>
> [. . .]
>
> *and*
>
> *(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and*
>
> *(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim*
>
> *(i) that the respondent has breached*
>
> *(A) an obligation under Section A,*
>
> [. . .]
>
> *and*
>
> *(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,*

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[702] **Exhibit C-008**, Notice Of Intent To Submit The Claim To Arbitration, 17 August 2018, ¶ 98 *("In the event consultations are unsuccessful, Claimants will submit a claim in arbitration seeking compensation for damages by reason of, or arising out of, Colombia's measures that are inconsistent with its obligations under Section A of Chapter Ten of the TPA, along with interest and costs.*").

[703] *See* Request for Arbitration, ¶ 22 ("*Claimants have consented to arbitration by submitting a claim to arbitration against Respondent pursuant to TPA Articles 10.16(1) and 10.16(3)(a).*").

[. . .]

2. *At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ('notice of intent'). The notice shall specify:*

   (a) *the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;*

   (b) *for each claim, the provision of this Agreement, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;*

   (c) *the legal and factual basis for each claim; and*

   (d) *the relief sought and the approximate amount of damages claimed.*

3. *Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:*

   (a) *under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention;*

   [. . .]

4. *A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ('notice of arbitration"):*

   (a) *referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary General;*

   [. . .]

   A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. *The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this*

Section, shall govern the arbitration except to the extent modified by this Agreement.

6. The claimant shall provide with the notice of arbitration:

(a) the name of the arbitrator that the claimant appoints; or

(b) the claimant's written consent for the Secretary-General to appoint that arbitrator."[704]

347. The dispute arose on 25 January 2017 when the Attorney General's Office filed its provisional Determination to proceed with its asset forfeiture claim, ordering the formal initiation of the asset forfeiture proceeding and effectively closing the Initial Stage of the process.[705] Colombia has continuously committed internationally wrongful conduct thereafter in its treatment of Claimants' investments.[706] On 17 August 2018, Claimants delivered a Notice of Intent to Colombia, which outlined the dispute and provided the information required in Article 10.16(2) of the TPA.[707] The Parties were unable to resolve the dispute by consultation or negotiation. Therefore, on 25 January 2019, more than 90 days after filing the Notice of Intent, and over six months after the events giving rise to the claim commenced, Claimants submitted their Request For Arbitration in accordance with Articles 10.16(1), (3)-(6) of the RFA.[708]

348. Article 10.18 of the TPA provides, in relevant part:

"*1. No 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 alleged under Article 10.16.1 and knowledge that the claimant (for*

[704] **Exhibit CL-001**, TPA, Art 10.16.

[705] *See supra* ¶ 226.

[706] *See supra* sections III.E-III.K.

[707] *See* **Exhibit C-008**, Notice Of Intent To Submit The Claim To Arbitration, 17 August 2018.

[708] *See* Claimants' Request for Arbitration.

claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.

2. No claim may be submitted to arbitration under this Section unless:

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 10.16.1(a)) and the claimant or the enterprise (for claims brought under Article 10.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration

[. . .]." [709]

349. The claim remains admissible for adjudication by this Tribunal as, pursuant to Article 10.18(1), less than three years have elapsed since the date on which Claimants first acquired knowledge of the alleged breaches of the TPA by Colombia (*i.e.* 25 January 2017).[710]

[709] **Exhibit CL-001**, TPA, Art 10.18.

[710] *See supra* ¶ 226.

350. Claimants have also complied with the requirements in the TPA under Article 10.18(2). In their Request For Arbitration, Claimants consented in writing to arbitration in accordance with the procedures set out in the TPA, and submitted a written waiver with respect to their claims.[711]

B. The Requirements Of Article 25 Of The ICSID Convention Have Been Met

351. Article 25 of the ICSID Convention provides, in relevant part:

> *"(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*
>
> *(2) National of another Contracting State' means:* [. . .]
>
> *(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration* [. . .]."[712]

352. The requirements of Article 25 of the ICSID Convention have also been met. At the time of the Request for Arbitration:

(a) The United States and Colombia were Contracting States of the ICSID Convention;[713]

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711 *See* Request for Arbitration, Annex A.

712 ICSID Convention, art. 25.

713 *See* **C-235**, ICSID, List Of Contracting States And Other Signatories Of The Convention, 12 April 2019.

(b) Claimants were citizens and enterprises of the United States,[714] thereby qualifying as "*national*[s] *of another Contracting State*"; and

(c) Both Colombia and Claimants had provided their written consent to arbitrate this dispute.[715]

353. In addition, the present dispute is a "*legal dispute arising directly out of an investment*." Article 25 of the ICSID Convention does not define the terms "*legal dispute*" and "*investment*." Nonetheless, it is indisputable that this dispute is "*legal*" in nature as it relates to claims arising under Colombia's obligations pursuant to the TPA.[716] Additionally, satisfaction of the definition of "*investment*" contained in the TPA is sufficient to qualify as an investment pursuant to the ICSID Convention.[717]

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354. As all of the jurisdictional requirements contained in the TPA and Article 25 of the ICSID Convention have been satisfied, the Tribunal has jurisdiction over the present dispute.

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[714] *See supra* ¶ 2-4.

[715] *See supra* ¶ 345.

[716] *See, e.g.*, **Exhibit CL-007**, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, ¶ 26 ("*Article 25(1) requires that the dispute must be a 'legal dispute arising directly out of an investment.' The expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.*").

[717] *See, e.g.*, **Exhibit CL-007**, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, ¶ 27 ("*No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).*"); **Exhibit CL-065**, *Malaysian Historical Salvors Sdn Bhd v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, ¶¶ 73-74 ("*It is* [. . .] *bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term 'investment' as found in Article 25(1) of the Convention, risks crippling the institution.*").

C. The Applicable Law Of This Dispute Is The TPA And Applicable Rules of International Law

355. Article 42(1) of the ICSID Convention provides that "[t]*he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.*"[718] The State Parties agreed on the rules of law applicable to this particular dispute in Article 10.22 of the TPA, which provides that "*when a claim is submitted under Article 10.16.1(a)(i)(A) or Article 10.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*."[719] On this basis, the law applicable to this dispute is reflected in the provisions of the TPA and international law.

[718] ICSID Convention, art. 42(1).

[719] **Exhibit CL-001**, TPA art. 10.22(1).

V. COLOMBIA HAS BREACHED FUNDAMENTAL OBLIGATIONS UNDER THE TPA

356. As detailed above, Colombia has taken a series of measures that have destroyed the economic value of Claimants' investments. The legal standards applicable to this dispute are longstanding principles that enjoy near-universal acceptance in international law texts and jurisprudence. They include, in particular, obligations under international law requiring States that undertake an expropriation to pay prompt and effective compensation and for States to treat foreign investors fairly and equitably. Colombia's actions have deprived Claimants of the value of their investment without compensation. In short, Colombia has breached its obligations to Claimants under the TPA and customary international law, and must pay damages to Claimants for its breaches. Claimants address the legal significance of Colombia's actions below.

A. Colombia Unlawfully Expropriated Claimants' Investment

357. Through the actions described in Sections III.D-III.K above, Colombia has expropriated Claimants' investment in the Meritage Project. Colombia has denied Royal Realty and Newport, in which the Meritage Claimants hold shares, access to the benefits and economic use of their investment in the Meritage Project. This amounts to an expropriation of the Meritage Claimants' investment. Colombia's expropriation violated international law (including, specifically, the TPA), by, among other things, failing to compensate Claimants.

358. The analysis below proceeds in three parts. First, Claimants describe the expropriation standard in the TPA. Second, Claimants show that Colombia's conduct resulted in the

expropriation of the Meritage Claimants' investment. Third, Claimants establish that Colombia's expropriation was unlawful.

1. The Expropriation Standard

359. The TPA prohibits expropriation of covered investments by either Contracting Party unless certain conditions are met:

> "*1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ('expropriation'), except:*
>
> *(a) for a public purpose;*
>
> *(b) in a non-discriminatory manner;*
>
> *(c) on payment of prompt, adequate, and effective compensation; and*
>
> *(d) in accordance with due process of law and Article 10.5.*
>
> *2. The compensation referred to in paragraph 1(c) shall:*
>
> *(a) be paid without delay;*
>
> *(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('the date of expropriation');*
>
> *(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and*
>
> *(d) be fully realizable and freely transferable.*"[720]

360. In addition, Annex 10-B of the TPA specifically recognizes both direct and indirect expropriation, confirming the Contracting Parties' "*shared understanding that:*"

[720] **Exhibit CL-001**, TPA, art. 10.7 (footnotes omitted).

> "*Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.*"

361. The TPA further recognizes that an indirect expropriation occurs "where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."[721]

362. These provisions reflect the well-accepted doctrine in international law that expropriation includes:

> "[N]*ot only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.*"[722]

363. Therefore, a State expropriates an investment "when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property."[723] Arbitral tribunals have consistently endorsed this standard.[724]

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[721] **Exhibit CL-001**, TPA, Annex 10-B, art. 3.

[722] **Exhibit CL-021**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 103.

[723] **Exhibit CL-020**, *Compañia del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶ 77. *See also* **Exhibit CL-076**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 14.3.1 ("*For an expropriation to occur, it is necessary for the investor to be deprived, in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value.*"); **Exhibit CL-029**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 107 ("*When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation or* [. . .] *as measures 'the effect of which is tantamount to expropriation.'*").

[724] *See, e.g.*, **Exhibit CL-027**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 604 ("*De facto expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims.*"); **Exhibit CL-077**, *Alpha Projecktholding GmbH v. Ukraine*, ICSID Case No.

364. In *Starrett Housing Corp v. Iran*, for example, the Iran-US Claims Tribunal observed that:

> "[I]*t is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.*"[725]

365. The tribunal in *Starrett* held Iran liable for indirectly expropriating claimants' investment by depriving it of "*the effective use, control and benefits of its property rights.*"[726] In that case, the facts were very similar to the case at hand. There, the "*property interest taken by the Government of Iran*" included "*the right to manage* [an apartment construction project] *and to complete the construction in accordance with the Basic Project Agreement and related agreements, and to deliver the apartments and collect the proceeds of the sales as provided in the Apartment Purchase Agreements.*"[727]

ARB/07/16, Award, 8 November 2010, ¶ 408 ("*Thus, even if the 1998 and 1999 JAAs remain nominally in force, Claimant's investment may still have been expropriated if the contracts have been 'rendered useless' by the actions of the Ukraine government.*").

[725] **Exhibit CL-011**, *Starrett Housing Corporation, et. al. and The Government of the Islamic Republic of Iran, et al.*, Case No. 24, Interlocutory Award, Iran-U.S. C.T.R., 20 December 1983, 23(5) I.L.M. 1090, p. 51. This passage has been cited with approval by a number of tribunals. *See, e.g.*, **Exhibit CL-077**, *Alpha Projecktholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 408; **Exhibit CL-038**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 191; **Exhibit CL-056**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶ 261.

[726] **Exhibit CL-011**, *Starrett Housing Corporation, et. al. and The Government of the Islamic Republic of Iran, et al.*, Case No. 24, Interlocutory Award, Iran-U.S. C.T.R., 20 December 1983, 23(5) I.L.M. 1090 , p. 54. The measure at issue was a government resolution appointing a temporary manager to direct activities of claimants' local subsidiary. *See* **Exhibit CL-011**, *Starrett Housing Corporation, et. al. and The Government of the Islamic Republic of Iran, et al.*, Case No. 24, Interlocutory Award, Iran-U.S. C.T.R., 20 December 1983, 23(5) I.L.M. 1090, pp. 51-54.

[727] **Exhibit CL-011**, *Starrett Housing Corporation, et. al. and The Government of the Islamic Republic of Iran, et al.*, Case No. 24, Interlocutory Award, Iran-U.S. C.T.R., 20 December 1983, 23(5) I.L.M. 1090, p. 55.

366. Similarly, in *Middle East Cement v. Egypt*, the tribunal held that the claimant's rights under a license to import and store cement were indirectly expropriated when Egypt enacted a decree banning the importation of cement.[728] The tribunal observed that, although the license had not been revoked as such, the "*investor is deprived by such measures of parts of the value of his investment* [. . ., and] *such a taking amounted to an expropriation*."[729]

367. The TPA reflects the standard for indirect expropriation in international law, as articulated by the tribunals in *Starrett* and *Middle East Cement*. The TPA lists some of the factors that ought to be considered in assessing whether an indirect expropriation has taken place. Those factors include, but are not limited to, the following:

> "*(i) the economic impact of the government action* [. . .]*;*
>
> *(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and*
>
> *(iii) the character of the government action.*"[730]

368. The TPA further specifies the types of rights that may be subject to expropriation. The TPA provides that Contracting Parties cannot expropriate unless a "*tangible or intangible property right or property interest in an investment*" is at issue.[731] In this regard, the TPA

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728 *See* **Exhibit CL-029**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶¶ 98, 106-107.

729 **Exhibit CL-029**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 107. *See also* **Exhibit CL-083**, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012, ¶¶ 300-301 (finding that Ukraine "*deprived Claimants of access to and control over the essential asset for its investment*," and the measures "*amounted to an indirect expropriation in that it destroyed the value of Claimants' contractual rights and such diminution in value (due to the lasting damage to Claimants' business) was, for all intents and purposes, permanent*.")

730 **Exhibit CL-001**, TPA, Annex 10-B, art. 3(a).

731 **Exhibit CL-001**, TPA, Annex 10-B, art. 1.

reflects the well-recognized position under customary international law that the "*bundle of rights*," associated with Claimants' shareholding in various Colombian entities can be subject to expropriation.[732]

2. Colombia Expropriated Claimants' Investment In The Meritage Project

369. By initiating and implementing Asset Forfeiture Proceedings against the Meritage Project, Colombia unlawfully expropriated the Meritage Claimants' investment in the Project. The Meritage Claimants, including Mr. Seda, own shares in Newport, the sole purpose of which was to develop the Meritage Project. And Mr. Seda is the sole owner of Royal Realty, which was set to help develop the Meritage Project and later operate the hotel associated with the Project.

370. Newport and Royal Realty had done all the necessary groundwork for the Project, which was in the advanced stages of construction when Colombia seized it. Royal Realty initially entered into a Commitment to Purchase Agreement with the land seller, La Palma, to buy the

[732] *See e.g.*, **Exhibit CL-127**, UNCTAD, Expropriation, Series on Issues in International Investment Agreements II, p. 67 ("*Loss of control is thus a factor that is alternative to destruction of value. It is particularly relevant in situations where the investment is a company or a shareholding in a company. The tribunal noted in Sempra v. Argentina that 'a finding of indirect expropriation would require* [. . .] *that the investor no longer be in control of its business operation, or that the value of the business has been virtually annihilated'. A valuable investment would be useless to the owner if he cannot use, enjoy or dispose of such an investment.*"); **Exhibit CL-027**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶¶ 603-607; **Exhibit CL-021**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 102-104. *See also* **Exhibit CL-115**, *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶ 822 ("[C]*ontractual rights may be the subject of an expropriation. In particular, they may be considered as forming an integral part of an investment and the taking of these rights may amount to an expropriation (in whole or in part) of such investment.*"); **Exhibit CL-041**, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, ¶ 241 ("*The deprivation of contractual rights may be expropriatory in substance and in effect.*").

Property and build the Meritage Project on it.[733] Royal Realty later assigned its rights under the Agreement to Newport.[734] Newport additionally entered into a number of trust agreements with fiduciary Corficolombiana to (as required by Colombian law when receiving funds from 20 or more persons)[735] manage the flow of funds from Unit Buyers and plots of land from La Palma, required for the development of the Project.[736] These trust agreements ensured that Newport would have access to the necessary funds for the construction of the Project as it met the relevant equilibrium point, and any funds remaining after such costs were covered would accrue to Newport.[737] Additionally, Newport had the "*exclusive responsibility*" of operating the aparta-hotel, which would form the centerpiece of the Meritage Project.[738] Newport contracted out some of the development and operating duties, and associated fees, to Royal Realty.[739]

371. After setting up the required contractual framework to administer the Project, Newport significantly advanced sales and construction of the Project. By February 2015, Newport had met all the contractual requirements to reach the equilibrium point for Phases 1 and 6 of the Project.[740] Under the trust agreements, and as recorded in Deed 361, Newport was now the

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733 *See supra* ¶ 61; **Exhibit C-19**, Sales-Purchase Agreement Between Royal Realty and La Palma Argentina, 1 November 2012.

734 *See supra* ¶ 74.

735 Martínez Expert Report, at note 16.

736 *See supra* section III.B.5.

737 *See supra* section III.B.5; *See also* **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, arts. 13.A, 14.B.2, 33.2.

738 **Exhibit C-028bis**, Administration and Payment Trust Agreement and Amendments, 17 October 2013, arts. 1(m), 3.

739 *See supra* ¶ 77; **Exhibit C-120**, Management Contract between Newport S.A.S. and Royal Realty S.A.S., 3 December 2013, art. 3.01.

740 *See supra* ¶ 89.

beneficial owner of the land associated with these phases and thus began construction.[741] By August 2016, Newport had built five towers for the aparta-hotel, started construction on two others, and sold over 150 units.[742]

372. Newport's development of Meritage came to an abrupt halt on 3 August 2016, when Colombia, based solely on a fabricated story of a convicted drug trafficker, imposed precautionary measures on the Meritage Property.[743] The measures' impact was immediate — they attached and seized both the land as well as the Project that was under construction on the land.[744] As a result of the measures, Newport was precluded from developing the Project any further: it was no longer able to sell units or continue construction.[745]

373. Then, despite being made aware of the falsity of Mr. López's account,[746] Colombian authorities pursued Asset Forfeiture Proceedings against the Meritage Project without providing the protections to which Newport, as a third party acting in good faith without fault, was entitled.[747] On 25 January 2017, the Colombian Attorney General's Office issued the Determination of the Claim, formally instituting the Asset Forfeiture Proceedings against the Project, and ordering the indefinite "*suspension of the power of disposition, attachment and*

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741 *See supra* ¶ 91; **Exhibit C-361**, Deed 361, 27 February 2015 (transferring title for Phase 1 to Newport).

742 Seda Witness Statement, ¶¶ 95-96.

743 *See supra* ¶ 136.

744 **Exhibit C-165**, Certificate of Seizure of the Meritage Property, 3 August 2016, p. 2.

745 *See supra* ¶ 139.

746 *See supra* sections III.E.6-III.E.7. Indeed, as noted above, a senior level prosecutor known in Colombia as the "*Iron Prosecutor*" for being incorruptible, **Exhibit C-238**, *The Iron Prosecutor and the General Who Have to Face the Underworld*, El Tiempo, 26 August 2019, https://www.eltiempo.com/unidad-investigativa/el-general-y-la-fiscal-que-tienen-que-frenar-el-hampa-en-las-ciudades-404792, declared on national television that "*no other term* [but fraudulent] *can be used to refer to this act of pretending to be the victim of a kidnapping that never occurred*." *Supra* ¶ 305.

747 *See* Martínez Expert Report, ¶ 78.

seizure" of the Meritage Project, including all the land and the structures on it, by the Colombian State.[748] While the precautionary measures were ostensibly temporary (although their effect has continued from the day on which they were imposed—3 August 2016—through to the present day), the Determination of the Claim crystallized the enduring nature of Colombia's interferences with Claimants' investments. Since then Colombia has only further entrenched its position, denying Newport a meaningful opportunity to defend itself and on 5 April 2017, formally requesting the court to commence Asset Forfeiture Proceedings against the Meritage Project.[749]

374. Colombia has thus indirectly, yet blatantly, expropriated the Meritage Claimants' investment. Colombia's imposition of the Asset Forfeiture Proceedings on the Meritage Property has had "*an effect equivalent to direct expropriation*" as "*the suspension of the power of disposition, attachment, and seizure*" of the Project has (*i*) deprived the Claimants' investment of all economic value; (*ii*) interfered with the Claimants' "*distinct, reasonable investment-backed expectations*"; and (*iii*) had "*the character of the government action*."[750]

375. With respect to the first factor, Newport's only purpose was to develop the Meritage Project. Through its Asset Forfeiture Proceedings, Colombia has completely, and without any end in sight, precluded Newport from developing the Meritage Project. Thus, Newport has lost its only source of expected revenue, rendering the company and Meritage Claimants' shares in the company valueless. Like in *ADC v. Hungary*, "[t]*here can be no doubt*

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748 **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, p. 129.

749 *See supra* section III.F.4.

750 **Exhibit CL-001**, TPA, Annex 10-B, art. 3; **Exhibit C-023bis**, Attorney General's Office, Asset Forfeiture Unit, Determination of the Claim, p. 129.

whatsoever" that Colombia's actions "*had the effect of causing the rights of* [Newport] *to disappear and/or become worthless*."[751] In other words, "[a]*n act of State* [has] *brought about the end of this investment*" and "*particularly absent compensation* [. . .] *is the clearest possible case of expropriation*."[752]

376. At the same time, Royal Realty has lost its stream of revenue from developing the Project and operating its hotel. As a result of Colombia's measures against the Meritage Project, Royal Realty's contractual rights in the Meritage Project have been eviscerated, as has Mr. Seda's indirect interest in those rights as the sole shareholder of Royal Realty.

377. With respect to the second factor related to indirect expropriation in the TPA, the Meritage Claimants reasonably expected that the Meritage Project would be built, unfettered by wrongful interference by Colombia. The Meritage Claimants' expectation of realizing a profit has evaporated following Colombia's pursuit of the Asset Forfeiture Proceedings. The Meritage Claimants' expectations in this regard were reasonable and well-founded. The Colombian Attorney General's Office itself had *twice* certified in writing (first in 2007, and again in 2013) that the prior titleholders to the land on which the Meritage Claimants intended to build the Meritage Project were not involved in any criminal activity.[753] Furthermore, Mr.

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751 **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 304.

752 **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 304. *See also* **Exhibit CL-029**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 107 ("*Where measures were are taken by a State the effect of which is to deprive the investor of the use and benefit of its investment even though he may retain nominal ownership of the respective rights* [with respect to] *the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation*"); **Exhibit CL-077**, *Alpha Projecktholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 408.

753 *See supra* ¶¶ 60, 72.

Seda retained one of the most reputable fiduciaries in Colombia, Corficolombiana, which carried out its own stringent due diligence protocol in full compliance with the Colombian anti-money laundering diligence requirements.[754] And, on Corficolombiana's recommendation, Mr. Seda engaged a respected and experienced specialized law firm, Otero & Palacio, to conduct a title study of the property.[755]

378. With Newport's acquisition of two written assurances from the Government, and having not merely complied with their due diligence obligations, but surpassed them, the Meritage Claimants had "*distinct, reasonable investment-backed expectations*" that they would be able to develop and profit from the Meritage Project. By seizing the Project and halting all development, Colombia has unlawfully eviscerated Claimants' expectations.

379. Finally, with respect to the third factor in the TPA, the Asset Forfeiture Proceedings are patently a government action. They were (wrongfully) initiated by the Attorney General's Office and are now being processed in Colombian courts.

380. Accordingly, Colombia has indirectly expropriated the Meritage Claimants' investment in the Meritage Project under the TPA and customary international law.

3. Colombia's Expropriation Was Unlawful

381. Pursuant to the TPA, in order to be lawful, any expropriation by Colombia must be carried out in compliance with all four of the following conditions: (*i*) with payment of prompt,

[754] Martínez Expert Report, ¶¶ 67 *et seq.*

[755] *See supra* ¶ 66.

adequate, and effective compensation; (*ii*) under due process of law; (*iii*) in a non-discriminatory manner; and (*iv*) for a public purpose.[756] These factors are cumulative: if any of the four conditions described above is not met, the expropriation is unlawful and Colombia has breached its obligations under the TPA and customary international law.[757] Here, Colombia's expropriation of the Meritage Claimants' investment fails to satisfy all four requirements.

a. Colombia Has Failed To Pay Prompt, Adequate, And Effective Compensation

382. It cannot be disputed that Colombia has failed to pay the Meritage Claimants any compensation for its expropriation of the Meritage Project. This is, on its own, sufficient to render Colombia's expropriation unlawful under the TPA and customary international law.[758]

b. Colombia Did Not Expropriate In Accordance With Due Process of Law

383. Colombia's expropriation of the Meritage Claimants' investment was conducted with a blatant disregard for due process of law. Host States are required to accord investors both

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[756] **Exhibit CL-001**, TPA, arts. 10.7(1)-(2).

[757] *See* **Exhibit CL-066** *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 428; **Exhibit CL-052**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 7.5.21; **Exhibit CL-099**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶¶ 361-62.

[758] *See* **Exhibit CL-113**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶¶ 543-45 (finding that the lack of compensation was sufficient to render Ecuador's expropriation unlawful); **Exhibit CL-120**, *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, ¶ 411 (finding that a failure to offer or pay compensation rendered Hungary's expropriation unlawful).

substantive and procedural due process protections.[759] The tribunal in *ADC v. Hungary* held that:

> "'[D]*ue process of law', in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that 'the actions are taken under due process of law' rings hollow."*[760]

384. Here, Colombia repeatedly acted in contravention of not only procedural due process guaranteed by international law, but also the procedural guarantees it put in place under its own domestic laws.

385. First, Colombia initiated Asset Forfeiture Proceedings against the Meritage Project based almost solely on the gossip of a drug trafficker, without any regard for the good faith status of third parties like Newport, and in blatant disregard of the requirements of Colombia's own

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[759] *See* **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 435; **Exhibit CL-066**, *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 440; **Exhibit CL-050**, *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, ¶ 395.

[760] **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 435. *See also* **Exhibit CL-067**, *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶¶ 440-42 (finding that Egypt failed to accord claimants both substantive and procedural due process); **Exhibit CL-050**, *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, ¶ 396 (finding that Georgia "*failed to ensure that there was a procedure or mechanism in place, either before the taking or thereafter, which allowed* [the claimant], *within a reasonable period of time, to have his claims heard*.").

Asset Forfeiture Law.[761] Colombia knew that Mr. López Vanegas was a convicted drug dealer. Serious doubts about his credibility and motives were raised by other departments within and outside of the Attorney General's Office.[762] Nonetheless, the Attorney General's Office proceeded to impose precautionary measures on the basis of his statement. As noted by Drs. Medellín and Martínez, this action, by itself, was in violation of the Asset Forfeiture Law.[763]

386. The Attorney General's Office did this without any thought to or assessment of the enormous consequences it would have for the good faith third parties invested in the Project, including Newport and the Meritage Claimants. Indeed, the Attorney General's Office had an affirmative obligation to safeguard the rights of good faith third parties.[764] Nevertheless, the Attorney General's Office failed to even consider Newport's rights in this matter, much less "*safeguard*" them.[765]

387. Even after—in part as a result of Mr. Seda's efforts including meetings with US Embassy officials and the Anti-Corruption Unit at the Attorney General's Office, and filing a formal criminal complaint (*denuncia*)[766]— Colombian authorities were unquestionably aware of the extortion scheme that motivated Mr. López Vanegas's fib, the Attorney General's Office pursued Asset Forfeiture Proceedings against Meritage. Again, Colombia ignored Newport's

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761 Medellín Expert Report, ¶ ¶ 15-17; Martínez Expert Report, ¶ 57.

762 *See supra* ¶ 162, *citing* **Exhibit C-022bis**, Attorney General's Office, Asset Forfeiture Unit, Precautionary Measures Resolution, 22 July 2016, pp. 26, 49. *See also supra* ¶¶ 215, 305.

763 Martínez Expert Report, ¶ 57; *see also* Medellín Expert Report, ¶ ¶ 15-17.

764 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, arts. 3, 7 87, 118(2). *See also* Medellín Report, ¶ 83; Martínez Report, ¶ 28.

765 *See supra* ¶ 156.

766 *See supra* ¶ 221.

rights as a good faith third party. And again, Colombia made no efforts to "*safeguard*[]" or "*search for and collect proof*" of Newport's good faith actions in acquiring the Project.[767] Indeed, instead of complying with its express obligations to good faith parties under Colombian Asset Forfeiture Law and the Political Constitution of Colombia, the Attorney General's Office denied that Corficolombiana had acted in good faith by inventing a standard of diligence that is expressly refuted by Colombian law.[768] Namely, the Attorney General's Office claimed that Corficolombiana should have applied SARLAFT processes to each and every prior title holder of the property even though Colombian law regulating SARLAFT plainly only requires financial institutions to apply SARLAFT to their clients.[769] There can be no question that the diligence processes applied by Corficolombiana, one of the largest and most experienced financial institutions in Colombia, were reasonable and prudent, and more than satisfied the requirements for good faith under the Asset Forfeiture Law.[770]

388. By arbitrarily instituting Asset Forfeiture proceedings and wilfully disregarding the requirements of its own Asset Forfeiture Law on respecting and investigating good faith third parties, Colombia breached due process norms under international law.[771]

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767 *See* **Exhibit C-003bis**, Law No. 1708, 20 January 2014, arts. 87, 118(5).

768 *See supra* ¶¶ 232-233.

769 *Ibid*.

770 *See supra* ¶¶ 238-240. *See also* Medellín Report, ¶¶ 15, 93; Martínez Report, ¶¶ 67-73.

771 *See* **Exhibit CL-066**, *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 441-42 (finding a "*denial of substantive due process*" where Egypt prematurely cancelled a contract on an inadequate basis, and noting Egyptian courts "*held the same view*" because the challenged action lacked legal foundation); **Exhibit CL-029**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 143 (finding a breach of due process where Egypt failed to comply with a notice requirement under domestic law); **Exhibit CL-103**, *Quiborax S.A., Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶ 245 ("[T]*he Tribunal has already determined that the revocation was not carried out in accordance with Bolivian law, whether as a matter of substance or procedure* [. . .]. *Hence, even if the expropriation was in the national or public interest, it was not carried out in accordance with the law*"); **Exhibit**

389. Second, and most egregious, Colombia appears to have seized the Meritage Project on the basis of a corrupt scheme in which Colombian Government officials colluded with a known drug dealer to attempt to extort Mr. Seda.[772] The Asset Forfeiture Unit's conduct in this case raises a number of "*red flags*"[773] indicative of corruption, including, but not limited to:

390. The timing of the Asset Forfeiture Proceedings coincides suspiciously with Mr. López Vanegas's extortion attempts. Indeed, Ms. Malagón took over the investigation and handed Ms. Ardila the case just two days after Mr. López Vanegas and his attorney reinitiated attempts to extort Mr. Seda.[774] Then, Ms. Ardila arrived at the Meritage site and seized the Project just days after Mr. Seda firmly declined to engage with Mr. López Vanegas and his representatives' extortion demands, and immediately after Mr. López's attorney ominously told Mr. Seda—the day the precautionary measures resolution was signed—that: "*The negotiation chapter is closed.*"[775]

391. Extortion attempts made on Mr. Seda specifically invoked references to the Attorney General's Office. Mr. Mosquera repeatedly bragged to Mr. Seda about his connections with and influence over the Asset Forfeiture Proceedings and his connections with Ms. Malagón

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CL-104, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶¶ 493-95 (finding "*the failure of Venezuela to observe the requirements of its own nationalisation legislation*" sufficient to constitute a breach of due process); **Exhibit CL-027**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 603 (finding an expropriation where conduct "*cannot be characterized as normal* [. . .] *regulations in compliance with and in execution of the law*").

772 *See supra* section III.I.

773 *See* **Exhibit CL-091**, *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 293 ("*For the application of the prohibition of corruption, the international community has established lists of indicators, sometimes called 'red flags'*").

774 *See supra* ¶ 120.

775 *See supra* ¶¶ 135-136.

and Ms. Ardila specifically.[776] And Mr. Seda was approached several times by individuals claiming to represent the Attorney General's Office, asking him to pay to make the case go away.[777]

392. The Colombian officials in charge of the Asset Forfeiture Proceedings have been linked to and investigated for corruption. Ms. Malagón and Ms. Ardila have been accused of abusing their authority to threaten asset forfeiture proceedings and then extort the property owners for money.[778] There is at least one pending investigation of Ms. Malagón and Mr. Seda has been informed there may be others.[779] The Anti-Corruption Unit of the Attorney General's Office told Mr. Seda and his colleague Mr. López Montoya in December 2016 that it was investigating Ms. Malagón for corruption and asked Mr. Seda to formalize his allegations against her with a written complaint.[780] More recently, in 2019, another former prosecutor, Ms. Hilda Niño, came forward with corruption allegations against Ms. Malagón, including those linking her to the proceedings against Meritage.[781] Since then, the Office of the Inspector General (*Procuraduría*) has also provided written confirmation that it has handled at least one investigation against Ms. Malagón.[782]

393. In light of these (non-exhaustive) red flags, each acting as discrete indicia of corrupt conduct on the part of Colombian officials, the Tribunal can "*connect the dots*" to "*infer from*

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[776] *See supra* ¶¶ 133-134.

[777] *See supra* ¶ 131.

[778] *See supra* ¶ 299-301.

[779] *See supra* ¶ 299.

[780] *See supra* ¶ 221.

[781] *See supra* ¶ 293.

[782] **Exhibit C-250**, Response by National Prosecutor's Office to *Derecho de Petición* by Angel Seda, 5 May 2020.

these indicia (using experience and reason) that [corruption] *has occurred*."[783] Having established *prima facie* corruption, the burden of proof shifts to Colombia.[784] Colombia is in possession of the information on the corrupt scheme perpetrated by its officials, which it has so far refused to disclose to Mr. Seda in response to his *derechos de petición*.[785] Indeed, Colombia's failure to produce the requested evidence allows this Tribunal to draw adverse inferences.[786] An expropriation stemming from corrupt motives by its nature contravenes fundamental due process requirements.[787]

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[783] **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019, ¶¶ 669-70; **Exhibit CL-090**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶¶ 4.876, 4.879.

[784] *See* **Exhibit CL-040**, *Methanex Corporation v. United States*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part II ¶ 55 (finding that once a party had "*demonstrated prima facie*" that "*unlawful*[]*, if not criminal*[]" conduct had taken place, the burden of proof shifted).

[785] *See* Seda Witness Statement, ¶ 129.

[786] *See* **Exhibit CL-091**, *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 245 ("*the Tribunal may draw appropriate inferences from a party's non-production of evidence ordered to be provided*"). *See also* **CL-034**, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgment of 6 November 2003, (2003) I.C.J. REPORTS 161, Separate Opinion of Judge Owada, ¶ 47 ("*Accepting as given this inherent asymmetry that comes into the process of discharging the burden of proof, it nevertheless seems to me important that the Court, as a court of justice whose primary function is the proper administration of justice, should see to it that this problem relating to evidence be dealt with in such a way that utmost justice is brought to bear on the final finding of the Court and that the application of the rules of evidence should be administered in a fair and equitable manner to the parties, so that the Court may get at the whole truth as the basis for its final conclusion*.").

[787] *See* **Exhibit CL-090**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.871, ("*International tribunals cannot turn a blind eye to corruption and cannot decline to investigate the matter simply because of the difficulties of proof*."); **Exhibit CL-024**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, Award, ¶ 111 ("[I]*nternational tribunals have often held that corruption of the type alleged* [. . .] *are contrary to international* [bonas] mores"); **Exhibit CL-046**, *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, ¶ 157 ("*In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy*.").

394. Third, despite being under a self-acknowledged obligation to protect third parties acting in good faith without fault from asset forfeiture proceedings, Colombia refused to even consider, much less analyze, Newport's position as a good faith third party.[788] The Attorney General's Office ignored Newport so blatantly, that it took Newport filing a court action—a *tutela* action—against the Attorney General's Office for the Attorney General's Office to even acknowledge Newport's submissions.[789] But acknowledging receipt is all the Attorney General's Office did; the Office did not address any of Newport's substantive arguments on the issue of good faith status and diligence.[790]

395. Moreover, the Colombian Court has since precluded Newport from defending its rights in relation to the Meritage Project.[791] The Court, in its *avocamiento* order accepting the Attorney General's Office's *Requerimiento*, has refused to recognize Newport as an "*affected party*" in the proceedings, thus ignoring Newport's evidence regarding its good faith buyer status, and precluding Newport from defending its rights. This violates fundamental due process norms (as well as the FET standard, as detailed below).[792]

396. Thus, by arbitrarily seizing the Meritage Project without regard for the protections set out under Colombian law for good faith parties, likely borne from a corrupt scheme between Colombian Government officials and a convicted drug trafficker, and then repeatedly denying

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[788] *See supra* sections III.E.7-III.F.4.

[789] *See supra* section III.F.3.

[790] *See supra* ¶¶ 245-246.

[791] *See supra* section III.F.5.

[792] Medellín Expert Report, ¶ 17; Martínez Expert Report, ¶ 63.

Newport's opportunity to be heard, Colombia's expropriation of the Meritage Project breached several fundamental tenets of due process.

c. Colombia's Expropriation Was Discriminatory

397. It is axiomatic that "*non-discrimination is a requisite for the validity of a lawful nationalization. This is a rule well established in international legal theory and practice* [. . .] *a purely discriminatory nationalization is illegal and wrongful.*"[793] Discrimination exists where there are "*different treatments to different parties*."[794]

398. Here, though the Attorney General's Office found 47 other properties with which Mr. López Vanegas is associated,[795] the only property Colombia has seized thus far is the Meritage Property. Most perplexingly, Colombia has refrained from seizing the other parcel of land that was carved from the same parent property which Colombia alleges belonged to Mr. López Vanegas and was allegedly transferred between various narcotraffickers from the Office of Envigado.[796]

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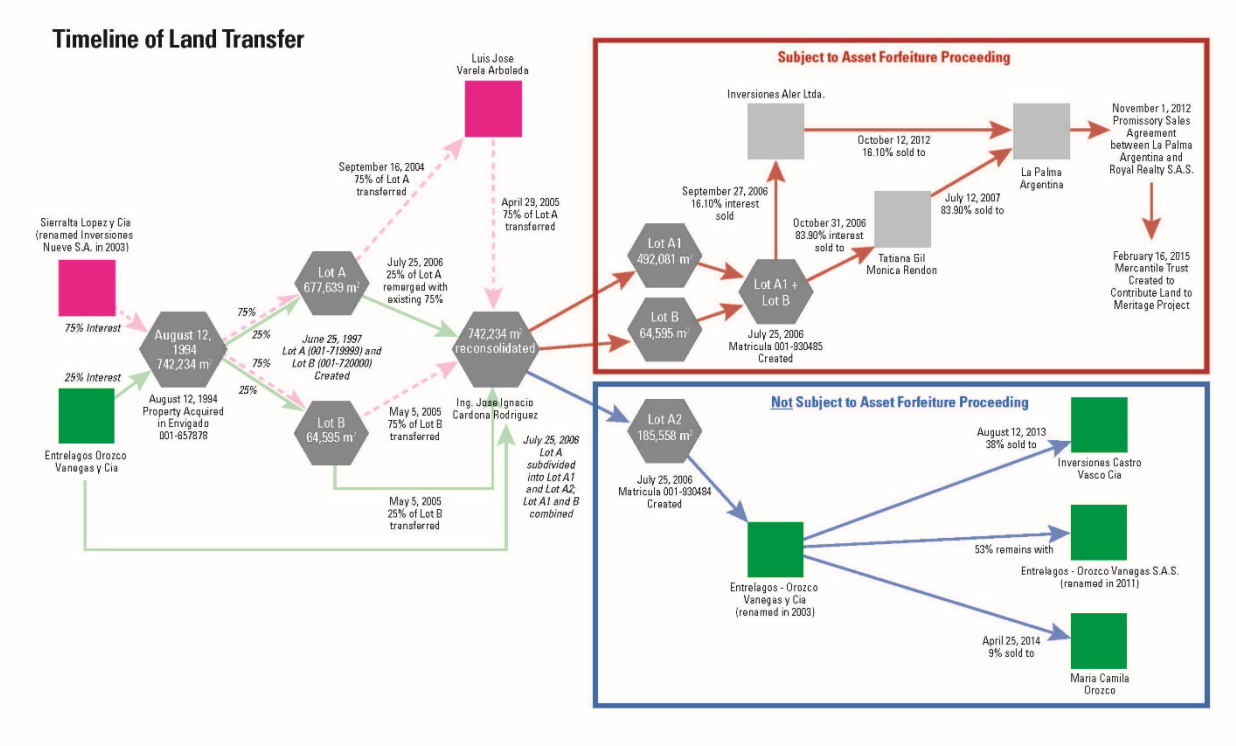
[793] **Exhibit CL-009**, *Libyan American Oil Company (LIAMCO) v. The Government of the Libyan Arab Republic Relating to Petroleum Concessions 16, 17 and 20*, Award, 12 April 1977, 20 I.L.M. 1, ¶ 242.

[794] **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 442 (rejecting Hungary's contention that there could not be discrimination where claimants were the only foreign parties involved in operation of the airport, as the relevant "*comparison of different treatments is made here between that received by the Respondent-appointed operator and that received by foreign investors as a whole*."). *See also* **Exhibit CL-041**, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, ¶ 242 (finding Poland expropriated the claimant's investment with discriminatory intent through a measure that aimed to exclude foreign control in the insurance business).

[795] **Exhibit C-24**, Requerimiento, 5 April 2017 at 16.

[796] *See supra* Section III.K.



Appendix F: Timeline of Land Transfer

399. As shown in the figure above, reproduced from Section III.K, the two parcels of land in the red square above and the blue square below stem from a common lot and share an ownership history up through and including (for Lot A and its subdivisions, A1 and A2) the alleged forced sale to the "*fruit seller*," Luis José Varela Arboleda, whom Mr. López Vanegas told the Attorney General's Office was a front for the Office of Envigado.[797] The only difference between the two parcels is that the Meritage Project, backed by U.S. investors including Mr. Seda and worth millions of dollars, was being built on the plot of land that Colombia seized while the other parcel of land remains in the hands of the family of Mr. López Vanegas's half-brother, Colombian citizens, and another Colombian entity. The Attorney

797 **Exhibit C-024bis**, Attorney General's Office, Asset Forfeiture Unit, Petition to Asset Forfeiture Court, 5 April 2017, pp. SP-0014 – SP-0018.

General's Office has provided no principled explanation for why it has failed to impose precautionary measures or otherwise seize the other property.[798]

400. In addition, Colombia failed to investigate or act on Mr. Seda's criminal complaint regarding Mr. López Vanegas's extortionate scheme against him, which was aided by persons within the Attorney General's Office, or even the assassination attempt against him.[799] Yet, they acted on Mr. López Vanegas's blatantly fabricated complaint as well as a complaint by Mr. Mosquera accusing Mr. Seda of defamation for filing a criminal complaint complaining about Mr. Mosquera's extortion.[800]

401. Colombia's selective pursuit of the Meritage Project, owned by Newport, which is in turn majority owned by Mr. Seda and other U.S. citizens, including the Meritage Claimants, and its disregard of criminal conduct victimizing Mr. Seda and the Meritage, is thus discriminatory, and makes Colombia's expropriation of the Project unlawful under the TPA and customary international law. It is also an independent breach of other protections offered by the TPA (as discussed in further detail below).

d. Colombia Did Not Expropriate For A Public Purpose

402. To demonstrate that it acted for a valid public purpose, a State must: (*i*) identify the public purpose; and (*ii*) demonstrate that a reasonable nexus exists between the impugned

[798] *See* **Exhibit C-284**, Response to Request for Information by Attorney General's Office, 1 June 2020.

[799] *See supra* section III.J.3.

[800] *See supra* ¶ 292.

expropriatory measure and the declared public purpose.[801] A State cannot simply purport to act with a public purpose. As the tribunal in *ADC v. Hungary* observed:

> "[A] *treaty requirement for 'public interest' requires some genuine interest of the public. If a mere reference to 'public interest' can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless."*[802]

403. Here, Colombia's conduct was devoid of public purpose because there is no reasonable nexus between the stated public purpose of Colombia's Asset Forfeiture Law and Colombia's initiation and application of the Asset Forfeiture Proceedings against the Meritage Project.

404. Colombia imposed precautionary measures on the Meritage Project based on a fabricated story about a kidnapping based on an unsubstantiated complaint filed by a known drug trafficker.[803] As it became clear that Mr. López Vanegas's story was false, Colombia should have withdrawn the precautionary measures and the Asset Forfeiture Proceeding. It did not. Instead, it shifted the rationale for the Asset Forfeiture Proceedings, claiming that it was based on the fact that *other* individuals and entities in the chain of title of the Property were acting as fronts or were associated with criminal activity.[804] This, of course, completely ignored Colombia's own Certification of No Criminal Activity confirming that there were no criminal proceedings or investigations against the Property or its prior titleholders.

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801 *See* **Exhibit CL-106**, *Vestey Group Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶¶ 294-96.

802 **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 432. The TPA equates the term "*public purpose*" with "*different terms, such as 'public necessity,' 'public interest,' or 'public use.'*" **Exhibit CL-001**, TPA art. 10.7 fn. 5.

803 *See supra* ¶ 162.

804 *See supra* section III.F.

405. Even assuming—*quod non*—that there had in fact been a deficiency with the title or history of the land (of which there is, to this day, no evidence), Colombian law required the Attorney General's Office to credit the good faith diligence of Newport and Royal Realty.[805] Moreover, even if the Attorney General's Office determined that it was required to implement precautionary measures or asset forfeiture proceedings, it was required by Colombian law and practice to do so in the manner most narrowly tailored to preserve the interests of good faith parties.[806] It did not do so here.

406. Instead, the Attorney General's Office failed entirely to assess Newport's status as a third party acting in good faith without fault.[807] Moreover, it invented *post hoc* a diligence standard—unsupported, and indeed contradicted, by existing Colombian law—that the Attorney General's Office now claimed Corficolombiana failed to apply to merit good faith status.[808]

407. As Drs. Medellín and Martínez explain, and as the Asset Forfeiture Law expressly provides, Colombia's asset forfeiture laws were designed to disgorge assets obtained through criminal activity while maintaining the rights of third parties who had acquired, in good faith, an interest in the affected assets.[809] Thus, by failing to even assess, much less recognize, Newport's good faith status, and failing to narrowly tailor the asset forfeiture proceedings to the alleged criminal action, Colombia failed to apply its Asset Forfeiture Law in a manner that

[805] Martínez Expert Report, ¶ 58.

[806] Martínez Expert Report, ¶ 28(c).

[807] *See supra* sections III.E.7-III.F.4.

[808] *See supra* sections III.F.1, III.F.4.

[809] Medellín Expert Report, ¶ 33; *see* Martínez Expert Report, ¶ 28.

respected or even complied with the stated purpose of the law.[810] There is accordingly no reasonable nexus between Colombia's expropriation and the stated goal of the Asset Forfeiture Law.

408. More concerning, as detailed above, there are numerous and significant indicia that a corrupt enterprise led by the Head of the Asset Forfeiture Unit, Ms. Malagón, and Prosecutor No. 44, Ms. Ardila Polo, instigated the Asset Forfeiture Proceedings against the Meritage Project.[811] Asset Forfeiture Proceedings launched by corrupt prosecutors designed to extort Mr. Seda cannot be for a "*public purpose*." Rather, such conduct does the very opposite: it contravenes public interest, rendering Colombia's expropriation unlawful.

B. Colombia Has Failed To Treat Claimant's Investment Fairly and Equitably

409. Colombia's conduct described in Section III.E-K above, individually and collectively, amounts to a breach of the FET obligation in the TPA and customary international law. The analysis below proceeds in two parts. First, Claimants describe the FET standard. Second, Claimants show that Colombia has breached the FET standard by arbitrarily and unreasonably initiating and pursuing Asset Forfeiture Proceedings against the Meritage Project, and by denying Claimants transparency and due process in those Proceedings.

[810] Medellín Expert Report, ¶¶ 15-17; Martínez Expert Report, ¶ 58.

[811] *See supra* ¶ 392.

1. The FET Standard

410. A State's obligation to provide "*fair and equitable treatment*" is a cornerstone protection of customary international law, and is enshrined in almost all investment treaties. As the tribunal in *PSEG Global* explained, the standard "*allow*[s] *for justice to be done in the absence of the more traditional breaches of international law standards* [. . .] *thus ensuring that the protection granted to the investment is fully safeguarded.*"[812]

411. Article 10.5 of the TPA guarantees all foreign investors treatment that is fair and equitable, providing:

> "*Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*"

412. The TPA ensures investments treatment in accordance with customary international law. And it acknowledges that customary international law now "*include*[s]" the FET standard of

[812] **CL-047**, *PSEG Global Inc. and Konya Ilgın Electrik Üretim ve Ticaret Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶ 239.

protection.[813] Many tribunals have similarly recognized that customary international law has evolved to include FET.[814]

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[813] In any event, pursuant to the Most-Favored Nation ("**MFN**") provision in Article 10.4 of the TPA, Claimants are entitled to "*treatment no less favorable than*" what Colombia accords to "*investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory*." Claimants are therefore entitled to the substantive protection granted to investors under other Colombian investment treaties. This includes, for example, Article 4(2) of *The Agreement Between The Republic of Colombia And The Swiss Confederation On The Promotion And Reciprocal Protection of Investments* ("**Colombia-Swiss BIT**"), which provides that: "*Each Party shall ensure fair and equitable treatment within its territory of the investments of investors of the other Party*." **Exhibit CL-069**, Agreement Between the Republic of Colombia and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments, entry into force 6 October 2009, art. 4(2). It is well accepted by tribunals that MFN provisions such as Article 10.4 of the TPA can be used to import a more favorable FET provision from a Treaty with a non-Party State, such as Article 4.2 of the Colombia-Swiss BIT. *See* **Exhibit CL-080**, *Sergei Paushok, CJSC Golden East Company, and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, ¶ 254 ("[T]*he MFN clause of the Treaty allows for the integration into it of the broader provisions contained in the U.S. Mongolia BIT and the Denmark-Mongolia BIT*."); **Exhibit CL-035**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 104, (noting the MFN provision may be used to import additional rights into FET provision "*that can be construed to be part of the fair and equitable treatment of investors*"); **Exhibit CL-067**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶¶ 155-57 (used the MFN provision to import FET, where the protection was not available in the BIT); **Exhibit CL-060**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 575 (parties agreed that MFN could be used to import an FET provision); **Exhibit CL-098**, *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, ¶¶ 551-52, 554-55 (used the MFN provision to import FET, where the protection was not available in a multilateral treaty).

[814] *See e.g.*, **Exhibit CL-039**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, Award, ¶¶ 274-76, 284 ("[T]*he Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law*."); **Exhibit CL-099**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, Award, ¶ 489 ("*The minimum customary standard has not remained frozen. It has developed significantly since its early formulations 100 years ago* [. . .] *What is relevant is not the standard as it was defined in the 20th century, but rather the standard as it exists and is accepted today*"); **Exhibit CL-108**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 520 ("[T]*here is no substantive difference in the level of protection afforded by both standards*."); *See also* **Exhibit CL-032**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. Arb (AF)/00/2, Award, 29 May 2003, Award, ¶ 153 (finding that the fair and equitable treatment provision of the relevant treaty was "*an expression and part of the bona fide principle recognized in international law*."); **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 291 (finding that "*the difference between the* [treaty FET standard] *and the customary minimum standard, when applied to the specific facts of a case, may be more apparent than real*."); **Exhibit CL-107**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 208 ("*The Tribunal finds that there is no material difference between the customary international law standard and the FET standard under the present BIT*."). *See also* **Exhibit CL-030**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 125 ("[T]*he* [Free Trade Commission] *interpretations* [of the international law minimum standard of treatment] *incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many*

413. The FET standard is a broad and flexible protection, requiring a fact-specific assessment to determine whether conduct is "*fair*" and *equitable*" in the context and particular circumstances in dispute.[815] It "*should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment.*"[816]

414. The ordinary meaning of the words "*fair*" and "*equitable*" have been interpreted by tribunals as protecting investors from treatment including conduct that is (*i*) unreasonable, discriminatory and arbitrary, (*ii*) not transparent and lacking in due process, and (*iii*) in

treaties of friendship and commerce. Those treaties largely and concordantly provide for 'fair and equitable' treatment of [. . .] *the foreign investor and his investments*.").

[815] *See* **Exhibit CL-093**, *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶¶ 505-06 ("*It is undisputed that an analysis of whether a state's conduct has been fair and equitable requires an assessment of all the facts, context and circumstances of a particular case*."); **Exhibit CL-097**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 566 ("*The Tribunal shares the view expressed by other investment treaty tribunals that in order to establish whether an investment has been accorded fair and equitable treatment, all of the facts and circumstances of the particular case must be considered*."); **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 285, 291, 309 ("*To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied*."); **Exhibit CL-109**, *Windstream Energy LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2013-22, Award, 27 September 2016, ¶¶ 361-62 ("*In other words, just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts*."); **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 544 *("The Tribunal further wishes to point out that the analysis of whether a state's conduct has been fair and equitable requires an assessment of all the facts, context and circumstances of a particular case*."); **Exhibit CL-075**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 188 ("*A fourth important characteristic of* [fair and equitable treatment] *is that its application is crucially dependent on an evaluation of the facts of each case*.").

[816] **Exhibit CL-035**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 113. *See also* **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019, ¶ 1308 ("*A host State breaches such minimum standard and incurs international responsibility if its actions (or in certain circumstances omissions) violate certain thresholds of propriety or contravene basic requirements of the rule of law, causing harm to the investor*.").

frustration of an investor's legitimate expectations.[817] Each of these factors is addressed below.

a. The FET Standard Protects An Investor From Unreasonable, Discriminatory And Arbitrary Treatment

415. Unreasonable or arbitrary treatment amounting to a violation of FET includes any of the following:

> "*a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;*
>
> *b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;*
>
> *c. a measure taken for reasons that are different from those put forward by the decision maker;*
>
> *d. a measure taken in wilful disregard of due process and proper procedure.*"[818]

416. Finding a breach of the FET standard, the tribunal in *Saluka v. Czech Republic* held that:

> "*A foreign investor protected by the Treaty may in any case properly expect that the [host State] implements its policies bona fide by conduct that is, as far as it affects the investors' investment,*

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[817] *See also* **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 543 ("[T]*he Tribunal is of the view that FET comprises,* inter alia, *protection of legitimate expectations, protection against arbitrary and discriminatory treatment, transparency and consistency.*").

[818] *See* **Exhibit CL-070**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303. *See also* **Exhibit CL-072**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 262-63 (quoting Professor Schreuer's description in EDF and explaining "[s]*umming up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law.*"); **Exhibit CL-064**, Christoph Schreuer, *Protection against Arbitrary or Discriminatory Measures, in* THE FUTURE OF INVESTMENT ARBITRATION (2009), pp. 184-88; **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 578 ("*In the Tribunal's eyes, a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker.*").

> *reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.*"[819]

417. A State acting contrary to its own legal principles constitutes arbitrary conduct and breaches its FET obligations. In *TECO v. Guatemala*, for example, the tribunal found a breach of FET under the minimum standard of treatment where a State agency disregarded the opinion of a technical commission in finalizing electricity tariff rates in contravention of the governing regulatory framework.[820] The tribunal held that "*although the conclusions of the Expert Commission were not technically binding* [. . . the regulatory agency] *had the duty to seriously consider them and to provide its reasons in case it would decide to disregard them.*"[821] The regulatory agency's "*repudiation of the two fundamental regulatory principles applying to the tariff review process* [was] *arbitrary and breaches elementary standards of due process in administrative matters.*"[822]

418. Indeed, if a State undertakes measures that defy basic reasoning and logic, they will be deemed unreasonable and arbitrary. For example, the tribunal in *Glencore v. Colombia* held

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819 **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 307 (emphases added). The tribunal held that the Czech Republic had unreasonably frustrated the claimant's good faith efforts to resolve a financing crisis. *See* **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 407.

820 *See* **Exhibit CL-095**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶¶ 664-711.

821 **Exhibit CL-095**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶ 588.

822 **Exhibit CL-095**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, ¶ 711.

that Colombia acted unreasonably and arbitrarily when the General Comptroller of Colombia calculated tariffs owed by the claimant following a contractual amendment in a manner that was "*contrary to basic principles of legal reasoning and financial logic*."[823]

419. Notably, the FET standard can be violated by unreasonable conduct, even in the absence of bad faith or malicious intent.[824]

b. The FET Standard Requires A State To Act Transparently And With Due Process

420. Host States bear an affirmative obligation to act transparently.[825] The tribunal in *Urbaser v. Argentina* noted that "*in relation to a foreign investor, the authorities of the State shall act*

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[823] **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019, ¶ 1475.

[824] *See* **Exhibit CL-043**, *Azurix Corp. v. The Argentine Republic*, ICSID CASE No. ARB/01/12, Award, 14 July 2006, ¶ 372 ("*It would be incoherent* [. . .] *to consider that a party to the BIT has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious*"); **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 543 ("*The Tribunal believes that the state's conduct need not be outrageous or amount to bad faith to breach the fair and equitable treatment standard*.").

[825] **Exhibit CL-022**, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, ¶ 83 ("[T]*he lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment*"); **Exhibit CL-060**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, Award, ¶ 618 ("[T]*he process that led to the decision of the Working Group lacked transparency and due process and was unfair, in contradiction with the requirements of the fair and equitable treatment principle*."); **Exhibit CL-048**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 308–309 (finding that the respondent showed a lack of transparency in denying access to the claimant to an administrative file and this was a breach of FET); **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 543, 579 ("*Furthermore, as noted by a number of arbitral tribunals, FET 'requires that any regulation of an investment be done in a transparent manner* [. . .]'"); **Exhibit CL-032**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 154, 167, 172 (at ¶ 167 observing that "*the Claimant was entitled to expect that the government's actions would be free from any ambiguity that might affect the early assessment made by the foreign investor of its real legal situation or the situation affecting its investment and the actions the investor should take to act accordingly*"); **Exhibit CL-097**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 570 ("*Fair and equitable treatment also requires that any regulation of an investment be done in a transparent manner*"); **Exhibit CL-042**, *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 307, 309; **Exhibit CL-072**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No.

in a way to create a climate of cooperation in support of investment activities. Investors must have trust in the host State's best efforts to sustain their operation on this State's territory."[826]

421. Furthermore, the tribunal in *TECMED v. Mexico* confirmed that investors are:

> "[E]*ntitled to expect that the government's actions would be free from any ambiguity that might affect the early assessment made by the foreign investor of its real legal situation or the situation affecting its investment and the actions the investor should take to act accordingly.*"[827]

422. Investors are also entitled to be treated with substantive and procedural due process, within both administrative and judicial proceedings.[828] This includes, *inter alia*, the right to be heard. In its recent decision, the tribunal in *Glencore v. Colombia* held that:

> "*The rule of law requires that in judicial proceedings (administered by a court of law or a tribunal) and in administrative proceedings*

ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284 ("[A]*n absence of transparency in the legal procedure or in the actions of the State*" is a factor relevant to the FET standard); **Exhibit CL-045**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 128 ("*This means that violations of the fair and equitable treatment standard may arise from a State's failure to act with transparency –that is, all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made under an investment treaty should be capable of being readily known to all affected investors.*").

826 **Exhibit CL-110**, *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, ¶ 628.

827 **Exhibit CL-032**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 167. *See also* **Exhibit CL-032**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 154, 172.

828 *See* **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 308 ("[A]*ccording to the 'fair and equitable treatment' standard, the host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities.*"); **Exhibit CL-021**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 91-94 (finding a violation of FET where a municipality did not act with procedural propriety); **Exhibit CL-032**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. Arb (AF)/00/2, Award, 29 May 2003, ¶¶ 162, 166 (finding a violation of FET where a government agency failed to notify the claimant of its intention to refuse renewal of a permit); **Exhibit CL-029**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 143 (finding a violation of FET where there was a procedural failure to give notice and an attachment order was executed by police without directly notifying the owner of the property).

> *(administered by the public administration) due process be respected: the adjudicator, be it a judge, tribunal member, or administrative authority, must give each party a fair opportunity to present its case and to marshal appropriate evidence, and then must assess the submissions and the evidence in a reasoned, even-handed, and unbiased decision.*
>
> *It is undisputed that a breach of due process, whether in judicial proceedings or in administrative proceedings, may result in the violation of the FET standard. But the due process standard operates differently in different settings. In administrative proceedings [. . .] the decision-maker is often the investigator, the accuser, and the adjudicator, and a related officer (who may be the senior officer of the decision-maker) is often the one who rules on appeal. Due process does not require strict separation of these functions - provided that the final administrative decision is subject to full judicial review. The private individual must have an opportunity to have the case revisited, this time by an independent and impartial judge, with the guarantee of a formal adversarial procedure."*[829]

423. Further, in *Deutsche Bank v. Sri Lanka*, the tribunal held that issuing an order "*without a proper examination and without giving the* [claimants] *involved an opportunity to respond, constitutes a breach of* [FET]."[830] The tribunal held that Sri Lanka's Supreme Court had violated due process by issuing an order with "*far-reaching consequences*" without giving claimants the right to be heard,[831] giving rise to "*a serious due process violation*" that was a breach of FET.[832]

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829 **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019, ¶¶ 1318-19 (emphases added).

830 **Exhibit CL-087**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, ¶ 478.

831 **Exhibit CL-087**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, ¶ 478.

832 **Exhibit CL-087**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, ¶ 480.

424. The FET standard therefore requires that a host State give investors a meaningful opportunity to defend themselves, prior to making administrative or judicial decisions that will severely impair the value of the investment.

c. The FET Standard Protects An Investor's Legitimate Expectations

425. The protection of an investor's legitimate expectations is "*firmly rooted in arbitral practice*."[833] As the tribunal in *Tecmed* noted, FET requires a host State to:

> "[P]*rovide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.* [. . .] *The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions* [. . .] *that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation."*[834]

426. A host State will be in breach of the FET standard if its conduct results in "*evisceration of the arrangements in reliance upon* [which] *the foreign investor was induced to invest*."[835]

427. The tribunal in *Glencore v. Colombia* considered that legitimate expectations:

> "[A]*rise when a State (or its agencies) makes representations or commitments or gives assurances, upon which the foreign investor (in the exercise of an objectively reasonable business judgement)*

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833 **Exhibit CL-093**, *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 667.

834 **Exhibit CL-032**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. Arb (AF)/00/2, Award, 29 May 2003, ¶ 154. *See also* **Exhibit CL-042**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 302 ("[A]*n obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations.*").

835 **Exhibit CL-027**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 611.

> *relies, and the frustration occurs when the State thereafter changes its position as against those expectations in a way that causes injury to the investor. The protection of legitimate expectations is closely connected with the principles of good faith, estoppel, and the prohibition of venire contra factum proprium.*
>
> *A State can create legitimate expectations vis-à-vis a foreign investor in two different contexts. In the first context, the State makes representations, assurances, or commitments directly to the investor (or to a narrow class of investors or potential investors). But legal expectations can also be created in some cases by the State's general legislative and regulatory framework: an investor may make an investment in reasonable reliance upon the stability of that framework, so that in certain circumstances a reform of the framework may breach the investor's legitimate expectations.*"[836]

428. Legitimate expectations may be formed through explicit or implicit representations by the host State. As such, numerous tribunals have recognized that an investor is entitled to rely on communications from the State as a basis for forming legitimate expectations.[837]

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[836] **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019, ¶¶ 1367-68.

[837] *See* **Exhibit CL-081**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 513 (finding Argentina breached legitimate expectations arising from general assurances contained in a regulatory framework); **Exhibit CL-079**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, ¶¶ 120, 167-168 (finding Argentina breached legitimate expectations arising from general assurances contained in a regulatory framework); **Exhibit CL-050**, *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, ¶¶ 189-94 (finding Georgia breached legitimate expectations arising from representations and warranties set forth in a joint venture agreement); **Exhibit CL-061**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶¶ 359-64 (finding Ecuador breached legitimate expectations arising from specific payment provisions of a purchase agreement); **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 563, 575 (finding Venezuela breached legitimate expectations arising from specific representations made in a letter); **Exhibit CL-119**, *Union Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, ¶¶ 9.130, 9.145 (finding Egypt breached legitimate expectations arising from representations made in a letter); **Exhibit CL-101**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, ¶¶ 198-205 (finding Romania breached legitimate expectations arising from representations made in a government notice); **Exhibit CL-041**, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, ¶¶ 226, 231-32 (finding Poland breached legitimate expectations arising from obligations contained in a purchase agreement).

429. Furthermore, it is well recognized that legitimate expectations not only arise through direct representations made by the State to the investor, but can also be generated through a host State's legal and regulatory frameworks.[838]

430. As the tribunal in *Murphy v. Ecuador* explained:

> "*An investor's legitimate expectations are based upon an objective understanding of the legal framework within which the investor has made its investment. The legal framework on which the investor is entitled to rely consists of the host State's international law obligations, its domestic legislation and regulations, as well as the contractual arrangements concluded between the investor and the State. Specific representations or undertakings made by the State to an investor also play an important role in creating legitimate*

[838] *See* **Exhibit CL-042**, *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 301 ("*An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable*."); **Exhibit CL-075**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 226 ("*In examining the various cases that have justifiably considered the legitimate expectations of investors and the extent to which the host government has frustrated them, this Tribunal finds that an important element of such cases has not been sufficiently emphasized: that investors, deriving their expectations from the laws and regulations adopted by the host country*, acted in reliance upon those laws and regulations and changed their economic position as a result. *Thus it was not the investor's legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment. It was the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not treated the investors fair and equitably*."); **Exhibit CL-045**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 133 (finding that Argentina had "*created specific expectations among investors*" through guarantees provided in its legislation and regulations, and was therefore bound by these guarantees); **Exhibit CL-063**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 179 (finding breach of FET where Argentina "*fundamentally changed the legal framework on the basis of which the Respondent itself had solicited investments and the Claimant had made them*"); **Exhibit CL-056**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 298, 307, 310 (observing that "[t]*he duties of the host State must be examined in the light of the legal and business framework as represented to the investor at the time that it decides to invest*"). *See also* **Exhibit CL-036**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 191 (observing that "*there is certainly an obligation not to alter the legal and business environment in which the investment has been made*"); **Exhibit CL-041**, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, ¶¶ 231-32 (finding breach of FET where the organs of the Government "*breached the basic expectations of Eureko that are at the basis of its investment*" and were enshrined in the underlying contractual agreements); **Exhibit CL-093**, *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 674 (finding Romania had made a promise or assurance, through its legal framework and issued certificates, which gave rise to the investors' legitimate expectation).

> *expectations on the part of the investor but they are not necessary for legitimate expectations to exist. An investor may hold legitimate expectations based on an objective assessment of the legal framework absent specific representations or promises made by the State to the investor.*"[839]

2. Colombia's Actions Breached The FET Standard

431. Colombia's conduct in initiating and pursuing the Asset Forfeiture Proceedings—based on the uncorroborated word of a drug trafficker, whose representatives claimed to be involved in a corrupt extortion scheme involving Colombian Government officials, and conducted with complete disregard for the fundamental protections offered under Colombia's own Asset Forfeiture Law—has breached its FET obligations in the TPA. Below Claimants describe some of the key characteristics of Colombia's conduct to highlight their unreasonable, arbitrary non-transparent nature, which have violated Claimants' due process rights and contravened their legitimate expectations.

a. Colombia Launched Asset Forfeiture Proceedings Arbitrarily, And In Blatant Disregard of Fundamental Procedural Protections

432. Colombia's initiation of Asset Forfeiture Proceedings against the Meritage Project breached Colombia's FET obligations under the TPA.

433. As set out above, Colombia initiated the process on the basis of a false story—that, years earlier, the property was transferred under duress due to the kidnapping of the purported owner's son—contrived by a convicted drug trafficker, Mr. López Vanegas. Mr. López

[839] **Exhibit CL-107**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 248.

Vanegas' fib has since been publicly acknowledged by senior Colombian Government officials as being false.[840] Indeed, Mr. López Vanegas failed to report this alleged kidnapping until nearly a decade after it allegedly occurred, and he only reported it after the Meritage Project had received substantial publicity. The Attorney General's Office then ignored it for nearly two years before suddenly acting on it to seize a multi-million dollar Project in mid-construction.[841] Colombia knew Mr. López Vanegas had been caught on tape acknowledging his involvement in the shipment of dozens of tons of cocaine from Latin America to Europe and South America.[842] But that did not stop the Attorney General's Office from relying on his story to impose precautionary measures on the Meritage Project and Property, despite the grave consequences the measures had on the Project. Indeed, the precautionary measures not only stopped all sales activity but also halted any construction or development of the Project.[843]

434. The lead author of Colombia's Asset Forfeiture Law, Claimants' expert Dr. Wilson Martínez, explains in his report that "*one of the main goals of* [the Asset Forfeiture Law] *was to establish clearly the inescapable obligation to guarantee and protect the rights and procedural safeguards of those impacted by an asset forfeiture action*."[844] Colombia arbitrarily, unreasonably, and in violation of Claimants' due process rights disregarded the protections under its own law to which Newport was entitled.

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840 **Exhibit C-167**, Transcript of TeleAntioquia Interview with Claudia Carrasquilla, 6 August 2018. *See also supra* ¶ 305.

841 *See supra* section III.E-F.

842 *See supra* ¶¶ 96, 162.

843 *See supra* ¶¶ 139, 183.

844 Martínez Expert Report, ¶ 28.

435. What is more, the prosecutors who instigated the case appear to have had corrupt motives as their conduct raises a litany of red flags.[845] Indeed, those corrupt motives are the only explanation for why the Asset Forfeiture Proceedings were pursued on such flimsy grounds in the first place. Yet Colombia persisted with those precautionary measures, and with the Asset Forfeiture proceeding, even after Mr. Seda made a formal complaint regarding Mr. López Vanegas' attempts to extort him and the claims of his representatives to be able to influence Ms. Malagón and Ms. Ardila.[846]

436. Colombia's commencement of Asset Forfeiture Proceedings without any evidence was arbitrary and unreasonable.[847] Doing so as part of an extortion scheme is an independent (and even more egregious) wrong.[848] Indeed, the corruption giving rise to the Proceedings breaches all the core protections of the FET standard: it renders the conduct arbitrary, unreasonable, discriminatory and in violation of due process.

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845 *See supra* section III.I.

846 *See supra* section III.E.8.

847 *See, e.g.*, **Exhibit CL-094**, *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v. The Republic of Kazakhstan*, SCC Case No. V116/2010, Award, 19 December 2013, ¶ 1093 (finding a breach of FET where Kazakhstan commenced a criminal investigation against the claimants where "*the evidence indicate*[d] *that the charge* [. . .] *did not comply with Kazakh law*"); **Exhibit CL-116**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/21/1, Decision on Jurisdiction and Liability, 10 November 2017, ¶¶ 1366, 1372 (finding Pakistan's refusal of a mining license to be "*arbitrary, unreasonable and discriminatory"* where the "*measures were motivated by the desire to implement its own project – without having a justified ground for denying the Mining Lease Application*."). *See also* **Exhibit CL-095**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013a, ¶ 458 ("[W]*illful disregard of the fundamental principles upon which the regulatory framework is based, a complete lack of candor or good faith on the part of the regulator in its dealings with the investor, as well as a total lack of reasoning, would constitute a breach of the minimum standard*."); **Exhibit CL-076**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶ 9.3.40 ("[W]*hen a state's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety) – to use the words of the* Tecmed *Tribunal* – [then] *the standard can be said to have been infringed*.").

848 *See* **Exhibit CL-098**, *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, ¶ 577 ("*The need for strong, independent and impartial prosecutorial authorities for the effective maintenance of the rule of law and human rights standards cannot be sufficiently emphasized*.").

437. Colombia's conduct also lacks transparency, as would be expected from a corrupt enterprise. For example, when she imposed precautionary measures on the Meritage Project, Prosecutor No. 44, Ms. Ardila, without any apparent reason, refused to provide even a copy of the Precautionary Measures Resolution to Newport or Corficolombiana.[849] There is no reasonable explanation for such conduct if the State had a legitimate basis for pursuing such measures. Based on the facts to date,[850] inferences may be drawn that the only reasonable explanation for such arbitrary and opaque conduct is to cover up a corrupt scheme against Mr. Seda and the Meritage Claimants.

b. Colombia Launched Asset Forfeiture Proceedings Against Meritage But Not Other López Vanegas Properties

438. As explained above, Colombia justified its seizure of the Meritage Project first on the basis of Mr. López Vanegas's fabricated story about the kidnapping of his son by members of a drug

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849 *See supra* section III.E.4.

850 *See supra* section III.I, *citing*, *inter alia*, **Exhibit C-250**, Response by National Prosecutor's Office to *Derecho de Petición* by Angel Seda, 5 May 2020; **Exhibit C-280**, Derecho de Petición to Attorney General's Office re Criminal Proceedings Involving López, Mosquera, and Valderrama, 17 May 2020 **Exhibit C-258**, Attorney General's Response to Derecho de Petición re Criminal Proceedings against López, Valderrama, and Mosquera, 29 May 2020; **Exhibit C-295,** Laura Palomino, WRadio *Attorney General Investigates Possible Irregularities in the Meritage Case*, 25 February 2020, https://www.wradio.com.co/noticias/actualidad/fiscalia-investiga-posibles-irregularidades-en-caso-meritage/20190225/nota/3868593.aspx; **Exhibit C-245**, *Las 'narcolimosnas' que recibió fiscal que ahora es testigo protegida*, El Tiempo, 1 March 2020, https://www.eltiempo.com/unidad-investigativa/la-exfiscal-hilda-nino-declarara-contra-fiscales-activos-y-exmagistrado-467748; **Exhibit C-246**, *Former prosecutor Hilda Niño points to former prosecutor Andrea Malagón*" W Radio, 2 March 2020; **Exhibit C-248**, *Exfiscal Niño empezó a hablar de corrupción en las entrañas del búnker*, El Tiempo, 9 March 2020, https://www.eltiempo.com/unidad-investigativa/exfiscal-nino-empezo-a-hablar-de-corrupcion-en-las-entranas-del-bunker-470434; **Exhibit C-229**, Catalina Vargas Vergara, *¿Un cartel para recuperar bienes incautados al interior de la Fiscalía?*, el espectador, 15 February 2019, https://www.elespectador.com/noticias/judicial/un-cartel-para-recuperar-bienes-incautados-al-interior-de-la-fiscalia/; **Exhibit C-167**, Transcript of TeleAntioquia Interview with Claudia Carrasquilla, 6 August 2018; **Exhibit C- 221**, Sylvia Charry, *Investigation of former director of extinction of domain in the Prosecutor's Office in the Supercundi case*, Blu Radio, 25 September 2018, https://www.bluradio.com/nacion/investigan-exdirectora-de-extincion-de-dominio-de-fiscalia-por-caso-supercundi-191650-ie430.

cartel, and then by alleging that Mr. López Vanegas himself was a drug trafficker. Under Colombia's rationale, any property associated with Mr. López Vanegas should be subject to asset forfeiture proceedings. Yet the only such asset Colombia has seized is the Meritage Project, which happens to have been the site for a highly lucrative real estate development, and whose owner and developer, Mr. Seda, was extorted repeatedly by Mr. López Vanegas and his representatives.

439. Yet, Colombia has refrained from seizing the lot from the same parent property as the Meritage Project, which Mr. López Vanegas allegedly owned and which his son was allegedly forced to sign over to the drug cartel that allegedly kidnapped him.[851] This plot is currently owned by the family of Mr. López Vanegas's half-brother, a Colombian citizen, and another Colombian entity.[852] Colombia has not (and cannot) provide any credible basis for this decision. Colombia's conduct is blatantly discriminatory and violates its obligations under the TPA to act fairly and equitably.[853]

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[851] *See supra* section III.K; Appendix F.

[852] 53 percent of the remaining holding belongs to Entrelagos-Orozco Vanegas S.A.S., the entity controlled by Jaime Orozco Vanegas, the brother of Mr. López Vanegas with whom he originally purchased the land; Mr. Orozco Vanegas's widow, Lina Beatriz Echeverry and their daughter María Camila Orozco are the representatives of this entity. *See* **Exhibit C-212**, Certificate of Existence for Entrelagos-Orozco Vanegas S.A.S. Maria Camila Orozco personally holds a 9 percent interest. *See* **Exhibit C-254**, Certificate of Transfer of Title, p.4. An entity named Inversiones Castro Vasco Cia holds the remaining 38 percent. *See* **Exhibit C-286**, Certificate of Existence for Inversiones Castro Vasco Cia p. 3 (showing its members and legal representatives have Colombian identification numbers).

[853] *See* **Exhibit CL-126**, *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, ¶ 886 (finding that discrimination exists where "*objectively, two similar situations are not treated similarly.*"). *See also* **Exhibit CL-045**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 146 ("[i]*n the context of investment treaties, and the obligation there under not to discriminate against foreign investors, a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has discriminatory effect.*"); **Exhibit CL-048**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 321 ("*intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment.*").

c. Colombia's Shifting Rationale For Asset Forfeiture and Failure to Recognize Newport as an Affected Third Party Demonstrate a Lack of Transparency

440. Colombia tried as long as it could to keep up the charade that the precautionary measures were necessary to address property title issues caused by the alleged kidnapping. But eventually, following Mr. Seda's repeated outreach to U.S. and Colombian authorities documenting the numerous extortion attempts by Mr. López Vanegas and his representatives, the FBI legal attaché's letter to the National Police of Colombia, an in-person meeting between Mr. Seda and the Anti-Corruption Unit at the Attorney General's Office to discuss the involvement of its prosecutors with Mr. López Vanegas to extort Mr. Seda, Colombia finally gave up on the farce.[854]

441. Lacking any evidence whatsoever to support Mr. López Vanegas's allegations, the Asset Forfeiture Unit was forced to shift the bases for the Asset Forfeiture Proceedings, finding instead in its Determination of the Claim that it was Mr. López Vanegas's background as a drug trafficker that must now compel the Project to seizure and attachment.[855] While a moving target is hard enough to shoot, the court's determination not to recognize Newport as an affected third party, so that it could appear and defend its good faith, compounded the problems.

[854] *See supra* sections III.6, 8.

[855] *See supra* ¶ 233.

d. Colombia Has Precluded Newport From Defending Itself In The Proceedings

442. As set out above in section V.A.3.b, Colombia breached due process obligations under both international and domestic law by ignoring Newport's petitions. Moreover, the Colombian court has since prevented Newport's participation in proceedings, denying it the ability to plead its good faith conduct in acquiring its interest in the Project. The Court instead found that Newport, which is the beneficial owner, developer and operator of the Meritage Project that has been seized by Colombia, was somehow not affected by the Proceedings.[856] The Court's conclusion conflicts with common sense. It also plainly conflicts with the definition of "*affected*" parties under the Asset Forfeiture Law.[857] Indeed, the Court arrives at this absurd decision by making conclusory accusations regarding Newport's option to purchase the Meritage Property from La Palma, yet failing entirely to assess the specific provisions of the trust agreements and Deed 361, which plainly set out Newport's interest in the Meritage Property and Project.[858]

443. Colombia's conduct has denied Newport critical due process rights, including the right to be heard. The State's measures clearly impacted Newport's rights in the Meritage Project. And, as Drs. Medellín and Martínez have explained, Newport should have had the opportunity to be heard with respect to its good faith status.

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856 *See supra* section III.F.5.

857 *See supra* ¶¶ 264-268; Medellín Expert Report, ¶¶ 57-58.

858 *See supra* ¶¶ 272-275.

444. As noted by the *Glencore v. Colombia* tribunal, for "*due process* [to] *be respected: the adjudicator, be it a judge, tribunal member, or administrative authority, must give each party a fair opportunity to present its case and to marshal appropriate evidence, and then must assess the submissions and the evidence in a reasoned, even-handed, and unbiased decision*."[859] The tribunal in *ECE Projektmanagement v. The Czech Republic* further opined that "*a failure to accord due process in administrative or judicial proceedings may, if unremedied and of sufficient seriousness, result in a violation of the fair and equitable treatment standard*."[860] By repeatedly excluding Newport from participating in the Asset Forfeiture Proceedings and refusing to assess evidence of Newport's good faith status in acquiring its rights to develop the Meritage Project, Colombia breached its obligation to accord Newport due process.

e. Colombia Failed To Respect And Protect Newport's Interests As A Good Faith Third Party

445. In instituting the Asset Forfeiture Proceedings against Meritage, Colombia failed to apply fundamental safeguards that it was required to uphold under its own Asset Forfeiture Law. In particular, as discussed above, Colombia failed to respect the rights of good faith third parties that would plainly be impacted by these proceedings. In so doing, it acted arbitrarily, unreasonably and in violation of the Meritage Claimants' legitimate expectations and due process rights.

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[859] **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019, ¶ 1318 (emphasis added).

[860] **Exhibit CL-090**, *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co. v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, ¶ 4.805.

446. Colombia's Asset Forfeiture Law expressly and repeatedly upholds as essential the protection of the rights of third parties acting in good faith without fault in asset forfeiture proceedings.[861] The Attorney General's Office must "*safeguard*" these interests in its determination on whether to impose precautionary measures. Moreover, it has an affirmative obligation to "*search for and collect proof* " to ensure that no good faith third parties are affected by asset forfeiture proceedings.[862] Should the Attorney General's Office find any such evidence of good faith, it must cease the forfeiture proceedings and find other ways to disgorge proceeds from illicit activities from the wrongdoer.[863]

447. That there were good faith third parties whose rights would be affected here was evident. None of the Attorney General's Office's allegations regarding the fraudulent transfer of the Meritage Property or its predecessors touched Newport—indeed, the impugned transfers occurred almost a decade before Newport began to enter agreements to acquire the land to build the Meritage Project.[864] And, as part of the diligence conducted by Newport and Corficolombiana, the Colombian Government itself had cleared the property and all of the prior owners of involvement in any criminal proceeding going back 50 years.[865] Nonetheless, despite being under a legal obligation to do so, the Attorney General's Office imposed precautionary measures on the Meritage Project without any investigation whatsoever of the good faith status of affected parties, including Newport.[866] It then ignored multiple pleas and

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861 *See supra* ¶¶ 144-153; Martínez Expert Report, ¶ 28; Medellín Expert Report, ¶ 34.

862 **Exhibit C-003bis**, Law No. 1708, 20 January 2014, arts 87, 118(5).

863 Martínez Expert Report, ¶ 40.

864 *See* Appendix F.

865 *See supra* ¶ 72.

866 *See supra* ¶¶ 159-180.

efforts by Newport to adduce evidence of its good faith status.[867] When the Attorney General's Office was forced to respond to Newport's submissions in response to Newport's *tutela* action, it did not engage with any of Newport's substantive arguments or evidence of good faith, including the Attorney General's Office's own Certification of No Criminal Activity.[868]

448. Had the Attorney General's Office considered Newport's good faith status, the result would have been undeniable. Newport's conduct in acquiring and commencing development of the Meritage Project was undoubtedly in good faith and it thus merited the concomitant protections under Colombian law. Newport: (*i*) sought and engaged a highly reputable fiduciary Corficolombiana to act as trustee for the Project, (*ii*) engaged an experienced law firm recommended by Corficolombiana to conduct a title study of the Property, and (*iii*) together with Corficolombiana obtained from the Attorney General's Office confirmation that no prior title holder had been subject to criminal proceedings.[869] The only third party whose good faith status the Attorney General's Office ever considered was that of Corficolombiana. Even here, Colombia's actions were unreasonable and arbitrary. The Attorney General's Office incorrectly claimed that Corficolombiana did not act in good faith because its due diligence was insufficient. In particular, according to the Attorney General's Office, Corficolombiana should have applied SARLAFT diligence against all the prior titleholders of the Meritage Property and its predecessors.[870] This standard is not only unworkable and impractical, it is

[867] *See e.g., supra* ¶¶ 218-219, 242-246.

[868] *See supra* ¶¶ 242-246.

[869] *See supra* ¶¶ 62, 66, 69-72.

[870] *See supra* ¶ 236.

contradicted by the plain language of Article 102 of Decree 663 of 1993, which requires financial entities to conduct SARLAFT diligence only in relation to their clients.[871]

449. In any event, as explained above, even if Corficolombiana had investigated each and every prior titleholder of the Property and its predecessors, the fiduciary would not have identified Mr. López Vanegas as part of its diligence as his name did not appear on the Property's chain of title, which he never owned directly. This was because—to hide his interest in the Property likely in connection with his extradition to and indictment in the U.S.—in 2003, Mr. López Vanegas changed the name of the company that owned the property (from Sierralta López to Inversiones Nueve), removed himself as legal representative, and made his son, Mr. López Betancur, the legal representative.[872] As a result, when, in 2013, Corficolombiana pulled then-current records for the company (Inversiones Nueve), it did not find Mr. López Vanegas's name, but only that of his son, Mr. López Betancur.[873] The only reason Mr. López Vanegas's interests in the property came to light was because he filed a complaint with the Attorney General's Office after diligence was complete and the relevant agreements executed. And, as noted, prior to Mr. López Vanegas's complaint, the Attorney General's Office itself twice certified that the prior title holders of the Property, and legal representatives of entities that held the property, including Mr. López Betancur, had no records of criminal activity.[874]

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871 **Exhibit C-072**, Decree 663 of 1993, art. 102. *See also supra* ¶¶ 231, 237-240.

872 *See supra* ¶ 328.

873 *See supra* ¶ 234.

874 *See supra* ¶ 60, 72.

450. Unsurprisingly, other large national banks that Newport had approached for financing the Meritage Project also found no criminal activity tied to the land.[875] This in itself confirms the adequacy and reasonableness of Corficolombiana's due diligence and thus its good faith status.[876]

451. Colombia's failure to assess Newport's good faith status, and its failure to recognize Corficolombiana's good faith status, is arbitrary and unreasonable. So are its invented due diligence requirements that have no basis in Colombian law, and that are moreover unattainable and impracticable.[877]

452. Colombia's *post hoc* imposition of a legally unsupported standard and failure to recognize and implement its own law requiring the protection of the rights of good faith third parties such as Newport also violates the Meritage Claimants' due process rights under the FET standard.[878]

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875 *See supra* ¶¶ 126, 129, 241.

876 *See supra* ¶ 241; Medellín Expert Report, ¶ 15.

877 *See* **Exhibit CL-068**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, ¶ 293 (finding that "*arbitrariness may lead to a violation of a State's* [FET obligations . . . when] *application of administrative or legal policy or procedure* [moves] *to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive. "*); **Exhibit CL-084**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶ 227 (finding an FET violation where the President of Guatemala exercised his "*discretion and used it with the approval of his Government for a purpose different from that for which it was justified*"); **Exhibit CL-079**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, ¶¶ 331-32 (finding an FET breach where a series of resolutions issued by a regulator were in opposition to an existing law, emphasizing that "[t]*his finding of unfairness is reinforced by the fact that the complete overhaul of the electricity regime established by the Electricity Law which remained on the books, was effected through acts of administrative authorities*").

878 *See* **Exhibit CL-021**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 91-94 (finding a violation of FET where a municipality did not act with procedural propriety); **Exhibit CL-032**, *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. Arb (AF)/00/2, Award, 29 May 2003, ¶¶ 162, 166 (finding a violation of FET where a government agency failed to notify the claimant of its intention to refuse renewal of a permit); **Exhibit CL-029**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶ 143 (finding a violation of FET where there was a procedural failure to give notice and an attachment order was executed by police without directly notifying the owner of the property).

Similarly, the tribunal in *Karkey v. Pakistan*, found that a decision of the Supreme Court of Pakistan was "*arbitrary, and therefore has no effect in international law*."[879] It explained:

> "[T]*here is no need that such deficiencies* [in the domestic court's judgment] *amount to a denial of justice which* [. . . are] *only one of the possible breaches of international law to be taken into consideration. Deficiencies relating to the substance of the Judgment, in certain circumstances, may amount to a breach of international law. In particular, an international tribunal may decide not to defer to an arbitrary judicial decision which is, as such, incompatible with international law*."[880]

453. Additionally, the Meritage Claimants relied on Colombia's Certification of No Criminal Activity to invest in the Meritage Project.[881] The letter expressly stated its intent: Corficolombiana was seeking information from the Attorney General's Office "*to adopt preventive measures in the area of Money Laundering and Asset Forfeiture* [. . .] *with the sole purpose of fulfilling essential preventive measures, taking care not to be used in an operation for Money Laundering or for Financing Terrorism"* and to "*apply the highest international preventive standards when purchasing real property*."[882] There was accordingly no doubt as to the purpose of the request. And indeed, it was only after Newport and Corficolombiana received this letter from the Attorney General's Office that the entities began entering a series

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879 **Exhibit CL-114**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶¶ 550, 561.

880 **Exhibit CL-114**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶ 550.

881 *See supra* ¶ 72.

882 **Exhibit C-031bis**, Petition for Information from Fiduciaria Corficolombiana to Attorney General Office of Asset Forfeiture and Anti-Asset Laundering, 22 August 2013, p. SP-0001 (emphases added).

of trust agreements that would govern the development of the Meritage Project.[883] Thus, the Meritage Claimants legitimately relied on the letter to commence the Meritage Project.

454. Similarly, in *Crystallex v. Venezuela*, the tribunal held that Venezuela created a legitimate expectation that an environmental study had been approved, and an authorization permit would be granted when it issued a letter that "*on its face* [was] *a positive representation made by* [Venezuela] *specifically to Crystallex in clear and precise terms*."[884] This letter, irrespective of whether it was "*the formal 'accreditation' of the project*,"[885] "*was susceptible of creating the type of legitimate expectation that, if later frustrated, is protected under the FET standard*."[886] Thus, by seizing the Project on the basis that it was linked to criminal conduct despite its confirmation that prior title holders had no criminal cases or proceedings, Colombia pedaled back on its express representations, breaching the Meritage Claimants' legitimate expectations.

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883 *See supra* section III.B.5. Corficolombiana and Newport entered into the Administration and Payment, and Presales Trusts on 17 October 2013. *See* **Exhibit C-028**, Presales Trust Agreement, 17 October 2013; **Exhibit C-034bis**, Presales Trust Agreement, 17 October 2013.

884 **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 563.

885 **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 563.

886 **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 563. *See also* **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 575 (finding that Venezuela frustrated the specific representation made to the claimant in the letter).

f. Colombia's Treatment Of Meritage Adversely Affected Claimants' Investments In Other Projects In Breach Of The FET Standard

455. Colombia's sustained and systematic assault on Mr. Seda's investments has effectively eliminated the possibility of the development of the other projects in Mr. Seda's portfolio.

456. Mr. Seda is now mired in prolonged legal proceedings with no end in sight that wrongfully tainted him and the Meritage Project with illegality even though he acted with utmost good faith and conducted due diligence that far exceeded requirements under Colombian law.[887] The Asset Forfeiture Proceedings have thus not only ceased the development of the Meritage Project, but all other projects associated with Mr. Seda. This includes Luxé, where construction has been stalled since the unlawful expropriation of the Meritage Project as the main bank funding the development of Luxé immediately stopped disbursing funds for that project.[888] The Luxé Claimants have thus also lost the value of their investment in that project. Similarly, other projects in Mr. Seda's pipeline, including Tierra Bomba, 450 Heights and Santa Fé, as well as other projects that Mr. Seda (through Royal Realty) had begun to develop and operate, have all come to a halt.[889]

457. In *Rompetrol v. Romania*, the tribunal held that:

> "[I]*t is part of the legitimate expectations of a protected investor* [. . .] *that, if its interests find themselves caught up in the criminal process either directly or indirectly, means will be sought by the authorities of the host State to avoid any unnecessarily adverse*

887 *See* Medellín Expert Report, ¶ 15.

888 López Montoya Witness Statement, ¶¶ 44-48.

889 *See supra* section III.J.2.

> *effect on those interests or at least to minimise or mitigate the adverse effects.*"[890]

458. The *Rompetrol* tribunal considered that criminal investigations initiated against company principals by Romanian authorities were tainted by "*procedural irregularities*," and "*from a certain point*" Romanian authorities must have known that the interests of the claimant's locally incorporated subsidiary "*stood directly or indirectly in the line of fire*."[891] Romania therefore breached its FET obligation to the claimant as no "*steps were taken either to assess or to avoid, minimise, or mitigate that possibility of harm*."[892] Other tribunals have similarly recognized that by launching proceedings that "*inflict*[] *damage on the investor without serving any apparent legitimate purpose*,"[893] the State has acted arbitrarily and in breach of its FET obligations.[894]

459. Likewise, Colombia was aware that Mr. Seda's investments in Colombia extended well beyond the Meritage Project to include the nearly complete Luxé as well as the other projects in Mr. Seda's pipeline. Colombia must have known that Luxé and the other projects "*stood*

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[890] **Exhibit CL-089**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 278.

[891] **Exhibit CL-089**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 279.

[892] **Exhibit CL-089**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 279.

[893] **Exhibit CL-070**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303.

[894] *See* **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 578 ("*a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker*."); **Exhibit CL-072**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 262-63 (quoting Professor Schreuer's description in *EDF* and explaining "[s]*umming up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law*.").

directly or indirectly in the line of fire"[895] but Colombia did not take any steps to minimize or mitigate the possibility of harm. Rather, for no good reason, the Government continued to ignore Newport's legitimate interest in the Meritage Project. Not knowing the basis for the Government's actions, Mr. Seda's co-investors and lenders understandably worried that Mr. Seda's other projects would suffer the same fate as Meritage.[896]

C. Colombia Breached Its Obligation To Accord National Treatment To The Meritage Claimants And The Meritage Claimants' Investment

1. The National Treatment Standard

460. *Article 10.3 of the TPA contains a National Treatment protection, providing:*

> *1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*
>
> *2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
>
> *3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.*

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[895] **CL-089**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶ 279.

[896] *See supra* section III.J.2.

461. To establish a breach of the national treatment standard, a foreign investor needs only to present a *prima facie* case that it "*has been treated in a different and less favorable manner*" than domestic investors in like circumstances.[897]

462. An assessment of whether investors are "*in like circumstances*" is fact-specific. Typically, investors are considered to be "*in like circumstances*" if they are competing entities "*in the same business or economic sector*."[898]

463. An assessment of whether a protected investor received treatment "*less favorable*" than that of a national investor depends on: (*i*) whether the measure on its face appears to favor the host State's nationals over non-nationals; or (*ii*) whether the practical effect of the measure creates a disproportionate benefit for nationals over non-nationals.[899] Discriminatory intent may be relevant to finding a breach of national treatment obligations, but is not a necessary precondition.[900]

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[897] **Exhibit CL-031**, *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 177.

[898] **Exhibit CL-026**, *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, ¶ 78 ("[T]*he Tribunal believes that, as a first step, the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector*."). *See also* **Exhibit CL-023**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 250 ("*The concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favourable treatment is in the same 'sector' as the national investor. The Tribunal takes the view that the word "sector" has a wide connotation that includes the concepts of 'economic sector' and 'business sector'*."); **Exhibit CL-055**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶ 198 (citing *S.D. Myers* and *Pope & Talbot* affirmatively).

[899] **Exhibit CL-023**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 252.

[900] *See* **Exhibit CL-023**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 254; **Exhibit CL-100**, *William Ralph Clayton, Bilcon of Delaware, Inc., et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 719 ("*It should be noted that the* UPS *test does not require a demonstration of discriminatory intent*."); **Exhibit CL-036**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶¶

464. Once an investor presents *prima facie* evidence of discriminatory treatment, the burden of proof shifts to the host State to prove that the apparent discriminatory treatment is justified by a "*reasonable nexus to rational government policies.*"[901] In particular, States are prohibited from pursuing a legitimate policy goal in a manner that results in disparate treatment where there are alternatives that would have avoided that treatment.[902]

2. Colombia Treated The Meritage Claimants And The Meritage Claimants' Investment Less Favorably Than National Investors

465. As set out in Sections V.A.3.c and V.B.2 above, the Meritage Project was singled out for seizure under Asset Forfeiture Proceedings while other properties involving Mr. López Vanegas in the chain of title were not. In fact, Colombia has taken no action against the other parcel of land—which now belongs to Mr. López Vanegas's Colombian half-brother—that stemmed from the very same parent property as Meritage and is subject to the very same alleged defects in the chain of title alleged against the Meritage Property.[903] Mr. López Vanegas's half-brother and others who currently own land previously associated with Mr. López Vanegas are undoubtedly in "*like circumstances*" with the Meritage Claimants given

177-79; **Exhibit CL-055**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶ 209.

901 **Exhibit CL-026**, *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, ¶ 78. *See also* **Exhibit CL-100**, *William Ralph Clayton, Bilcon of Delaware, Inc., et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 722-24; **Exhibit CL-023**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 250 ("*The assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest*."); **Exhibit CL-058**, *Corn Products International, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, ¶ 142 (observing that "[d]*iscrimination does not cease to be discrimination, nor to attract the international liability stemming therefrom, because it is undertaken to achieve a laudable goal or because the achievement of that goal can be described as necessary*.").

902 *See* **Exhibit CL-023**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 255.

903 *See supra* section III.K and Appendix F.

that the Colombian Government's latest rationale to seize the Meritage Claimant's interest in the Project is Mr. López Vanegas's purported appearance in records associated with an entity in the chain of title for the property on which the Project is being developed. Colombia has therefore failed to accord to the Meritage Claimants treatment "*no less favorable*" than to Colombian nationals. There can be no clearer breach of the TPA than this.

D. Colombia Breached Its Obligation To Accord Claimants' Investment Full Protection And Security

1. The FPS Standard

466. Article 10.5 requires Colombia to provide "*full protection and security*" to Claimants' investments.[904] Article 10.5.2(b) defines the content of this obligation "*to provide the level of police protection required under customary international law*."[905]

467. The full protection and security ("**FPS**") standard owed to Claimants' investments additionally requires the host State's guarantee to provide a legally stable and secure investment environment.[906] To satisfy this standard, the host State is required to exercise:

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904 **Exhibit C-007**, TPA art. 10.5.

905 **Exhibit C-007**, TPA art. 10.5.2(b).

906 Claimants also note that pursuant to Article 10.4 of the TPA, Claimants are entitled to "*treatment no less favorable than*" what Colombia accords to "*investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory*." Claimants are therefore entitled to the substantive protection granted to investors under other Colombian investment treaties. This includes, for example, the substantive protection granted to investors pursuant to Article 2(3) of the *Agreement between the Kingdom of Spain and the Republic of Colombia for the reciprocal promotion and protection of investments* ("**Colombia-Spain BIT**"), which provides that: "*Investments made by investors of one Contracting Party in the territory of the other Contracting Party shall receive fair and equitable treatment and shall enjoy full protection and security, in no way hindering, through arbitrary or discriminatory measures, the management, maintenance, the use, enjoyment, and sale or liquidation of such investments*." *See* **Exhibit CL-053**, Agreement between the Kingdom of Spain and the Republic of Colombia for the reciprocal promotion and protection of investments, entry into force 22 September 2007, art. 2(3) (emphasis added).

(*i*) "*vigilance*" which requires the host State to "*take all measures necessary to ensure the full enjoyment and protection and security of* [the investor's] *investment*";[907] and (*ii*) due diligence which requires the host State to take reasonable, precautionary and preventive action against harm to the protected investment.[908] While the standard is not one of strict or absolute liability, the host State must take all reasonable measures to protect foreign investments against harm from both the actions of the host State and its representatives and the actions of third parties.

468. As explained by Professor Christoph Schreuer, the content of the FET standard and the FPS standard differ; on the one hand, "[t]*he FET standard consists mainly of an obligation on the host State's part to desist from behaviour that is unfair and inequitable*."[909] On the other hand:

> "[B]*y assuming the obligation of full protection and security the host State promises to provide a factual and legal framework that grants security and to take the measures necessary to protect the investment against adverse action by private persons as well as State organs. In particular, this requires the creation of legal remedies against adverse action affecting the investment and the creation of mechanisms for the effective vindication of investors' rights.*"[910]

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907 **Exhibit CL-018**, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, ¶ 6.05.

908 *See* **Exhibit CL-014**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 85(b) (finding breach of FPS and violation of the due diligence obligation through "*failure to resort to* [. . .] *precautionary measures*" and "*inaction and omission*").

909 **Exhibit CL-071**, Christoph Schreuer, *Full Protection and Security*, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2010), p. 14.

910 **Exhibit CL-071**, Christoph Schreuer, *Full Protection and Security*, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2010), p. 14.

2. Colombia's Actions Breached The FPS Standard

469. Colombia has failed to fulfil its obligation to protect Claimants and their investments in Colombia. The Meritage Claimants' investment has been subject to a corrupt extortion racket perpetrated by officials from the Attorney General's Office (in collusion with Mr. López Vanegas) for two years.[911] Mr. López Vanegas and his representatives repeatedly harassed Mr. Seda, threatening to compel the Government to launch (as they eventually did) asset forfeiture proceedings against the Meritage Project if he did not pay them, and making good on their promise when he refused.[912]

470. Once Colombia acknowledged that Mr. López Vanegas's story was a hoax, it was under an obligation to lift the precautionary measures on the Meritage Project. The Colombian State was also under an obligation to identify and protect good faith third parties such as Newport.[913] Colombia failed to do either. Accordingly, the Colombian Government fundamentally failed to protect Claimants' investment against the actions of its own State organs as it was required to do under both international and domestic law.

471. The Government also failed to protect Claimants' investments from the (unlawful) actions of third parties despite express requests for assistance. Mr. Seda sought the assistance of Colombian law enforcement in December 2016, filing an official complaint against Mr. López Vanegas with the Attorney General's Office at the request of the Anti-Corruption Unit.[914] This

911 *See supra* sections III.D and III.I.

912 *See supra* section III.D.

913 *See supra* section III.E.1.b.

914 *See supra* ¶ 221.

was ultimately futile as Colombian authorities appear to have dismissed the complaint just a month later and took no steps to protect Mr. Seda's and the Claimants' investments.[915]

472. Tribunals have repeatedly held that the failure of a host State to act in circumstances similar to these is a breach of the FPS obligation.[916] It is irrelevant whether the host State "*instigate*[s] *or participate*[s]" in creating the insecurity if, once made aware of the insecurity, it takes no actions to protect covered investors.[917] An FPS violation will arise where a host state does not "*take active measures to protect the investment from adverse effects that stem from private parties or from the host state and its organs*."[918] For example, the tribunal in *Von Pezold v. Zimbabwe* held that "*non-responsiveness of police to various violent incidents that occurred*"[919] was a breach of the FPS obligation.

473. In the interim, in the face of Colombia's inaction, the degree and intensity of threats against Mr. Seda continued to increase. In September 2017, Mr. Seda narrowly survived an

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915 *See supra* ¶ 223.

916 *See* **Exhibit CL-066**, *Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶¶ 445-48 (finding a breach of FPS where claimants made multiple requests to Egyptian police for protection from expropriatory executive resolutions and decrees); **Exhibit CL-018**, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, ¶¶ 6.02-6.11 (finding a breach of FPS where the investment was looted by elements of the army); **Exhibit CL-014**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶¶ 78-86 (finding a breach of FPS where Sri Lankan security forces destroyed a covered investment in counter insurgency operation); **Exhibit CL-121**, *Cengiz Insaat Sanayi Ve Ticaret A.S. v. The State of Libya*, ICA Case No. 21537/ZF/AYZ, Final Award, 7 November 2018, ¶¶ 437-42 (finding a breach of FPS where Libya failed to provide protection to covered investments in a time of heightened security deficit, and the investments were looted and destroyed by "*private mobs*").

917 **Exhibit CL-024**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶¶ 85-88.

918 **Exhibit CL-078**, *Frontier Petroleum Services Ltd.v. The Czech Republic*, Final Award, 12 November 2010, ¶ 261.

919 **Exhibit CL-102**, *Bernhard Friedrich Arnd Rüdiger von Pezold, et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 597.

assassination attempt after two gunmen on a motorcycle shot multiple rounds at his car.[920] Mr. Seda filed a police report immediately after the attack.[921] Yet again, to date, no steps have been taken to identify the individuals responsible.[922] Instead, counterproductively, Colombia obstructed Mr. Seda from taking steps to protect himself, denying him a permit for protecting his car—a relatively routine request in Colombia.[923]

474. Mr. Seda's daughter and her mother were also targeted by unknown individuals.[924] Mr. Seda fled the country with his family for a year and a half as a result of these events.[925]

475. Colombia's systematic and sustained inaction amounts to an absolute failure to protect Mr. Seda and Claimants' investments, and is a breach of Colombia's FPS obligation.

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[920] *See supra* ¶ 320.

[921] *See supra* ¶ 320; **Exhibit C-202**, Angel Seda Statement attached to Request for Police Protection, 26 September 2017.

[922] Seda Witness Statement, ¶ 138.

[923] *See supra* ¶ 320; Seda Witness Statement, ¶ 141.

[924] *See supra* ¶ 320; Seda Witness Statement, ¶ 139.

[925] Seda Witness Statement, ¶ 140.

VI. CLAIMANTS ARE ENTITLED TO FULL REPARATION

A. Applicable Legal Standard

476. Article 10.26.1 empowers the Tribunal to "*make a final award against*" Colombia, in which it may award "*monetary damages and any applicable interest*", including "*in lieu of restitution.*"[926] Section V above establishes Colombia's violations of Articles 10.3, 10.5 and 10.7 of the TPA. As a result of these breaches, Claimants are entitled to reparation in accordance with the applicable principles of international law.

477. The TPA does not contemplate the applicable measure of damages in the event of an unlawful expropriation (as is the case here). Similarly, the TPA is silent on the measure of damages applicable for the State's breaches of Articles 10.3 (National Treatment) and 10.5 (FET).

478. Accordingly, one must turn to the applicable principles of international law to determine the appropriate remedy for violations of international law.[927] In the *Case Concerning the Factory at Chorzów*, the Permanent Court of International Justice articulated the basic purpose and principle of reparation under international law as follows:

> "*The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which*

[926] **Exhibit CL-001**, TPA art. 10.26(1)(a) and (b) ("*1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution. A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.*").

[927] *See* **Exhibit CL-001**, TPA art. 10.22(1) ("[T]*he tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*").

> *would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."*[928]

479. The authoritative standard set out in *Chorzów*[929] has since been codified in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("**ILC Articles on State Responsibility**").[930] Specifically, Article 31(1) of the Articles on

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[928] **Exhibit CL-006**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, 13 September 1928, 1928 P.C.I.J. (Ser. A) No. 17, p. 47 (emphases added).

[929] *See* **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 847-48 (describing *Chorzów* as "[a]*n authoritative description of the principle of full reparation*"); **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶¶ 484-95 (review decisions of international courts and tribunals to find that the principle set forth in *Chorzów* is the governing standard); **Exhibit CL-0052**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶¶ 8.2.4-8.2.5 (quoting *Chorzów* and observing that "[t]*here can be no doubt about the vitality of this statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ's successor, the International Court of Justice*"); **Exhibit CL-125**, *Glencore International A.G. and C.I. Prodeco, S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 7 August 2019, ¶¶ 1566-67 (noting that "[t]*he legal standard which the Tribunal must apply is not disputed by the Parties: it is the principle of full reparation of the injury caused, firmly established in jurisprudence since the PCIJ's seminal* Chorzów Factory *decision*."); **Exhibit CL-096**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, Final Award, 18 July 2014, ¶¶ 1587-88, 1593 (quoting *Chorzów* and recognizing it as amongst "*accepted principles of international law*"); **Exhibit CL-122**, *Foresight Luxembourg Solar 1 S.A.R.L., et al. v. The Kingdom of Spain*, SCC Arbitration V 2015/150, Final Award, 14 November 2018, ¶¶ 434-36 (noting that "*the principle of full reparation is generally accepted in international investment law*"); **Exhibit CL-123**, *CEF Energia B.V. v. The Italian Republic*, SCC Arbitration V 2015/158, Award, 16 January 2019, ¶ 275 (refusing to adopt a valuation approach that "*would be inconsistent with the even longer-established* Chorzow Factory *principle*."); **Exhibit CL-037**, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, (2004) I.C.J. REPORTS 136, 198, ¶ 152; **Exhibit CL-008**, *Texaco Overseas Petroleum Company (TOPCO) and California Asiatic Oil Company (CALASIATIC) v. The Government of the Libyan Arab Republic*, Award on the Merits, 19 January 1977, 17 I.L.M. 1, 32, ¶ 97.

[930] **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 31. *See also* **Exhibit CL-102**, *Bernhard Friedrich Arnd Rüdiger von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶¶ 682-84; **Exhibit CL-103**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶¶ 327-28; **Exhibit CL-048**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 350-52; **Exhibit CL-097**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶¶ 678-79; **Exhibit CL-027**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶¶ 617-18; **Exhibit CL-107**, *Murphy Exploration & Production Company –*

State Responsibility provides that "[t]*he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act*."[931]

480. The Articles on State Responsibility identify three forms of reparation: restitution, compensation, and satisfaction.[932] Restitution is the primary remedy, which requires the State "*to re-establish the situation which existed before the wrongful act was committed*."[933] However, where restitution is materially impossible, Article 36 explains that "[t]*he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution*."[934] Compensation must "*cover any financially assessable damage including loss of profits insofar as it is established*."[935] As the *Vivendi II* tribunal noted:

> "[I]*t is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action*."[936]

International v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶ 424-25.

[931] **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 31(1).

[932] **Exhibit CL-025**, ILC INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 34.

[933] **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 35.

[934] **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 36(1).

[935] **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 36(2).

[936] **Exhibit CL-025**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 8.2.7 (emphasis added).

481. In other words, the "*full reparation*" standard under customary international law requires that Claimants be placed in the same economic position they would have been in had Colombia not committed the wrongful acts—i.e., the "*but-for*" scenario.[937] The Tribunal's task in valuing the damages owed to Claimants' investment as a result of Colombia's breaches is to consider the value of that investment in a but-for world, "*wip*[ing] *out all the consequences of the illegal act*."[938]

482. The starting point for assessing damages for unlawful conduct is often the fair market value ("**FMV**") of an investment immediately before the breach. The concept of FMV is well established in international law and regularly adopted in investment-treaty cases.[939] According to the World Bank, the FMV of an investment is:

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[937] *See* **Exhibit CL-113**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶ 358 ("*In the Tribunal's view, when quantifying the value of the expropriated assets, the Tribunal must proceed on the basis that Burlington is entitled to exercise all of the contractual rights it would have had but for the expropriation, and that Ecuador would have complied with its contractual obligations going forward. In other words, when building the counterfactual scenario in which the expropriation has not occurred, the Tribunal must assume that Burlington holds the rights that made up the expropriated assets and that those rights are respected*.").

[938] **Exhibit CL-006**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, 13 September 1928, 1928 P.C.I.J. (Ser. A) No. 17, p. 47.

[939] *See, e.g.*, **Exhibit CL-021**, *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 118; **Exhibit CL-032**, *Técnicas Medioambientales Tecmed S. A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 189; **Exhibit CL-054**, *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, ¶¶ 402-10; **Exhibit CL-039**, *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶ 409-10; **Exhibit CL-049**, *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶¶ 359-63; **Exhibit CL-048**, *Siemens A.G. v The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 353-54; **Exhibit CL-027**, *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 618; **Exhibit CL-085**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 707; **Exhibit CL-033**, *AIG Capital Partners, Inc. & CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, ¶ 12.1.1; **Exhibit CL-124**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 273-74; **Exhibit CL-111**, *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, ¶¶ 627-28.

> "[A]*n amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future* [. . .] *and other relevant factors pertinent to the specific circumstance of each case.*"[940]

483. Such a valuation must necessarily involve a willing buyer and willing seller; in other words, it must be voluntary. This means that the FMV of an investment must be unaffected by the State's interference. The TPA confirms this notion, providing the compensation must "*not reflect any change in value occurring because the intended expropriation had become known earlier*."[941] Thus, as BRG notes, "*an FMV valuation excludes forced sales or other sales that occur under situations of pressure, time constraints or lack of liquidity*."[942]

B. The Appropriate Date Of Valuation Is The Date Of The Meritage Project's Indefinite Seizure

484. The appropriate date of valuation for damages accruing to Claimants is 25 January 2017, which is the date on which Colombia's treaty breaches led to an irreversible and substantial deprivation of the value of Claimants' investments.

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[940] **Exhibit CL-128**, The World Bank Group. "*Legal Framework for the Treatment of Foreign Investment, Volume II: Guidelines*". *Foreign Investment Law Journal*. 1992, Chapter IV Expropriation and Unilateral Alterations of Termination of Contracts, ¶¶ 5-6. *See also* **Exhibit CL-057**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), Chapter 6, pp. 183-184 ("*Starting with awards of the Iran-US Claims Tribunal, the willing-buyer/willing-seller analytical framework has been used to determine the FMV of investments. Tribunals have used different definitions of FMV, but the common denominator has been that FMV represents a reasonable price that would normally be paid by a willing buyer to a willing seller of the asset*."); **Exhibit CL-039**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 402; **Exhibit CL-081**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 702; **Exhibit CL-105**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 851-52; **Exhibit CL-124**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 273-74; **Exhibit CL-111**, *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, ¶¶ 627-28.

[941] **Exhibit CL-001**, TPA art. 10.7(2)(c).

[942] BRG Expert Report, ¶ 84.

485. In cases of unlawful expropriation, such as here, claimants are entitled to choose between, on the one hand, a valuation as of the date of the State's unlawful expropriation and, on the other hand, a valuation as of the date of the tribunal's award.[943] This is because, where the State has unlawfully expropriated the investment, an investor should not bear the risk (but can, in appropriate cases, enjoy the benefits) of unanticipated events leading to a change in the value of the expropriated asset between the time of the expropriatory actions and the rendering of an award.[944] Indeed, the investor could always have sold its investment at any point in time prior to the date of the award and realized the full value of its investment on that date. This is consistent with the standard set out in *Chorzów*, reflected in the ILC Articles on State Responsibility.[945]

486. Similarly, for treaty breaches other than unlawful expropriation, such as breaches of the obligation to accord FET, tribunals have looked to when the investment was "*irreversibl*[y]

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943 *See* **Exhibit CL-096**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-05/AA228, Final Award, 18 July 2014, ¶ 1769; **Exhibit CL-044**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶¶ 496-497; **Exhibit CL-048**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 352.

944 **Exhibit CL-096**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-05/AA228, Final Award, 18 July 2014, ¶¶ 1766-68, *citing* **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), Arts. 35-36.

945 *See supra* ¶¶ 479-480. *See also* **Exhibit CL-096**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-05/AA228, Final Award, 18 July 2014, ¶¶ 1766-68, *citing* **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), Arts. 35-36.

depriv[ed]"[946] of value, or "*the date when the loss crystallised with the divesture*"[947] of the investment to determine the appropriate date of valuation.

487. In this case, the Colombian Attorney General's Office imposed precautionary measures on the Meritage Project on 3 August 2016, based on a false statement by a known drug trafficker, Mr. López Vanegas.[948] Pursuant to the precautionary measures, Colombia seized the Project, halting all construction, development and sales activity.[949] The precautionary measures were, however, meant to be temporary: under Colombian law, they were required to expire within six months.[950]

488. Mr. Seda accordingly engaged in a host of efforts to bring to light the extortion attempts by Mr. López Vanegas to Colombian authorities. He contacted US embassy officials, who eventually wrote to the Colombian National Police, informing the latter that Mr. López Vanegas's kidnapping story was a lie.[951] Mr. Seda also informed the Anti-Corruption Unit at the Attorney General's Office of Mr. López Vanegas's extortion attempts that appeared to be

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946 *See* **Exhibit CL-118**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, ¶ 605 ("*The Tribunal considers Claimant's proposed application of an* "irreversible deprivation test*" to cases of non-expropriatory breaches convincing. As a number of tribunals have concluded, and Claimant correctly argues, this date provides a reasonably ascertainable point in time, capable of consistent and objective application in FET cases, just as it does in expropriation cases*.").

947 **Exhibit CL-092**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Award, 27 November 2013, ¶ 150 (setting the valuation date as "*the date when the loss crystallised with the divesture* [of the investment]"); s*ee also* **Exhibit CL-124**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 272 (setting the date of valuation as the date that Pakistan denied the claimant's mining lease application and breached its obligations under the relevant BIT). **Exhibit CL-043**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶¶ 417-18 (setting the date of valuation as the date when "*breaches of the BIT had reached a watershed*.")

948 *See supra* ¶¶ 136, 162.

949 *See supra* ¶ 139.

950 *See supra* ¶ 225; **Exhibit C-003bis**, Law No. 1708, 20 January 2014, art. 89.

951 *See supra* ¶¶ 209, 215.

supported by leading officials in the Asset Forfeiture Unit.[952] Mr. Seda hoped that by exposing the extortion and corruption underlying the imposition of the precautionary measures, Colombian authorities would lift the measures, enabling the development of the Meritage Project and, crucially, clearing Mr. Seda's reputation.[953]

489. Colombia, however, did the very opposite. On 25 January 2017, the Colombian Attorney General's Office issued a Determination of the Claim, formally instituting Asset Forfeiture Proceedings against the Meritage Project.[954] The Determination of the Claim initiated the indefinite seizure of the Project, which has substantially and irreversibly deprived Claimants of the value their investments.[955] By seizing the Meritage Project, Colombia has indefinitely precluded Mr. Seda from developing it, which has eviscerated the value of the Meritage Claimants' shares in Newport. Colombia's conduct also indefinitely eliminated the revenues Royal Realty would have earned as a developer of the Meritage Project and operator of the aparta-hotel.[956] Moreover, as a result of the Asset Forfeiture Proceedings against Meritage, other projects associated with Mr. Seda also lost funding, potential investors and even sellers, making their development impossible.[957] Thus, the losses associated with Claimants' shares in Luxé SAS, as well as Mr. Seda's other development projects, crystallized in or around the same time as the Determination of Claim against the Meritage Property.

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952 *See supra* ¶¶ 220-221.

953 Seda Witness Statement, ¶¶ 124-134.

954 *See supra* ¶ 226.

955 *See supra* ¶¶ 226-227.

956 Seda Witness Statement, ¶ 60.

957 *See supra* section III.J.2.

490. In sum, on 25 January 2017, the "*deprivation of* [the Meritage Claimants'] *property* [. . .] *crossed the threshold and became tantamount to an expropriation*."[958] It was also on this date that Colombia's conduct resulted in an "*irreversible deprivation*" of the Claimants' other investments. 25 January 2017 is therefore the appropriate date for the valuation of damages resulting from Colombia's breaches of Articles 10.3 (National Treatment), 10.5 (FET) and 10.7 (Expropriation) of the TPA.

C. An Income- And Market-Based Valuation Methodology Is Appropriate Here

491. The FMV of an investment may be assessed using an income-,[959] market-,[960] or asset-based[961] methodology and tribunals have discretion as to which method they adopt.[962] Tribunals have generally disfavored asset-based valuations because they fail to value the future potential of investment.[963] For this reason, an asset-based methodology is not suitable here.

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958 **Exhibit CL-096**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, Final Award, 18 July 2014, ¶ 1761.

959 The income approach relies on the future stream of cash flows that the asset is expected to generate.

960 The market approach relies on transaction prices in similar assets for which price and other information is available.

961 The asset-based valuation typically estimates either the liquidation value, cost basis or the replacement cost value of the asset.

962 *See e.g.*, **Exhibit CL-028**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment Proceeding, 5 January 2002, ¶ 91; and **Exhibit CL-073**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *Ad Hoc* Committee, 25 March 2010, ¶¶ 143-146 and 179(5).

963 *See* **Exhibit CL-013**, *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. The Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 31 May 1990, ¶¶ 191-193 ("*Net book value has been described as 'assets minus liability without consequential damages'* [. . .] *It can immediately be seen that it is a method unsuited to placing a party in the position of his contract having been performed*."); **Exhibit CL-049**, *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶ 382 ("*The Tribunal is not persuaded by the use of book value or unjust enrichment in this case because these methodologies do not provide an adequate tool for estimating the market value of TGS's stake. The book value of TGS stake is by definition valid for accounting purposes but* [. . .] *fails to incorporate the expected performance of the firm in the future*."); **Exhibit CL-108**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 775 ("*Benefit must follow risk: it would*

492. Prior to Colombia's taking of the Meritage Project, Mr. Seda had built a successful real estate and hospitality brand, as reflected by the runaway success of the Charlee Hotel, which to this day boasts average daily occupancy rates that are significantly higher than other leading hotels in Medellín.[964] The success of Mr. Seda's brand was also reflected in the rapid sales of units in the Luxé and Meritage projects.[965] Within three months of Mr. Seda's sales launch of Luxé, all lots, apartments and residential units in the first phase had been sold.[966] Likewise, nearly all phase 1 units of the Meritage Project were sold by August 2016.[967] Mr. Seda had thus demonstrated his acumen in finding and developing attractive real estate and hospitality opportunities in Colombia, in which the other Claimants also invested.

493. Mr. Seda's initial successes helped create an established track record, reputation and brand recognition, which allowed him to build a robust pipeline of additional projects. These included the Cartagena resort Tierra Bomba; other planned mixed-use developments in Medellín's suburbs, 450 Heights and Santa Fé de Antioquia; and a planned condominium

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be deeply inequitable to permit the State to expropriate Rusoro's investment for the amount invested, and to reap the benefits of Rusoro's decision to invest in the Venezuelan gold sector at the appropriate time."). *See also* **Exhibit CL-112**, Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL LAW (2d ed. 2017) , pp. 201-202 ("[M]*any assets and liabilities, such as certain intangible assets and goodwill, are not appropriately reflected on a company's balance sheet. Furthermore, the asset-based approach does not consider the combination of the assets, and thus the value of the entity as a whole. Finally, in business reality income-based and market-based valuations are widespread, while asset-based valuations are rarely applied. It follows that valuation guidelines generally do not recommend the asset-based approach.*"); **Exhibit CL-057**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), pp. 218-19 ("*The general drawback of asset-based methods for the purpose of business valuation is that they do not take into account the value of a business that exceeds the value of its individual assets, ie they do not incorporate the business's 'goodwill'* [. . .] *for the purposes of valuing a business, asset-based methods generally produce a less reliable result than income-based or market-based methods.*"); **Exhibit CL-117**, Mark Bezant and David Rogers, *Asset-Based Approach and Other Valuation Methodologies, in* THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION (2018), pp. 269-70.

964 *See supra* ¶ 54.

965 *See supra* ¶¶ 51, 83.

966 *See supra* ¶ 51.

967 Seda Witness Statement, ¶ 96.

project with three hotels in the outskirts of Bogotá, Prado Tolima.[968] By January 2017, while Meritage and Luxé had substantially advanced their sales and construction, the other projects in Mr. Seda's pipeline also had begun or were just about to begin sales and construction.

494. Given their advanced stages of development, and based on Mr. Seda's track record with the Charlee, Luxé and Meritage, Claimants' Projects were expected to generate substantial value once they were built and operational.[969] The FMV of Claimants' investments must therefore include the future potential value of Claimants' Projects. BRG has accordingly used the income- and market-based approaches to value Claimants' investments.

D. Colombia Must Compensate Claimants USD 309.2 Million

495. To calculate damages under the income- and market- based approach, BRG used the discounted cash flow ("**DCF**") methodology anchored in market information.[970] The DCF is "*considered to be theoretically the strongest*" methodology for valuation purposes,[971] and has been widely adopted by tribunals.[972] It employs historical and prospective data to estimate

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968 *See supra* section III.C.

969 *See, e.g.*, **Exhibit CL-124**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 330-335 (holding that a DCF analysis was appropriate for determining future profits of a non-operational project based on the fact that the project would have been operational and profitable but for the respondent's breaches and the tribunal could determine with the profits with reasonable confidence based on the parties' inputs). *See also* **Exhibit CL-105**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 878-80 (applying a DCF analysis to value a non-operational project).

970 BRG Expert Report, ¶¶ 107-115.

971 **Exhibit CL-057**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), 27 November 2008, p. 193.

972 BRG Expert Report, ¶ 110. *See also* **Exhibit CL-108**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 758 ("*Valuations based on the DCF method have become usual in investment arbitrations, whenever the fair market value of an enterprise must be established*."); **Exhibit CL-118**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No.

future expected cash flows as of the date of valuation. BRG also used market data sourced from Jones Lang LaSalle ("**JLL**"), a highly reputable real estate and hospitality consultancy, to complement and validate the data used in Claimants' own contemporaneous business plans and internal documents.[973]

496. BRG computed the difference between the value, as of the date of valuation, of each of Claimants' Projects in (i) a "*but-for*" scenario, where Colombia did not seize the Meritage Project; and (ii) the "*actual*" scenario, where Colombia has seized the Meritage Project, causing the cessation of the rest of Claimants' Projects.

497. To calculate the cash flows in the "*but for*" scenario, BRG calculated expected revenue for each of Claimants' Projects from (*i*) unit sales, based on the number of units, timing of sales, equilibrium point and projected prices; and (*ii*) fees from hotel operations, based on the number of rooms, forecasted average daily occupancy rates, food and beverage revenues, management and incentive fees, etc.[974] The main cost components of the cash flows included pre-development expenses, land purchase costs, construction costs, sales and marketing costs, fees for developer, contractor, architect and fiduciary, among others, and taxes.[975] A portion of the developer, contractor, management and incentive fees would have been captured by Royal Realty and therefore accrue to Mr. Seda.[976]

ARB/14/1, Award, 16 May 2018, ¶ 575 ("[T]*he DCF valuation method is presumptively appropriate, absent persuasive reasons making it inappropriate in particular cases.*").

973 BRG Expert Report, ¶¶ 112-118.

974 BRG Expert Report, ¶ 125.

975 BRG Expert Report, ¶ 125.

976 BRG Expert Report, ¶¶ 126, 163-164.

498. BRG then converted the forecasted cash flows from Claimants' Projects from COP to USD.[977] Next, BRG discounted the cash flows using the weighted average cost of capital ("**WACC**") to calculate the present value as of the date of valuation for each of the Projects.[978] Finally, BRG deducted the value of any long-term financial debt held by the Project as of the date of valuation.[979]

499. In the actual scenario, Colombia's seizure of the Meritage Project suspended all of Claimants' Projects. As described above, Colombia's imposition of precautionary measures on 3 August 2016 temporarily halted all construction and sales activity.[980] Thereafter, Colombia formally instituted Asset Forfeiture Proceedings against the Meritage Project, continuing the seizure of the Project indefinitely when the Attorney General's Office filed a Determination of the Claim on 25 January 2017.[981] Colombia's actions, moreover, tarnished Mr. Seda's reputation to such a degree that it has made it impossible for him to develop any of the other projects in his pipeline. For instance, just after Colombia imposed precautionary measures on Meritage, Banco Colpatria stopped disbursing funds for the development of Luxé, the construction of which was scheduled for completion by the end of 2016.[982] Likewise, Mr. Seda was unable to pursue any funding for the Prado Tolima and Santa Fé de Antioquia projects following Meritage's seizure.[983] Sellers of the lands for the 450 Heights and Tierra

977 BRG Expert Report, ¶ 122(b).

978 BRG Expert Report, ¶ 122(c).

979 BRG Expert Report, ¶ 122(d).

980 *See supra* ¶ 188.

981 *See supra* ¶¶ 226-227.

982 *See supra* ¶ 312.

983 *See supra* ¶¶ 313, 315.

Bomba projects told Mr. Seda they could no longer continue with the sale due to reputational issues stemming from the Meritage Project's seizure.[984] A hotel owner in Tierra Bomba with whom Mr. Seda had advanced discussions to enter into an operations contract backed out noting they did not "*want the situation that is occurring with the Meritage project to affect* [them] *in the near future*."[985] Thus, the actual value of Claimants' Projects—having been stripped of any opportunity to develop due to Colombia's actions—is only the residual value of the land held by Claimants as of the date of valuation.[986]

500. Accordingly, to assess damages to Claimants' equity, BRG subtracted the residual value from the but-for value of the Claimants' Projects. BRG then divided the equity damages among Mr. Seda and the rest of the Claimants according to their respective interests. To Mr. Seda's damages, BRG also added the present value of the lost fees from hotel operations that would have otherwise been captured by Royal Realty.[987]

501. BRG then compared the income-approach derived values with independent valuations under a market-based approach, using data from JLL. JLL provided historical data and projections of prices, construction costs and historical transactions of comparable projects in Latin America to Claimants' Projects.[988] BRG used JLL's data to apply the comparable transactions methodology pursuant to which BRG compared the value per room equivalent

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984 *See supra* ¶¶ 313, 317.

985 *See supra* ¶ 314; **Exhibit C-197**, WhatsApp chain between Manager of Tierra Bomba Hotel Owner and Angel Seda, 13 September 2017.

986 BRG Expert Report, ¶¶ 176-178.

987 BRG Expert Report, ¶¶ 163-164.

988 BRG Expert Report, ¶¶ 165-173. JLL performed a transaction search of comparable resorts in Latin America as of the date May 2020, *"given Colombia's lack of a full service upscale or luxury mixed-use/resort market."* BRG Expert Report, ¶ 166.

between Claimants' hotels and comparable resorts in Latin America.[989] JLL then calculated the average market value per room equivalent for the full sample of transactions from JLL and applied that value to each of Claimants' hotels under construction (Meritage and Luxé) and development (Tierra Bomba, 450 Heights, Santa Fé) to generate a value for the each of the hotels under a market based approach.[990] The market generated values were consistent with the values generated under the income-based DCF approach using the Claimants' internal business planning documents.[991]

502. BRG additionally estimated the value of the Claimants' brand by estimating the future value of Claimants' business beyond the value of the projects under construction and in development. Mr. Seda had, over a number of years in Colombia, established a luxury real estate brand that was working not only on the above-mentioned projects, but had also identified a number of novel opportunities around Colombia, including Prado Tolima and hospitality projects in Cali, Barranquilla and Amazonas.[992] To capture the future value of such projects, that would have leveraged Claimants' brand, know-how and expertise in high-end real estate projects, BRG used cash flows from the Claimants' existing projects to develop an estimate of the value of additional projects later in time, accounting for risk.[993]

[989] BRG Expert Report, ¶ 166.

[990] BRG Expert Report, ¶ 170.

[991] BRG Expert Report, ¶ 173.

[992] Seda Witness Statement, ¶ 37.

[993] BRG Expert Report, ¶¶ 156-162.

503. Finally, BRG applied an additional step into its calculation of the companies' value to account for the probability of failure of the projects in development.[994] Accordingly, BRG applied a haircut of 23 percent, derived from data published by the U.S. Bureau of Labor Statistics, to the intrinsic value of Tierra Bomba, 450 Heights and Santa Fé, to account for their probability of success as of the valuation date.[995] BRG also used this methodology to apply a haircut to the value of the Claimants' brand to account for its probability of success.[996]

504. Applying the full methodology described above, BRG calculated the following damages accruing to Mr. Seda:[997]

Table 15 Damages to Mr. Seda

(USD millions)	Loss in Mr. Seda's Equity	Loss in Fees	Total Damages to Mr. Seda
	[a]	[b]	[c] = [a] + [b]
Projects in Construction			
The Meritage	40.1	37.4	**77.5**
The Luxé	19.9	21.6	**41.5**
Total, Projects in Construction	60.0	59.0	**119.0**
Projects in Development			
Cartagena Tierra Bomba	17.6	17.8	**35.4**
450 Heights	10.1	9.5	**19.6**
Santa Fé de Antioquia	20.1	21.9	**41.9**
Total, Projects in Development	47.7	49.2	**96.9**
Incremental Value of Future Expansions in Real Estate			**30.1**
Total, All Projects as of January 25, 2017	107.7	108.2	**246.1**
Pre-Award Interest up to June 15, 2020			**44.5**
Total, All Projects as of June 15, 2020			**290.6**

505. And, according to BRG, the remaining Claimants are owed the following damages:[998]

994 BRG Expert Report, ¶¶ 99-101.

995 BRG Expert Report, ¶¶ 101-106.

996 BRG Expert Report, ¶ 157(c).

997 BRG Expert Report, Table 15, p. 82.

998 BRG Expert Report, Table 16, p. 83.

Table 16 Loss in Equity Value to Other Claimants

(USD millions)	Loss in Other Claimants' Equity
Projects in Construction	
The Meritage	9.3
The Luxé	6.5
Total, Projects in Construction	15.7
Total, All Projects as of January 25, 2017	**15.7**
Pre-Award Interest up to June 15, 2020	**2.8**
Total, All Projects as of June 15, 2020	**18.6**

E. Colombia Must Pay Claimants Interest

506. Claimants are entitled to both pre- and post-Award interest. Article 10.26(1)(a) of the TPA provides that a tribunal may award "*monetary damages and any applicable interest.*"[999] With respect to lawful expropriations, Article 10.7(3) of the TPA provides further guidance. It provides that interest will be calculated "*at a commercially reasonable rate*" for the currency in which compensation is awarded, "*accrued from the date of expropriation until the date of payment.*"[1000]

507. The TPA's interest provisions are generally reflective of the well-established principle that interest forms an integral part of any award of compensation, the aim of which is to achieve "*full reparation*" and to re-establish the situation that would have existed had the illegal acts not been committed. Article 38 of the ILC Articles on State Responsibility provides that "*interest on any principal sum due under this chapter shall be payable when necessary in order*

[999] **Exhibit CL-001**, TPA art. 10.26(1)(a).

[1000] **Exhibit CL-001**, TPA art. 10.7(3).

to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result."[1001] Article 38 further states that "*interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled*."[1002] Accordingly, tribunals have repeatedly held that, in order to achieve full reparation, it is necessary that an award of damages bear interest.[1003]

508. As BRG explains, a "*commercially reasonable rate*" of interest "*should account for both the passage of time and a risk premium*."[1004] BRG further notes that this rate "*should be related to the business being the center of the dispute*" and therefore uses "*the average cost of debt that would be faced by Claimants in operating their real estate business and hospitality business but for*" Colombia's unlawful conduct.[1005] BRG calculates this rate as 5.23 percent and 4.83 percent for the real estate and hospitality businesses respectively.[1006] BRG derives this rate from the 5-year trailing average of JP Morgan's Emerging Bond Index and corporate bond yields for real estate development and hotel operations.[1007] Using these rates, as of 15

[1001] **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Article 38.

[1002] **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 38.

[1003] *See e.g.*, **Exhibit CL-029**, *Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, ¶¶ 174-175; **Exhibit CL-051**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, ¶ 55; **Exhibit CL-062**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 308; **Exhibit CL-124**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶¶ 1785, 1790; **Exhibit CL-122**, *Foresight Luxembourg Solar 1 S.A.R.L., et al. v. The Kingdom of Spain*, SCC Arbitration V 2015/150, Final Award, 14 November 2018, ¶¶ 544-45; **Exhibit CL-096**, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, Final Award, 18 July 2014, ¶¶ 1677, 1687.

[1004] BRG Expert Report, ¶ 179.

[1005] BRG Expert Report, ¶ 181.

[1006] BRG Expert Report, ¶ 182.

[1007] BRG Expert Report, ¶ 182(a)-(b).

June 2020 (using the filing date as a proxy for the date of the Award), Colombia owes Mr. Seda USD 44.5 million and the remaining Claimants USD 2.8 million in pre- and post-award interest.[1008] Claimants reserve the right to update this figure until the date of the Award.

F. Colombia May Not Deduct Additional Taxes From Award

509. BRG has calculated damages owed to Claimants accounting for corporate taxes that Claimants would have paid in Colombia had their Projects been allowed to develop. Therefore, to ensure full reparation and place Claimants in the same position they would have occupied but for Colombia's breaches of the TPA, the Award should not be subjected to any further taxes by Colombia.[1009]

G. Colombia Must Pay Claimants Moral Damages

510. Colombia owes Mr. Seda moral damages for the personal and reputational harm he has incurred as a result of the State's actions. As noted above, Article 31 of the ILC Articles on State Responsibility provide that a State must make full reparation for any "*injury caused by* [an] *internationally wrongful act*."[1010] Article 31(2) defines "*injury*" as "*any damage, whether material or moral, caused by the internationally wrongful act of a State*."[1011] Accordingly,

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[1008] BRG Expert Report, ¶ 184.

[1009] *See* **Exhibit CL-124**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, *dispositif*; **Exhibit CL-111**, *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum, 30 December 2016, Decision on Liability and Principles of Quantum, *dispositif*.

[1010] **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 31.

[1011] **Exhibit CL-025**, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), art. 31(2) (emphasis added).

several international adjudicatory bodies,[1012] including investment arbitration tribunals,[1013] have awarded moral damages for "*injury inflicted resulting in mental suffering, injury to* [. . .] *feelings, humiliation, shame, degradation, loss of social position or injury to* [. . .] *credit or to* [. . .] *reputation.*"[1014]

511. Numerous investment arbitral tribunals have concluded that an injury to an investor's credit, reputation and prestige is compensable in the form of moral damages.[1015] Additionally, tribunals have recognized that the State's failure to prevent violence and threats of violence against investors, among other criminal activities, warrants moral damages. In *von Pezold v. Zimbabwe*, for example, the investors were "*humiliated, threatened with death and assaulted*" by bands of militia that appeared to have been supported by organs of the Zimbabwean

[1012] *See e.g.*, **Exhibit CL-019**, *M/V "Saiga" (No. 2) (St. Vincent and the Grenadines v. Guinea)*, Judgment, 1999 ITLOS Rep. 10, 1 July 1999, ¶ 175; **Exhibit CL-016**, *U.N. Compensation Comm'n, Decision taken by the Governing Council of the United Nations Compensation Commission During its Second Session, at the 15th Meeting held on 18 October 1991: Personal Injury and Mental Pain and Anguish*, U.N. Doc. S/AC.26/1991/3 (23 October 1991), p. 2 (providing, *inter alia* that "*compensation will be provided for non-pecuniary injuries resulting from* [. . .] *mental pain and anguish*"); **Exhibit CL-015**, *Velásquez Rodríguez Case*, Compensatory Damages, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, 21 July 1989, ¶¶ 39, 50–2, 156; **Exhibit CL-012**, *Godínez Cruz* Case, Compensatory Damages, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 8, ¶¶ 37, 48–50 (21 July 21 1989); **Exhibit CL-003**, *Di Caro (Italy v. Venezuela)*, Decision, 10 R.I.A.A. 597, 7 May 1903; **Exhibit CL-004**, *Heirs of Jean Maninat Case (France v. Venezuela)*, Decision, 10 R.I.A.A. 55, 31 July 1905; **Exhibit CL-002**, *Gage Case (United States v. Venezuela)*, Decision, 9 R.I.A.A. 226, 17 February 1903; **Exhibit CL-017**, *Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt (United States/Chile)*, Decision of 11 January 1992, 25 R.I.A.A. 1.

[1013] *See e.g.*, **Exhibit CL-059**, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008; **Exhibit CL-102**, *Bernhard von Pezold et al. v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015; **Exhibit CL-088**, *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. The Government of the State of Libya, et al.*, Final Arbitral Award, 22 March 2013.

[1014] **Exhibit CL-005**, *Lusitania Cases (United States v. Germany)*, Opinion, 7 R.I.A.A. 32, 1 November 1923, p. 40.

[1015] **Exhibit CL-059**, *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶ 290; **Exhibit CL-088**, *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya et al.*, Final Arbitral Award, 22 March 2013, pp. 368-69; **Exhibit CL-102**, *Bernhard von Pezold et al. v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 920. *See also* **Exhibit CL-010**, *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980 , ¶ 4.96 (awarding "*equitable*" damages for "*intangible loss*").

Government.[1016] The tribunal concluded that "*the threats of, and actual, physical violence*" against the claimant "*clearly contravene the conduct expected of states. Even if the Respondent did not directly perpetrate these actions, the failure of the police to protect*" the claimant fell "*short of the conduct expected of states*."[1017] The tribunal recognized that the events caused the claimant "*considerable stress and anxiety*" and that he "*not only worried about his own safety but the safety of his staff*."[1018] Thus, the tribunal awarded moral damages, concluding that "*simply awarding compensation for unlawful expropriation would not be sufficient*."[1019]

512. Colombia's actions have irrefutably damaged Mr. Seda's credit and reputation. As soon as the Colombian Attorney General's Office imposed precautionary measures on the Meritage Property, news about the seizure quickly spread over Colombia.[1020] Though Mr. Seda was not accused of any wrongdoing (and, indeed, he could not be), his name was now enmeshed with reports of criminal activity by drug cartels in relation to the Meritage Property. Indeed, given Colombia's refusal to even assess—much less grant—Newport's good faith status, Colombia effectively implied (falsely) that Mr. Seda himself was involved in activity that precluded him from being recognized as a good faith party. In light of Colombia's history, being associated in any way with drug cartels was fatal to one's reputation.[1021] Indeed, the association was

[1016] **Exhibit CL-102**, *Bernhard von Pezold et al. v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 898.

[1017] **Exhibit CL-102**, *Bernhard von Pezold et al. v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 920.

[1018] **Exhibit CL-102**, *Bernhard von Pezold et al. v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 920.

[1019] **Exhibit CL-102**, *Bernhard von Pezold et al. v. Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 920.

[1020] *See supra* ¶ 187.

[1021] *See supra* ¶ 187.

particularly damaging for a foreign investor like Mr. Seda, who had no pre-existing ties to the region and had painstakingly built his reputation from scratch after arriving in Colombia almost ten years ago.[1022]

513. Colombia's tarnishing of Mr. Seda's reputation had a tangible effect on his business. Banco de Bogotá triggered the acceleration clause in its loan agreement for the Meritage Project shortly after Colombia imposed precautionary measures on the Project.[1023] Banco Colpatria also stopped disbursing loans for the Luxé project.[1024] Further, Mr. Seda could not find any banks to finance other projects in his pipeline, such as Tierra Bomba.[1025] Even non-financial institutions and other individuals no longer wanted to work with Mr. Seda. Sellers of the land pulled out of the 450 Heights and Tierra Bomba projects.[1026] A potential business partner in Tierra Bomba backed out of an operating agreement.[1027]

514. Thus, Colombia's unlawful seizure of the Meritage Project sullied Mr. Seda's reputation, causing him to lose not just the Meritage Project, but his entire pipeline of projects. Colombia must pay moral damages for this injury to Mr. Seda's reputation.

515. Moreover, Colombia's treatment of Mr. Seda did not just harm his reputation, but also his physical and mental well-being. Mr. Seda was the target of a corrupt extortion racket

[1022] Seda Witness Statement, ¶¶ 72, 99, 108, 111, 113-115, 152; **Exhibit C-288**, Interview of Angel Seda on Canal Uno, 26 May 2015, https://www.youtube.com/watch?v=weHtFTPO0vM.

[1023] *See supra* ¶ 189.

[1024] *See supra* ¶ 312.

[1025] *See supra* ¶ 313.

[1026] *See supra* ¶¶ 313-317.

[1027] *See supra* ¶ 314.

perpetrated by the highest levels of the Attorney General's Office, including the Head of the Asset Forfeiture Unit, Ms. Malagón, and her right-hand woman, Prosecutor No. 44, Ms. Ardila.[1028] Mr. López Vanegas and his representatives harassed Mr. Seda for money, threatening to wield their influence with Ms. Malagón if Mr. Seda did not comply with their demands.[1029] Mr. Seda was even approached on multiple occasions by individuals claiming to act on behalf of the Attorney General's Office.[1030] On an especially frightening occasion, Mr. López Vanegas showed Mr. Seda's pictures of his three children (all of whom were born and lived in Colombia) in a blatant threat to his family's safety.[1031]

516. While the Anti-Corruption Unit of the Attorney General's Office initially promised Mr. Seda that they would take action, they (without explanation) failed to do so.[1032] Indeed, Mr. Seda filed an official complaint with the Attorney General's Office in December 2016, on the request of the Anti-Corruption Unit.[1033] Yet, without explanation or notice, the Attorney General's Office appears to have dismissed this complaint.[1034] Mr. Seda only became aware of this dismissal via a brief reference to it in the Determination of the Claim submitted by the Asset Forfeiture Unit in January 2017.[1035]

[1028] *See supra* ¶¶ 389-392; section III.I.

[1029] *See supra* section III.D.1, III.D.3 .

[1030] *See supra* ¶ 131.

[1031] *See supra* ¶ 134.

[1032] *See supra* ¶¶ 220-223.

[1033] *See supra* ¶ 221.

[1034] *See supra* ¶ 223.

[1035] *See supra* ¶ 223.

517. The harassment against Mr. Seda continued to escalate thereafter. In September 2017, two gunmen on a motorcycle shot multiple rounds at Mr. Seda while he was in his car.[1036] Mr. Seda filed a police report but has heard no updates on the investigation.[1037] Rather, Colombian authorities denied him a permit for protecting his car—otherwise normally granted quite routinely in Colombia—despite the documented attack on his life.[1038] Mr. Seda's daughter and her mother were also targeted by unknown individuals.[1039] Mr. Seda had to flee the country with his family for a year and a half as a result of these events.[1040]

518. Instead of protecting him, Colombian authorities further harassed Mr. Seda by falsely reporting to U.S. authorities that he was associated with Colombian drug traffickers on the OFAC list.[1041] Colombia's false allegations humiliated Mr. Seda, who had never been remotely associated with criminal activity, much less drug traffickers, before this ordeal. Moreover, Mr. Seda was forced to spend hundreds of thousands of dollars to respond to these patently false accusations.[1042]

519. The extortion campaign, threat of and actual physical violence against Mr. Seda, threats against Mr. Seda's family, and continued harassment by Colombian authorities have caused Mr. Seda considerable stress, anxiety, humiliation, pain and suffering. Not only have Colombia's actions destroyed Mr. Seda's business, they have also caused him significant

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[1036] *See supra* ¶ 320.

[1037] *See* Seda Witness Statement, ¶¶ 138-141.

[1038] Seda Witness Statement, ¶ 141.

[1039] Seda Witness Statement, ¶ 139.

[1040] Seda Witness Statement, ¶ 140.

[1041] Seda Witness Statement, ¶ 143.

[1042] Seda Witness Statement, ¶ 144.

mental and physical anguish that cannot be compensated merely by reparations for unlawful expropriation and other breaches of the TPA. Colombia's egregious conduct thus warrants moral damages to make Mr. Seda whole.

520. While "*it is manifestly impossible to compute mathematically or with any degree of accuracy or by any use of any precise formula the damages sustained*" for moral injuries, the amount of "*compensation must be adequate and balance as near as may be the injury suffered.*"[1043] As demonstrated above, Colombia's actions have harmed Mr. Seda's reputation such that he is no longer able to pursue his real estate and hospitality business in the country.[1044] More egregiously, the State sanctioned and even participated in acts of harassment against Mr. Seda, including extortion attempts, pursuing false allegations with OFAC, and failing to offer protection when Mr. Seda and his family were threatened with violence.

521. Thus, Mr. Seda requests 10 percent of the total damages owed to him in loss of fees and equity in moral damages. This represents an adequate, proportionate and reasonable measure of compensation for the personal, business, reputational, physical and mental anguish suffered by Mr. Seda due to Colombia's actions.

H. Colombia Must Compensate Claimants For All Costs Incurred In This Arbitration

522. In order to make Claimants whole, Colombia must pay the entire costs and expenses of the Arbitration, including Claimants' legal fees, the fees and expenses of any experts, the fees and expenses of the Tribunal, and ICSID's other costs.

[1043] **Exhibit CL-005**, *Lusitania Cases (United States v. Germany)*, Opinion, 7 R.I.A.A. 32, 1 November 1923, p. 36.

[1044] *See* Seda Witness Statement, ¶ 152.

523. The Tribunal's authority to award costs is established in Article 10.26(1) of the TPA, providing that a tribunal "*may also award costs and attorney's fees*" in the final award.[1045] Furthermore, Article 61(2) of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules authorize an ICSID tribunal to award costs.[1046] If the Tribunal finds that Colombia breached its obligations under the TPA, the award of costs is consistent, and in fact required, by the full reparation principle set out in *Chorzów*.[1047] Claimants would not have brought this Arbitration, and incurred substantial costs and lost time as a result, if Colombia had respected its obligations under the TPA. Accordingly, Claimants should be awarded their costs and will submit a formal quantification of their costs at the appropriate phase of these proceedings.

[1045] **Exhibit CL-001**, TPA art. 10.26(1).

[1046] *See* ICSID Convention, Article 61(2) ("*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award*."); ICSID Arbitration Rules, Rule 28.

[1047] *See e.g.*, **Exhibit CL-114**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, ¶ 1060.

VII. REQUEST FOR RELIEF

524. On the basis of the foregoing, without limitation and reserving Claimants' right to supplement these prayers for relief, Claimants respectfully request that the Tribunal:

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

(b) **ORDER** Colombia to pay Claimants in excess of USD 309.2 million to be updated as of the date of the Award;

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

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

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

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

525. Claimants reserve their right to specify, supplement or amend the factual or legal claims and arguments contained herein, as well as the relief requested.

Dated: 15 June 2020

Gibson Dunn & Crutcher LLP

GIBSON, DUNN & CRUTCHER LLP